

## **COURT OF APPEAL FOR ONTARIO**

IN THE MATTER OF A REFERENCE to the Court  
of Appeal pursuant to section 8 of the Courts of  
Justice Act, RSO 1990, c. C.34, by Order-in-  
Council 1014/2018 respecting the  
constitutionality of the Greenhouse Gas  
Pollution Pricing Act, Part 5 of the Budget  
Implementation Act, No. 1, SC 2018, c. 12

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**FACTUM OF THE PROSPECTIVE INTERVENOR,  
CANADIAN TAXPAYERS FEDERATION  
RE: INTERVENTION APPLICATION**

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## I. INTRODUCTION AND RELIEF SOUGHT

1. The Proposed Intervenor, the Canadian Taxpayers Federation [the *CTF*], respectfully seeks to participate in this reference case in order to ensure that the interests and viewpoints of everyday taxpayers are properly and fully represented. The *CTF*'s position is that this reference not only affects the interests of the governments and the environmental groups who are participating in this reference, but it also separately affects the interests of everyday taxpayers who will be impacted by this Court's decision. Therefore, for the following reasons, the *CTF* respectfully seeks leave to intervene in this reference case.

## II. FACTS

2. The *CTF* is a federally incorporated, not-for-profit citizen's group dedicated to advocating for lower taxes, less waste, and more accountable government. The *CTF* is completely non-partisan, and relies exclusively on private contributions from its approximately 141,000 supporters, who collectively make over 30,000 donations annually.<sup>1</sup> In order to fulfill its mandate, the *CTF* conducts extensive research and public advocacy, as detailed in the *Van Geyn Affidavit*.<sup>2</sup> The *CTF* respectfully submits that no other non-profit group is as actively engaged in researching issues that affect Canadian taxpayers, nor as experienced at appearing before, and assisting, Canadian appellate courts with tax-related legal issues of this nature.

3. The carbon tax has generated significant public dialogue across the country,<sup>3</sup> and the *CTF* has a particular interest in the carbon tax and the *GGPPA*,<sup>4</sup> given its mandate to address vital tax-related issues (including the potential unconstitutionality of the carbon tax). That said, given the *CTF*'s strictly non-partisan mandate, it is not the *CTF*'s intention to turn this reference into a partisan or political arena, or to widen the scope of the overall issues.<sup>5</sup>

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<sup>1</sup> Affidavit of Christine Van Geyn [*Van Geyn Affidavit*] at paras 3–5.

<sup>2</sup> Affidavit of Christine Van Geyn [*Van Geyn Affidavit*] at paras 3–7.

<sup>3</sup> *Van Geyn Affidavit* at para 8.

<sup>4</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 Ontario [OBOA] Schedule B, Tab 2.

<sup>5</sup> *Van Geyn Affidavit* at para 12.

### III. PROPOSED GROUNDS TO INTERVENE

4. The voice of taxpayers in this reference is crucial, as Canada's constitutional architecture does not belong to either the Parliament or the respective Legislatures. Rather, our constitutional architecture exists for the benefit and protection of the citizens of Canada; this is especially apt with regard to taxation matters, as taxes have the 'power to destroy' (in this case, to partially destroy the wealth of taxpayers).<sup>6</sup> Therefore, it is taxpayers who benefit from section 53 of the *Constitution Act*<sup>7</sup> being enforced, and it is taxpayers whose voices respectfully deserve to be amongst those heard by this Court in this reference.

5. On that basis, the CTF is respectfully proposing to intervene in this reference. The CTF's proposed position is not already represented or protected by one of the parties to this reference, nor does the CTF seek to duplicate the submission of any of the parties; the Attorneys General are all governmental entities whose perspectives are inherently different than that of taxpayers. Rather, with regard to the positions discussed below in this brief, this Court will respectfully benefit from a taxpayer-oriented perspective. As such, the CTF respectfully submits that the CTF can bring much needed perspective to this reference that none of the Attorneys General in this reference can bring – the perspective of the taxpayers who will ultimately actually be paying this proposed carbon tax.

6. Indeed, earlier this month, the Saskatchewan Court of Appeal has recognized the CTF's useful place in these carbon tax references and allowed the CTF to intervene. Indeed, both of the grounds that the CTF is advancing below, in this reference, are grounds that were consented to by both the Attorney General of Canada and the Attorney General of Saskatchewan in that reference.<sup>8</sup> The CTF respectfully submits that this Court deserves the benefit of similar submissions from the CTF. Those two accepted grounds for intervention, which form the basis of the CTF's proposed intervention in this reference, are as follows.

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<sup>6</sup> *Westbank First Nation v British Columbia Hydro and Power Authority*, [1999] 3 SCR 134 [*Westbank*] at para 17, OBOA Schedule A, Tab 29; *Reference re: Excise Tax Act*, [1992] 2 SCR 445 [*Re Excise Tax*] at para 93, OBOA Schedule A, Vol. 1, Tab 6.

<sup>7</sup> *Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.) at s. 53 [the *Constitution Act*], OBOA Sched. A, Tab 1.

<sup>8</sup> *Van Geyn Affidavit* at paras 8–9.

**Ground 1: The carbon tax is a ‘tax’**

7. The CTF’s first concern is that the proposed carbon tax is a tax rather than a regulatory charge. 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<sup>9</sup> are met; if so, then this Court must proceed to consider *Westbank*’s two-stage analysis for determining whether the tax-like levy is part of a ‘relevant regulatory scheme’.<sup>10</sup> Here, Sir Lyman Duff’s indicia are clearly met; thus, the focus next turns to the two-stage approach from *Westbank*. In that analysis, the first stage considers whether an applicable regulatory scheme exists; if so, then the second-stage considers whether the levy is suitably connected to that regulatory scheme.<sup>11</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’.

8. The first stage of the *Westbank* analysis considers the following four factors:<sup>12</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.

9. Beginning with the initial three factors, which collectively consider whether a relevant regulatory scheme exists, the CTF’s position is that the *GGPPA* does not contain a complete and detailed code of regulation<sup>13</sup>. Rather, the entire *GGPPA* contains nothing but rules and protocols for applying the carbon tax;<sup>14</sup> Parts I and II of the *GGPPA* are not just two parts of a ten-part comprehensive act which specifically contemplates and regulates ‘green economic development’. For instance, there is nothing in the *GGPPA* that legislates ‘the development of more affordable green technologies’. Therefore, there is not actual broader regulatory scheme in place beyond the tax itself.

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<sup>9</sup> As cited in *Re Eurig Estate* [1998] 2 SCR 565 [*Eurig Estate*] at paras 15-16, 22-23, OBOA Schedule A, Tab 30; *Westbank* at paras 21-24, OBOA Schedule A, Tab 29; *620 Connaught Ltd. v Canada (Attorney General)*, 2008 SCC 7, [2008] 1 SCR 131 [*620 Connaught*] at para 22, OBOA Schedule A, Tab 27.

<sup>10</sup> *Westbank* at paras 23-30, OBOA Sched A, Tab 29; *620 Connaught* at paras 23-26,29, OBOA Sched A, Tab 27.

<sup>11</sup> *620 Connaught* at paras 25, 38-39, OBOA Schedule A, Tab 27.

<sup>12</sup> *Westbank* at paras 25-30, OBOA Schedule A, Tab 29; *620 Connaught* at para 25, OBOA Schedule A, Tab 27.

<sup>13</sup> *620 Connaught* at paras 25, OBOA Schedule A, Tab 27.

<sup>14</sup> *GGPPA* at Parts I and II, OBOA Schedule, Tab 2.

10. The CTF's position is also that the carbon tax fails the second stage of the *Westbank* test,<sup>15</sup> as there is no suggestion that the carbon tax is intended to defray the costs of the *GGPPA*'s ostensible regulatory scheme.<sup>16</sup> Furthermore, the predominant effect of the carbon tax is that taxpayers will now be gouged further as they pay more for the same products. Thus, the core character – that is, the 'pith and substance'<sup>17</sup> – of the carbon tax is that of a tax, not a regulatory charge. In the Saskatchewan reference, both of the main Attorneys General, there, consented to this ground and that Court of Appeal has allowed the CTF to advance it.

**Ground 2: The Carbon Tax violates section 53 of the *Constitution Act***

11. The second concern that the CTF will address in this reference, if granted leave to intervene, is that the *GGPPA*'s carbon tax does not to properly adhere to the constitutionally recognized principle of '*no taxation without representation*' that is enshrined in section 53 of the *Constitution Act*. This constitutionally enshrined principle, which requires that all federal taxes be initiated by Parliament (rather than by the Crown), is central to our conception of democracy and dates back all the way to the 1688 Bill of Rights.<sup>18</sup> Yet, for the following reasons, the CTF's position is the proposed carbon tax violates this constitutional principle.

12. The CTF recognizes that Parliament is generally able to explicitly delegate the details of the administration and application of a taxation; however, the CTF respectfully submits that this carbon tax is different than the situation in *OECTA*. For example, consider section 26 of the *GGPPA*; effectively every detail concerning the tax is determined other than by Parliament including who the tax applies to, what it applies to, when it applies, what circumstances it applies to, and how much the tax is [emphasis added in quote]:

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.

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<sup>15</sup> *620 Connaught* at paras 25, 34-36, OBOA Sch. A, Tab 27; *Westbank* at paras. 28-30, OBOA Sch. A, Tab 29.

<sup>16</sup> *620 Connaught* at paras 38-39, OBOA Sch. A, Tab 27; *Eurig Estate* at paras. 30-34, OBOA Sch. A, Tab 30.

<sup>17</sup> *620 Connaught* at paras 20-21, OBOA Sch. A, Tab 27; *Westbank* at para 30, OBOA Sch. A, Tab 29.

<sup>18</sup> *Ontario English Catholic Teachers' Assn. v Ontario (Attorney General)*, 2001 SCC 15, [2001] 1 SCR 470 [*OECTA*] at paras 69-71, OBOA Schedule A, Tab 28; *Eurig Estate* at para 32, OBOA Schedule A, Tab 30.

13. Simply put, the CTF's intends to submit that the federal carbon tax is in violation of the afore-noted principles underlying section 53, because it is not in keeping with the idea of Parliament – taxpayers elected representatives – conclusively determining even the broadest details of the tax. Thus, if granted leave to intervene, the CTF respectfully intends to submit that section 53 is violated, and therefore that the federal carbon tax at issue in this reference is unconstitutional. Again, in the Saskatchewan reference, both of the main Attorneys General, there, consented to this ground and that Court of Appeal has allowed the CTF to advance this ground.

**Summary and Conclusion**

14. The CTF has a unique and well-established ability to advance the voice of taxpayers, who – as the payers of this carbon tax – have interests which are at the heart this matter. The CTF has no intention to turn this reference, or this Court, into a partisan political arena or to widen the scope of the litigation. Rather, CTF's intention is to helpfully concentrate on issues that have already been raised in this reference, and to advance that taxpayer voice by using grounds that both of the main Attorneys General have consented to the CTF raising as a proposed intervenor in the Saskatchewan reference. On that basis, the CTF respectfully submits that it will be a useful and positive contributor to this particular reference, and thus respectfully asks to be permitted to intervene, on the basis of the grounds set out herein.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at the City of Victoria, in the Province of British Columbia, this 23rd day of December, 2018.

CREASE HARMAN LLP

Per: 

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## VII. AUTHORITIES

### Cases

*620 Connaught Ltd. v Canada (Attorney General)*, 2008 SCC 7, [2008] 1 SCR 131 at paras 16-17, 20-36, 38-39

**[Book of Authorities of the Attorney General of Ontario, Schedule A, Tab 27]**

*Ontario English Catholic Teachers' Assn. v Ontario (Attorney General)*, 2001 SCC 15, [2001] 1 SCR 470 at paras 69–71, 74-79

**[Book of Authorities of the Attorney General of Ontario, Schedule A, Tab 28]**

*Reference re: Excise Tax Act*, [1992] 2 SCR 445 at p. 497

**[Book of Authorities of the Attorney General of Ontario, Schedule A, Tab 6]**

*Re Eurig Estate* [1998] 2 SCR 565 at paras 14-15, 22-23, 30-34

**[Book of Authorities of the Attorney General of Ontario, Schedule A, Tab 30]**

*Westbank First Nation v British Columbia Hydro and Power Authority*, [1999] 3 SCR 134 at paras 21-30

**[Book of Authorities of the Attorney General of Ontario, Schedule A, Tab 29]**

### Statutes

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

**[Book of Authorities of the Attorney General of Ontario, Schedule B, Tab 1]**

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

**[Book of Authorities of the Attorney General of Ontario, Schedule B, Tab 2]**