

# Summary of Saskatchewan Court Decision on the Federal Carbon Pricing Law

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## 1. *What is the decision?*

The Saskatchewan Court of Appeal ruled that the federal Greenhouse Gas Pollution Pricing Act (GGPPA) is constitutionally valid; it falls within federal authority under the “National Concern” power – a branch of the Peace, Order and Good Government power.

3 of the 5 judges joined in this majority opinion. The two dissenting judges found that the federal law is unconstitutional for two reasons: Part 1 of the Act (the carbon price) is a “Tax”, and does conform with the requirements for federal Taxation under the Constitution; and Part 2 of the Act (applying to industry) is regulatory, and does not satisfy the requirements to fall within the National Concern power.

## 2. *What is the effect of the decision?*

The decision confirms that the federal GGPPA is constitutionally valid. There will also be a decision soon by the Ont. Court of Appeal on its reference case on the same question. Both these cases probably will be appealed to the Supreme Court of Canada.

The decision confirms that both the federal *and* provincial governments have authority to legislate over greenhouse gas (GHG) emissions. Ottawa has the power to set minimum national standards of pricing carbon across Canada, and provinces have broad authority to legislate over the provincial aspects of carbon pricing and climate change more generally. (The GGPPA has an ‘equivalency clause’ – the federal law does not apply in any province that has an equivalent or stronger carbon price. Provinces are then free to tailor their laws to meet their local circumstances, such as their mix of industries.)

## 3. *What does it say about carbon pricing?*

The Court also found that “GHG pricing is regarded as an *essential* ... element of the global effort to limit GHG emissions”, and that “carbon prices that have been implemented around the world have been successful in reducing greenhouse gas emissions”

## 4. *What is the basis of the decision?*

Background: The Constitution sets out the various ‘heads of power’ over which the federal government (s. 91) or provincial governments (s. 92), may legislate. Those heads of power do not specifically address matters such as “pollution” or “climate change” (it was drafted in 1867), so courts must look by analogy to the other heads of power to decide if a matters falls within federal or provincial authority – or if authority is shared (as was found here).

The Court found that the GGPPA falls within federal constitutional authority under the “National Concern” power – which is a branch of the Peace, Order and Good Government power in s. 91.

The following are key quotes from the judgment:

<p>The <i>GGPPA</i> is constitutional:</p>	<p>Para 3 the <i>Act</i> falls within the legislative authority of Parliament. It is not unconstitutional in whole or in part.</p> <p>Para 81 the <i>Act</i> is the product of a long line of initiatives and agreements tracing back to the <i>Framework Convention</i> in 1992. The <i>Act</i> treats GHG pricing as a core element of the initiative to mitigate GHG emissions and its self-evident regulatory purpose is to attach a minimum national cost to GHG emissions so as to incentivize behavioural changes that will reduce such emissions.</p>
<p>Shared Fed-Prov Jurisdiction over environment:</p>	<p>Para 7 Neither level of government has exclusive authority over the environment. As a result, Parliament can legislate in relation to issues such as GHGs so long as it stays within the four corners of its prescribed subject matters and the provinces can do the same so long as they stay within their prescribed areas of authority.</p> <p>Para 161 Just as significantly, limiting federal jurisdiction to the matter of the establishment of minimum national standards of price stringency leaves plenty of room for provincial action in relation to GHG emissions. Unlike recognizing Parliamentary authority over GHG emissions generally ... this approach does not put at risk the constitutional validity of provincial initiatives to price GHGs, either through carbon taxes or cap-and-trade systems.</p> <p>Para 144 It is also in keeping with what the Supreme Court has said about the utility of, where possible, allowing both Parliament and the provincial legislatures jurisdictional room to act in relation to the environment.</p>
<p>Federal Jurisdiction to establish national standards:</p>	<p>Para 11 However, Parliament does have authority over a narrower POGG subject matter – the establishment of minimum national standards of price stringency for GHG emissions. This jurisdiction has the singleness, distinctiveness and indivisibility required by the law. It also has a limited impact on the balance of federalism and leaves provinces broad scope to legislate in the GHG area. The <i>Act</i> is constitutionally valid because its essential character falls within the scope of this POGG authority.</p> <p>Para 160 The authority to establish minimum national standards of price stringency does not empower Parliament to reach into areas of otherwise intra-provincial authority to regulate things like highway speeds and the content of livestock feeds simply because they have an impact on GHG emissions. Rather, the establishment of minimum national standards of price stringency is no more than just that. Once the relevant standards are established, individual consumers and businesses are free to choose how they will respond, or not, to the price signals sent by the marketplace.</p>

	<p>Para 164 The pith and substance of the <i>Act</i> is about establishing minimum national standards of price stringency for GHG emissions. Parliament has jurisdiction over this subject matter by virtue of the national concern branch of POGG. It follows that the <i>Act</i> is constitutionally valid.</p>
<p>The <i>GGPPA</i> is a backstop:</p>	<p>Para 120 &amp; 139 the purpose of the <i>Act</i> is to ensure minimum national standards of price stringency for GHG emissions.</p> <p>Para 122 The substantive provisions of the <i>Act</i>, in both Part 1 and Part 2, reflect this goal or purpose of establishing minimum national standards of price stringency for GHG emissions. They do not dictate specific maximum levels of GHG reductions either generally or by reference to particular classes of individuals or operations. Nor do they directly impose a GHG emissions price across the country. Rather, the <i>Act</i> serves only as a backstop in the sense that it defers to the regulatory efforts of the provinces and comes into play only when those efforts do not meet minimum standards.</p>
<p>Carbon pricing is Effective:</p>	<p>Para 28 carbon pricing as “a necessary policy tool for efficiently reducing GHG emissions”</p> <p>Para 147 Significantly, the factual record before the Court indicates that GHG pricing is not just part and parcel of an effective response to climate change. It indicates that GHG pricing is regarded as an <i>essential</i> aspect or element of the global effort to limit GHG emissions. The following unchallenged features of the record are noteworthy in this regard:</p> <p>(a) “There is widespread international consensus that carbon pricing is a necessary measure, though not a sufficient measure, to achieve the global reductions in GHG emissions necessary to meet the <i>Paris Agreement</i> targets” (Moffet affidavit at para 46).</p> <p>(b) “A well-designed carbon price is an indispensable part of a strategy for reducing emissions in an efficient way” (High-Level Commission on Carbon Prices, <i>Report of the High-Level Commission on Carbon Prices</i> (Washington, DC: World Bank, 2017) at 1).</p> <p>(c) “There is a widespread trend in favour of carbon pricing ... Overall, 67 jurisdictions ... are putting a price on carbon” (Moffet affidavit at para 49).</p> <p>(d) “The existing literature is highly convergent in finding that carbon prices that have been implemented around the world have been successful in reducing greenhouse gas emissions” (Nicholas Rivers affidavit affirmed October 5, 2018, at para 6(b)).</p>

	<p>Para 148 In light of this, it is difficult to suggest GHG emissions prices and the more specific question of minimum national standards of price stringency for GHG emissions are anything other than matters of sufficient consequence to warrant consideration for inclusion under the national concern branch of POGG.</p>
Carbon leakage and competitiveness	<p>Para 155 A more concrete concern for an individual province is that the failure of other Canadian jurisdictions to adopt minimum GHG pricing could result in what is known as “carbon leakage”. This is a phenomenon where GHG pricing increases the cost of production, and thereby affects competitiveness, leading businesses to shift jobs or investments to lower GHG cost jurisdictions. ... a study by Canada’s Ecofiscal Commission in November of 2015 entitled <i>Provincial Carbon Pricing and Competitiveness Pressures</i> filed by British Columbia, and based on data analysis for four provinces, suggests these pressures are significant for only a few sectors.</p> <p>Para 156 Climate change is a global problem and, accordingly, it calls for a global response. Such a response can only be effectively developed internationally by way of state-to-state negotiation and agreement.</p>
International Angle:	<p>Para 156 But, it is to say that the international nature of the climate change problem necessarily colours and informs an assessment of the effects of a provincial failure to deal with GHG pricing.</p> <p>Para 156 Those [international climate] commitments are self-evidently difficult for Canada, as a country, to meet if not all provincial jurisdictions are prepared to implement GHG emissions pricing regimes – regimes that, on the basis of the record before the Court, are an essential aspect of successful GHG mitigation plans.</p> <p>Para 157 It is true that the provinces, acting individually but cooperatively, could agree on a minimum national price for GHG emissions and thereby accomplish the same goal as the one sought by the <i>Act</i>. But this is not the point here. The point is that provinces could always withdraw from such arrangements and there is, accordingly, no assurance that coordinated provincial action would lead to a sustained approach to minimum GHG pricing.</p>
Climate Change is an existential threat	<p>Para 4 climate change caused by anthropogenic greenhouse gas [GHG] emissions is one of the great existential issues of our time. The pressing importance of limiting such emissions is accepted by all of the participants in these proceedings.</p> <p>Para 144 The record indicates climate change has emerged as a major threat, not just to Canada, but to the planet itself.</p>