

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA)**

**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 ALBERTA
UNDER THE *JUDICATURE ACT*, RSA 2000, C. J-2, S. 26**

BETWEEN:

ATTORNEY GENERAL OF BRITISH COLUMBIA

Appellant

- and -

ATTORNEY GENERAL OF ALBERTA

Respondent

- and -

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(Style of cause continued on next page)

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(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)**

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**FACTUM OF THE INTERVENER,
THUNDERCHILD FIRST NATION**

PART I: OVERVIEW OF FACTS

1. This factum is filed in relation to the appeal from the decisions of the Ontario Court of Appeal¹, the Saskatchewan Court of Appeal², and the Alberta Court of Appeal³, on the constitutionality of the *Greenhouse Gas Pollution Pricing Act* (the “*GGPPA*”)⁴

2. Thunderchild First Nation (“**Thunderchild**”) is an Indian band, as defined by the *Indian Act*.⁵

3. Thunderchild is subject to those charges levied under Part 1 of the *GGPPA* (“**Part 1**”)

PART II: STATEMENT OF ISSUE

4. This factum addresses the particular issues raised within both the Ontario Reference and Saskatchewan Reference, specifically, the determination that Part 1 is not a tax, in part because any revenue raised under Part 1 is returned to the originating province or prescribed persons of the province.

PART III: STATEMENT OF ARGUMENT

5. Both the Ontario and Saskatchewan Courts of Appeal concluded that the function and purpose of the charges under Part 1 were that of a regulatory levy and not a tax, relying largely on the finding that the *GGPPA* was intended to make a behavioural change to the continued use of greenhouse gas emitting resources, and that revenues derived thereof are to be returned.

¹ *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544 [*Ontario Reference*]

² *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40 [*Saskatchewan Reference*]

³ *Reference re Greenhouse Gas Pollution Pricing Act*, 2020 ABCA 74

⁴ *Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12, s 186.

⁵ *Indian Act*, (R.S.C., 1985, c. I-5) at s. 2(1)

6. As Saskatchewan has not implemented a satisfactory regime, Part 1 applies imposing carbon pricing on fuel products and energy sales and purchases in the province. Thunderchild has been subjected to charges under Part 1 by way of fuel purchases and energy consumption, where the supplier has charged the Part 1 pricing to Thunderchild directly.

7. Typically, under Section 87 of the *Indian Act*,⁶ an individual or a band, as defined in the *Indian Act*, is not required to pay tax when fuel is purchased on reserve for personal or the band's own use. In this case, Thunderchild argues that the carbon pricing scheme established under Part 1 is indicative of a direct taxes as Thunderchild does not have an opportunity to reclaim those payments through their end of year taxes, not being a natural person or corporation. Being a direct tax, Thunderchild would be permitted to utilize their taxation exemption rights.

8. In support of their position, Thunderchild relies on the decision of this Honourable Court in *Eurig Estate, Re.* [1998] 2 SCR 565, which provided four criteria for a levy to be a tax: "(1) enforceable by law; (2) imposed under the authority of a legislature; (3) levied by a public body; and (4) intended for a public purpose."⁷

9. *Westbank First Nation v British Columbia Hydro and Power Authority*, [1999] 3 SCR 134 [*Westbank*] is the most significant decision on the assessment of whether a levy can be characterized as a tax or a regulatory charge. In *Westbank*, the SCC laid out an analytical framework that details characteristics of both taxes and regulatory charges, stating:

30 In all cases, a court should identify the primary aspect of the impugned levy. ... Although in today's regulatory environment, many charges will have elements of taxation and elements of regulation, the central task for the court is to determine whether the levy's primary purpose is, in pith and substance: (1) to tax, i.e., to raise revenue for general purposes; (2) to finance or constitute a regulatory scheme, i.e., to be a regulatory charge or to be ancillary or adhesive to a regulatory

⁶ *Ibid.*

⁷ *Eurig Estate, Re.* [1998] 2 SCR 565 at para 15.

scheme; or (3) to charge for services directly rendered, i.e., to be a user fee.⁸

10. As noted by within the dissenting opinion of the *Saskatchewan Reference*, the levy imposed under Part 1 bears all the hallmarks of taxation and insufficient indicia of a regulatory charge.⁹ The dissent further states that the way in which the fuel levy applies to only listed provinces reinforces a conclusion that it is a tax, as the federal Governor in Council is responsible to evaluate the province's ability to exercise its law-making powers to determine whether the federal fuel levy under Part 1 will apply. As the Attorney General of Saskatchewan conceded at the time, Parliament has the power to tax, whereas, the Provincial legislatures have the power to regulate in this area.¹⁰

11. For Thunderchild, one of the consequences of the imposition of the levy is the inability to collect the paid levies in the same way as a province or a prescribed person of a province would.

12. The matter of revenue being returned to the provinces and/or prescribed persons of the provinces has been raised and relied upon by both the Ontario and Saskatchewan Courts of Appeal as a consideration favouring that Part 1 is a regulatory levy. Thunderchild submits that although they are subject to Part 1 charges, they do not have a mechanism in which to recover any of the monies paid under Part 1.¹¹

13. The *Ontario Reference* commented on administration of those revenues raised under Part 1, stating:

[41] Pursuant to s. 165 of the Act, the Minister of National Revenue must distribute the net amount of charges levied under Part 1 to the provinces in which they were paid or to other prescribed persons or classes of persons. On October 23, 2018, Canada announced that charges levied in provinces that have voluntarily adopted the federal system will be returned directly to the province of origin. In the case of backstop jurisdictions that have not

⁸ *Westbank First Nation v British Columbia Hydro and Power Authority*, [1999] 3 SCR 134 at para 30.

⁹ *Supra* note 2 at para 265.

¹⁰ *Ibid*, at para 272.

¹¹ Motion Record of the Proposed Intervener, Thunderchild First Nation, Tab 2, Affidavit of Chief James Snakeskin, sworn June 16, 2020, at paras 6-8.

voluntarily adopted the federal system, approximately 90 percent of the proceeds of the fuel charge will be returned to residents of the province of origin as “Climate Action Incentive” payments. Canada has said that the balance will provide support to schools, hospitals, colleges and universities, municipalities, not-for-profit enterprises, Indigenous communities, and small and medium-sized businesses in the province of origin.¹²

14. The *Saskatchewan Reference* also commented on the nature of any revenues realized under Part 1 being returned to a province or prescribed persons of a province, stating:

.... By contrast, monies raised under the *Act* must be returned to the listed province, persons in that province, or a combination of both. Fuel charge and combustible waste revenues raised in Saskatchewan could not be employed by the federal government, and at the discretion of the Governor in Council, to build a bridge or to offset the federal government’s cost of making old age security payments. Rather, they must be returned, in the form of cash so to speak, to the province or prescribed persons in the province. This in itself is perhaps not wholly determinative of the status of the charge imposed by the *Act*. However, it certainly does serve to distinguish the charges from what would typically be seen as a tax.¹³

15. The regime in Saskatchewan is that of returning revenues of Part 1 to taxpayers, or corporations of Saskatchewan within their annual income returns. Although Thunderchild is geographically located within the Province of Saskatchewan, all monies paid by Thunderchild under Part 1 are provided to either the province or those prescribed persons and not Thunderchild. As such, the monies paid by Thunderchild are revenue generating for Saskatchewan or prescribed persons of Saskatchewan, as those are revenues derived from an outside source.

16. In contrast to municipalities and other like governing bodies administering public lands, Thunderchild is not afforded the protections of Section 125 of the *Constitution*.¹⁴

17. In essence, Thunderchild’s payments under Part 1 are revenue generating for the province or those prescribed persons of the province, through a

¹² *Supra* note 1 at para 41.

¹³ *Supra* note 2 at para 86.

¹⁴ *The Constitution Act, 1867*, 30 & 31 Vict, c 3.

reallocation of federal dollars intended for the specific use and benefit of Thunderchild government and people.

18. Should the *Ontario Reference* and *Saskatchewan Reference* be correct, then Thunderchild would be included in the return of any revenues raised as a participant making payments on those purchases subject to Part 1. This is not the case; therefore, the findings of the Courts of Appeal should be assessed in light of the considerations raised by Thunderchild, and the overall effect and function of Part 1 on Thunderchild and other Indian bands.

19. The *Ontario Reference* further stated that funds are “returned to provinces, taxpayers and institutions to reward them for their participation”¹⁵ in the *GGPPA* program.

20. Although participating in the *GGPPA* program, Thunderchild is not rewarded through the return of any revenue raised under Part 1. Revenue returned was a consideration as to the effort to try and modify behaviour. This is also not the case for Thunderchild.

PART IV: SUBMISSION CONCERNING COSTS

21. Thunderchild does not seek costs and requests that no cost be ordered against them.

PART V: ORDER SOUGHT

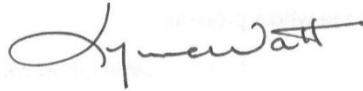
22. Thunderchild respectfully supports the orders requested by the Attorney Generals of Saskatchewan, Alberta and Ontario declaring that Part 1 is in fact a tax, instead of a regulatory levy, thus Part 1 being unconstitutional.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

¹⁵ *Supra* note 1 at para 162

DATED at the City of Saskatoon, in the Province of Saskatchewan, this 12th day of August, A.D. 2020.

McKERCHER LLP



For:

Solicitors for the Intervener,
Thunderchild First Nation

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PART VI: TABLE OF AUTHORITIES AND LEGISLATION**Authorities**

Case Law	Cited at Paragraphs:
<i>Eurig Estate, Re.</i> [1998] 2 SCR 565	8
<i>Reference re Greenhouse Gas Pollution Pricing Act</i> , 2019 ONCA 544	1, 13, 19
<i>Reference re Greenhouse Gas Pollution Pricing Act</i> , 2019 SKCA 40	1, 10, 14
<i>Westbank First Nation v British Columbia Hydro and Power Authority</i> , [1999] 3 SCR 134	9

Statutes

Legislation	
<i>The Constitution Act</i> , 1867, 30 & 31 Vict, c 3 <i>Loi constitutionnelle de 1867, 30 & 31 Victoria, c 3</i>	16
<i>Greenhouse Gas Pollution Pricing Act</i> , SC 2018, c 12, s 186 <i>Loi sur la tarification de la pollution causée par les gaz à effet de serre</i> (L.C. 2018, ch. 12, art. 186)	1
<i>Indian Act</i> , (R.S.C., 1985, c. I-5) <i>Indian Act</i> , R.S.C. 1985, c. 1-5	2, 7