CITATION: CCLA v. Attorney General of Ontario, 2020 ONSC 4838
COURT FILE NO.: CV-19-00626685-0000
DATE: 20200904

ONTARIO

SUPERIOR COURT OF JUSTICE

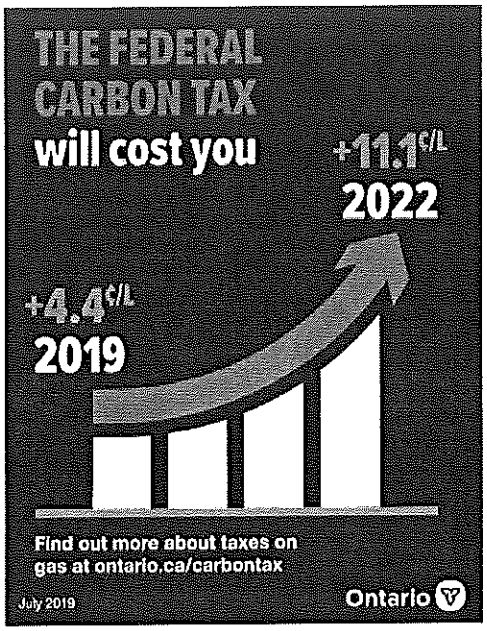
BETWEEN:	
THE CORPORATION OF THE CANADIAN CIVIL LIBERTIES ASSOCIATION Plaintiff	*Steven Sofer, Sandra Barton, and Elizabeth Kurz*, for the CCLA
– and –	
THE ATTORNEY GENERAL OF ONTARIO Defendant	*Zachary Green, Padraic Ryan, and Ashley McKenzie*, for Ontario
– and –	
PEN CANADA Intervener	*Peter Wardle and Evan Rankin*, for the Intervener
	HEARD: July 6, 2020

MORGAN J.

I. The impugned legislation

[1] In May 2019, the Ontario legislature enacted the *Federal Carbon Tax Transparency Act*, 2019, SO 2019, c. 7, Sched. 23 ("FCTTA"), section 2(1) of which requires that a notice explaining certain fuel charges be affixed to every gas pump in every gasoline station in Ontario. Under section 4 of the FCTTA, the notice requirement is enforced by the prospect of substantial fines that can accumulate on a daily basis for as long as the requisite notice is not displayed by the retailer.

[2] The form of the notice is a sticker set out in O. Reg. 275/19 (the "Sticker"), promulgated pursuant to section 5 of the FCTTA. There is an English and a French version of the Sticker. The regulation requires the Sticker to be prominently displayed "within the top two-thirds of the side of the gasoline pump that faces motor vehicles when the pump is used to put gasoline into their fuel tanks". The Sticker must take the prescribed form, the English version of which is:



[3] The information conveyed in the Sticker refers to the charges on gasoline imposed by the federal *Greenhouse Gas Pollution Pricing Act*, SC 2018, c. 12 ("GGPPA"). As can be seen, it is focused on the cost of the federal "carbon tax" – a nomenclature used by the province in reference to the charges in issue, but that does not appear in the federal legislation. Under Part I of the GGPPA, the amount in issue is referred to as a "Fuel Charge".

[4] The Sticker advises that this measure will cost the consumer an additional 4.4 cents per litre of gasoline, which will escalate gradually to a high of 11.1 cents per litre in three years' time. The reader is then referred to an Ontario government website for further details about these charges. Those details include information about the Ontario government's own environmental policies and to alternatives to the Fuel Charge, but do not include further information about the federal legislation, how it earmarks and distributes the Fuel Charge funds, or the other initiatives that were enacted by Parliament as part of the overall package of greenhouse emission policies.

[5] The Ontario government characterizes the FCTTA and O. Reg. 275/19 as a notice requirement conveying information relevant to the consuming public. It is Ontario's submission that the policies underlying this legal requirement reflect the legitimate goals of promoting informed consumer choice and price transparency. It is also Ontario's position that the requirement to post this specific form of pricing notice on each gas pump does not limit the ability of gasoline retailers to express themselves, and, moreover, that the Sticker itself does not associate gasoline retailers with a message with which they either agree or disagree.

[6] The Canadian Civil Liberties Association ("CCLA") views the notice requirement imposed by the FCTTA and accompanying regulation to be a form of compelled speech that violates freedom of expression under section 2(b) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c. 11 (the "Charter"). It is the CCLA's submission that the mandatory content of the Sticker is political messaging rather than genuine consumer information, and it is therefore a rights violation that cannot be justified under section 1 of the Charter.

[7] The CCLA seeks a declaration that ss. 2, 4, and 5 of the FCTTA, along with O. Reg. 275/19, are of no force or effect pursuant to section 52(1) of the Charter. The parties have agreed that the constitutional challenge is to proceed by way of a motion for summary judgment.

II. Origin and purpose of the Sticker

[8] As indicated, the Sticker turns the reader's attention to the federal GGPPA. That legislation has two substantive parts: Part I imposes a "Fuel Charge" on a number of different types of fuel and combustible materials, and Part II creates a pricing system based on an entity's output of "Industrial Greenhouse Gas Emissions". The former is administered by the Canada Revenue Agency, while the latter is administered by Environment and Climate Change Canada.

[9] The Preamble to the GGPPA indicates that provinces and territories may create their own system of emissions pricing if they chose to do so, but that if they do not, or if they create a system that falls short of federal requirements, the Fuel Charge is applicable and is implemented in that province or territory. The Preamble makes it clear that the federal government has enacted this legislation as part of a group of financial incentives for industrial operations to pursue those changes in their operations that will reduce greenhouse gas emissions.

[10] For those provinces where the Fuel Charge is imposed, sections 165(2) and 188(1) of the GGPPA, along with section 13 of the *Budget Implementation Act, 2018, No 2,* SC 2018, c 27, returns some of the proceeds received from the Fuel Charge to the province of origin as support for the educational, health, business, and Indigenous sectors, and to defray social services and infrastructure costs incurred in the province. The budgetary measures also include the addition of a new Subdivision A.3, section 122.8, of the *Income Tax Act*, RSC, 1985, c. 1 (5th Supp.) ("ITA"), entitled "Climate Action Incentive". This new section which provides an income tax reduction or refund to individuals residing in eligible provinces making a claim on their tax returns from 2019 and forward. The federal tax relief is structured as a deemed tax payment linked to the Fuel Charge payable at the gas pump, with section 122.8(6) of the ITA describing the relevant amounts to have been paid in the following terms:

> The amount deemed by this section to have been paid on account of tax payable for a taxation year is deemed to have been paid in the year following the taxation year as a rebate in respect of charges levied under Part I of the *Greenhouse Gas Pollution Pricing Act* in respect of the relevant province.

[11] As of April 1, 2019, the Fuel Charge imposed under the GGPPA applies in Ontario. Evidence in the record establishes that the rate charged on gasoline began at about 4.4 cents per

litre in April 2019, increasing to 6.6 cents per litre in April 2020. It is further set to rise to 8.8 cents per litre in April 2021, followed by an increase to 11.1 cents per litre in April 2022. Likewise, on December 16, 2019, the Minister of Finance designated Ontario as one of the provinces to which the federal rebate and tax incentive program applies. Section 122.8(4) of the ITA provides the calculation for a basic individual claim of $224 for residents of Ontario, with varying amounts available to be claimed by taxpayers in different family categories and with extra supplements for residents of small and rural communities.

[12] It is fair to say that the government of Ontario has not been in favour of the federal Fuel Charge. In 2018, it passed an Order-in-Council 1014/2018 which referred to the Court of Appeal the question of the constitutionality of the GGPPA and its attendant Fuel Charge. That challenge resulted in a rejection of the Ontario government's point of view: *Reference Re Greenhouse Pollution Pricing Act*, 2019 ONCA 544. The Court of Appeal held, at para 3, that the GGPPA is within federal jurisdiction, and that the subject of carbon emissions, or greenhouse gases, represents a pressing concern across the country and internationally:

> The *Act* is within Parliament's jurisdiction to legislate in relation to matters of 'national concern' under the 'Peace, Order, and good Government' (POGG) clause of s. 91 of the *Constitution Act, 1867*. Parliament has determined that atmospheric accumulation of greenhouse gases (GHGs) causes climate changes that pose an existential threat to human civilization and the global ecosystem.

[13] In addition, the Court determined that the Fuel Charge is not a tax, as that term is understood in Canadian constitutional law. That is, the GGPPA is not, first and foremost, a revenue-raising measure, but rather the Fuel Charge is enacted as part of a broader regulatory scheme aimed at modifying corporate conduct with respect to carbon emissions. It is therefore a regulatory charge rather than a tax: *Ibid.*, at para 148.

[14] Moreover, the Court reasoned, at para 154, that contrary to Ontario's position, the charges levied under a regulatory scheme need not be restricted to cost recovery. Rather, citing *620 Connaught Ltd. v. Canada (Attorney General)*, [2008] 1 SCR 131, at para 20, the Court confirmed that regulatory fees such as the Fuel Charge may be designed as a means of altering the behaviour targeted in the regulatory scheme. An appeal of the Court of Appeal's decision in the *Greenhouse Reference* is scheduled to be argued at the Supreme Court of Canada in the upcoming months.

[15] As indicated at the outset, the FCTTA is mandatory legislation. Section 2(1) requires gasoline retailers to obtain copies of the Sticker prescribed in O. Reg. 275/19 and to affix it to each gasoline pump in the manner set out in the regulation. Section 4(1) of the FCTTA authorizes penalties for failure to comply with the legislative and regulatory requirements; Schedule 17.1 to the Set Fine Schedules under the *Provincial Offences Act* provides that on August 30, 2019, the Chief Justice of the Ontario Court of Justice established fines of $150 per day for an offence under subsection 4(1).

[16] The FCTTA was enacted by Parliament and received Royal Assent on May 29, 2019. The requirement to display Stickers on gas pumps, however, came into force on a delayed basis. It only became mandatory for gasoline retailers on August 30, 2019. As CCLA's counsel point out, this

was a mere two months prior to the October 21, 2019 federal election, in which issues around the environment were central to the election campaign.

[17] The affidavit evidence establishes that in the 2019 election campaign, the federal Conservatives and the Liberals had very different views on environmentalism, climate change, greenhouse gas emissions, and what means should be used to address these problems. A *Globe and Mail* article dated October 15, 2019, a copy of which is an exhibit in the CCLA's motion record, reported that "Leader Andrew Scheer opposes the carbon-pricing system, vowing that his party would repeal it and instead use tax incentives, levies on large industrial polluters and spending on carbon-capture technology." Ontario Premier Doug Ford was quoted in an article in *The Canadian Press* dated October 28, 2019, to the effect that the "carbon tax", as he called it, was a campaign issue which he was following closely in the upcoming federal election.

[18] It is the CCLA's position that the key motivation of the governing Progressive Conservatives in Ontario for implementing the Sticker policy, and the specific motivation for its timing in the run-up to the federal election, was to influence the electorate to vote against the incumbent Liberal Party that enacted the FCTTA. The Supreme Court of Canada has indicated that the meaning of a statute can most readily be gleaned from a combination of "the historical background, from statements indicating why the provision was introduced, and from the text of the provision itself": *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19, at para 44. The record before me contains a combination of these evidentiary sources, which cumulatively demonstrate that the FCTTA should be understood as forming a part of the Ontario government's engagement with federal partisan politics.

[19] On April 18, 2019, with a federal election only months away and at a time when the bill that became the FCTTA was before the Ontario legislature, Premier Ford identified for the press the central goal of the proposed legislation: "People in our province have to know how the federal government is gouging them on the worst single tax you could ever put on the backs of people, the backs of businesses." At the same time, former Ontario Finance Minister Vic Fedeli also identified the partisan battle in which the proposed FCTTA formed an integral part: "We will be putting stickers on gas pumps that show just how much Justin Trudeau is taking out of your pocket": "Ontario NDP asks federal elections watchdog to look into Ontario Carbon tax sticker campaign", CBC.CA News (18 April 2019).

[20] That same week, on April 17, 2019, Ontario's Minister of Energy, Northern Development and Mines, Greg Rickford, stated in the legislature that, "We're fighting this job-killing, regressive carbon tax. At every opportunity we are going to let the people of Ontario know where it hurts the most, when they're fueling up their automobiles": Legislative Assembly of Ontario, Official Report of Debates (Hansard) No. 95, 1st Session, 42nd Parliament, Wednesday 17 April 2019, p. 4448. Statements to this effect were likewise made in the legislature by various members of the governing Progressive Conservatives on April 16, April 18, May 7, and May 15, 2019, all of which were published in Hansard under the heading "Government Advertising."

[21] The partisan thrust of the Sticker itself, and the context of that measure as part of a war-of-words between the Ontario Conservatives and the federal Liberals, was reiterated on several occasions in the legislature by Minister Rickford: see, e.g., Legislative Assembly of Ontario,

Official Report of Debates (Hansard) No. 96, 1st Session, 42nd Parliament, Thursday 18 April 2019, pp. 4492:

> We're hearing the radio stations talk about the carbon tax. It seems like the federal government – there's no amount of money that they will *[sic]* spend to talk about and tout this job-killing, regressive carbon tax.
>
> We feel differently. We think that a sticker at the gas pump with some public notice is an important way of letting the people of Ontario know how much this tax scheme is going to cost them. Imagine them putting their hand in one pocket and saying, 'It's not going to cost you…
>
> It's not available to the federal government to spend unlimited resources on touting a tax that's going to kill jobs…

[22] It is the CCLA's position that these statements by the Premier and Ontario cabinet members encompass the thrust of the FCTTA and O. Reg. 275/19. Following the Supreme Court's guidance, "the statements recounted here were made by those directly responsible for introducing the [policy in issue], and as such provide relevant evidence of legislative purpose": *Babstock*, at para 46. Counsel for the CCLA submits that it is the adversarial political context, evidenced in Hansard and in the media, that gives those enactments their true meaning.

III. The CCLA's involvement

[23] It is Ontario's position that the CCLA lacks standing to bring the present action. Counsel for the province contend that the CCLA lacks a "genuine interest" in the case in that it is not directly impacted by the outcome of the proceeding. The CCLA, on the other hand, contends that it has a sufficient interest in the proceeding to give it standing as challenger, and that while it lacks a direct personal or financial interest it is fully engaged with the issues raised in the case.

[24] The FCTTA was first announced in Ontario's April 2019 Budget. Shortly thereafter, on April 29, 2019, the CCLA, through its counsel, sent a letter to the provincial government notifying it that the proposed policy amounted to compelled speech and would be a violation of section 2(b) of the Charter. A little over a week later, the CCLA's executive director appeared before a legislative committee considering the Bill and made the same point, stating that "the government is perfectly free, obviously, to undertake its fight against the federal government and fight against the carbon tax. But to play ventriloquist and to ask businesses and citizens to be the dummy to ape the political message of the government…is compelled speech".

[25] This position was reiterated on June 7, 2019 upon the Ontario government's invitation to the public to comment on the proposed legislation and regulations. The CCLA submitted that either no legislation be enacted or a more politically neutral conveying of information about the Fuel Charge be adopted.

[26] In acting with immediacy, and in taking a position in support of freedom of expression, the CCLA conformed with its history as a prominent civil liberties organization in the province. Its role in developing the law of civil liberties and human rights in Ontario has been noted by the

courts on numerous occasions. In *Corporation of the Canadian Civil Liberties Association v. Ontario (Minister of Education)* (1988), 64 OR (2d) 577, Watt J. observed that, "The [CCLA], a national organization created in 1964, actively promotes respect for and the observance of fundamental human rights and civil liberties".

[27] Likewise, in *Tadros v. Peel Regional Police Service*, 2008 ONCA 775, at para 3, O'Connor ACJO expressly recognized that the [CCLA] "has substantial experience in promoting and defending the civil liberties of Canadians". It has done so in legislative committees, as friend of the court in cases raising significant civil liberties issues, and as a party/challenger in its own right in constitutional and human rights cases: see *Canadian Civil Liberties Association v. Canada (Attorney General)*, 1998 CanLII 627 (Ont CA); *Canadian Civil Liberties Association v. Ontario (Minister of Education)*, 1990 CanLII 6881 (Ont CA). The courts have held that the defense of civil liberties and constitutional rights is the CCLA's mission, and in involving itself from the outset in the policy debate and legislative facts giving rise to the present case, it was fulfilling a fundamental aspect of its goals as an organization.

[28] The CCLA has submitted affidavit evidence setting out that it made efforts to find a gas retailer to act as a plaintiff or co-plaintiff herein. Those efforts were unsuccessful, perhaps due to the politically prominent nature of the issues at stake. As the CCLA's affiant explains it, various gasoline retailers, when contacted by representatives of the CCLA, reacted with concern about suing the government that regulates them. They also expressed a wariness of publicly embracing a political position with which some of their customers may take issue. Ironically, it is the CCLA's very point about the impugned legislation and regulation – i.e. that it is intrinsically wed to partisan politics – that has prevented it from convincing any retailer to join it or to take this challenge in its own right as named plaintiff.

[29] Furthermore, the CCLA's position is that there is a more than adequate record of legislative facts on which the court can proceed, and that the nature of the case is such that facts relating to any one gasoline retailer are not necessary to the constitutional challenge. Indeed, CCLA's counsel argue that the legislative facts themselves set out the message that the Ontario government requires gasoline retailers to deliver, and so incorporates the necessary adjudicative facts for this challenge. They therefore submit that the facts in the record, including the requirements contained in the legislation and the design of the Sticker contained in the regulation thereunder, suffice in "help[ing] to establish the purpose and background of legislation, including the social, economic and cultural context in which the legislation was enacted": *R v. Levkovic*, 2010 ONCA 830, at para 30.

[30] As a further part of the factual record, the CCLA also relies on the legislative debates and Ontario government media statements surrounding the enactment of the FCTTA and the implementation of the Sticker. The media statements by provincial government members are uncontroversial in the sense that they appeared in the mainstream press and their existence is not challenged; the statements in the legislature are likewise admissible to assist the Court in determining the purpose of a legislative enactment, and can reliably serve as evidence of legislative purpose where the statements in the legislature are those of government Ministers introducing or explaining a bill: see Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th Ed., (Toronto: Lexis Nexis, 2014), at 9.48, 23.81, and 23.83.

IV. Public interest standing

[31] In the absence of a challenger with a direct personal interest in the outcome of this litigation, the CCLA seeks public interest standing to bring the claim. In evaluating such a request, the Supreme Court of Canada in *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, [2012] 2 SCR 524, at para 2, has instructed courts to look to three factors: (a) Is a serious justiciable issue being raised? (b) Does the applicant have a real stake or genuine interest in the issue? (c) Under the circumstances, is this a reasonable and effective way to bring the issue to court? As CCLA's counsel point out, the discretion as to whether to grant public interest standing is to be exercised in a "liberal and generous manner": *Ibid.*, at para 2, quoting *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 SCR 236, 253.

[32] Counsel for Ontario puts up little argument that the issue at hand is not a serious and justiciable one. The alleged speech-act at the centre of the constitutional challenge is not frivolous or novel, and although it occurs in a retail setting is not the mere sale of a product: see *R. v. Greenbaum; R. v. Sharma* (1991), 44 OAC 355 (Ont CA), rev'd on other grounds *R. v. Sharma*, [1993] 1 SCR 650; *R. v. Greenbaum*, [1993] 1 SCR 674. The FCTTA expressly requires the conveying of information by gasoline retailers to their customers, which, as discussed in Part V below, is certainly within the broad definition of expressive activity embraced by the Supreme Court of Canada: *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 SCR 927.

[33] Moreover, among public interest groups, the CCLA is not alone in voicing concern about the requirements of the FCTTA and O. Reg. 275/19. Affidavit and other evidence in the record before me establishes that Greenpeace Canada has made it clear to the government of Ontario that it views the Sticker requirement as a violation of freedom of expression under the Charter. Likewise, the Ontario Chamber of Commerce has informed the government that gas station operators are concerned about what they view as the political character of the required Sticker, and that they perceive the mandatory policy as a violation of their Charter rights.

[34] In similar fashion, the Canadian Independent Petroleum Marketers Association has observed publicly that the partisan content of the Stickers, combined with the penalties contained in the FCTTA, amount to a rights violation that is particularly detrimental to the operations of small businesses. Finally, the Intervener in this case, PEN Canada, a venerable defender of free expression, has joined the CCLA in challenging the constitutionality of the provincial legislation and regulation that make mandatory the public display of the Sticker.

[35] The supporting viewpoints of these groups is not determinative of the legal issues in the case. Nevertheless, the fact that public interest organizations representing a number of different sectors in the society have expressed objection to the legislation and regulation on similar legal grounds to those of the CCLA is significant in establishing that the challenge raises "a 'substantial constitutional issue' and an 'important one' that is 'far from frivolous'": *Downtown Eastside*, at para 54, quoting *Nova Scotia Board of Censors v. McNeil*, [1976] 2 SCR 265, 268, *Minister of Justice of Canada v. Borowski*, [1981] 2 SCR 575, 589; *Finlay v. Canada (Minister of Finance)*, [1986] 2 SCR 607, 633.

[36] The record also establishes without qualification that the CCLA's interest in the issue raised by this case is genuine, and that it has a track record of engagement with the constitutional issue at hand: *Downtown Eastside*, at para 43. The CCLA has been acknowledged by the courts to be an "experienced and qualified public interest litigant": *Landau v Ontario (Attorney General)*, 2013 ONSC 6152, at para 22(c). It has a lengthy record of involving itself in public interest litigation, including a number of freedom of expression cases argued at the Supreme Court of Canada: see *R v Keegstra*, [1990] 3 SCR 697; *Little Sisters Book & Art Emporium v Canada*, 2000 SCC 69; *R v National Post*, 2010 SCC 16; *R v Butler*, [1992] 1 SCR 452.

[37] Public interest litigants can gain standing where they have demonstrated a genuine interest in the issues by publishing on the topic, participating in committee hearings relating to the legislation, and establishing a history of expertise in the area: *Alford v. Canada (Attorney General)*, 2019 ONCA 657, at para 4. The CCLA has engaged in all of those activities and more in relation to the issue before the court. Its interest in the case reflects the core of the civil liberties and constitutional law mandate which it exists to defend, and as an organization it has the capacity to take on this litigation.

[38] In addition to all of that, allowing the CCLA public interest standing is a reasonable way to bring the issues to court. While any gas retailer in the province could potentially be a plaintiff in this action, the existence of other potential plaintiffs must be considered realistically in considering the CCLA's request for standing. The CCLA has provided evidence of efforts it has made to find a gas retailer to act as a co-plaintiff.

[39] As already indicated, the record shows that retailers, with a view to market forces rather than to politics and constitutional law, have been loath to participate in this case. Unlike gasoline retailers, the CCLA is not subject to the changing winds of public opinion and the retail market.

[40] I conclude that this is an appropriate case in which to grant public interest litigant status to the CCLA.

V. Freedom of expression and compelled speech

[41] The expression protected by section 2(b) of the Charter "can be conveyed through an infinite variety of forms of expression: for example, the written or spoken word, the arts, and even physical gestures or acts." *Irwin Toy Ltd. v. Québec (Attorney General)*, [1989] 1 SCR 927, at para 43. Certain conduct such as labour strikes or acts of criminal violence have been specifically excluded from the scope of constitutional protection: *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 SCR 313; *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 SCR 573, at 588. Otherwise, "s. 2(*b*) of the *Charter* embraces all content of expression irrespective of the particular meaning or message sought to be conveyed." *R. v. Keegstra*, [1990] 3 SCR 697.

[42] The Supreme Court of Canada has said since its earliest jurisprudence under section 2(b) that, "if the activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of the guarantee": *Irwin Toy*, at 969. Importantly, this freedom "encompasses the right *not* to express views." *Rosen v. Ontario (Attorney General)* (1996), 131 DLR (4th) 708, at para 16 (Ont CA) [emphasis added]. As the Supreme Court explained it in

Slaight Communications Inc. v. Davidson, [1989] 1 SCR 1038, at para 95, "[t]here is no denying that freedom of expression necessarily entails the right to say nothing or the right not to say certain things. Silence is in itself a form of expression which in some circumstances can express something more clearly than words could do."

[43] In previous cases, the right not to express a government's preferred point of view has been applied to persons who oppose socially positive messages such as health warnings: *RJR McDonald Inc. v. Canada (Attorney General)*, [1995] 3 SCR 199, at para 124. Likewise, the section 2(b) right has been found to include the right to refrain from expressing objective, uncontested facts: *Slaight Communications*, at para 95. The Court made it clear in *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 SCR 139, at para 18, that the Charter not only protects people from having to express a message with which they disagree or with which they do not want to associate themselves, but it also guarantees the corresponding right not to have to listen to such a message.

[44] The freedom sought by the CCLA here can be characterized as an expansive one. The Sticker itself may be relatively small – it fits neatly on the face of a gas tank – but that does not mean that the burden on the gasoline retailer compelled to post it can be dismissed as "trivial or insubstantial": *R v. Edwards Books and Art Ltd.*, [1986] 2 SCR 713, at para 97. In fact, the principle at stake is substantial when seen from the point of view of the retailer, its customers, and of a rights-based society in general. As the Supreme Court observed in *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 SCR 211, at 267, a statutory requirement whose effect is "to put a particular message into the mouth of the plaintiff" will run afoul of section 2(b) of the *Charter*.

[45] In *McAteer v. Attorney General (Canada)* (2014), 121 OR (3d) 1, at para 69, the Court of Appeal set out three questions to be addressed in analyzing a section 2(b) challenge alleging government-compelled expression:

> The first question is whether the activity in which the CCLA is being forced to engage is expression. The second question is whether the purpose of the law is aimed at controlling expression. If it is, a finding of a violation of s. 2(b) is automatic. If the purpose of the law is not to control expression, then in order to establish an infringement of a person's *Charter* right, the claimant must show that the law has an adverse effect on expression. In addition, the claimant must demonstrate that the meaning he or she wishes to convey relates to the purposes underlying the guarantee of free expression, such that the law warrants constitutional disapprobation.

[46] The first *McAteer* question is not a difficult one under the circumstances. As discussed above, the definition of expressive activity for the purposes of the section 2(b) guarantee is extremely broad. There can be little doubt that a Sticker designed to convey a specific message to the consumer of gasoline – whatever that message might be – falls within its definition.

[47] Indeed, the placing of a Sticker in a publicly visible locale is so analogous as to be identical to the placing of "public signs and posters [which] are a form of expression protected by s. 2(*b*) [of the Charter]": *Ramsden v. Peterborough (City)*, [1993] 2 SCR 1084. Since the Sticker is a form of

expression, and sections 2(1) and 4 of the FCTTA use mandatory language and require, under threat of penalty, the display of the Sticker, it follows that the challenged law compels expression.

[48] The second *McAteer* question is less straightforward. The problem is that counsel for the CCLA has misstated it in making its submissions. The question is not, as paraphrased in CCLA's factum, whether the purpose of the law is aimed at *compelling* expression, but rather whether the purpose of the law is aimed at *controlling* expression. Since the first question is answered in the affirmative – that is, the law does in fact compel expression – then of course its purpose is to do so. The impugned provisions of the FCTTA and O. Reg. 275/19 have no other purpose than to do what they do – to compel the placement of the prescribed Sticker on gasoline tanks in order to convey a message to customers. The question posed by the *McAteer* analysis, however, is a different one: is the law designed not so much to compel a specific message but to control any message the gasoline retailer might otherwise express?

[49] The CCLA contends that gasoline retailers would like to remain silent on the question of fuel charges under the federal GGPPA addressed by the compulsory Sticker. That seems likely in view of the fact that despite investing some effort the CCLA was unable to come up with a gasoline retailer willing to join this litigation as co-Plaintiff. But while that realistic likelihood may suffice to give the CCLA standing to launch the constitutional challenge on its own as the most convenient way to bring the matter to court, it does so as a pragmatic procedural consideration. It does not, however, amount to a body of evidence of the retailers' intended viewpoint or expression.

[50] In any case, it would be difficult for government to control expression by compelling certain messages in the FCTTA, but not restricting others. By way of illustration, the CCLA complains that the Sticker conveys accurate but incomplete information about the Fuel Charge, and that these half-truths are misleading. CCLA's counsel in their factum submit that the Sticker "does not tell consumers that there are other costs and other taxes, which are blended into the price of gas." They further submit that the Sticker "deliberately omits significant information about the Federal Rebate [which forms part of the greenhouse gas package of initiatives], which could negate the economic impact of the Fuel Charge on consumers."

[51] It is self-evident that any gasoline retailers that were so inclined could fill the missing information in for themselves. Nothing in the FCTTA prevents them from designing a sticker or even a giant billboard of their own in addition to the mandatory Sticker. The Court of Appeal made a similar point in *McAteer*, at para 77, commenting that it is necessary to consider not only the compelled nature of the required expression but to consider "whether the legislation in issue has the effect of 'chilling' or impairing freedom of expression in determining whether there had been a violation of s. 2(b)." The Court explained its reasoning by reference to the Supreme Court of Canada jurisprudence which lays the foundation for the analysis, at para 76:

> The opportunity to publicly disavow a message is relevant to the determination of whether there is a s. 2(b) violation. In *Lavigne*, at p. 279, Wilson J. (with whom L'Heureux-Dubé and Cory JJ. agreed) stated that 'this Court has already accepted that public identification and opportunity to disavow are relevant to the determination of whether s. 2(b) has been violated.' The Supreme Court came to a similar conclusion in *Slaight Communications Inc. v. Davidson*, 1989 CanLII 92

(SCC), [1989] 1 S.C.R. 1038. These factors are important because, as Wilson J. noted in *Lavigne*, at pp. 279-80:

> If a law does not really deprive one of the ability to speak one's mind or does not effectively associate one with a message with which one disagrees, it is difficult to see how one's right to pursue truth, participate in the community, or fulfil oneself is denied.

[52] Since the impugned legislation and regulation compel the Sticker message but nowhere deprive one of the ability to disavow it or dissociate oneself with it, the law is designed to compel expression but not to control it in the constitutionally understood sense. There is, accordingly, no automatic violation of section 2(b) as there would be for government action which both compels and controls expression.

[53] The crux of the problem with the impugned legislation and regulation lies in the answer to the third *McAteer* question: does the law adversely effect expression, and is this effect related to the purposes of the freedom of expression guarantee? The Court of Appeal found that, like here, the impugned governmental measure had an incidental effect on expression. That is, the measure caused persons to speak when they might want to be silent, whether or not they agree or disagree with the legislatively compelled message. In *McAteer*, the compulsion to convey the prescribed message – the oath of citizenship – was on threat of losing access to a benefit – Canadian citizenship. In the present case, the compulsion is on threat of incurring a burden – a fine – but in this context a benefit and a burden are just different sides of the same coin.

[54] The Court of Appeal went on to reason that for five distinct reasons, this adverse effect did not relate to the underlying purposes of section 2(b). While some of those reasons apply equally to the case at bar, not all of them do. In fact, there is one crucial difference between the compelled speech in *McAteer* and the compelled speech under the FCTTA, and that is that the speech at issue in *McAteer* was of a nature that fostered the rule of law whereas the speech at issue here arguably countermands the rule of law.

[55] The first point identified by the Court of Appeal in *McAteer*, at para 76, is that the effected individuals have the opportunity "to publicly disavow what they consider to be the message conveyed by the oath" [i.e. the message compelled by the relevant legislation]. As discussed above, that is equally the case here. Any gasoline retailer is at liberty to add the information that the CCLA has identified as lacking to fully explain the details and impact of the federal government's GGPPA fuel charge. While every such retailer must post the Sticker, that is the end of their obligation in that respect. Nothing in the FCTTA or O. Reg. 275/19 prohibits them from posting a separate sticker expressing the fallacy of the information contained on the prescribed Sticker if they so desire.

[56] The second point identified by the Court of Appeal in *McAteer*, at para 81, is that the challengers' understanding of the compelled message represented a misapprehension of the meaning of that message. That may or may not be a relevant factor in the case at bar. While there is no evidence as to what any given retailer thinks the Sticker means, there is ample evidence from reliable sources as to what the government thinks the Sticker means. The problem is that the

evidence from government sources points in several different directions. The question of whether the public is operating under a misapprehension of the import of the Sticker message ultimately depends on whether government members are being forthright in articulating their own understanding of the compelled message. That understanding will be discussed below.

[57] The Court of Appeal's third point in *McAteer*, at para 82, is that even if the offending words of the compelled message were revised or eliminated, such a remedy would "only be a superficial cure for the appellants' complaint." That is, the challengers, like here, may want to say absolutely nothing. Being made to say something innocuous does not exactly accomplish that goal; indeed, it might not be possible to say something entirely innocuous and still articulate anything resembling the government's preferred message.

[58] The Court of Appeal's fourth and fifth points in *McAteer*, at paras 83 and 84, essentially amount to one overarching and important point: in prescribing the compelled speech at issue in that case, the government was fulfilling a number of its properly mandated functions, including the protection and promotion of Canada's national and legal culture. More specifically, the Court, at para 74, specifically observed that the compelled expression in that case "promotes the unwritten constitutional principles of the rule of law and democracy." The same cannot be said of the Sticker.

[59] As already explained, it is Ontario's position that the content of the Sticker is merely information-conveying, and is designed for the purpose of informing the consumer about the cost of gasoline and the Fuel Charge imposed by the GGPPA. However, the information thereby conveyed is incomplete in such a significant way that it does not convey the true state of facts. In fact, even the label "Federal Carbon Tax" that appears in bold, red font at the top of the Sticker is a misnomer and an adversarial slogan, albeit a recognizable one and understandable from a public advocacy point of view.

[60] Not only is use of this nomenclature inaccurate from a strictly legal point of view, it is inaccurate in a way that the Ontario government well knows. As discussed in Part II above, the Court of Appeal in *Reference Re Greenhouse Pollution Pricing Act*, at para 148, already determined that the Fuel Charge is a valid federal regulatory enactment under the Peace Order and Good Government clause of s. 91 of the *Constitution Act, 1867* rather than under the federal taxing power in s. 91(3). In other words, it was enacted for regulatory purposes rather than for revenue raising purposes, and so is a regulatory charge and not a tax. Persisting in calling it a "carbon tax" would be perfectly acceptable in political advertising or in a politician's speech, but it is an intentional use of 'spin' that reveals the advocacy rather than informational thrust of the message.

[61] Moreover, as also discussed above, the federal government, for better or for worse, has enacted a two-part policy, one being a Fuel Charge and the other being a rebate to designated provinces and tax relief to individuals in those provinces. The Sticker purports to explain the true cost of the federal Fuel Charge, but omits the federal rebate and Climate Action Incentive provisions of the ITA. That kind of half-truth is not very truthful. While a rebate and tax refund program may not lower the price of gas at the pump, they are self-evidently a relevant part of the pricing package.

[62] Again, there is nothing altogether unusual about government members explaining a policy measure in a partial or incomplete way during the course of a political campaign. For example, a politician who campaigns on a promise to lower the cost of housing or of an essential service may not feel a need to explain every detail of how that price adjustment will impact on other aspects of the economy. This approach, however, is emblematic of the public relations and advocacy aspects of politics, and should not be confused with genuine, viewpoint-neutral information sharing.

[63] What is important here is therefore not that the prescribed Sticker is inaccurate or guilty of significant omissions, but rather that in designing the Sticker and making it mandatory the government is trying to accomplish a task that is only coincidentally related to conveying the price of automobile fuel of carbon emissions. That is, the government is not so much explaining a policy, but rather is making a partisan argument. In placing its version of Fuel Charge information on every gas pump in the province, the government is attempting to, in Premier Ford's words, demonstrate to Ontarians how the governing federal Liberals are "gouging them".

[64] In this way, the FCTTA and O. Reg. 275/19 create not so much consumer messages but political missives. The Sticker's information about the Fuel Charge is really a reversal of a well-known Canadian aphorism: it is the medium but is not, in fact, the message: see Marshall McLuhan, *Understanding Media: The Extensions of Man* (New York: McGraw-Hill, 1964), ch. 1. The message is that the incumbent party in Ontario has better policy ideas than the incumbent party in Ottawa. That is a perfectly acceptable message in a political campaign, but it is not the one that the government has purported to enact.

[65] It takes little effort to distinguish a partisan message aimed at an opposing political party from a prescribed measure that "promotes the unwritten constitutional principles of the rule of law and democracy", to use the *McAteer* description of a constitutionally appropriate form of compelled speech. It is essential to the concept of the rule of law that the law does not serve political leaders, but rather political leaders serve the law: *Roncarelli v. Duplessis*, [1959] SCR 121, 142. By using the law for partisan ends, the Ontario legislature has enacted a measure that runs counter to, rather than in furtherance of, the purposes underlying freedom of expression. As the Court of Appeal put it in *McAteer*, at para 69, this type of compelled expression "warrants constitutional disapprobation."

VI. Is the infringement justifiable?

[66] It is accurate to say that the best way of discerning legislative purpose "will usually be to look to the legislation itself": *Frank v. Canada (Attorney General)*, [2019] 1 SCR 3, at para. 130 (Côté and Brown JJ., dissenting on other points). But that does not mean that the legislative language must be taken at face value. In this respect, the FCTTA and O. Reg. 275/19 must be viewed in light of what they expressly convey, what they omit, the context in which they were enacted, and the statements in the legislature of the government members that introduced the measures. Sticking strictly to the legislative language is only reliable where the context supports the language used. Without putting too fine a point on it, scholars of statutory interpretation have observed that statutes are enacted by legislators/politicians, and that "politicians sometimes misrepresent their actual policy preferences": McNollgast (Matthew McCubbins, Roger Noll,

Barry Weingast), "The Use of Positive Political Theory in Statutory Interpretation", 57 Law & Contemp. Probs. 3, 8 (1994).

[67] Counsel for Ontario submit in their factum that, "The impugned provisions of the [FCTTA and O. Reg. 275/19] are straightforward." In one sense that is accurate – the legislation and Sticker design are easy to understand from the perspective of the retailers required to adhere to the policy. In another sense, however, the statutory/regulatory enactment is deceptive in that it cloaks subjective advocacy about a federal legislative initiative in the language of objective information sharing.

[68] For example, in labelling itself the *Federal Carbon Tax Transparency Act* [emphasis added], but in making transparent only those aspects of the federal policy that fit the government of Ontario's political narrative, the statute speaks in the voice of an unreliable narrator. It is a "Tell-Tale Heart" approach to drafting, as where the ostensibly objective narrator of Edgar Allen Poe's famous tale is revealed as ultimately complicit in the acts he describes and their mode of description: see Wayne C. Booth, *The Rhetoric of Fiction* (Chicago: U. of Chicago Press, 1961), pp. 158-9. To invoke a colloquialism, the statute exudes anger (i.e. opposition) but says that it is just disappointed (i.e. transparent).

[69] Accordingly, the impugned legislation and regulation fail the first stage of the test under section 1 of the Charter: *R v. Oakes*, [1986] 1 SCR 103. While truly informing the public about the components that make up the cost of gasoline would be a pressing and substantial government objective, promoting the Ontario governing party over the federal governing party is not. As scholars of public policy have pointed out, "The core distinction...between partisan advantage-seeking and political decision making is that partisan advantage-seeking is concerned primarily or solely with providing a benefit, or rent, to the governing party while political decisions are matters of public policy choice...": Kayle Hatt, "The Abuse of Government Advertising: Examining Partisan Advantage-Seeking and Parliamentary Innovation Designed to Eliminate Misuse" (2014), 6 Public Pol. and Gov. Rev. 78, 80-81. Public policy choices can reflect pressing and substantial objectives in the *Oakes* test sense of that phrase, while partisan advantage-seeking by definition does not.

[70] Even if one were to conclude that the legislative objective is a hybrid of policy and partisanship, and that the government of Ontario intended to 'kill two birds with one stone', as it were, by making gasoline pricing information available to the public but also designing the Sticker in a way which implicitly criticized the federal government, the infringement of section 2(b) would be disproportionate to any beneficial objective it served. That is, the hybrid objective might pass the "pressing and substantial" hurdle of the *Oakes* test, but it would falter on the final proportionality hurdle. The salutary benefit of the information conveyed by requiring a Sticker on every gas tank would be far outweighed by the deleterious effect of using legislative and regulatory power for partisan ends.

[71] As a means of testing this contest between the two values, it is worth making reference to the argument posed by counsel for Ontario with respect to the "voice" in which the Sticker speaks. It is Ontario's position that there are numerous justifiable instances of compelled expression in law. Thus, for example, the *Ontario Health and Safety Act* requires that a copy of the statute be

posted in every place of employment in the province, the *Smoke-Free Ontario Act* requires 'No Smoking' signs to be posted throughout any enclosed workplace, the *Ontario Building Code* requires 'Exit' signs to be placed over every exit door, etc. The difference, according to Ontario's counsel, between a justified and an unjustified use of legislative power to compel private persons or companies to post signs, posters, or Stickers, turns on whether the prescribed signage purports to speak in the private party's voice.

[72] In other words, counsel argues that the government can tell people to post signs about things the public needs to know as long as it speaks in its own voice; it cannot, however, make a private employer or building owner speak through mandatory signage in what appears to be the private party's voice. Thus, the City of Toronto By-law can require a sign on a restaurant door announcing the date and result of a Toronto Public Health inspection, but it could not, hypothetically, require signage announcing that the health inspector was here today and that she did a great job. The former conveys public policy information in the government's neutral voice, while the latter expresses a subjective viewpoint and imposes it in the private owner's voice.

[73] I accept that there are justified instances of compelled expression, as illustrated above. I also accept that compelled messages that speak in the government's voice are in many instances more likely to fall within the justifiable category than compelled messages that mimic the private party's voice. I do not agree, however, that the 'voice' of the required message is the end of the analysis. One can imagine instances where a mandatory sign is explicitly in the voice of government, but the message nevertheless reflects a value whose effect is more deleterious than beneficial. In that case, it will not be justified regardless of the voice in which the message sounds.

[74] One obvious example will suffice to demonstrate the point. The ultimately partisan thrust of the FCTTA and the Sticker was put most clearly in the legislature by Energy Minister Rickford on April 16, 2019. On that date, the Minister announced: "We're going to stick it to the Liberals and remind the people of Ontario how much this job-killing, regressive carbon tax costs": Legislative Assembly of Ontario, Official Report of Debates (Hansard) No. 94, 1st Session, 42nd Parliament, Tuesday 16 April 2019, pp. 4397-4398. It is the CCLA's view that, in fact, the dramatic language and half-truths of the Sticker are meant to do precisely what the Minister of Energy conceded – i.e. to goad the government's political adversaries.

[75] Could the Ontario government, speaking in its own voice, require a gas pump sticker that says explicitly what the Minister of Energy says it means implicitly? To ask this rhetorical question is to answer it. A mandatory sticker that said "Stick it to the Liberals" might not speak in the gasoline retailer's voice – it could even be prefaced with the phrase "Ontario says..." But the message would be blatantly advantage-seeking by a political party and a misuse of the governing party's legislative power. Its deleterious effect on democratic governance would certainly outweigh any salutary benefit of the information it contained.

[76] The final step in the *Oakes* analysis "requires placing colliding values and interests side by side and balancing them according to their weight": *R. v. KRJ*, [2016] 1 SCR 906, at para 76. The Supreme Court has made it clear that the use of legislative/executive power for partisan purposes amounts to "an unjustified attempt to [legislate/regulate] to benefit the governing party": *Reference re Saskatchewan Electoral Boundaries*, [1991] 2 SCR 158.

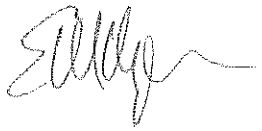
[77] With this admonition in mind, it is obvious that the Sticker could not be designed to say what the government of Ontario says it really means. It would be an insurmountable hurdle for the Ontario to require a sticker that uses explicitly partisan rather than ostensibly neutral language, and to then establish that the benefit of its *bona fide* public policy choice outweighed the detriment of its self-interested, partisan use of governmental power.

[78] Accordingly, the FCTTA and O. Reg 275/19 cannot be justified under section 1 of the Charter.

VII. Disposition

[79] A government or political party can, in the words of Ontario's Minister of Energy, "stick it to" another tier of government or political party as a matter of free speech in an election campaign or otherwise. But a government cannot legislate a requirement that private retailers post a Sticker designed to accomplish that task. The mandatory fuel pump Sticker is an unconstitutional attempt to do just that.

[80] Sections 2, 4, and 5 of the FCTTA, and O. Reg. 275/19, violate section 2(b) of the Charter and are of no force or effect. Gasoline retailers are at liberty to keep the Stickers on their fuel pumps or to remove them, as they see fit.



Morgan J.

Released: September 4, 2020

CITATION: CCLA v. Attorney General of Ontario, 2020 ONSC 4838
COURT FILE NO.: CV-19-00626685-0000
DATE: 20200904

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

THE CORPORATION OF THE CANADIAN CIVIL LIBERTIES ASSOCIATION

Plaintiff

– and –

THE ATTORNEY GENERAL OF ONTARIO

Defendant

– and –

PEN CANADA

Intervener

REASONS FOR JUDGMENT

E.M. Morgan J.

Released: September 4, 2020