

IN THE COURT OF APPEAL FOR SASKATCHEWAN  
IN THE MATTER OF THE *GREENHOUSE GAS POLLUTION PRICING ACT*,  
Bill C-74, Part 5  
AND IN THE MATTER OF A REFERENCE BY THE LIEUTENANT GOVERNOR IN  
COUNCIL TO THE COURT OF APPEAL  
UNDER *THE CONSTITUTIONAL QUESTIONS ACT, 2012*, s 2012, c C-29.01.

BETWEEN:

THE ATTORNEY GENERAL OF SASKATCHEWAN

Party pursuant to Section 4 of  
*The Constitutional Questions Act, 2012*

- and -

THE ATTORNEY GENERAL OF CANADA

Intervener pursuant to Section 5(2) of  
*The Constitutional Questions Act, 2012*

- and -

THE ATTORNEY GENERAL OF ONTARIO

Intervener pursuant to Section 6 of  
*The Constitutional Questions Act, 2012*

- and -

CANADIAN TAXPAYERS FEDERATION

Intervener pursuant to Section 7 of  
*The Constitutional Questions Act, 2012*

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**FACTUM OF THE INTERVENER,  
CANADIAN TAXPAYERS FEDERATION**

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## 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.<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 Saskatchewan, despite being imposed on the taxpayers of Saskatchewan 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 Saskatchewan.

3. In order to understand why the predominant characteristic of the federal carbon tax is that of a 'tax', it is crucial to understand what is being taxed. "*Energy is the basis of our modern lives. It fuels our economy, generating the economic production and underpins the high living standards Canadian households have achieved*".<sup>3</sup> In other words, energy is an essential element of the modern Canadian way-of-life and it is even a core component of the very fabric of Canadian society; after all, energy consumption "*allows us to be connected across Canada's vast land mass and heat our homes during the cold Canadian winter*".<sup>4</sup> However, the ability of Saskatchewan families to partake in this enriched way of life should not be taken for granted; rather, the energy that Saskatchewan families use first "*require[s] a level of affordability if we are to experience the full benefits of our modern lifestyles*".<sup>5</sup>

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<sup>1</sup> Affidavit of Aaron Wudrick, affirmed November 26, 2018 [Wudrick Affidavit] at paras 3–7.

<sup>2</sup> *Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.) at s. 53 [*Constitution Act*], SKBA Vol. 1, Tab 1.

<sup>3</sup> Affidavit of Aaron Wudrick, affirmed November 26, 2018 [Wudrick Affidavit] at Exhibit E, p. 1.

<sup>4</sup> Wudrick Affidavit at Exhibit E, p. 1.

<sup>5</sup> Wudrick Affidavit at Exhibit E, p. 1.

4. This regard for affordability is crucial because whether an energy tax is levied against business at their factories or families at the gas-pumps, there is ultimately only one taxpayer; those very same working families who will have to pay more at the pump and more for the factory-made products that are part-and-parcel of the Canadian way of life. Thus, no matter who pays up front, it will be the hard-working Saskatchewan families who will have to pay for the carbon tax, when they ultimately consume these essential energy goods.

5. That is why this reference not only affects the interests of the two levels of government who are the primary litigants, but it also affects the individual interests of those working, tax-paying families whose finances will be negatively impacted by this Court's decision if the carbon tax is upheld, as they will be the ones ultimately paying for the carbon tax that is being imposed on the taxpayers of Saskatchewan, ostensibly under the authority of the federal *Greenhouse Gas Pollution Pricing Act* [the GGPPA].<sup>6</sup>

6. Ultimately, energy is not a superfluous 'luxury' product; it is a 'need', rather than just a 'want'. Saskatchewan families still need to heat their homes and get to work, Saskatchewan's farmers still need to operate, and Saskatchewan's business still need to produce things and meet customer demand. Thus, for the reasons set out herein, the federal carbon tax is a tax on indispensable energy goods, which will still need to be bought. Now, because of the carbon tax, that same necessary energy consumption will just cost more money.

7. Furthermore, it was not Parliament that decided that Saskatchewan'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 Saskatchewan and chose to impose this tax on this province. Accordingly, the imposition of the carbon tax on Saskatchewan 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>6</sup> *Greenhouse Gas Pollution Pricing Act*, S.C. 2018, c. 12, s. 186, S.C. 2018, c. 12, s. 186, being Part 5 of the *Budget Implementation Act, 2018, No. 1*, S.C. 2018, c. 12 [GGPPA], Book of Authorities of the Attorney General of Saskatchewan [SKBA] Vol. 1, Tab 3.

## II. JURISDICTION

8. As the Attorney General of Saskatchewan describes in its factum, dated July 30, 2018, the Lieutenant Governor in Council of Saskatchewan 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:<sup>7</sup>

The *Greenhouse Gas Pollution Pricing Act* was introduced into Parliament on March 28, 2018 as Part 5 of Bill C-74. If enacted, will this *Act* be unconstitutional, in whole or in part?

## III. SUMMARY OF FACTS

9. 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>8</sup> is particularly poignant in Saskatchewan because, after Atlantic Canada, Saskatchewan has the worst level of energy affordability in Canada.<sup>9</sup>

10. Notably, Saskatchewan follows only Atlantic Canada in terms of energy poverty, with 23.3% of Saskatchewan’s households being in energy poverty, when expenditures of gasoline costs are considered.<sup>10</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>11</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>12</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>13</sup>

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<sup>7</sup> Factum of the Attorney General of Saskatchewan dated July 30, 2018 [AG Saskatchewan Factum] at para. 2; *GGPPA*, SKBA Vol. 1, Tab 3.

<sup>8</sup> Wudrick Affidavit at Exhibit E, p. 1.

<sup>9</sup> Wudrick Affidavit at Exhibit E, p. 8.

<sup>10</sup> Wudrick Affidavit at Exhibit E, p. 17.

<sup>11</sup> Wudrick Affidavit at Exhibit E, p. 18.

<sup>12</sup> Wudrick Affidavit at Exhibit E, p. 11.

<sup>13</sup> Wudrick Affidavit at Exhibit E, p. 20.

11. 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>14</sup>.

12. 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>15</sup> So, a carbon tax will increase the costs of these essential energy goods, and will thus drive even more Saskatchewan families closer to, or further into, energy poverty.

13. The difficulty is that the carbon tax targets household essentials (like a family’s ability to heat their home in the winter). Again, Saskatchewan’s working families have no choice but to 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 Saskatchewan’s families will now need to pay more to travel, farm, et cetera.

14. As to the first point, as many economic reports, including the Fraser Institute’s peer-reviewed<sup>16</sup> publication<sup>17</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>18</sup>

15. This “means that price changes tend to have a small impact on the quantity consumed”.<sup>19</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>20</sup>

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<sup>14</sup> Wudrick Affidavit at Exhibit I, p. 7.

<sup>15</sup> Wudrick Affidavit at Exhibit E, p. 2.

<sup>16</sup> Wudrick Affidavit at Exhibit E, p. 37.

<sup>17</sup> Wudrick Affidavit at para 11 and Exhibit E.

<sup>18</sup> Wudrick Affidavit at paras 9–18 and Exhibit E, p. 11.

<sup>19</sup> Wudrick Affidavit at Exhibit E, p. 11.

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

16. 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>21</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>22</sup>

17. 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>23</sup> Several analyses have concluded that BC’s carbon tax has had little impact on BC’s carbon emissions.<sup>24</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.

18. 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>25</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>26</sup>

19. 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>27</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.

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<sup>21</sup> Wudrick Affidavit at para 12 and Exhibit F.

<sup>22</sup> Wudrick Affidavit at Exhibit F, p. 1.

<sup>23</sup> Wudrick Affidavit at paras. 13–14.

<sup>24</sup> Wudrick Affidavit at Exhibit G & I.

<sup>25</sup> Wudrick Affidavit at para 13 and Exhibits G & H.

<sup>26</sup> Wudrick Affidavit at Exhibit G, p. 1.

<sup>27</sup> Wudrick Affidavit at Exhibit G, p. 2.

20. 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>28</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>29</sup>

21. 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>30</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>31</sup>.

22. 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>32</sup> and that "*[c]arbon tax proponents have significantly overstated the purported beneficial effects of the British Columbia carbon tax*".<sup>33</sup> Ultimately, the report found that "*the British Columbia carbon tax has had no beneficial long-term impact on greenhouse gas emissions*".<sup>34</sup>

23. 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>35</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>36</sup>. Thus, the carbon tax did not significantly alter demand in BC, and it will not alter demand in Saskatchewan.

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<sup>28</sup> Wudrick Affidavit at para 14 and Exhibit I.

<sup>29</sup> Wudrick Affidavit at Exhibit I, p. 9.

<sup>30</sup> Wudrick Affidavit at Exhibit I, p. 6.

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

<sup>32</sup> Wudrick Affidavit at Exhibit I, p. 2.

<sup>33</sup> Wudrick Affidavit at Exhibit I, p. 3.

<sup>34</sup> Wudrick Affidavit at Exhibit I, p. 5.

<sup>35</sup> Wudrick Affidavit at Exhibit I, p. 5.

<sup>36</sup> Wudrick Affidavit at Exhibit I, p. 5.



24. However, those who are left behind by the economy, such as low-income working families<sup>37</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.

25. 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>38</sup>. Indeed, energy poverty has even been linked to negative mental health impacts<sup>39</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>40</sup>.

#### IV. POINTS IN ISSUE

26. The CTF submits that the carbon tax, and the *GGPPA* itself, is unconstitutional for the following three, interrelated reasons; each issue builds on the preceding issue, each of which will be discussed herein:

- (i) the carbon tax does not reduce emissions to the degree that the Attorney General of Canada suggests (this is relevant to ground (ii));
- (ii) the carbon tax is a 'tax' rather than a regulatory charge; and
- (iii) the federal carbon tax does not adhere to the constitutional principle of '*no taxation without representation*'<sup>41</sup>.

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<sup>37</sup> Wudrick Affidavit at Exhibit I, p. 7.

<sup>38</sup> Wudrick Affidavit at Exhibit E, p. 26.

<sup>39</sup> Wudrick Affidavit at Exhibit E, p. 26.

<sup>40</sup> Wudrick Affidavit at Exhibit E, p. 26.

<sup>41</sup> As set out in *Kingstreet Investments Ltd. v New Brunswick (Finance)*, 2007 SCC 1 [*Kingstreet*] at paras 14–15, SKBA Vol 1, Tab 15; *Ontario English Catholic Teachers' Assn. v Ontario (Attorney General)*, 2001 SCC 15, [2001] 1 SCR 470 [*OECTA*] at paras 69-71, Book of Authorities of the Attorney General of Canada [CBA] Vol. 1, Tab 22; *Re Eurig Estate* [1998] 2 SCR 565 [*Eurig Estate*] at paras 30-34, SKBA Vol 2, Tab 30; *Constitution Act* at s. 53, SKBA Vol. 1, Tab 1.

## V. ARGUMENT

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

27. 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: this is an issue that the Attorney General of Canada has already raised in its factum,<sup>42</sup> by propounding the effectiveness of carbon taxes and by relying largely on the example of BC carbon tax to do so.

28. In contrast, 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>43</sup>, largely as a result of the inelasticity of demand for energy goods, which really are household essentials.<sup>44</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>45</sup> – a carbon tax imposed on Saskatchewan residents should not be expected to have a discernable impact on inelastic energy consumption.

29. However, as discussed previously, the tax will have an impact on the price of energy products, and on the price that Saskatchewan's 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 Saskatchewan families – especially low-income families whose household budgets are disproportionately impacted by the carbon tax<sup>46</sup>. This issue is connected with the CTF's second point, below. The CTF respectfully submits the afore-noted 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.

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<sup>42</sup> Factum of the Attorney General of Canada, dated October 29, 2018, at paras 94–95.

<sup>43</sup> Wudrick Affidavit at paras 13-14, Exhibit G, pp. 1-2 & Exhibit I, pp. 2-9; see also: *supra* at paras. 16–22.

<sup>44</sup> Wudrick Affidavit at paras 9-12, 15–18, Exhibit E, p. 11 & Exhibit F, p. 1; see also: *supra* at paras. 13–15.

<sup>45</sup> Wudrick Affidavit at Exhibit I, p. 5.

<sup>46</sup> Wudrick Affidavit at Exhibit E, p. 20 & Exhibit I, p. 7.

**(b) The carbon tax is a ‘tax’**

30. 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>47</sup> In this reference, the Attorney General of Canada appears to implicitly accept, in its factum, that Sir Lyman Duff’s indicia are met.<sup>48</sup>

31. Sir Lyman Duff’s indicia are clearly met<sup>49</sup>: (1) the carbon tax is enforceable by law<sup>50</sup>; (2) the Attorney General of Canada states that the carbon tax is authorized by Parliament<sup>51</sup>; (3) the carbon tax is certainly imposed by a public body<sup>52</sup>; and (4) the Attorney General of Canada states that the carbon tax is intended for a public purpose<sup>53</sup>. Therefore, the focus next turns to *Westbank*’s two-stage test,<sup>54</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>55</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 ‘tax’.

32. Beginning first with the initial-stage of the *Westbank* analysis, this Court must consider the following four factors:<sup>56</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.

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<sup>47</sup> As cited in *Eurig Estate* at paras 15–16, 22–23, SKBA Vol 2, Tab 30; *Westbank* at paras 21–24, SKBA Vol 2, Tab 36; *620 Connaught Ltd. v Canada (Attorney General)*, 2008 SCC 7, [2008] 1 SCR 131 [*620 Connaught*] at para 22, SKBA Vol 1, Tab 4.

<sup>48</sup> Factum of the Attorney General of Canada, dated October 29, 2018, at para 113.

<sup>49</sup> *Westbank* at para 21, SKBA Vol 2, Tab 36

<sup>50</sup> *GGPPA* at Part I, Division 6, SKBA Vol. 1, Tab 3.

<sup>51</sup> Factum of the Attorney General of Canada, dated October 29, 2018, at paras 131–141.

<sup>52</sup> Tellingly, the Minister responsible for imposing and administering the carbon tax is the Minister of National Revenue: *GGPPA* at s. 3, SKBA Vol. 1, Tab 3.

<sup>53</sup> Factum of the Attorney General of Canada, dated October 29, 2018, at paras 117–129.

<sup>54</sup> *Westbank* at paras 23–30, SKBA Vol 2, Tab 36; *620 Connaught* at paras 23–26, 29, SKBA Vol 1, Tab 4.

<sup>55</sup> *620 Connaught* at paras 25, 38–39, SKBA Vol 1, Tab 4.

<sup>56</sup> *620 Connaught* at para 25, SKBA Vol 1, Tab 4; see also: *Westbank* at paras 25–30, SKBA Vol 2, Tab 36.

33. 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>57</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>58</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.

34. Similarly, here, the entire *GGPPA* contains nothing but rules and protocols for applying the carbon tax.<sup>59</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, contrary to the Attorney General of Canada's suggestion,<sup>60</sup> 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'.

35. 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>61</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>62</sup>

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<sup>57</sup> *620 Connaught* at paras 25, 30–33, SKBA Vol 1, Tab 4; *Westbank* at paras 25–27, SKBA Vol 2, Tab 36; *Reference re: Proposed Federal Tax on exported Natural Gas*, [1982] 1 SCR 1004 [*Re Exported Natural Gas*] at pp. 1073–1076, CBA Vol. 1, Tab 30.

<sup>58</sup> *620 Connaught* at paras 25, 30–33, SKBA Vol 1, Tab 4; *Westbank* at paras 25–27, SKBA Vol 2, Tab 36; *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), CBA Vol. 1, Tab 30.

<sup>59</sup> *GGPPA* at Parts I and II, SKBA Vol. 1, Tab 3.

<sup>60</sup> Factum of the Attorney General of Canada, dated October 29, 2018, at para 119.

<sup>61</sup> *Re Exported Natural Gas* at pp. 1077–1078, CBA Vol. 1, Tab 30.

<sup>62</sup> *620 Connaught* at para 30, SKBA Vol 1, Tab 4.

36. In the instant situation, however, the carbon tax is more akin to legislation just establishing a toll-gate on the Yellowhead Highway (through Jasper) without any national park. In effect, the *GGPPA*, from beginning to end, is all-‘highway toll’ and no-‘green park’. As such, 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’.

37. 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>63</sup>. However, as noted, carbon taxes do succeed in one thing: driving working families further into energy poverty<sup>64</sup>. Thus, the second initial-stage *Westbank* factor also shows the carbon tax not to be a ‘regulatory charge’.

38. As to the third initial-stage *Westbank* factor, here too the ineffectiveness<sup>65</sup> of carbon taxes shows the disconnect between the carbon tax and any broader regulatory purpose (other than the collection of revenue from working Saskatchewan families, some of whom may be drive into energy poverty by the carbon tax).<sup>66</sup> Thus, the third initial-stage *Westbank* factor also shows the carbon tax not to be a ‘regulatory charge’.

39. 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>67</sup>

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<sup>63</sup> Wudrick Affidavit at paras 9-14, Exhibit E, p. 11 & Exhibit F, p. 1 & Exhibit G, pp. 1-2 & Exhibit I, pp. 2-9; see also: *supra* at paras. 13–22.

<sup>64</sup> Wudrick Affidavit at Exhibit E, pp. 20, 26 & Exhibit I, p. 7; see also: *supra* at paras. 10-11, 22-23.

<sup>65</sup> Wudrick Affidavit at paras 9-14, Exhibit E, p. 11 & Exhibit F, p. 1 & Exhibit G, pp. 1-2 & Exhibit I, pp. 2-9; see also: *supra* at paras. 13–22.

<sup>66</sup> Wudrick Affidavit at Exhibit E, pp. 20, 26 & Exhibit I, p. 7; see also: *supra* at paras. 10-11, 22-23.

<sup>67</sup> *620 Connaught* at paras 25, 34–36, SKBA Vol 1, Tab 4.

40. Here, however, there is no direct and obvious relationship between the carbon tax and Saskatchewan families. Indeed, in the instant matter, the obligation for Saskatchewan families to pay the federal carbon tax is condition on policy choices made by the Province of Saskatchewan. The triggering condition for determining if Saskatchewan residents will pay the federal carbon tax is whether Government of Saskatchewan adopts a policy that satisfies the Government of Canada.<sup>68</sup> If the Government of Saskatchewan does, then a Saskatchewan family could drive all year and heat their house all winter and not pay any federal carbon tax. But, if the Government of Saskatchewan does not satisfy the Government of Canada, then that same Saskatchewan 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 Saskatchewan adopts a climate policy that satisfies the Government of Canada.

41. Furthermore, although a charge may be issued in relation to the conferral of a benefit; here, the federal carbon tax is all-'highway toll' and no-'green park', and Saskatchewan families clearly do not benefit from paying this tax; indeed, some of the Saskatchewan families may actually be driven into energy poverty due to the carbon tax.<sup>69</sup> Therefore, there is no direct relation between the people of Saskatchewan 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>70</sup>.

42. As to the secondary stage of the *Westbank* test,<sup>71</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>72</sup>

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<sup>68</sup> *GGPPA* at s. 17 & Schedule 1, SKBA Vol. 1, Tab 3.

<sup>69</sup> Wudrick Affidavit at Exhibit E, pp. 20, 26 & Exhibit I, p. 7; see also: *supra* at paras. 10-11, 22-23.

<sup>70</sup> *620 Connaught* at paras 30–37, SKBA Vol 1, Tab 4.

<sup>71</sup> *620 Connaught* at paras 38–39, SKBA Vol 1, Tab 4; *Westbank* at paras 28-30, SKBA Vol 2, Tab 36.

<sup>72</sup> *620 Connaught* at paras 20–21, SKBA Vol 1, Tab 4.

43. Second, the predominant effect of carbon tax is to generate revenue since the effect on behaviour is more limited, given the inelasticity of demand, the carbon tax would have to set at a profoundly different level than what it is set at now<sup>73</sup>. Although it is recognized that “*the government needs to be given some reasonable leeway*”,<sup>74</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<sup>75</sup>.

44. Rather, all the federal carbon tax seems calibrated to do, at this point, it to require Saskatchewan 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>76</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 about of energy to heat their homes in the winter. Thus, the predominant character – that is, the ‘pith and substance’<sup>77</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***

45. 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*.<sup>78</sup> 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 Saskatchewan on this point, at paragraphs 59 to 64 of the Attorney General’s factum, dated July 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.

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<sup>73</sup> Wudrick Affidavit at paras 9-14, Exhibit E, p. 11 & Exhibit F, p. 1 & Exhibit G, pp. 1-2 & Exhibit I, pp. 2-9; see also: *supra* at paras. 13–22.

<sup>74</sup> *620 Connaught* at para 40, SKBA Vol 1, Tab 4.

<sup>75</sup> Wudrick Affidavit at paras 15-17, Exhibits J, K & L.

<sup>76</sup> Wudrick Affidavit at paras 9–18.

<sup>77</sup> *620 Connaught* at paras 16–17, SKBA Vol 1, Tab 4; *Westbank* at para 30, SKBA Vol 2, Tab 36.

<sup>78</sup> *Eurig Estate* at para 30, SKBA Vol 2, Tab 30; *Constitution Act* at s. 53, SKBA Vol. 1, Tab 1.

46. In particular, while Parliament is certainly able to explicitly delegate the details and mechanism of a tax;<sup>79</sup> the CTF agrees with and adopts the Attorney General of Saskatchewan’s submission that “*in order to make section 53’s guarantee meaningful, taxation legislation must set out the essentials or the fundamentals of the taxation scheme – the who, what and where of the tax*”<sup>80</sup>. Here, the CTF seeks to add the perspective of taxpaying Saskatchewan families who are the ones that may be required to pay the tax’ in order to explain why the Attorney General of Saskatchewan’s interpretation of section 53 is necessary.

47. The crucial starting point is the recognition that section 53 enshrines the constitutional principle of ‘*no taxation without representation*’.<sup>81</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>82</sup>. Thus, the Governor General in Council cannot impose a tax on a given section of the populace without Parliament authorizing that imposition<sup>83</sup>. This principle is “*central to our conception of democracy*”<sup>84</sup> and dates back all the way to the 1688 *Bill of Rights*.<sup>85</sup> Indeed, the principle of ‘*no taxation without representation*’ is “*a constitutional imperative that is enforceable by the courts*”.<sup>86</sup>

48. Why is the principle of ‘*no taxation without representation*’ so important? Because “*the power to tax involves the power to destroy*”<sup>87</sup>; for instance, as noted above, the federal carbon tax could consign numerous Saskatchewan families into energy poverty<sup>88</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.

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<sup>79</sup> *Eurig Estate* at para 30, SKBA Vol 2, Tab 30; *Constitution Act* at s. 53, SKBA Vol. 1, Tab 1.

<sup>80</sup> Factum of the Attorney General of Canada, dated October 29, 2018, at para 119.

<sup>81</sup> *Kingstreet* at paras 14–15, SKBA Vol 1, Tab 15; *OECTA* at paras 69-71, CBA Vol. 1, Tab 22; *Eurig Estate* at paras 30-34, SKBA Vol 2, Tab 30; *Constitution Act* at s. 53, SKBA Vol. 1, Tab 1.

<sup>82</sup> *Eurig Estate* at para 32, SKBA Vol 2, Tab 30.

<sup>83</sup> *Eurig Estate* at para 31, SKBA Vol 2, Tab 30.

<sup>84</sup> *Kingstreet* at paras 14–15, SKBA Vol 1, Tab 15.

<sup>85</sup> *OECTA* at paras 69-71, CBA Vol. 1, Tab 22; *Constitution Act* at s. 53, SKBA Vol. 1, Tab 1.

<sup>86</sup> *Eurig Estate* at para 34, SKBA Vol 2, Tab 30.

<sup>87</sup> *Westbank First Nation v British Columbia Hydro and Power Authority*, [1999] 3 SCR 134 [*Westbank*] at para 17; *Reference re: Goods and Services Tax (GST)*, [1992] 2 SCR 445 [*Re GST*] at p. 497, CBA Vol. 1, Tab 28.

<sup>88</sup> Wudrick Affidavit at Exhibit E, p. 20 & Exhibit I, p. 7.



49. 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]

50. Contrary to the Attorney General of Saskatchewan's meritorious submission that the '*who, what and where of the tax*' must be set by Parliament; 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 Saskatchewan families is not made by Parliament. Thus, the decision whether or not to impose the destructive power of taxation on the people of Saskatchewan (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*.

## VI. CONCLUSION AND RELIEF REQUESTED

51. 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 Saskatchewan, 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 23rd day of January, 2019.

CREASE HARMAN LLP

Per: 

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**VII. AUTHORITIES**

<b>Cases</b>	<b>Para(s)</b>
<p><i>620 Connaught Ltd. v Canada (Attorney General)</i>, 2008 SCC 7, [2008] 1 SCR 131 at paras 16–17, 20–40</p> <p><b>[Book of Authorities of the Attorney General of Saskatchewan, Vol. 1, Tab 4]</b></p>	<p>30–33, 35–36, 39, 41–44</p>
<p><i>Kingstreet Investments Ltd. v New Brunswick (Finance)</i>, 2007 SCC 1 at paras 14–15</p> <p><b>[Book of Authorities of the Attorney General of Saskatchewan, Vol. 1, Tab 15]</b></p>	<p>26, 47</p>
<p><i>Ontario English Catholic Teachers’ Assn. v Ontario (Attorney General)</i>, 2001 SCC 15, [2001] 1 SCR 470 at paras 69–71, 74–79</p> <p><b>[Book of Authorities of the Attorney General of Canada, Vol. 1, Tab 22]</b></p>	<p>26, 47</p>
<p><i>Reference re: Goods and Services Tax (GST)</i>, [1992] 2 SCR 445 at p. 497</p> <p><b>[Book of Authorities of the Attorney General of Canada, Vol. 1, Tab 28]</b></p>	<p>48</p>
<p><i>Reference re: Proposed Federal Tax on exported Natural Gas</i>, [1982] 1 SCR 1004 at pp. 1073–1078</p> <p><b>[Book of Authorities of the Attorney General of Canada, Vol. 1, Tab 30]</b></p>	<p>33–35</p>
<p><i>Re Eurig Estate</i> [1998] 2 SCR 565 at paras 14–15, 22–23, 30–34</p> <p><b>[Book of Authorities of the Attorney General of Saskatchewan, Vol. 2, Tab 30]</b></p>	<p>26, 30, 45–48</p>
<p><i>Westbank First Nation v British Columbia Hydro and Power Authority</i>, [1999] 3 SCR 134 at paras 21–30</p> <p><b>[Book of Authorities of the Attorney General of Saskatchewan, Vol. 2, Tab 36]</b></p>	<p>30–33, 44, 48</p>

<b>Statutes</b>	<b>Para(s)</b>
<i>Constitution Act, 1867</i> , 30 & 31 Victoria, c. 3 (U.K.) at s. 53  <b>[Book of Authorities of the Attorney General of Saskatchewan, Vol. 1, Tab 1]</b>	1, 45–48, 50–51
<i>Greenhouse Gas Pollution Pricing Act</i> , S.C. 2018, c. 12, s. 186, being Part 5 of the <i>Budget Implementation Act, 2018, No. 1</i> , S.C. 2018, c. 12  <b>[Book of Authorities of the Attorney General of Saskatchewan, Vol. 1, Tab 3]</b>	5, 8, 26, 34, 36, 40, 49