

Carbon tax showdown: where will your money go?

Introduction

Can the federal government's commitments on greenhouse gases be realized in the face of provincial opposition?

Canada's federal government has committed to reducing greenhouse gas emissions to 30% below 2005 levels by 2030.^[1] This commitment was made as a result of the international climate change agreement (the Paris Agreement), in which Canada agreed to help limit the increase in average global temperature over the next century to less than two degrees Celsius.^[2] The problem now is that while the federal government is free to make such a commitment, the government powers needed to achieve the target are split between the provincial and federal governments in the *Constitution Act, 1867* (commonly referred to as the "[division of powers](#)").^[3]

Which level of government has the power to do what when it comes to curbing climate change? Who can put an extra fee on the fuel you need to run your car and heat your home?

Spoiler: both the federal and provincial governments probably can.

The showdown

The federal government and the provinces are largely in consensus that reducing greenhouse gas emissions is necessary to limit the adverse effects of climate change.^[4] However, many different tools and strategies exist to achieve that goal, and it remains a debate as to which will work best.^[5]

One method is to place a price on the use of fossil fuels, either by way of a carbon tax or a cap-and-trade system.^[6] The fundamental idea behind this strategy is that people should pay a price when they pollute, and that when consumers are forced to do so, they will find ways to pollute less.^[7]

While the federal government and 11 provinces and territories have agreed to a national climate change plan that includes placing a price on greenhouse gas emissions, Saskatchewan and Manitoba have refused to get on board.^[8] In particular, Saskatchewan opposes the federal government's plan to introduce a carbon levy in provinces that do not place a minimum price on carbon by 2018.^[9]

Saskatchewan has stated that it will challenge any attempt by the federal government to introduce a carbon tax (or levy) on the basis that imposing this tax is outside the powers of the federal government.^[10]

Room for argument and overlap

Neither the federal, nor the provincial governments are granted exclusive control over the “environment” in the *Constitution Act, 1867*. Either level of government can make laws on a specific environmental issue as long as it can connect that issue to a power that it has been expressly granted in the Constitution.[\[11\]](#)

For example, both the federal and provincial governments may set requirements for an environmental assessment and approval process for a hydroelectric dam.[\[12\]](#) The federal government can require an environmental assessment because of its authority over issues that impact fisheries, navigation and shipping, and “Indians and Indian lands.”[\[13\]](#) Provinces, meanwhile, can require an environmental assessment process for proposed dams because provincial powers cover property and civil rights, local works and undertakings that are not under federal jurisdiction, and the development of energy production facilities.[\[14\]](#)

Because there is room to argue that both federal and provincial governments have the power to act and make laws in relation to greenhouse gas emissions, an important consideration then becomes *which* government is best suited to address that specific environmental issue.

The federal government can impose a single, unified standard for greenhouse gas emissions across Canada, ensuring that one province does not set standards that are far less restrictive than the other provinces. This is advantageous because greenhouse gases and the effects that they have on climate do not stay in the province in which they are first produced.[\[15\]](#) For example, if one province refuses to curb its use of fossil fuels, its choice may contribute to, among other things, a) the annual loss of Prince Edward Island’s shoreline as a result of rising sea levels, and b) the degradation of housing and road infrastructure in northern Canada caused by melting permafrost.[\[16\]](#)

On the other hand, provinces vary widely in the size and diversity of their populations, their geographies, and the unique environmental issues that they face.[\[17\]](#) As a result, others argue that provincial governments are best suited for coming up with innovative and effective strategies for managing greenhouse gas emissions that will work in one province, but not in another.[\[18\]](#)

The powers available

Federal powers

The federal government’s authority to charge a carbon levy or otherwise deter the emission of greenhouse gases may be less clear than it is for provinces.[\[19\]](#) However, the *Constitution Act, 1867* grants the federal government several powers that support those pursuits.

Section 91(3) of the *Constitution Act, 1867* allows the federal government to raise money “by any Mode or System of Taxation.” However, there are limits on how the federal government can use this [taxation power](#). The federal government cannot impose a tax on “Lands or Property belonging to... any Province.”[\[20\]](#) Therefore, the federal government

generally does not have the authority to tax provincial governments or corporations owned by a province (such as SaskPower or SaskEnergy in Saskatchewan).[21]

Another limitation is that the federal government can only use its taxation power to impose a fee on people if that fee is for a public purpose (such as to “raise revenue for general purposes”).[22] If a fee’s primary purpose is to fund a specific government scheme (or plan) or to change the behaviour of consumers, the fee may not qualify as a “tax” that the federal government has the power to charge.[23] However, the federal government may avoid the limitations placed on its taxation power by relying on the other powers it holds in order to place a levy on fossil fuels as part of a broader plan to combat climate change.[24]

The federal government can make laws on matters that are of national concern because of its authority to govern for the “[Peace, Order, and good Government](#) of Canada” (commonly called the “POGG power”).[25] In *R v Crown Zellerbach Canada Ltd*, a majority of the Supreme Court of Canada found that pollution of the ocean was a matter of national concern.[26] Therefore, the federal government could use its POGG power to create laws against the dumping of substances (including woodwaste) into coastal waters.[27] Academics argue that courts are likely to find that, like marine pollution, greenhouse gas emissions are also an issue of national concern that the federal government has the power to regulate.[28]

The federal government may also be able to rely on its power to pass criminal laws in order to limit and reduce greenhouse gas emissions.[29] In *R v Hydro-Québec*, the Supreme Court of Canada clarified that the federal government could use its criminal law power for the purpose of protecting the environment.[30] In that case, the Court found that the federal government could restrict the release of toxic substances into the environment (with penalties for non-compliance).

More recently, the Federal Court of Appeal in *Syncrude Canada Ltd v Canada (AG)* concluded that the federal government could use its criminal law power to require that diesel fuel in Canada contain at least two percent renewable fuel.[31] The Court found that limiting greenhouse gas emissions from fossil fuels to protect human health and the environment is a valid criminal law purpose.[32]

Provincial powers

Provincial governments can rely on several powers granted to them in the *Constitution Act, 1867* to support a provincial carbon tax or laws that otherwise reduce greenhouse gas emissions. First, provincial governments have the [authority to impose direct taxes](#) within their provinces in order to raise revenue for a provincial purpose.[33] They can therefore charge consumers a tax on the fossil fuels that they buy within the province.[34]

Provinces may also introduce a system of rules that includes charging a levy or placing a limit on greenhouse gas emissions by relying on their authority over property and civil rights and matters of a local and private nature.[35] In its 1973 decision of *R v Lake Ontario Cement Ltd*, the Ontario High Court of Justice found that those provincial powers allowed a

province to make laws against the emission of “contaminants” into the environment.[36] In addition, provincial governments have the power to regulate industries such as mining, forestry, oil and gas, construction, and manufacturing.[37] The provinces may use that power, in addition to their authority over “local works and undertakings” (other than those expressly designated to the federal government) to set restrictions on those industries for the purpose of environmental protection.[38]

Conclusion

Both the federal and provincial governments can point to a number of different powers granted to them in the *Constitution Act, 1867* that allow them to make laws regarding greenhouse gas emissions:

- The federal government can place a price on carbon using its taxation power (with important limits on the application of the tax), or it can put an additional fee on fossil fuels as part of a broader plan to limit and reduce greenhouse gas emissions (using its POGG or criminal law powers).[39]
- The provinces can also place limits or prices on greenhouse gas emissions as long as the provincial laws do not directly oppose or undermine federal laws on issues found to be within the authority of the federal government.[40]

At this point, it appears clear that the federal government will place a minimum national price on carbon in 2018 as part of a plan to reduce greenhouse gas emissions and support the growth of renewable energy sources.[41] If that plan is properly worded and implemented to remain within the federal government’s powers, it will likely withstand a challenge brought by one or more provinces.[42]

It can be expected, however, that any decision made by the courts on the validity of a federal carbon levy will likely leave room for both levels of government to play a role in regulating greenhouse gases. [43] This approach would align with the Supreme Court’s statement in *Hydro-Québec* that environmental protection is “an international problem, one that requires action by governments at all levels.”[44] The preferred approach by the courts will also likely be for the federal and provincial governments to work together to achieve reduced emissions, given the overlap of federal and provincial powers on this issue (see [co-operative federalism](#)).[45]

[1] First Ministers’ Meeting and Meeting with National Indigenous Leaders, *Pan-Canadian Framework on Clean Growth and Climate Change: Canada's Plan to Address Climate Change and Grow the Economy*, (Ottawa: 9 December 2016) at 1-2, online: <www.canada.ca/content/dam/themes/environment/documents/weather1/20161209-1-en.pdf

f> ; Shawn McCarthy, "Liberal government formally ratifies Paris climate accord", *The Globe and Mail* (5 October 2016), online: <www.theglobeandmail.com/news/politics/ottawa-formally-ratifies-paris-climate-accord/article32267242/>.

[2] *Pan-Canadian Framework*, *ibid*.

[3] *Constitution Act, 1867* (UK), 30 & 31, c 3, reprinted in RSC 1985, Appendix II, No 5, ss 91, 92, 132 .

[4] See e.g. *Pan-Canadian Framework*, *supra* note 1 at 1-3, 7-8; Canada's Ecofiscal Commission, "The Way Forward: A Practical Approach to Reducing Canada's Greenhouse Gas Emissions" (April 2015) at iii, 1-3, online: <ecofiscal.ca/wp-content/uploads/2015/04/Ecofiscal-Commission-Report-The-Way-Forward-April-2015.pdf>.

[5] Canada's Ecofiscal Commission, *ibid* at 1, 9-10; Andrew Leach, "The economic cost of carbon policy", *MacLean's* (19 June 2016), online: <www.macleans.ca/economy/economicanalysis/the-economic-cost-of-carbon-policy/>; "Saskatchewan Premier Brad Wall outlines climate change plan as alternative to Trudeau's carbon tax", *Global News* (18 October 2016), online: <globalnews.ca/news/3010692/saskatchewan-premier-brad-wall-outlines-climate-change-plan-as-alternative-to-trudeaus-carbon-tax/>.

[6] A carbon tax is a fee charged on every tonne of carbon dioxide that a consumer produces by burning fuels (paid for at the time of fuel purchase). In comparison, a cap-and-trade system is where the government sets a limit on the amount of carbon dioxide a company is allowed to emit in a given year. In effect, the company has "permits" or "credits" to produce up to that amount of carbon dioxide. A company that emits less than the capped amount can sell their unused credits to other companies who want to emit more than what they are allowed. See Dennis Mahoney, *The Law of Climate Change in Canada*, student ed (Toronto: Thomson Reuters, 2015) at 3:30.10.20; National Round Table for the Environment and the Economy, *The ABCs of Emissions Trading: An Overview* (Ottawa: NRTEE, 2002) at 1; Canada's Ecofiscal Commission, *supra* note 4 at 32-33.

[7] Mahoney *ibid* at 15:20.60.10-15:20.60.20; Leach, *supra* note 5; Canada's Ecofiscal Commission, *supra* note 4 at 32.

[8] Shawn McCarthy, "Manitoba and Saskatchewan could be cut out of federal low-carbon program", *The Globe and Mail* (16 June 2017), online: <www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/manitoba-and-saskatchewan-could-be-cut-out-of-federal-low-carbon-program/article35319610/>; Mia Rabson, "Saskatchewan environment minister says province will never allow a carbon tax", *National Observer* (4 May 2017), online: <www.nationalobserver.com/2017/05/04/news/saskatchewan-environment-minister-says-province-will-never-allow-carbon-tax>.

[9] Environment and Climate Change Canada, “Technical paper: federal carbon pricing backstop” (Gatineau, Que: Environment and Climate Change Canada, 2017) at 4-6, online: <www.canada.ca/content/dam/eccc/documents/pdf/20170518-2-en.pdf>; Susan Lunn & Margo McDiarmid, “Liberals provide details of plan for national carbon tax”, *CBC News* (18 May 2017), online: <www.cbc.ca/news/politics/carbon-price-tax-discussion-paper-1.4120135>.

[10] See e.g. Sean Craig, “Saskatchewan Premier Brad Wall renews attacks on possibility of federal carbon tax, defends Energy East”, *Financial Post* (14 June 2016), online: <business.financialpost.com/commodities/energy/saskatchewan-premier-brad-wall-renews-attacks-on-possibility-of-federal-carbon-tax-defends-energy-east/wcm/f6fd1ec2-cbe2-410d-ba27-01912da71799>; Rabson, *supra* note 8.

[11] Shi-Ling Hsu & Robin Elliot, “Regulating Greenhouse Gases in Canada: Constitutional and Policy Dimensions” (2009) 54:3 McGill L J 463 at 480-481; *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3 .

[12] Peter W Hogg, *Constitutional Law of Canada*, vol 2, 5th ed (Toronto: Thomson Reuters, 2007) (loose-leaf 2010 supplement), ch 30 at 30.6(a), 30.7(b) [Hogg, *Constitutional Law of Canada*]; *Friends of the Oldman River Society*, *ibid* at 67-69. See also Shawn Denstedt, Martin Ignasiak & Richard J King, “Regulatory Approvals for Energy Projects” in *Doing Business in Canada* (Osler, Hoskin & Harcourt LLP, 2015) 91 at 91-96.

[13] *Constitution Act, 1867*, *supra* note 3, ss 91(10),(12),(24); Hogg, *Constitutional Law of Canada*, *ibid*, ch 30 at 30.6(a), 30.7(b); *Friends of the Oldman River Society*, *ibid* at 73.

[14] *Constitution Act, 1867*, *ibid*, ss 92(10),(13), 92A(1)(c); Hogg, *Constitutional Law of Canada*, *ibid*, ch 30 at 30.6(a).

[15] Nathalie Chalifour, “The feds have every legal right to set a carbon price”, *iPolitics Insights* (4 October 2016), online: <ipolitics.ca/2016/10/04/the-feds-have-every-legal-right-to-set-a-carbon-price/> [Chalifour, “The feds have every legal right”]; Nancy Olewiler, “Environmental Policy in Canada: Harmonized at the Bottom” in Kathryn Harrison, ed, *Racing to the Bottom?: Provincial Interdependence in the Canadian Federation* (Vancouver: UBC Press, 2006) 113 at 114-115, 117.

[16] Chalifour, “The feds have every legal right”, *ibid*; Jessica Boyle, Maxine Cunningham & Julie Dekens, *Climate Change Adaptation and Canadian Infrastructure: A review of the literature* (Winnipeg, Man: The International Institute for Sustainable Development, 2013) at 9-13.

[17] Alexis Bélanger, “Canadian Federalism in the Context of Combating Climate Change” (2011) 20:1 Const Forum Const 21 at 26.

[18] Bélanger, *ibid* at 26-28.

[19] See e.g. Mahoney, *supra* note 6 at 3:20.10.10; PW Hogg, “Constitutional Authority over

Greenhouse Gas Emissions” (2009) 46:2 Alta L Rev 507 at 510 [Hogg, “Constitutional Authority”].

[20] *Constitution Act, 1867*, *supra* note 3, s 125.

[21] Hogg, “Constitutional Authority”, *supra* note 19 at 518; Interview of Eric Adams, associate law professor, University of Alberta in Andy Blatchford, “Baloney Meter: Brad Wall could challenge any federal carbon tax on Crown corps”, *CBC News* (28 July 2016), online: <www.cbc.ca/news/politics/baloney-meter-brad-wall-carbon-tax-1.3699134>.

[22] *620 Connaught Ltd v Canada (AG)*, 2008 SCC 7 at para 17, citing *Westbank First Nation v British Columbia Hydro and Power Authority*, [1999] 3 SCR 134 at para 30; *Re Eurig Estate*, [1998] 2 SCR 565 at para 15, citing *Lawson v Interior Tree Fruit and Vegetable Committee of Direction*, [1931] SCR 357 at 362-363.

[23] *620 Connaught Ltd*, *ibid* at paras 20, 22-24; Nathalie Chalifour, “Can Trudeau keep his carbon tax out of court?”, *iPolitics Insights* (24 September 2016), online: <ipolitics.ca/2016/09/24/can-trudeau-keep-his-carbon-tax-out-of-court/> [Chalifour, “Can Trudeau keep his carbon tax out of court?”].

[24] Chalifour, “Can Trudeau keep his carbon tax out of court?”, *ibid*.

[25] *Constitution Act, 1867*, *supra* note 3, s 91. See generally Hogg, *Constitutional Law of Canada*, *supra* note 12, ch 17 at 17.1, 17.3-17.4.

[26] [1988] 1 SCR 401 at 436-438.

[27] *Ibid*.

[28] Hogg, “Constitutional Authority”, *supra* note 19 at 516; Chalifour, “The feds have every legal right”, *supra* note 15. But see Hsu & Elliot, *supra* note 11 at 494-495.

[29] *Constitution Act, 1867*, *supra* note 3, s 91(27); Hogg, “Constitutional Authority”, *ibid* at 512-515; Chalifour, “The feds have every legal right”, *ibid*. But see Hsu & Elliot, *ibid* at 492.

[30] [1997] 3 SCR 213 .

[31] 2016 FCA 160.

[32] *Ibid* at paras 42, 49-50.

[33] *Constitution Act, 1867*, *supra* note 3, s 92(2).

[34] Mahoney, *supra* note 6 at 3:30.10.30; Hsu & Elliot, *supra* note 11 at 483-385.

[35] *Constitution Act, 1867*, *supra* note 3, ss 92(13),(16); Hsu & Elliot, *ibid* at 480, 486-487; *R v Lake Ontario Cement Ltd* (1973), 35 DLR (3D) 109 .

[36] *Lake Ontario Cement Ltd*, *ibid* at 116.

[37] *Constitution Act, 1867*, *supra* note 3, ss 92(5), 92A, Hsu & Elliot, *supra* note 11 at 480, 487.

[38] *Constitution Act, 1867*, *ibid*, ss 92(10); Hsu & Elliot, *ibid* at 487; *Friends of the Oldman River Society*, *supra* note 11 at 68.

[39] Chalifour, “Can Trudeau keep his carbon tax out of court?”, *supra* note 23; Chalifour, “The feds have every legal right”, *supra* note 15.

[40] Hogg, “Constitutional Authority”, *supra* note 19 at 510-511; Mahoney, *supra* note 6 at 3:20.10, 3:20.10.40, 3:30.10.30.

[41] Environment and Climate Change Canada, *supra* note 9; Stephen Hui, “Time for Premier Brad Wall to focus on carbon price implementation” (11 May 2017), *Pembina Institute (blog)*, online: <www.pembina.org/blog/carbon-pricing-saskatchewan>.

[42] Stephen Hui, *ibid*; Chalifour, “Can Trudeau keep his carbon tax out of court?”, *supra* note 23.

[43] Hsu & Elliot, *supra* note 11 at 481; *Hydro-Québec*, *supra* note 30 at para 131; *114957 Canada Ltée (Spraytech) v Hudson (Town)*, 2001 SCC 40; *Friends of the Oldman River Society*, *supra* note 11 at 63-65.

[44] *Supra* note 30 at para 127.

[45] Hsu & Elliot, *supra* note 11 at 481; *Hydro-Québec*, *ibid* at para 131.