Court of Appeal File No.: C65807

COURT OF APPEAL FOR ONTARIO

IN THE MATTER OF A REFERENCE to the Court of Appeal pursuant to section 8 of the *Courts of Justice Act*, RSO 1990, c. C.34, by Order-in-Council 1014/2018 respecting the constitutionality of the *Greenhouse Gas Pollution Pricing Act*, Part 5 of the *Budget Implementation Act, 2018, No. 1*, SC 2018, c. 12

STATEMENT OF PARTICULARS

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The Attorney General of Ontario submits that the *Greenhouse Gas Pollution Pricing Act*, enacted by s. 186 of S.C. 2018, c. 12 ("the Act") is unconstitutional and of no force and effect for the following reasons:

1. Counsel for the Attorney General of Canada has stated that the Act is intended to impose a regulatory charge supported by the national concern branch of the federal peace, order and good government ("POGG") power, which originates in the opening words of section 91 of the *Constitution Act, 1867* (UK), 30&31 Vict., c.3.

2. The Attorney General for Ontario, however, submits that the Act cannot be supported by the national concern branch of POGG. The provinces are capable of regulating greenhouse gas emissions themselves and there is no need to expand the scope of federal jurisdiction to impose a one-size-fits-all federal carbon price. Nor do the wide variety of activities that give rise to greenhouse gas emissions have the singleness, distinctiveness and indivisibility that must be present before the national concern branch can apply.

3. Even if greenhouse gas emissions did fall within the scope of the national concern branch, the Act would still impose unconstitutional taxes. Compelled payments for a public purpose imposed by a public body in order to raise revenue are presumptively taxes that must be expressly authorized as such by Parliament or a provincial legislature. The Act does not provide a sufficient nexus between the charges it imposes and a regulatory purpose to turn unconstitutional taxes into valid regulatory charges.

I. Putting a Price on Greenhouse Gas Emissions Is Not Authorized by the National Concern Branch of the Federal Peace, Order, and Good Government Power

4. The POGG power, and in particular the national concern branch of that power, is a residuary power that only applies to matters that do not otherwise fall within the heads of power allocated between Parliament and the provincial legislatures by sections 91 to 95 of the *Constitution Act, 1867*.

5. Expanding the scope of the national concern branch to permit Parliament to regulate the nearly limitless swath of human activity which can result in greenhouse gas emissions would represent an unprecedented and unwarranted intrusion into provincial jurisdiction that is irreconcilable with the fundamental distribution of legislative power under the Constitution. The Act is therefore *ultra vires* and unconstitutional in its entirety.

6. The mere fact that greenhouse gas emissions can have extra-provincial effects is insufficient to justify resort to the national concern branch of POGG. The provincial legislatures have ample ability to regulate greenhouse gas emissions under the enumerated heads of power set out in section 92 of the *Constitution Act, 1867*. Acting separately or in concert, the provinces are well equipped to effectively combat climate change in a manner that takes into account each province's unique circumstances.

7. The regulation of greenhouse gases does not become a matter of "national concern" just because different provinces take different views as to the most effective method to regulate them. The provinces are able to decide how best to regulate greenhouse gas emissions themselves without any need for a one-size-fits-all federal carbon price.

8. Even if the provinces were unable to do so, resort to the national concern branch would still be unwarranted. Greenhouse gas emissions lack the singleness, distinctiveness and indivisibility required for the national concern branch of POGG to apply.

9. The Act attempts to regulate emissions of 33 different greenhouse gases (a list that can be amended by the Governor in Council at any time). Those greenhouse gases are produced by an incredibly broad range of diverse activities, including home and office heating, electricity generation, transportation, industrial processes, manufacturing, agriculture, and waste management. Such a varied range of activities do not share the single, distinctive, and indivisible nature of the other matters that have been found to be subject to federal regulation under the national concern branch.

10. Finding the regulation of the wide variety of greenhouse gasses emitted by all of these disconnected activities to be a single, distinctive, and indivisible matter of national concern would greatly expand the scope of federal jurisdiction beyond the specific matters enumerated in section 91 of the *Constitution Act, 1867*. Granting Parliament an amorphous and ill-defined jurisdiction over such a wide range of matters traditionally regulated by the provinces would distort the existing division of powers, unduly expand the scope of federal jurisdiction, and erode the constitutional balance inherent in the Canadian federal state.

II. The Act Imposes Unconstitutional Taxes Contrary to Section 53 of the *Constitution Act, 1867*

11. Even if the Act were authorized under a valid federal head of power, the charges it imposes would still have to comply with section 53 of the *Constitution Act, 1867*. They do not.

12. Section 53 requires taxation to be authorized by clear and explicit statutory authority. To ensure taxes are not disguised as regulatory charges and imposed without complying with section 53, the Supreme Court has articulated a test for distinguishing valid regulatory charges from invalid disguised taxes. One of the requirements of that test is that there must be a nexus between the regulatory charge and the regulatory scheme under which it is levied.

13. The Act purports to authorize two types of regulatory charge, but does not require that the funds raised by either charge be spent in a manner which has any nexus to the reduction of greenhouse gas emissions. Indeed, the Act does not even restrict to whom the funds raised may be distributed, since the Governor in Council may prescribe any persons or a class of persons to be eligible to receive such funds (subsections 165(2) and 188(1)). The federal Minister of Environment and Climate Change has publicly indicating that the federal government is considering distributing the funds raised by the Act as unconditional cash payments to individual residents of listed provinces. The raising of revenue to be spent by the Crown as it sees fit is an irrefutable indicator of taxation.

14. The distinction between a tax and a regulatory charge has always turned on the strength of the nexus between the charge and the purpose of the regulatory scheme in

question. Ontario's position is that nexus must include tying the use of the funds raised by the charge to the regulatory purposes animating the regulatory scheme.

15. To allow the nexus requirement to be met ***solely*** by alleging that the charge discourages undesirable behaviour while leaving the government imposing the charge free to spend the funds without regard to any particular regulatory purpose would severely undermine the "no taxation without representation" principle which underlies section 53. If so weak a nexus were sufficient to uphold a regulatory charge, governments could raise funds for general purposes by levying any number of purportedly non-tax charges on negative behaviours, without ever having to seek clear and explicit legislative authorization to impose a tax.

16. Finding the Act, which uses a purported regulatory charge to raise funds which can then be spent in a virtually unrestricted manner, to be a regulatory charge would be an unprecedented and unwarranted expansion of the national concern jurisprudence and undermine the constitutional principle that the raising of general revenues be authorized by express taxation statutes. In Ontario's submission, the Act imposes disguised taxes that were never given the Parliamentary scrutiny the constitution requires. The Act therefore is invalid.

DATED THIS 13TH DAY OF SEPTEMBER, 2018

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Proceedings commenced at Toronto

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