

Court of Appeal File No.: C65807

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.34, by Order-in-Council
1014/2108 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 UNITED CONSERVATIVE ASSOCIATION
(on a Motion seeking Leave to Intervene)**

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TABLE OF CONTENTS

PART I - INTRODUCTION AND FACTS	1
PART II - FACTS	1
PART III - ISSUES AND LAW	2
PART IV - ANSWER REQUESTED.....	5

PART I - INTRODUCTION AND FACTS

1. The United Conservative Association (“UCA”) seeks leave to intervene in the within Reference regarding the constitutionality of the *Greenhouse Gas Pollution Pricing Act* (the “GGPPA”).

2. If leave is granted, the UCP intends to argue that the GGPPA cannot be justified using the national concern branch of the peace, order, and good governance power (the “POGG power”). This would grant the exclusive jurisdiction to regulate greenhouse gas emissions to the federal government, disrupting the current balance of Canadian federalism, and preventing Alberta from developing made in Alberta policy solutions to regulate greenhouse gases that take into account Alberta’s unique social and economic situation.

PART II - FACTS

3. The UCA is an Alberta society that operates the United Conservative Party (the UCA and United Conservative Party are collectively referred to as the “UCP”). The UCP is uniquely positioned to offer perspective on how the Court’s decision will impact Albertans. With over 140,000 members across Alberta, the UCP is the largest provincial political party in Canada. Its 26 elected MLAs serve as the Official Opposition in the Legislative Assembly of Alberta, representing more than 1.2 million Albertans as constituents. The UCP and its legacy parties have collectively served as either Alberta’s governing party or the official opposition party since 1971, and have significant experience preparing and implementing government policy.

Affidavit of The Honourable Jason Kenney PC MLA sworn December 19, 2018 (the “Kenney Affidavit”) at paras. 4-16 and 21.

4. As stated in its formal policy declaration, the UCP is committed to respecting and defending the separation of powers between the federal and provincial governments, and in opposing intrusions by the federal government into the constitutional rights of Albertans. The UCP believes that policy decisions regarding the challenge of effectively regulating greenhouse gas emissions require made in Alberta solutions that takes Alberta's unique social and economic situation into account.

Kenney Affidavit at paras. 17-19.

5. The Court of Appeal for Saskatchewan recently granted the UCP leave to intervene in the Attorney General of Saskatchewan's reference case challenging the constitutionality of the *GGPPA*.

Kenney Affidavit at para. 23.

PART III - ISSUES AND LAW

6. A person may, with leave, intervene as a friend of the court to render assistance to the court by way of argument.

Rules 13.02-03, *Rules of Civil Procedure*, RRO 1990, Regulation 194.

7. The court should consider the nature of the case, the issues that 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.

Peel (Regional Municipality) v. Great Atlantic and Pacific Co. of Canada Ltd., 74 OR (2d) 164 at para. 10.

8. In constitutional cases, intervention is welcome if the applicant will provide fresh information or a fresh perspective on an important constitutional

issue. The threshold for intervention is lower in such cases as it is important for the court to “receive a diversity of representations reflecting the wide-ranging impact of its decision”. While they are not determinative factors, an intervenor in constitutional cases will usually demonstrate either a real, substantial, and identifiable interest in the subject matter of the proceedings; an important perspective distinct from the immediate parties; or that it is a well-recognized group with a special expertise and a broadly identifiable membership base.

Reference Re Workers' Compensation Act, 1983 (Nfld), [1989] 2 SCR 335 at para. 12. (“**Workers' Compensation Reference**”).

Trinity Western University v. Law Society of Upper Canada, 2014 ONSC 5541, 122 OR (3d) 553, at paras. 5-10.

9. The fact that the applicant is not indifferent to the outcome of the appeal is not a reason to deny it the right to intervene. In fact, where there are multiple prospective interveners, the court should attempt to seek a balance between the positions to be advocated when granting intervenor status.

Trinity Western University v. Law Society of Upper Canada, 2014 ONSC 5541 at para. 10.

10. This Reference involves important constitutional questions regarding the constitutional division of powers and the future of federalism in Canada that are the focus of policy statements adopted in the UCP's policy declaration. The Reference's outcome will have a direct impact on Alberta, including the more than 140,000 Albertans who are UCP members and the more than 1.2 constituents represented by UCP MLAs. All of this gives the UCP, its members, and their constituents a real, identifiable interest in the Reference's outcome.

11. The UCP and its legacy parties have extensive experience developing and implementing government policy, interacting with the federal government, and observing the importance of preserving the powers assigned to the provinces by the Constitution.

12. This experience allows the UCP to provide this Court with a unique perspective on how this Reference could affect Alberta and Albertans, which is an important viewpoint that should be heard and considered by the Court. The perspective the UCP offers is exactly the fresh perspective and unique outlook that the Supreme Court of Canada encouraged in cases involving broad constitutional questions in the *Workers' Compensation Reference*.

13. If granted leave to intervene, the UCP will not make arguments as to whether carbon taxes or levies are good or bad public policy, but will argue that the national concern branch of the POGG power cannot be used to justify the *GGPPA*. In particular, the UCP intends to argue that:

a. This Court must apply the principles of federalism and subsidiarity, as discussed in *Reference re Assisted Human Reproduction Act*, [2010] 3 SCR 457, and other cases, when assessing whether the *GGPPA*'s impact on provincial jurisdiction is reconcilable with the fundamental distribution of legislative powers under the Constitution;

b. A finding that the *GGPPA* was validly enacted using the national concern branch of the POGG power could render any provincial legislation targeted at reducing greenhouse gas emissions

unconstitutional by ceding exclusive jurisdiction over greenhouse gas emissions to the federal government; and

c. The regulation of greenhouse gas emissions is a subject matter of broad application that touches upon every aspect of life in Alberta such that the POGG power cannot be used to justify the *GGPPA* without fundamentally altering the balance of Canadian federalism.

14. The UCP's intervention will not delay the proceeding or prejudice the parties. It will not add any new materials to the record, and will limit its arguments to the constitutional issues framed by the parties.

15. Given its broad membership, real and identifiable interest in outcome of the Reference, and its fresh and unique perspective on the issues, if leave to intervene is granted, the UCP will make a useful contribution to the resolution of the Reference without prejudicing the parties.

PART IV - ANSWER REQUESTED

16. The UCP respectfully requests that it be granted leave to intervene as a friend of the court, to file a factum of no more than 10 pages, and to make such oral submissions as the Panel hearing the Reference may allow. The UCP does not ask for costs and asks that costs not be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, THIS 21st DAY OF DECEMBER, 2018.

McLENNAN ROSS LLP

Per: 
Ryan Martin, Steven Dollansky, and Justine Bell
Counsel for the United Conservative Association

SCHEDULE A – AUTHORITIES CITED

CASES

1. *Peel (Regional Municipality) v. Great Atlantic and Pacific Co. of Canada Ltd.*, 74 OR (2d) 164.
2. *Reference Re Workers' Compensation Act, 1983 (Nfld)*, [1989] 2 SCR 335.
3. *Trinity Western University v. Law Society of Upper Canada*, 2014 ONSC 5541, 122 OR (3d) 553.
4. *Reference re Assisted Human Reproduction Act, Quebec (Procureur general) c. Canada (Procureur general)*, 2010 SCC 61, [2010] 3 SCR 457.

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