

COURT OF APPEAL FOR ONTARIO

CITATION: Reference re Greenhouse Gas Pollution Pricing Act, 2019 ONCA 29

DATE: 20190118

DOCKET: C65807 (M49919, M49949, M49950, M49955, M49957, M49961, M49963, M49965, M49966, M49968, M49970, M49971, M49972 & M49974)

MacPherson J.A. (Motion Judge)

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, No. 1*, SC 2018, c. 12

Gareth Morley, for the moving party Attorney General of British Columbia

Amir Attaran and Matt Hulse, for the moving party Athabasca Chipewyan First Nation

Stewart Elgie, for the moving party Canada's Ecofiscal Commission

Joseph Castrilli, for the moving party Canadian Environmental Law Association, Environmental Defence, and Sisters of Providence of St. Vincent de Paul

Jennifer L. King and Michael Finley, for the moving party Canadian Public Health Association

R. Bruce E. Hallsor, for the moving party Canadian Taxpayers Federation

Marc Bishai, for the moving party Centre québécois du droit de l'environnement and Équiterre

Nathan Hume, for the moving party Intergenerational Climate Coalition

Lisa DeMarco and Jonathan McGillivray, for the moving party International Emissions Trading Association

Cynthia Westaway and Nathalie Chalifour, for the moving party United Chiefs and Councils of Mnidoo Mnising

Ryan Martin, for the moving party United Conservative Association

Greg Vezina, acting in person

Sharlene Telles-Langdon, Brooke Sittler, Mary Matthews and Ned Djordjevic, for the Attorney General of Canada

Josh Hunter and Thomas Lipton, for the Attorney General of Ontario

Heard: January 15, 2019

A. OVERVIEW

[1] By order-in-council, the Lieutenant Governor in Council referred a reference to this court concerning the constitutionality of the *Greenhouse Gas Pollution Pricing Act*, S.C. 2018, c. 12, s. 186. On August 30, 2018, I issued an order providing a timeline for hearing the reference and setting out the procedures for parties wishing to intervene in the matter. On January 15, 2019, I heard motions from various parties seeking leave to intervene and/or file a record. These reasons address those motions and other procedural matters.

B. THE INTERVENTIONS

[2] Pursuant to my order of August 30, 2018, any Attorney General could intervene as of right in this reference by serving notice of his or her intention to intervene on the Attorney General of Ontario and the Attorney General of Canada and filing the notice with this court. Three Attorneys General have served and filed notices: (1) the Attorney General of New Brunswick; (2) the Attorney General of British Columbia; and (3) the Attorney General of Saskatchewan. I grant them leave to intervene.

[3] Beyond the Attorneys General, any party seeking leave to intervene could do so by serving a motion for leave to intervene on the Attorney General of Ontario and the Attorney General of Canada and filing it with the court. Thirteen parties have done so. Many of these parties have already been granted leave to intervene in a parallel reference challenging the constitutionality of the *Greenhouse Gas Pollution Pricing Act* in the Court of Appeal for Saskatchewan (Docket: CACV3239). In the reference in Saskatchewan, the court granted leave to all parties seeking to intervene, notwithstanding some opposition.

[4] In this case, the Attorney General of Ontario and the Attorney General of Canada consent to or do not oppose the motions for leave to intervene of six of the thirteen parties seeking leave. These six parties are:

- 1) Assembly of First Nations;
- 2) Canadian Environmental Law Association, Environmental Defence, and Sisters of Providence of St. Vincent de Paul;
- 3) Canadian Taxpayers Federation;
- 4) David Suzuki Foundation;
- 5) United Chiefs and Councils of Mnidoo Mnising; and
- 6) United Conservative Association.

[5] I agree that these six parties should be granted leave to intervene and order accordingly.

[6] The Attorney General of Canada also consents to the motions for leave to intervene of six of the seven other parties seeking leave. The Attorney General of Ontario opposes these motions. These six parties are:

- 1) Athabasca Chipewyan First Nation;
- 2) Canada's Ecofiscal Commission;
- 3) Canadian Public Health Association;
- 4) Centre québécois du droit de l'environnement and Équiterre;
- 5) Intergenerational Climate Coalition; and
- 6) International Emissions Trading Association.

[7] I grant leave to intervene to these six parties. In my view, they have satisfied the test for intervener status.

[8] In determining motions for leave to intervene, the court will generally consider "the nature of the case, the issues which arise and the likelihood of the applicant being able to make a useful contribution to the resolution of the appeal without causing injustice to the immediate parties": *Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada* (1990), 74 O.R. (2d) 164 (in Chambers), at p. 167; see also *Bedford v. Canada (Attorney General)*, 2009 ONCA 669, 98 O.R.

(3d) 792, at para. 2. In constitutional cases, the rules governing motions for leave to intervene are relaxed: *Peel*, at p. 167. Nevertheless, an applicant seeking to intervene in constitutional litigation must usually meet at least one of the following criteria: (1) the applicant has a real, substantial and identifiable interest in the subject matter of the proceedings; (2) the applicant has an important perspective distinct from the immediate parties; or (3) the applicant is a well-recognized group with a special expertise and a broadly identifiable membership base: *Bedford*, at para. 2; see also *P.S. v. Ontario*, 2014 ONCA 160, 317 O.A.C. 219 (in Chambers), at para. 6.

[9] Applying the applicable principles in this case, I grant leave to intervene to Athabasca Chipewyan First Nation, Canada's Ecofiscal Commission, Canadian Public Health Association, Centre québécois du droit de l'environnement and Équiterre, Intergenerational Climate Coalition, and International Emissions Trading Association. This reference raises important issues about the constitutionality of legislation. These proposed interveners have each established that they have a real interest in the proceeding and will make useful submissions distinct from the Attorney General of Ontario and the Attorney General of Canada without causing them prejudice. As a result, I grant them leave to intervene.

[10] I decline, however, to grant leave to the one remaining party seeking leave to intervene, Mr. Greg Vezina. Both the Attorney General of Ontario and the Attorney General of Canada oppose his intervention in this matter.

[11] According to his affidavit evidence, Mr. Vezina is the founder and chairman of two energy technology companies with interests relating to clean fuel standards and the use of ammonia as an alternative fuel. Mr. Vezina's submissions reflect a keen interest in scientific and policy issues relating to greenhouse gas emissions. In my view, however, they do not assist the court in determining the legal issue of whether the *Greenhouse Gas Pollution and Pricing Act* is constitutional. I therefore dismiss his motion for leave to intervene.

C. FACTUMS

[12] My order of August 30, 2018 set out the length of intervener and reply factums. Having heard submissions from the parties on that issue, I would vary the order as follows:

- The Attorney General of New Brunswick, Attorney General of British Columbia, and Attorney General of Saskatchewan may each file a factum not to exceed 25 pages;
- The other interveners may each file a factum not to exceed 15 pages; and
- The Attorney General of Ontario may file a reply factum not to exceed 30 pages.

D. ORAL ARGUMENT

[13] Pursuant to my order of August 30, 2018, the reference will be heard from April 15 to April 18, 2019. I have canvassed the parties' and interveners' submissions and order that the time be divided as follows:

- Attorney General of Ontario: 4.5 hours (including reply);
- Attorney General of Canada: 4 hours (including reply);
- Attorney General of New Brunswick, Attorney General of British Columbia, and Attorney General of Saskatchewan: 30 minutes each; and
- Other interveners: 10 minutes each.

[14] The schedule for submissions will be as follows:

- April 15, 2019: Submissions of the Attorney General of Ontario;
- April 16, 2019: Submissions of the Attorney General of Canada;
- April 17, 2019: Submissions of the intervening Attorneys General and other interveners; and
- April 18, 2019: Reply submissions of the Attorney General of Canada and the Attorney General of Ontario.

E. RECORDS

[15] The Attorney General of British Columbia, Athabasca Chipewyan First Nation, Canada's Ecofiscal Commission, Canadian Public Health Association, Intergenerational Climate Coalition, International Emissions Trading Association, and United Chiefs and Councils of Mniidoo Mnising further seek leave to file a record.¹ The Attorney General of Canada consents to these seven parties being granted leave to file a record, while the Attorney General of Ontario opposes. In the parallel reference in Saskatchewan, the Court of Appeal for Saskatchewan granted leave to the interveners seeking to supplement the record.

[16] I have reviewed the proposed records of these seven interveners in this case and grant them leave to file their records. I am cognizant of the court's common practice to require interveners in an appeal to accept the existing record and not to seek to supplement it: see *R. v. Kokopenace*, 2011 ONCA 498 (in Chambers), at para. 4; *Jones v. Tsige* (2011), 106 O.R. (3d) 721 (C.A., in Chambers), at para. 26. In my view, however, the usual prohibition on supplementing the record in an appeal should be relaxed when this court is sitting as a court of first instance in a constitutional reference.

¹ Mr. Vezina also sought leave to file a record. Given my decision not to grant him intervener status, this motion is now moot.

[17] Constitutional challenges should not be determined in a factual vacuum: *Mackay v. Manitoba*, [1989] 2 S.C.R. 357, at p. 361; *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086, at p. 1099. In a constitutional reference, an intervener may be permitted to file material subject to reserve by the court as to its relevancy and weight: *Re: Anti-Inflation Act*, [1976] 2 S.C.R. 373, at p. 387; see also *Reference re Education Act of Ontario and Minority Language Education Rights* (1984), 47 O.R. (2d) 1 (C.A.), at p. 10. As Dickson J. observed in *Re Residential Tenancies Act*, [1981] 1 S.C.R. 714, at p. 723:

A constitutional reference is not a barren exercise in statutory interpretation. What is involved is an attempt to determine and give effect to the broad objectives and purpose of the Constitution, viewed as a "living tree", in the expressive words of Lord Sankey in *Edwards and Others v. Attorney-General for Canada and Others*. Material relevant to the issues before the court, and not inherently unreliable or offending against public policy should be admissible, subject to the proviso that such extrinsic materials are not available for the purpose of aiding in statutory construction. [Footnote and citations omitted.]

[18] In this case, I am satisfied that the proposed records of these seven interveners may assist the court in determining the constitutional validity of the *Greenhouse Gas Pollution Pricing Act* and should therefore be admitted.

F. CONCLUSION

[19] For the reasons above, with the exception of the motion of Mr. Vezina, the motions to intervene and file records are granted.

A handwritten signature in blue ink, reading "J.P. MacKerson J.A.", is located at the bottom right of the page.