

**COURT OF APPEAL OF ALBERTA**

COURT OF APPEAL FILE NUMBER: 1903-0157-AC

REGISTRY OFFICE: Edmonton



IN THE MATTER OF THE *GREEN HOUSE*  
*GAS POLLUTION PRICING ACT*, SC 2018 c.12

AND

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

DOCUMENT: **FACTUM**

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**FACTUM OF THE INTERVENOR CANADIAN TAXPAYERS FEDERATION**

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## I. OVERVIEW

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.<sup>1</sup> 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 Alberta, despite being imposed on the taxpayers of Alberta in a manner that is contrary to section 53 of the *Constitution Act, 1867*.<sup>2</sup>
2. The CTF intends to use its participation in this reference to advance the following three points. First, carbon taxes are more effective at collecting tax revenue than they are at altering consumer demand for energy goods, thus, the predominant real-world character of the federal carbon tax is that of a 'tax'. Second, the federal carbon tax also meets the legal criteria for being designated as a 'tax'. Third, 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 Alberta.
3. In short, for the reasons set out herein, the federal carbon tax is a tax. However, it was not Parliament that decided that Alberta's families will be required to pay this tax. It was not Parliament that singled out Alberta and chose to impose this tax on this province. Accordingly, the imposition of the carbon tax on Alberta 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).

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<sup>1</sup> Affidavit of Aaron Wudrick, affirmed October 28, 2019 [Wudrick Affidavit] at paras 3-5.

<sup>2</sup> *Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.) at s. 53 [*Constitution Act*], Canadian Taxpayers Federation Book of Authorities ("CTFBA") Vol. 1, Tab 8.

## II. FACTS

4. The fact that the energy needs of hard-working families “require[s] a level of affordability if we are to experience the full benefits of our modern lifestyles”<sup>3</sup>. Notably, low-income families are most likely to suffer from energy poverty, as low-income individuals tend to spend a relatively higher portions of their incomes on energy.<sup>4</sup> As a result, increases to the price of energy products “can have an effect on discretionary income and the consumption of other goods”.<sup>5</sup> This means that “[p]olicies that raise prices could exacerbate problems faced by families who are in energy poverty or those on the cusp of energy poverty”.<sup>6</sup>

5. The consequence is that

“[l]ower-income households bear the disproportionate brunt of carbon taxes that are levied on transportation fuel, electricity generation and residential heating. These energy costs represent a larger share of expenses for lower-income households, making the tax especially regressive”<sup>7</sup>.

6. A large part of the variance in energy prices between jurisdictions “comes from wide variances in the taxes that governments choose to levy on energy goods”.<sup>8</sup> So, a carbon tax will increase the costs of these essential energy goods, and will thus drive even more Alberta families closer to, or further into, energy poverty. This is particularly troubling due to the fact that

“Alberta’s incidence of energy poverty was in the middle of Canadian regions, with their 2013 estimate being 6.8%. The increase in energy poverty of 21.2% from 2010 in Alberta was the second highest in Canada in this period, behind only Quebec.”<sup>9</sup>

7. The difficulty is that the carbon tax targets household essentials (like a family’s ability to heat their home in the winter). Again, Alberta’s working families have no choice but to

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<sup>3</sup> Wudrick Affidavit at Exhibit B, p. 1.

<sup>4</sup> Wudrick Affidavit at Exhibit B, p. 18.

<sup>5</sup> Wudrick Affidavit at Exhibit B, p. 11.

<sup>6</sup> Wudrick Affidavit at Exhibit B, p. 20.

<sup>7</sup> Wudrick Affidavit at Exhibit F, p. 7.

<sup>8</sup> Wudrick Affidavit at Exhibit B, p. 2.

<sup>9</sup> Wudrick Affidavit at Exhibit B, p. 16

heat their homes in the winter, or to consume fuel in their farming operations, in their small businesses, or on their way to work. So, at least for the foreseeable future, they will continue to need to consume energy products. The only real consequence of the carbon tax will be that Alberta's families will now need to pay more to travel, farm, work et cetera.

8. As to the first point, as many economic reports, including the Fraser Institute's peer-reviewed<sup>10</sup> publication<sup>11</sup>, indicate: demand for gasoline and other energy products (including gasoline, electricity, natural gas, and so on) is inelastic. That is to say that the price of these energy goods may rise and fall considerably over time, but the demand curve is almost never significantly affected by even dramatic rises and falls in the price of energy.<sup>12</sup>
9. This "means that price changes tend to have a small impact on the quantity consumed".<sup>13</sup> That is because energy goods such as gasoline are inelastic, so changes in energy prices, including due the carbon tax, have little influence on demand for the products.<sup>14</sup>
10. Indeed, even the United States Energy Information Administration (EIA) has observed that variances in gasoline prices have little effect on demand for gasoline consumption.<sup>15</sup> Specifically, the data shows that the

"price elasticity of motor gasoline is currently estimated to be in the range of -0.02 to -0.04 in the short term, meaning it takes a 25% to 50% decrease in the price of gasoline to raise automobile travel 1%"

(or, presumably, going the other way, it would take a 25% to 50% increase in the price of gasoline to decrease gasoline-powered automobile travel by 1%)".<sup>16</sup>

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<sup>10</sup> Wudrick Affidavit at Exhibit B, p. 37.

<sup>11</sup> Wudrick Affidavit at para 9 and Exhibit B.

<sup>12</sup> Wudrick Affidavit at paras 7-16 and Exhibit B, p. 11.

<sup>13</sup> Wudrick Affidavit at Exhibit B, p. 11.

<sup>14</sup> Wudrick Affidavit at Exhibit C, p. 1.

<sup>15</sup> Wudrick Affidavit at para 10 and Exhibit C.

<sup>16</sup> Wudrick Affidavit at Exhibit C, p. 1.



11. The carbon tax in British Columbia (BC) is illustrative; it was introduced in 2008 and it demonstrates the ineffectiveness of carbon taxes in Canada.<sup>17</sup> Several analyses have concluded that BC's carbon tax has had little impact on BC's carbon emissions.<sup>18</sup> Simply put, families still need to heat their homes, farmers still need to run their farms, small business still need to operate, and their employees still need to travel to work.
12. For instance, the Sierra Club's analysis demonstrates that BC's carbon emissions have continued to grow since the implementation of the tax, and by some measures at an accelerated pace over the pre-implementation period.<sup>19</sup> Indeed, the Sierra Club noted that BC's own provincial numbers show that in 2015, emissions were 63.3 million tonnes of carbon dioxide; more 1.6 per cent higher than in 2014, 4.5 per cent higher than in 2012, and only 2.1 per cent lower than the baseline year of 2007.<sup>20</sup>
13. As a result, the Sierra Club concluded that the "[t]en years after the previous government legislated the target to reduce emissions by 33 per cent from 2007 levels by 2020 we are essentially in the same place we started".<sup>21</sup> In other words, although the carbon tax had a negative impact on the household budget of working families, it had no discernable impact on their energy consumption, due to the inelasticity of these essential energy products.
14. Similarly, the Food & Water Watch, a Washington D.C.-based think tank, also produced a report on this point. That latter report examined BC's carbon tax and concluded that the carbon tax was ineffective in reducing emissions;<sup>22</sup> specifically, "British Columbia's carbon tax has failed to change the province's long-term greenhouse gas emissions trends or to reduce gasoline sales".<sup>23</sup>

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<sup>17</sup> Wudrick Affidavit at paras. 11–12.

<sup>18</sup> Wudrick Affidavit at Exhibit D & F.

<sup>19</sup> Wudrick Affidavit at para 11 and Exhibits D & E.

<sup>20</sup> Wudrick Affidavit at Exhibit D, p. 1.

<sup>21</sup> Wudrick Affidavit at Exhibit D, p. 2.

<sup>22</sup> Wudrick Affidavit at para 12 and Exhibit F.

<sup>23</sup> Wudrick Affidavit at Exhibit F, p. 9.

15. In fact, the report observed that the straightforward data assessment demonstrates that the BC carbon tax has not had a long-term impact on greenhouse gas emissions or gasoline consumption trends, since both have resumed their rise after a brief decline<sup>24</sup>.

Furthermore,

“[n]ot only do the pro-carbon tax studies fail to establish a causal link between the application of the carbon tax and the short-term declines in emissions and vehicle fuel sales, but also many of the studies have methodological flaws that further overstate the purported benefits of the carbon tax”<sup>25</sup>.

16. As a result of its analysis of BC’s carbon tax regime, the report further concluded that “carbon taxes are not a viable policy solution to climate change”,<sup>26</sup> and that “[c]arbon tax proponents have significantly overstated the purported beneficial effects of the British Columbia carbon tax”.<sup>27</sup> Ultimately, the report found that “the British Columbia carbon tax has had no beneficial long-term impact on greenhouse gas emissions”.<sup>28</sup>

17. In fact, the report observed that – despite the carbon tax – “British Columbia projects that total greenhouse gas emissions will increase over coming years even with the tax in place”<sup>29</sup>, and the report predicted that “[a]s the economy continues to improve, it seems likely that British Columbia greenhouse gas emissions will continue to rise”<sup>30</sup>. Thus, the carbon tax did not significantly alter demand in BC, and it will not alter demand in Alberta.

18. However, those who are left behind by the economy, such as low-income working families<sup>31</sup>, will experience worsening energy poverty. While one concern is the effect that high energy costs have on working families’ household budgets, energy poverty can also have negative health effects.

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<sup>24</sup> Wudrick Affidavit at Exhibit F, p. 6.

<sup>25</sup> Wudrick Affidavit at Exhibit F, p. 7.

<sup>26</sup> Wudrick Affidavit at Exhibit F, p. 2.

<sup>27</sup> Wudrick Affidavit at Exhibit F, p. 3.

<sup>28</sup> Wudrick Affidavit at Exhibit F, p. 5.

<sup>29</sup> Wudrick Affidavit at Exhibit F, p. 5.

<sup>30</sup> Wudrick Affidavit at Exhibit F, p. 5.

<sup>31</sup> Wudrick Affidavit at Exhibit F, p. 7.

19. Indeed, some interveners seek to discuss the health implications of climate change, but neglect the tangible negative health implications of energy poverty. For instance, there are notable negative health repercussions that are associated with a family experiencing energy poverty being unable to heat one's house to an adequate level<sup>32</sup>. Indeed, energy poverty has even been linked to negative mental health impacts<sup>33</sup>. In fact, the analyses demonstrate that unaffordable energy is associated with food insecurity, more frequent relocations, diminished educational performance, and reductions in personal productivity<sup>34</sup>.

### III. ARGUMENT

#### (a) Carbon taxes are not as effective as suggested, relative to the tax-impact

20. Starting with the CTF's first issue, the predominant character (certainly the predominant effect) of the carbon tax will be revenue generation. This is in part because carbon taxes do not work effectively as a regulatory charge.

21. As discussed previously in this factum, the reports discussed in Aaron Wudrick's affidavit indicate that carbon taxes, including BC's carbon tax, have not actually shown evidence of significantly reducing carbon emissions<sup>35</sup>, largely as a result of the inelasticity of demand for energy goods, which really are household essentials.<sup>36</sup> Thus, for the reasons noted previously herein, the federal carbon tax is unlikely to have the behavioural impact on taxpayer that the Attorney General of Canada suggests. As in BC – where emissions are expected to increase despite the carbon tax<sup>37</sup> – a carbon tax imposed on Albertan residents should not be expected to have a discernable impact on inelastic energy consumption.

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<sup>32</sup> Wudrick Affidavit at Exhibit B, p. 26.

<sup>33</sup> Wudrick Affidavit at Exhibit B, p. 26.

<sup>34</sup> Wudrick Affidavit at Exhibit B, p. 26.

<sup>35</sup> Wudrick Affidavit at paras 9-10, Exhibit D, pp. 1-2 & Exhibit F, pp. 2-9.

<sup>36</sup> Wudrick Affidavit at paras 7-10, 13-16, Exhibit B, p. 11 & Exhibit C, p. 1.

<sup>37</sup> Wudrick Affidavit at Exhibit F, p. 5.

22. However, as discussed previously, the tax will have an impact on the price of energy products, and on the price that Albertan families have to pay for the energy goods – including for heat, work, or travel. As a result the tax will have a significant impact on the energy poverty of many Albertan families – especially low-income families whose household budgets are disproportionately impacted by the carbon tax<sup>38</sup>. This issue is connected with the CTF’s second point, below. The CTF respectfully submits the aforementioned fact that the carbon tax’s predominant character (and certainly its predominant effect) will be revenue generation, as compared to the very nominal impact on energy consumption, further confirms to the very crux of the CTF’s second point: that the carbon tax is indeed a tax.

**(b) The carbon tax is a ‘tax’**

23. 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’.<sup>39</sup>

24. Sir Lyman Duff’s indicia are clearly met<sup>40</sup>: (1) the carbon tax is enforceable by law<sup>41</sup>; (2) the carbon tax is authorized by Parliament; (3) the carbon tax is certainly imposed by a public body<sup>42</sup>; and (4) the carbon tax is intended for a public purpose. Therefore, the focus next turns to *Westbank*’s two-stage test,<sup>43</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>44</sup> The CTF’s position is that the carbon tax does not satisfy either part of the two-stage *Westbank* analysis and is, thus, a

<sup>38</sup> Wudrick Affidavit at Exhibit B, p. 20 & Exhibit F, p. 7.

<sup>39</sup> As cited in *Eurig Estate (Re)*, [1998] 2 SCR 565 [*Eurig Estate*] at paras 15–16, 22–23, CTFBA Vol 1 Tab 5; *Westbank First Nation v British Columbia Hydro and Power Authority*, [1999] 3 SCR 134. [*Westbank*] at paras 21–24, CTFBA Vol 1 Tab 6; *620 Connaught Ltd. v Canada (Attorney General)*, 2008 SCC 7, [2008] 1 SCR 131 [*620 Connaught*] at para 22, CTFBA Vol 1 Tab 1.

<sup>40</sup> *Westbank* at para 21, CTFBA Vol 1 Tab 6.

<sup>41</sup> *GGPPA* at Part I, Division 6, Book of Legislation of the Attorney General of Alberta (“ABBOL”) Vol 1 Tab 1.

<sup>42</sup> Tellingly, the Minister responsible for imposing and administering the carbon tax is the Minister of National Revenue: *GGPPA* at s. 3, ABBOL Vol 1 Tab 1.

<sup>43</sup> *Westbank* at paras 23–30, CTFBA Vol 1 Tab 6; *620 Connaught* at paras 23–26, 29, CTFBA Vol 1 Tab 1.

<sup>44</sup> *620 Connaught* at paras 25, 38–39, CTFBA Vol 1 Tab 1.

'tax'.

25. Beginning first with the initial-stage of the *Westbank* analysis, this Court must consider the following four factors:<sup>45</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.

26. 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*.<sup>46</sup> 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:<sup>47</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.

27. Similarly, here, the entire *GGPPA* contains nothing but rules and protocols for applying the carbon tax.<sup>48</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. There is nothing in the *GGPPA* that makes the carbon tax part of a

<sup>45</sup> 620 *Connaught* at para 25, CTFBA Vol 1 Tab 1; see also: *Westbank* at paras 25-30, CTFBA Vol 1 Tab 6.

<sup>46</sup> 620 *Connaught* at paras 25, 30-33, CTFBA Vol 1 Tab 1; *Westbank* at paras 25-27, CTFBA Vol 1 Tab 6; *Reference re: Proposed Federal Tax on exported Natural Gas*, [1982] 1 SCR 1004 [*Re Exported Natural Gas*] at pp. 1073-1076, CBA CTFBA Vol 1 Tab 4.

<sup>47</sup> 620 *Connaught* at paras 25, 30-33, CTFBA Vol 1 Tab 1; *Westbank* at paras 25-27, CTFBA Vol 1 Tab 6; *Re Exported Natural Gas* at pp. 1073-1076 (citation from p. 1073), CTFBA Vol 1 Tab 4.

<sup>48</sup> *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*] at Parts I and II, ABBOL Vol 1 Tab 1.

legislative scheme aimed at 'the development of more affordable green technologies'.

28. 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.<sup>49</sup> *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).<sup>50</sup>
29. In the instant situation, however, the carbon tax is more akin to legislation just establishing a tollgate on the Yellowhead Highway through Jasper National Park. The toll might have the incidental effect of reducing vehicle emissions through the park, but its real aim is to simply raise revenue for highways, not to regulate use of the park. 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* shows the carbon tax not to be a 'regulatory charge'.
30. As to the second initial-stage *Westbank* factor, the carbon tax may pretend to be aimed at altering behaviour but, as previously noted, the predominant effect of carbon taxes is not actually to alter behaviour; even the inelasticity of demand for energy goods, carbon taxes do not significantly alter demand/consumer behaviour<sup>51</sup>. However, as noted, carbon taxes do succeed in one thing: driving working families further into energy poverty<sup>52</sup>. Thus, the second initial-stage *Westbank* factor also shows the carbon tax not to be a 'regulatory charge'.
31. As to the third initial-stage *Westbank* factor, here too the ineffectiveness<sup>53</sup> of carbon taxes shows the disconnect between the carbon tax and any broader regulatory purpose (other than the collection of revenue from working Albertan families, some of whom may be

<sup>49</sup> *Re Exported Natural Gas* at pp. 1077-1078, CTFBA Vol 1 Tab 4.

<sup>50</sup> *620 Connaught* at para 30, CTFBA Vol 1 Tab 1.

<sup>51</sup> Wudrick Affidavit at paras 7-12, Exhibit B, p. 11 & Exhibit C, p. 1 & Exhibit D, pp. 1-2 & Exhibit F, pp. 2-9.

<sup>52</sup> Wudrick Affidavit at Exhibit B, pp. 20, 26 & Exhibit F, p. 7.

<sup>53</sup> Wudrick Affidavit at paras 7-12, Exhibit B, p. 11 & Exhibit C, p. 1 & Exhibit D, pp. 1-2 & Exhibit F, pp. 2-9.

drive into energy poverty by the carbon tax).<sup>54</sup> Thus, the third initial-stage *Westbank* factor also shows the carbon tax not to be a 'regulatory charge'.

32. 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.<sup>55</sup>

33. Here, however, there is no direct and obvious relationship between the carbon tax and Albertan families. Indeed, in the instant matter, the obligation for Albertan families to pay the federal carbon tax is condition on policy choices made by the Province of Alberta and the federal cabinet. The triggering condition for determining if Albertan residents will pay the federal carbon tax is whether Legislature of Albertan passes a law that satisfies the Governor General in Council.<sup>56</sup> If the Dominion government is satisfied with Alberta's policy choice, then an Alberta family could drive all year and heat their house all winter and not pay any federal carbon tax. But, if the Alberta does not satisfy the Government of Canada's goals, then that same Alberta family could drive all year and heat their house all winter and have to pay federal carbon tax, and maybe suffer greater energy poverty. Therefore, the triggering condition is not the taxpayer's behaviour. Rather, the triggering condition is solely dependent on whether certain federal officials decide that Alberta's climate policy satisfies the Government of Canada.

34. Furthermore, although a regulatory charge is related to the conferral of a benefit (for example, in Jasper National Park it was the benefit of park maintenance); here, the federal carbon tax confers no benefit on those who pay it. Therefore, there is no direct relation between the people of Alberta 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>57</sup>.

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<sup>54</sup> Wudrick Affidavit at Exhibit B, pp. 20, 26 & Exhibit F, p. 7.

<sup>55</sup> *620 Connaught* at paras 25, 34-36, CTFBA Vol 1 Tab 1.

<sup>56</sup> *GGPPA* at s. 17 & Schedule 1, ABBOL Vol 1 Tab 1.

<sup>57</sup> *620 Connaught* at paras 30-37, CTFBA Vol 1 Tab 1.

35. As to the secondary stage of the *Westbank* test,<sup>58</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 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.<sup>59</sup>
36. The predominant character of carbon tax is to generate revenue. Although it is aimed at altering consumer behaviour, given the inelastic nature of energy demand 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<sup>60</sup>.
37. Rather, all the federal carbon tax seems calibrated to do, at this point, it to require Albertan families to now pay more for the same quantity of an inelastic good (and now risk being driven into energy poverty as a result)<sup>61</sup>. 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'<sup>62</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'.

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

38. 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

<sup>58</sup> *620 Connaught* at paras 38–39, CTFBA Vol 1 Tab 1; *Westbank* at paras 28–30, CTFBA Vol 1 Tab 6.

<sup>59</sup> *620 Connaught* at paras 20–21, CTFBA Vol 1 Tab 1.

<sup>60</sup> Wudrick Affidavit at paras 13–15, Exhibits G, H & I.

<sup>61</sup> Wudrick Affidavit at paras 7–16.

<sup>62</sup> *620 Connaught* at paras 16–17, CTFBA Vol 1 Tab 1; *Westbank* at para 30, CTFBA Vol 1 Tab 6.



*Constitution Act*, and therefore the federal carbon tax is unconstitutional. The CTF views section 53 as primarily protecting the taxpaying public (rather than government). In particular, while Parliament is certainly able to explicitly delegate the details and mechanism of a tax.<sup>63</sup>

39. The crucial starting point is the recognition that section 53 enshrines the constitutional principle of ‘no taxation without representation’.<sup>64</sup> 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”<sup>65</sup>. Thus, the Governor General in Council cannot impose a tax on a given section of the populace without Parliament authorizing that imposition<sup>66</sup>. This principle is “central to our conception of democracy”<sup>67</sup> and dates back all the way to the 1688 *Bill of Rights*.<sup>68</sup> Indeed, the principle of ‘no taxation without representation’ is “a constitutional imperative that is enforceable by the courts”.<sup>69</sup>

40. Why is the principle of ‘no taxation without representation’ so important? Because “the power to tax involves the power to destroy”<sup>70</sup>; for instance, as noted above, the federal carbon tax could consign numerous Alberta families into energy poverty<sup>71</sup>. 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.

<sup>63</sup> *Eurig Estate* at para 30, CTFBA Vol 1 Tab 5; *Constitution Act* at s. 53, CTFBA Vol 1 Tab 8.

<sup>64</sup> *Kingstreet Investments Ltd. v. New Brunswick (Finance)*, 2007 SCC 1 [*Kingstreet*] at paras 14–15, Vol 1 Tab 7; *OECTA* at paras 69–71, CTFBA Vol 1 Tab 2; *Eurig Estate* at paras 30–34, CTFBA Vol 1 Tab 5; *Constitution Act* at s. 53, CTFBA Vol 1 Tab 8.

<sup>65</sup> *Eurig Estate* at para 32, CTFBA Vol 1 Tab 5.

<sup>66</sup> *Eurig Estate* at para 31, CTFBA Vol 1 Tab 5.

<sup>67</sup> *Kingstreet* at paras 14–15, CTFBA Vol 1 Tab 7.

<sup>68</sup> *OECTA* at paras 69–71, CTFBA Vol 1 Tab 2; *Constitution Act* at s. 53, CTFBA Vol 1 Tab 8.

<sup>69</sup> *Eurig Estate* at para 34, CTFBA Vol 1 Tab 5.

<sup>70</sup> *Westbank* at para 17 CTFBA Vol 1 Tab 6; *Reference re: Goods and Services Tax (GST)*, [1992] 2 SCR 445 at p. 497, CTFBA Vol 1 Tab 3.

<sup>71</sup> Wudrick Affidavit at Exhibit B, p. 20 & Exhibit F, p. 7.

41. However, that is the absolute opposite of what is occurred here with the federal carbon tax; for example, consider section 26 of the *GGPPA*<sup>72</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]

42. A '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 Alberta families is not made by Parliament. Thus, the decision whether or not to impose the destructive power of taxation on the people of Alberta (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*.

#### IV. CONCLUSION AND RELIEF REQUESTED

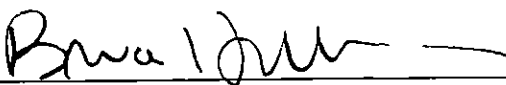
43. In conclusion, the federal carbon tax's predominant character is that of a tax and, indeed, the carbon tax is a 'tax'. Furthermore, the implementation of the federal carbon tax, against the people of Alberta, violates section 53 of the *Constitution Act*. On that basis, the CTF respectfully submits 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 29 day of October, 2019.

CREASE HARMAN LLP

Per: \_\_\_\_\_

  
R. Bruce E. Hallsor, Q.C., Solicitor for the Intervener,  
Canadian Taxpayers Federation

<sup>72</sup>*GGPPA* at s. 26, *ABBOL* Vol 1 Tab 1.

## V. TABLE OF AUTHORITIES

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