C.A. No. CACV3239

IN THE COURT OF APPEAL FOR SASKATCHEWAN

IN THE MATTER OF THE GREENHOUSE GAS POLLUTION PRICING ACT, BILL C-74, PART 5

AND IN THE MATTER OF A REFERENCE BY THE LIEUTENANT GOVERNOR IN COUNCIL TO THE COURT OF APPEAL FOR SASKATCHEWAN UNDER *THE CONSTITUTIONAL QUESTIONS ACT, 2012*, SS 2012, c C-29.01.

FACTUM OF THE INTERVENORS, CANADIAN ENVIRONMENTAL LAW ASSOCIATION AND ENVIRONMENTAL DEFENCE CANADA, INC.

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PART I - INTRODUCTION

1. The *Greenhouse Gas Pollution Pricing Act* [*Act*] addresses the public health and environmental crisis caused by climate change by establishing a charge on greenhouse gas emissions that applies broadly across Canada.[1] The *Act* is *intra vires* Parliament under the criminal law power because it has a valid criminal law purpose to reduce greenhouse gas emissions by mandating that emitters pay a charge, which is backed by prohibitions and sanctions. In the alternative, Part 2 of the *Act* is *intra vires* Parliament under the trade and commerce power because it creates a market for emissions credits for industrial facilities and applies to trade and commerce as a whole.[2]

PART II - JURISDICTION

2. *The Constitutional Questions Act, 2012* authorizes the Saskatchewan Court of Appeal to provide an opinion on a matter referred to it by the Lieutenant Governor in Council.[3] The question before the Court is:

> The *Greenhouse Gas Pollution Pricing Act* was introduced into Parliament on March 28, 2018 as Part 5 of Bill C-74. If enacted, will this *Act* be unconstitutional, in whole or in part?[4]

PART III - SUMMARY OF FACTS

3. The intervenors accept the facts as stated by the Attorney General of Canada and highlight the following additional facts.[5] Part 1 of the *Act* requires various liquid, gas, and solid fuel producers, distributors, importers, and final fuel carriers to pay a greenhouse gas emission [GHGE] charge. They must register, report and remit monthly charges to the Canada Revenue Agency [CRA]. There are prohibitions, summary and indictable offences, and penalties for providing false information to the CRA or failing to register, report, remit, or provide information to the CRA.[6] A failure

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[1] Intervenors' Book of Authorities [IBOA], Tab 1: *Greenhouse Gas Pollution Pricing Act*, SC 2018, c. 12, s 186, preamble [*Act*].
[2] Saskatchewan's Book of Authorities [SBOA], Tab 1: *Constitution Act, 1867*, ss 91(27) and 91(2).
[3] SBOA, Tab 2: *The Constitutional Questions Act, 2012*, SS 2012, c C-29.01, ss 2-3.
[4] Order-in-Council 194/2018, Province of Saskatchewan, April 19, 2018.
[5] Attorney General of Canada Factum [CF] at paras 8-64.
[6] IBOA, Tab 1: *Act*, *supra* note 1, Part 1, ss 17-27, 28-35, 55-74, 123-140.

to pay a charge as required by the *Act* is punishable on summary conviction. The penalty is a fine or imprisonment.[7] An offence is also established for failing to comply with any provision of Part 1 of the *Act,* and the penalty is a fine or imprisonment.[8]

4. Part 2 of the *Act* establishes mandatory charges for industrial facilities emitting 50 kt or more of carbon dioxide equivalent [CO_2e] per year and allows other facilities to request coverage in lieu of being subjected to Part 1 charges. The pricing mechanism consists of two components: (1) a levy for a facility's GHGEs that exceed an annual prescribed threshold; and (2) emission credits if a facility emits below the annual prescribed threshold.[9] Emission credits can be transferred to other facilities.[10] Environment and Climate Change Canada [ECCC] will establish and maintain a system to track emission credits, transfers, retirement, and cancellation of credits, and levy payments for excess GHGEs for facilities.[11]

5. Part 2 also establishes prohibitions, offences, and penalties similar to Part 1 of the *Act* and "inspired" by the enforcement provisions of the *Canadian Environmental Protection Act, 1999* [*CEPA*].[12] Section 233 creates a summary or indictable offence for contravening any provision or regulation under Part 2. The penalties are fines or imprisonment.[13] A separate offence is created for each tonne of CO2e that is emitted over the applicable emissions limit for which no compensation is provided.[14]

PART IV - POINT IN ISSUE

6. Is the *Act* constitutional, in whole or in part?

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[7] IBOA, Tab 1: *Act, supra* note 1, s 135.
[8] IBOA, Tab 1: *Act, supra* note 1, s 136.
[9] IBOA, Tab 1: *Act, supra* note 1, ss 169, 174-175, 178(1)(b).
[10] IBOA, Tab 1: *Act, supra* note 1, ss 174-175, 185.
[11] IBOA, Tab 1: *Act, supra* note 1, s 185.
[12] *Canadian Environmental Protection Act, 1999*, SC 1999, c 33 [*CEPA*]; Attorney General of Canada Record, Vol. 1, Tab 1: Affidavit of John Moffet, affirmed October 25, 2018 at para 116 [Moffet Affidavit]; IBOA, Tab 1: *Act, supra* note 1, ss 208, 217, 225(4), 232, 233.
[13] IBOA, Tab 1: *Act, supra* note 1, s 233.
[14] IBOA, Tab 1: *Act, supra* note 1, ss 174(1), 178(1)(a), 233(5), 240.

PART V - ARGUMENT

A. THE PITH AND SUBSTANCE OF THE *ACT* IS TO ADDRESS CLIMATE CHANGE THROUGH MANDATORY CHARGES ON GREENHOUSE GAS EMISSIONS

7. The pith and substance of the *Act* is to encourage lower overall GHGEs causing climate change by imposing mandatory charges for emitting GHGs. The preamble of the *Act* cites the "unprecedented risk to the environment, including its biological diversity, to human health and safety and to economic prosperity" caused by climate change and that the absence or lack of stringency of GHGE pricing systems in some provinces could contribute to serious deleterious effects on the environment, human health and safety, and economic prosperity. The effect of the law will be to impose widely applicable GHGE charges to induce behavioural change and lower overall GHGEs. The Part 1 and Part 2 systems of mandatory charges are backed by prohibitions and penalties.[15]

B. THE *ACT* IS INTRA VIRES PARLIAMENT ON THE BASIS OF THE CRIMINAL LAW POWER

8. S. 91(27) of the *Constitution Act, 1867* confers on Parliament the exclusive and plenary power to legislate in relation to criminal law. Its reach is broadly defined, not "frozen in time", stands on its own as federal jurisdiction, and is not restricted to the *Criminal Code*.[16] The *Act* may be upheld under the criminal law power because it is (1) founded on a "legitimate public purpose" associated with an "evil" that Parliament seeks to suppress; (2) stipulates prohibitions backed by sanctions; and (3) does not colourably invade areas of exclusively provincial legislative competence.[17]

9. The Attorney General of Saskatchewan raises concerns about upholding the *Act* pursuant to the federal power to make laws for the peace, order and good

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[15] IBOA, Tab 1: *Act*, *supra* note 1, preamble, ss 17-27, 28-35, 55-74, 123-140, 169, 174-175, 178(1)(b), 185, 208, 217, 225(4), 232, 233, 240.

[16] SBOA, Tab 1: *Constitution Act, 1867*, s 91(27); IBOA, Tab 2: *R v Hydro-Quebec*, [1997] 3 SCR 213 at paras 119-122 [*Hydro-Quebec*]; IBOA, Tab 3: *Reference re Firearms Act (Can)*, 2000 SCC 31 at paras 28-29, 1 SCR 783 [*Firearms Reference*] (federal laws on food, drugs, tobacco, firearms, toxic substances upheld under criminal law power).

[17] IBOA, Tab 4: *RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199 at para 28 [*RJR-MacDonald*]; IBOA, Tab 2: *Hydro-Quebec*, *supra* note 16 at paras 121, 123.

government of Canada and its impact on the balance of Canadian federalism.[18] However, this Court should also be concerned about hampering the federal government's ability to act on climate change. The Supreme Court of Canada [SCC] cautioned against allocating exclusive legislative power respecting environmental pollution to either the federal or provincial government. Justice La Forest, writing for the majority in *Hydro-Quebec*, held that the Federal government must have authority to exercise the leadership role expected of it in the international community and to protect the basic values of Canadians through the criminal law power in s. 91(27):

> 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, under general powers such as property and civil rights, control over the environment in a manner that prevented Parliament from exercising the leadership role expected of it by the international community and its role in protecting the basic values of Canadians regarding the environment through the instrumentality of the criminal law power. Great sensitivity is required in this area since, as Professor Lederman has rightly observed, environmental pollution "is no limited subject or theme, [it] is a sweeping subject or theme virtually all-pervasive in its legislative implications… [19]

10. As a matter of statutory interpretation, this Court should construe the *Constitution Act, 1867* in a manner consistent with international law's precautionary principle. Upholding the *Act* under the criminal law power is consistent with this principle. Canada has a mandate in law to act consistently with its international law obligations and in particular with the branch of the precautionary principle that requires governments to pursue environmental measures that "anticipate, prevent and attack the causes of environmental degradation". The *Act* aims to prevent environmental ills that pose threats of serious or irreversible damage and has a "clear and preventive purpose". Its validity ought to be interpreted in the context of this principle of international law.[20]

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[18] Attorney General of Saskatchewan Reply Factum at paras 13, 14 [SRF].
[19] IBOA, Tab 2: *Hydro-Quebec, supra* note 16 at para 154.
[20] IBOA, Tab 5: *114957 Canada Ltee (Spraytech Societie d'arrosage) v Town of Hudson*, 2001 SCC 40 at paras 30-32, 2 SCR 241 [*Hudson*]; IBOA, Tab 6: *Castonguay Blasting Ltd v Ontario (Environment)*, 2013 SCC 52 at para 20, 3 SCR 323; IBOA, Tab 7: Charles-Emmanuel Côté, "Applying International Law to Canadian Environmental Law" (Address delivered at *A Symposium on Environment in the*

1) Legitimate Criminal Law Purpose

11. Environmental protection is recognized as a criminal law purpose because "pollution is an evil" that Parliament can legitimately seek to suppress.[21] Courts have recognized mitigating climate change, reducing toxic pollution, and protecting species at risk as valid criminal law purposes.[22]

12. It is uncontroverted that GHGEs are harmful to both health and the environment.[23] The *Act* has a valid public purpose to mitigate climate change by imposing charges on GHGE sources to induce emitters to change their behaviour and reduce their emissions.[24] In exercising its criminal law power, Parliament can "determine what evil it wishes by penal prohibition to suppress and what threatened interest it thereby wishes to safeguard". Here, the evil is climate change-inducing GHGEs requiring mitigation. "Stewardship of the environment is a fundamental value… and…Parliament may use its criminal law power to underline that value…and keep pace with and protect our emerging values".[25]

13. The Federal Court of Appeal upheld regulations passed under *CEPA* that require diesel fuel to contain a 2% renewable fuel component as valid under the criminal law power. This requirement is not unlike the charges imposed on fossil fuels in the *Act* to induce behavioural change and reduce GHGEs.[26] The criminal law power is not negated because Parliament hoped that the underlying sanction would encourage the consumption of renewable fuels. All criminal law seeks to deter or modify behaviour.[27]

Courtroom: Key Environmental Concepts and the Unique Nature of Environmental Damage, University of Calgary, 23-24 March 2012) at 2, 8.

[21] IBOA, Tab 2: *Hydro-Quebec*, *supra* note 16 at paras 85, 123 (public purpose of superordinate importance); IBOA, Tab 8: *Syncrude Canada Ltd v Canada (Attorney General*), 2016 FCA 160 at para 49, 2016 FCA 160 (CanLII) [*Syncrude*].

[22] IBOA, Tab 2: *Hydro-Quebec*, *supra* note 16 at paras 85-86; IBOA, Tab 9: *Le Groupe Maison Candiac Inc v Attorney General of Canada*, 2018 FC 643 at paras 110, 114, 118 [*Groupe Maison*]; IBOA, Tab 8: *Syncrude*, *supra* note 21 at para 49.

[23] IBOA, Tab 8: *Syncrude*, *ibid* at para 62; SR, Tab 1: Vancouver Declaration on Clean Growth and Climate Change.

[24] CF, *supra* note 5 at para 83; IBOA, Tab 1: *Act*, *supra* note 1, Declaration, Preamble, Part 1, ss 17-27, 28-35, 55-74, 165, 123-140, Part 2, ss 169-172, 173-188, 232-240, Schedules 3 & 4.

[25] IBOA, Tab 2: *Hydro-Quebec*, *supra* note 16 at paras 119, 123-125, 127.

[26] IBOA, Tab 8: *Syncrude*, *supra* note 21 at paras 61, 69-70.

[27] IBOA, Tab 8: *Syncrude*, *ibid* at para 69.

14. The GHGs identified in Part 2's Schedule 3 are also designated as toxic substances under *CEPA;* a statute upheld by the SCC as *intra vires* Parliament under the criminal law power in *Hydro-Quebec*.[28]

2) The *Act* contains prohibitions backed by sanctions

15. The *Act* falls within Parliament's criminal law power because it (1) contains a prohibition combined with a sanction, and (2) the prohibition is founded on an "evil" that Parliament seeks to suppress. The *Act* establishes sanctions for emitters who do not pay the appropriate charge by penalizing false or insufficient reporting of emissions, and subsequently penalizing a failure to pay the appropriate charge as required in Part I or emitting over the applicable emissions limit without paying compensation or acquiring emissions credits as required in Part 2. [29]

16. The Court has repeatedly found that Parliament can establish detailed, precise, and highly complex regulatory systems under its criminal law power, as long as the regime is backed by prohibitions and penalties.[30] For instance, the complex scheme upheld as valid under the criminal law power in *Hydro-Quebec* deals with the control of toxic substances that may be released into the environment. To determine whether substances should be classified as toxic, the substances are assessed and tested, and the provinces and the public are consulted. A Priority Substances List is created to prioritize testing of the most dangerous chemicals. The aim of the assessments is to create a List of Toxic Substances in Schedule 1 of *CEPA.* Of these substances, regulations may be created with respect to the quantity or concentration of a substance that may be released, either alone or in combination with other sources, the places where substances may be released, the manufacturing or processing activities in the course of which the substances may be released, and the manner and conditions of

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[28] IBOA, Tab 1: *Act*, *supra* note 1, Schedule 3 (GHG); *CEPA, 1999*, *supra* note 12, Schedule 1 (List of Toxic Substances that are GHGs); IBOA, Tab 2: *Hydro-Quebec*, *supra* note 16 at para 161.
[29] IBOA, Tab 1: *Act*, *supra* note 1, ss 123-131, 132-136, 174, 178(1)(a), 240.
[30] IBOA, Tab 4: *RJR-MacDonald*, *supra* note 17 at para 28; IBOA, Tab 2: *Hydro-Quebec*, *supra* note 16 at para 150; IBOA, Tab 3: *Firearms Reference*, *supra* note 16 at para 37; IBOA, Tab 8: *Syncrude*, *supra* note 21 at paras 73-74; IBOA, Tab 10: *Reference re Assisted Human Reproduction Act*, 2010 SCC 61 at paras 233-234, 237, 3 SCR 457 [*Assisted Human Reproduction*].

release. The prohibitions in *CEPA* apply if substances are released beyond the limits of the imposed restrictions, and are backed by penal sanctions.[31]

17. The SCC in *Reference re Assisted Human Reproduction* found that the *Assisted Human Reproduction Act* was *ultra vires* the criminal law power because there was no evil to suppress or threatened interest to safeguard, not because it was a complex regulatory scheme. The Court highlighted that the substantive purpose component had heightened significance because the formal component - the requirement for a prohibition backed by a sanction - has been interpreted liberally.[32] In any event, as highlighted by the Federal Court in *Groupe Maison*, the ruling in *Reference re Assisted Human Reproduction* did not involve protection of the environment.[33]

18. The federal government is not restricted in its choice of means to address the evil it seeks to suppress, as long as it establishes a scheme with prohibitions backed by sanctions. Parliament may delegate power to the executive branch to define or specify which conduct could have criminal consequences and which conduct may be exempt from criminal consequences. The prohibition need not be total or direct in order to be upheld as a valid exercise of criminal law:

- Parliament chose to address the evil of tobacco by prohibiting tobacco advertising, not tobacco consumption. It was not practical to prohibit tobacco use altogether. The only true distinction that can be drawn between measures to prohibit advertising and measures to prohibit consumption is in the means employed by Parliament to combat the evil. That distinction, absent evidence of colourability, is not constitutionally significant.[34]

- Parliament chose to address public safety through indirect means by controlling access to firearms through mandatory licensing requirements, rather than by prohibiting firearms.[35]

- Parliament chose to address the evil of GHGs and their contribution to climate change by imposing a 2% renewable fuel requirement, rather than banning the

[31] IBOA, Tab 2: *Hydro-Quebec*, *supra* note 16 at paras 135, 142, 143-147, 150.
[32] IBOA, Tab 10: *Assisted Human Reproduction*, *supra* note 30 at paras 232, 234.
[33] IBOA, Tab 9: *Groupe Maison*, *supra* note 22 at para 122.
[34] IBOA, Tab 4: *RJR-MacDonald*, *supra* note 17 at paras 34-44.
[35] IBOA, Tab 3: *Firearms Reference*, *supra* note 16 at paras 39-40.

> presence of GHGs in fuel. The regulatory obligation could be met by purchasing compliance units from another user because on a national basis, the net effect is the same.[36]

19. The fuel charge in Part 1 and the emission charge in Part 2 are consistent with this approach; Parliament chose to prohibit using or emitting GHGs without paying a charge, rather than prohibiting the emission of GHGs altogether, to effect its purpose of reducing GHGEs.[37]

20. The Attorney General of Saskatchewan's objection to the "backstop" architecture of the legislation does not render the *Act* invalid under the criminal law power. Despite his characterization of the "backstop" mechanism as "without precedent"[38], the Court in *Hydro-Quebec* found that *CEPA*, which provided that the toxics regulation regime did not apply where a matter was otherwise regulated under equivalent federal or provincial legislation, was valid criminal law and furthered cooperation and coordination between federal and provincial authorities.[39] The SCC likewise held in *R v Furtney* that a valid criminal law may limit the reach of its legislation in recognition of the existence of provincial legislation.[40]

3) The *Act* is not colourable

21. The *Act* is not a colourable attempt to invade provincial heads of power. It is designed to address a serious environmental objective to combat the deleterious effects of GHGs by placing a charge on fossil fuels to induce behavioural change to reduce overall GHGEs.[41] The preamble of the *Act* points out that some provinces have GHGE pricing systems, however the absence or lack of stringency of provincial GHGE pricing in some provinces could contribute to deleterious effects on the environment, human health and safety, and on economic prosperity. The federal scheme ensures that GHGE pricing applies broadly in Canada.[42]

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[36] IBOA, Tab 8: *Syncrude*, *supra* note 21 at paras 71-77.
[37] IBOA, Tab 1: *Act*, *supra* note 1, Part 1, ss 17-27, 55-74, Schedule 2 (Charge Rates); Part 2, ss 169-188, Schedules 3 & 4.
[38] Attorney General of Saskatchewan Factum at paras 11, 34 [SF].
[39] IBOA, Tab 2: *Hydro-Quebec*, *supra* note 16 at para 153.
[40] IBOA, Tab 11: *R v Furtney*, [1991] 3 SCR 89 at 102, 104-105.
[41] IBOA, Tab 8: *Syncrude*, *supra* note 21 at paras 87-93.
[42] IBOA, Tab 1: *Act*, *supra* note 1, preamble.

22. There is a very high standard to establish colourability. It is not "lightly inferred" and it cannot be used as a backdoor to challenge the wisdom or efficacy of the law.[43] Saskatchewan does not dispute the seriousness of climate change or the need to act. Saskatchewan's opposition to the *Act* as expressed in its climate change plan *Prairie Resilience* is that the federal carbon "tax" will be ineffective or impair Saskatchewan's ability to respond to climate change. This policy disagreement amounts to an attack on the wisdom of the *Act* and is not constitutionally significant.[44]

23. The valid use of the criminal law power to protect the environment may have consequential economic effects. Parliament's challenge in addressing climate change is to protect the environment while considering other side effects of its actions. A law is not a colourable attempt to intrude on provincial jurisdiction only because it seeks to manage the economic effects of addressing climate change.[45]

24. The legitimate use of the criminal law in no way constitutes encroachment on provincial legislative power, though it may affect matters falling within the latter's ambit. The provinces may still exercise their powers under s. 92 of the *Constitution Act, 1867* to control GHG pollution independently or to supplement federal action.[46] Under the criminal law power, Saskatchewan can still execute its climate change plan without any conflict with the *Act*. Part 2 will apply to Saskatchewan only to the extent that it does not meet the federal law's requirements.[47]

25. The pith and substance doctrine contemplates that a matter may fall within one level of government's jurisdiction for one purpose and in one aspect and fall within another level of government's jurisdiction for another purpose and another aspect. Under the double aspect theory, even if there is duplication between federal and provincial laws, the two laws may both operate as long as there is no actual conflict or contradiction between them. In the *Firearms Reference*, the SCC rejected the argument that a province should have a "right not to cooperate" with a federal scheme with which it disagrees. The double aspect doctrine allows both levels of government to legislate

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[43] IBOA, Tab 8: *Syncrude, supra* note 21 at para 88.
[44] SR, Tab 10: "Prairie Resilience: A Made-in-Saskatchewan Climate Change Strategy" at 1 [*Prairie Resilience*].
[45] IBOA, Tab 8: *Syncrude, supra* note 21 at para 91.
[46] IBOA, Tab 2: *Hydro-Quebec, supra* note 16 at paras 129, 131.
[47] SR, Tab 10: *Prairie Resilience*; Moffet Affidavit, *supra* note 12 at paras 120-121.

in one jurisdictional field for two different purposes.[48] Where there is an operational conflict between two laws enacted on the same matter by each level of government, federal paramountcy applies and the federal law prevails to the extent of the conflict.[49]

C. IN THE ALTERNATIVE, PART 2 IS *INTRA VIRES* PARLIAMENT UNDER THE TRADE AND COMMERCE POWER

26. If Part 2 is not *intra vires* Parliament as criminal law, it is *intra vires* under the trade and commerce power in s. 91(2). The purpose of Part 2, like Part 1, is to induce behavioural change in GHGE sources to mitigate climate change. Part 2 achieves this purpose by introducing economic value to GHGE credits and a market for facilities to trade those credits if they reduce their emissions below prescribed levels. Part 2 creates an industry-wide market for trading of emission credits.[50]

27. S. 91(2) of the *Constitution Act, 1867* confers on Parliament the power to make laws in relation to "the regulation of trade and commerce" affecting the whole country if the law meets five indicia: (1) the legislation must be part of a general regulatory scheme; (2) the scheme must be monitored by the continuing oversight of a regulatory agency; (3) the legislation must be concerned with trade as a whole rather than with a particular industry; (4) the legislation should be of a nature that the provinces jointly or severally would be constitutionally incapable of enacting; and (5) the failure to include one or more provinces or localities would jeopardize the successful operation of the scheme in other parts of the country. The indicia are not exhaustive, nor must they be present in every case. The first two indicia identify the required formal structure; a federal regulatory scheme under the oversight of a regulator. The final three indicia identify whether federal regulation is constitutionally appropriate. The law must be of genuine national importance and scope, and must apply

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[48] SF, *supra* note 38 at para 49; IBOA, Tab 3: *Firearms Reference*, *supra* note 16 at para 52.
[49] IBOA, Tab 12: *Canadian Western Bank v Alberta*, 2007 SCC 22 at paras 30, 69-72, 2 SCR 3; IBOA, Tab 13: *Multiple Access Limited v McCutcheon* (1981), [1982] 2 SCR 161 at 190-191; IBOA, Tab 5: *Hudson*, *supra* note 20 at paras 34-36.
[50] SBOA, Tab 1: *Constitution Act, 1867*, s 91(2); IBOA, Tab 1: *Act*, *supra* note 1, ss 173-188, Schedules 3 & 4.

to trade as a whole distinct from provincial concerns, allowing Parliament to deal effectively with economic issues.[51]

28. The dissenting view in *Hydro-Quebec* that *CEPA* could not be upheld under the trade and commerce power does not apply to the *Act.* The dissent found that the pith and substance of *CEPA* was not trade and commerce, even if trade and commerce was affected by provisions controlling toxic substances. The majority was silent on the issue.[52] Neither judgement examined a scheme similar to Part 2 of the *Act*, which creates a market for emission credits.

1) Part 2 of the *Act* is Part of a General Regulatory Scheme

29. Part 2 meets the first indicium because it is part of a general regulatory scheme necessary to implement elaborate economic measures for facilitating emissions trades.[53]

2) Part 2 is Continually Monitored by Agency

30. Part 2 meets the second indicium because ECCC must establish and maintain a system that tracks emission credits, transfers, retires, and cancels credits, and levy payments for excess GHGEs for each covered facility.[54]

3) Part 2 is Concerned with Trade as a Whole

31. The Part 2 emissions trading regime is valid under trade and commerce for four reasons. First, pollution has an important economic dimension in its impact on trade and commerce. The design of Part 2 addresses concerns about GHGEs leakage. There is little incentive for company A to reduce GHGEs in one province if company B in another province can continue to pollute and thereby obtain an economic advantage over company A. By not responding with effective legislation, or by imposing lower environmental standards, it is possible for provinces to subsidize

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[51] IBOA, Tab 14: *General Motors of Canada Limited v City National Leasing*, [1989] 1 SCR 641 at 662-663, 669-670 [*General Motors*]; IBOA, Tab 15: *Reference re Securities Act (Canada)*, 2011 SCC 66 at paras 80, 84, 108, 3 SCR 837 [*Securities Reference*]; IBOA, Tab 16: *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48 at para 103, 2018 SCC 48 (CanLII) [*Pan-Canadian Securities*].
[52] IBOA, Tab 2: *Hydro-Quebec*, *supra* note 16 at paras 80-82.
[53] IBOA, Tab 1: *Act*, *supra* note 1, ss 173-188, Schedules 3 & 4.
[54] IBOA, Tab 1: *Act*, *supra* note 1, ss 185-186.

existing businesses and attract new businesses to their jurisdictions, thus creating competitive, commercial, and trade imbalances across the country. GHGEs leakage also undermines the environmental goal of the *Act* to reduce GHGEs across the country. This problem suggests the need for federal law to address the economic, trade, and commercial dimensions of the GHG pollution problem through the trade and commerce power.[55] This also explains reliance by the United States Supreme Court on the Commerce Clause as constitutional justification for upholding federal environmental law in the United States.[56]

32. Second, even if, as the *Hydro-Quebec* dissent suggests, traditional environmental regulation does not concern trade and commerce, Part 2 adopts economic or market approaches to environmental pollution by turning an emission credit into an article of trade; that is, a commodity with economic value to industry.[57]

33. Third, the SCC has said that environmental protection is "one of the major challenges of our time". It is an "abstruse matter which does not comfortably fit within" the division of powers without considerable overlap and uncertainty, and requires that the Constitution be "interpreted in a manner that is fully responsive to emerging realities and the nature of the subject matter sought to be regulated", given the particular difficulties posed by the "pervasive and diffuse nature of the environment". Accordingly, the Intervenors submit that the: (1) SCC is signaling that complex environmental legislation may attract a more flexible pith and substance analysis than that afforded by the dissent in *Hydro-Quebec*; and (2) challenges posed by climate change and measures necessary to address it warrant such flexibility.[58]

34. Fourth, in the *Securities Reference*, the SCC treated securities as a particular industry and found the main thrust of the proposed law to be regulation of that industry, and that despite the asserted national goals of control of systemic risk and data collection, the federal scheme completely displaced the long-existing provincial

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[55] Moffet Affidavit, *supra* note 12 at paras 65, 67, 85.
[56] IBOA, Tab 17: *Hodel v Virginia Surface Mining & Reclamation Association*, 452 US 264 at 281-283 (1981).
[57] IBOA, Tab 1: *Act*, *supra* note 1, Part 2, ss 173-188.
[58] IBOA, Tab 2: *Hydro-Quebec*, *supra* note 16 at paras 86, 112; IBOA, Tab 18: *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3 at 16-17, 63-65.

securities regulatory schemes.[59] This is not the case under the *Act*, where Part 2 does not target any particular industry, rather it applies to GHGEs from a broad scope of industries that emit over 50 kt or more of CO_2e emissions per year.[60] It does not target the day-to-day operations of covered facilities.[61] Likewise, in *General Motors*, the SCC found that federal competition legislation met the third indicium because it was aimed at improving the economic welfare of the nation as a whole. Parliament and the provinces both had the constitutional power to regulate the intraprovincial aspects of competition because it, like pollution, is not a single matter.[62]

35. In the case at bar, Part 2 meets the third indicium because emissions trading: (1) is not a "particular industry"; (2) is concerned with trading emission credits, a commodity of economic value to any industry that emits GHGs; and (3) meets "larger national goals" of GHGE reductions.[63]

4) <u>Part 2 Could Not be Enacted by the Provinces</u>

36. In the *Securities Reference*, and upheld in the *Reference re Pan-Canadian Securities Regulation*, the portions of the proposed *Securities Act* dealing with systemic risk and data collection passed the fourth indicium in part because, although the provinces could in theory collaborate towards such goals, their "inherent prerogative to resile from an interprovincial scheme…limits their constitutional capacity to achieve the truly national goals of the proposed federal act". The same logic holds true for emissions trading under Part 2. Regardless of whether provinces could enact emissions trading regimes and synchronize them, their inability to bind one another to such a regime is inescapable. The concern in the *Securities Reference* was that the federal securities regime would completely displace provincial securities laws, whereas Part 2 leaves provinces wide latitude to maintain equivalent GHGE pricing regimes. The federal legislation only serves to ensure that if provinces resile from a

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[59] IBOA, Tab 15: *Securities Reference*, *supra* note 51 at paras 116-117.
[60] IBOA, Tab 19: *Notice Establishing Criteria Respecting Facilities and Persons and Publishing Measures*, SOR/2018-213, s 3; Moffet Affidavit, *supra* note 12 at paras 114-115.
[61] IBOA, Tab 16: *Pan-Canadian Securities*, *supra* note 51 at paras 87, 95, 111.
[62] IBOA, Tab 14: *General Motors*, *supra* note 51 at 680-681, 682.
[63] IBOA, Tab 15: *Securities Reference*, *supra* note 51 at paras 116-117; IBOA, Tab 16: *Pan-Canadian Securities*, *supra* note 51 at paras 87, 90, 92, 95-97, 106-107, 111-112, 116.

GHGE pricing scheme, there is a consistent minimum standard for GHGE pricing maintained across the country. There is no legislative "overreach" in Part 2 of the type found in the *Securities Reference*.[64]

5) Part 2 is Jeopardized if all Provinces not Included

37. The *Securities Reference* found that the portions of the proposed *Securities Act* deemed acceptable under the fourth *General Motors* indicium also met the fifth indicium because "fair, efficient and competitive markets" and the other national goals addressed by the proposed *Securities Act* were "genuine national goals" rather than "lesser regulatory matters". Emissions trading under Part 2 raises analogous fairness and competition issues, and the prevention of GHGEs is a valid national goal, as reviewed under the third indicium. The opt-in feature criticized in the *Securities Reference* as undermining the federal argument that success of the law required participation by all provinces was in fact an opt-in provision by provinces, not by individual facilities as is the case in Part 2. The Part 2 opt-in is ancillary to the *Act's* objectives because if facilities do not opt-in they are still subject to Part 1.[65] The *Act* is designed to ensure that GHGE pricing applies widely across the country.

38. Finally, reliance on the trade and commerce power to support Part 2 allows concurrent and compatible provincial legislation to apply intraprovincially, and is permissible even with Part 1 being upheld under the criminal law power. [66]

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

January 24, 2019

per

Theresa McClenaghan

Jacqueline Wilson
Counsel for Canadian Environmental Law Association and Environmental Defence Canada, Inc.

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[64] IBOA, Tab 15: *Securities Reference, supra* note 51 at paras 120-122; IBOA, Tab 16: *Pan-Canadian Securities*, *supra* note 51 at paras 113-114.

[65] IBOA, Tab 15: *Securities Reference*, *supra* note 51 at para 123; IBOA, Tab 16: *Pan-Canadian Securities*, *supra* note 51 at para 115.

[66] IBOA, Tab 2: *Hydro-Quebec*, *supra* note 16 at paras 115-116 (determining subject matter of national concern results in matter falling within exclusive power of Parliament); IBOA, Tab 14: *General Motors*, *supra* note 51 at 680-682; IBOA, Tab 20: *R v Wetmore*, [1983] 2 SCR 284 at 288.

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