

# SUPREME COURT OF CANADA UPHOLDS FEDERAL CARBON PRICING REGIME

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In a [decision](#) released March 25, 2021, the Supreme Court of Canada (“**SCC**”) ruled that the [Greenhouse Gas Pollution Pricing Act](#) (the “**GGPPA**”) is constitutional.<sup>[1]</sup> The Court confirms that climate change is an existential threat to human life and must therefore be approached in Canada as a matter of national concern through coordinated national and international efforts.

The GGPPA, which came into force on June 21, 2018, set a minimum national standard on greenhouse gas (“**GHG**”) pricing in an attempt to reduce emissions and fulfil Canada’s commitments under the 2015 *Paris Agreement*. For provinces that did not already have a provincially-regulated carbon pricing scheme that meets federal requirements, the GGPPA established a regulatory charge on fossil fuels and a carbon pricing system, the Output-Based Pricing System (“**OBPS**”). For provinces with carbon pricing schemes that meet or exceed federal standards, the regime established under the GGPPA did not apply.

In separate legal actions, the governments of Saskatchewan, Ontario and Alberta challenged the constitutionality of the GGPPA taking the position that it was beyond the jurisdiction of the federal government because natural resource regulation under the Constitution falls under provincial jurisdiction. The Courts of Appeal for Saskatchewan and Ontario ruled that the GGPPA was constitutional, while the Alberta Court of Appeal ruled that it was unconstitutional. All three decisions were appealed to the SCC.

For a discussion of the SCC’s decision continue reading. Alternatively, see the discussion on “[Impacts of the Decision and Going Forward](#)” below for key takeaways.

## The SCC Decision

In the majority decision of the Court, Chief Justice Wagner held that the federal government had jurisdiction to enact the GGPPA as a matter of national concern under the peace, order and good government (“**POGG**”) power found in section 91 of the *Constitution Act, 1867* (the “**Constitution**”).

Under the division of powers analysis developed by Canadian courts, the court must consider the characterization or the dominant purpose as well as the classification or head of legislative power of the

impugned statute.

In order to characterize the GGPPA, the SCC considered the “pith and substance” of the legislation, finding that:

[T]he true subject matter of the GGPPA is establishing minimum national standards of GHG price stringency to reduce GHG emissions. . . In my view, a national GHG pricing scheme is not merely the means of achieving the end of reducing GHG emissions. Rather, it is the entire matter to which the GGPPA is directed, as is evident from the analysis of the purpose and effects of the statute. It is also the most precise characterization of the subject matter of the GGPPA, as it accurately reflects both what the statute does — imposing a minimum standard of GHG price stringency — and why the statute does what it does — reducing GHG emissions in order to mitigate climate change.<sup>[2]</sup>

With respect to the proper classification of the GGPPA, Wagner C.J. applied the well-established three-step analysis used to determine whether an issue is a matter of national concern:

- First, the federal government must establish that “the matter is of sufficient concern to Canada as a whole to warrant consideration as a possible matter of national concern.”<sup>[3]</sup>
- Second, the matter must have a “singleness, distinctiveness and indivisibility.”<sup>[4]</sup> This requires that federal jurisdiction exist over a specific and identifiable matter that is qualitatively different from matters of provincial concern and that the matter must be one that the provinces are unable to deal with on their own.
- Third, the matter must have “a scale of impact on provincial jurisdiction that is reconcilable with the division of powers.”<sup>[5]</sup>

In the first step, Wagner C.J. reasoned that: “[T]he evidence clearly shows that establishing minimum national standards of GHG price stringency to reduce GHG emissions is of concern to Canada as a whole. This matter is critical to our response to an existential threat to human life in Canada and around the world. As a result, it readily passes the threshold test and warrants consideration as a possible matter of national concern.”<sup>[6]</sup>

As to the second, the singleness, distinctiveness and indivisibility of the matter, the majority of the court found the federal role in carbon pricing to be qualitatively different from matters of provincial concern. Wagner C. J. noted that GHGs are a specific and identifiable type of pollutant and that emissions are predominantly extra-provincial in their character and implications. In addition, Wagner C.J. found that the regulatory mechanism of GHG pricing is specific and limited and does not amount to the regulation of GHG emissions generally.<sup>[7]</sup>

The SCC found that the provinces, acting alone or together, are constitutionally incapable of establishing minimum national standards of GHG pricing to reduce emissions. If one province were to opt out of a

cooperative pricing scheme it would jeopardize the scheme's success in the rest of Canada. Provinces that fail to implement a sufficiently stringent GHG pricing mechanism may see a rise in GHG emissions, as businesses may decide to transfer their operations to that province to avoid higher prices and stricter regulation, something known as “carbon leakage”. Moreover, an increase in one province's GHG emissions could offset the reductions in other provinces, leading to a failure to address climate change. This was of particular concern as Ontario, Alberta and Saskatchewan which together account for 71 percent of Canada's GHG emissions in 2016 had either refused to adopt or had withdrawn from the [\*Pan-Canadian Framework on Clean Growth and Climate Change\*](#) in 2018, a scheme in which the provinces agreed to work together to reduce GHG emissions.<sup>[8]</sup>

Regarding the third step of the analysis, Wagner C.J. held that the GGPPA's impact on the provincial freedom to legislate on areas of life that fall under the provincial heads of power is qualified and limited. The GGPPA operates as a “backstop”, meaning it only applies if a province or territory's GHG pricing system is not sufficiently stringent and only to the extent necessary to remedy the deficiency. The GGPPA creates a national GHG pricing “floor” while continuing to provide the provinces and territories with the flexibility to design their own policies and regimes to meet emissions reductions targets, including carbon pricing, adapted to each province and territory's specific circumstances. Simply put, if a province's pricing mechanisms meet the federal standard, the GGPPA's scheme will not apply to that province.<sup>[9]</sup>

Lastly, Wagner C.J. noted that while the restrictions on pricing standards “may interfere with a province's preferred balance between economic and environmental considerations, it is necessary to consider the interests that would be harmed — owing to irreversible consequences for the environment, for human health and safety and for the economy — if Parliament were unable to constitutionally address the matter at a national level.”<sup>[10]</sup>

### **Decision Not Unanimous**

The decision to uphold the GGPPA was not unanimous, with three out of the nine justices dissenting.

Justice Côté agreed with the majority of the court that the matter was one of national concern and that the federal government had the power to enact legislation establishing minimum national standards on GHG pricing to reduce emissions. However, she took issue with the GGPPA's current form, finding it to be unconstitutional as it failed to place any meaningful limits on the discretion that it confers on the executive branch. Côté J. also noted that the GGPPA does not set the minimum standards but rather permits the Governor in Council to set them and further that it permits the Governor in Council to amend and override the GGPPA, something Côté J. found to be a violation of the Constitution, parliamentary sovereignty, the rule of law and the separation of powers.<sup>[11]</sup>

Justices Brown and Rowe also wrote dissenting opinions. Both found that GHG emissions were purely a matter of provincial jurisdiction and that the federal government did not have authority to establish minimum standards for GHG pricing, stating that the national concern doctrine “is a residual power of last resort.”<sup>[12]</sup> Brown J. regarded the fact that the GGPPA’s structure and operation was premised on the provinces having authority to enact the same scheme as being fatal to the constitutionality of the GGPPA.<sup>[13]</sup> Brown. J. also voiced concern that the majority’s analysis would open the floodgates to federal “minimum national standards” in all areas of provincial jurisdiction.<sup>[14]</sup>

### Impacts of the Decision and Going Forward

From a legal standpoint, the decision is consistent with modern SCC jurisprudence which takes a flexible approach to federalism with the intent of encouraging and accommodating intergovernmental cooperative efforts. The decision also recognizes that global climate issues are of utmost importance and must be regulated as such.

From a practical standpoint, the decision allows the federal government to resume the regulation of carbon emissions and require provincial carbon pricing regimes to meet the thresholds established in the GGPPA. The one practical implication arising from the SCC’s decision is that provinces that were waiting to enact their own carbon emissions programs pending the SCC decision will now need to decide whether they will design their own federally-compliant programs or whether they will simply rely on the regime established under the GGPPA.

Currently, the GGPPA regime applies in part or in full in Alberta, Manitoba, New Brunswick, Nunavut, Ontario, Prince Edward Island, Saskatchewan and Yukon. While some of these jurisdictions opted for the GGPPA, others enacted their own regimes or are in the process of doing so.

Here is a summary of the current status of the governing regimes in each Canadian jurisdiction:

- **Alberta:** Repealed the *Carbon Leadership Act* on May 30, 2019 and enacted the *Technology Innovation and Emissions Reduction Act* and *Technology Innovation and Emissions Reduction Regulation* (the “**TIER Regulations**”) on November 22, 2019. The TIER Regulations revamped the province’s GHG emission policies and output-based pricing system with respect to large industrial emitters and opted-in facilities and created the Technology Innovation and Emissions Reduction System (TIER Program), which came into effect in Alberta on January 1, 2020.<sup>[15]</sup> The TIER Regulations are compliant with the federal standards, but only for the emission sources they cover, and the GGPPA backstop continues to supplement Alberta’s regulations for other sources of emissions.<sup>[16]</sup>
- **British Columbia:** Enacted the *Carbon Tax Regulation* on July 1, 2008, which has remained compliant with the GGPPA standards.<sup>[17]</sup>

- **Manitoba:** Continues to be governed in full by the GGPPA.
- **New Brunswick:** Enacted the *Gasoline and Motive Fuel Tax Act*, which came into effect on April 1, 2020, and is partially compliant with the GGPPA.<sup>[18]</sup> However, the GGPPA backstop continues to supplement New Brunswick's regulations with regards to the regulatory trading system requirement.<sup>[19]</sup>
- **Newfoundland and Labrador:** Enacted the *Management of Greenhouse Gas Act* and the *Management of Greenhouse Gas Reporting Regulations* in 2016, which received approval by the federal government on October 23, 2018,<sup>[20]</sup> which has remained compliant with the GGPPA standards.
- **Northwest Territories:** Enacted *An Act to Amend the Petroleum Products Tax Act*, amending the Petroleum Products Tax Act in 2019,<sup>[21]</sup> which has remained compliant with the GGPPA standards.
- **Nova Scotia:** Enacted the *Cap-and-Trade Program Regulations* on November 13, 2018, which has remained compliant with the GGPPA standards.<sup>[22]</sup>
- **Nunavut:** Continues to be governed in full by the GGPPA.
- **Ontario:** On September 21, 2020, Ontario announced that its Emissions Performance Standards ("EPS") Program under the *Greenhouse Gas Emissions Performance Standards Regulation*<sup>[23]</sup> enacted on July 4, 2019, was accepted by the federal government and that the two governments were working towards transitioning to the Ontario program. For more information regarding this announcement, see [here](#). As of the date of this bulletin, the GGPPA remains in effect in Ontario for carbon pricing and transition is still underway.
- **Prince Edward Island:** Enacted a carbon levy under the *Climate Leadership Act* and *Climate Leadership Regulations* in December 2018.<sup>[24]</sup> However, the regime is not fully compliant with the federal standard and the GGPPA backstop continues to supplement PEI's regulations.<sup>[25]</sup>
- **Québec:** Enacted the *Regulation respecting a cap-and-trade system for greenhouse gas emission allowances* in January 2012, which has remained compliant with the GGPPA standards.<sup>[26]</sup>
- **Saskatchewan:** Enacted the *Management and Reduction of Greenhouse Gases Act* in December 2018 and various regulations thereunder.<sup>[27]</sup> While the system is equivalent with the federal standard for the emission sources that it covers, the regime is not fully compliant with the federal standard for other sources of emissions and the GGPPA backstop continues to supplement Saskatchewan's regulations.<sup>[28]</sup>
- **Yukon:** Continues to be governed in full by the GGPPA.

We expect that over the next year some of the above noted provincial and territorial governments where the GGPPA regulates carbon emissions will enact their own compliant regimes to suit the specific needs of their individual jurisdictions.

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

[2] *Ibid* at para 80.

[3] *Ibid* at para 144.

[4] *Ibid* at para 145.

[5] *Ibid* at para 160.

[6] *Ibid* at para 171.

[7] *Ibid* at para 172-175.

[8] *Ibid* at paras 19, 182-186.

[9] *Ibid* at paras 198-204.

[10] *Ibid* at para 206.

[11] *Ibid* at para 222.

[12] *Ibid* at para 457.

[13] *Ibid* at para 302.

[14] *Ibid* at para 303.

[15] [Technology Innovation and Emissions Reduction Regulation](#), Alberta Regulation 133/2019.

[16] Ministry of Environment and Climate Change, [Putting a price on pollution: Carbon pollution pricing systems across Canada](#) (last accessed March 28, 2021).

[17] [Carbon Tax Regulation](#), B.C. Reg. 125/2008.

[18] [Gasoline and Motive Fuel Tax Act](#), CHAPTER G-3.

[19] *Supra* Note [16](#).

[20] [Management of Greenhouse Gas Act](#), SNL 2016, c M-1.001.

[21] [An Act to Amend the Petroleum Products Tax Act](#), Bill 42.

[22] [Cap-and-Trade Program Regulations](#), N.S. Reg. 194/2018.

[23] [Greenhouse Gas Emissions Performance Standards](#), O Reg 241/19.

[24] [Climate Leadership Act](#), RSPEI 1988, c C-9.1.

[25] *Supra* Note [16](#).

[26] [Regulation respecting a cap-and-trade system for greenhouse gas emission allowances](#), CQLR c Q-2, r 46.1.

[27] [The Management and Reduction of Greenhouse Gases Act](#), SS 2010, c M-2.01.

[28] *Supra* Note [16](#).

By [Holly Sherlock](#), [Talia Gordner](#), [Julia Loney](#), [Ralph Cuervo-Lorens](#), and [Samantha Irving](#)

### **A Cautionary Note**

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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