

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 THE ATTORNEY GENERAL OF CANADA IN RESPONSE TO ALL
MOTIONS FOR LEAVE TO INTERVENE AND MOTIONS TO SUPPLEMENT
THE RECORD**

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PART I - OVERVIEW

1. The test for assessing intervener motions in Ontario sets a relatively low threshold where the case raises constitutional issues of public importance. The Attorney General of Canada (“Canada”) consents to twelve of the thirteen proposed interveners. They have each shown that they have a legitimate interest, can make useful submissions that may assist to resolve the issues before the Court, and would not cause prejudice to the parties.
2. Canada opposes Greg Vezina’s motion for leave to intervene and to supplement the record with further evidence. Mr. Vezina’s intervention would not assist the Court in considering the legal issues.
3. Canada consents to the Attorney General of British Columbia’s (“British Columbia”) motion to file a record, as well as the motions of the five proposed interveners who seek to add affidavit evidence to the materials before the Court on the merits of the reference.

PART II – FACTS

A. The dispute between the parties

4. Broadly defined, the dispute between the parties – Canada and the Attorney General of Ontario (“Ontario”) – relates to Parliament’s constitutional authority to enact the *Greenhouse Gas Pollution Pricing Act* (“Act”). Canada and Ontario disagree over Parliament’s constitutional authority to enact the Act under the peace, order, and good government power to legislate on matters of national concern, and whether the fuel charge and output-based pricing system set out in the Act constitute a valid regulatory charge or a validly enacted tax. Ontario

has produced a factum and record in support of its position. Canada will file materials by February 15, 2019.

Factum of the Attorney General of Ontario at paras 1-5; *Greenhouse Gas Pollution Pricing Act*, being Part 5 of the *Budget Implementation Act, 2018, No. 1*, SC 2018, c 12, Factum of the Attorney General of Ontario, Schedule B, Tab 2.

5. The Attorneys General of Saskatchewan, British Columbia, and New Brunswick have each intervened as of right.

Order of Justice MacPherson dated August 30, 2018, at para 4, Record of the Attorney General of Ontario, Vol. 1, Tab 3; Notices of Intervention of the Attorneys General of Saskatchewan, British Columbia, and New Brunswick, respectively dated September 18, December 13, and December 18, 2018.

B. The proposed interveners

6. Twelve groups and one individual have filed motions for leave to intervene in this Reference. Canada opposes the motion filed by Greg Vezina. The facts relevant to Canada's opposition of Mr. Vezina's motion are addressed in the argument section below.

7. Canada consents to the motions filed by each of the twelve groups, including: the Assembly of First Nations; the Athabasca Chipewyan First Nation; the Canadian Environmental Law Association, Environmental Defence Canada Inc., and the Sisters of Providence of St. Vincent de Paul; the Canadian Public Health Association; the Canadian Taxpayers Federation (including their motion for an extension of time); the David Suzuki Foundation; the Ecofiscal Commission of Canada; Équiterre and the Centre québécois du droit de l'environnement; the Intergenerational Climate Coalition; the International Emissions Trading Association; the United Chiefs and Councils of Mniidoo Mnising; and the United Conservative Association.

C. The motions to supplement the record

8. British Columbia has sought leave to file a record. Canada consents to that motion.
9. Six of the proposed interveners seek leave to supplement the record with affidavits attached to their motion records, including: the Athabasca Chipewyan First Nation; the Canadian Public Health Association; the Ecofiscal Commission of Canada; the Intergenerational Climate Coalition; the United Chiefs and Council of Mniidoo Mnising; and Greg Vezina. Canada opposes Mr. Vezina's request to file further evidence, and consents to the requests of the remaining proposed interveners.

PART III – ISSUES AND LAW

10. Given Canada's consent to all but Mr. Vezina's motion, the sole issue on which Canada makes submissions in response to all of the motions before this Court is whether this Court should grant Mr. Vezina's motion for leave to intervene and to file new evidence.

A. The test for granting leave to intervene

11. On motions for leave to intervene as a friend of the court, the Court must 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." Although the test is relaxed in cases raising constitutional issues with implications beyond the dispute between the parties, a proposed intervener must still make a useful contribution that may assist to resolve the legal issue before the Court, without causing injustice to the parties.

Rules of Civil Procedure, RRO 1990, Reg. 194, [rule 13.02](#) and [subrule 13.03\(2\)](#), Canada's Book of Authorities on Motions for Leave to Intervene [**CBOA**], Tab 6; [Peel \(Regional Municipality\) v. Great Atlantic & Pacific Co of Canada Ltd.](#) (1990), 74 O.R. (2d) 164 at paras. 6 & 10 (ONCA), **CBOA**, Tab 1; [Jones v. Tsige](#), (2011), 106 O.R. (3d) 721 at paras. 15 & 23-24 (ONCA), **CBOA**, Tab 2; [Authorson](#)

Litigation Guardian of) v. Canada (Attorney General) (2001), 9 C.P.C. (5th) 218 at paras. 7-9 (ONCA), **CBOA**, Tab 3; *Bedford v. Canada (Attorney General)*, 2009 ONCA 669 at paras 7 & 9, 98 O.R. (3d) 792, **CBOA**, Tab 4.

12. In constitutional cases, interventions are generally allowed by groups with a substantial interest in the issue, an important and distinct perspective, or that are well-recognized with special expertise and broadly identifiable membership.

Bedford v. Canada (Attorney General), 2009 ONCA 669 at para. 2, 98 OR (3d) 792, **CBOA**, Tab 4.

B. Mr. Vezina’s motion should be dismissed

13. Mr. Vezina has not established that he is able to make a useful contribution to the resolution of the appeal. Much of Mr. Vezina’s factum appears to be copied from the factum of the Canadian Environmental Law Association, Environmental Defence, and Sisters of Providence of St. Vincent de Paul (“CELA et al.”). His only proposed arguments exactly replicate CELA et al.’s factum.

Factum of Greg Vezina at paras. 10-11.; Factum of the Canadian Environmental Law Association, Environmental Defence, and and Sisters of Providence of St. Vincent de Paul at paras. 10-11.

14. Although Mr. Vezina’s material shows an interest in fuel issues, it does not clearly engage with the constitutionality of the *Act* itself. While he provides some information at paragraph 2 of his factum to show his interest in environmental protection and energy production, his affidavit focuses primarily on his commercial interests relating to the use of ammonia as an alternative fuel and with existing or proposed clean fuel standards. Although he indicates that he has a unique perspective from that of the parties, he does not show how that perspective will assist in resolving the question of the *Act*’s constitutionality. Consequently, his motion should be dismissed.

Affidavit of Greg Vezina at paras. 3-11, Motion Record of Greg Vezina at 8-13.

C. The test for supplementing the record

15. Although the test for supplementing the record in true appeals is well-defined, there is no specific authority relating to references to this Court. A somewhat broader test is appropriate in references, where no record has been established in a lower court.

16. To prevent injustice to the parties, interveners in true appeals are generally required to take the record as it is and not introduce new material. “This condition is imposed to ensure economy and fairness to the parties and to prevent an intervenor from changing the focus, scope or nature of the proceedings by changing the record.”

Jones v. Tsige, (2011), 106 OR (3d) 721 at para. 26 (ONCA), **CBOA**, Tab 2; *R. v. M. (A.)* (2005), 66 WCB (2d) 642 at para. 4 (ONCA), as cited in *Tadros v. Peel Regional Police Service*, 2008 ONCA 775 at para. 5, **CBOA**, Tab 5.

17. With no record established in a lower court and a broad reference question asking whether the *Act* is unconstitutional in whole or in part, limited expansion of the record by the interveners will not cause injustice to the parties or change the focus, scope, or nature of the proceedings. The timelines for this reference include cross-examinations on affidavits, which minimizes prejudice to the parties. While Ontario has filed, and Canada will file, a record containing the information relevant to their arguments, limited additional evidence from the interveners would allow them to provide this Court with the full benefit of their distinct perspectives and expertise.

D. If Mr. Vezina is granted leave to intervene, he should not be permitted to file unspecified other evidence

18. The Court should not be satisfied that Mr. Vezina’s further evidence will assist in determining whether the *Act* is constitutional. He has not identified any distinct proposed arguments that he intends to make, or provided the specifics of the evidence he intends to introduce. Given that absence of information and Mr. Vezina’s apparent focus on clean fuel

standards rather than the *Act* proper, this Court should not permit him to file further evidence if he is granted leave to intervene.

19. Other than Mr. Vezina, British Columbia and the proposed interveners seeking to supplement the record have each provided the affidavits that they intend to introduce. Those affidavits each appear to support the arguments that those proposed interveners intend to make.

PART IV – ORDER REQUESTED

20. Canada requests an order of this Court:

- a) dismissing Mr. Vezina's motion for leave to intervene, including his request to file further evidence;
- b) granting the motion of the Canadian Taxpayers Federation for an extension of time to file its motion for leave to intervene;
- c) granting to the following proposed interveners leave to intervene as friends of the Court pursuant to rule 13.02 and subrule 13.03(2) of the *Rules of Civil Procedure*, RRO 1990, Reg. 194: the Assembly of First Nations; the Athabasca Chipewyan First Nation; the Canadian Environmental Law Association, Environmental Defence Canada Inc., and the Sisters of Providence of St. Vincent de Paul; the Canadian Public Health Association; the Canadian Taxpayers Federation; the David Suzuki Foundation; the Ecofiscal Commission of Canada; Équiterre and the Centre québécois du droit de l'environnement; the Intergenerational Climate Coalition; the International Emissions Trading Association; the United Chiefs and Councils of Mniidoo Mnising; and the United Conservative Association;

- d) granting leave to British Columbia to file a record; and
- e) granting leave to the following proposed interveners to introduce the following further evidence included within their motion records on the merits of the reference:
 - i. for the Athabasca Chipewyan First Nation, the affidavit of Lisa Tsessaze;
 - ii. for the Canadian Public Health Association, the affidavit of Ian Culbert;
 - iii. for the Ecofiscal Commission of Canada, the affidavit of Christopher Ragan;
 - iv. for the Intergenerational Climate Coalition, the affidavit of Dr. Paul Kershaw;
and
 - v. for the United Chiefs and Council of Mniidoo Mnising, the affidavit of Patsy Corbiere.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.


January 7, 2019.


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SCHEDULE A – AUTHORITIES CITED

<u>Tab</u>	<u>Cases</u>	<u>Para(s)</u>
1	<i>Peel (Regional Municipality) v. Great Atlantic & Pacific Co of Canada Ltd.</i> (1990), 74 O.R. (2d) 164 (ONCA)	11
2	<i>Jones v. Tsige</i> (2011), 106 O.R. (3d) 721 (ONCA)	11, 16
3	<i>Authorson (Litigation Guardian of) v. Canada (Attorney General)</i> (2001), 9 C.P.C. (5th) 218 (ONCA)	11
4	<i>Bedford v. Canada (Attorney General)</i> , 2009 ONCA 669, 98 O.R. (3d) 792	12
5	<i>Tadros v. Peel Regional Police Service</i> , 2008 ONCA 775	16

SCHEDULE B – LEGISLATION CITED

<u>Tab</u>	<u>Statutes & Regulations</u>	<u>Para(s)</u>
6	<div style="display: flex; justify-content: space-between;"> <div style="width: 45%;"> <i>Rules of Civil Procedure</i>, RRO 1990, Reg. 194, rule 13.02 and subrule 13.03(2) </div> <div style="width: 45%;"> <i>Règles de Procédure Civile</i>, R.R.O. 1990, Règl. 194, règle 13.02 et paragraphe 13.03(2) </div> </div>	11, 20

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COURT OF APPEAL FOR ONTARIO

Proceedings commenced at Toronto

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