

CLIENT ALERT

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REFERENCE RE GREENHOUSE GAS POLLUTION PRICING ACT – SUPREME COURT OF CANADA RULES CARBON PRICING CONSTITUTIONAL

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Introduction

On March 25, 2021, the Supreme Court of Canada (the “SCC”) released its decision in *Reference re Greenhouse Gas Pollution Pricing Act*, upholding the constitutionality of a federal law establishing minimum national standards for carbon pricing in Canada.¹ The SCC’s ruling will allow the federal government to move forward with its plan to ensure each Canadian province and territory has a price on carbon to curb greenhouse gas (“GHG”) emissions, helping Canada meet its emission targets under the Paris Climate Agreement.²

In its decision, the SCC ruled that the *Greenhouse Gas Pollution Pricing Act* (the “GGPPA”) is constitutional because the law is within the federal government’s jurisdiction to legislate in relation to matters of national concern, under the federal “peace, order, and good government” power (the “POGG Power”) of Canada’s *Constitution Act, 1867* (the “Constitution”).³ The governments of Alberta, Ontario and Saskatchewan had challenged the GGPPA’s constitutionality for encroaching on the provincial power to legislate over their natural resources.

The GGPPA

The GGPPA is a federal law which aims to put a price on GHG emissions in Canada through binding “minimum national standards” on Canada’s federal government and its provinces and territories. The pricing standards are divided in two parts: a regulatory charge on carbon-based fuels and an output-based emissions trading system for polluting industries.

The GGPPA requires that all provincial and territorial governments establish a pollution pricing scheme that meets the national minimum price per tonne of carbon dioxide equivalent and establish emission caps. A federally managed backstop system under the GGPPA would apply in provinces or territories that do not have a system that meets the criteria or if the province or territory requests the federal system be used.

Procedural History

The governments of Alberta, Ontario, and Saskatchewan each challenged the constitutionality of the GGPPA, submitting the matter to their provincial courts of appeal. The Alberta Court of Appeal held the GGPPA to be unconstitutional on the basis the legislation exceeded the

federal jurisdiction.⁴ In contrast, the Saskatchewan Court of Appeal and the Ontario Court of Appeal held that the GGPPA was within the federal legislative jurisdiction.⁵ Both Ontario and Saskatchewan appealed their respective appellate courts’ decisions to the SCC.

The SCC’s Decision

The majority in *Reference re Greenhouse Gas Pollution Pricing Act* held that the GGPPA was constitutional.

The majority began by applying the two-stage analytical approach for reviewing legislation on federalism grounds. The first stage involves assessing the challenged legislation’s purpose and effects, with a view to characterizing its subject matter. The second stage involves classifying the legislation’s subject matter as either within a federal or provincial head of power under the *Constitution*.⁶

Applied to the GGPPA, the majority held that the subject matter of the GGPPA is establishing minimum national standards of GHG price stringency to reduce GHG emissions. The national minimum standards would serve as a national backstop to give effect to the federal government’s purpose of ensuring GHG pricing applies broadly across Canada.⁷

The majority also held that the GGPPA fell under the federal government’s POGG Power under the national concern branch.⁸ According to the majority, the POGG Power is involved where there is a “provincial inability to deal with [a] matter” and where “failure of one or more provinces to cooperate would prevent the other provinces from successfully addressing [an issue].”⁹ The majority considered the issue of GHG emissions to be of clear concern to Canada as a whole in light of the “irreversible harm [which] would be felt across [Canada] if the federal government was not given authority to address GHG emissions.”¹⁰

The majority conceded that while the GGPPA impacts the provinces’ legislative jurisdiction, the impact was justified.¹¹ The majority emphasized that the GGPPA’s impact on the provincial sphere was minimal because the GGPPA only creates an emission pricing floor, retaining provinces and territories’ abilities to create their own polices to meet emission reduction targets, including carbon pricing.¹² Furthermore, the majority concluded that any constitutional impact is outweighed by the irreversible consequences on the environment, human health and safety, and for the economy, if the federal government were not able to address GHG emissions on a national level.¹³

¹ *Reference re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 [*Reference re GGPPA* (SCC)].

² *Paris Agreement to the United Nations Framework Convention on Climate Change*, Dec 12, 2015, TIAS No 16-1104.

³ *Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12; *Constitution Act, 1867*, 30 & 31 Victoria, c 3, s 91-92.

⁴ *Reference re Greenhouse Gas Pollution Pricing Act*, 2020 ABCA 74.

⁵ *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40; *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 29.

⁶ *Reference re GGPPA* (SCC) at para 47.

⁷ *Reference re GGPPA* (SCC) at paras 80-88.

⁸ *Reference re GGPPA* (SCC) at paras 208-211.

⁹ *Reference re GGPPA* (SCC) at para 146.

¹⁰ *Reference re GGPPA* (SCC) at para 206.

¹¹ *Reference re GGPPA* (SCC) at para 205.

¹² *Reference re GGPPA* (SCC) at para 205.

¹³ *Reference re GGPPA* (SCC) at para 205.

Conclusion

The key takeaway from *Reference re Greenhouse Gas Pollution Pricing Act* is that the federal government's GHG emission pricing standards will remain in place. In the short term, this means that provincial and territorial GHG pricing regimes currently below the GGPPA's standard (including, Alberta, Manitoba, Nunavut, Ontario, and Saskatchewan), will need to be raised to the national minimums as set out in the GGPPA.

With several provinces and territories being required to bring their GHG pricing schemes in line with federal standards, businesses operating in these jurisdictions can expect to experience higher costs as it regards their GHG emissions. However, businesses across Canada can now make projections and set targets in light of increased regulatory certainty in the area of carbon pricing. Similarly, with more clearly defined emission costs, many businesses will have the opportunity, among others, to more precisely outline and project their environmental, social and corporate governance initiatives to stakeholders.

KEY CONTACTS



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