

Dec 07, 2018

Ontario Government Files Arguments in Federal Carbon Pricing Challenge

By Zoë Thoms

The Ontario government recently filed a factum setting out its argument against the federal government's carbon pricing legislation as unconstitutional. The factum expands on the arguments outlined in the statement of particulars previously filed by the Attorney General of Ontario: (1) that putting a price on greenhouse gas emissions does not fall within the federal government's jurisdiction as set out in the *Constitution Act, 1867*, and (2) that the federal carbon pricing legislation imposes unconstitutional taxes contrary to the *Constitution Act, 1867*.

In its factum, the Ontario government agrees with the federal government's assertion in the *Greenhouse Gas Pollution Pricing Act*, that climate change is real and that human activities are a major cause. The Ontario government also agrees that proactive action is needed to address the disruptive effect of climate change. The Ontario government disagrees that pricing carbon is an appropriate way to combat climate change "given the adverse impact carbon prices have on families and businesses."¹ The Ontario government argues that its recently released plan to address climate change - Preserving and Protecting our Environment for Future Generations: A Made-in-Ontario Environment Plan - will achieve emissions reductions in line with Canada's 2030 GHG reduction targets under the Paris Agreement without implementing carbon pricing.

The Ontario government argues that carbon pricing is not within the federal government's constitutional jurisdiction:

Greenhouse gas emissions are not a single, distinct, and indivisible matter which Parliament can regulate under its jurisdiction over matters of a national concern without fundamentally disturbing the balance of federalism. Greenhouse gases are caused by an extremely wide range of activities that have always been provincially regulated (e.g., electricity generation, natural resource exploration and production, industrial facilities, home heating, intra-provincial transportation, land use, forestry management, etc.)

Virtually every segment of the provincial economy and society could be regulated in minute detail on the basis that activities in them generate greenhouse gases. Transferring jurisdiction over greenhouse gases to Parliament would give the federal government broad jurisdiction not just to impose a price on greenhouse gas emissions but also to regulate a wide range of matters of traditionally provincial concern. Shifting so much power from the provincial legislatures to Parliament would undermine the federal-provincial division of powers that allows the Canadian union "to reconcile diversity with unity." As the Supreme Court has held, the underlying constitutional principle of federalism "has from the beginning been the lodestar by which the courts have been guided" in interpreting sections 91 and 92 of the *Constitution Act, 1867*.²

The Ontario government also argues that the charges imposed under the federal Act are neither valid regulatory charges nor valid taxation:

The Act and its legislative history make it clear that Parliament intended to regulate greenhouse gases, not authorize the imposition of taxation. At the same time, however, the Act does not require the revenues it raises to be spent on reducing greenhouse gas emissions; the "charges" it imposes therefore lack the nexus with the Act's regulatory purpose required to be valid regulatory charges, even if greenhouse gas emissions did fall within the scope of the national concern doctrine.³

With respect to the nexus issue, the Ontario government references the federal government's plan to use the funds collected under the carbon pricing plan to pay households a Climate Action Incentive and fund energy efficiency efforts:

The Act does not have the required nexus as it does not require that the funds it raises be spent in connection with the Act's purposes. On the contrary, the federal government itself claims that over 90 per cent of the funds raised by the Act will be distributed to individuals as flat-rate, per capita refundable income tax credits. There is no requirement that the proposed tax credits be spent on actions that would mitigate climate change; on the contrary, taxpayers would be completely free to spend their tax refunds on anything, including activities that cause greenhouse gas emissions.⁴

The government of New Brunswick recently announced that it will intervene in the Ontario challenge as well as the Saskatchewan challenge to the federal carbon pricing plan. New Brunswick also announced that it will bring its own challenge. British Columbia recently announced that it will intervene in both Ontario's and Saskatchewan's court proceedings in support of the federal carbon pricing plan.

The federal *Greenhouse Gas Pollution Pricing Act* will come into effect in January 2019. Saskatchewan's challenge is scheduled to be heard in the spring of 2019. Ontario's reference hearing is set for April 2019.

¹ Reference to the Court of Appeal pursuant to section 8 of the *Courts of Justice Act, RSO 1990, c. C.34*, by Order-in-Council 1014/2018 respecting the constitutionality of the *Greenhouse Gas Pollution Pricing Act, Part 5 of the Budget Implementation Act, 2018, No. 1, SC 2018, c. 12*, Factum of the Attorney General of Ontario, November 30, 2018 (the "Factum") at paras 6-7.

² Factum at paras 57-58.

³ Factum at para 5.

⁴ Factum at para 105.

Author



Zoë Thoms
Associate
T 416.865.7755
zthoms@airdberlis.com

This communication offers general comments on legal developments of concern to business organizations and individuals and is not intended to provide legal advice. Readers should seek professional legal advice on the particular issues that concern them.