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Supreme Court of Canada Rules Federal Carbon Pricing is Constitutional

By Emily Chittick

On March 25, the Supreme Court of Canada (SCC) handed down its decision on the constitutionality of the federal government's carbon pricing regime. In a 6-3 decision, the court ruled that the federal government has the right to impose minimum carbon-pricing standards on the provinces.

This decision follows rulings from the highest courts in several provinces, including Ontario, Saskatchewan and Alberta, on the constitutionality of the federal carbon pricing regime. In May 2019, Saskatchewan's highest court ruled that the carbon pricing regime is constitutional (see our article here). In its decision, the court stated that climate change is a vital national issue, one for which the federal government has the power to set national greenhouse gas (GHG) emission standards. The majority concluded that the *Greenhouse Gas Pollution Pricing Act* (the Act), which imposes minimum carbon pricing standards across the provinces, was a valid exercise of Parliament's constitutional power to legislate for the peace, order and good government of Canada (POGG). Shortly thereafter, in July 2019, the Ontario Court of Appeal handed down the same ruling, also finding that the Act fell under Parliament's POGG power (see our article here). By contrast, on February 24, 2020, the Alberta Court of Appeal held (by a 4-1 majority) that the Act was unconstitutional, focusing on the fact that under the Constitution of Canada, the power over property and civil rights - therefore the regulation of GHG emissions - is vested in provincial, not federal, authority (see our article here). Appeals of all three of these decisions brought the matter to the SCC.

The SCC's majority decision was written by Chief Justice Richard Wagner, who stated that the federal government is free to impose minimum pricing standards due to the fact that the threat of climate change is so great as to demand a coordinated national approach. He concluded that Parliament can act under the POGG clause of the constitution, which gives the federal government authority to enact laws to deal with issues that concern the entire country. At paragraph 171 of the decision, Chief Justice Wagner concludes,

"The 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."

The majority noted that although the term "carbon tax" is used to describe the pricing of carbon emissions, this has nothing to do with the concept of taxation and as such concluded that the fuel and excess emission charges imposed by the Act were constitutionally valid regulatory charges, not taxes.

The majority highlighted that the Act does not explicitly dictate how provinces should price carbon emissions. Chief Justice Wagner states that the Act does not limit the provinces' freedom to legislate, but partially limits their ability to refrain from legislating pricing mechanisms or to legislate mechanisms that are less stringent than would be needed in order to meet national targets. Provinces are free to design any GHG pricing system they choose "as long as they meet the federal government's outcome-based targets."

The three dissenters were Justices Côté, Brown and Rowe. Justice Côté argued that the federal carbon pricing regime gives too much discretion to cabinet. Similarly, Justices Brown and Rowe were primarily concerned that the federal government had strayed into provincial jurisdiction and the national concern power is to be reserved for matters in which the provinces have no legislative authority. In his reasons, Justice Rowe, in agreement with Justice Brown, states that the POGG power "should be, and was always intended to be, a residual and circumscribed power of last resort" and should only be available "where no enumerated head of power, or combination of enumerated heads of power, is available."

With this decision from the SCC comes the final word as to the constitutionality of the Act - it is within the federal government's constitutional power to impose minimum carbon pricing standards on the provinces.

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