

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 CANADA'S ECOFISCAL COMMISSION
(Motion for Leave to Intervene)**

Stewart Elgie, LSM
Barrister & Solicitor
LSO No. 38777P
Faculty of Law
University of Ottawa
57 Louis Pasteur St.
Ottawa, ON K1N 6N5
T. 613-562-5800 ext. 1270
Stewart.elgie@uottawa.ca

Counsel for Canada's Ecofiscal Commission

TO: Attorney General of Ontario
Constitutional Law Branch
720 Bay Street, 4th Floor
Toronto, ON M7A 2S9

Joshua Hunter / Andrea Bolieiro / Padraic Ryan
Tel: 416-326-3840 / 416-326-0131 /416-326-6287
Fax: 416-326-3840
Email: joshua.hunter@ontario.ca
andrea.bolieiro@ontario.ca
padraic.ryan@ontario.ca
Counsel for the Attorney General of Ontario

AND TO: Attorney General of Canada
Department of Justice Canada
Prairie Region Office
301 – 310 Broadway
Winnipeg, MB R3C 0S6

Sharlene Telles-Langdon
Tel: 204-983-0862
Fax: 204-984-8495
Email: sharlene.telles-langdon@justice.gc.ca
Counsel for the Attorney General of Canada

INDEX

PART I – OVERVIEW	1
PART II – FACTS	1
PART III – ARGUMENT	2
PART IV – RELIEF SOUGHT	5
SCHEDULE A – LIST OF AUTHORITIES	6

PART I - OVERVIEW

1. This case raises constitutional issues of fundamental importance for Canada's ability to address the problem of climate change and meet our treaty commitments in a manner that is effective, economically efficient, and supports cooperative federalism. Canada's Ecofiscal Commission, given its substantial expertise and experience on carbon pricing, is uniquely positioned to make submissions that may assist the Court in this proceeding.

PART II - FACTS

2. The Ecofiscal Commission ("CEC" or "Commission") is an independent, non-partisan, national research organization, based at McGill University. Its mission is "to identify and promote practical fiscal solutions for Canada that spark the innovation required for increased economic and environmental prosperity." It conducts research, produces reports and engages in education to inform the public and policy-makers.¹

3. The Ecofiscal Commission's work is directed and authored by 13 Commissioners, who include some of Canada's most respected independent economic experts. It also has a 16 member Advisory Board of prominent Canadians from across the country.²

4. The Commission's research and reports focus on how 'market-based' instruments, such as pollution pricing, can achieve environmental objectives at the lowest economic cost and stimulate innovation. Since 2015, the CEC has released eight research reports on carbon pricing, using economic analysis to explore different aspects of its application and design, including a report *focused specifically on Ontario's carbon pricing system*.³

¹ Affidavit of Christopher Ragan, Motion Record, Tab 2, paras 5-6

² Affidavit of Christopher Ragan, Motion Record, Tab 2, paras 7-9

³ Affidavit of Christopher Ragan, Motion Record, Tab 2, paras 11-12, 22

5. The CEC's research reports and education materials have been widely read, and have played a significant role in informing governments and the public on carbon pricing systems and design across Canada, particularly in Ontario.⁴

PART III - ARGUMENT

6. It is submitted that the Commission meets the tests under Rule 13.02, as summarized in *Peel*,⁵ for leave to intervene in a constitutional matter, for the following reasons.

The Nature of the Case

7. This case involves a constitutional issue of wide public importance, and the reference question is broad, both of which suggest a "relaxed" application of the intervention test.

The Ecofiscal Commission will make Useful, Distinct Submissions

8. The Commission's mission, expertise and work are specifically focused on market-based approaches to environmental protection, and particularly carbon pricing. No other organization in Canada, to our knowledge, has this specific focus and expertise.

9. The CEC will argue that Parliament has authority, under the *Constitution Act, 1867*, to enact the *Greenhouse Gas Pollution Pricing Act* ("GGPPA"), principally under its Peace, Order and Good Government (POGG) power, particularly the National Concern branch.

10. The Commission will add to the arguments of the Government of Canada by *focusing its submissions in two areas*: first, on aspects of the National Concern test that have received little focus from the main parties, and draw on the CEC's core expertise; and second, on the fact that the GGPPA is intended to meet Canada's international treaty obligations, and how that reinforces Parliament's authority under POGG.

⁴ Affidavit of Christopher Ragan, Motion Record, Tab 2, paras 26-29

⁵ *Peel (Regional Municipality) v Great Atlantic and Pacific Co.* (1990) 74 OR (2d) 164 (CA), paras 6-10.

Peace, Order and Good Government – National Concern Branch

11. The Ecofiscal Commission will add, in several ways, to the arguments of the Attorney General of Canada that the *GGPPA*, and its subject matter, satisfy the elements of the "national concern" test from *Crown Zellerbach*.⁶ In brief:

- (a) Controlling climate change is not only a matter of national environmental concern, it is also of national *economic* concern.
- (b) The failure of a province to effectively regulate GHG emissions would cause significant extra-provincial *economic* impacts, in addition to environmental ones.

12. The third part of the test – the *scale of impact on provincial jurisdiction* – is where the CEC mainly will focus its submissions and add to those of other parties. The *GGPPA* will minimize impacts on areas of provincial jurisdiction, for several reasons:

- (a) The use of price-based regulation *minimizes the costs* to provincial economies – saving an estimated \$70 billion per year across Canada, compared to prescriptive regulations, based on the CEC's economic modeling.⁷
- (b) The use of price-based regulation gives *maximum flexibility* to businesses and households about how and how much to reduce emissions.
- (c) The use of a *backstop approach*, deferring to equally stringent provincial laws, allows provinces to develop their own carbon pricing schemes tailored to the needs of their economies, and minimizes any impacts on provincial jurisdiction.
- (e) By requiring that all *pricing revenues stay in the province they came from*, the *GGPA* lets provinces use those revenues to minimize impacts from the carbon price.

⁶ *R v Crown Zellerbach Ltd.*, [1988] 1 SCR 401 at para 33 [*Crown Zellerbach*].

⁷ Affidavit of Christopher Ragan, Motion Record, Tab 2, para 17 (cost to meet Canada's 2020 GHG targets)

13. Further, national minimum standards will ensure a basic level of protection across Canada, and avoid potential "pollution price wars" (*Crown Zellerbach, supra*, para 34).

Treaty Implementation and the POGG power

14. The fact that this Act is intended, in part, to implement Canada's obligations under international climate treaties is, at the very least, a strong factor in favour of it falling within the POGG power. The Attorney General of Canada briefly touches on this issue in its factum in the Saskatchewan reference (paras 86, 89). The CEC will make submissions that are *very different in both kind and depth* from those of Canada.

15. The nature and extent of the federal power to implement treaties is an important unresolved question in Canadian constitutional law. The Privy Council ruled in 1937, in *Labour Conventions*, that the power to implement treaties did not rest with Parliament, but with the level of government that had jurisdiction over a particular subject-matter.⁸

16. Since then, several Supreme Court justices have questioned *Labour Conventions* and indicated the issue may need to be reconsidered.⁹ Further, the decision has been the subject of a number of academic articles – almost all critical of it.¹⁰ However, Canadian courts have not yet had occasion to squarely address this important issue.¹¹

17. The present appeal need not resolve whether a full federal treaty implementing power exists. However, it does squarely raise the issue of what role the existence of a treaty

⁸ *A-G Can. v. A-G Ont. ("Labour Conventions")*, [1937] A.C. 326 at paras 14-15.

⁹ See, e.g., *MacDonald v Vapor Canada Ltd.* [1977] 2 SCR 134 at 167-172. For a list of other cases see, S. Elgie, "Kyoto, the Constitution and Carbon Trading" (2008) 13:1 *Review of Constitutional Studies* 67 at 92.

¹⁰ For a list of 15 articles see S Elgie, "Kyoto the Constitution and Carbon Trading", *supra* note 9 at 90-93.

¹¹ Australia's High Court, by comparison, has interpreted its federalist constitution to include a federal treaty implementing power, *Commonwealth v Tasmania*, [1983] 158 CLR 1.

plays in deciding whether a statute to implement the treaty falls within the POGG power.

18. Canadian courts and scholars have identified several options in that regard, ranging from a treaty being evidence that an Act's subject matter is of national concern,¹² to proposing which *types* of treaties Parliament should have authority to implement.¹³

19. Regardless of which approach is adopted, the fact that the *GGPPA* is meant in part to implement an international treaty – one that deals with a global problem – is at least strong evidence that its subject matter falls within the POGG power.

The Ecofiscal Commission's Intervention will not Cause Injustice or Prejudice

20. The Commission accepts the hearing schedule in this matter. Since the Parties have notice of the CEC's arguments in the parallel Saskatchewan Reference, in which the CEC has intervener status, there will be no surprise and minimal extra effort.

PART IV – RELIEF SOUGHT

21. The Commission seeks an order that it be granted leave to intervene, and that
- i. it may file a factum, and make oral argument of 60 minutes at the merits hearing;
 - ii. the Affidavit of Christopher Ragan, filed in this motion, may be relied on in the merits hearing, and be included in the Court's record; and
 - iii. it may neither seek nor be subject to any costs in this Motion or the Reference.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, December 20, 2018.



Stewart Elgie, LSM
University of Ottawa, Faculty of Law
 Counsel for Canada's Ecofiscal Commission

¹² *Crown Zellerbach*, *supra* note 2 at para 38.

¹³ Peter Hogg, *Constitutional Law of Canada* 5th ed (Toronto: Carswell, 2007) (loose-leaf updated 2015), at 11-16.; W. Lederman, *Continuing Canadian Constitutional Dilemmas* (Toronto: Butterworth's, 1981) at 358.

SCHEDULE A – LIST OF AUTHORITIES

<u>Tab</u>	<u>Cases</u>	<u>Para(s)</u>
1	<i>A-G Can. v. A-G Ont. (“Labour Conventions”)</i> , [1937] A.C. 326 at paras 14-15	15
2	<i>Commonwealth v Tasmania</i> , [1983] 158 CLR 1	16
3	<i>MacDonald v Vapor Canada Ltd.</i> [1977] 2 SCR 134 at paras 167-172	16
4	<i>Peel (Regional Municipality) v Great Atlantic and Pacific Co of Canada</i> , (1990) 74 OR (2d) 164 (CA), paras 6-10	6
5	<i>R v Crown Zellerbach Ltd.</i> , [1988] 1 SCR 401 at paras 33, 34, 38	11, 18

<u>Tab</u>	<u>Statutes</u>	<u>Para(s)</u>
6	<i>Greenhouse Gas Pollution Pricing Act</i> , SC 2018, c 12, s. 165(1). <i>Loi sur la tarification de la pollution causée par les gaz à effet de serre</i> , LC 2018, ch 12, s. 165(1).	9-12, 19

<u>Tab</u>	<u>Secondary Sources</u>	<u>Para(s)</u>
7	S. Elgie, “Kyoto, the Constitution and Carbon Trading: Waking a Sleeping BNA Bear (or Two)” (2008) 13:1 <i>Review of Constitutional Studies</i> 67 at 90, 92, 93.	16
8	Peter W Hogg, <i>Constitutional Law of Canada</i> 5 th ed (Toronto: Carswell, 2007) (loose-leaf updated 2015, release 1), at 11-16	18
9	W. R. Lederman, <i>Continuing Canadian Constitutional Dilemmas</i> (Toronto: Butterworth’s, 1981) c. 19 at 358	18

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

COURT OF APPEAL FOR ONTARIO

PROCEEDINGS COMMENCED AT TORONTO

FACTUM

Stewart Elgie, LSM
LSO No. 38777P
Faculty of Law, University of Ottawa
57 Louis Pasteur St.
Ottawa, ON K1N 6N5
T. 613-562-5800 ext. 1270
Stewart.elgie@uottawa.ca

Counsel for Canada's Ecofiscal Commission