

A Matter of National Concern: The Supreme Court of Canada Upholds a Federal Price on Carbon

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The Decision

On March 25, 2021, the Supreme Court of Canada handed down its decision in the highly anticipated Reference re *Greenhouse Gas Pollution Pricing Act*.^[1] In a 6-3 majority, the Court upheld the *Greenhouse Gas Pollution Pricing Act*, ("GGPPA"), legislation enacted by Parliament in 2018 establishing a price on greenhouse gas emissions. Chief Justice Wagner wrote the majority opinion, with Justices Abella, Moldaver, Karakatsanis, Martin and Kasirer concurring. Justice Côté dissented in part, and Justices Brown and Rowe each penned their own dissent.

The Court considered the GGPPA's constitutionality after the provinces of Ontario, Alberta and Saskatchewan challenged Parliament's authority to put a price on carbon by claiming that the GGPPA infringed provincial jurisdiction. The majority conducted a division of powers analysis, held that the primary purpose of the legislation was to establish a minimum national standard for regulating carbon pollution, and classified its subject matter as being of national concern. This result confers paramount jurisdiction on Parliament on the matter, on the grounds that the minimum standard set by the GGPPA forms a critical part of Canada's response to the issue of climate change, and that the provinces alone cannot address the risks posed by this issue poses on a systematic basis.

As the basis for its reasons, the Court reviewed significant scientific and policy evidence that led it to comment on the nature of climate change:

All parties to this proceeding agree that climate change is an existential challenge. It is a threat of the highest order to the country, and indeed to the world. The undisputed existence of a threat to the future of humanity cannot be ignored. [167]

These, and other comments made in Chief Justice Wagner's opinion will likely constitute a jurisprudential basis for future litigation considering and regulating carbon emissions.

Three members of the bench dissented with the majority's result, and each wrote a separate opinion: Justice Côté concurred with the majority's analysis that climate change was of national concern but found that the GGPPA was drafted overly broad and failed to adequately limit executive power. Justices Brown and Rowe dissented on the basis that the GGPPA was an improper exercise of residual federal lawmaking authority through its jurisdiction to legislate on "peace, order and good government", found in section 91 of the *Constitution Act, 1867*.

Anticipated Impacts on Business

Now that the Supreme Court's ruling upholding the federal government's carbon pricing scheme has brought finality to this issue, businesses should anticipate and prepare for these price increases. When Parliament introduced its federal price on carbon in 2019, it

set the price at \$20/tonne of greenhouse gas emissions. In April 2021, that price will increase to \$40, will rise to \$50 in 2022 and will increase by \$15 per year until 2030, at which time emissions will be priced at \$170/tonne. Canada's increasing carbon price poses challenges for businesses who must streamline their processes to lower emissions, but also brings significant opportunities for increased efficiency and growth.

Businesses operating in Ontario should be aware that provinces may choose to release their own regulatory scheme that prices carbon. The GGPPA operates as a "backstop", meaning that it only imposes a federal carbon price if a province's own measures to limit emissions do not meet the federal minimum price for carbon, and of other greenhouse gases such as methane and nitrous oxide. It is too early to determine how Ontario will react to the decision. Ontario currently has a [Made In Ontario Environmental Plan](#) and recently announced an initiative for the development of a [low carbon hydrogen strategy](#). It is unclear if it would reinstate a cap-and-trade program where carbon emissions are bought and sold and additional benefits are granted to businesses who seek to bring in revenue by decreasing atmospheric carbon or by manufacturing techniques and technologies that lower or offset emissions. Ontario has however signaled its support for a growing cleantech sector.

This decision also comes at a time of increased national and international pressure on businesses to disclose their risk exposure to environmental factors, as well as increasing pressure from large financial institutions and consumers alike to improve Environmental and Social Governance (ESG) standards. Canada's carbon price positions businesses to respond to carbon pricing schemes in other jurisdictions and create cross-border opportunities for trade without the uncertainty of potential emissions tariffs. This decision may further provide businesses with an opportunity to improve their environmental, financial and social risk exposure to climate issues by creating a more certain regulatory environment for businesses to build momentum. Sufficient certainty is crucial for businesses looking to develop a more robust ESG program or diversify their offerings by investing in clean technologies. While the scope of the GGPPA, as well as other federal initiatives on climate, will continue to be hotly debated in courts and in Parliament, this landmark decision signals a clear path forward on carbon pricing.

If you would like to discuss the contents of this article, please contact [Janet Bobechko](#) at jbobechko@weirfoulds.com.

[\[1\]](#) 2021 SCC 11.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

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