

Carbon Taxes: What Are the Limits of Federal Constitutional Power?

Alastair R. Lucas

Carbon Pricing

- Carbon taxes
- Cap/Baseline and Trade
- School of Public Policy and Canadian Energy Research Institute Studies

The Federal Greenhouse Gas Pollution Pricing Act (GGPPA): What it Deals With

- “Greenhouse gas”
- GHG emissions classification per IPCC Guidelines—
listed in a Schedule to the Act

Preamble refers to Paris Agreement and federal “Pan-Canadian Framework on Clean Growth and Climate Change”

- 2030 target: 30% of 2005 emissions

What the GGPPA Says

- **Part 1 “Fuel Charge”**
- “Delivery by a registered distributor” of a substance prescribed in the Schedule
 - 22 GHG producing fuels
 - Beginning at \$20 per tonne

GGPPA cont.

- **Part 2** “Compensation for excess emissions” by a covered facility that emits GHGs in a quantity that exceeds the emissions limit for that applies to that ... facility”
 - Performance standards — output-based pricing system (OBPS) — detailed in Regulation
 - Applies to “covered facilities” — those listed in a Schedule — essentially those emitting more than 50 Kt of emissions per year

GGPPA cont.

- Application (Backstop)
 - Provinces listed in Schedule 1 that fail a “stringency requirement”
 - A “primary factor” is the stringency of provincial requirements

Constitutional References

- Ontario CA — held valid (4-1)
- Saskatchewan CA — held valid (3-2)
- Alberta — held unconstitutional (4-1)
- SCC heard appeals in late September

What the *Constitution Act 1867* Says

- Federal powers:
 - **91.** It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, 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; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,
 - ...
 - 3. The raising of Money by any Mode or System of Taxation.
 - ...
 - And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the **Class of Matters of a local or private Nature** comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

Provincial Powers

- **92.** In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,
 - ...
 - 10. Local Works and Undertakings other than such as are of the following Classes:
 - (a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province:
 - ...
 - 13. Property and Civil Rights in the Province.
 - 16. **Generally all Matters of a merely local or private Nature in the Province.**

Provincial Powers cont.

- **92A. (1)** In each province, the legislature may **exclusively** make laws in relation to
 - (a) **exploration** for non-renewable natural resources in the province;
 - (b) **development, conservation and management** of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom; and
 - (c) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy.
- (2) In each province, the legislature may make laws in relation to the **export from the province** to another part of Canada of the primary production from non-renewable natural resources and forestry resources in the province and the production from facilities in the province for the generation of electrical energy, but such laws may not authorize or provide for discrimination in prices or in supplies exported to another part of Canada.

Provincial Powers cont.

- (3) Nothing in subsection (2) derogates from the authority of Parliament to enact laws in relation to the matters referred to in that subsection and, where such a law of Parliament and a law of a province **conflict, the law of Parliament prevails to the extent of the conflict.**
- **109.** All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all Sums then due or payable for such Lands, Mines, Minerals, or Royalties, **shall belong to the several Provinces** of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same.

Constitutional Analysis

- **1. Characterization of “the matter” — purpose and effect of the statute**
 - “Minimum standards to reduce GHGs” (Ontario CA)
 - “Minimum national standards of price stringency” (Saskatchewan CA)
 - Alberta CA:
 - [256] For these reasons, after taking into account both the purpose of the Act (to mitigate climate change) and the narrower effects of the Act, we have concluded that the subject matter of the Act – its “main thrust”, “dominant characteristic”, “essential character”, “pith and substance” – is, **at a minimum, the “regulation of GHG emissions”**. Moreover, whether the “matter” is characterized as being the “regulation of GHG emissions” or the “cumulative effect of GHG emissions” or “establishing minimum national standards of GHG emissions” or “the establishment of minimum national standards of price stringency for GHG emissions” or “the establishment of minimum national standards of stringency for GHG emissions pricing to reduce Canada’s nationwide GHG emissions” or some variation on this theme, it all reduces to the same thing. The “matter” of the Act is no less than the “regulation of GHG emissions”.
 - “New matters”

Constitutional Analysis cont.

- **2. Classification to powers**
 - Provincial heads, particularly, sections 92 (13) and (10) and 92A
 - “In the end, it is each province that is concerned with the sustainable development of its natural resources, not the federal government. It is the province that owns the resources, not the federal government. And it is the province and its people who lose if those resources cannot be developed, not the federal government. That is why the Resource Amendment was intended to ensure that the provinces’ proprietary and legislative rights to determine the basis on which they would allow the development of their resources would be subject only to specific heads of federal power.” (Alberta Court of Appeal majority, para 269)
 - Federal heads, particularly section 91 (3) and “Peace, Order, and Good Government” (POGG)
 - “national concern” — “singleness, distinctiveness indivisibility”
 - “provincial inability” is an indicator (provincial jurisdictional inability or risk of provincial inability to meet a national standard? (Alberta Court of Appeal majority, para 308-309)
 - “scale of impact on provincial powers”

Constitutional Analysis cont.

- Potential Concurrence and Paramountcy

Interpretive Issues

- Transfer theory — POGG as “plenary power”?
- Section 92A shield?
- Subsidiarity — “Law-making and implementation are often best achieved at a level that is not only effective, but also closest to the citizens affected”
- L’Heureux-Dubé J in *Spraytech* (SCC 2000) — cited by ABCA majority at para 137

- Cooperative federalism (interpretive presumption?)
- Canada-Ontario-New Brunswick agreement, October 2020
- Does POGG apply only to matters that would have fallen within section 92(16) and not into any enumerated powers? (ABCA majority at paras 170-175)

Significance of Analogy and Context

- Radio Reference (Privy Council, 1932)
- Johannesson v. West St. Paul (SCC, 1952) — aeronautics
- Crown Zellerbach (SCC, 1988) — marine pollution
- Munro v. National Capital Commission (SCC, 1966) — national capital region
- Ontario Hydro (SCC, 1993) — atomic energy

Conclusions

- Not federal taxation
- Narrow POGG characterization?
- Stronger POGG basis for GGPPA Part 1