

Court of Appeal File No.: C65807 (M49955)

**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**

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**FACTUM OF THE  
ATTORNEY GENERAL OF ONTARIO**

**(British Columbia's Motion for Leave to File Evidence  
Returnable January 15, 2019)**

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## **PART I – OVERVIEW**

1. This reference concerns whether the *Greenhouse Gas Pollution Pricing Act*, SC 2018, c. 12, s. 186 (the “Act”) is *ultra vires* Parliament. The Attorney General of British Columbia has intervened as of right and now seeks leave to file evidence.
2. Ontario submits that British Columbia’s motion to file evidence should be dismissed. The evidence British Columbia seeks to lead is irrelevant, inadmissible hearsay, or inadmissible opinion evidence from witnesses who are not qualified, independent experts.

## **PART II – FACTS**

3. By Order in Council 1014/2018, the Lieutenant Governor in Council referred to this Court under section 8 of the *Courts of Justice Act* the following question:

Is the *Greenhouse Gas Pollution Pricing Act*, Part 5 of the *Budget Implementation Act, 2018, No. 1*, SC 2018, c.12, unconstitutional in whole or in part?

Ontario, Order in Council 1014/2018, Ontario’s Motion Record, Tab 1, pp. 1-3

4. On August 30, 2018, Justice MacPherson issued an Order setting out the procedure for the reference. The Attorney General of Canada was ordered to be a party to the reference and provincial and territorial Attorneys General were given the right to intervene if they so chose. Saskatchewan, British Columbia, and New Brunswick have exercised that right.

Order of Justice MacPherson dated August 30, 2018, paras. 1 and 4, Ontario’s Motion Record, Tab 2, pp. 5-6

5. The Court granted Ontario and Canada the right to file evidence on the reference. It also permitted other Attorneys General to seek leave to do so by motion. British Columbia now seeks leave to do so.



Order of Justice MacPherson dated August 30, 2018, paras. 5, 7, 10, and 12, Ontario's Motion Record, Tab 2, pp. 6-7

6. British Columbia seeks leave to file an affidavit from the Executive Director, Clean Growth Strategy, Climate Action Secretariat of its Ministry of Environment and Climate Change Strategy and a Legal Assistant.

Affidavit of Tim Lesiuk #2, Exhibit "A" to the Affidavit of Tim Lesiuk #1, British Columbia's Motion Record, Tab 4A, pp. 15-273

Affidavit of June Parker, Exhibit "A" to the Affidavit of Tim Lesiuk #1, British Columbia's Motion Record, Tab 4B, pp. 274-408

### **PART III – ISSUES AND LAW**

7. The issue on this motion is whether British Columbia should be permitted to file evidence on this reference. Ontario submits that British Columbia should not be permitted to do so as the evidence it seeks to lead is irrelevant, inadmissible hearsay, or inadmissible opinion evidence from witnesses who are not qualified, independent experts.

[R. v. Spence, 2005 SCC 71](#) at paras. 68-69, [2005] 3 SCR 71

[White Burgess Langille Inman v. Abbott and Haliburton Co., 2015 SCC 23](#) at paras. 14-54, [2015] 2 SCR 182

[Bruff-Murphy \(Litigation guardian of\) v. Gunawardena, 2017 ONCA 502](#) at paras. 33-39, leave to appeal to SCC refused [\[2017\] SCCA No. 343](#)

[R. v. Davey, 2010 ONCA 818](#) at paras. 11-17, aff'd on other grounds [2012 SCC 75, \[2012\] 3 SCR 828](#)

[R. v. Sheriffe, 2015 ONCA 880](#) at paras. 101-06, leave to appeal to SCC refused [\[2016\] SCCA No. 514](#)

#### **A. Mr. Lesiuk's Affidavit**

8. Mr. Lesiuk's affidavit sets out his opinions on some of the alleged impacts of climate change on British Columbia, the impacts British Columbia's carbon tax allegedly had on greenhouse gas emissions, and the alleged impact British Columbia

having a carbon tax and other jurisdictions not having a carbon tax will have on the competitiveness of British Columbia industries. Mr. Lesiuk relies on a number of unsworn reports and academic articles for the truth of their contents.

Affidavit of Tim Lesiuk #2, Exhibit “A” to the Affidavit of Tim Lesiuk #1, British Columbia’s Motion Record, Tab 4A, pp. 15-273

9. The evidence Mr. Lesiuk seeks to put forward about the adverse impacts of climate change is irrelevant to the issue in this reference – which level of government has jurisdiction to regulate greenhouse gases. This reference is not about whether climate change is an important issue that needs to be addressed. As Ontario states in its factum:

Ontario agrees with Canada that climate change is real and that human activities are a major cause. Ontario also acknowledges that climate change is already having a disruptive effect across Canada, and that, left unchecked, its potential impact will be even more severe. Ontario agrees that proactive action to address climate change is required.

There is thus no live debate about the impacts of climate change before the Court which Mr. Lesiuk’s evidence on the impact of climate change could help to resolve.

Ontario’s Factum, para. 6, Ontario’s Motion Record, Tab 3, p. 16

10. Similarly, the evidence Mr. Lesiuk seeks to put forward about the effectiveness of British Columbia’s carbon tax or the competitive disadvantages it might face vis-à-vis jurisdictions that do not have carbon taxes is also irrelevant. This reference is about jurisdiction, not about the efficaciousness or policy desirability of any particular carbon pricing regime. As the Supreme Court has repeatedly made clear, division of power cases are solely about legislative competence, not policy:

Efficaciousness is not a relevant consideration in a division of powers analysis. ... Canada must identify a federal aspect distinct from that on which the provincial legislation is grounded. The courts do not have the power to declare legislation constitutional simply because they conclude

it may be the best option from the point of view of policy. The test is not which jurisdiction – federal or provincial – is thought to be best placed to legislate regarding the matter in question. The inquiry into constitutional powers under ss. 91 and 92 of the *Constitution Act, 1867* focuses on legislative competence, not policy.

Ontario's Factum, para. 76, Ontario's Motion Record, Tab 3, p. 41

[Reference re Securities Act, 2011 SCC 66](#) at para. 90, [2011] 3 SCR 837

[Reference re Pan-Canadian Securities Regulation, 2018 SCC 48](#) at para. 82

11. The fact that the different choices provinces make as to how best to exercise the heads of power the Constitution grants them may make some provinces' industries more competitive than others is irrelevant to whether a matter falls within provincial or federal jurisdiction in the first place. One of the main benefits of Canada's federal system of government is that, within their spheres of jurisdiction, the provinces have the freedom to choose the policy measures they determine are most appropriate to their local circumstances, including the competitiveness of their industries.

12. Even if Mr. Lesiuk's evidence were relevant to the issues before the Court on this reference, he would not be qualified to lead it. Mr. Lesiuk has a Bachelor of Science in Biology and a Diploma of Technology of Environmental Science. He does not purport to be an expert in any of the fields on which he opines. Nor does he purport to be independent from the Government of British Columbia.

13. Mr. Lesiuk is not a qualified, independent expert witness entitled to adduce opinion evidence about the impact greenhouse gas emissions will have on British Columbia, the effectiveness of British Columbia's carbon tax, or the impact it has on the competitiveness of British Columbia's industries. Nor is he permitted to rely on the various hearsay reports he attaches to his affidavit for the truth of their contents.

**B. Ms. Parker's Affidavit**

14. Ms. Parker's affidavit consists solely of six academic articles on the economics of carbon taxation and climate change. Ms. Parker identifies herself as a Legal Assistant and does purport to have any expertise in the matters discussed in those articles.

Affidavit of June Parker, Exhibit "A" to the Affidavit of Tim Lesiuk #1, British Columbia's Motion Record, Tab 4B, pp. 274-408


15. Even if the efficaciousness or policy wisdom of carbon taxation were relevant to this reference (which for the reasons set out above it is not), British Columbia cannot seek to lead economic opinion evidence by attaching academic articles to a Legal Assistant's affidavit. Only a duly qualified, independent expert can lead such evidence.

**PART IV – ORDER REQUESTED**

16. Ontario requests that British Columbia's motion to lead evidence be dismissed.

17. Ontario estimates that it will require thirty (30) minutes of oral argument.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, THIS 8<sup>TH</sup> DAY OF  
JANUARY, 2019

  
\_\_\_\_\_  
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\_\_\_\_\_  
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**SCHEDULE A – AUTHORITIES CITED**

1. *R. v. Spence*, 2005 SCC 71 at paras. 68-69, [2005] 3 SCR 71
2. *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 at paras. 14-54, [2015] 2 SCR 182
3. *Bruff-Murphy (Litigation guardian of) v. Gunawardena*, 2017 ONCA 502 at paras. 33-39, leave to appeal to SCC refused [2017] SCCA No. 343
4. *R. v. Davey*, 2010 ONCA 818 at paras. 11-17, aff'd on other grounds 2012 SCC 75, [2012] 3 SCR 828
5. *R. v. Sheriffe*, 2015 ONCA 880 at paras. 101-06, leave to appeal to SCC refused [2016] SCCA No. 514
6. *Reference re Securities Act*, 2011 SCC 66, [2011] 3 SCR 837
7. *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48

**SCHEDULE B – LEGISLATION CITED**

None

**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**

**Court of Appeal File No.:  
C65807 (M49955)**

**COURT OF APPEAL FOR ONTARIO**

Proceedings commenced at Toronto

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for Leave to File Evidence  
Returnable January 15, 2019)**

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