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## Ontario Court of Appeal Rules That Federal Carbon Pricing Act Is Constitutional

By Emily Chittick and Zoë Thoms

The Ontario Court of Appeal has ruled that federal carbon pricing is constitutional. In a 4-1 decision, the court rejected Ontario's claim that the federal carbon levy is outside the federal government's jurisdiction. This decision comes just a month after the Saskatchewan Court of Appeal released their decision on this issue. As we discussed in an earlier post, the Saskatchewan Court of Appeal recently ruled, with a 3-2 split, that the federal carbon pricing legislation is constitutional under the peace, order and good government (POGG) clause of section 91 of the *Constitution Act, 1867*. In December 2018, the Ontario government filed a factum setting out its arguments against the federal government's carbon pricing legislation as unconstitutional. In their decision released on June 28, the Ontario Court of Appeal held that the *Greenhouse Gas Pollution Pricing Act* is within Parliament's jurisdiction to legislate in relation to matters of "national concern" under the POGG.

As we discussed in an earlier post, the federal government adopted the *Greenhouse Gas Pollution Pricing Act* (the Act) on June 21, 2018, which imposes minimum carbon pricing in provinces that have not enacted their own carbon-pricing mechanisms. Part 1 of the Act levies charges on fuel delivered, used, brought into or produced in a listed province. Part 2 of the Act establishes a cap-and-trade regime for pricing industrial GHG emissions and levies a charge on facilities that emit greenhouse gases in a quantity that exceeds their emissions limit. Ontario, New Brunswick, Manitoba and Saskatchewan, known as the federal backstop jurisdictions, have not implemented their own carbon pricing systems in accordance with the federal Act. Under the Act, the federal output-based pricing system (Part 1) came into force in these provinces in January 2019 and the emissions charge (Part 2) came into force in April 2019.

Like in Saskatchewan, the issue before the Ontario Court of Appeal was whether Parliament has the constitutional authority to enact the Act. The Ontario government made two submissions:

1. They challenged Part 1, the federal fuel levy, and Part 2, the GHG emissions charge, of the Act, submitting they are unconstitutional as they cannot be supported under any head of power.
2. The second submission contains two independent arguments: (1) Ontario claims that the Act is a regulatory statute and therefore the federal government cannot rely on its taxation power as a constitutional basis for the charges under the Act; (2) Ontario submits that the charges imposed under the Act are unconstitutional regulatory charges because they have "no nexus to the purposes of the Act," which Ontario claims is required by s.53 of the *Constitution Act, 1867*.

Both these submissions were consistent with submissions made by the Saskatchewan government in their reference case.

The decision comprised of three separate opinions. Chief Justice Strathy wrote on behalf of himself and two other justices, ruling that the legislation is constitutionally valid under the national concern branch of the POGG power. Associate Chief Justice Hoy wrote a separate opinion, concurring in result with the Chief Justice but differing in her characterization of the Act. Justice Huscroft wrote in dissent, concluding that the charges imposed by the Act "are not valid exercises of the national concern branch of the POGG power."

In his majority decision, Chief Justice Strathy begins by stating that "the need for a collective approach to a matter of national concern, and the risk of non-participation by one or more provinces, permits Canada to adopt minimum national standards to reduce greenhouse gas emissions." [4] He stresses that the Act leaves room for the provinces to legislate on GHG emissions while "constraining federal jurisdiction to address risk of provincial inaction" [4] and cites Canada's ratification of the *Paris Agreement* in 2016, and

the federal government's pledge to reduce Canadian GHG emissions by 30% below 2005 levels by 2030. He concludes that the charges imposed by the Act are constitutional and not taxes.

With respect to Ontario's second submission, Chief Justice Strathy agrees with Ontario that the Act does not fall within Canada's taxation power, however given that he concluded it fell under the POGG power, this part of Ontario's argument does not render the Act invalid. Strathy then turns to the second part of Ontario's second submission. Ontario submits that there is no nexus between the charges and the regulatory purposes of the Act given that the revenue raised by the regulatory charges will not be spent in connection with the purposes of the Act. The court rejects this stating that the funds are returned to the provinces, which in turn promotes behavior modification - a purpose which is identified in the Preamble of the Act.

In his dissenting opinion, Justice Huscroft did not challenge the urgency of addressing climate change, however he raised issues about the federal government's authority to impose such a solution, ultimately concluding that the charges are not valid exercises of the POGG power.

As long as something gets done, it may seem unimportant which level of government does it. But federalism is no constitutional nicety; it is a defining feature of the Canadian constitutional order that governs the way in which even the most serious problems must be addressed, and it is the court's obligation to keep the balance of power between the levels of government in check. [198]

Huscroft does not however deny Parliament's ability to legislate on GHG emissions:

My conclusion that passage of the Act is not authorized under the national concern branch of the POGG power does not mean that Parliament is powerless to address climate change. On the contrary, Parliament has significant authority to address pollution and the environment, including lawmaking authority over taxation, criminal law and trade and commerce - none of which have been exercised here. Not only can Parliament legislate in a variety of ways to reduce GHGs; it can legislate to accomplish much of what the Act aims to do. [240]

The Ontario Court of Appeal has adopted virtually the same view as the Saskatchewan Court of Appeal on this issue. Both courts held that the federal government is within its jurisdiction to implement this carbon levy under the POGG head of power, however it is interesting to see that the decision is not as split as in the Saskatchewan case with a 4-1 majority in Ontario as opposed to a 3-2 majority in Saskatchewan. The Saskatchewan government has already appealed their decision and the Supreme Court of Canada will hear it on December 5, 2019. Ontario Premier Doug Ford has indicated that the Ontario government will do the same.

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