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**THE UNIVERSITY OF BRITISH COLUMBIA
FACULTY OF LAW**

DECEMBER 2018 EXAMINATION

**LAW 201
CONSTITUTIONAL LAW**

**SECTION 4
PROFESSOR EDINGER**

TOTAL MARKS – 50

TIME ALLOWED – 1 HOUR PLUS 10 MINUTES READING TIME

Note: this is an open book exam. Students may bring in and use their notes and their casebooks.

- 50** 1. Section 139 of the *Canadian Environmental Protection Act 1999*, SC 1999 c.33 (*CEPA*) prohibits the production, importation and sale in Canada of fuel that does not meet prescribed requirements. Section 272 makes it an offence to breach s. 139. An offender is liable for a fine of between \$500,000 and \$6,000,000. On conviction for a second offence, the fines double.

Section 3(1) of *CEPA* defines air pollution as a condition of the air arising from any substance which, directly or indirectly, endangers health and safety.

In s. 64, *CEPA* defines toxic substances as those which may have an immediate or long-term harmful effect on the environment or biological diversity; those which constitute a danger to the environment on which life depends; and those which may constitute a danger to human life or health. *CEPA* lists a number of greenhouse gases as toxic substances in Schedule I.

By s.140(1) of *CEPA*, the Governor General is authorized to make regulations for carrying out the purposes of s.139 if he or she is of the opinion that the regulations will significantly prevent or reduce air pollution resulting from the combustion of fuel. Regulations were enacted. The asserted objective of the regulations is to reduce greenhouse gases.

Section 5(2) of the regulations requires that 2% of diesel fuel consist of renewable fuel. Subsequent sections of the regulations create a formula for measuring that 2%.

Various reports accompanied the development of the regulations. One report stated that there has been a rise in greenhouse gases as a result of human activity and that the rise was predominantly caused by the combustion of fossil fuels. Another stated that a 5% use of renewable fuels could significantly reduce emissions and projected the environmental benefit as the equivalent of removing approximately 675,000 vehicles from the roads.

Syncrude Canada Ltd. produces diesel fuel from its oil sands operations in Alberta and uses that diesel fuel in its vehicles and equipment. Syncrude is charged and convicted at trial with breach of s. 5(2) of the regulations – with failing to ensure that 2% of its diesel fuel consisted of renewable fuel.

Canada asserted at trial that the regulations enacted pursuant to *CEPA* were legislation in relation to s. 91(27) of the *Constitution Act 1867* and that s. 5(2) was valid criminal law.

Syncrude appeals, arguing that s. 5(2) of the regulations has no valid criminal purpose; it is pure economic regulation. Section 5(2) is, therefore, legislation in relation to Property and Civil Rights in s. 92(13) and in relation to Natural Resources in s. 92A. Syncrude argues further that the regulations are a colourable device intended to establish a domestic market for renewable fuels. Or, putting that argument another way, Syncrude argues that s. 5(2) is not aimed at reducing air pollution; it is really aimed at creating a local market for renewable fuels. Syncrude argues further that the regulations will not work and that they will be ineffective in reducing greenhouse gases. In fact, Syncrude argues that there will be a net increase in greenhouse gases arising from the emissions associated with the planting, harvesting, transportation and refining of bio-fuel crops. Syncrude argues, further, that the trial judge applied the wrong methodology because he commenced by considering s. 5(2) in the context of *CEPA* and not in isolation. Finally, Syncrude argued that the criminal law power requires either a complete prohibition on use of fossil fuels or else a requirement that the percentage of renewable fuels used be more than 2%.

The Attorney General Canada retains you to draft the argument upholding the validity of the regulations. The Attorney General also wants to argue that s. 5(2) is ancillary to the regulations generally. She informs you that the federal government is fully aware of the economic implications of the regulations, namely, that there will be an increased market demand for renewable fuels.

Draft a memorandum for the Attorney General Canada arguing that s. 5(2) of the regulations is legislation in relation to s. 91(27). Advise the Attorney General Canada whether she can argue that s. 5(2) of the regulations is valid pursuant to the ancillary doctrine. Finally, advise the Attorney General whether the reports preceding and accompanying the enactment of the regulations can be used in evidence.

If you need more information, explain the purpose for which you need it.

END OF EXAMINATION