

**S.C.C. FILE NO. 38781**

**(IN THE SUPREME COURT OF CANADA)**  
**(ON APPEAL FROM COURT OF APPEAL OF ONTARIO AND COURT OF APPEAL**  
**OF 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 ONTARIO UNDER THE *COURTS OF***  
***JUSTICE ACT*, RSO 1990, c. C. 43, s. 8**

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**FACTUM OF THE INTERVENER CANADIAN TAXPAYERS FEDERATION**  
(Pursuant to Rule 42 of the Rules of the *Supreme Court of Canada*)

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**S.C.C. File No. 38663**

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## PART I – OVERVIEW AND FACTS

1. Both of the appeals before the Court are concerned with whether the federal legislation, The *Greenhouse Gas Pollution Pricing Act*, (the “GGPPA” or “Act”)<sup>1</sup>, that regulates Provincial greenhouse gas (GHG) emissions is constitutional in whole or in part.
2. It is the position of the Intervenor the Canadian Taxpayers Federation (the “CTF”) that the GGPPA is wholly unconstitutional.
3. The CTF intervenes in these appeals following notices of intention to intervene in relation to a constitutional question filed on November 4, 2019.
4. The CTF relies on the statements of facts in the Court’s files.

## PART II – QUESTIONS IN ISSUE

5. In its notices of constitutional question submitted to the Court the appellant, the Attorney General for Saskatchewan (file # 38663), formulated the following questions:
  1. Is the *Greenhouse Gas Pollution Pricing Act* unconstitutional in whole or in part?
  2. In particular, does Parliament have jurisdiction to establish minimum national standards for price stringency for greenhouse gas emissions under the national concern branch of the peace, order and good government power set out in the opening words of section 91 of the *Constitution Act, 1867*<sup>2</sup>?
6. In its notices of constitutional question submitted to the Court the appellant, the Attorney General for Ontario (file # 38781), formulated the following questions:
  1. Whether the Court of Appeal for Ontario erred in finding that Parts 1 and 2 of the *Greenhouse Gas Pollution Pricing Act* are a valid exercise of the national concern branch of the peace, order and good government power set out in the opening words of s 91 of the *Constitution Act, 1867*; and
  2. Whether the Court of Appeal for Ontario erred in finding that the charges imposed by the *Greenhouse Gas Pollution Pricing Act* comply with s 53 of the *Constitution Act, 1867*.

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<sup>1</sup> *Greenhouse Gas Pollution Pricing Act*, SC 2018, c.12, s 186.

<sup>2</sup> *Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.) (the “*Constitution Act, 1867*”)



7. With the above questions in mind the CTF wants to put forward the following two interrelated arguments that the *GGPPA*, itself, is wholly unconstitutional:

A. The CTF’s first concern and position is that the *GGPPA* is in fact a tax, and not a regulatory charge as was found by the majority judgement in both Courts below. The CTF will make submissions that the *GGPPA* satisfies the test for whether a levy is a tax under the Sir Lyman Duff’s indicia of taxation and, at the same time it does not satisfy either of the two stages of the *Westbank* test, as outlined by this Court, and therefore it is a tax.

B. The the federal carbon tax does not adhere to the constitutional principle of ‘*no taxation without representation*’ and Parliament has not delegated its power to tax in the proper manner. Therefore, the CTF will respectfully submit that the *GGPPA* is unconstitutional and violates the *Constitution Act*, 1867.

### **PART III – STATEMENT OF ARGUMENT**

#### **A. The Carbon Tax under the *GGPPA* is a Tax, not a Regulatory Charge**

8. The CTF disagrees with the assessment of both majority decisions that the *GGPPA* is a regulatory charge and not a tax.

9. The CTF agrees with the Saskatchewan minority that found the charges under *GGPPA* Part 1 to be a tax<sup>3</sup> and clearly do not meet the test of a regulatory charge under the *Westbank* test.<sup>4</sup>

10. The CTF submits that Part 1 of the *GGPPA* is a tax as defined by Sir Lyman Duff and does not meet any of the *Westbank* factors for determining whether a tax-like levy is part of a relevant regulatory scheme.<sup>5</sup>

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<sup>3</sup> *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40 (the “Saskatchewan Reference”) at para 346.

<sup>4</sup> Saskatchewan Reference at para 316.

<sup>5</sup> As cited in *Eurig Estate (Re)*, [1998] 2 SCR 565 [*Eurig Estate*] at paras 15–16, 22–23; *Westbank First Nation v British Columbia Hydro and Power Authority*, [1999] 3 SCR 134 [*Westbank*] at paras 21– 24; *620 Connaught Ltd. v Canada (Attorney General)*, 2008 SCC 7, [2008] 1 SCR 131 [*620Connaught*] at para 22.

11. In both in both Courts below, the Attorney General of Canada appeared to implicitly accept, in its factum, that Sir Lyman Duff’s indicia are met because the AG of Canada agrees:

- (1) the carbon tax is enforceable by law<sup>6</sup>;
- (2) the carbon tax is authorized by Parliament;
- (3) the carbon tax is imposed by a public body<sup>7</sup>; and
- (4) the carbon tax is intended for a public purpose.

12. Therefore, the focus turns to *Westbank*’s two-stage test<sup>8</sup>, 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.<sup>9</sup> The CTF’s position is that the *GGPPA* does not satisfy either part of the two-stage *Westbank* analysis and is, thus, a ‘tax’.

13. At the initial-stage of the *Westbank* analysis, the following four factors should be considered<sup>10</sup>:

[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.

14. The *GGPPA* is not a complete and detailed code of regulation, nor is it part of a complete and detailed code of regulation. Instead, the carbon tax is only a tax, and associated tax legislation, like the tax that was considered by this Court in *Reference re: Natural Gas Export Tax*<sup>11</sup>. There, this Court considered a levy on Alberta’s natural gas, which the Dominion claimed has a regulatory

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<sup>6</sup> *GGPPA* at Part I, Division 6.

<sup>7</sup> Tellingly, the Minister responsible for imposing and administering the carbon tax is the Minister of National Revenue: *GGPPA* at s. 3.

<sup>8</sup> *Westbank* at paras 23–30; *620 Connaught* at paras 23–26, 29.

<sup>9</sup> *620 Connaught* at paras 25, 38–39.

<sup>10</sup> *620 Connaught* at para 25; see also: *Westbank* at paras 25–30.

<sup>11</sup> *620 Connaught* at paras 25, 30–33; *Westbank* at paras 25–27; *Reference re: Proposed Federal Tax on exported Natural Gas*, [1982] 1 SCR 1004 [*Re Exported Natural Gas*] at pp. 1073–1076.

charge aimed at regulating energy. In its finding the levy to be a tax, the majority made the following comments about that tax's regulatory scheme<sup>12</sup>:

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.

15. Similarly, here, the entire *GGPPA* contains nothing but rules and protocols for applying the carbon tax<sup>13</sup>. 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, 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.

16. As in *Reference re: Natural Gas Export Tax*, there is no broader regulatory scheme in place beyond the (largely delegated) administration of the carbon tax itself.<sup>14</sup> *620 Connaught* is an example of when a tax may be part of a regulatory scheme. There, the levy was raised within the Jasper National park to raise money for the maintenance and administration of Jasper National Park.<sup>15</sup>

17. 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'.

18. As to the second initial-stage *Westbank* factor, the regulatory purpose must seek to affect some behaviour, 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

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<sup>12</sup> *Re Exported Natural Gas* at pp. 1073–1076 (citation from p. 1073).

<sup>13</sup> *GGPPA* at Parts I and II.

<sup>14</sup> *Re Exported Natural Gas* at pp. 1077–1078.

<sup>15</sup> *620 Connaught* at para 30.

and imprecise effect at best, which is impossible to measure. The Saskatchewan minority pointed out that the “Record of the Attorney General of Canada acknowledges that carbon pricing policies ‘are not automatically environmentally effective.’”<sup>16</sup> The Saskatchewan minority further noted that the purpose of discouraging behavior is not achieved by the legislation “at the outset and no one seems to be able to say when it will.”<sup>17</sup>

19. British Columbia has had a carbon tax for 10 years now, and yet the affidavit of Dr. Mark Bigland-Pritchard 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 25 indicates that BC decreased its GHG emissions by around 5% while Ontario recorded a decrease of around 22%<sup>18</sup>.

20. 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 drive 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. 135-140<sup>19</sup>.

21. 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.”<sup>20</sup>

22. The theory that carbon taxes will result in consumers reducing carbon consumption is a theory, not a fact. The effectiveness is impossible to accurately predict or measure, as the effect

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<sup>16</sup> Saskatchewan Reference at para 314.

<sup>17</sup> Saskatchewan Reference at para. 315.

<sup>18</sup> Affidavit of *Dr. Mark Bigland-Pritchard*, Sworn December 17, 2018, Appendix 2 at pp. 25 [Record of the Appellant] (the “ROA”) Vol 10, pp 194; Affidavit of John Moffet [*Moffet Affidavit*], sworn October 25, 2018, at Exhibit N at pp. 16 [ROA] Vol 3, Tab pp 151.

<sup>19</sup> *Moffet Affidavit, supra* at para. 135 – 140 and Exhibit O at pp. 6, [ROA] Vol 4 pp. 7.

<sup>20</sup> *Moffet Affidavit, supra* at Exhibit O at pp.11, [ROA] Vol 4 pp. 12; *Moffet Affidavit*, at Exhibit O at pp.12, [ROA] Vol 4 pp. 13.

is only indirect.

23. The third initial-stage *Westbank* factor looks at identifying the presence of a proper estimation of its costs. The CTF agrees with the Saskatchewan minority that concluded “This criterion is not satisfied by Part 1. The evidence before the Court does not demonstrate that the fuel levy forms a nexus with any regulatory costs so as to bring it within the type of regulatory charge contemplated in *Allard Contractors Ltd. v Coquitlam (District)*, [1993] 4 SCR 371 [*Allard*], or in *Ontario Home Builders*.”<sup>21</sup>

24. 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 business owners within Jasper National Park, so there was an obvious relationship.<sup>22</sup>

25. Here, however, there is no direct and obvious relationship between the carbon tax and families living in the respective provinces. Indeed, in the instant matter, the obligation for families to pay the federal carbon tax is condition on policy choices made by their provincial government. The triggering condition for determining if residents will pay the federal carbon tax is whether the Government of the Province adopts a policy that satisfies the Government of Canada. If it does, then families could drive all year and heat their house all winter and not pay any federal carbon tax. But, if the Provincial Government does not satisfy the Government of Canada, then that same 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 Provincial Government adopts a climate policy that satisfies the Government of Canada.

26. 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 Provincial Government. This tax can come and go at the

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<sup>21</sup> Saskatchewan Reference at para 319.

<sup>22</sup> *620 Connaught*, *supra* at paras 25 and 34–36.

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.

27. Furthermore, although a charge may be issued in relation to the conferral of a benefit; individual residents of a Province clearly do not receive any direct benefit from paying this tax. The Saskatchewan minority also concluded there is no indication “that the persons who are subject to the direct payment of the fuel levy will benefit from any of the *regulation* provided under Part 1.”<sup>23</sup> Therefore, there is no direct relation between the people of a Province 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<sup>24</sup>.

28. As to the secondary stage of the *Westbank* test<sup>25</sup>, 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 was also contemplated by the Saskatchewan minority when contemplating whether Part 1 of the *GGPPA* meets the second stage of the *Westbank* criteria.

29. The predominant effect of carbon tax is not to affect behavior, but to generate revenue. Although it is recognized that “*the government needs to be given some reasonable leeway*”<sup>26</sup>, 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.

30. Rather, all the federal carbon tax seems calibrated to do, at this point, it to require families to now pay more for the same quantity of an inelastic good. In short, 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.

31. The *GGPPA* does not provide under s.165 where the collected revenue from the tax should be spent or deposited. Under s.165(2) the Minister may distribute the net amount:

(a) to the province;

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<sup>23</sup> Saskatchewan Reference para 308.

<sup>24</sup> *620 Connaught, supra* at para. 30–37.

<sup>25</sup> *620 Connaught* at paras 38–39; *Westbank* at paras 28–30.

<sup>26</sup> *620 Connaught* at para 40.

(b) to persons that are prescribed persons, persons of a prescribed class or persons meeting prescribed conditions; or

(c) to a combination of the persons referred to in paragraphs (a) and (b).

32. The federal government can decide where the money collected by the levy is placed and spent within the province. It can select a single group of people, or simply let the Provincial government decide where the funds are allocated within the Province. There is no nexus between the tax collected and the members of the public in each province who are forced to pay the tax, nor does it have to be spent on greenhouse gas prevention schemes or project.

33. The predominant character – that is, the ‘pith and substance’<sup>27</sup> – 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’.

#### **B. The Carbon Tax violates section 53 of the *Constitution Act***

34. The second issue that the CTF addresses in these appeals, builds on the CTF’s first issue. Because the federal carbon tax is a ‘tax’, the implementation it 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*, 1867, and therefore the federal carbon tax is unconstitutional.

35. The CTF agrees and respectfully adopts the position of the minority in Saskatchewan Reference that there are three key issues with the *GGPPA* and the validity of the Act under s.53 of the *Constitution Act*, 1867. Firstly, that the act fails to set an express and unambiguous delegation of Parliament’s taxing authority.<sup>28</sup> Secondly, the overbreadth of the delegation of legislative power and thirdly the back-stop feature of the *GGPPA* that offends the principle of uniformity of federal taxation.

36. The *GGPPA* contains no express statement as to the intention of the Parliament to delegate its taxing authority to any other branch of government. However, the *GGPPA* affords a large

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<sup>27</sup> 620 *Connaught* at paras 16–17; *Westbank* at para 30.

<sup>28</sup> *Eurig Estate* at para 88 and 92; *Ontario English Catholic Teachers’ Assn. v Ontario (Attorney General)*, 2001 SCC 15, [2001] 1 SCR 470 [*OECTA*] at para 74-75 and 77-79.

discretion to the executive branch of the government under s.166 (4), allowing the executive to amend the terms of the Act without the legislative power of the Parliament.

37. This is a clear violation of the principle of ‘no taxation without representation’<sup>29</sup> and offends the requirements for delegation of taxation power by Parliament as clearly outlined in *OECTA*. The *GGPPA* is therefore invalid as it lacks an ‘express and unambiguous’<sup>30</sup> intention of Parliament to delegate its taxing authority as required by s. 53 of the *Constitution Act, 1867*.

38. With regard to the second issue of overbreadth of the delegation of legislative power the CTF submits that the *GGPPA* confers unprecedented breath of amendment power to the executive branch. As was noted by the Saskatchewan minority “most of the critical features of the fuel levy under Part 1, including just about every definition under s. 3, are open-ended, subject to qualifying statements that permit the executive branch of government to change the very nature of the levy”<sup>31</sup> for example, consider section 26 of the *GGPPA*<sup>32</sup>:

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]

39. Nearly every detail about the *GGPPA* charge is set other than by Parliament. Even the very decision whether or not to impose the federal carbon tax on Provinces is not made by Parliament. Thus, the decision whether or not to impose the destructive power of taxation on the Province is not one that was truly democratically made. That, respectfully, violates section 53 of the *Constitution Act, 1867*.

40. Lastly the CTF agrees and adopts the argument of the Attorney General of Ontario as stated in its factum at paragraph 124 and 125 and in conjunction with the Saskatchewan minority

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<sup>29</sup> *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, 2007 SCC 1 [*Kingstreet*] at paras 14–15; *OECTA* at paras 69-71; *Eurig Estate* at paras 30-34; *Constitution Act* at s. 53.

<sup>30</sup> *OECTA* at para 74.

<sup>31</sup> Saskatchewan Reference at para 365.

<sup>32</sup> *GGPPA* at s. 26.

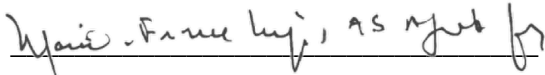


judgement that the *GGPPA* Part 1 offends the principle of uniformity of federal taxation, which requires federal legislation to apply in the same way to all Canadians. The *GGPPA* Part 1 allows for the executive branch of the federal government to impose the tax on a single Province if it chooses to do so. This is a clear violation of the principles enshrined in our Constitution and the ideals that underpin s. 53 of the *Constitution Act*, 1867.

#### **PART IV – COSTS**

41. Canadian Taxpayers Federation does not seek costs and requests that no costs be awarded against it.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**, this 24th day of January, 2020.



R. Bruce E. Hallsor, Q.C.

## PART VI – TABLE OF AUTHORITIES

Authorities	Cited at Paragraph No.
<a href="#"><i>620 Connaught Ltd. v Canada (Attorney General)</i></a> , 2008 SCC 7, [2008] 1 SCR 131.	10, 11, 12, 13, 14, 16, 24, 27, 28, 29, 33
<a href="#"><i>Eurig Estate (Re)</i></a> , [1998] 2 SCR 565.	10, 35
<a href="#"><i>Kingstreet Investments Ltd. v. New Brunswick (Finance)</i></a> , 2007 SCC 1	37
<a href="#"><i>Ontario English Catholic Teachers' Assn. v Ontario (Attorney General)</i></a> , 2001 SCC 15, [2001] 1 SCR 470.	35, 37
<a href="#"><i>Reference re: Proposed Federal Tax on exported Natural Gas</i></a> , [1982] 1 SCR 1004.	14, 16
<a href="#"><i>Reference re Greenhouse Gas Pollution Pricing Act</i></a> , 2019 SKCA 40	9, 18, 23, 27, 38,
<a href="#"><i>Westbank First Nation v British Columbia Hydro and Power Authority</i></a> , [1999] 3 SCR 134	10, 12, 13, 14, 28, 33, 37
Legislation	Cited at Paragraph No.
<a href="#"><i>Constitution Act, 1867</i></a> , 30 & 31 Victoria, c. 3 (U.K.) at s. 53	5, 6, 7, 34, 35, 37, 39, 40
<a href="#"><i>Greenhouse Gas Pollution Pricing Act</i></a> , S.C. 2018, c. 12, s. 186, being Part 5 of the <i>Budget Implementation Act</i> , 2018, No. 1, S.C. 2018, c. 12	1, 11, 15, 31