

## REVIEW ARTICLE

# The Constitutionality of Canada's Greenhouse Gas Pollution Pricing Act, 2018

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## Abstract

Air pollution (Greenhouse Gas) is ambient and inherently transboundary and transnational in nature. In Canada, it is not exclusively a local or provincial matter but rather an international and national concern. Per section 91 of the Constitution Act, Canada's federal government has the power over any matter that is not listed under provincial powers in section 92. The nature of the matter is deemed not to be local and private. The Greenhouse Gas Pollution Pricing Act (June 21, 2018 – GHGPPA) falls under the national concern branch of the Peace, Order, and Good Government power of the federal government, as its core purpose is to establish minimum national standards for pricing greenhouse gas emissions to address climate change. While pricing is typically a provincial matter, the transboundary nature of air pollution makes it a matter of national concern, justifying the federal government's authority to enact the GHGPPA as a backstop measure when provincial regulations do not meet minimum standards. More information is available in the following note.

## 1. Introduction

This short note reviews whether the Greenhouse Gas Pollution Pricing Act (June 21, 2018 “GHGPPA”)<sup>1</sup> is a matter of national concern falling within Parliament's power to legislate in respect of peace, order, and good government (“POGG”) of Canada. The GHGPPA, the Constitution Act, 1867<sup>2</sup>, s. 91 and past jurisprudence are examined to determine under which heads of power this act falls, validating its enactment by the Government of Canada?

The GHGPPA initially aimed to mitigate climate change, e.g., greenhouse gas (“GHG”) emissions, by designing a pricing mechanism for a broad set of GHG emissions sources<sup>3</sup>, which imposed a minimum carbon tax pricing standard to the provinces and territories. The question that follows is not regarding the seriousness of this topic, or if it is an efficient and cost-effective way of reducing gas emissions but

about the overall constitutionality of the GHGPPA, considering the federal government's authority to impose the system set out in the act. Also, does it infringe on the provincial and territorial legislative ability to regulate related environmental pricing matters?

## 2. Pith and Substance

Canada's Constitution Act, sections 91 and 92, divides the power to make laws between the Federal Parliament and Provincial Legislatures. When a question arises whether the Parliament or a Legislature has enacted a law that comes within the Constitution's definition of the powers allocated to the enacting body, an authoritative answer can be provided only by the courts.<sup>4</sup>

When trying to determine whether a statute falls within Provincial or Federal authority, the courts must first

<sup>1</sup>SC 2018, c 12, s 186

<sup>2</sup>30 & 31 Vict, c 3

<sup>3</sup>SC 2018, c 12, s 186

<sup>4</sup>Peter W. Hogg, Wade K. Wright, Constitutional Law of Canada, p. 438

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determine what the matter of the law is. This is the pith and substance analysis, which determines what the dominant purpose and effect of the legislation is. The courts then decide what head of power the matter should be allocated to.

The purpose of the GHGPPA is to ensure minimum national standards of price stringency for GHG emissions. The preamble expressly links the GHGPPA to the impact of anthropogenic GHG emissions on climate change, the *Framework Convention<sup>5</sup> and Canada's commitments under the Paris Agreement<sup>6</sup>*.

Part 1 and Part 2 of the GHGPPA reflect this goal 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 classes of individuals or operations. Nor do they directly impose a GHG emissions price across the country. Instead, the GHGPPA 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.

When Part 1 or Part 2 applies in a province or area, it does not dictate a GHG emission price and then impose that price inflexibly or blindly across the board to each emission source. Part 1 sets a charge on GHG-producing fuels and, Part 2, in effect, puts a price on the GHG emissions above prescribed levels for large industrial operations. Both Parts apply only in those provinces that, in the assessment of the Governor in Council, have failed to put acceptable pricing standards in place.

It stands clear that the pith and substance of the GHGPPA is to establish minimum national standards for the pricing of greenhouse gas emissions. While pricing is generally a provincial matter, given that any province or territory can outline its pricing systems based on its needs, these standards are necessary to address climate change, a of national concern.

### 3. National Concern Branch of the POGG

It can be argued that the GHGPPA falls within the national concern branch of the POGG power granted to the federal government in Section 91 of the Constitution Act. This section confers upon the federal

government the power to "make laws for the peace, order and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces (...)."<sup>7</sup> The POGG power is residual by nature because it can only be exercised in instances where the subject matter does not explicitly fall under the provincial heads of power. There are three branches under which the federal government can invoke the POGG power, namely, the "gap" branch, the "national concern" branch and the "emergency" branch, and it is the national concern branch that applies to the GHGPPA.

The central idea under the national concern branch is the federal government's authority to pass laws on matters that originate as local or provincial but acquire the status of "national concern"<sup>8</sup> due to their complexity and importance. The seminal ruling in *A-G Ontario v. Canada Temperance Federation*<sup>9</sup> established that the POGG power can be invoked based on "national concern." The doctrine of national concern was also extensively discussed in *R. v. Crown Zellerbach*<sup>10</sup> and *Munro v. National Capital Commission*<sup>11</sup>. I.e., to qualify as a matter of national concern branch of the POGG power, it must pass the distinctness and provincial inability test.

The GHGPPA falls under the national concern branch of the POGG because its pith and substance relate to addressing the threat of climate change, which is a matter of national concern. The matter is distinct because the GHGPPA sets a minimum national price on GHG emissions to meet Canada's international obligations. The GHGPPA also passes the provincial inability test, as it can be argued that the provincial legislatures do not have adequate powers to address the issue of climate change and reduce GHG emissions.

### 4. The Double Aspect Doctrine

The double aspect doctrine recognizes that the same relationships can be regulated from different perspectives by-laws with multiple purposes and effects, one of which may be a subject of federal legislative power and the other of provincial legislative power. The double aspect doctrine can apply to every enumerated federal and provincial head of power (a provincial capacity to enact laws on the same matter).

<sup>5</sup><https://unfccc.int/resource/docs/convkp/conveng.pdf>

<sup>6</sup>[https://unfccc.int/sites/default/files/english\\_paris\\_agreement.pdf](https://unfccc.int/sites/default/files/english_paris_agreement.pdf)

<sup>7</sup>Ibidem.

<sup>8</sup>Peter W. Hogg, Wade K. Wright, Constitutional Law of Canada, Pg. 555

<sup>9</sup>A.G. Ontario v. Canada Temperance Federation (1946) A.C. 193

<sup>10</sup>R. v. Crown Zellerbach Canada Ltd., (1988) SCC, 63

<sup>11</sup>Munro v. National Capital Commission, (1966), SCC 74

Which is consistent with the modern approach to federalism, favoring flexibility and a degree of overlapping jurisdiction. However, the fact that the double aspect doctrine can apply does not mean it will apply in each case.

## 5. Conclusion

Air pollution (GHG) is ambient and inherently transboundary and transnational in nature. It is not exclusively a local or provincial matter but rather an international and national concern. Per section 91 of the Constitution Act, Canada's federal government has the power over any matter that is not listed under provincial powers in section 92. The nature of the matter is deemed not to be local and private.

The federal government established the GHGPPA under the principle of national concern related to POGG. Its pith and substance are to establish minimum national standards for the pricing of GHG emissions. The act operates as a federal backstop legislative framework that applies to provinces lacking similar legislation and sets minimum standards (e.g., carbon pricing) to be met. While pricing generally is a provincial matter, these national standards are necessary to address climate change. It does not prevent provincial legislation on the matter, provided alignment with the GHGPPA, which defers to the regulatory efforts of the provinces and comes into play only when those efforts do not meet minimum standards.

## 6. References

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