

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

**FACTUM OF
INTERNATIONAL EMISSIONS TRADING ASSOCIATION ("IETA")**

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PART I: OVERVIEW

1. This motion is made by the International Emissions Trading Association (**IETA**) pursuant to Rules 1, 13, 21, 37, and 39 of the *Rules of Civil Procedure* and the Order of the Honourable Justice J. C. MacPherson, dated August 30, 2018 on the Reference (the **Procedural Order**).

Rules of Civil Procedure, RRO 1990, Reg 194, rr. 1, 13, 21, 37, and 39

2. IETA seeks leave to intervene as a friend of the Court in accordance with Rules 13.02 and 13.03 of the *Rules of Civil Procedure* and the test for interventions set out by Dubin CJO in *Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd.*

Rules of Civil Procedure, supra, rr. 13.02 and 13.03; *Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd.*, 74 O.R. (2d) 164 (C.A.) ("*Peel*") at pp. 128-129 (as printed in the IETA Book of Authorities)

3. It does so on the grounds that: (i) the Reference is a constitutional case with broad public policy issues that warrant a lower threshold supporting IETA's intervention; (ii) IETA is uniquely situated to usefully contribute to the Court's consideration of the Reference by providing real, substantial, and identifiable expertise and a direct interest in the subject matter; (iii) IETA has been approved as an *amicus curiae* to courts considering similar matters in other jurisdictions, including California; (iv) IETA has a unique perspective on the issue(s) and appears to be the sole progressive business voice of directly affected entities; and (v) there is no injustice to the Parties that will result from IETA's intervention. IETA seeks an order of the Court granting, among other related relief, IETA's leave to intervene in this Reference.

California Chamber of Commerce v. State Air Resources Board, (Cal. C.A., 3d App. District)

PART II: FACTS

4. IETA is a specialized, non-profit organization operating internationally as a Swiss verein, and in Canada as a non-share capital corporation. It has over one hundred and fifty (150)

members that are committed to low-cost, market-based approaches to mitigate climate change. It is a leading Canadian and international business voice expert in carbon pricing, climate finance, emissions trading, and offset systems. Many jurisdictions (including, without limitation, Canada, the Provinces, the United States and respective states, the European Union, the United Kingdom, China, Brazil, Chile, Colombia, Mexico, South Korea, Morocco, and South Africa) have called upon IETA's assistance and expertise. IETA's support for market-based approaches is underpinned by environmental integrity and inter-jurisdictional harmonization.

Affidavit of Kathleen Eleanor Sullivan at paras. 4, 5, and 8.

5. IETA was an approved *amicus curiae* in the recent jurisdictional- and taxation-based court challenge to carbon pricing legislation in the State of California. It is also approved as an intervenor in Saskatchewan's constitutional reference.

California Chamber of Commerce v. State Air Resources Board, supra

6. Many of IETA's members are, or will be, directly regulated by either or both of the impugned federal legislation and the Ontario Environment Plan. They include project developers and investors with projects/investments that will be directly affected by the outcome of this Reference. IETA members have a direct interest in this Reference.

Greenhouse Gas Pollution Pricing Act, SC 2018, c. 12; Ontario, Preserving and Protecting our Environment for Future Generations: A Made-in-Ontario Environment Plan (29 November 2018) ("Ontario Environment Plan"); Affidavit of Kathleen Eleanor Sullivan at paras. 6 and 9

7. The risks of climate change are significant and increasing, and require prompt action by governments and businesses to avoid the serious consequences.

Affidavit of Kathleen Eleanor Sullivan at Exhibit "B"; *Constitution Act, 1867*

8. IETA intends to support each of Canada's and Ontario's constitutional jurisdiction to address climate change through measures including carbon pricing. There are many consistencies

between the federal legislation and Ontario's announced industrial emissions carbon pricing regimes. To the extent that a conflict exists, IETA will argue that it must be resolved in a manner that reduces greenhouse gas (**GHG**) emissions, and is consistent with a least-cost, market-based approach, the principle of cooperative federalism, and the constitutional competence afforded to Parliament, the Provinces, and Canada's indigenous peoples in accordance with sections 91, 92, 92A, and 35 of the Constitution. This "**IETA Position**" does not currently appear to be represented by the Parties.

Constitution Act, 1867, ss. 35, 91, 92, and 92A

PART III: ISSUES AND ARGUMENT

ISSUE: Should the proposed intervenor, IETA, be granted leave to intervene?

9. IETA respectfully submits that it should be granted leave to intervene as its intervention is supported by Rules 13.02, 13.03, and the test outlined by Dubin CJO in *Peel*. Specifically, IETA submits that its motion to intervene is supported by: (i) the nature of the Reference; (ii) the issues that arise in the Reference; and (iii) the unique experience, expertise, and perspective of IETA that will allow it to make a useful contribution to the Court's consideration of the Reference, without causing injustice to the Parties.

Rules of Civil Procedure, supra, rr. 13.02 and 13.03; *Peel, supra*; *Zoe Childs v. Desormeaux*, 67 O.R. (3d) 385 (C.A.) ("*Childs*"); *Bedford v. Canada (Attorney General)*, 2009 ONCA 669 ("*Bedford*"); *Adler v. Ontario*, 8 O.R. (3d) 200 (O.C.J.) ("*Adler*")

10. The Reference is a constitutional case that includes broad public policy issues on the constitutionality of federal legislation mitigating climate change through carbon pricing, and its potential application to classes of subjects within the shared jurisdiction of the federal and provincial governments, and potentially the exclusive jurisdiction of the Province(s).

11. The courts have generally supported a lower threshold for granting interventions in constitutional cases with broad public policy issues impact on entities that are not party to the

proceedings. The Reference is such a case. IETA's intervention should therefore be considered under the relaxed standard.

Peel, supra; Adler, supra at paras. 8 and 13; *Bedford, supra* at para. 2

12. IETA submits that its unique experience, expertise, and perspective will make a useful contribution to the Court's consideration of the Reference. Specifically, IETA: (i) is a specialized, non-profit organization focussed on the subject matter at issue in the Reference; (ii) is a leading Canadian and international business voice on carbon pricing and climate finance and has been for nearly two decades; and (iii) has been an approved *amicus curiae* in the recent jurisdictional- and taxation-based court challenge to carbon pricing legislation in California.

Affidavit of Kathleen Eleanor Sullivan at paras. 4, 5, and 6 and Exhibit "A".

13. Further, many IETA members are, or will be, directly regulated pursuant to either or both of the impugned federal legislation and the Ontario Environment Plan. IETA members therefore have a real, substantial, and identifiable interest in the subject matter and are directly affected by the outcome of the Reference.

14. The IETA Position and perspective does not appear to be represented by one of the Parties. IETA appears to be the sole voice of business and industry and regulated entities and the only entity espousing the IETA Position on the constitutional question.

15. Finally, IETA's intervention in the Reference will not cause either procedural or substantive injustice to the Parties if granted. It will not unduly delay the timelines or proceedings outlined in the Procedural Order. IETA's facts and authorities largely fall within those set out by the Attorney General of Ontario and anticipated from that of Canada, subject to only minor clarifications. Similarly, the substance of the IETA Position may support the Court's interpretation of the Reference question in a manner that is conducive to the claimed vires and principles anticipated from each of the Parties. The IETA intervention will highlight the common

elements of the Ontario Environment Plan and Canada's legislative approach to pricing industrial emissions in excess of defined emission standards.

PART IV: RELIEF REQUESTED AND ORDER SOUGHT

16. IETA respectfully requests an Order from this Honourable Court:

- (a) granting IETA leave to intervene in this Reference;
- (b) permitting IETA to file a factum on the substantive issue to be determined in the Reference and make oral argument, in accordance with such further procedural directions of this Honourable Court;
- (c) confirming that there shall be no costs awarded for or against IETA in respect of this motion for leave to intervene and in the proposed intervention, should it be granted leave to intervene; and
- (d) such further or other Order as IETA shall request and this Honourable Court deem appropriate.

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

DEMARCO ALLAN LLP

Per:



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Counsel for IETA

Jonathan McGillivray
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PART V: TABLE OF AUTHORITIES

LEGISLATION

Constitution Act, 1867 (as per Factum of the Attorney General of Ontario)

Greenhouse Gas Pollution Pricing Act, SC 2018, c. 12 (as per Factum of the Attorney General of Ontario)

Rules of Civil Procedure, RRO 1990, Reg 194

JURISPRUDENCE

Adler v. Ontario, 8 O.R. (3d) 200 (O.C.J.)

Bedford v. Canada (Attorney General), 2009 ONCA 669

California Chamber of Commerce v. State Air Resources Board, (Cal. C.A., 3d App. District)

Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd., 74 O.R. (2d) 164 (C.A.)

Zoe Childs v. Desormeaux, 67 O.R. (3d) 385 (C.A.)

SECONDARY MATERIAL: GOVERNMENT DOCUMENTS

Ontario, *Preserving and Protecting our Environment for Future Generations: A Made-in-Ontario Environment Plan* (29 November 2018) (as per Record of the Attorney General of Ontario at **VOLUME I, TAB 4**)

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PROCEEDING COMMENCED AT
Toronto

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