

JULY 3, 2019

## Ontario Court of Appeal Rules That Federal Carbon Pricing Scheme Is Constitutional

The Court of Appeal for Ontario has delivered its decision in the constitutional reference, initiated by the Ontario government, relating to the federal carbon pricing scheme. The Court was asked to consider whether the *Greenhouse Gas Pollution Pricing Act* (GGPPA) is unconstitutional, either in whole or in part. The two central arguments advanced by the Ontario government were the following:

- i. the GGPPA does not fall within any of the matters relegated to the federal government's legislative purview, as articulated in the *Constitution Act, 1867*; and
- ii. the carbon levy imposed under Part I of the GGPPA is not a regulatory charge, but rather a disguised, and illegitimate, tax.

In a split decision released on June 28, 2019, the Court rejected both arguments, holding that the GGPPA falls within Parliament's authority to legislate on matters of national concern under the government's Peace, Order and Good Government (POGG) power, and that the carbon levy is regulatory in nature, and is thus not a tax. The Ontario government's constitutional challenge of the GGPPA was preceded by a similar challenge initiated by the Saskatchewan government in the Saskatchewan Court of Appeal, which upheld the legislation as constitutional in a split decision issued in May 2019.

### Background

On October 3, 2016, the federal government released "The pan-Canadian approach to pricing carbon pollution," often referred to as the "benchmark" document, which required the provinces and territories to develop a carbon pricing mechanism by 2018. The provinces and territories that did not develop a carbon pricing mechanism that met specified criteria within this time frame would be subject to the "backstop" of the federal carbon pricing mechanism.

The federal carbon pollution pricing system under the GGPPA, which came into force on June 21, 2018, is comprised of the following two elements:

- a regulatory charge on fuel; and
- a regulatory trading system, known as the Output-Based Pricing System (OBPS), applicable to industrial facilities engaged in prescribed activities causing emissions above a prescribed threshold.

With the exception of Yukon and Nunavut, where the federal carbon pricing system was implemented on July 1, 2019, the OBPS took effect on January 1, 2019, with the federal carbon levy taking effect on April 1, 2019. The federal government has implemented both the federal carbon levy and the OBPS in Ontario, New Brunswick, Manitoba, Saskatchewan, Yukon and Nunavut. The OBPS has also been implemented in Prince Edward Island. The federal government has announced that as of January 1, 2020, the federal carbon levy will also apply in Alberta, and that Alberta's large industrial emitter system will continue to be monitored to determine whether the OBPS should also be implemented in that province.

### Constitutional Challenges

#### POGG

Although both the Saskatchewan and the Ontario appeal courts upheld the GGPPA as valid federal legislation under the federal government's POGG power, each court took a slightly different position on the characterization of the purpose, or "pith and substance," of the legislation. While the Ontario Court held that the GGPPA was aimed at "establishing minimum national standards to reduce

greenhouse gas emissions,” the Saskatchewan Court held that the GGPPA was meant to establish “minimum national standards of price stringency for GHG emissions.”

According to the Ontario Court, establishing minimum national standards to reduce GHG emissions is a new matter – that is, one that was not recognized at Confederation – and may be correctly described as a matter having the appropriate degree of singleness, distinctness and indivisibility required of an exercise of the national concern branch of the federal POGG power, because it is something that no province or territory could achieve on its own. As the Court expressed the point, “One province’s failure to address the issue would endanger the interests of the other provinces.”

### **Regulatory Charge**

In the constitutional context, a tax is distinguished from a regulatory charge on the basis of the purpose for which it is imposed. While a tax is imposed in order to raise revenues for general fiscal purposes, a regulatory charge is imposed for a particular regulatory purpose. According to the Ontario Court, the federal carbon levy is properly viewed as a regulatory charge, since it serves a legitimate purpose within a regulatory scheme – namely, behaviour modification to reduce GHG emissions. The Saskatchewan Court had previously arrived at the same conclusion, finding that the carbon levy is not intended to raise revenue for general purposes but to mitigate GHG emissions by raising the costs of such emissions.

### **Future Court Actions**

Now that the Ontario Court has issued its ruling, all eyes will turn to the Supreme Court of Canada, which is expected to hear the appeal from the Saskatchewan Court’s decision in December 2019. Ontario’s Minister of the Environment, Conservation and Parks has made it clear that the Ontario government will also be taking its challenge of the GGPPA to the Supreme Court of Canada. Not to be outdone by Ontario and Saskatchewan, Alberta’s Justice Minister has announced that his government has filed a constitutional reference in the Alberta Court of Appeal, questioning the constitutional validity of the GGPPA. Although it will be many months before there is clarity to Canada’s regulatory landscape for GHG emissions, the federal regime applies in the interim.

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