

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 – SUMMARY OF THE FACTS

1. Canada’s Ecofiscal Commission (“Commission”) is an independent, non-partisan, national research organization. Its 13 Commissioners include some of Canada’s most respected economic experts. The Commission’s expertise and work focus on how market-based approaches, particularly pollution pricing, can achieve environmental goals at the lowest economic cost and stimulate innovation. Since 2015, it has released eight in-depth research reports on different aspects of carbon pricing.

Affidavit of Christopher Ragan, Ecofiscal Commission Record, paras 5-9, 11-14, 22-29

2. The Commission accepts the facts as set out in the Attorney General of Canada’s factum.

PART II – ISSUES AND LAW

3. The Commission submits that the *Greenhouse Gas Pollution Pricing Act (GGPPA)* is *intra vires* the Parliament of Canada. Both Parliament and the provincial legislatures have authority to legislate for the purpose of controlling greenhouse gas (GHG) emissions in general, and putting a price on GHG emissions in particular. Meeting Canada’s GHG emissions reduction commitments requires effective, coordinated measures by governments across the country.

4. Parliament’s authority to enact the *GGPPA* arises principally under the power over Peace, Order and Good Government (POGG), particularly the National Concern branch. Global climate change, caused by GHG emissions, is the quintessential example of a serious, international environmental problem. If it is not a matter of National Concern, it is difficult to imagine what kind of trans-boundary pollution problem ever would be.

Peace, Order and Good Government – National Concern Branch

5. The Commission submits that the *GGPPA*'s **pith and substance or 'matter'** is "*the control of extra-provincial and international pollution caused by GHG emissions.*" This framing is consistent with the Act's preamble.¹ It also reflects what makes GHGs a matter of national concern: they cause serious international impacts, i.e. climate change. It is in line with how the Supreme Court of Canada (SCC) characterized the Act's subject matter in *Crown Zellerbach* – "the control of pollution by the dumping of substances in marine waters" – and with the substantial body of authority supporting "inter-provincial and international pollution" as a matter of National Concern (see para. 13 below)

R v Crown Zellerbach Canada Ltd., [1988] 1 SCR 401 at para 37 [*Crown Zellerbach*]

6. The *GGPPA* and its subject matter satisfy the four elements of the **National Concern test** from *Crown Zellerbach* (see para 52 of Canada's Factum).

7. **New matter:** Human-caused climate change is a new problem, unknown in 1867. In any event it has become a problem of utmost national and global concern.

Attorney General of Canada's Factum, para 59 and the authorities cited therein

8. **Single, distinct, indivisible:** The *GGPPA* applies to the same specific GHGs that are covered by the *UNFCCC*. It is a limited, distinct and indivisible group of pollutants, all of which contribute to climate change. By contrast, the *Ocean Dumping Act*, upheld in *Crown Zellerbach*, covered *any type* of material dumped into the ocean.

Crown Zellerbach, at paras 28-32; See also Nathalie Chalifour, "Canadian Climate Federalism: Parliament's Ample Constitutional Authority to Legislate GHG Emissions" (2016) 36:2 NJCL 331 at 365 [Chalifour, "Canadian Climate Federalism"]

¹ The preamble states "*the United Nations, Parliament and the scientific community have identified climate change as an international concern which cannot be contained within geographic boundaries*" [emphasis added]

9. **Provincial inability:** Climate change is the epitome of a trans-boundary problem. GHG emissions, regardless of where they originate, have a global impact. The failure of one or more provinces to effectively regulate them will have serious impacts on other provinces and countries, and on Canada's ability to meet its national targets and international commitments.

Canada's Factum, at paras 3, 53, 68, 69 and authorities cited therein

10. Ontario's factum mischaracterizes the 'provincial inability' test. The issue is not whether provinces are "capable of" regulating GHGs – if that were the test, almost nothing would meet it.² The issue, as stated in *Crown Zellerbach*, at para 33, is "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". [emphasis added] In the case of GHG emissions, such provincial failure would have serious extra-provincial effects.

11. There is a close analogy between the control of GHGs and the control of atomic energy – a matter with serious global impacts. In *Ontario Hydro*, the SCC reasoned:

The production, use and application of atomic energy constitute a matter of national concern. It is predominantly extra-provincial and international in character and implications, and possesses sufficiently distinct and separate characteristics to make it subject to Parliament's residual power. [emphasis added]

Ontario Hydro v Ontario (Labour Relations Board), [1993] 3 SCR 327 at para 84

12. The Court used very similar language in *Crown Zellerbach*, at para 37: "Marine pollution, because of its predominantly extra-provincial as well as international character and implications, is clearly a matter of concern to Canada as a whole." [emphasis added] Like ocean pollution, GHG emissions affect a global commons (the atmosphere), a problem which requires coordinated action by the nations of the world to address.

² Provinces are 'able' to regulate nuclear power, airports, narcotics, and ocean pollution (in provincial marine waters), yet they are all matters of national concern, because of their extra-provincial impacts.

13. In addition to *Crown Zellerbach*, there is a substantial body of authority supporting Parliament's authority to address extra-provincial and international pollution under the National Concern power. For instance:

- In *Interprovincial Co-operatives*, the SCC held that Parliament has authority over the pollution of interprovincial rivers.

Interprovincial Co-operatives Ltd. v Dryden Chemicals Ltd., [1976] 1 SCR 477 at pp 511-515 (three of the four majority judges found the authority over inter-provincial pollution in the National Concern power)

- In *Crown Zellerbach*, at para 59, the dissenting judges agreed that Parliament's jurisdiction "extends to the control of deposits in fresh water that have the effect of polluting outside a province." [emphasis added].
- In *Hydro-Quebec*, the dissenting judges (the only ones to address POGG) reasoned that the *Canadian Environmental Protection Act* did not meet the National Concern test because it "is not limited to substances having interprovincial effects." [emphasis added]

Hydro Québec, at para, 68; see also paras 74 (fails to target "toxic substances ... which move across *interprovincial or international borders*"), and 75 (does not distinguish "between types of toxic substances ... on the basis of their *extraprovincial aspects*.")

- In *Canada Metal Co.*, the Court held that controlling international air pollution qualified as a matter of National Concern, in upholding the federal *Clean Air Act*.

Canada Metal Co. and The Queen [1982] 144 DLR (3d) 124 at para 18 (Man. QB)

- Professor Hogg concludes: "The national concern ... power will support measures to control pollution of air or water that are beyond the capacity of provinces to control." He also concludes that the control of greenhouse gases would fall under the national concern branch of POGG, as well as the Criminal Law power.

Peter Hogg, *Constitutional Law of Canada* 5th ed (Toronto: Carswell, 2007, updated 2015) at 30-21 [Hogg, *Constitutional Law of Canada*]; Peter Hogg, "Constitutional Authority Over Greenhouse Gas Emissions" (2009) 46 *Alta L Rev* 507 at p 516

14. Thus, there is abundant authority that controlling *extra-provincial and international pollution caused by GHGs* falls under the National Concern power.

15. Saskatchewan's argument (at paras 28-29) that GHGs' extra-provincial impacts do not result from traceable molecules blowing across a border is a red herring. GHGs are a global pollutant; they accumulate in the atmosphere, resulting in climate change that causes substantial impacts around the world, as well as in their province of origin. To suggest that GHGs do not cause extra-provincial environmental impacts is, with respect, absurd.

16. In addition to environmental impacts, there is a risk of extra-provincial *economic* effects. If one province does not effectively regulate GHG emissions, other provinces must incur additional cost and effort to meet Canada's GHG commitments.

Ecofiscal Commission, *The Way Forward: A Practical Approach to Reducing Canada's Greenhouse Gas Emissions* (Montreal: McGill University, 2015), in Canada's Record, Affidavit of John Moffet, Exhibit O, pp. 535-537 ("*The Way Forward*")

17. **Impact on provincial jurisdiction:** The *GGPPA* is designed to achieve its objectives while minimizing impacts on areas of provincial jurisdiction, in several ways:

- The use of price-based regulation *minimizes any costs to provincial economies*. Economic research, and experience, consistently show that pricing is effective at reducing emissions, and does so at the lowest possible cost. The Commission's economic modeling shows that using price-based regulations, rather than prescriptive regulations, to meet Canada's 2020 GHG targets would result in cost savings equal to approximately 3.4% of Canada's GDP (about \$70 billion per year).
- The use of price-based regulation *maximizes flexibility and minimizes cost to businesses and households*; it allows them to decide for themselves how best to reduce emissions, rather than having it prescribed by regulation.

- In addition, the use of an *output-based approach* for large industrial emitters, in Part 2 of the Act, further reduces costs and strengthens their competitiveness, while maintaining the full incentive to innovate to reduce GHG emissions.
- The use of a *'backstop' approach*, deferring to equally stringent provincial pricing laws, allows provinces to develop their own carbon pricing systems tailored to the needs of their economies. This approach *maximizes flexibility and minimizes any impacts* on provincial jurisdiction. Provinces remain free to bring in any other types of complementary climate laws they wish, within their jurisdiction.
- Further, by requiring that all *pricing revenues stay in the province they came from* – either by deferring to equivalent provincial laws, or by returning revenues generated under the backstop – the *GGPPA* allows provinces to use those revenues to minimize any impacts that may arise from the carbon price.

The Way Forward at pp. 9, 18-23, 28, 41; Ecofiscal Commission, *Clearing the Air: How Carbon Pricing Helps Canada Fight Climate Change*, in Canada's Record, Affidavit of John Moffet, Exhibit P, pp 587-592, 609-610 ("*Clearing the Air*"); *GGPPA*, s. 165(1)

Ontario's 'displacement' argument

18. Ontario's argument (at para 67) that upholding the *GGPPA* under POGG would "displace broad swaths of exclusive provincial jurisdiction" lacks merit. The argument is based not on the Act's actual impacts, but on far-fetched speculation that the federal government would use its power in extreme ways, like imposing quotas on fuel use or when people may drive, or limiting when factories may operate or how much they produce. That is not a helpful way to do constitutional analysis. One could speculate just as apocalyptically about other federal powers. For example, a similarly broad list of activities generates water pollution, which enters into interprovincial waters or affects fisheries. The federal

government has long used its ample powers in that area judiciously, to target the aquatic impacts of activities, not to impose draconian economic restrictions. It can be expected to use its power over the extra-provincial impacts of GHG emissions in a similar manner.

Environment Canada, *Threats to Sources of Drinking Water and Aquatic Ecosystem Health in Canada* (National Water Research Institute, 2001), online <<http://publications.gc.ca/collections/Collection/En40-237-1-2001E.pdf>>; Vermont Department of Environmental Conservation, *Surface Water Management Strategy, Exhibit C: Human Activities as a Source of Water Pollutants* (2013), online <https://dec.vermont.gov/sites/dec/files/documents/WSMD_swms_C_Activities_leading_to_Stressors.pdf>; Canada, Library of Parliament, *Federal and Provincial Jurisdiction to Regulate Environmental Issues*, Background Paper No. 2013-86-E (Sept. 2013), online <https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/201386E#txt8>; *Canada Water Act*, RSC 1985 c C-11; *Fowler v The Queen*, [1980] 2 SCR 213

19. The same is true of other federal powers that touch on a broad range of activities. For example, the *Consumer Product Safety Act* and *Food and Drugs Act* apply to almost all consumer, food and drug products in Canada, covering importing, manufacturing, advertising and sale, yet those laws have not upset the balance of federalism, because they target only the safety aspect of those products – just as the *GGPPA* targets only GHG emissions.

Consumer Product Safety Act, S.C. 2010, c. 21; *Food and Drugs Act*, R.S.C., 1985, c. F-27

20. Ontario’s Factum (paras 83-87) quotes from *Crown Zellerbach* and *Oldman River* to warn against the danger of giving Parliament authority over *all aspects of the environment or pollution*. But of course this case, and the *GGPPA*, is only about authority over *GHGs and their extra-provincial effects* (much like *Crown Zellerbach* was about federal authority over extra-provincial pollution of oceans.)

21. Ontario’s argument that upholding the Act would “displace broad swaths of exclusive provincial jurisdiction” harkens back to the Privy Council’s ‘watertight compartments’ view of the division of powers from the early 20th Century. That view has long been rejected by the SCC, in favour of a more flexible, cooperative approach to federalism.

Reference re Pan-Canadian Securities Regulation, 2018 SCC 48 at paras 16-19;
Canada (Attorney General) v PHS Community Services Society, [2011] 3 SCR 134 at
para 70 (“*PHS Community Services*”)

22. It is trite law that the Constitution gives “exclusive authority” to federal and provincial governments to legislate under all of their respective heads of power, including the National Concern power. However, it is not the case that provinces are precluded from addressing a matter within their jurisdiction that also falls within federal jurisdiction – under National Concern or any other power. For decades, Canada’s courts have repeatedly found that there may be substantial overlap between federal and provincial laws, as long as each is properly grounded in a head of power – except if they ‘conflict’, which is very rare. This is part of the long-recognized “double aspect doctrine”, which, tellingly, is not mentioned in Ontario’s factum. As stated in the *Securities Reference*:

Canadian constitutional law has long recognized that the same subject or “matter” may possess both federal and provincial aspects. This means that a federal law may govern a matter from one perspective and a provincial law from another.

Reference re Securities Act, [2011] 3 SCR 837 at para 66 [*Securities Reference*];
Canadian Western Bank v Alberta, [2007] 2 SCR 3 at para 75 [*Canadian Western Bank*];
Alberta (AG) v. Moloney (2015) 3 SCR 327, 2015 SCC 51

23. There are many examples of provincial laws whose application overlaps substantially with areas of federal jurisdiction, including under POGG:

- Although ‘marine pollution’ is a matter of federal jurisdiction under POGG (*Crown Zellerbach*), provinces also regulate the discharge of pollution into the ocean from many sources, including sewage from coastal cities such as Victoria.

The *Municipal Wastewater Regulations* BC Reg 97/2012; Capital Regional District, “Wastewater Treatment Project Charter” 2018 at pp. 1-2, online <https://www.crd.bc.ca/docs/default-source/wastewater-planning-2014/2017-04-04-sr-cawtpb-approvalofthedraftprojectcharter-appendixa.pdf?sfvrsn=c8d13cca_6>; B.C. Ministry of Environment Lands and Parks, Letter of August 19, 1999, “RE: Waste Management Permits PE-00270 (Macaulay Point Outfall) and PE-01877 (Clover Point Outfall)” at pp. 1-4, online <https://j200.gov.bc.ca/pub/ams/download.aspx?PosseObjectId=37692476>

- Although regulating “development and improvement of the National Capital Region” is a matter of National Concern, the City of Ottawa takes the lead in municipal planning and development approval, acting under provincial legislation.

Munro v Canada (National Capital Commission), [1966] SCR 663 at pp. 671-672; City of Ottawa Official Plan, Publication 1-28 (Ottawa By-Law No. 2003-203) at 1-1 to 1-2

- Federal environment assessment legislation has been upheld under a combination of POGG and other powers, yet new development projects frequently undergo both a federal and provincial environmental impact assessment, one addressing the provincial impacts, the other the federal (including extra-provincial) impacts.

Friends of the Oldman River Society v Canada (Minister of Transport), [1992] 1 SCR 3 at paras 99-101; *Alberta Wilderness Assn. v. Cardinal River Coals*, [1999] 3 FC 425; *Mining Watch Canada v. Canada (Fisheries and Oceans)*, [2010] 1 SCR 6

- Other heads of power operate exactly the same way. For example, discharging pollution into water is typically regulated under both the federal *Fisheries Act* and provincial water pollution laws. One addresses the federal concern (impacts on fish), the other addresses the provincial concern (provincial environmental impacts), but they routinely regulate the same emissions from the same sources.

Capital Regional District, “Wastewater Treatment Project Charter” at 1-2; *Law Society of B.C. v. Mangat*, [2001] 3 S.C.R. 113, para 49 [areas of federal-provincial overlap]

24. GHG emissions are no different. All GHGs have significant extra-provincial and global effects, and only the federal government can ensure that Canada addresses these *trans-boundary* impacts and meets its international commitments. At the same time, GHGs and climate change also have *intra*-provincial impacts – both environmental and economic – which provinces can address using an array of Constitutional heads of powers.³

³ Relevant powers include: property and civil rights (92(13)), local works and undertakings (92(10)), public lands (92(16)), licensing (92(9)), direct taxation within the province (92(2)), natural resources (92A), etc.

Parliament may address the extra-provincial impacts of GHGs and provinces may address the intra-provincial impacts – subject to federal paramountcy in rare cases of direct conflict.

Nathalie Chalifour, “Making Federalism Work for Climate Change: Canada’s Division of Powers over Carbon Taxes” (2008) 22 NJCL 119 pp 156-172 (provincial authority); *Rothmans*, at para 14; *Canadian Western Bank*, at para 75 (paramountcy rules)

25. Finally, Ontario argues that upholding the *GGPPA* would cause “the wholesale takeover of [a] vast array of *provincially-regulated activities*”. [emphasis added] But the SCC has rejected that ‘watertight compartments’ way of thinking in *Oldman River*, at para 91:

What is not particularly helpful in sorting out the respective levels of constitutional authority over a work such as the Oldman River dam, however, is the characterization of it as ... an undertaking "primarily subject to provincial regulation" as the appellant Alberta sought to do.

...

What is important is to determine whether either level of government may legislate. One may legislate in regard to provincial aspects, the other federal aspects.

The exact same is true for regulation of GHGs.

Saskatchewan’s ‘backstop’ argument

26. The Attorney General of Saskatchewan, in the parallel reference case, argued that its “fundamental objection” to the *GGPPA* is its ‘backstop’ mechanism – which defers to provinces with an equally stringent carbon price. Specifically, Saskatchewan argued that because the backstop recognizes provinces’ ability to price carbon, it cannot be a matter of national concern. This argument suffers from the same fallacy as above: it ignores the double aspect doctrine, and fails to differentiate between the intra-provincial effects (which provinces can regulate) and extra-provincial effects, which are a matter of National Concern.

27. Saskatchewan’s Factum (para 2) further argues that the *GGPPA*’s backstop mechanism is “unprecedented in Canadian history”. To the contrary, it is quite common. Similar mechanisms – whereby federal rules apply only when Cabinet determines that a province

does not have equivalent or effective measures of its own⁴ – are found in many federal environmental laws, such as the: *Canadian Environmental Protection Act* (“CEPA”) (upheld in *Hydro-Quebec*), *Species At Risk Act*, *Fisheries Act*, *Canada Water Act*, and *Canadian Environmental Assessment Act*. Similar ‘backstop’ provisions are also found in other federal laws, such as the *Personal Information Protection and Electronic Documents Act*.

Canadian Environmental Protection Act, SC 1999, c 33, s. 10(3); *Species At Risk Act*, SC 2002, c 29, ss. 34, 61, 78; *Fisheries Act*, RSC 1985, c F-14 s 4.1, 4.2; *Canada Water Act*, ss. 9, 13 (Cabinet may designate inter-jurisdictional waters to be of “national concern” and impose “effluent discharge fees”); *Canadian Environmental Assessment Act*, SC 2012, c. 19, s. 52, ss. 32-37; *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5, s. 26(2)

28. In *R v Furtney*, [1991] 3 SCR 89 at para 34, the SCC upheld an analogous provision in the *Criminal Code*, specifying that its gaming prohibitions do not apply where an organization is operating under a provincial licence. The Court ruled that Parliament “may limit the reach of its legislation by a condition, namely the existence of provincial legislation.”

29. The SCC also has recognized that the *GGPPA*’s approach of setting “national standards that could be supplemented by local legislation” is effective, particularly for “pollution problems that ... are now regional or even global in scale”, like climate change.

Hydro Quebec, at para 126 (citing the Bruntland Commission report)

30. In sum, this Act and its subject matter fall within Parliament’s authority under the National Concern power, in particular because: (a) the *GGPPA* targets only those specific GHGs covered by international climate treaties; (b) the Act’s approach – using pricing, and a backstop – is an example of cooperative federalism that minimizes any impacts on areas of provincial jurisdiction; (c) the failure of one or more provinces to effectively price GHG emissions would have substantial effects on other provinces and countries, and on Canada’s

⁴ Or vice-versa: the federal rules may be suspended where a province *does* have equivalent measures.

ability to meet its international obligations; and (d) upholding the *GGPPA* and its subject matter under the National Concern power will allow Parliament to address the *trans-boundary* impacts of GHGs, while provinces can address the *provincial* aspects of GHGs under their powers.

Treaty Implementation and the POGG power

31. The *GGPPA* is intended, in part, to implement Canada’s obligations under international climate change treaties (as the preamble states). In 1937, the Privy Council held in *Labour Conventions* that the power to implement treaties no longer rested with Parliament, but with whichever level of government had jurisdiction over the particular subject-matter at issue. Since then, several SCC justices have questioned the Privy Council’s reasoning. The decision has also been the subject of many academic articles, almost all critical of it. Professor Hogg concludes that *Labour Conventions* “has impaired Canada’s capacity to play a full role in international affairs”. He suggests the decision can be read narrowly, and confined to treaties about “harmonization of domestic law”, leaving Parliament with power to implement treaties “under which states undertake reciprocal obligations to each other”, like the *Paris Agreement*.

*A-G Can. v A-G Ont. (“Labour Conventions”), [1937] A.C. 326 at paras 14-15; MacDonald v Vapor Canada Ltd. [1977] 2 SCR 134 at 167-172; S. Elgie, “Kyoto, the Constitution and Carbon Trading: Waking a Sleeping BNA Bear (or Two)” (2008) 13:1 Review of Constitutional Studies 67 at 90-93 (listing SCC cases and academic articles questioning *Labour Conventions*); Hogg, *Constitutional Law of Canada* at 11-16, 11-17*

32. The *Labour Conventions* precedent leaves Canada as virtually the *only country in the world* whose federal government is unable to implement its commitments under international climate treaties (unless legislative power is found under POGG or elsewhere).

Torsten Strom & Peter Finkle, “Treaty Implementation: The Canadian Game Needs Australian Rules”, 25 Ottawa L. Rev. 39 (1993) at 60 [**“Canada is the only federal state with its treaty implementation power rigidly divided on the basis of the respective federal and provincial legislative jurisdictions.”**]; *Commonwealth v Tasmania*, [1983] 158 CLR 1 (Aus. H.C.); John Trone, *Federal Constitutions and International*

Relations” (St Lucia, Univ. of Queensland Press, 2001) at pp 85-86, 113-114 [“***In most federal states the national government possesses the power to give effect in domestic law to all bona fide treaties to which it is party, including those concerning matters which would otherwise be beyond federal jurisdiction. This is the case in Australia, the United States, India, Malaysia, and Austria.***” Both Germany and Switzerland also have stronger federal authority than Canada to implement treaties.]

32. This case does *not* require the Court to determine if a full federal treaty implementing power exists. However, it does raise the question of what role the existence of a treaty – the UNFCCC, supplemented by the *Paris Agreement* – plays in determining if an implementing statute falls within POGG. In *Crown Zellerbach*, the SCC cited international treaties in finding that the *Ocean Dumping Act*’s subject matter was ‘single, distinct and indivisible’ and upholding it under POGG. Similarly, the fact that the *GGPPA* is meant in part to implement a treaty – one that deals with a problem that is global in nature – is *at the very least* strong evidence that the matter is of national concern and falls within the POGG power.

Crown Zellerbach, para 38; Hogg, *Constitutional Law of Canada* at 11-18

The GGPPA is a valid exercise of Parliament’s Criminal Law power

33. The Commission submits in the alternative that the *Act* is valid under Parliament’s Criminal Law power (s. 91(27)). This power, which courts have interpreted broadly, has been used to uphold several environmental laws – including one restricting GHG emissions.

Hydro-Québec at paras 34-35, 119-120, 160; *Reference re Firearms Act* [2000] 1 SCR 783 at para 27 [*Firearms Reference*]; *RJR MacDonald Inc. v Canada (AG)*, [1995] 3 SCR 199 at para 28 [*RJR-Macdonald*]; *Groupe Maison Candiac Inc. v Canada (AG)*, 2018 FC 686 at paras 4-5, 99-100 (upholding the *Species at Risk Act*); *Syncrude Canada Ltd. v Canada (AG)* [2016] FCJ No 572 at para 101[*Syncrude*] (upholding CEPA’s renewable fuels standards)

34. The **pith and substance** of the *GGPPA* for Criminal Law purposes is to reduce GHG pollution, by prohibiting emissions without payment of a mandatory charge. The *Act* meets the three-part test to qualify as Criminal Law.

35. **Purpose:** The SCC has held that environmental protection is a valid Criminal purpose. Indeed, reducing GHG emissions is one of the most important public purposes of our time.

Hydro Quebec at para 43; *Syncrude* at para 62.

36. **Prohibition and penalties:** The *GGPPA*'s use of "economic incentives" in order to reduce emissions is a valid Criminal Law approach, as recognized in *Syncrude* – much like restricting tobacco advertising, or requiring the registration and licencing of firearms are valid ways to *incentivize* behaviour change, without fully prohibiting the behaviour.

Syncrude at paras 67-69; *RJR-Macdonald* at para 51; *Firearms Reference* at paras 37, 47

37. It is well-established that Criminal Law can achieve its goals using *restrictions or incentives*, as the *GGPPA* does, rather than complete prohibitions. (Often this is done to "mitigate the economic side effects" a full prohibition would cause.) As the SCC stated in *RJR-Macdonald*, Parliament's use of a "circuitous path to accomplish [a] goal does not in any way lessen the constitutional validity of the goal."

RJR-Macdonald at para 51; *Syncrude* at paras 67, 91; Hogg, "Constitutional Authority Over Greenhouse Gas Emissions" at pp 514-515.

38. The *GGPPA* prohibits GHG-emitting activities without payment of the required charge, through a suite of offences, coupled with substantial penalties for non-compliance.

GGPPA, ss 132-136, 232-243

39. Moreover, the Act's 'backstop' does not affect its constitutionality. Federal laws need not apply uniformly across the country. Parliament may set different rules in different regions, or make the application of criminal law contingent on provincial law.

Furtney at paras 31-34; Chalifour, "Canadian Climate Federalism" at pp. 372-374; Hogg, *Constitutional Law of Canada* at 17-13; and authorities cited at para 27 of this factum

40. In *Hydro Quebec* the SCC stated that there can be broad concurrency between federal Criminal Law and provincial laws, and that “this type of approach [concurrency] is essential in dealing with amorphous subjects like ... the environment.” [emphasis added] It continued:

“In *Crown Zellerbach*, I expressed concern with the possibility of allocating legislative power respecting environmental pollution exclusively to Parliament. I would be equally concerned with an interpretation of the Constitution that effectively allocated to the provinces... control over the environment in a manner that prevented Parliament from exercising the leadership role expected of it by the international community... through the instrumentality of the criminal law power.”

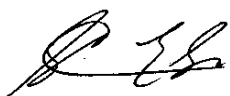
Hydro-Québec, at paras 131, 153-154

41. In sum, the *GGPPA*, like other valid Criminal Laws, uses incentives backed by prohibitions to achieve a vital public purpose. The Act’s design, and plenary nature of the Criminal power, allow for the co-existence of federal and provincial laws to reduce GHGs – the most serious, trans-boundary environmental problem of our time.

PART III – RELIEF REQUESTED

42. For all of these reasons, the Commission submits that the reference question should be answered that the *GGPPA* is Constitutional, in its entirety.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, February 26, 2019.



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SCHEDULE A – TABLE OF AUTHORITIES

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4.	<i>Canada (Attorney General) v PHS Community Services Society</i> , [2011] 3 SCR 134
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7.	<i>Commonwealth v Tasmania</i> , [1983] 158 CLR 1.
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10.	<i>Groupe Maison Candiac Inc. v Canada (Attorney General)</i> , 2018 FC 643
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14.	<i>Mining Watch Canada v. Canada (Fisheries and Oceans)</i> , [2010] 1 SCR 6
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16.	<i>Ontario Hydro v Ontario (Labour Relations Board)</i> , [1993] 3 SCR 327
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25.	<i>Syncrude Canada Ltd. v Canada (Attorney General)</i> , 2016 FCA 160

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27.	<i>Canadian Environmental Protection Act, 1999</i> , SC 1999, c 33
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29.	<i>Consumer Product Safety Act</i> , SC 2010, c 21
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34.	<i>Municipal Wastewater Regulations</i> , BC Reg 97/2012
35.	<i>Personal Information Protection and Electronic Documents Act</i> , SC 2000, c 5
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	<u>Secondary Sources</u>
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COURT OF APPEAL FOR ONTARIO

PROCEEDINGS COMMENCED AT TORONTO

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