

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. C34, 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

FACTUM OF THE CANADIAN PUBLIC HEALTH ASSOCIATION
(Motion for Leave to Intervene)

December 21, 2018

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PART I - OVERVIEW

1. Climate change, caused by greenhouse gas (“GHG”) emissions, is the gravest global public health threat of the 21st century. GHG emissions do not respect provincial or national borders, and neither do the detrimental public health effects they cause. The Canadian Public Health Association (“CPHA”) is a widely-respected, national, independent, non-profit, non-governmental organization (“NGO”) focused exclusively on public health. For over a century, CPHA has supported evidence-based solutions to Canada’s public health challenges. Since the early 1990s, CPHA has been a leader in recognizing and studying the threat climate change poses to Canadian public health.

2. If granted leave to intervene, CPHA will leverage its unique expertise to demonstrate the constitutional implications of the public health impacts caused by GHGs. CPHA will argue that a public health approach requires inter-jurisdictional action on GHG emissions, and Canada is constitutionally empowered to create a framework for that approach. CPHA intends to argue that the *Greenhouse Gas Pollution Pricing Act* (the “Act”) is constitutional under the national concern branch of the “peace, order and good government” (“P.O.G.G”) power or, in the alternative, pursuant to the criminal law power.

PART II - STATEMENT OF FACTS

3. Public health focuses on protecting and improving the collective health of the broader community.¹ As the only national NGO focused exclusively on public health, CPHA is uniquely positioned to advise decision-makers about public policy based on sound science and about initiatives to safeguard public health. In Canada, this evidence-

¹ “Public health” is distinct from individual health care and is defined as: “the organized efforts of society to keep people healthy and prevent injury, illness and premature death. It is a combination of programs, services and policies that protect and promote the health of all Canadians.” Affidavit of Ian Culbert affirmed November 29, 2018 [“Culbert Affidavit”], at paras. 13 – 15.

based approach to public health has revolutionized human well-being. CPHA has been at the forefront of these efforts for over a century.²

4. CPHA has recognized the importance of environmental health policies to promote public health since the 1930s. Since the early 1990s, CPHA has recognized the public health threat posed by GHG emissions. CPHA has released multiple reports and facilitated workshops to assess this threat, educate, and canvass possible solutions. It has released reports on public health implications of climate change with *The Lancet*, including the *Lancet Countdown 2018 Report: Briefing for Canadian Policy-Makers*.³

5. The scientific consensus is that climate change is a critical, global public health issue. Canada will be especially hard-hit by the public health impacts of climate change as warming is happening here at double the global rate; triple in the Arctic. Consistent, coordinated, evidence-based national and international action is required to address these public health risks, which are already being felt in Canada. Carbon pricing is well-established as an economically efficient strategy to reduce emissions in furtherance of public health, but it will only be effective if implemented by all levels of government.⁴

6. The Saskatchewan Court of Appeal has granted CPHA leave to intervene in its reference respecting the constitutionality of the Act.⁵ CPHA has previous experience contributing its unique public health perspective as an intervener in constitutional cases before the Supreme Court of Canada and Ontario Superior Court of Justice.⁶

² Culbert Affidavit, at paras. 5 – 9 and 12.

³ Culbert Affidavit, at paras. 10 - 11, 16 – 18, and 24 – 27, Ex C: CPHA activities re ecological determinants of health, Ex D: 2018 Lancet Countdown Report, Ex E: Chief Public Health Officer's 2008 report.

⁴ Culbert Affidavit, at paras. 21 – 36, Ex G: 2014 IPCC Report, Ex D: 2018 Lancet Countdown Report.

⁵ Culbert Affidavit, Ex K: Saskatchewan Court of Appeal Second Order Respecting Interventions (December 10, 2018).

⁶ *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44 and *Simons v. Canada (Attorney General)*, 2018 ONSC 3741.

PART III - ISSUE

7. The issue on this motion is whether CPHA should be granted leave to intervene.

PART IV - ARGUMENT

8. The well-established principles applicable to intervention motions favour granting CPHA leave to intervene as a friend of the court under Rule 13.02.⁷

A. This reference raises issues of public interest

9. There is no dispute that this reference raises issues of public interest. CPHA seeks to intervene because the reference raises national public health issues. The threshold for granting intervener status in a public interest or public policy case is lower than it is for a private interest case. In constitutional issues, it is important for the court to receive a diversity of representations reflecting the wide-ranging impact of its decision.⁸

B. CPHA has a real, substantial and demonstrated interest in the subject matter

10. CPHA has a serious and long-standing interest in the matters at issue. For over 25 years, CPHA has taken steps to address the borderless national and international threat climate change poses to public health.⁹

C. CPHA's useful and different contribution to this reference

11. If granted leave, CPHA will make useful and distinct submissions. CPHA intends to demonstrate that the public health implications render GHG emissions and climate change a matter of national concern under the P.O.G.G. power. The Court may find a

⁷ *Groia v. Law Society of Upper Canada*, 2014 ONSC 6026 (Div. Ct.) [*Groia*], at para. 4; *Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd.* (1990), 74 O.R. (2d) 164 (C.A.) [*Peel*], at para. 10; *Bedford v. Canada (Attorney General)*, 2009 ONCA 669, at para. 2.

⁸ *Groia, ibid*, citing *Jones v. Tsige* (2011), 106 O.R. (3d) 721 (C.A.) [*Tsige*], at para. 23; *Peel, ibid*, at para. 6. Ontario courts have allowed interventions of groups similar to CPHA in constitutional cases: *Ethyl Canada Inc. v. Canada (Attorney General)* (1997), 74 A.C.W.S. (3d) 941 (Ont. C.J. (G.D.)), at paras. 13-14, 17; *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)* (1989), 29 F.T.R. 267 (F.C. T.D.), at paras. 3 and 19.

⁹ Culbert Affidavit, at para. 11, Ex D: 2018 Lancet Countdown Report.

matter to be of national concern where, as here, there exists: a) a distinctive, recognizable subject matter; that b) has the potentially adverse health impacts on an interprovincial or national scale. The national concern branch properly applies to matters that may negatively impact public health in a manner that transcends provincial borders.¹⁰ The borderless, large-scale impacts of GHG emissions represent a public health threat requiring national regulation. A failure of one province to act, or a lack of stringency in a province's GHG pricing system, harms public health and safety across Canada. A coordinated, consistent and evidence-based approach is necessary from a public health perspective and is available to Parliament.

12. CPHA intends to argue, in the alternative, that the Act is constitutional pursuant to the s. 91(27) criminal law power. CPHA will argue that the Act is intended to reduce GHG emissions by prohibiting certain conduct, coupled with a penalty, unless that conduct is carried out according to the Act. Public health is a fundamental concern of the criminal law. CPHA will argue that valid use of the criminal law power includes regulation of large-scale threats to public health including GHG emissions.¹¹

13. CPHA views public health as a constitutional responsibility of government shared across different jurisdictional levels.¹² Co-operative federalism favors concurrent distribution of jurisdiction, allowing the federal government to address the national public

¹⁰ *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401, at paras. 30 and 37, and *Society of Ontario Hydro Professional & Administrative Employees v. Ontario Hydro*, [1993] 3 S.C.R. 327, at paras. 84-85.

¹¹ *Synchrude Canada Ltd. v. Canada (Attorney General)*, 2016 FCA 160, at para. 62. Other examples: environmental contamination (*Canada (Attorney General) v. Hydro Quebec*, [1997] 3 S.C.R. 213), food safety (*Standard Sausage Co v. Lee* (1933), 47 B.C.R. 411 (C.A.)) and tobacco use (*RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199).

¹² Culbert Affidavit, at para. 13.

health threat posed by GHGs. This is consistent with the shared constitutional jurisdiction over public health and environmental matters and the public health approach.

14. The Attorney General of Ontario's factum does not mention health care or public health. In its factum filed in the Saskatchewan reference, the Attorney General of Canada makes only passing reference to the health impacts of GHG emissions but makes no mention of public health. CPHA's position is unique among the parties and interveners in the Saskatchewan reference in addressing the public health impacts of GHG emissions and explaining why the nature of those impacts matters constitutionally.

D. CPHA's intervention will not cause injustice to the parties

15. CPHA's intervention will not cause injustice.¹³ There is no prospect of delay – the hearing dates have already been set. If granted leave, CPHA will comply with whatever limits this Court sets regarding the materials in the record and length of oral submissions. CPHA undertakes to consult with all parties in an effort to avoid duplication of arguments.

PART V - RELIEF SOUGHT

16. CPHA requests orders granting CPHA leave to intervene in this Reference as a friend of the Court pursuant to Rule 13.02 of the *Rules of Civil Procedure* on the terms set out in CPHA's Notice of Motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21st day of December, 2018.

Jennifer L. King / Michael Finley / Liane Langstaff

¹³ *Tsige*, *supra* note 8, at para. 26.

SCHEDULE "A"**LIST OF AUTHORITIES*****Cases re leave to intervene***

1. *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44
2. *Simons v. Canada (Attorney General)*, 2018 ONSC 3741
3. *Groia v. Law Society of Upper Canada*, 2014 ONSC 6026 (Div. Ct.)
4. *Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd.* (1990), 74 O.R. (2d) 164 (C.A.)
5. *Bedford v. Canada (Attorney General)*, 2009 ONCA 669
6. *Jones v. Tsigie* (2011), 106 O.R. (3d) 721 (C.A.)
7. *Ethyl Canada Inc. v. Canada (Attorney General)* (1997), 74 A.C.W.S. (3d) 941 (Ont. C.J. (G.D.))
8. *Rothmans, Benson & Hedges Inc. v. Canada (Attorney General)* (1989), 29 F.T.R. 267 (F.C. T.D.)

Cases re proposed constitutional argument

9. *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401
10. *Society of Ontario Hydro Professional & Administrative Employees v. Ontario Hydro* (sub nom *Ontario Hydro v. Ontario (Labour Relations Board)*), [1993] 3 S.C.R. 327
11. *Syncrude Canada Ltd. v. Canada (Attorney General)*, 2016 FCA 160

SCHEDULE “B”
TEXT OF STATUTES AND REGULATIONS

1. Rules of Civil Procedure, RRO 1990, Reg 194, r 13, made under the *Courts of Justice Act*, RSO 1990, c. C.43.

LEAVE TO INTERVENE AS ADDED PARTY

13.01 (1) A person who is not a party to a proceeding may move for leave to intervene as an added party if the person claims,

- (a) an interest in the subject matter of the proceeding;
- (b) that the person may be adversely affected by a judgment in the proceeding; or
- (c) that there exists between the person and one or more of the parties to the proceeding a question of law or fact in common with one or more of the questions in issue in the proceeding.

(2) On the motion, the court shall consider whether the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding and the court may add the person as a party to the proceeding and may make such order as is just.

LEAVE TO INTERVENE AS FRIEND OF THE COURT

13.02 Any person may, with leave of a judge or at the invitation of the presiding judge or master, and without becoming a party to the proceeding, intervene as a friend of the court for the purpose of rendering assistance to the court by way of argument.

LEAVE TO INTERVENE IN DIVISIONAL COURT OR COURT OF APPEAL

13.03 (1) Leave to intervene in the Divisional Court as an added party or as a friend of the court may be granted by a panel of the court, the Chief Justice or Associate Chief Justice of the Superior Court of Justice or a judge designated by either of them.

(2) Leave to intervene as an added party or as a friend of the court in the Court of Appeal may be granted by a panel of the court, the Chief Justice or Associate Chief Justice of Ontario or a judge designated by either of them.

2. Constitution Act, 1867, 30 & 31 Victoria, c. 3 (UK)

VI. DISTRIBUTION OF LEGISLATIVE POWERS

POWERS OF THE PARLIAMENT

Legislative Authority of Parliament of Canada

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

1. Repealed.
- 1A. The Public Debt and Property.
2. The Regulation of Trade and Commerce.
- 2A. Unemployment insurance.
3. The raising of Money by any Mode or System of Taxation.
4. The borrowing of Money on the Public Credit.
5. Postal Service.
6. The Census and Statistics.
7. Militia, Military and Naval Service, and Defence.
8. The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of Canada.
9. Beacons, Buoys, Lighthouses, and Sable Island.
10. Navigation and Shipping.
11. Quarantine and the Establishment and Maintenance of Marine Hospitals.

12. Sea Coast and Inland Fisheries.
13. Ferries between a Province and any British or Foreign Country or between Two Provinces.
14. Currency and Coinage.
15. Banking, Incorporation of Banks, and the Issue of Paper Money.
16. Savings Banks.
17. Weights and Measures.
18. Bills of Exchange and Promissory Notes.
19. Interest.
20. Legal Tender.
21. Bankruptcy and Insolvency.
22. Patents of Invention and Discovery.
23. Copyrights.
24. Indians, and Lands reserved for the Indians.
25. Naturalization and Aliens.
26. Marriage and Divorce.
27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.
28. The Establishment, Maintenance, and Management of Penitentiaries.
29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

IN THE MATTER OF A REFERENCE to the Court of Appeal pursuant to section 8 of the *Courts of Justice Act*, RSO 1990, c. C34, 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

Court of Appeal File No.: C65807

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PROCEEDING COMMENCED AT
TORONTO

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