Cassels

Supreme Court of Canada Finds that Carbon Tax Backstop is Constitutional

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On March 25, 2021, the Supreme Court of Canada (SCC) released a much-anticipated decision on the carbon tax provisions of the *Greenhouse Gas Pollution Pricing Act* (GGPPA).[1] Provincial governments in Alberta, Ontario, and Saskatchewan challenged the constitutionality of parts of this federal legislation. In a 6-3 decision, the SCC found the GGPPA to be constitutionally valid. This finding will have impacts for governments and industry across the country.

Background to the Decision

Greenhouse Gas Pollution Pricing Act

The GGPA comes in 4 parts – parts 1 and 2 of the Act being the most contentious. Part 1 sets a levy on various carbon-based fuels. Part 2 provides a pricing mechanism for large industrial emitters of greenhouse gases (GHG). The GGPPA is designed to serve as a "backstop" for provinces, listed by Cabinet, that have not adopted the stringent carbon pricing standards set out in the Act.

Rulings in Alberta, Ontario and Saskatchewan

The case came before the SCC because provincial governments in Alberta, Ontario, and Saskatchewan challenged the constitutionality of the two parts of the GGPPA referred to above (as well as the four schedules to the Act which set out the types of GHG in issue and the proposed charges and rates for the respective provinces) by referring the matter to the appellate courts of the respective provinces.

- The majority of the Alberta Court of Appeal had held that parts 1 and 2 of GGPPA are unconstitutional in their entirety – describing the *Act* as a "*constitutional Trojan horse*."[2] It found that the regulation of GHG emissions falls under heads of power assigned to the provinces under section 92 of the *Constitution Act, 1867*.
- The majority of the Ontario Court of Appeal held that the Act is constitutional, finding that, "*[t]he need for a collective approach to a matter of national concern, and the risk of non-participation by one or more provinces, permits Canada to adopt minimum national standards to reduce [greenhouse gas] emissions*."[3] Thus, the Act properly falls within the national concern branch of the Peace, Order and Good Government (POGG) power in section 91 of the *Constitution Act, 1867*.

- The majority of the Saskatchewan Court of Appeal held that the Act is constitutionally valid, as the establishment of a minimum standard for carbon pricing to reduce GHG emissions does not mean that all regulation of GHG emissions is now under federal jurisdiction, as provinces and territories still retain the ability to legislate emissions limits and fuel charges and to participate in GHGs output pricing systems.[4]

The Supreme Court of Canada Decision

Constitutional Background

Writing for the majority, and starting with the underlying premise that climate change is real and poses a grave threat to humanity, Chief Justice Wagner utilized applicable legal doctrines and principles to address the constitutionality of the GGPPA. He discussed the federal division of powers and the two-stage analytical approach which is applied to determine if legislation is constitutionally valid. In the first stage, the Court is required to characterize the pith and substance of the challenged law, while in the second stage, the Court must determine whether the matter properly falls under a head of power in section 91 (federal) or section 92 (provincial) of the *Constitution Act, 1867.*[5]

The three-part national concern test examines whether a challenged law falls within the national concern branch of the federal POGG power, emerging from the introductory clause of section 91. In this case, first, the federal government had to establish that the matter is sufficient concern to the country as a whole to meet the threshold of national concern. Second, the federal government had to show that the matter has "singleness, distinctiveness and indivisibility." Finally, the Court had to find that the matter's impact on provincial jurisdiction was compatible with the division of powers.

The Chief Justice also discussed the double aspect doctrine, which recognizes that some matters can be subject to both provincial and federal jurisdiction. Where this doctrine is applicable, in order for the federal aspect to have precedence, the Court must be satisfied that the double aspect is real and not insignificant, and that Canada has a compelling reason to enact the legislation in question. This doctrine has particular significance with respect to the GGPPA, given that the law imposes minimum national standards, but leaves the provinces free to legislate on the matter of GHG emissions pricing, subject to adherence to the national threshold.

The Chief Justice then considered the three-part national concern test which examines whether a challenged law falls within the federal POGG power. In this case, the federal government had to establish, based on evidence, that the matter is of sufficient concern to the country as a whole. Second, the federal government had to show that the matter has "singleness, distinctiveness and indivisibility." Finally, the Court had to conclude that the impact of the legislation on provincial jurisdiction is compatible with the division of powers.

Application to the GGPPA

Ultimately, the majority of the SCC held that the GGPPA is constitutionally valid, under the POGG clause of section 91.

The majority held that the true subject matter of the GGPPA is the establishment of national minimum standards of GHG price stringency to reduce GHG emissions, not the regulation of GHG emissions generally. The minimum standards set a floor for GHG pricing where a province fails to implement sufficiently stringent GHG pricing systems, or GHG pricing at all.

The national minimum standards are to act as a backstop. This means that parts 1 and 2 of the GGPPA do not come into effect in a province or territory that has already established a sufficiently stringent GHG pricing system. The majority of the Court found that this feature of the GGPPA provides provinces and territories the latitude to design their own GHG pricing programs that can be adapted to the needs of each specific sub-national jurisdiction.

The majority ruling then focused on whether, applying the three-step analysis referred to above, the matter is one of national concern and held that it is. As for the first criterion, it was concluded that, "*[t]his matter is critical to our response to an existential threat to human life in Canada and around the world*." Thus, it met the threshold for the first step.

As for the second step of analysis, the Court determined that provincial inability was established in this case. First, the provinces are not capable, acting alone or together, of establishing national minimum standards of GHG price stringency to reduce GHG emissions. Secondly, the failure of one province to adhere to the scheme would jeopardize the success of the national regulatory framework. Finally, a province's failure to cooperate would have "grave consequences" across the country, particularly in Canada's Arctic, coastal regions and on Indigenous peoples.

With respect to the third step, the Court found that the GGPPA is reconcilable with the constitutional division of powers, as the matter is limited to the pricing of GHG emissions. Moreover, the backstop pricing system is only imposed as a remedy where a province fails to meet the national standards. Otherwise, provinces and territories still possess flexibility to create their own GHG pricing policies, so long they adhere to the federal minimum standards. The impact of the GGPPA on areas that generally fall under provincial heads of power is therefore limited. Finally, the GGPPA*'s* levies cannot be characterized as a tax, as they have a regulatory purpose – placing regulatory charges on GHG emitters to alter behaviour.

Impact for Industry

As the SCC has held the GGPPA to be constitutionally valid, all of Canada's provinces and territories will

now need to meet the minimum national standards for GHG pricing set out in parts 1 and 2. There is now greater certainty about carbon pricing after three years of litigation. Under the GGPPA. The charge per tonne of carbon will rise over the course of this decade. The federal government plans to have carbon pricing reach $170 per tonne emitted by 2030.[6] However, provinces and territories can introduce their own carbon pricing systems which meet the requirements of parts 1 and 2 of the GGPPA. More changes may come at the provincial and territorial level in response to the decision, and with respect to the design of GHG pricing systems, not only to meet national standards, but also to reflect the specific needs of industries in each province or territory.

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[1] Greenhouse Gas Pollution Pricing Act, SC 2018, c 12, s 186 [*GGPPA*].

[2] *Reference re Greenhouse Gas Pollution Pricing Act,* 2020 ABCA 71.

[3] *Reference re Greenhouse Gas Pollution Pricing Act,* 2019 ONCA 544.

[4] *Reference re Greenhouse Gas Pollution Pricing Act,* 2019 SKCA 40.

[5] *Constitution Act, 1867* (U.K.), 30 & 31 Vict, c 3, reprinted RSC 1985, Appendix II, No 5

[6] https://www.canada.ca/content/dam/eccc/documents/pdf/climate-change/climate-plan/healthy_environment_healthy_economy_plan.pdf

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