

ENVIRONMENTAL LAW CASE SUMMARY



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Reference re: Greenhouse Gas Pollution Pricing Act

The Supreme Court of Canada released its decision in [Reference re Greenhouse Gas Pollution Pricing Act](#). A 6-3 majority upheld the federal [Greenhouse Gas Pollution Pricing Act](#) (the "Act") as constitutional within the federal government's power to legislate for the peace, order and good government of Canada ("POGG Power").

Background

The Act is an integral aspect of the federal government's plan to address climate change. It was enacted in 2018 with the aim to reduce greenhouse gas ("GHG") by introducing minimum national standards of carbon-pricing.

Amongst other things, the Act creates a fuel charge applicable to producers, distributors, and importers of carbon-based fuels (Part 1) and provides for output-based limits on large industrial emitters (Part 2).

The Act also provides flexibility to the provinces and territories to design their own pricing and operates as a "backstop" that will apply in the event the provincial or territorial regulatory regimes are insufficient or fail to meet the federal benchmark.

Appeals

Quickly after enactment in 2018, the Attorney Generals of Alberta, Ontario and Saskatchewan initiated constitutional challenges to the Act. Over the past three years those cases have been making their way through the judicial system, producing inconsistent results along the way. In split decisions, majorities of the Courts of Appeal for Ontario (3-2) and Saskatchewan (3-2) concluded that the Act is constitutional, however, a majority of the Court of Appeal of Alberta (4-1) concluded that it is not.

Supreme Court of Canada ("SCC")

Chief Justice Wagner, writing for a majority of six judges, held that the Act is a constitutional exercise of the federal government's POGG Power.

The analysis consists of two stages: pith and substance where the court looks at the purpose and effects of the legislation, and classification where the court classifies the matter under a head of power set out in sections 91 and 92 of the *Constitution Act, 1876*.

1) Pith and substance

The SCC carefully reviewed the language in the Act (including the title and preamble), the legislative history, and the effects of the Act. The legal and practical effect of the legislation, was to price GHG emissions nationally and limit the provinces' ability to

avoid implementing pricing mechanisms or implementing mechanisms that were less stringent than needed to meet national targets. Accordingly, the SCC characterized the true subject matter of the *Act* as "establishing minimum national standards of GHG price stringency to reduce GHG emissions".

2) Classification of the Act

The Majority classified the *Act* under the POGG Power after undertaking a three-step analysis.

Matter is of sufficient concern

The Majority was satisfied that the federal government provided sufficient evidence to establish that minimum national pricing standards to reduce GHG emissions is of sufficient concern to Canada as a whole, as it is vital to climate change in Canada and around the world.

Matter is "single, distinct, and indivisible" from provincial concerns

The Court also found that the second part of the test was satisfied, because GHGs are specific and a precisely identifiable pollutant. Further, GHG emissions are an extra provincial matter that have global scope.

Scale of impact on provincial jurisdiction

Finally, the Majority recognized that although the *Act* had an impact on provincial autonomy, this impact was qualified, limited and justified by the *Act*'s environmental benefits.

Chief Justice Wagner noted the *Act* was narrow in scope in that the entire substance of the *Act* was distinctly national relating to pricing of GHG emissions. Furthermore, the provinces were free to enact their own GHG pricing system as long as it met the minimum national price stringency standards.

In considering the final part of this analysis the Majority recognized that the provinces, acting alone or together, would be constitutionally incapable of establishing minimum national price stringency standards to reduce GHG emissions. Additionally, a failure to include any of the provinces in the *Act* could jeopardize the effects of the *Act* and undermine the ability to achieve the goal of addressing climate change.

The Dissents

Justice Coté, dissenting in part, agreed with the Majority's articulation of the pith and substance analysis, and agreed the federal government could legislate to set minimum national pricing standards to reduce GHG emissions. However, Justice Coté found the *Act* unconstitutional based on the very broad regulation-making power that the *Act* provides to the federal Cabinet. She found the wide discretion vested in the Governor in Council with no meaningful limits on the government's executive power was inconsistent with parliamentary sovereignty, the rule of law and the separation of powers between the legislative and executive branches of government.

Justice Brown also found the *Act* unconstitutional but on the basis that the pith and substance of the *Act* fell within provincial jurisdiction and could not be supported by the POGG Power or any source of federal power. He noted that the Majority's approach is a massive expansion of federal power, that could ultimately allow the federal government to set minimum standards across all various areas of provincial jurisdiction.

Justice Rowe agreed with Justice Brown's analysis and conclusion that the pith and substance of the *Act* fell within provincial jurisdiction. However, he also provided commentary on the nature of the POGG Power, which, in his view, is a power of last resort that only confers residual authority.

Implications

This decision has significant implications for future environmental and energy-related legislation in Canada. Given the increasing impact of climate change and growing environment concerns, Canada has seen an upsurge in environmental legislation and regulations to legislate these areas. This is a landmark decision that clarifies the provincial and federal jurisdiction over modern environmental legislation. In particular, this case provides more certainty with respect to the regulation of GHG's emissions and the potential for the future application of POGG in the environmental legislation context.

This case also has significant constitutional law implications, it expands federal power to legislation on matters of "national concern", which will likely be faced with opposition in the future. The dissenting judges criticized the Majority's approach as advocating an unwarranted extension of the federal POGG

Power. We will likely see these dissents used to attempt to strictly limit the scope of federal government's power in the future.

Ultimately, the full impact of this decision on the division of powers is yet to be seen. It will be interesting to see whether future courts view this decision as a product of unique circumstances that is distinguishable, or as a general expansion on the federal governments jurisdiction to legislate on the basis of the national concern doctrine.

Conclusion

The SCC's decision provides some finality on the *Act* and means the federal GHG emission pricing standard are here to stay. Currently, Alberta, Manitoba, Nunavut, Ontario, and Saskatchewan, have some drafting work to do as they will need to draft legislation and regulations that raise their provincial standards to align with the federal benchmark. Businesses in those jurisdiction can expect higher costs as it relates to their GHG emissions.

We hope you found this summary useful.

If you would like more details about the issues covered, to provide general comments, or to suggest topics or cases of interest please email the author(s).

This Environmental Law Case Summary is not a legal opinion. Readers should not act on the basis of this update without first consulting a lawyer for analysis and advice on a specific matter.

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