

## Supreme Court ends uncertainty over constitutionality of federal carbon pricing framework

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Even before the *Greenhouse Gas Pollution Pricing Act* (the GGPPA) received royal assent in June 2018, questions arose about the federal government's jurisdiction to enact a federal carbon pricing regulatory framework. For nearly three years, constitutional challenges brought by multiple provincial governments – Saskatchewan, Ontario and Alberta – worked their way through the courts, leading to conflicting decisions as to the GGPPA's constitutionality.

For businesses across Canada, this uncertainty ended on March 25, 2021 when the Supreme Court of Canada (the Court) upheld the constitutionality of the GGPPA. In a 6-3 decision in *References re Greenhouse Gas Pollution Pricing Act*, the majority of the Court confirmed and applied the "division of powers" analysis under Canadian constitutional law to uphold the validity of the GGPPA. In doing so, the Court emphasized the importance of a national approach in addressing climate change.

The decision provides much-needed clarity on the constitutional question of the federal government's ability to impose a minimum price on carbon going forward. While the decision represents a conclusive verdict on the GGPPA's general constitutionality, the result of the decision does not preclude future policy initiatives by the federal government or by the provinces to address climate change. With increasing political attention on climate change, 2022 is certain to result in greater regulation and activity in the space, with significant effects felt from the Court's decision.

### The Greenhouse Gas Pollution Pricing Act

The GGPPA implements a carbon pricing regime that is central to the federal government's plan to meet Canada's commitments under the *Paris Agreement* to reduce greenhouse gas (GHG) emissions to 30% below 2005 levels by 2030. Divided into two main parts, the GGPPA (a) imposes a fuel charge on fuel producers and distributors; and (b) introduces an output-based pricing system for large industrial emitters. The GGPPA also imposes minimum requirements on provinces and territories to meet the GGPPA's pricing and emissions reduction benchmarks. This approach, with the federal government intervening only where a province has failed to legislate in accordance with the minimum requirements of the GGPPA, has led to a patchwork of carbon pricing systems across Canada. In certain provinces and territories, the federal system operates alone, while others have implemented a wholly provincially-legislated regime. The balance are subject to a mixed approach involving both federal and provincial regulation.

The following graphic prepared by the [Government of Canada](#) summarizes the applicable regime in each province and territory:



## Carbon pricing across Canada

Alberta	Federal fuel charge, Alberta TIER regulation for industry
British Columbia	Provincial carbon tax
Manitoba	Federal Backstop
New Brunswick	Provincial fuel charge as of April 1, 2020, intent to transition federal OBPS to provincial OBPS for January 1, 2021
Newfoundland and Labrador	Provincial carbon tax + OBPS
Northwest Territories	Territorial carbon tax
Nova Scotia	Cap-and-Trade
Nunavut	Federal Backstop
Ontario	Federal fuel charge, intent to transition federal OBPS to provincial OBPS for January 1, 2022
Prince Edward Island	Provincial fuel charge, Federal OBPS
Quebec	Cap-and-Trade
Saskatchewan	Federal fuel charge Provincial OBPS on some sectors, federal OBPS on others
Yukon	Federal Backstop

## The Court of Appeal decisions

Between May 2019 and February 2020, each of the Saskatchewan, Ontario and Alberta Courts of Appeal considered the constitutionality of the GGPPA. In May of 2019, a 3-2 majority at the Saskatchewan Court of Appeal determined that the GGPPA was a valid use of federal legislative jurisdiction. A 4-1 majority at the Ontario Court of Appeal reached the same conclusion in June of 2019. However, in February of 2020, a 4-1 decision of the Alberta Court of Appeal found the GGPPA to be unconstitutional on the grounds that it exceeded federal jurisdiction. These split decisions, and the divergent legal bases upon which they were made, created uncertainty for businesses pending a final resolution by the Supreme Court of Canada.

## The Supreme Court of Canada's decision

Writing for the majority of the Supreme Court, Chief Justice Wagner held that the GGPPA was constitutional and that Parliament had the jurisdiction to enact it as a matter of national concern under the national concern branch of the "peace, order and good government" (POGG) clause of s. 91 of the Canadian Constitution.

In determining the constitutionality of the GGPPA, the Court was required, first, to identify the true subject matter of the GGPPA and then to classify that subject matter with reference to the division of powers set out in the Constitution. In doing so, the Court gave effect to the principle of cooperative federalism, which requires that an appropriate balance be

maintained between the powers of the federal government and those of the provinces. The majority of the Court considered the importance of preserving provincial autonomy, but favoured a flexible view of federalism and the Constitution that supports "modern cooperative federalism."

The majority's finding was informed by what it referred to as the "essential factual backdrop of the case," namely that "[c]limate change is real. It is caused by greenhouse gas emissions resulting from human activities, and it poses a grave threat to humanity's future. The only way to address the threat of climate change is to reduce greenhouse gas emissions." The Court further found that "[a]ddressing climate change requires collective national and international action. This is because the harmful effects of GHGs are, by their very nature, not confined by borders."

In undertaking its division of powers analysis, the majority began by considering the purpose and effects of the GGPPA in order to identify its "pith and substance," or true subject matter. In this regard, the Court, having analyzed the title, preamble, legislative debates, purpose and legal and practical effects of the GGPPA, found that "the true subject matter of the GGPPA is establishing minimum national standards of GHG price stringency to reduce GHG emissions."

"While each province's emissions do contribute to climate change, there is no denying that climate change is an 'inherently global problem' that neither Canada nor any one province acting alone can wholly address. This weighs in favour of a finding of provincial inability. As a global problem, climate change can realistically be addressed only through international efforts. Any province's failure to act threatens Canada's ability to meet its international obligations, which in turn hinders Canada's ability to push for international action to reduce GHG emissions. Therefore, a provincial failure to act directly threatens Canada as a whole." – *Chief Justice Wagner*

The majority held that establishing such minimum national standards was of sufficient concern to Canada as a whole that it warranted consideration in accordance with the national concern doctrine. In doing so, the Chief Justice remarked that "[t]here is broad consensus among expert international bodies ... that carbon pricing is a critical measure for the reduction of GHG emissions" and that the matter of the GGPPA "is critical to our response to an existential threat to human life in Canada and around the world."

The majority then examined whether the matter at hand had a "singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern" as federal jurisdiction in the interests of "peace, order and good government" should only be found to exist where the evidence establishes provincial inability to deal with the matter. In the case of GHG emissions, the majority concluded that "federal jurisdiction is necessitated by the provinces' inability to address the matter as a whole through cooperation, which exposes each province to grave harm that it is unable to prevent."

The final element of the Court's analysis assessed whether the impact on provincial jurisdiction was acceptable, having regard at the same time to the impact on the interests that would be affected if Parliament was unable to constitutionally address the matter at a national level. The majority held that upholding the constitutionality of the GGPPA would have a "clear impact on provincial autonomy" that would be "limited" and would "ultimately be outweighed by the impact on interests that would be affected if Parliament were unable to constitutionally address this matter at a national level." The Court noted that provinces remain free to regulate GHG emissions and can design any GHG pricing system they choose as long as they meet the federal government's outcome-based targets.

To address the concern that the Court's decision raised the spectre of further federal

incursion into areas of provincial jurisdiction, the majority of the Court remarked that its ruling would not “[open] the floodgates to federal ‘minimum national standards’ in all areas of provincial jurisdiction.” In particular, the decision did not extend the national concern doctrine under the POGG power to cover any matter touching on climate change, but was specifically and narrowly limited to GHG pricing.

## Impacts of the decision

Beyond providing clarity on the specific question of the constitutionality of the GGPPA, the decision also provided long-awaited guidance regarding the application of the national concern doctrine under the POGG power and its application to environmental legislation more broadly. The decision is a forceful endorsement by the Supreme Court of the principle of cooperative federalism, particularly in respect of “matters which, by their nature, transcend the provinces.” This principle may have future application to environmental and other matters that, due to their nature, provinces alone are unable to address.

The decision provides welcome certainty as to the ability of the federal government to impose a carbon pricing regime. However, in a practical sense, the cooperative federalism approach to carbon pricing leaves businesses with national operations subject to a patchwork of carbon pricing regimes across Canadian jurisdictions. Navigating these inconsistencies has imposed increased regulatory burdens on businesses and impeded the broader development and use of carbon finance instruments and markets in Canada to date.

While the decision represents an important marker for climate change developments in 2021, the decision has preceded other significant developments in 2021, including the release of the report of the United Nations’ Intergovernmental Panel on Climate Change, the passage of the Canadian Net-Zero Emissions Accountability Act which supports Canada’s efforts to achieve net-zero emissions by 2050, and the numerous commitments made by Canada at the United Nations Climate Change Conference (COP26). Statements by the Government of Canada at COP26 emphasized the role of the GGPPA in meeting its carbon-reduction commitments and encouraging the development of a clean energy transition. However, the commitments made at COP26 — including in respect of deforestation and methane emissions — indicate that the GPPAA will likely be joined by other climate-focused legislation from the federal government.

These developments have occurred in a year that has seen rapidly accelerating focus on energy transition and environmental, social and governance (ESG) matters by a wide variety of industries and sectors across Canada. ESG factors are gaining momentum as strong drivers of private foreign direct investment and institutional investment, as stakeholders lend their support to more sustainable, less carbon-intensive opportunities. Many global corporations and major asset owners have already announced and taken actions to achieve their own commitments to reducing emissions and meeting other ESG-based targets across their operations irrespective of regulatory requirements. ESG considerations are explored in greater detail in our article “People, Planet and Performance: Embracing ESG.”

For more information on the federal carbon pricing system, as well as other federal and provincial/territorial initiatives to fight climate change, visit Osler’s Carbon and Greenhouse Gas Legislation webpage.