

Saskatchewan Court of Appeal upholds constitutionality of federal carbon pricing regime

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In this Update

- On May 3, 2019, the Saskatchewan Court of Appeal issued a majority decision that the *Greenhouse Gas Pollution Pricing Act* (the *GGPPA*) was constitutional.
- This decision provides an early opportunity to take stock of the constitutional arguments in play, which include the division of powers, environmental regulation and taxation.
- The most salient aspects of the majority and minority decisions and how the legal debate is likely to unfold.

Introduction

Even prior to its enactment, the *Greenhouse Gas Pollution Pricing Act* (the *GGPPA*) – colloquially known as the federal carbon tax – has garnered considerable attention across Canada's political and legal landscape. It has inspired a range of responses across the country, prompting provincial references and becoming an election issue in multiple jurisdictions.

On May 3, 2019, the Saskatchewan Court of Appeal (the Court) rendered its lengthy [advisory opinion](#) regarding the constitutional validity of the *GGPPA*. In a 3-2 split decision, the majority held that the *GGPPA* was constitutional; the minority concluded that it was not.

Canada and Saskatchewan were the main parties to the appeal. In addition, the large number of intervenors included provincial governments, Indigenous groups, environmental organizations, non-governmental organizations, and some industry groups. Largely absent were interests representing corporate Canada that are affected by the *GGPPA*.

A parallel reference is underway in Ontario, and the issues are now expected to come before the Supreme Court of Canada, with announcements by Saskatchewan that it intends to appeal the decision and, by Alberta, that it will seek to intervene in that appeal.

This decision provides an early opportunity to take stock of the constitutional arguments in play, which include the division of powers, environmental regulation and taxation. These legal proceedings matter to Canadian businesses because they will likely (i) determine the fate of carbon pricing in Canada and each of the provinces, (ii) influence the scope of federal and provincial powers to regulate environmental matters, and (iii) develop the jurisprudence on taxation in Canada.

In this Osler Update we summarize the most salient aspects of the decision to outline how

the legal debate is likely to unfold.

Background

The *GGPPA*, which entered into force on June 21, 2018, establishes a federal greenhouse gas (GHG) emissions pricing scheme that ensures the existence of carbon pricing throughout Canada in the form of (i) a fuel charge and (ii) excess emissions charges for large industrial emitters. A critical element of the legislation, and the source of some provincial discontent, is the so-called backstop, whereby provinces are entitled to enact their own carbon pricing schemes that meet designated federal benchmarks, but those that do not are subject to the federal pricing regime.

On April 19, 2018, the Government of Saskatchewan announced it would ask the Court to provide its opinion on the constitutional validity of the *GGPPA*. Arguments were heard by a panel of five Justices on February 13-14, 2019.

The majority decision

Chief Justice Richards, writing for the majority, found that the *GGPPA* was constitutionally valid. Three key findings relating to the division of powers in Canada underpin the majority's conclusion.

First, the majority wholly rejected Saskatchewan's arguments that the *GGPPA* was constitutionally invalid on the grounds that it contravened (i) principles of federalism and (ii) section 53 of the *Constitution Act, 1867*. Rather, on the first issue they concluded that there is no constitutional requirement that laws enacted by Parliament must apply in a uniform manner across all provinces. On the second issue, the majority found that the levies imposed by the *GGPPA* are regulatory charges, and not a tax, and consequently that the requirements of section 53 are not relevant to the *GGPPA*. In the majority's view, the "pith and substance" of the fuel levy was not to raise revenue for general purposes, but rather formed the "centerpiece of a regulatory plan" that would mitigate GHG emissions. The fuel levy thus constitutes a regulatory charge.

Second, the majority generally agreed with the Attorney General of Canada's central argument that the *GGPPA* is a valid exercise of Parliament's authority under the national concern branch of the "Peace, Order and good Government" (POGG) power. In the majority's view, the legislation's core purpose and effect is to ensure minimum national standards of price stringency for GHG emissions, which is properly characterized as a national concern under the POGG power. In narrowly framing its conclusion about the purpose and effect of the *GGPPA*, the majority showed itself reluctant to create an overly broad domain of exclusive federal jurisdiction that would disrupt the allocation of powers between Parliament and the provinces.

Beyond the positions advanced by the Attorneys General of Canada and Saskatchewan, the Court considered – and rejected – the intervenors' arguments for alternate federal heads of power under which the *GGPPA* could be justified. In a passage with which the minority concurred, the Court declined to find that the impugned legislation was properly justified under the trade and commerce power, the criminal law power, international treaty power, section 35 of the *Constitution Act, 1982*, or the emergency branch of the POGG power. The Court also declined to consider whether the application of the *GGPPA* to Crown corporations offended section 125 of the Constitution.

Minority decision

In a comprehensive dissent, Justices Ottenbreit and Caldwell disagreed with the majority's conclusions regarding the *GGPPA*'s constitutional validity. They deemed that the Act cannot be justified under the POGG power due to their assessment of the pith and substance of the *GGPPA*, and their conclusion that the distinctiveness standard for invoking the national concern branch of POGG is not established. Likewise, the dissenting minority disagreed with the majority's treatment of the fuel levy. On this issue, they characterized the levy as an unconstitutional tax on the basis of the lack of a clear delegation of authority by Parliament to the Governor in Council, an overly broad delegation of authority under the Act, and the unequal pan-Canadian application. Underpinning the minority's entire reasoning is a view that GHG emissions are a subset of air pollution, which has previously been deemed a local matter and thereby falls under provincial jurisdiction.

Conclusion

This decision provides an insightful first assessment of the constitutional validity of the *GGPPA*. However, the matter is far from settled. A second advisory opinion is expected from the Ontario Court of Appeal in the coming months, and given the similarity of the issues at stake, it is generally expected that the parties will appeal to the Supreme Court of Canada.

Given that the outcome of these proceedings will likely impact federal and provincial regulation of environmental issues and taxation jurisprudence, we will be closely following developments in the months ahead.