

# Canadian Supreme Court Upholds Federal Carbon Pricing System



Federal government wards off constitutional challenge to control over GHG emissions regulation

There was a lot on the line on March 25, 2021 when the Supreme Court of Canada handed down its long-awaited decision on whether the federal government has the constitutional authority to impose its national greenhouse gas emissions (GHG) carbon pricing system on recalcitrant provinces. One could almost hear the groans emanating from Alberta, Ontario and Saskatchewan when the Court ruled, 6-3, that the federal *Greenhouse Gas Pollution Pricing Act* (GGPPA) is, in fact, constitutional. Here's a look at the ruling and what it means.

## The GGPPA

Adopted in June 2018, the GGPPA establishes 'minimum national standards of GHG price stringency to reduce GHG emissions. . . seeking to change behaviour by internalizing the cost of climate change impacts, incorporating them into the price of fuel and the cost of industrial activity.' The federal government adopted the legislation as part of its commitment under the Paris Agreement to reduce GHG emissions by 2030. The GGPPA consists of 2 parts:

Part 1 establishes a carbon levy for producers, distributors and importers of various types of carbon-based fuel who ultimately pass the charge on to consumers downstream. The levy increases annually, reaching \$40 per tonne of CO<sub>2</sub> equivalent in April 2021 and \$50 per tonne in 2022.

Part 2 establishes an output-based pricing system (OBPS) for greenhouse gas (GHG) emissions from large industrial emitters. The OBPS is industry-specific and uses the industry-average emissions as a benchmark. The excess emissions charge under the OBPS has the same price per tonne as the carbon levy under Part 1.

## The Controversy

Although it's a national system, the GGPPA doesn't bar provinces from adopting their own systems. Instead, it serves as a backstop minimum national standard that applies in provinces that haven't yet adopted their own carbon pricing mechanism; the GGPPA also applies if a province does adopt its own scheme but it falls below the minimum national standards.

In spite of its attempt to accommodate national and provincial approaches, the GGPPA has drawn protest from certain provinces over which level of government has the right to regulate GHG emissions. Under Canada's federalist system, the federal and provincial governments share power with the latter regulating local matters and the federal government exercising authority over areas of national interest. So, where exactly does GHG regulation fall within this scheme'

## **The Supreme Court Decision**

That was essentially the question the Supreme Court had to answer. 'Climate change is real,' wrote Chief Justice Wagner on behalf of the majority. 'It is caused by [GHG] emissions resulting from human activities.' And, as the majority stated repeatedly in its decision, the harms caused by GHG emissions 'pose a grave threat to humanity's future' that go beyond provincial boundaries.

Because these matters, the majority continued, are also beyond the provinces' capability to address as a whole, even through interprovincial cooperation, 'federal action is indispensable' in Canada's efforts to combat climate change.

The third decisive factor was that the GGPPA scheme was limited in its intrusion on provincial powers to the extent it enables the provinces to create their own GHG emissions systems without federal interference, provided that they meet the federal backstop.

The 3-Justice minority was equally adamant in its view that the GGPPA represents a federal usurpation of the provinces' right to regulate themselves. All 3 Justices made powerful, strongly worded arguments. But at the end of the day, they were outvoted [*Reference re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 (CanLII), March 25, 2021].

## **What It Means**

The most direct impact of the case will be felt in the 3 provinces'Alberta, Ontario and Saskatchewan'that were planning to disregard the GGPPA in favour of their own local GHG emissions plans tailored to local conditions. The decision will have little effect in provinces that have been following the GGPPA regime or like BC, Manitoba and Quebec that have implemented their own programs that meet or exceed the federal backstop.

The impact on industry is more difficult to determine. On the one hand, alternative carbon pricing schemes in the dissenting provinces might have been more favorable to large emitters; at the same time, final word on the GGPPA's constitutionality provides the regulatory certainty business needs to operate, invest and plan for the long-term future, particularly in an areas as impactful as carbon pricing.