

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**B E T W E E N :**

**THE CANADIAN TAXPAYERS FEDERATION  
and JOHN WILLIAMSON**

Applicants

and

**HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO AS REPRESENTED BY  
THE MINISTER OF FINANCE, GREG SORBARA and DALTON J. P. McGUINTY**

Respondents

**FACTUM OF THE APPLICANTS**

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## PART I – NATURE OF THE APPLICATION

### *Overview*

1. The applicants make application for an order:
  - a) as against the respondents Greg Sorbara (“Sorbara”) and Her Majesty the Queen in Right of Ontario as Represented by the Ministry of Finance (“HMQ”):
    - i) declaring that s.17 of Bill 83 “An Act to implement Budget measures” is a provision which establishes a new tax within the meaning of the *Taxpayer Protection Act, 1999*, S.O. 1999, c.7 as amended<sup>1</sup> (the “TPA”) and that, by introducing Bill 83 in the Assembly before a referendum was held, Sorbara acted in contravention of s.2(1) of the TPA;
    - ii) in the alternative, declaring that s.17 of said Bill 83 is a provision which permits the increase of a tax rate under a designated tax statute within the meaning of the TPA and that, by introducing Bill 83 in the Assembly before a referendum was held, Sorbara acted in contravention of s.2(1) of the TPA; and
    - iii) in view of (i) and (ii) above, declaring that s.17 of what is now the *Budget Measures Act, 2004*, S.O. 2004, c. 7 is invalid or *ultra vires* unless and until a referendum is held, as required by s.2(1) of the TPA;
    - iv) further, declaring that ss. 3 - 11 and s. 13 of Bill 106 “An Act to implement Budget measures and amend the Crown Forest Sustainability Act, 1994” are provisions which establish a new tax

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<sup>1</sup> As of June 27, 2002.

within the meaning of the TPA and that given the circumstances in (i) and (ii) above, by having introduced Bill 106 in the Assembly, before a referendum has been held, Sorbara is acting in contravention of s.2(1) of the TPA;

- v) in the alternative to (iv), declaring that ss. 3- 11 and s. 13 of Bill 106 are provisions which permit the increase of a tax rate under a designated tax statute within the meaning of the TPA and that, given the circumstances in (i) and (ii) above, by having introduced Bill 106 in the Assembly before a referendum has been held, Sorbara is acting in contravention of s.2(1) of the TPA; and in any event
  - vi) requiring Sorbara to withdraw ss. 3 -11 and s. 13 from Bill 106 and enjoining him from taking any further steps to establish a new tax, or increase or permit the increase of a tax rate under a designated tax statute, unless and until a referendum is held, as required by s.2(1) of the TPA; or
  - (vii) in the event that ss. 3 – 11 and s. 13 of Bill 106 receive Royal Assent and are enacted as part of the *Budget Measures Act, 2004 (No. 2)* as proposed prior to the hearing of this application, and given the circumstances set out in (i) and (ii) above, declaring that those provisions are invalid or *ultra vires* unless and until a referendum is held, as required by s.2(1) of the TPA;
- b) as against the respondent Dalton J. P. McGuinty (“McGuinty”):
- i) declaring that the written promise dated September 11, 2003 (the “Promise”) executed by McGuinty constituted a contract between McGuinty and the applicant The Canadian Taxpayers Federation

(the “CTF”) which McGuinty has breached or is in the process of breaching; and

- ii) in the alternative, declaring that the Promise constituted a misrepresentation by McGuinty, which he made negligently or recklessly without regard to its truth or falsity;

2. The respondents have brought a motion to strike the application. They have not challenged any factual assertions of the applicants, and accordingly the motion (as well as this application) should proceed on the basis that the facts are not in dispute.

## **PART II – THE FACTS**

### ***The Applicants***

3. The applicant John Williamson is the federal director of the Canadian Taxpayers Federation (the “CTF”). He has held that position since January 2004. Prior to this appointment, he was the CTF’s Ontario director, from September 2002 until January 2004. The CTF is a federally incorporated, non-profit and non-partisan advocacy organization, dedicated to lower taxes, less waste and accountable government.

*Para. 1, Affidavit of John Williamson, sworn May 30, 2004, Application Record, Tab B (hereinafter “Williamson Affidavit”)*

4. The CTF was founded, and federally incorporated in 1991 in Regina and has approximately 65,000 supporters nationwide, of which over 4,000 are located in Ontario. It maintains a federal office in Ottawa and offices in the five provincial capitals of British Columbia, Alberta, Saskatchewan, Manitoba and Ontario, as well as a Centre for Aboriginal Policy Change in Calgary (the “Centre”). The Centre and provincial offices conduct research and advocacy activities specific to their provinces or issues in addition

to acting as regional organizers of Canada-wide initiatives.

*Para. 2, Williamson Affidavit, Application Record, Tab B*

5. CTF offices field hundreds of media interviews each month, hold press conferences and issue regular news releases, commentaries and publications to advocate the common interest of taxpayers. CTF representatives speak at functions, make presentations to government, meet with politicians, and organize petition drives, events and campaigns to mobilize citizens to effect public policy change.

*Para. 3, Williamson Affidavit, Application Record, Tab B*

6. The CTF has been the driving force behind many successful taxpayers' rights initiatives, including the elimination of "bracket creep" at the federal level and the enactment of taxpayer protection and balanced budget legislation in Manitoba and Ontario. Such legislation is designed to protect taxpayers from unexpected tax hikes and budget deficits. It generally obliges governments to consult voters, through an election or referendum, before raising most taxes, and penalizes politicians financially if they fail to table balanced budgets. In addition, the CTF was responsible for stopping a 25 per cent pay increase for Members of Provincial Parliament that was scheduled to happen after the last Ontario election campaign.

*Para. 4, Williamson Affidavit, Application Record, Tab B*

***History of Taxpayer Protection Legislation in Ontario***

7. On May 30, 1995, the CTF obtained a signed pledge from then-Ontario Progressive Conservative leader Mike Harris to enact taxpayer protection legislation should his party form the next government. This pledge stipulated that a Harris government would make any increase in existing tax rates or any new taxes subject to approval by the voters of Ontario in a binding referendum. Both the governing New Democrats and opposing Liberals declined an invitation to sign the CTF pledge.

*Para. 5, Williamson Affidavit, Application Record, Tab B*

8. Mr. Harris and the provincial Progressive Conservative party came to power in the fall of 1995. In August 1996, the government released a consultation and discussion paper on the use of referenda in Ontario, entitled “Your Ontario, Your Choice”. In September 1996, the Standing Committee on the Legislative Assembly (the “Standing Committee”) held public hearings on this paper. Submissions were received from groups including Democracy Watch and the CTF.

*Para. 6, Williamson Affidavit, Application Record, Tab B*

9. In July 1997, the Standing Committee tabled its report. It recommended the implementation of a “Taxpayer Protection and Balanced Budget Act”.

*Para. 7, Williamson Affidavit, Application Record, Tab B*

10. A taxpayer protection bill was subsequently twice introduced before the legislature, in 1998 and 1999. Both times it died on the order paper before being passed, the first time because the legislature adjourned for the Christmas break in December 1998, and the second time because an election was called in June 1999. On both occasions, members of the Liberal opposition party spoke in favour of the bill.

*Para. 8, Williamson Affidavit, Application Record, Tab B*

11. In the 1999 election, then-Opposition Liberal leader Dalton McGuinty’s campaign team issued a news release on May 13, 1999, criticizing Premier Harris for failing to enact a taxpayer protection law. On the same date, Mr. McGuinty also issued his own pledge promising to pass taxpayer protection legislation within the first 100 days should his party form the government.

*Para. 9, Williamson Affidavit, Application Record, Tab B*

12. On June 4, 1999, the Harris Conservative government was re-elected. On November 23, 1999, Bill 7, “An Act to protect taxpayers against tax increases, to establish a process requiring voter approval for proposed tax increases and to ensure that



the Provincial Budget is a balanced budget” was passed into law with bipartisan support in a 76-9 vote. Mr. McGuinty and the Liberals (then the official opposition) voted in favour of the bill, while the New Democrats under Howard Hampton voted against it. The bill was given royal assent on December 14, 1999. The passage of this bill resulted in the two statutes now known as the Taxpayer Protection Act, 1999 (the “TPA”) and the Balanced Budget Act, 1999.

*Para. 10, Williamson Affidavit, Application Record, Tab B*

***Background to the 2003 Election: The Spectre of Deficits***

13. One of the key provisions in the TPA is s.2(1):

Restriction on tax increases, new taxes

2. (1) A member of the Executive Council shall not include in a bill a provision that increases, or permits the increase of, a tax rate under a designated tax statute or that establishes a new tax unless,

(a) a referendum concerning the increase or the new tax is held under this Act before the bill is introduced in the Assembly; and

(b) the referendum authorizes the increase or the new tax.

[emphasis added]

***Section 2, TPA, Factum of the Applicants, Schedule B, Tab 2***

14. On December 4, 2002 came the first public signs that the government of Premier Ernie Eves, who had succeeded Mike Harris as leader of the provincial Progressive Conservative party, was having trouble managing provincial finances. The government’s economic and fiscal outlook predicted a deficit after four years of previously balanced budgets, unless the government divested itself of several assets including a stake in Hydro One.

*Para. 11, Williamson Affidavit, Application Record, Tab B*

15. On January 20, 2003, the Eves government announced that it would not be selling Hydro One assets as previously planned. This decision was widely condemned and fueled increased public speculation that the province would not be able to balance its books in the coming year.

*Para. 12, Williamson Affidavit, Application Record, Tab B*

16. On March 27, 2003, the Eves government delivered its budget and controversy immediately erupted over the accompanying economic statement. Then-Liberal finance critic Gerry Phillips listed six areas of questionable revenue assumptions and declared that the budget “is based on an overly optimistic economic outlook.”

*Para. 13, Williamson Affidavit, Application Record, Tab B*

17. On June 4, 2003, Mr. Phillips issued an even more ominous warning to the House Standing Committee on Estimates about the potential size of the government’s deficit:

“I therefore take it that there is a \$5-billion risk in the budget. That is a fact, with the \$2.2-billion asset sales that you've refused to identify. You've acknowledged that there's over \$800 million of spending on SARS that's not in the budget. It's not in the budget; you've added that. There's \$800 million of cost savings and you've not identified any of that. There's \$770 million from the federal government that's only available if they run a significant surplus; you've acknowledged that. The one that is uncertain is whether there's \$600 million of lost revenue - there is a one-point economic downturn. So Minister, I say to you again, I do think your budget is high risk.”

*Para. 14, Williamson Affidavit, Application Record, Tab B*

18. On June 17, 2003, NDP leader Howard Hampton publicly estimated the government’s deficit at \$4 billion.

*Para. 15, Williamson Affidavit, Application Record, Tab B*

19. These estimates proved consistent with the conclusions of The Fraser Institute, an independent Canadian think tank. On September 22, 2003, Fraser Institute economist

Mark Mullins released a report pegging the province's deficit at \$4.5 billion. This figure was even referred to in two news releases from the Ontario Liberal Party.

*Para. 16, Williamson Affidavit and Exhibit 11 thereto, Application Record, Tab B and Tab 11*

***Dalton McGuinty's Promise***

20. Despite all these signs of fiscal uncertainty and a deficit in the neighborhood of 4 to 5 billion dollars, Mr. McGuinty, at the time Liberal Opposition leader, repeatedly promised to hold the line on taxes and not run a deficit should his party form the government after the anticipated 2003 election.

*Para. 17, Williamson Affidavit, Application Record, Tab B*

21. During a meeting with Mr. Williamson on April 25, 2003, Mr. McGuinty outlined what he viewed as the deteriorating state of the province's finances and shoddy budgeting practices of the Eves administration. He stated that he supported the TPA and the BBA, that he had voted for those laws, that his government would abide by those laws if elected, and that he would not raise taxes beyond the measures outlined in his pre-campaign literature. Mr. McGuinty was very clear that he would abide by the law and be fiscally responsible, and would not run deficits, if he became Premier.

*Para. 18, Williamson Affidavit, Application Record, Tab B*

22. In discussions with officials from the Progressive Conservative and Liberal parties about a proposed CTF pledge, Mr. Williamson made it clear that signing such a pledge would mean the CTF would not subsequently criticize their respective campaign platforms. While this was not a formal endorsement of either party, it was a tacit acknowledgment from the CTF to all taxpayers that the signing party could be trusted by Ontario voters to not raise taxes without calling a province-wide referendum and not run deficits without triggering a financial penalty.

*Para. 19, Williamson Affidavit, Application Record, Tab B*

23. Mr. Williamson had numerous discussions with McGuinty staff and advisors. He was told that Mr. McGuinty was willing to sign a pledge in order to showcase his willingness to abide by the TPA, and to ensure his fiscal promises were taken seriously by voters and taxpayers. Mr. McGuinty said as much when he later signed the CTF pledge.

*Para. 20, Williamson Affidavit, Application Record, Tab B*

24. On May 23, 2003, Mr. McGuinty released his party's pre-election fiscal plan, and was himself quoted as saying,

**“Fiscal discipline, holding the line on taxes and balancing our budget, is not only the price of admission for governing at the beginning of the 21<sup>st</sup> century, it is the foundation on which we build the rest of our platform.** We can't do the things we want to do as Liberals, invest in more nurses for example, reduce class sizes in early years ... unless we are fiscally disciplined when it comes to the management of government finances.” (emphasis added)

*Para. 21, Williamson Affidavit, Application Record, Tab B*

25. The provincial election was called on September 2, 2003. From the early stages of the campaign, the deficit and taxes were major issues.

*Para. 22, Williamson Affidavit, Application Record, Tab B*

26. On September 5, 2003, at an editorial board meeting with the Toronto Sun newspaper, when questioned as to what he would do if faced with a larger than anticipated deficit, Mr. McGuinty affirmed that he would balance the budget, but would slow down implementation of his election promises rather than raise taxes or run a deficit. Mr. McGuinty was quoted in the Toronto Sun as saying:

**“I will not break the Taxpayer Protection Act, even though the Tories did...We are not counting on \$2 billion in fictitious sales (to balance the budget). We are not counting \$800 million in savings. What we are saying is if we have to slow down our investments, we will do so ... but we will not raise taxes and we will insist on balancing our budgets.”** (emphasis added)

*Para. 23, Williamson Affidavit, Application Record, Tab B*

27. Mr. McGuinty's clearest commitment not to raise taxes came several days later when he agreed, at the request of the CTF, to sign the written Taxpayer Protection Promise (the "Promise"). In signing the Promise, Mr. McGuinty represented and agreed that, if his party was elected as the next government, he would:

- (a) "Not raise taxes or implement any new taxes without the explicit consent of Ontario voters; and
- (b) Not run deficits.
- (c) [P]romise to abide by the Taxpayer Protection and Balanced Budget Act."

*Para. 24, Williamson Affidavit and Exhibit 15 thereto, Application Record, Tab B and Tab 15*

28. In exchange for signing the Promise, Mr. McGuinty was able to utilize the CTF to generate and capitalize on very favourable publicity. For example, he signed the Promise in the presence of Mr. Williamson at a full court press conference on September 11, 2003 at a campaign event.

*Para. 25, Williamson Affidavit and Exhibit 16 thereto, Application Record, Tab B and Tab 16*

29. This event was reported in all major media and was widely promoted as a stamp of approval by the CTF for the Liberal Party's platform. For example, the editorial from the Globe and Mail dated September 12, 2003 stated:

"With a flourish of his pen, the Liberal Leader bought himself a ton of credibility and made it a lot harder for Mr. Eves to continue to paint him as a sticky-fingered guy with his eye on the wallet of Ontario. Praise from Mr. Williamson (CTF Ontario Director) only sweetened the deal... 'Frankly,' Mr. Williamson said, 'I think the plan is a responsible plan.'"

*Para. 26, Williamson Affidavit, Application Record, Tab B*

30. As another example of how Mr. McGuinty was able to utilize CTF to generate and capitalize on favourable publicity, the Liberal campaign team issued a news release on

September 23, 2003, referring to Mr. Williamson numerous times, and quoting him as saying that the Liberals' financial plan was better than that of the PC government and had been "approved by independent financial experts."

*Para. 27, Williamson Affidavit, Application Record, Tab B*

31. Throughout the campaign, the Liberals repeatedly affirmed their commitment to fiscal responsibility as outlined in the Promise. They promised a balanced budget, to "hold the line on taxes", and vowed to "not bend the law whenever convenient." This commitment was reiterated in Liberal campaign booklets.

*Para. 28, Williamson Affidavit, Application Record, Tab B*

32. In various press releases the Liberals also vowed not to raise income tax or any other tax, and in a television advertisement Mr. McGuinty promised that "I won't cut your taxes, but I won't raise them either".

*Para. 29, Williamson Affidavit, Application Record, Tab B*

33. As contemplated by s.4(1) of the TPA, the Liberals filed a statement outlining their fiscal plan with the Chief Elections Officer in mid-September, 2003. This statement included the cancellation of corporate tax cuts promised by the Progressive Conservative government and the repeal of various cuts to personal income taxes set for January 1, 2004. Nowhere in this statement was there any mention of the imposition of a health tax or any other type of income tax. In fact, Mr. McGuinty stated in a letter dated September 16, 2003 to the Chief Elections Officer, that:

"As you will see, our platform ensures that we can deliver our election commitments without establishing a new tax or giving any person or body a new authority to tax, as defined in subsections 4(1)(b) and (c) of the *Taxpayer Protection Act*."

*Para. 30, Williamson Affidavit and Exhibit 22 thereto, Application Record, Tab B and Tab 22*

34. On October 2, 2003, the Liberals won the provincial election with 46.45% of the popular vote, compared to 34.6% for the Conservatives, and Mr. McGuinty became Premier of Ontario. It is believed that had Mr. McGuinty not made his tax-related promises – in words, in print, in television advertisements, and by signing the CTF Promise – his party would not have come to power in that election.

*Para. 31, Williamson Affidavit and Exhibit 22 thereto, Application Record, Tab B and Tab 22*

### ***The Budget***

35. On May 18, 2004 the McGuinty government delivered its first budget. In spite of Mr. McGuinty's Promise, the budget contained several new taxes, including a new health tax and increased liquor taxes. Mr. Sorbara, the Finance Minister, made it clear in his Budget Speech that the new health tax would be virtually immediate:

“Ontarians would begin paying the premium as of July 1, 2004.”

[at page 6 of 27]

*Para. 32, Williamson Affidavit and Exhibit 24 thereto, Application Record, Tab B and Tab 24*

36. It is now apparent that the implementation of the new tax was to be accomplished through a predetermined plan of statutory amendments.

37. First, Bill 83, “An Act to implement Budget measures,” which was introduced in the Legislative Assembly by Mr. Sorbara and received first reading on May 18, 2004, the same day the Budget was delivered. Bill 83 included a provision, among others, establishing a new tax called the “Ontario Health Premium”:

“17. Section 2 of the *Taxpayer Protection Act, 1999*...is amended by adding the following subsection:

1. A provision that amends the *Income Tax Act* to establish a new tax called the Ontario Health Premium in English and contribution-sante de l'Ontario in French.”

No referendum was held before this provision was introduced.

*Para. 34, Williamson Affidavit and Exhibit 25 thereto, Application Record, Tab B and Tab 25*

38. Bill 83 received its second reading on June 14, 2004. On June 17, 2004, less than a month after being introduced, the bill received third reading and Royal Assent. On the same date, it was enacted as the Budget Measures Act, 2004, S.O. 2004, c.7.

*Para. 3 and 4 and Exhibit C thereto, Supplementary Affidavit of John Williamson, sworn July 2, 2004, Supplementary Application Record, Tab 2 and Tab C*

39. Then, several days later, on June 21, 2004, Mr. Sorbara introduced Bill 106 in the Assembly, entitled “An Act to implement Budget measures and amend the Crown Forest Sustainability Act, 1994.”. No referendum was held before Bill 106 was introduced in the Assembly.

*Para. 5 and 6, Supplementary Affidavit of John Williamson, sworn July 2, 2004, and Exhibit D thereto, Supplementary Application Record, Tab 2 and Tab D*

40. With respect to collecting the new tax, this is to be done through a pre-existing Tax Collection Agreement between the province and the federal government, pursuant to which the latter collects income tax on behalf of the province thereby enabling taxpayers to file a single return. This was explained in Paper C of the Ontario Budget as follows:

“Since the premium is proposed to be implemented through the Income Tax Act and administered under the existing Tax Collection Agreement between Ontario and the federal government, income tax withholding and instalment rules would apply. Withholdings will commence July 1, 2004. To ensure that employers do not incur added costs to change their payroll systems, the premium would be included on pay stubs as a component of the income tax withheld...” [at page 116]

*Para. 35, Williamson Affidavit and Exhibit 26 thereto, Application Record, Tab B and Tab 26*



41. Significantly, there is no indication that any of the taxes collected under this scheme are being earmarked for health care.

*Para. 36, Williamson Affidavit, Application Record, Tab B*

42. While it was quite distressing to learn that the McGuinty government was increasing and establishing new taxes, it was equally distressing to learn that the Budget was also not balanced, running a deficit of \$2.2 billion in 2004-2005 and projecting deficits of \$2.1 billion for 2005-2006 and \$1.5 billion for 2006-2007. In this respect, Mr. Sorbara stated in the Budget Speech that the government intended to replace the BBA with a new act called the Financial Transparency and Accountability Act. This new act would allow the government to avoid taking financial penalties in future years when the government was tabling budget deficits.

*Para. 37, Williamson Affidavit, Application Record, Tab B*

### ***Budget Fall-Out***

43. Public reaction to the Budget was overwhelmingly negative. On the day of the Budget Speech, Mr. Sorbara shrugged this off, stating to reporters that “It’s the realities of the work that we do...Zap, you’re frozen.”

*Para. 38, Williamson Affidavit, Application Record, Tab B*

44. In the days following the Budget, the CTF received hundreds of calls and e-mails from irate taxpayers upset with the new taxes, in particular the proposed health tax. Many of these persons were also upset with the CTF because they perceived that the CTF had let them down. In just five days, over 50,000 people added their names to a CTF online petition calling on Mr. McGuinty not to raise taxes or run deficits. That petition bore over 95,000 signatures as of noon, on May 28, 2004.

*Para. 39, Williamson Affidavit, Application Record, Tab B*

45. Over the same period, Ontario talk radio stations were inundated with callers asking that legal action be taken against the government for breaking its promise not to raise taxes and for flouting the TPA.

*Para. 40, Williamson Affidavit, Application Record, Tab B*

46. As a result of the favourable publicity which Mr. McGuinty was able to garner through the signing of the Promise in the presence of CTF, and the adverse public reaction now being generated by the Budget, CTF's reputation and that of Mr. Williamson have been damaged, and the CTF's effectiveness as an organization dedicated to lower taxes and accountable government has been called in to question. CTF and Mr. Williamson feel used and betrayed: as a direct result of securing Mr. McGuinty's oral promise and signature on the Promise, the CTF allowed Mr. McGuinty to utilize the CTF's good name for his benefit and the benefit of his party. This gave him credibility with voters who might not otherwise consider voting for the Liberals because they feared Mr. McGuinty would, if elected, raise taxes and table budget deficits.

*Paras. 41 and 42, Williamson Affidavit, Application Record, Tab B*

### **PART III – THE ISSUES AND LAW**

#### ***Bill 83 Contravenes Section 2 of the TPA***

47. Courts have recognized that the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

*Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C. R. 27 at 41 [hereinafter Rizzo]*

48. In addition, s. 10 of the Interpretation Act provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit".

**Section 10, *Interpretation Act*, R.S.O. 1990, c.I. 11, Factum of the Applicants, Schedule B, Tab 1**

49. In this regard, the purpose and intent of the TPA is clear. As was outlined by the Honourable Chris Hodgson, Chair of Management Board of Cabinet when the TPA was introduced for first reading in May 1999:

The Taxpayer Protection and Balanced Budget Act asks that governments not be able to introduce a new tax or raise a tax unless they ask Ontarians if that is indeed what they want.....

...This act proposes that governments receive the voters' permission before introducing any bill that imposes any new tax or increases the rate of personal income tax, corporation taxes, retail sales tax, employer health tax, gasoline or fuel tax or education property taxes. That is real taxpayer protection.

*Legislative Assembly of Ontario, Hansard (May 3, 1999)(excerpts)*

50. This purpose and intent was reiterated at the second reading of the *TPA* by the Honourable Michael Harris who stated:

The taxpayer protection sections of Bill 7 stem from a very simple, and yet an important, idea: That politicians should not be able to raise the people of Ontario's tax rates without getting their permission first. I think we all know what happened in the past. Politicians would promise a program, and all the attention and focus on this new program or new spending, without an accountability to the taxpayers or to the public of how it would be paid for. The sections of Bill 7 now say: "You can't do that. You can no longer promise the goodies without also telling how they are to be paid for, and identify that....

...That is why our taxpayer protection law would require that future government seek your approval if they want to impose new taxes or to increase tax rates on any of the major tax instruments that we have, and we have a variety of them, as I think you know.

*Legislative Assembly of Ontario, Hansard, (November 2, 1999) (excerpts)*

51. Section 17 of Bill 83 "An Act to implement Budget measures" provides as follows:

17. Section 2 of the *Taxpayer Protection Act, 1999*, as amended by the Statutes of Ontario, 2002, chapter 8, Schedule L, section, is amended by adding the following subsection:

(7) Despite subsection (1), the following provisions may be included in a bill that receives First Reading in 2004:

1. A provision that amends the *Income Tax Act* to establish a new tax called the Ontario Health Premium in English and contribution-santé de l'Ontario in French.

[emphasis added]

*Section 17, Bill 83 “An Act to implement Budget measures” [now the Budget Measures Act [hereinafter s. 17 of Bill 83], Factum of the Applicants, Schedule B, Tab 3*

52. Canadian courts have defined the word “establish” to mean “set up”. The plain meaning of the words contained in s. 17 of Bill 83 confirms that the provision sets up or results in the establishment of a new tax called the Ontario Health Premium.

*R. v. Gignac, [1934] O.R. 195 (H.C.)*  
*Crawford v. Ottawa (City) Board of Education, [1971] 2 O.R. 179 (C.A.)*

53. The fact that s. 17 of Bill 83 established a new tax is particularly clear in the context of the Budget speech which was read on the same day that Bill 83 was introduced in the Legislature. Among other things, the Budget Speech:

- announced the nature of the new tax;
- described the quantum of the new tax;
- described how the new tax was to be collected; and
- announced the commencement date of the new tax (July 1, 2004).

**Williamson Affidavit and Exhibit 24 thereto, Application Record, Tab 24**

54. Moreover, courts have held that in order to properly interpret the legislative scheme of an Act:

The court must not only consider one section but all sections of an Act including the relation of one section to the other sections, the relation of a section to the general object intended to be secured by the Act, the importance of the section, the whole scope of the Act and the real intention of the enacting body...the provisions of other statutes relating to the Act under consideration must also be

examined in order to determine whether or not they can be of assistance to the interpretation of the Act.

*Melnychuk v. Heard (1963), 45 W.W.R. 257 at 263 (Alta. S.C.)*

55. It is therefore appropriate to interpret s. 17 of Bill 83 in the context not only of the TPA, but also the provisions of ss. 3-11 and s. 13 of Bill 106 which was introduced within days of the passage of Bill 83. Such analysis reveals that s. 17 of Bill 83 is not merely an amendment that creates an exemption to subsection 2(1) of the TPA as asserted by the respondents, but rather, is part of a legislative scheme whose primary goal is to establish a new tax.

56. Further, and in any event, the Ontario Health Premium is an additional provincial tax on taxable income. Since the Ontario Health Premium is to be based on taxable income, the amount payable will increase as individual income rises. Section 17 of Bill 83 read in the context of the Budget, the Tax Collection Agreement and ss. 3-11 and s. 13 of Bill 106, therefore permits the increase of a tax rate under a designated statute, namely, the *Income Tax Act*.

***Section 1, TPA, Factum of the Applicants, Schedule B, Tab 2  
Sections 3-11 and 13 of Bill 106, Supplementary Affidavit of Williamson and  
Exhibit D, Tabs 2 and D.  
Poschmann, F., "Ontarians Watch their Tax Steps" Financial Post (June 2,  
2004) FP19  
CCH Ontario Tax Reporter, Vol. 1, Budgets and News Releases, 1-117 and  
3-238***

57. By introducing Bill 83, which establishes a new tax and/or permits the increase of a tax rate under a designated statute, in the Assembly before holding a referendum, Mr. Sorbara has contravened the express provisions of the TPA.

***Bill 106 Also Contravenes s. 2 of the TPA***

58. Sections 3-11 and 13 of Bill 106 also expressly establish a new tax, or alternatively permit the increase of a tax rate under a designated tax statute. The respondents submit that since Bill 106 was introduced following the purported exemption

created by s. 17 of Bill 83 no referendum was required as set out in s. 2 of the TPA. However, this fails to take into account the well established principle that the Legislature cannot do indirectly what it cannot do directly.

*Leprohon v. Ottawa (City) (1878), 2 O.A.R. 522 at 526 (C.A.) [hereinafter Leprohon]*

59. The clear objective behind s. 17 of Bill 83 and ss. 3-11 and s. 13 of Bill 106 is to do indirectly that which is not directly authorized by the provisions of the TPA, namely, to establish a new tax or increase or permit the increase of a tax rate under a designated statute, without holding a referendum. These provisions, read together with the Budget and the Tax Collection Agreement are part of a predetermined plan of statutory amendments designed to circumvent the spirit and intent of the TPA. Section 17 of Bill 83 and ss. 3-11 and s. 13 of Bill 106 must therefore be declared invalid or *ultra vires* unless or until a referendum is held.

*Toronto (City) v. Toronto Transit Commission, [1992] O.J. No. 1967 (Gen. Div.)  
Leprohon, supra*

60. The interpretation of s. 17 of Bill 83 and ss. 3-11 and s. 13 of Bill 106 proposed by the respondents relies on the words of the provisions in isolation without regard to the overall scheme of the TPA, its object or the intention of the legislature. The Supreme Court of Canada has ruled that relying on what appears to be the plain meaning of a legislative text is incomplete and therefore unacceptable; and further, in some instances, the actual law is not found in the words, but in the spirit of the statute. The interpretation of s. 17 of Bill 83 and ss. 3-11 and s. 13 of Bill 106 proposed by the applicants is a fair,

large and liberal construction consistent with the object, intent, meaning and spirit of the TPA.

*Rizzo, supra* at 40 -41  
Sullivan, R., *Sullivan and Driedger on the Construction of Statutes*, 4th ed.,  
(Markham: Butterworths, 2002) at 10  
*McBratney v. McBratney*, [1919] 59 S.C.R. 550 at 561

### ***Manner and Form of TPA Requires Referendum***

61. The doctrine of parliamentary sovereignty and section 13 of the Interpretation Act reserve to the legislature the power of repealing or amending statutes “whenever the repeal, amendment, revocation, restriction or modification is considered by the Legislature to be required for the public good.” [emphasis added]

*S. 13, Interpretation Act, R.S.O. 1990, c. I.11, Factum of the Applicants,  
Schedule B, Tab 1*

62. However, the doctrine of parliamentary sovereignty and section 13 do not apply where it is shown that the Legislature intended, in the face of the Interpretation Act, to bind itself or restrict the legislative powers of those members who are also members of the Executive.

*Reference Re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525 at 562-563  
[hereinafter *Re Canada Assistance Plan*]

63. In the present case, Section 2 of the TPA expressly prohibits the Legislature from establishing a new tax or the increase of a tax rate under a designated statute unless the manner and form mandated by the section have been complied with, namely, by holding a referendum before any such amendment. In that regard, the Legislature has disengaged itself from considering what is “required for the public good” (as referred to in s.13 of the Interpretation Act) and instead, by imposing the requirement of a referendum, it has delegated the determination of what is “required for the public good” to the very persons who make up the public.

64. The Supreme Court of Canada in *R. v. Mercure*, ruled that a basic provision regarding the manner in which the legislature must enact laws cannot be ignored or circumvented. The court stated:

It is inconceivable to me that when s. 110 was enacted by Parliament, the Territorial Assembly could validly have ignored a provision in its constituent statute regarding the manner and form in which its laws must be enacted. An Ordinance enacted in violation of its requirements would clearly be invalid.

A basic provision regarding the manner in which a legislature must enact laws cannot be ignored. I cannot accept that such a provision can be impliedly repealed by statutes enacted in a manner contrary to its requirements....Since the manner and form of enactment (in English and French) was not entrenched however, the provision may be modified or repealed, but such repeal or modification must be made in the manner and form required by law at the time of the amendment.

*R. v. Mercure*, [1988] 1 S.C.R. 234 at 277 [hereinafter *Mercure*]

Accordingly, s. 17 of Bill 83 and ss. 3-11 and s. 13 of Bill 106 which were introduced in a manner and form designed to circumvent s. 2 of the TPA must be declared invalid.

65. The case at bar is distinguishable from *Re Canada Assistance Plan* where the Act in question said nothing about the amendment of the Plan, and so revealed no parliamentary intention to restrict parliamentary sovereignty. In this case, s. 2 of the TPA expressly restricts any member of the Executive Council from introducing a bill in the Assembly which establishes a new tax or permits the increase of a tax rate under a designated statute *unless* a referendum is held.

*Re Canada Assistance Plan*, *supra*

66. The respondents' suggestion that s. 2(6) and 2(7) of the TPA, as the more recently enacted provisions, impliedly repeal and prevail over s 2(1) of the TPA must be rejected. As La Forest J. in *R. v. Mercure* wrote:

...[S]tringent tests...have been established to warrant a holding that a statute has been impliedly repealed. As the court put it in *The "India"* ...a prior statute is repealed by implication *only* if "the entire subject matter has been so dealt with in



subsequent statutes that, according to all ordinary reasoning, the particular provision in the prior statute could not have been intended to subsist...” (at p. 265)

This stringent test has not been met in this case.

67. A declaration that s. 17 of Bill 83 and ss. 3-11 and s. 13 of Bill 106 contravene the manner and form of s. 2 of the TPA and are therefore invalid, is consistent with an interpretation of the TPA which best ensures the attainment of the object of that act according to its true intent, meaning and spirit.

***Sorbara has Contravened s. 2 of the TPA***

68. As noted previously, section 2(1) of the TPA provides as follows:

Restriction on tax increases, new taxes

2. (1) A member of the Executive Council shall not include in a bill a provision that increases, or permits the increase of, a tax rate under a designated tax statute or that establishes a new tax unless,

(a) a referendum concerning the increase or the new tax is held under this Act before the bill is introduced in the Assembly; and

(b) the referendum authorizes the increase or the new tax.

[emphasis added]

***Section 2, TPA, Factum of the Applicants, Schedule B, Tab 2***

69. By introducing s. 17 of Bill 83 and ss. 3-11 and s. 13 of Bill 106 without holding a referendum, Mr. Sorbara, a member of the Executive Council, breached his statutory duty to hold a referendum as outlined by section 2 the TPA and therefore exceeded his authority.

***Section 2, TPA, Factum of the Applicants, Schedule B, Tab 2***  
***Nelles v. Ontario, [1989] 2 S.C.R. 170***

70. Where a public officer is obliged by statute to do a particular thing, in particular circumstances for the benefit of particular persons, then such persons can seek judicial

enforcement of that duty. Section 2 of the TPA mandates a referendum before a bill establishing a new tax or permitting the increase of a tax rate under a designated statute is introduced in the Assembly. The TPA does not permit the exercise of discretion on this issue. Section 17 of Bill 83 and ss. 3-11 and s. 13 of Bill 106 must therefore be declared invalid unless and until a referendum is held as required by section 2 of the TPA.

*Distribution Canada Inc. v. Canada (Minister of National Revenue)*, [1991] 1 F.C. 716 (T.D.), aff'd [1993] 2 F.C. 26 (F.C.A.)

### ***McGuinty's Contract with the CTF***

71. The applicants seek a declaration against Mr. McGuinty in his personal capacity and not in his capacity as Premier of the Province. There is no doubt that Mr. McGuinty had capacity to sign the Promise dated September 11, 2003 (i.e. prior to being elected Premier) and that he expressly acknowledged his acceptance of the terms of the Promise. No evidence has been put forward to refute this.

*Amended Notice of Application, Supplementary Application Record, Tab 1  
Para. 24, Williamson Affidavit, Application Record, Tab B*

72. Further, the respondents admit, in paragraph 68 of their factum, that Mr. McGuinty intended to keep his promise.

73. A contract consists of a promise or set of promises, given by one person in exchange for the promise or set of promises, made by another person. In this case, Mr. McGuinty promised that if elected, he would not raise taxes or implement any new taxes without the explicit consent of the Ontario voters, would not run deficits and, that he would abide by the TPA and the Balanced Budget Act. In return, Mr. McGuinty was able to utilize the CTF to generate and capitalize on very favourable publicity. This meets the classic test for valuable consideration and therefore created an enforceable contract. Contrary to paragraph 73 of the respondents' factum, there is no basis in the evidence to suggest that "the CTF had already provided its support for Mr. McGuinty and the Liberal Party long before the alleged binding contract of September 11, 2003".

Fridman, G.H.L., *The Law of Contract in Canada*, 4<sup>th</sup> ed., (Scarborough: Carswell, 1999) at 3  
*Loranger v. Haines* (1921), 64 D.L.R. 364 at 372 (Ont. C.A.)  
*Spruce Grove v. Yellowhead Regional Library Board* (1982), 143 D.L.R. (3d) 188 (Alta. C.A.)

74. Following the election of his party to the government of Ontario, Mr. McGuinty breached his contract with CTF by failing to seek the explicit consent of Ontario voters before the 2004 Budget (which he approved) was announced and the new or increased tax in s. 17 of Bill 83 and ss. 3-11 and s. 13 of Bill 106 was introduced in the Assembly.

75. In addition, the 2004 Ontario Budget, which Mr. McGuinty approved, is a deficit Budget and the *Balanced Budget Act 1999* is in the process of being repealed, by reason of which Mr. McGuinty has put himself in a position of not being able to comply with the Act and with his Promise. The applicants are therefore entitled to a declaration that Mr. McGuinty has breached the Promise that he signed on September 11, 2003.

### ***McGuinty's Negligent Misrepresentations***

76. The tort of negligent misrepresentation will be established if a party can demonstrate that:

- (i) there is a duty of care based on a special relationship between the representor and the representee;
- (ii) the representation in question must be untrue, inaccurate or misleading;
- (iii) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and
- (iv) the reliance must have been detrimental to the representee in the sense that damages resulted.

*Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 at 110  
*Moin v. Collingwood (Township)* (2000), 135 O.A.C. 278

77. The Promise signed by Mr. McGuinty is properly characterized as a representation as to a present statement of fact, namely, the then existing commitment of Mr. McGuinty

to a tax policy for his party, if elected as the next government.

*Reclamations Systems Inc. v. Rae* (1996), 27 O.R. (3d) 419 at 445 (Gen. Div.)  
[hereinafter *Reclamation Systems Inc.*]

78. The duty to take care includes relationships “equivalent to contract” where there is an implied undertaking. By signing the Promise, Mr. McGuinty entered into a special relationship with the applicants. In addition, Mr. McGuinty, as an individual seeking election, sought and utilized the favourable publicity generated by his personal dealings with the applicants for the benefit of his campaign, and therefore was in a special relationship with them.

Linden, A.M., *Canadian Tort Law*, 6<sup>th</sup> ed. (Markham: Butterworths, 1997)  
at 432

79. The representation made by Mr. McGuinty of his commitment to a tax policy for his party, if elected as the next government, was untrue, misleading or inaccurate in light of Mr. McGuinty’s approval of the 2004 Budget which announced a new or increased tax without seeking the consent of voters and approved the repeal of the *Balanced Budget Act 1999*. Mr. McGuinty’s actions are therefore distinguishable from those in the *Reclamations Systems Inc.* decision, *supra*, where the Minister of the Environment who had made a representation maintained the representation he had made to his opponents and in response to questions in the legislature.

*Reclamations Systems Inc., supra*

80. Mr. McGuinty acted negligently or recklessly without regard to the truth or falsity of his representation. In particular, he knew or ought to have known that the provincial state of finances was in a large deficit position and that his party (if elected as the next government) would be unable to run a balanced budget and increase spending without raising taxes, and would need to obtain the explicit consent of Ontario voters to raise taxes or implement new taxes as provided for by the TPA.

81. It was reasonable for the applicants to rely on Mr. McGuinty's representations given that the provisions of the TPA mandate a referendum before the establishment of a new tax or increase of a tax rate, and the legitimate expectation that Mr. McGuinty and his government would abide by its terms (based on the prior statements made by Mr. McGuinty). As a result of their reliance on the representations of Mr. McGuinty, the applicants suffered damage to their reputation.

82. The applicants are therefore entitled to a declaration that Mr. McGuinty breached the Promise that he signed with the CTF, and that the representations he made in order to secure CTF's praise of the Liberal Party's fiscal policies and capitalize on the resulting publicity were negligently or recklessly made.

### ***The Respondents' Motion to Strike***

83. In order to succeed on a motion to strike, the moving party must demonstrate that it is "plain and obvious" or beyond reasonable doubt that the pleading discloses no reasonable cause of action.

*Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at 980 [hereinafter *Hunt*]  
*R.D. Belanger & Associates Ltd. v. Stadium Corp. of Ontario Ltd.*, (1991), 5  
O.R. (3d) 778 (C.A.)  
*Eliopoulos v. Ontario (Minister of Health & Long Term Care)*, 2004 O.J. No.  
3035 at para 6 (S.C.J.) [hereinafter *Eliopoulos*]

84. The Supreme Court of Canada has held that "neither the complexity of the legal issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case." A "germ" or "scintilla" of a cause of action will suffice to maintain the claim.

*Hunt, supra at 977 and 980*  
*Eliopoulos, supra at paragraph 7*

85. It is clear from all of the above that the applicants have more than a "germ" or "scintilla" of a cause of action and that the application discloses a reasonable cause of action and, as such, ought to proceed.

86. In addition, on a motion to strike, the facts as alleged in the pleading at issue must be taken as true for the purpose of determining whether the claim discloses a reasonable cause of action. The court should not look beyond the pleadings and determine whether the action has any chance of success. To do otherwise is to effectively conduct a summary judgment proceeding under Rule 20 without having the sworn evidence of the parties as a basis for determining whether there is a genuine issue for trial. In any event, the respondents have not challenged any factual assertions of the applicants.

*Nash v. Ontario* (1995), 27 O.R. (3d) 1 (C.A.)  
*Morse Typewriter Co. v. Cairns* (1992), 7 C.P.C. (3d) 136 (Ont. Gen. Div.)

#### **PART IV – ORDER SOUGHT**

87. The applicants thus respectfully request an order:
- a) dismissing the respondents' motion to strike;
  - b) granting the declarations set out in the amended notice of application;
  - c) awarding costs to the applicants on a substantial indemnity basis;
  - d) providing for such further and other relief as to this Honourable Court may seem just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED BY

September 16, 2004

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Joseph C. D'Angelo  
of counsel for the Applicants

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Susan Muigai  
of counsel for the Applicants

## SCHEDULE A

### AUTHORITIES CITED

- | <b><u>Tab</u></b> | <b><u>Authority</u></b>  |
|-------------------|--|
| 1.                | <i>Rizzo &amp; Rizzo Shoes Ltd. (Re)</i> , [1998] 1 S.C.R. 27  |
| 2.                | <i>Legislative Assembly of Ontario, Hansard (May 3, 1999)(excerpts)</i>  |
| 3.                | <i>Legislative Assembly of Ontario, Hansard (November 2, 1999)(excerpts)</i>   |
| 4.                | <i>R. v. Gignac</i> , [1934] O.R. 195 (H.C.)   |
| 5.                | <i>Crawford v. Ottawa (City) Board of Education</i> , [1971] 2 O.R. 179 (C.A.)   |
| 6.                | <i>Melnychuk v. Heard</i> (1963), 45 W.W.R. 257 (Alta. S.C.)   |
| 7.                | Poschmann, F., “ <i>Ontarians Watch their Tax Steps</i> ” Financial Post (June 2, 2004) FP19   |
| 8.                | <i>CCH Ontario Tax Reporter, Commentary on 2004 Ontario Budget</i> [updated as of July 15, 2004]                                     |
| 9.                | <i>Leprohon v. Ottawa (City)</i> (1878), 2 O.A.R. 522 (C.A.)   |
| 10.               | <i>Toronto (City) v. Toronto Transit Commission</i> , [1992] O.J. No. 1967 (Gen. Div.)   |
| 11.               | Sullivan, R., <i>Sullivan and Driedger on the Construction of Statutes</i> , 4 <sup>th</sup> ed., (Markham: Butterworths, 2002)      |
| 12.               | <i>McBratney v. McBratney</i> , [1919] 59 S.C.R. 550   |
| 13.               | <i>Reference Re Canada Assistance Plan (B.C.)</i> , [1991] 2 S.C.R. 525  |
| 14.               | <i>R. v. Mercure</i> , [1988] 1 S.C.R. 234   |
| 15.               | <i>Nelles v. Ontario</i> , [1989] 2 S.C.R. 170   |
| 16.               | <i>Distribution Canada Inc. v. Canada (Minister of National Revenue)</i> , [1991] 1 F.C. 716 (T.D.), aff’d [1993] 2 F.C. 26 (F.C.A.) |

17. Fridman, G.H.L., *The Law of Contract in Canada*, 4<sup>th</sup> ed., (Scarborough: Carswell, 1999)
18. *Loranger v. Haines* (1921), 64 D.L.R. 364 (Ont. C.A.)
19. *Spruce Grove v. Yellowhead Regional Library Board* (1982), 143 D.L.R. (3d) 188 (Alta. C.A.)
20. *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87
21. *Moin v. Collingwood (Township)* (2000), 135 O.A.C. 278
22. *Reclamations Systems Inv. v. Rae* (1996), 27 O.R. (3d) 419 (Gen Div.)
23. Linden, A.M., *Canadian Tort Law*, 6<sup>th</sup> ed. (Markham: Butterworths, 1997)
24. *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959
25. *R.D. Belanger & Associates Ltd. v. Stadium Corp. of Ontario Ltd.* (1991), 5 O.R. (3d) 778 (C.A.)
26. *Eliopoulos v. Ontario (Minister of Health & Long Term Care)*, 2004 O.J. No. 3035 (S.C.J.)
27. *Nash v. Ontario* (1995), 27 O.R. (3d) 1 (C.A.)
28. *Morse Typewriter Co. v. Cairns* (1992), 7 C.P.C. (3d) 136 (Ont. Gen. Div.)



## SCHEDULE B

### LEGISLATIVE PROVISIONS CITED

1. *Interpretation Act*, R.S.O. 1990, c.I. 11 ss 10 and 13
2. *Taxpayers Protection Act, 1999*, S.O. 1999, c. 7, Schedule A, as amended
3. *Section 17, Bill 83 “An Act to implement Budget measures”*, 1<sup>st</sup> Sess., 38<sup>th</sup> Leg., Ontario, 2004, with Explanatory Notes
4. *Budget Measures Act, 2004*, S.O. 2004, c. 7
5. Bill 106, “*An Act to implement Budget measures and amend the Crown Forest Sustainability Act, 1994*”, 1<sup>st</sup> Sess., 38<sup>th</sup> Leg., Ontario, 2004, with Explanatory Notes