

**IN THE SUPREME COURT OF CANADA  
(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)**

**IN THE MATTER OF THE *GREENHOUSE GAS POLLUTION PRICING ACT, SC 2018,*  
c. 12, s. 186**

**AND IN THE MATTER OF A REFERENCE BY THE LIEUTENANT GOVERNOR IN  
COUNCIL TO THE COURT OF APPEAL FOR ALBERTA UNDER THE *JUDICATURE  
ACT, RSA 2000, C. J-2, S. 26***

BETWEEN:

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APPELLANT

-and-

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*(Style of Cause continued on next page)*

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*(Pursuant to Rule 42 of the Rules of the Supreme Court of Canada)*

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## **PART I: OVERVIEW OF POSITION AND STATEMENT OF FACTS**

1. The International Emissions Trading Association's (IETA's) members are among the only entities before this Court that *are actually regulated emitters* subject to the carbon pricing obligations imposed by the *Greenhouse Gas Pollution Pricing Act* (the **Act**) and/or equivalent provincial carbon pricing regimes. They span the mining, oil and gas, electricity, utilities, finance, trading, and manufacturing sectors within Canada and around the world. They are among the only entities before the Court that *directly experience and pay for the practical and legal effects* of the Act and the minimum national standards that it creates.

2. Nonetheless, IETA members *support the constitutional validity of the Act* (and the minimally intrusive carbon pricing system that it creates) as in relation to Parliament's trade and commerce power — *not as anathema to the economic growth and prosperity in Canada's resource sectors, but as integral to it*.

3. This factum is supplemental to IETA's factum in the Saskatchewan and Ontario appeals (Court File Nos. 38663 and 38781) and is solely focussed on the Court of Appeal of Alberta's opinion that the Act is unconstitutional.<sup>1</sup> Specifically, IETA submits that Chief Justice Fraser and Justices Watson and Hughes (the **majority**) erred in the four fundamental areas<sup>2</sup> identified by the Appellant, the Attorney General of British Columbia (**BC**), and by:

- (a) characterizing the Act in an imprecise manner that does not recognize its legal and practical effect on regulated emitters covered by the currently operating, minimal national standards for carbon pricing and trading ([para 253](#));
- (b) finding that: (i) the Act confers unconstrained discretion on the federal government to regulate essentially everything within exclusive provincial jurisdiction ([para 244](#)) and (ii) environmental choices involving greenhouse gas (**GHG**) emissions and development and management of a province's natural resources and its economy

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<sup>1</sup> [Reference re Greenhouse Gas Pollution Pricing Act](#), 2020 ABCA 74, Supplementary Record of the Intervener Attorney General of Alberta in Court File Nos. 38663 and 38781, Record 1, pp. 1-273.

<sup>2</sup> Factum of the Attorney General of British Columbia in Court File No. 39116 [**BC Factum**] at para 1.

are opposing and antithetical forces that must be balanced ([paras 113, 316, 344-345](#)); and

- (c) failing to adequately consider and grapple with the potential classification of the Act as in relation to the trade and commerce (s. 91(2)) and/or criminal law (s. 91(27)) powers.

## **PART II: POSITION ON THE APPELLANT'S QUESTION**

- 4. IETA submits that the Act, in its entirety, is *intra vires* Parliament.

## **PART III: STATEMENT OF ARGUMENT**

5. **Characterization of the Act.** IETA generally supports BC's identification of the majority's errors in characterizing the Act as set out in paras 7 through 27 of its factum. The characterization of the matter must: (a) be precise;<sup>3</sup> (b) occur before application of other constitutional doctrines;<sup>4</sup> and (c) be thorough, as it is often determinative of constitutional validity. Where the choice between competing characterization is not clear, the court should favour the characterization that supports the constitutional validity of the law.<sup>5</sup> The majority's characterization of the Act fails to respect the principles of precision and thoroughness,<sup>6</sup> and does not recognize the legal and practical effects of the Act.

6. IETA submits that the Act is, in pith and substance, a ***GHG emissions pricing and trading regime that establishes minimum national price stringency standards in order to address the systemic risk of climate change in accordance with the Paris Agreement.*** The Act facilitates nationally consistent minimum standards and provincially flexible means to achieve the end goal of reducing Canada-wide GHG emissions to address the systemic economic risks of climate change. It does so by: (i) putting a **price** on the GHG emissions associated with the delivery, use, and import of fossil fuels, and resulting from industrial emissions that exceed minimum national sectoral benchmarks and (ii) establishing a flexible compliance **trading** regime that incents GHG emission reductions from within and outside of industry, while protecting the **trade competitiveness** of industry. The Act addresses the systemic economic risks of climate change in

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<sup>3</sup> [Desgagnés Transport Inc v Wärtsilä Canada Inc](#), 2019 SCC 58 at paras 35-36.

<sup>4</sup> [Rogers Communications Inc v Châteauguay \(City\)](#), 2016 SCC 23 at paras 35-36 [**Rogers**].

<sup>5</sup> [Rogers](#) at para 82.

<sup>6</sup> See BC Factum at paras 8-9.

accordance with Canada's commitments under the Paris Agreement.

7. The essential character of the Act is evidenced by its express provisions which effect a system of pricing and trading carbon. IETA agrees with BC's submission that the Act "does not allow the federal government to determine *who* may emit GHGs or set *conditions* on how they do it: even the Part 2 backstop can always be complied with by paying money ***and is therefore just a (complex) system of pricing.***"<sup>7</sup> The Act moreover protects the trade competitiveness of regulated emitters by making accommodations for emissions-intensive and trade-exposed sectors and addressing the systemic economic risks associated with inter-provincial and international carbon leakage. IETA again agrees with BC that the "only remedies to the competitive pressures from trade within jurisdictions that have no price or a lower price for GHGs — whether a carbon duty or international agreements on minimum pricing standards — must lie with the federal government"<sup>8</sup> and that "[i]nternational carbon leakage is a matter of international trade."<sup>9</sup> The essential nature of the Act is therefore the establishment of a GHG emissions pricing and trading regime that establishes minimum national price stringency standards in order to address the systemic risk of climate change in accordance with the Paris Agreement.

8. The majority erred by failing to characterize the Act in this precise and thorough manner that recognizes its practical effects and application only in the absence of an equally stringent provincial system.

9. **Unsubstantiated Findings.** The majority made two central unsubstantiated findings that, IETA submits, wrongly contributed to its determination that the Act is unconstitutional. First, it found that the Act confers unconstrained discretion on the federal government to regulate essentially everything within exclusive provincial jurisdiction ([para 244](#)). The majority's finding appears to be that an actual, non-incidental conflict exists between the concurrent jurisdiction of the provinces to regulate property, civil rights and natural resources (and associated GHG emissions) and the jurisdiction of Parliament to price GHG emissions, and address carbon leakage and trade and competitiveness concerns by establishing minimum national carbon pricing standards.

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<sup>7</sup> BC Factum at para 21 [emphasis added].

<sup>8</sup> BC Factum at para 53.

<sup>9</sup> *Ibid* [emphasis added].



10. There is no evidence before the Court to support more than a merely incidental impact on any areas of provincial jurisdiction. Further, IETA notes that the Act and equally stringent provincial GHG pricing systems of varying design have been operating for nearly two years without giving rise to such a conflict.

11. This finding also ignores the specific context of the Act, the basic canons of statutory interpretation, and the potential for judicial review which are all relevant should the federal government exercise its discretion under the Act in a manner that has more than a merely incidental impact on provincial powers. IETA submits that any theoretical impact(s) that the Act may have on provincial jurisdiction has not been borne out and is, at best, merely incidental.

12. Second, the majority found that environmental choices involving GHG emissions and the development and management of a province's natural resources and its economy are opposing and antithetical forces that must be balanced ([paras 113, 316, 344-345](#)). The majority treats as fact that meeting environmental objectives by reducing GHG emissions must necessarily detract from or obviate developing a province's natural resources and preserving a provincial economy. There is simply no basis for this finding in evidence and, to the contrary, Ms. Sullivan's affidavit evidence supporting IETA's submissions clearly controverts such an assertion.<sup>10</sup>

13. Climate change is not only a pressing and serious environmental risk. It is a very significant, systemic business and economic risk that has resulted in the preponderance of central banks, insurance companies, pension and investment funds, and accounting standards boards around the world advocating for economy-wide carbon pricing. These systemic business and trade competitiveness risks are increasing. The European Commission recently announced a 'border carbon adjustment' to be applied to higher GHG emission goods and/or countries that do not comply with their obligations under the Paris Agreement.<sup>11</sup>

14. Carbon leakage — both inter-provincial and international — is a serious economic risk. Moreover, the evidence supports that provinces, like British Columbia, which have unilaterally implemented meaningful carbon pricing, have experienced negative trade and competitiveness

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<sup>10</sup> Motion Record of the Proposed Intervener, International Emissions Trading Association, in Court File Nos. 38663 and 38781, Tab 2, Affidavit of Kathleen Eleanor Sullivan, sworn November 5, 2019.

<sup>11</sup> European Commission, [Communication from the Commission: The European Green Deal](#), COM(2019) 640 final, December 11, 2019.

impacts that are attributed to inconsistent or non-existent carbon pricing in other provinces.<sup>12</sup>

15. It is increasingly clear that facilitating economic certainty and attracting the investment needed to “preserve” provincial economies and natural resource sectors requires the environment and the economy to go hand in hand. The evidence supports that carbon pricing constitutes the most efficient and least restrictive means to address GHG emissions, mitigate compliance cost and support sustainable investment in Canadian goods, services and exports.

16. **Classification of the Act.** IETA’s above characterization of the Act can be classified as validly in relation to Parliament’s jurisdiction over general trade and commerce as set out in s. 91(2) of the *Constitution* and further elucidated by this Court. Alternatively, IETA says that the Act can be classified as validly in relation to Parliament’s criminal law power pursuant to s. 91(27) of the *Constitution* (and adopts the submissions of the Canadian Environmental Law Association, Environmental Defence Canada Inc., and Sisters of Providence of St. Vincent de Paul concerning same). The majority, in IETA’s view, failed to adequately consider and grapple with the potential classification of the Act as in relation to the trade and commerce or criminal law powers.

17. While IETA acknowledges the court’s discretion, it strongly submits that a full and fair consideration of the classification of the Act warrants consideration of the precise matter of the Act in the context of the general trade and commerce analysis and the five indicia set out by Dickson CJ in *General Motors*, and applied by this Court in the *Securities Reference* and the *Pan-Canadian Securities Reference*<sup>13</sup>, as more fully set out in paragraphs 14 through 23 of IETA’s factum in Court File Nos. 38663 and 38781.

#### **PART IV: SUBMISSIONS CONCERNING COSTS**

18. IETA does not seek costs and requests that no costs be awarded against it.

#### **PART V: ORDER SOUGHT**

19. IETA makes no statement on the outcome of the appeals.

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<sup>12</sup> [Reference re Greenhouse Gas Pollution Pricing Act](#), 2019 SKCA 40 at para 155.

<sup>13</sup> [General Motors of Canada Ltd v City National Leasing](#), [1989] 1 SCR 641 at 661; [Reference re Securities Act](#), 2011 SCC 66 at paras 80-81; [Reference re Pan-Canadian Securities Regulation](#), 2018 SCC 48 at paras 103-104.

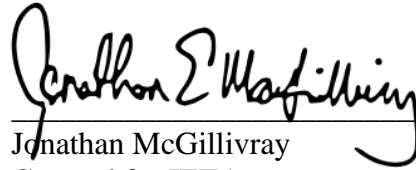
**ALL OF WHICH IS RESPECTFULLY SUBMITTED**, this 12<sup>th</sup> day of August, 2020.

**DEMARCO ALLAN LLP**

Per:

A handwritten signature in black ink, appearing to read 'Lisa DeMarco', written over a horizontal line.

Lisa (Elisabeth) DeMarco  
Counsel for IETA

A handwritten signature in black ink, appearing to read 'Jonathan McGillivray', written over a horizontal line.

Jonathan McGillivray  
Counsel for IETA

**PART VI:  
TABLE OF AUTHORITIES**

| <b>Case Law</b>          |   | <b>Cited at Paragraph(s):</b> |
|--------------------------|---|-------------------------------|
| 1.                       | <a href="#"><i>Desgagnés Transport Inc v Wärtsilä Canada Inc</i></a> , 2019 SCC 58  | 5                             |
| 2.                       | <a href="#"><i>General Motors of Canada Ltd v City National Leasing</i></a> , [1989] 1 SCR 641  | 17                            |
| 3.                       | <a href="#"><i>Reference re Greenhouse Gas Pollution Pricing Act</i></a> , 2020 ABCA 74   | 3                             |
| 4.                       | <a href="#"><i>Reference re Greenhouse Gas Pollution Pricing Act</i></a> , 2019 SKCA 40   | 14                            |
| 5.                       | <a href="#"><i>Reference re Securities Act</i></a> , 2011 SCC 66  | 17                            |
| 6.                       | <a href="#"><i>Reference re Pan-Canadian Securities Regulation</i></a> , 2018 SCC 48  | 17                            |
| 7.                       | <a href="#"><i>Rogers Communications Inc v Châteauguay (City)</i></a> , 2016 SCC 23   | 5                             |
| <b>Secondary Sources</b> |   |                               |
| 8.                       | European Commission, <a href="#">Communication from the Commission: The European Green Deal</a> , COM(2019) 640 final, December 11, 2019. | 13                            |