

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 CANADIAN TAXPAYERS FEDERATION

CANADIAN TAXPAYERS FEDERATION

Crease Harman LLP
Barristers and
Solicitors 800 – 1070
Douglas Street
Victoria, BC V8W 2C4

Per: R. Bruce E. Hallsor, Q.C.

Phone: 250-388-5421
Fax: 250-388-4294
Email: bhallsor@crease.com

**Counsel for Canadian Taxpayers
Federation**

TO:

ATTORNEY GENERAL OF CANADA

Department of Justice Canada Prairie Region (Winnipeg) 301 – 310
Broadway Winnipeg, MB R3C 0S6

**Per: Sharlene Telles-Langdon, Brooke Sittler, Mary Matthews, Neil
Goodridge, and Ned Djordjevic**

Phone: 204-983-0862
Fax: 204-984-8495
E-mail: sharlene.telles-langdon@justice.gc.ca

AND TO:
THE ATTORNEY GENERAL OF ONTARIO
Constitutional Law Branch
720 Bay Street, 4th Floor
Toronto, ON M7A 2S9
Per: Josh Hunter / Padraic Ryan / Thomas Lipton
LSO Nos.: 49037M / 61687J / 60776V
Tel.: 416-326-3840 / 416-326-0131 / 416-326-0296
Fax: 416-326-4015
E-mail: Joshua.hunter@ontario.ca
Padraic.ryan@ontario.ca
thomas.lipton@ontario.ca
Counsel for the Attorney General of Ontario

AND TO:
ATTORNEY GENERAL OF SASKATCHEWAN
Ministry of Justice (Saskatchewan)
Constitutional Law Branch
820-1874 Scarth St,
Regina, SK, S4P 4B3
Per: P. Mitch McAdam, QC, and Alan Jacobson
Phone: 306-787-7846
Fax: 306-787-9111
Email: mitch.mcadam@gov.sk.ca
Counsel for the Attorney General of Saskatchewan

AND TO:
ASSEMBLY OF FIRST NATIONS
55 Metcalfe Street, Suite 1600
Ottawa, ON K1P 6L5
Per: Stuart Wuttke and Adam Williamson
Phone: 613-241-6789
Fax: 613-241-5808
Email: swuttke@afn.ca
awilliamson@afn.ca
Counsel for Assembly of First Nations

AND TO:
ATTORNEY GENERAL OF NEW BRUNSWICK
Office of the Attorney General
Legal Services
PO Box 6000, 675 King Street, Suite 2078
Fredericton, NB E3B 5H1
Per: William E. Gould, Isabel Lavoie Daigle, and Rachelle Standing
Phone: 506-453-2222
Fax: 506-453-3275
Email: William.Gould@gnb.ca
Isabel.LavoieDaigle@gnb.ca
Rachelle.Standing@gnb.ca
Counsel for the Attorney General of New Brunswick

AND TO:
ATTORNEY GENERAL OF BRITISH COLUMBIA
British Columbia Ministry of Attorney General
Legal Services Branch
6th Floor - 1001 Douglas Street
Victoria, BC V8W 2C5
Per: J. Gareth Morley
Phone: 250-952-7644
Fax: 250-356-9154
Email: Gareth.Morley@gov.bc.ca
Counsel for the Attorney General of British Columbia
Goddard Nasser LLP
55 University Avenue, Suite 1100
Toronto, ON M5J 2H7
Per: Justin H. Nasser
LSO No.: 64173W
Phone: 647-351-7944
Fax: 647-846-7733
Email: justin@gnllp.ca
Toronto Agent for the Attorney General of British Columbia

**AND TO:
ATHABASCA CHIPEWYAN FIRST
NATION**

Ecojustice Environmental Law Clinic
at the University of Ottawa
216 – 1 Stewart Street
Ottawa, ON K1N 6N5

Per: Amir Attaran

Phone: 613-562-5800 ext. 3382

Fax: 613-562-5319

Email: aattaran@ecojustice.ca

Woodward & Company Lawyers LLP
200 – 1022 Government Street
Victoria, BC V8W 1X7

Per: Matt Hulse

Phone: 250-383-2356

Fax: 250-380-6560

Email:

mhulse@woodwardandcompany.com

**Counsel for the Athabasca Chipewyan
First Nation**

**AND TO:
CANADIAN ENVIRONMENTAL
LAW ASSOCIATION,
ENVIRONMENTAL DEFENCE
CANADA INC. and the SISTERS OF
PROVIDENCE OF ST.VINCENT DE
PAUL**

Canadian Environmental Law Association
1500 – 55 University Avenue
Toronto, ON M5J 2H7

**Per: Joseph Castrilli and
Richard Lindgren**

Phone: 416-960-2284 ex 7218

Fax: 416-960-9392

Email: castrillij@sympatico.ca

rlindgren@sympatico.ca

**Counsel for Canadian Environmental
Law Association, Environmental
Defence**

**Canada Inc., and the Sisters of
Providence of St. Vincent de Paul**

**AND TO:
CANADIAN PUBLIC HEALTH
ASSOCIATION**

Gowling WLG (Canada) LLP
1 First Canadian Place
100 King Street West, Suite 1600
Toronto, ON M5X 1G5

**Per: Jennifer King, Michael Finley,
and Liane Langstaff**

Phone: 416-862-7525

Fax: 416-862-7661

Email: jennifer.king@gowlingwlg.com

michael.finley@gowlingwlg.com

liane.langstaff@gowlingwlg.com

**Counsel for Canadian Public Health
Association**

**AND TO:
DAVID SUZUKI FOUNDATION**
Ecojustice Environmental Law Clinic
at the University of Ottawa
216 – 1 Stewart Street
Ottawa, ON K1N 6N5

**Per: Joshua Ginsberg and
Randy Christensen**

Phone: 613-562-5800 ext. 3399

Fax: 613-562-5319

Email: jginsberg@ecojustice.ca

rchristensen@ecojustice.ca

Counsel for David Suzuki Foundation

**AND TO:
CANADA'S ECOFISCAL
COMMISSION**

University of Ottawa
57 Louis Pasteur Street
Ottawa, ON K1N 6N5

Per: Stewart Elgie

Phone: 613-562-5800 ext. 1270

Fax: 613-562-5124

Email: selgie@uottawa.ca

**Counsel for Canada's Ecofiscal
Commission**

**AND TO:
ÉQUITERRE / CENTRE QUÉBÉCOIS
DU**

DROIT DE L'ENVIRONNEMENT

Michel Bélanger Avocats inc.
454, avenue Laurier Est
Montréal (Québec) H2J 1E7

Per: Marc Bishai and

David Robitaille

Phone: 514-844-4646

Facsimile: 514-844-7009

Email: marc.bishai@gmail.com

david.robitaille@uottawa.ca

**Counsel for Équiterre / Centre
québécois du droit de l'environnement
(CQDE)**

**AND TO:
INTERGENERATIONAL CLIMATE
COALITION**

Ratcliff & Company LLP
500 – 221 West Esplanade
North Vancouver, BC V7M 3J3

Per: Nathan Hume and

Emma K. Hume

Phone: 604-988-5201

Fax: 604-988-1352

Email: nhume@ratcliff.com

ehume@ratcliff.com

**Counsel for the Intergenerational
Climate Coalition**

**AND TO:
INTERNATIONAL EMISSIONS
TRADING**

ASSOCIATION

DeMarco Allan LLP
333 Bay Street, Suite 625
Toronto, ON M5H 2R2

Per: Lisa DeMarco and

Jonathan McGillivray

Phone: 647-991-1190

Fax: 1-888-734-9459

Email: lisa@demarcoallan.com

jonathan@demarcoallan.com

**Counsel for the International Emissions
Trading Association**

AND TO:

**AND TO:
UNITED CONSERVATIVE
ASSOCIATION**

McLennan Ross LLP
600 McLennan Ross Building
12220 Stony Plain Road
Edmonton, AB T5N 3Y4

Per: Steven Dollansky and

Ryan Martin

Phone: 780-492-9135

Fax: 780-733-9707

Email: sdollansky@mross.com

rmartin@mross.com

**Counsel for United Conservative
Association**

**AND TO:
UNITED CHIEFS AND COUNCILS OF
MNIDOO MNISING**

Faculty of Law, University of Ottawa

57 Louis Pasteur St.

Ottawa, ON K1N 6N5

Per: Nathalie Chalifour

LSO No. 377660

Phone: 613-562-5800, ext 3331

Fax: 613-564-5124

Email: nathalie.chalifour@uottawa.ca

Westaway Law Group

55 Murray Street, Suite 230

Ottawa, ON K1N 5M3

Per: Cynthia Westaway

LSO No. 37698V

Phone: 613-722-9091

Fax: 613-722-9097

Email: cynthia@westawaylaw.ca

Counsel for United Chiefs and Councils of Mnidoo Mnising

INDEX

I.	INTRODUCTION	1
II.	JURISDICTION	2
III.	POINTS IN ISSUE	2-3
V.	ARGUMENT	3-13
VI.	CONCLUSION AND RELIEF REQUESTED	13
VII.	AUTHORITIES	14

I. INTRODUCTION

1. The Canadian Taxpayers Federation [the CTF] is a federally incorporated, not-for-profit citizen's group dedicated to advocating for lower taxes, less waste, and more accountable government. The CTF is participating in this reference based on its concern that the federal carbon tax is unlikely to achieve its stated objective and will, instead, just be a 'tax' on the taxpayers of Ontario, despite being imposed on the taxpayers of Ontario in a manner that is contrary to section 53 of the *Constitution Act, 1867*.

Constitution Act, 1867, at s. 53.

2. The CTF intends to use its participation in this reference to advance the following two points. First, the federal carbon tax also meets the legal criteria for being designated as a 'tax'. Second, the federal carbon tax does not comply with the constitutionally-enshrined principle of "*no taxation without representation*" and, thus, the federal carbon tax is unconstitutional, at least in its application in Ontario.

3. In short, for the reasons set out herein, the federal carbon tax is a tax. However, it was not Parliament that decided that Ontario's families will be required to pay this tax (when families in various other provinces do not pay the federal carbon tax). It was not Parliament that singled out Ontario and chose to impose this tax on this province. Accordingly, the imposition of the carbon tax on Ontario violates that principle of "*no taxation without representation*". Thus, as discussed in greater detail herein, the CTF respectfully submits that the federal government's carbon tax is unconstitutional, and that the reference question in this proceeding should, therefore, be answered 'yes' (in whole).

II. JURISDICTION

4. As the Attorney General of Ontario describes in its factum, dated November 30, 2018, by Order in Council 1014/2018, the Lieutenant Governor in Council referred to this Court under section 8 of the *Court of Justice Act* the following question: of Ontario commenced this reference case by way of a Reference Order-in-Council authorized under section 2 of *The Constitutional Questions Act, 2012* on April 19, 2018; wherein the Order-in-Council posed the following sole reference question to this Court:

The Greenhouse Gas Pollution Pricing Act, Part 5 of the Budget Implementation Act, 2018, No.1, SC 2018, c.12, unconstitutional in whole or in part?.

Ontario, Order in Council 1014/2018; Greenhouse Gas Pollution Pricing Act, SC 2018, c.12, s.186

Factum of the Attorney General of Ontario dated November 30, 2018 at para. 1; *Greenhouse Gas Pollution Pricing Act, S.C. 2018, c. 12, s. 186, being Part 5 of the Budget Implementation Act, 2018, No. 1, S.C. 2018, c. 12 [GGPPA].*

III. POINTS IN ISSUE

5. The CTF submits that the carbon tax, and the *Greenhouse Gas Pollution Pricing Act, SC 2018, c. 12, s. 186*, itself, is unconstitutional for the following two, interrelated reasons, each of which will be discussed herein:

- (i) the carbon tax is a ‘tax’ rather than a regulatory charge; and

- (ii) the federal carbon tax does not adhere to the constitutional principle of ‘no taxation without representation’.

***Ontario English Catholic Teachers’ Assn. v Ontario (Attorney General)*, 2001 SCC 15, [2001] 1 SCR 470; [OECTA] at para. 69-71; *Re Eurig Estate* [1998] 2 SCR 565 [Eurig Estate], at para. 30-34.; *Constitution Act, supra* at s. 53.**

IV. ARGUMENT

(a) **The carbon tax is a ‘tax’**

6. The test for whether a levy is a tax or a regulatory charge is well-established: first, this Court must consider whether Sir Lyman Duff’s indicia of taxation are met; if so, then this Court must, next, proceed to consider *Westbank*’s two-stage analysis for determining whether the tax-like levy (here, the carbon tax) is part of a ‘relevant regulatory scheme’. In this reference, the Attorney General of Canada appears to implicitly accept, in its factum, that Sir Lyman Duff’s indicia are met.

***Eurig Estate, supra* at para. 15–16 and 22–23.; *Westbank First Nation v British Columbia Hydro and Power Authority*, [1999] 3 SCR 134 [Westbank], at para. 21–24.; *620 Connaught Ltd. v Canada (Attorney General)*, 2008 SCC 7, [2008] 1 SCR 131 [620 Connaught], at para. 22.; *Factum of the Attorney General of Canada*, dated February 08, 2019, at para. 90.**

7. Sir Lyman Duff’s indicia are clearly met: (1) the carbon tax is enforceable by law; (2) the Attorney General of Canada states that the carbon tax is authorized by Parliament; (3) the carbon tax is certainly imposed by a public body; and (4) the Attorney General of Canada states that the carbon tax is intended for a public purpose. Therefore, the focus next turns to *Westbank*’s two-stage test, wherein the initial-stage considers whether a

regulatory scheme exists and, if so, then the secondary-stage considers whether the levy is suitably connected to that regulatory scheme. The CTF's position is that the carbon tax does not satisfy either part of the two-stage *Westbank* analysis and is, thus, a 'tax'.

GGPPA, supra at s. 3 and Part I, Division 6.; Factum of the Attorney General of Canada, dated February 08, 2019, at para. 81-90 and 92-96.; Westbank, supra at para. 21 and 23-30.; 620 Connaught, supra at para. 25, 23-26, 29 and 38-39.

8. Beginning first with the initial-stage of the *Westbank* analysis, this Court must consider the following four factors:

[A] court should look for the presence of some or all of the following indicia of a regulatory scheme: (1) a complete, complex and detailed code of regulation; (2) a regulatory purpose which seeks to affect some behaviour; (3) the presence of actual or properly estimated costs of the regulation; (4) a relationship between the person being regulated and the regulation, where the person being regulated either benefits from, or causes the need for, the regulation.

620 Connaught, supra at para. 25.; see also: Westbank, supra at para. 25-30.

9. Beginning with the first initial-stage *Westbank* factor, the *GGPPA* is not a complete and detailed code of regulation, nor is it part of a complete and detailed code of regulation. Rather, the CTF submits that the carbon tax ostensibly established under the *GGPPA* is similar to the tax, and associated tax legislation, that was considered by the Supreme Court of Canada in *Reference re: Natural Gas Export Tax*. There, the Supreme

Court of Canada considered a levy on Alberta's natural gas. In its finding the levy to be a tax, the majority made the following comments about that tax's regulatory scheme:

As will be seen, there is nothing in Part IV.1 added to the Excise Tax Act, *supra*, by Bill C-57 which in any way regulates the flow of natural gas produced in Canada through interprovincial or international channels. It is not a conservation statute nor is it indeed a price regulating statute. It has nothing to do with the channels of industry into which the gas should be routed, as, for example, in replacement of electricity, coal or other sources of energy. In short, it is purely, as announced in the budget and The National Energy Program 1980 a revenue raising measure.

620 Connaught, supra at para. 25 and 30–33.; Westbank, supra at para. 25–27.; Reference re: Proposed Federal Tax on exported Natural Gas, [1982] 1 SCR 1004 [Re Exported Natural Gas] at pp. 1073–1076 (citation from p. 1073).

10. Similarly, here, the entire *GGPPA* contains nothing but rules and protocols for applying the carbon tax. In other words, the two parts of the *GGPPA* – Parts I and II – are not just two parts of a ten-part comprehensive environmental and 'green development' legislative scheme. In short, contrary to the Attorney General of Canada's suggestion, there is nothing in the *GGPPA* that makes the carbon tax part of a legislative scheme aimed at the development of more affordable green technologies.

GGPPA, supra at Parts I and II.; Factum of the Attorney General of Canada, dated February 08, 2019, at para 82.

11. Therefore, as in *Reference re: Natural Gas Export Tax*, there is no actual broader regulatory scheme in place beyond legislation aimed at the (largely delegated)

administration of carbon the tax itself. *620 Connaught* involved a levy related to Jasper National Park; that levy was related to a statutory scheme that envisioned the entire maintenance and administration of Jasper National Park (and the whole parks system).

Re Exported Natural Gas, supra at pp. 1077–1078.; 620 Connaught, supra at para 30.

12. But the *GGPPA*'s legislative scheme, limited as it is, is far more akin to the situation described in *Reference re: Natural Gas Export Tax* than it is to the situation described in *620 Connaught*. On that basis, the first initial-stage *Westbank* factor carbon tax and the *GGPPA* show the carbon tax not to be a 'regulatory charge'.

13. As to the second initial-stage *Westbank* factor, the carbon tax is only indirect in its attempt to alter behaviour. The carbon tax is simply a sales tax on fuel, no different than the GST/HST or other excise taxes that are already charged on fuel. To the extent that increased prices alter consumer behaviour, this is an indirect and imprecise effect at best, which is impossible to measure.

14. British Columbia has had a carbon tax for 10 years now, and yet the affidavit of Dr. Dominique Blain shows that in the last 10 years, BC's reduction in greenhouse gas emissions has been insignificant compared to that of Ontario, which has not had a carbon tax. The chart on page 9 of the affidavit indicates that BC decreased its GHG emissions by 5.1% while Ontario recorded a decrease of 22%. Given that the provincial emission intensity (GHGs per unit of GDP) was equal between BC and Ontario in 2012. If carbon taxes really

altered behaviour, you would expect the opposite.

Affidavit of Dr. Dominique Blain, affirmed January 25, 2019, at para 21, Exhibit A at pp. 13, Court Record Attorney General of Canada [CRC], Vol 3, Tab2.;
Affidavit of John Moffet [*Moffet Affidavit*], affirmed January 29, 2019, at Exhibit 0 at pp. 16, CRC Vol 1, Tab 1.

15. According to the affidavit of John Moffet, British Columbia has actually seen a steady increase in GHG emissions since 2012, and ‘a higher carbon price will be required to dive deeper emissions reductions in the future.’ His affidavit also notes that are significant areas of GHG’s that are not regulated by a carbon tax and that in some areas carbon taxation is simply impracticable or ineffective. This is discussed at paras. 137-143.

Moffet Affidavit, supra* at Exhibit P at pp. 6. CRC Vol 2, Tab 1.; *Moffet Affidavit, at para. 137 – 143, CRC Vol 1, Tab 1.

16. Demand inelasticity is a bar to the effectiveness of carbon price as certain activities may not respond to an increase in carbon price in an effective and timely manner unless the price is very high. Furthermore, there needs to be access to lower cost, cleaner alternatives as without such access increased carbon prices will likely lead to ‘little or no reduction in GHG regardless of the assigned carbon price.’

Moffet Affidavit, supra* at Exhibit R at pp.11, CRC Vol 2, Tab 1.; *Moffet Affidavit, at Exhibit R at pp.12, CRC Vol 2, Tab 1.

17. The theory that carbon taxes will result in consumers reducing carbon consumption is a theory, not a fact. It is probably true, but its effectiveness is impossible to accurately predict or measure, as the effect is only indirect.

18. And this leads to the third initial-stage *Westbank* factor. Because the effect of carbon taxes on GHG emissions is only indirect, it cannot be said that the tax is directly related to any broader regulatory purpose other than the collection of revenue. Thus, the third initial-stage *Westbank* factor also shows the carbon tax not to be a ‘regulatory charge’.

19. Finally, the fourth initial-stage factor considers the relationship between the ostensible regulatory scheme and the set of persons that is being made subject to the federal carbon tax; for instance, in *620 Connaught*, the regulatory scheme pertained to the maintenance and administration of Jasper National Park, and the persons being made subject to the levy were the patrons of Jasper National Park, so there was an obvious relationship.

620 Connaught, supra at paras 25 and 34–36.

20. Here, however, there is no direct and obvious relationship between the carbon tax and Ontario families. Indeed, in the instant matter, the obligation for Ontarians to pay the federal carbon tax is condition on policy choices made by their provincial government. The triggering condition for determining if Ontario residents will pay the federal carbon tax is whether the Government of Ontario adopts a policy that satisfies the Government of Canada. If it does, then an Ontario family could drive all year and heat their house all winter and not pay any federal carbon tax. But, if the Government of Ontario does not satisfy the Government of Canada, then that same Ontario family could drive all year and heat their house all winter and have to pay federal carbon tax, and maybe suffer energy poverty. Therefore, the triggering condition is not the family’s behaviour. Rather, the triggering condition is solely dependent on whether the Government of Ontario adopts a climate policy

that satisfies the Government of Canada.

GGPPA, supra at s. 17 and Schedule 1.

21. In fact, because the standards are set by regulation, it would be possible for those regulations to change every year, and for the tax to apply one year, and not the next, even though there was no change in the policy of the Ontario government. This tax can come and go at the whim of an appointed body, and there is nothing an individual can do to alter whether or not he or she has to pay it.

22. Furthermore, although a charge may be issued in relation to the conferral of a benefit; individual Ontarians clearly do not receive any direct benefit from paying this tax. Therefore, there is no direct relation between the people of Ontario and the federal carbon tax. As a result, this fourth initial-stage factor also shows the carbon tax not to be a 'regulatory charge'. Thus, the carbon tax fails the initial-stage of the *Westbank* test.

620 Connaught, supra at para. 30–37.

23. As to the secondary stage of the *Westbank* test, the CTF also submits as there is no connection between the ostensible broader regulatory purpose (even if one finds that there is one), and the carbon tax under the *GGPPA*. This is because, first, the carbon tax is not a user fee nor is it intended to defray the costs of the *GGPPA*'s ostensible regulatory scheme; unlike in *620 Connaught* (where the levy offset the costs of operating Jasper National Park) there is no evidence that the carbon tax is meant to offset some connected governmental program.

620 Connaught, supra at para. 20-21 and 38–39.; Westbank, supra at para. 28-30.

24. Second, the predominant effect of carbon tax is to generate revenue. Although it is recognized that “*the government needs to be given some reasonable leeway*”, the evidence shows that the federal carbon tax is not even vaguely calibrated toward being at a level that is rationally connected to the Government of Canada’s supposed policy aim.

620 Connaught, supra at para. 40.

25. Rather, all the federal carbon tax seems calibrated to do, at this point, it to require Ontario families to now pay more for the same quantity of an inelastic good. In short, as previously noted, taxpayers will now have to pay more tax, for the same amount of gas as before in order to get to work or for the same amount of energy to heat their homes in the winter. Thus, the predominant character – that is, the ‘pith and substance’ – of the carbon tax is that of a ‘tax’; thus, the carbon tax also fails the secondary stage of the *Westbank* test. The carbon tax is, indeed, a ‘tax’.

620 Connaught, supra at para. 16–17.; Westbank, supra at para. 30.

(b) The Carbon Tax violates section 53 of the *Constitution Act*

26. The third issue that the CTF addresses in this reference builds on the CTF’s second issue, above. Because the federal carbon tax is a ‘tax’, the implementation of the federal carbon tax must comply with section 53 of the *Constitution Act*. The CTF respectfully submits that the implementation of the federal carbon tax does not comply with section 53 of

the *Constitution Act*, and therefore the federal carbon tax is unconstitutional. With regard to this issue, the CTF respectfully adopts the submission of the Attorney General of Ontario on this point, particularly at paragraphs 102 to 108 of the Attorney General’s factum, dated November 30, 2018. However, since the CTF views section 53 as primarily protecting the taxpaying public (rather than government), the CTF will add a few contextual comments. In particular, while Parliament is certainly able to explicitly delegate the details and mechanism of a tax; the CTF agrees with and adopts the Attorney General of Ontario submission that “*the Supreme Court has articulated a unified test for determining whether a charge that has not been “expressly and unambiguously” authorized by Parliament or a provincial legislature as a tax is constitutional.*”

Eurig Estate, supra at para. 30.; Constitution Act at s. 53.; Factum of the Attorney General of Ontario, dated November 30, 2018, at para. 103.

27. The crucial starting point is the recognition that section 53 enshrines the constitutional principle of ‘*no taxation without representation*’. The principle of ‘*no taxation without representation*’ means that only elected representatives have “*the right to decide to the last cent what money is to be granted and what taxes are to be imposed*”. Thus, the Governor General in Council cannot impose a tax on a given section of the populace without Parliament authorizing that imposition. This principle is central to our conception of democracy and dates back all the way to the 1688 *Bill of Rights*. Indeed, the principle of ‘*no taxation without representation*’ is “*a constitutional imperative that is enforceable by the courts*”.

OECTA, supra at para. 69-71.; Eurig Estate, supra at para. 30-34; Constitution Act at s. 53.

28. Why is the principle of ‘*no taxation without representation*’ so important? Because “*the power to tax involves the power to destroy*”; for instance, as noted above, the federal carbon tax could consign numerous Ontario families into energy poverty. Thus, the imposition of this destructive power upon the public must be carefully crafted and considered. Clearly then, in a democratic society, only our elected representatives should have the authority to impose the destructive power of taxation upon a given section of the populace.

Westbank, supra at para. 17.; Reference re: Goods and Services Tax (GST), [1992] 2 SCR 445, at p. 497.

29. However, that is the absolute opposite of what is occurred here with the federal carbon tax; for example, consider section 26 of the *GGPPA*:

Subject to this Part, a prescribed person, a person of a prescribed class or a person meeting prescribed conditions must pay to Her Majesty in right of Canada a charge in respect of a type of fuel or combustible waste in the amount determined in prescribed manner if prescribed circumstances exist or prescribed conditions are met. The charge becomes payable at the prescribed time. [Emphasis added]

30. Contrary to the Attorney General of Ontario’s meritorious submission that the ‘valid tax requires Parliament’s clear and unambiguous authorization of taxation’; here, nearly every detail about the tax is set other than by Parliament. Even the very decision whether or not to impose the federal carbon tax on Ontario families is not made by

Parliament. Thus, the decision whether or not to impose the destructive power of taxation on the people of Ontario (and thus risk subjecting some of the public to energy poverty) is not one that was truly democratically made. That, respectfully, violates section 53 of the *Constitution Act*.

Factum of Attorney General of Ontario, as signed on November 30, 2018, at para. 112.

VI. CONCLUSION AND RELIEF REQUESTED

31. In conclusion, the federal carbon tax's predominant character is that of a tax and, indeed, the carbon tax is a 'tax'. Furthermore, the implementation of the federal carbon tax, against the people of Ontario, violates section 53 of the *Constitution Act*. On that basis, the CTF respectfully submits that this Court should answer the sole reference question in this matter as follows: "*yes, the GGPPA is unconstitutional, in whole*"

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at the City of Victoria, in the Province of British Columbia, this the 25th day of February, 2019.

CREASE HARMAN LLP

Per: _____

Emma R. Grolla on behalf of R. Bruce E.

Hallsor, Q.C., Solicitor for the Intervener,

Canadian Taxpayers Federation

VII. AUTHORITIES

Cases

620 Connaught Ltd. v Canada (Attorney General), 2008 SCC 7, [2008] 1 SCR 131.

[Joint Book of Authorities, Vol. 1, Tab 1]

Ontario English Catholic Teachers' Assn. v Ontario (Attorney General), 2001 SCC 15, [2001] 1 SCR 470.

[Joint Book of Authorities, Vol. 2, Tab 33]

Reference re: Goods and Services Tax, (GST), [1992] 2 SCR 445.

[Joint Book of Authorities, Vol. 3, Tab 47]

Reference re: Proposed Federal Tax on exported Natural Gas, [1982] 1 SCR 1004.

[Joint Book of Authorities, Vol. 3, Tab 42]

Eurig Estate (Re), [1998] 2 SCR 565.

[Joint Book of Authorities, Vol. 1, Tab 19]

Westbank First Nation v British Columbia Hydro and Power Authority, [1999] 3 SCR 134.

[Joint Book of Authorities, Vol. 4, Tab 56]

Statutes

Constitution Act, 1867, 30 & 31 Victoria, c. 3 (U.K.) at s. 53

[Factum Attorney General of Ontario Schedule B Tab 1]

Greenhouse Gas Pollution Pricing Act, S.C. 2018, c. 12, s. 186, being Part 5 of the *Budget Implementation Act, 2018, No. 1*, S.C. 2018, c. 12

[Factum Attorney General of Ontario Schedule B Tab 2]

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

PROCEEDING COMMENCED AT TORONTO

**FACTUM OF THE CANADIAN
TAXPAYERS FEDERATION**

CREASE HARMAN LLP

Barristers and Solicitors
800-1070 Douglas Street
Victoria, British Columbia
V8W 2C4

**Lawyer in Charge of File: R. Bruce E.
Hallsor, Q.C.**

Telephone: (250) 388-5421

Fax: (250) 388-4294

Email address: hallsor@crease.com

Counsel for the Canadian Taxpayers
Federation