COURT OF APPEAL OF ALBERTA

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IN THE MATTER OF THE *Greenhouse Gas Pollution Pricing Act*, SC 2018, c.12

AND IN THE MATTER OF a reference by the Lieutenant Governor in Council to the Court of Appeal of Alberta under the *Judicature Act*, RSA 2000, c. J-2, s. 26.

DOCUMENT: **FACTUM**

Reference by the Lieutenant Governor in Council
to the Court of Appeal of Alberta
Order in Council filed the 20th day of June, 2019

FACTUM OF THE INTERVENOR, INTERNATIONAL EMISSIONS TRADING ASSOCIATION

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PART I – OVERVIEW AND STATEMENT OF FACTS

(i) Overview

1. IETA is a non-profit organization with over one hundred and fifty (150) Albertan, Canadian, and international business and industry members that span the mining, oil and gas, electricity, utilities, finance, trading, professional services, and manufacturing sectors.[1] All of IETA's members are committed to facilitating progressive, low-cost, market-based approaches in order to meaningfully address climate change, enhance business certainty, and facilitate long term investment.[2] IETA has been a leading Canadian, North American, and international business voice on carbon pricing and climate finance for nearly two decades.[3]

2. Many of IETA's members are directly regulated by the federal *Greenhouse Gas Pollution Pricing Act* (the "**Act**"), the Alberta carbon pricing regime, and other provincial carbon pricing regimes.[4] IETA is one of the only intervenors whose business and industry members are directly impacted by the outcome of this Reference.[5]

3. IETA's general support for coordinated and comprehensive market-based approaches/carbon pricing is underpinned by its members' commitment to environmental integrity, inter-jurisdictional harmonization, and facilitating least-cost approaches to addressing the pressing issue of climate change.[6]

4. The Act is, in pith and substance, a greenhouse gas ("**GHG**") **emissions pricing and trading regime that establishes minimum national stringency standards in order to reduce Canada's GHG emissions in accordance with the *Paris Agreement***. The Act facilitates nationally consistent standards and provincially flexible means to achieve the end goal of reducing Canada-wide GHG emissions in a cost-effective manner while maintaining economic competitiveness. It does so by: (i) putting a price on the GHG emissions associated with the delivery, use, and import of fossil fuels, and resulting from industrial emissions that exceed sectoral benchmarks, (ii) establishing a flexible compliance trading regime that facilitates and

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[1] Affidavit of Kathleen Eleanor Sullivan at paras 4, 5 [**Sullivan Affidavit**].
[2] *Ibid* at para 4.
[3] *Ibid* at para 6.
[4] *Ibid* at para 5.
[5] *Ibid*.
[6] *Ibid* at para 12.

incents GHG emission reductions from within and outside of industry, while maintaining trade competitiveness, and (iii) imposing prohibitions and penalties for non-compliance with key aspects of the regime that are intended to achieve the legitimate public purpose of reducing GHG emissions, their uncontroverted harms, and thereby taking meaningful steps to address climate change and industrial competitiveness concerns in accordance with Canada's commitments under the *Paris Agreement*.

5. There is no jurisprudence, factual basis, or interpretative convention that requires this Honourable Court to limit its discretion in characterizing the Act by considering *only* the *subject* of its application and not the *means* by which it achieves its intended purpose. Characterization of the matter of the Act is not, and should not be, an 'all or nothing,' 'qualitative or quantitative,' chiaroscuro exercise that limits the application of Court's wisdom and discretion on this and future reference cases.

6. The Act, appropriately and narrowly characterized, is validly classified as falling within the federal government's shared jurisdiction over the environment, existing jurisdiction over trade and commerce (s. 91(2)), criminal law (s. 91(27)), and/or international treaties as set out in of the *Constitution Act, 1867* (the "**Constitution**").[7]

7. However, to the extent that the implementation of the Act in Alberta or any other province has the effect of: (i) *sterilizing the core elements* of an expressly enumerated area of exclusive provincial jurisdiction (including those set out in s. 92A and in particular s. 92A(1)(c) of the Constitution); or (ii) unnecessarily encroaching upon a provincial carbon pricing regime of greater GHG-reducing stringency, which is validly enacted under a province's shared jurisdiction over the environment; the Act should be interpreted in a manner that reflects the express balance of powers in the Constitution and rendered inapplicable to such class of subject. Any factually supported provincial harm or conflict of jurisdiction that may arise through the operation of the Act should be resolved in a manner that is consistent with: (i) the principles of cooperative federalism and subsidiarity, (ii) the double aspect, interjurisdictional immunity, and paramountcy doctrines, and (iii) the constitutional competence afforded to Parliament and the provinces, under

[7] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91, reprinted in RSC 1985, Appendix II, No 5 [Book of Legislation of the Attorney General of Alberta, Vol. 2, Tab 5].

ss. 91, 92, and 92A of the Constitution. To date, the record in this Reference does not support such harm or judicial treatment that would render the Act or any of its parts inapplicable.

(ii) Facts

8. IETA generally adopts and agrees with the facts as set out in paragraphs 8 to 59, inclusive, of Factum of the Attorney General of Canada, and does not dispute the facts set out in paragraphs 16 to 28, inclusive, 31, 32, 35, 37, 40, 43-45, 48, 50, 51, 53, 56, 59, 71, and 96 of the Factum of the Attorney General of Alberta, subject to the following clarifications.

9. Canada and the provinces have each been grappling with climate change policy and related market mechanisms since the ratification of the United Nations Framework Convention on Climate Change ("**UNFCCC**") in 1994, subsequent protocols in 2002, and 2009, and the *Paris Agreement* in 2015. To date, none of Canada's provinces have challenged Canada's entry into or continued membership in the UNFCCC and/or the *Paris Agreement* treaties and many have actively supported same.

10. A number of provinces have enacted valid, provincially-specific climate legislation and carbon pricing schemes, which have resulted in some reductions of GHG emissions in certain provinces. Alberta has had a limited carbon pricing scheme since 2007,[8] but its GHG emissions have continued to increase.[9]

11. In the 25-year period that has ensued since the ratification of the UNFCCC, a number of Canada's provinces acting jointly or severally have attempted to achieve coordinated, minimum regional or national standards for GHG emissions pricing and have not been successful.[10]

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[8] Factum of the Attorney General of Alberta at para 32 [**Alberta Factum**].
[9] Factum of the Attorney General of Canada at paras 56-57 [**Canada Factum**].
[10] The National Round Table on the Environment and the Economy, which included provincial working groups, existed from 1988 until 2013. See *National Round Table on the Environment and the Economy Act*, SC 1993, c. 31 (assented to June 23, 1993) as repealed on April 1, 2013 by *Jobs, Growth and Long-term Prosperity Act*, SC 2012 c. 19; Friends of the Former National Round Table on the Environment and the Economy, "NRT: Canada's Round Table – History" (last modified February 19, 2013), online: <http://nrt-trn.ca/history>. See *Climate Change Mitigation and Low-carbon Economy Act, 2016*, SO 2016, c. 7, as repealed by Cap and Trade Cancellation Act, 2018, SO 2018, c. 13; O Reg 144/16 (The Cap and Trade Program) as revoked by O Reg 386/18; QCLR c Q-2, r 46.1 (Regulation respecting a cap-and-trade system for greenhouse gas emission allowances); Government of Ontario, "Agreement on the Harmonization and Integration of Cap-and-Trade Programs for Reducing Greenhouse Gas Emissions" (September 22, 2017), online: Newsroom (Archived Backgrounder) <https://news.ontario.ca/opo/en/2017/09/agreement-on-the-harmonization-and-integration-of-cap-and-trade-programs-for-reducing-greenhouse-gas.html>.

Provincial attempts to harmonize and coordinate provincial carbon pricing regimes have been limited,[11] have required the assistance of an extra-jurisdictional third party,[12] and were ultimately unsuccessful.[13]

12. It is noteworthy that GHG emissions in both Canada and Alberta have increased significantly over the same 25-year period and over the last decade.[14]

13. Similarly, there are trade and competitiveness impacts that have been experienced when provinces legislate to address GHG emissions without an overreaching and unifying national scheme of minimum national standards. The Government of British Columbia has previously confirmed the competitiveness impacts faced by its cement industry that are attributed to inconsistent or non-existent carbon pricing in other provinces.[15]

14. Prior to the enactment of the Act, the federal government had never implemented a comprehensive regulatory regime to limit GHG emissions or price GHG emissions. It is uncontroverted that the Act sets out a general, comprehensive, national GHG emissions pricing and trading regulatory scheme, which continues to be overseen by the Minister of Environment and Climate Change Canada and the Minister of National Revenue.[16]

15. The central provisions of the Act are summarized in Table 1, below.

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[11] Ontario and Quebec attempted to harmonize and coordinate their cap and trade regimes through the international Western Climate Initiative ("**WCI**").

[12] The US non-profit corporation, Western Climate Initiative, Inc., coordinated and acted as a counterparty to administer the Ontario-Quebec-California linked cap and trade auctions and markets

[13] Following the 2018 Ontario provincial election, Ontario withdrew from the WCI joint auctions and subsequently repealed its cap and trade legislation.

[14] See Appeal Record and Evidence of the Attorney General of Canada, Vol. 3, Expert Report of Dr. Dominique Blain (September 27, 2019) at para 31.

[15] *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544 (Factum of the Attorney General of British Columbia at para 18) [**BC Factum (ONCA)**].

[16] Alberta Factum at para 94.

Table 1. Summary of the Act		
Key Provision(s)	**Section(s)**	**Summary**
Price on fuel deliveries by distributors	17(1); 18(1); 19(1)-(2)	**Price** on the stipulated GHG emissions from fuel delivered to another person or used by a distributor in a listed province, or imported into a listed province. **Price** to be determined in accordance with s. 40 and escalating to $50/tonne by 2023.
Pricing and compliance trading (OBPS)	174(1)-(2), 175	Obligation to **pay a price** for GHGs emitted at covered facility that are above an applicable **minimum stringency standard** or benchmark set for each industrial sector. Payments for GHG emissions above the minimum standard may be avoided or mitigated through a **flexible compliance trading regime** that includes: • Earning, creating, **trading,** or purchasing and remitting *credits* awarded to facilities emitting less than the applicable **minimum GHG standard** • **trading,** or purchasing and remitting *offsets* from entities reducing GHG emissions outside of the covered facilities ; • paying the **minimum stipulated price** for excess GHG emissions charge (same as applicable **fuel emission price**); or • a combination of these **flexible pricing and trading mechanisms**.[17]
Prohibitions and Penalties	132; 133(2); 135; 136; 232-233	Prohibitions and penalties for failure to file or make return when required, failure to pay all or part of the applicable **price**, or failure to comply with specific **pricing or compliance/trading obligations** or other provisions set out in the Act. The range of punishments is similar to those set out in the constitutionally valid Canadian Environmental Protection Act.
Trading (compliance units)	192(l);	Regulations may address compliance units, including **trading** of compliance units, offsets, the circumstances under which **trading** of compliance units are prohibited and the recognition of units or credits issued by a person other than the Minister as compliance units.
Accounts for Tracking and Trading and Return of Proceeds	186(1), 165(2), 188(1)	Covered facility must have account in compliance tracking system in accordance with criteria set out in regulations; other persons may have accounts in compliance tracking system for purpose of trading compliance units. Proceeds of **payments** returned to provinces.
Stringency	166(2)-(3) and 189(1)-(2)	Regulation or order may amend list of provinces and territories for purposes of fuel charge and OBPS. In making regulation or order, must take into account as the primary factor, the **minimum national standards** and the **stringency of provincial pricing mechanisms for GHG emissions**. Stringency test based on provincial GHG emissions **price**, scope of coverage and/or the consistency with Canada's ***Paris Agreement*** commitment (30% reduction from 2005 by 2030).

[17] Canada Factum at paras 43-46.

16. The Act regulates specified GHGs from defined activities, not all GHGs from all activities of a merely local and private nature, in order to assist Canada in achieving its 2030 national emissions target of 512 Mt CO_2e under the *Paris Agreement*.

17. The Act is not targeted at a particular industry. It imposes minimum national standards for only GHG emissions pricing and trading on most sectors. GHG emissions from the following industrial activities and facilities are covered by the GHG emissions pricing and trading scheme set out in the Act: oil and gas production (extraction, processing production); mineral processing; chemicals; pharmaceuticals; iron, steel and metal tubes; mining and ore processing; nitrogen fertilizers; food processing; pulp and paper; automotive; electricity generation.[18]

18. The business risks and challenges of responding to climate change and competitiveness concerns are increasing as time passes and Canadian jurisdictional challenges continue. Canadian and international businesses are being called upon to help address and respond to those risks, and related opportunities, in a legal and policy environment that requires certainty and a legislative approach that is consistent with cooperative federalism.[19]

19. Canadian and international business and industry are directly affected by the commercial and trade risks and impacts of climate change, as well as the legislative responses to it. There are any number of policy approaches that may help address climate change, but IETA believes that systems including carbon pricing through efficient emissions markets have the best potential to deliver low-cost emissions reductions over the required timelines. Robust, least-cost approaches to carbon pricing, which are both environmentally and politically sustainable, are critical to business and investment in Alberta, Canada, and globally.[20]

20. The essential trade and competitiveness nature of the Act and the GHG emissions pricing and trading regime that it implements through minimum national standards is confirmed by both Canada[21] and Alberta.[22] Each addresses the trade and competitiveness effects, the specific application to, and accommodations for, emissions-intensive and trade-exposed ("**EITE**")

[18] Output-Based Pricing System Regulations, SOR/2019-26, Schedule 1 [Alberta BOL, Vol. 2, Tab 4].
[19] Sullivan Affidavit, *supra* note 1 at paras 9, 12-13.
[20] Sullivan Affidavit, *supra* note 1 at paras 11-12.
[21] Canada Factum at paras 43-45, 50.
[22] Alberta Factum at paras 77-84, 101.

sectors, and 'leakage' of GHG emissions from and into other provincial and international jurisdictions.[23]

21. The express market mechanisms set out Article 6 of the *Paris Agreement* provide for GHG emissions reduction, pricing, and trading opportunities that are currently not being harnessed by Canada and the provinces for the benefit of Canadian business and the economy. Canada's target under the *Paris Agreement* is, in fact, expressly contingent on access to and use of GHG emissions pricing and trading opportunities, which are included in the Act.[24] The minimum national standards in the Act appear to facilitate the coordination and cooperative action of the federal and provincial governments necessary for Canada and the Provinces[25] to take full advantage of their rights under Article 6 of the *Paris Agreement*.[26]

PART II – ARGUMENT

22. ***No single issue begs for the promise of cooperative federalism in Canada to be realized more than climate change.*** The ongoing effects and impacts of climate change in Canada are pressing and urgent.[27] Neither the federal nor the provincial governments have exclusive jurisdiction over climate change, GHG emissions, or carbon pricing. In the Canadian context, coordinated and ambitious action of both the federal and provincial governments is required to effectively and efficiently reduce GHG emissions and address climate change in a manner consistent with the targets and ambitions set out in the *Paris Agreement*.

23. Despite many policy attempts since Parliament's ratification of the UNFCCC over 25 years ago, the Act constitutes Canada's first successful legislative enactment of a comprehensive GHG emissions pricing and trading scheme to reduce GHG emissions and address climate change.

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[23] Alberta Factum at paras 78-84; Canada Factum at paras 44, 59.

[24] Canada's 2017 Nationally Determined Contribution Submission to the United Nations Framework Convention on Climate Change [Appeal Record and Evidence of the Attorney General of Canada, Vol. 2, Affidavit of John Moffet, Exhibit N].

[25] There appears to be **aligned federal-provincial support** for carbon pricing as each and all of Canada, Ontario, Saskatchewan, British Columbia, and New Brunswick use carbon pricing in their legislative and regulatory responses to climate change.

[26] *Paris Agreement*, art. 6.2 [Appeal Record and Evidence of the Attorney General of Canada, Vol. 2, Affidavit of John Moffet, Exhibit M]; Sullivan Affidavit, *supra* note 1 at paras 15-16.

[27] Alberta Factum at paras 29-38; Canada Factum at paras 9-14.

24. The success of the Act and related provincial GHG pricing and trading regimes is critical for long-term business certainty. However, it cannot be at the expense of the balance of powers expressly set out in the Constitution. The following examination of the characterization of the Act and its classification under the express legislative powers set out in the Constitution supports this Honourable Court's determination that the Act is constitutionally valid.

25. Contrary to Alberta's submission,[28] this Reference turns on the mandatory pith and substance analysis that is central to virtually all division of powers cases.

(i) The characterization of the Act

26. An examination of the pith and substance of the Act and its purpose and effect supports a narrow characterization of the matter of the Act in a manner consistent with the decisions of the Saskatchewan Court of Appeal (the "**Saskatchewan Decision**")[29] and the Ontario Court of Appeal (the "**Ontario Decision**")[30] in their recent respective reference cases regarding the Act.

27. Contrary to Alberta's submissions,[31] the examination of the pith and substance of the Act by the majority of the court in the Saskatchewan Decision, the majority of the court in Ontario, and the concurring reasoning of Hoy, A.C.J. in the Ontario Decision were <u>not</u> 'different formulations' of the Act's *classification* under a new federal peace, order and good government ("**POGG**"), but rather the appropriate and requisite *characterization* of the Act in accordance with the balance of powers test set out in *Crown Zellerbach.*[32]

28. The Act's essential character or pith and substance can be gleaned from its provisions and its purpose and effects. IETA largely agrees with the analysis and characterization of the Act set out by Canada at paragraphs 66 through 72 of its Factum, subject to the further refinement that flows from the examination of the express provisions of the Act as set out in Table 1 at paragraph 15, above, the Saskatchewan Decision, and Ontario Decision.

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[28] Alberta Factum at para 112 ("In this case, the pith and substance analysis is of less significance than in many other division of powers cases…")
[29] *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40 [Book of Authorities of the Attorney General of Alberta ("**Alberta BOA**"), Vol. 3, Tab 21].
[30] *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544 [Alberta BOA, Vol. 3, Tab 20].
[31] Alberta Factum at para 126.
[32] *R v Crown Zellerbach Canada Ltd.*, [1988] 1 SCR 401 [Alberta BOA, Vol 2., Tab 15].

29. Canada finds that the preamble, legislative history, and substance of the Act support the narrow characterization of its pith and substance as "a framework and a pricing system to establish minimum national standards of stringency for GHG emissions pricing to reduce Canada's nationwide GHG emissions".[33]

30. However, Canada also clearly states that: "[t]ogether, Parts 1 and 2 provide a complete and complementary system for pricing GHG emissions **in a way that aims to minimize negative competitive impacts on EITE industries**"[34] and it does so by creating a *flexible, national compliance trading regime* that is critical to its success. The essential trade and competitiveness aspects of the Act are also confirmed by both Canada[35] and Alberta.[36] Each addresses the trade and competitiveness effects, the specific application to, and accommodations for, EITE sectors, and 'leakage' of GHG emissions from and into other provincial and international jurisdictions.[37]

31. As indicated in paragraph 15, the key provisions of the Act have the effect of creating ***both*** a GHG emissions **pricing** and a compliance **trading** regime that is **consistent with Canada's obligations under the *Paris Agreement***. The Hansard on the Act also supports the relevance of Canada's GHG reduction commitment under the *Paris Agreement.* The final effect of the Act is to establish national carbon pricing and trading regime that allows for a variety of provincial approaches and potentially inter-provincial compliance trading in order to facilitate nationwide GHG reductions consistent with Canada's *Paris Agreement* commitments.

32. The Act facilitates nationally consistent standards and provincially flexible means to achieve the end goal of reducing Canada-wide GHG emissions in a cost-effective manner and maintaining economic competitiveness. It does so by: (i) putting a price on the GHG emissions associated with the delivery, use, and import of fossil fuels, and resulting from industrial emissions that exceed sectoral benchmarks, (ii) establishing a flexible compliance trading regime that facilitates and incents GHG emission reductions from within and outside of industry, while protecting the trade competitiveness of industry, and (iii) imposing prohibitions and penalties for non-compliance with key aspects of the regime that are intended to achieve the legitimate public

[33] Canada Factum at para 71.
[34] *Ibid* (emphasis added).
[35] Canada Factum at paras 43-45, 50.
[36] Alberta Factum at paras 77-84, 101.
[37] Alberta Factum at paras 78-84, Canada Factum at paras 44, 59.

purpose of reducing GHG emissions, their uncontroverted harms, and thereby taking meaningful steps to address climate change in accordance with Canada's commitments under the *Paris Agreement*.

33. IETA therefore submits that the dominant purpose and effect of the Act is to create "a GHG emissions pricing **and trading regime** that establishes minimum national standards of GHG emissions price stringency in order to reduce Canada's GHG emissions in accordance with the *Paris Agreement*".

34. Both Alberta and Ontario attempt to limit this Honourable Court's discretion to characterize the Act to a consideration of only the *subject* of its application (facilities within a listed province) and not the *means* by which it achieves its intended purpose. IETA disagrees with this approach, which would effectively fetter the Court's discretion on this and future Reference cases before it.

35. There is no jurisprudence, factual basis, or interpretative convention that requires this Honourable Court to limit its discretion in characterizing the Act by considering *only* the *subject* of its application and not the *means* by which it achieves its intended purpose. Characterization of the matter of the Act is not, and should not be, an 'all or nothing,' 'qualitative or quantitative,' chiaroscuro exercise that limits the application of Court's wisdom and discretion on this, and future, Reference cases.

(ii) The classification and validity of the Act

36. The essential character of Act, so characterized as *a GHG emissions pricing and trading regime that establishes minimum national standards of GHG emissions price stringency in order to reduce Canada's GHG emissions in accordance with the Paris Agreement*, can be variously classified as validly in relation to the federal government's jurisdiction over: (i) general trade and commerce as set out in s. 91(2) of the *Constitution* and further elucidated by Dickson C.J. in *General Motors*, and the Supreme Court in the *Securities Reference* and the *Pan-Canadian*

Securities Regulation Reference;[38] (ii) criminal law pursuant to s. 91(27) of the *Constitution* and consistent with the Supreme Court's ruling in *Hydro Quebec*;[39] and/or (iii) treaty power.

a. Trade and commerce

37. The Act creates a *GHG* emissions **pricing and trading regime** that establishes minimum national stringency standards in a way that aims to **minimize negative competitive and trade impacts** on EITE industries. In doing so it assists in preserving the stability and integrity of EITE industries and the trade of products from them. The Act is therefore validly in relation to the general trade and commerce power as set out in s. 91(2) of the Constitution.

38. This conclusion is entirely consistent with the findings of the Supreme Court in the *Securities Reference* and the *Pan-Canadian Securities Reference*, wherein the Supreme Court found that "legislation aimed at imposing minimum standards applicable throughout the country and preserving the stability and integrity of Canada's financial markets might well relate to trade as a whole".[40]

39. In fact, the subject matter of the Act meets all five indicia of the general trade competence as set out by Dickson C.J. in *General Motors*, and more recently applied in by the Supreme Court in the *Securities Reference* and the *Pan-Canadian Securities Regulation Reference.* This Court is also encouraged to apply such criteria in a broad and purposive manner consistent with the decision in *General Motors.*[41]

40. First, it is uncontroverted that the Act sets out and is part of a general and comprehensive regulatory scheme for GHG pricing and trading. The scheme sets minimum national standards of GHG emissions price stringency in order to reduce GHG emissions in a manner that protects the trade competitiveness of affected entities. It stipulates to whom, how, what and when it will

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[38] *General Motors of Canada Ltd. v City National Leasing*, [1989] 1 SCR 641 at 661 [Book of Authorities of the Attorney General of Canada ("**Canada BOA**"), Vol. 1, Tab 4]; *Reference re Securities Act*, 2011 SCC 66 at para 70 [Alberta BOA, Vol. 3, Tab 25] [***Securities Reference***]; *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48 [Alberta BOA, Vol. 3, Tab 23] [***Pan-Canadian Securities Reference***].

[39] *R v Hydro Quebec*, [1997] 3 SCR 213 [Alberta BOA, Vol. 2, Tab 13] [***Hydro Quebec***].

[40] *Securities Reference*, supra note 38 at para 114 [Alberta BOA, Vol. 3, Tab 25]; *Pan-Canadian Securities Reference*, supra note 38 at para 112.

[41] *Securities Reference*, supra note 38.

apply and provides detailed rules for registration, monitoring, trading, and otherwise effecting compliance if it applies. The Act is clearly a general regulatory scheme.

41. Second, the Act is overseen and monitored by the Ministers of Environment and Climate Change Canada and the Minister of National Revenue.[42] The fuel charges are administered through the Minister of National Revenue. The OBPS, the emissions trading, compliance activities, and the related trading, tracking and monitoring accounts are administered by the Minister of Environment and Climate Change Canada. Compliance with the Act, related penalties, Canada's compliance with its obligations under the *Paris Agreement* are also under the responsibility of, and administered by, the Minister of Environment and Climate Change Canada.

42. Third, the Act, consistent with the *Securities Reference* and the *Pan-Canadian Reference*, imposes minimum national GHG pricing standards applicable throughout the country and is intended to preserve the competitiveness and thereby the stability and integrity of Canada's business and industry and in particular EITE industries. The Act applies broadly to the wide range of industrial facilities outlined in paragraph 17, above. It does not apply only to a particular industry or industry sector. It therefore relates to trade as a whole.

43. Further climate change and decreasing GHG emissions though an efficient, lower-cost system of GHG emissions pricing and trading consistent with Canada's *Paris Agreement* obligations is matter of genuine national importance and scope that goes to trade as a whole in a way that is distinct from provincial concerns. Alberta's and Canada's EITE sectors facing trade competitiveness challenges need minimum national standards for GHG emissions price stringency policy and the resulting consistency and certainty in order to address leakage and competitiveness, make long term investment decisions, and undertake prudent business planning.[43]

44. Fourth, in the 25 years that have now followed the ratification of the UNFCCC, the Provinces acting together or alone have been unable to fully implement a national system of minimum national standards for GHG emissions pricing and trading, or otherwise address the trade and economic issues associated with reducing Canada's GHG emissions. In the last 25

[42] Alberta Factum at para 94.
[43] Sullivan Affidavit at paras 8, 12-13.

years Canada-wide emissions have increased, as have climate-related business and competitiveness challenges and obligations.

45. The provinces may validly enact provincial carbon pricing and trading legislation and many have. However, they have not and cannot, either jointly or severally, enact minimum national standards for GHG emissions price stringency, an inter-provincial compliance trading regime, and a system of national accounts and monitoring that is included in the Act in a manner that is within their jurisdictional competence under the Constitution.

46. Finally, the Attorney General of British Columbia has confirmed that in its direct experience, the failure to include one or more of the provinces in the carbon pricing and industrial emissions trading system included in the Act would jeopardize its successful operation in other parts of the country. Specifically, British Columbia has elucidated the competitiveness impacts faced by its cement industry, which were attributed to inconsistent or non-existent carbon pricing in other Provinces.[44]

b. Criminal law power

47. IETA submits, in the alternative, that the Act is a constitutional exercise of Parliament's criminal law power pursuant to s. 91(27) of the *Constitution*. The Act has each and all of: (i) a valid criminal law purpose backed by (ii) a prohibition and (iii) a penalty.

48. First, the Federal Court of Appeal in *Syncrude* found that "it is uncontroverted that GHGs are harmful to both health and the environment and, as such, constitute an evil that justifies the exercise of the criminal law power."[45] Similarly, the Supreme Court in *Hydro Quebec* found that a regulatory scheme to control the emission of toxic substances through prohibitions and penalties was a "wholly legitimate public objective in the exercise of the criminal law power."[46] The matter of the Act and its objective of reducing GHG emissions in Canada therefore falls squarely within the ambit of a valid criminal law purpose.

[44] BC Factum (ONCA), supra note 15 at para 18.
[45] *Syncrude Canada Ltd v Canada (Attorney General)*, 2016 FCA 160 [Canada BOA, Vol. 1, Tab 17.]
[46] *Hydro Quebec*, *supra* note 39 at para 132.

49. Second, Table 1 of paragraph 15 sets out the various prohibitions in the Act that are intended to ensure compliance with GHG emissions pricing and trading scheme set out in Act and that the objective of reducing national GHG emissions is achieved.

50. Third, the Act, in sections 132, 133(2), 135, 136, 232, and 233 includes express prohibitions and penalties related to emitting GHGs that are expressly tied to that legitimate public purpose. IETA therefore submits that the matter of the Act is also validly in relation to the federal government's criminal law power.

c. Treaty power

51. It is also noteworthy that the legislative and regulatory regime set out in the Act implements a system of GHG emissions pricing and trading that is implementing the UNFCCC and the *Paris Agreement*, international treaties that Canada validly entered into, supported by Canada's Provinces. The *Paris Agreement* and the overarching UNFCCC are both supported by Canada's concurrent jurisdiction over the environment and powers over international trade and commerce. Neither the treaties nor federal administrative/compliance actions under them appear to be subject to jurisdictional challenge.

52. While the federal treaty power in and of itself does not support federal legislative authority over the subject matter, it does bolster the otherwise valid exercise of federal authority under its trade and/or criminal law powers as none of the provinces, acting jointly or severally, can enter into or implement such treaties.

(iii) Future applicability and operability of the Act

53. An increasing number of provinces now have valid and operative legislative regimes that reduce GHG emissions in an economically efficient manner through the use of carbon pricing. There is no indication in the Act, or otherwise, that such valid provincial carbon pricing regimes will not continue to operate when the federal Act is implemented and the Attorney General of Canada attempts to confirm same.[47] While IETA anticipates that federal and provincial carbon pricing regimes will eventually undergo some degree of harmonization, it is possible that there may be either (i) areas of overlap between provincial and federal carbon pricing regimes or (ii)

[47] Canada Factum at paras 74-77.

unanticipated effects that materially impact areas of exclusive provincial jurisdiction, particularly those under s. 92A of the Constitution.

54. However, to the extent that the implementation of the Act in Alberta or any other province has the effect of: (i) *sterilizing the core elements* of an expressly enumerated area of exclusive provincial jurisdiction (including those set out in s. 92A and in particular s. 92A(1)(c) of the Constitution); or (ii) unnecessarily encroaching upon a provincial carbon pricing regime of greater GHG-reducing stringency, which is validly enacted under a province's shared jurisdiction over the environment; the Act should be interpreted in a manner that reflects the express balance of powers in the Constitution and rendered inapplicable to such class of subject. Any factually supported provincial harm or conflict of jurisdiction that may arise through the operation of the Act should be resolved in a manner that is consistent with: (i) the principles of cooperative federalism and subsidiarity, (ii) the double aspect, interjurisdictional immunity and paramountcy doctrines, and (iii) the constitutional competence afforded to Parliament and the Provinces, under ss. 91, 92, and 92A of the *Constitution*. To date, the record in this Reference does not support such harm or judicial treatment that would render the Act or any of its parts inapplicable.

PART III – RELIEF SOUGHT

55. IETA respectfully requests that this Honourable Court:

(a) affirm the constitutional validity of the Act as validly enacted under Parliament's power over general trade and commerce, or alternatively its criminal law power;

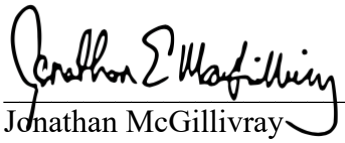
(b) confirm that the Act, like any other impugned legislation, is subject to future judicial consideration of its applicability and operability in the event that it sterilizes the core elements of an area of exclusive provincial jurisdiction or otherwise encroaches upon a validly enacted provincial carbon pricing regime of greater GHG reducing stringency; and

(c) provide such further or other Order as IETA shall request and this Honourable Court shall deem appropriate.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 4th day of November, 2019

DEMARCO ALLAN LLP
Per:

Lisa (Elisabeth) DeMarco
Counsel for IETA



Jonathan McGillivray
Counsel for IETA

PART IV – TABLE OF AUTHORITIES

LEGISLATION

Constitution Act, 1867 (UK) 30 & 31 Vict, c 3, s 91, reprinted in RSC 1985, Appendix II, No 5 [Alberta BOL, Vol. 2, Tab 5]

Output-Based Pricing System, SOR/2019/26, Schedule 1 [Alberta BOL, Vol. 2, Tab 4]

JURISPRUDENCE

General Motors of Canada Ltd. v City National Leasing, [1989] 1 SCR 641 [Canada BOA, Vol. 1, Tab 4]

R v Crown Zellerbach Canada Ltd., [1988] 1 SCR 401 [Alberta BOA, Vol. 2, Tab 15]

R v Hydro-Québec, [1997] 3 SCR 213 [Alberta BOA, Vol. 2, Tab 13]

Reference re Greenhouse Gas Pollution Pricing Act, 2019 ONCA 544 [Alberta BOA, Vol. 3, Tab 20]

Reference re Greenhouse Gas Pollution Pricing Act, 2019 SKCA 40 [Alberta BOA, Vol. 3, Tab 21]

Reference re Pan-Canadian Securities Regulation [Alberta BOA, Vol. 2, Tab 13]

Reference re Securities Act, 2011 SCC 66 [Alberta BOA, Vol. 3, Tab 25]

Syncrude Canada Ltd v Canada (Attorney General), 2016 FCA 160 [Canada BOA, Vol. 1, Tab 17]

SECONDARY MATERIAL

Paris Agreement [Appeal Record and Evidence of the Attorney General of Canada, Vol. 2, Affidavit of John Moffet, Exhibit M]