

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

**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
SASKATCHEWAN UNDER THE *CONSTITUTIONAL QUESTIONS ACT, 2012*, SS
2012, c. C-29.01**

BETWEEN:

ATTORNEY GENERAL OF SASKATCHEWAN

Appellant

-and-

ATTORNEY GENERAL OF CANADA

Respondent

-and-

**ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF ALBERTA,
ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL OF
MANITOBA, ATTORNEY GENERAL OF NEW BRUNSWICK, ATTORNEY
GENERAL OF QUEBEC**

Interveners

(Style of cause continued on next page)

AFFIDAVIT OF KATHLEEN ELEANOR SULLIVAN

Court File Nos. 38663 and 38781

AND:

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

**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 ONTARIO
UNDER THE *COURTS OF JUSTICE ACT*, RSO 1990, c. C.43, s. 8**

BETWEEN:

ATTORNEY GENERAL OF ONTARIO

Appellant

-and-

ATTORNEY GENERAL OF CANADA

Respondent

-and-

**ATTORNEY GENERAL OF SASKATCHEWAN, ATTORNEY GENERAL OF
ALBERTA, ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY
GENERAL OF MANITOBA, ATTORNEY GENERAL OF NEW BRUNSWICK,
ATTORNEY GENERAL OF QUEBEC**

Interveners

AFFIDAVIT OF KATHLEEN ELEANOR SULLIVAN

I, **KATHLEEN ELEANOR SULLIVAN**, of the City of Toronto, in the Province of Ontario, in my capacity as the Managing Director of International Emissions Trading Association (“**IETA**”) MAKE OATH AND SAY:

1. I am the Managing Director of IETA. I make this Affidavit for the purpose of supporting IETA’s motion for intervention in the appeals (“**Appeals**”) of the decisions of the Court of Appeal for Saskatchewan and the Court of Appeal for Ontario in the matter of the *Greenhouse Gas Pollution Pricing Act* (“**Act**”).
2. Except as otherwise indicated, I have personal knowledge of the matters to which I depose in this Affidavit. Where I lack such personal knowledge, I have indicated the source of my information and I verily believe such information to be true.

3. I began working with IETA in January 2010 and I am currently the Managing Director of IETA globally. I have previously held the positions of North America & Climate Finance Director, North America Director, and Canadian Director. Throughout the course of my employment with IETA I have worked with policy makers and business interests around the world in order to develop, negotiate, and implement many forms of carbon trading and pricing regimes that are operating to successfully result in efficient, low-cost greenhouse gas (“GHG”) reductions.

International Emissions Trading Association (IETA)

4. IETA is a long-standing, non-profit organization, taking the form of a Swiss verein, and having registered non-share capital corporation(s) in several of the jurisdictions where it is active, including Canada. IETA has over one hundred and fifty (150) Canadian and international business and industry members.
5. Many of IETA’s members are emitters that are directly regulated under the Act and/or Provincial industrial emissions and carbon pricing regimes. All of IETA’s members are committed to facilitating progressive, low-cost, market-based approaches in order to actively and meaningfully assist in addressing climate change.
6. IETA and its members are therefore both directly affected by the issues and outcomes of the Appeals, and potentially adversely affected by unstable, uncertain, and inconsistent carbon regimes.
7. IETA supports prompt and meaningful government and business action to address and respond to the important and urgent issue of climate change in a manner that may include carbon pricing. IETA is of the view that robust, least-cost approaches to carbon pricing, which are both environmentally and politically sustainable and consistent with the Constitution of Canada, should form the backbone of climate action in Canada and the Provinces. Such an approach is integral to long term business certainty and an efficient and effective approach to the many climate-related risks and opportunities that Canadian and international business organizations must now address.

Expertise and Capacity Building in Canada and Other Jurisdictions

8. IETA has been a leading Canadian and international business voice on carbon pricing and climate finance, including the design and implementation of flexible, compliance emissions

trading and offset systems for nearly two decades. Many IETA members have decades of experience and expertise in working with other jurisdictions navigating the cooperative development, implementation of, and challenges to, carbon pricing and related emission markets.

9. IETA's members are directly engaged in developing and implementing long-, medium-, and short-term business strategies and plans to address, adapt, and respond to a changing climate and the necessity of sustainable policy in furtherance of such goals. They view climate change as a significant business issue, which presents both risks and opportunities that are best addressed through a stable and meaningful policy framework. IETA members are generally supportive of carbon pricing regimes that include carbon markets and certain, stable market rules to facilitate the related capital and infrastructure investments.
10. IETA's support for market-based approaches to achieve efficient, low-cost GHG reductions is underpinned by environmental integrity and cooperation among jurisdictions. This approach facilitates business and policy certainty by incenting long-term, harmonized, least-cost solutions to addressing the pressing issue of climate change. In jurisdictions like the European Union, effective carbon trading regimes have been best achieved through coordination and cooperation among the broader regional economic integration organization and its member states, each of which have relevant jurisdiction in a manner similar to Canada and the Provinces.
11. IETA is also a leading business and industry non-governmental organization (BINGO) and a stalwart of the negotiations under United Nations Framework Convention on Climate Change ("UNFCCC") and the Paris Agreement established under the UNFCCC. In fact, an IETA member was called upon to speak on behalf of all business and industry delegations in the final UNFCCC plenary approving the *Paris Agreement* in 2015.
12. IETA also plays a significant role in education and capacity-building on carbon pricing and markets in jurisdictions around the world. IETA offers a plethora of publicly available carbon pricing documents and training resources on its website (<https://www.ieta.org/IETA-Resources>) including: market readiness training materials, insights and submissions for climate regulators and policy makers, an 'emissions trading 101' library, case studies on the world's carbon markets, and a quarterly publication of topical analysis entitled *IETA Insights*.

13. In September 2019, IETA and the World Bank-initiated Carbon Pricing Leadership Coalition¹ jointly released a report with quantitative analysis of the University of Maryland titled *The Economic Potential of Article 6 of the Paris Agreement and Implementation Challenges* (the “**Report**”) (attached as **Exhibit “A”** to this Affidavit). The Report found that effective and cooperative carbon pricing will decrease the global cost of achieving current *Paris Agreement* commitments (in the range of \$250 billion USD per year globally) and may result in significantly more global GHG reductions (in the range of 5 Gigatons CO₂e removed per year).
14. Consistent with the global findings of the Report, IETA believes that the Act results in a nationally consistent approach to setting minimal national standards for carbon pricing across Canada, while encouraging cooperation among provincially specific approaches to carbon pricing. In IETA’s experience, a consistent national carbon pricing approach that sets minimum pricing standards and provides for cooperation and trading among provincially-determined carbon pricing approaches through an overarching trading scheme is more likely to achieve cost savings for Canadian business and greater and more efficient GHG emission reductions in Canada.
15. Many jurisdictions (including, without limitation, Canada and the Provinces, the United States and respective states, the European Union, the United Kingdom, China, Brazil, Chile, Colombia, Mexico, South Korea, Morocco, and South Africa) have called upon IETA’s specialized and extensive carbon market and technical expertise to inform and facilitate policies, regulations, and legislation that deliver meaningful GHG reductions, minimize carbon leakage, address economic competitiveness concerns, and balance economic efficiencies with social equity and co-benefits.

¹ Carbon Pricing Leadership Coalition (CPLC) members include Alberta and Canada and a total of 34 national and sub-national governments, over 164 businesses from a range of sectors and regions, and upwards of 82 strategic partners representing civil society organizations, NGOs, and academic institutions that agree to advance the carbon pricing agenda by working with each other towards the long-term objective of a carbon price applied throughout the global economy. More information on CPLC’s members may be found at:

<https://www.carbonpricingleadership.org/partners>.

16. Many of these jurisdictions have navigated, and continue to navigate, jurisdictional issues similar to those being considered in the Appeals. This currently includes active involvement in: (i) the European Union in its navigation of jurisdictional issues surrounding Brexit and the integrated EU Emissions Trading System (EU ETS); (ii) California and the United States in various jurisdiction related court challenges; and (iii) China in its transition from province-led emissions trading systems to a nation-wide system. As such, IETA is a well-recognized, reputable organization with specialized expertise on the matters and issues giving rise to, and now before the Court in, these Appeals.

Experience in Other Proceedings

17. IETA has been very active on legal and policy challenges related to various carbon pricing/trading regimes in a number of jurisdictions. Its experience includes active participation:

- a. as an active intervener in the **Court of Appeal for Saskatchewan and the Court of Appeal for Ontario References on the Act**, where it participated fully by providing written and oral submissions. The Court of Appeal for Saskatchewan's order granting IETA leave to intervene before that court is attached as **Exhibit "B"** to this Affidavit. MacPherson, J.A.'s order granting IETA leave to intervene in the Court of Appeal for Ontario is attached as **Exhibit "C"** to this Affidavit.
- b. as an active intervener in Alberta's ongoing **Reference before the Court of Appeal of Alberta**. Slatter, J.A.'s reasons for decision granting IETA intervener status before the Court of Appeal of Alberta are attached as **Exhibit "D"** to this Affidavit. IETA was one of the two intervenors tasked by Slatter, J.A. to successfully develop and achieve consensus on the procedural proposal now governing the interventions of all non-Attorney General interveners.
- c. as *amicus curiae* to the **Court of Appeal of the State of California (Third Appellate District)** in the recent challenges related to California's carbon pricing system and the legal validity of its auctions as a tax or a regulatory charge in *California Chamber of Commerce v. State Air Resources Board*, decided April 6, 2017 (attached as **Exhibit "E"** to this Affidavit).

Proposed Arguments

18. If granted leave to intervene, IETA will offer the Court a globally informed, useful, and unique perspective on the validity of the Act, based on its carbon pricing expertise and experience in other carbon pricing jurisdictional challenges around the world.
19. IETA will provide the perspective of its members that are directly regulated by the Act. It will make submissions on the Act's essential GHG emission pricing and trading nature, the Act's consistency with Canada's commitments under the *Paris Agreement* (and in particular Article 6), the discretion afforded to the Court characterizing the Act, the appropriate and narrow characterization of the Act, the classification of the Act as validly in relation to the federal trade and commerce power or alternatively criminal law power (ss. 91(2) and 91(27) of the *Constitution Act, 1867*, respectively), and the important role of s. 92A of the Constitution should future issues of applicability and operability of the Act arise.
20. IETA intends to make following proposed arguments, which are further elucidated in IETA's factum recently filed in the Alberta Court of Appeal Reference on the Act (attached as Appendix "A" to IETA's Memorandum of Argument):
 - a. The Act is, in pith and substance, *a GHG emissions pricing and trading regime that establishes minimum national standards of GHG emissions price stringency in order to reduce Canada's GHG emissions in accordance with the Paris Agreement.*
 - b. The Act facilitates nationally consistent minimum standards and provincially flexible means to achieve the end goal of reducing Canada-wide GHG emissions in a cost-effective manner, while maintaining economic competitiveness. 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 sectoral benchmarks, (ii) establishing a flexible compliance trading regime that incents GHG emission reductions from within and outside of industry, while maintaining trade competitiveness, (iii) imposing prohibitions and penalties for non-compliance with key aspects of the regime that are intended to achieve the legitimate public purpose of reducing GHG emissions, their uncontroverted harms, and thereby, (iv) takes meaningful steps to address climate change and industrial competitiveness concerns in accordance with Canada's commitments under the *Paris Agreement.*

- c. There is no jurisprudence, factual basis, or interpretative convention that requires this Honourable Court to limit its discretion in characterizing the Act by considering *only* the *subject* of its application and not the *means* by which it achieves its intended purpose. Characterization of the matter of the Act is not, and should not be, an “all or nothing”, “qualitative or quantitative”, chiaroscuro exercise that limits the application of Court’s wisdom and discretion on these, and future, Appeals.
 - d. The Act, appropriately and narrowly characterized, is validly classified as in relation to the federal government’s shared jurisdiction over the environment, existing jurisdiction over trade and commerce (s. 91(2)), or criminal law power (s. 91(27)) as set out in the *Constitution Act, 1867*.
 - e. However, to the extent that the implementation of the Act in Ontario, Saskatchewan, or any other province has the effect of: (i) *sterilizing the core elements* of an expressly enumerated area of exclusive provincial jurisdiction (including those set out in s. 92A and in particular s. 92A(1)(c) of the Constitution); or (ii) unnecessarily encroaching upon a provincial carbon pricing regime of greater GHG-reducing stringency, which is validly enacted under a province’s shared jurisdiction over the environment; the Act should be interpreted in a manner that reflects the express balance of powers set out in the Constitution and the doctrines and principles used to interpret it.
21. I believe that IETA will provide the Court with unique insight, information, and perspective that will be useful to the Court in considering the issues before the Court in each of the Ontario and Saskatchewan Appeals, as well as the broader impact that the Court’s decision may have on regulated entities.
22. I swear this Affidavit in support of IETA’s motion for intervention in the Ontario and Saskatchewan Appeals and for no other or improper purpose.

SWORN before me at the City of Toronto in)
the Province of Ontario, this 5th day of)
November, 2019.)

)

)

)

)

)

)

)

)

)

)

)

)

Commissioner for Taking Affidavits

Name: Jonathan McGillivray
LSO No.: 71613F

KATHLEEN ELEANOR SULLIVAN