

# Carbon Tax Showdown: Who Holds the Power?

## Introduction

As a way to reduce greenhouse gas emissions, the Government of Canada will impose a carbon tax beginning in 2019. Producers of carbon emissions will be forced to pay an amount per tonne of carbon emitted. This cost would be passed on to consumers in the form of raised prices on goods such as gasoline. The idea behind this strategy is that consumers of fossil fuels - carbon - such as oil and gas, will be motivated to find ways to reduce their consumption if they have to pay more for usage. [1]

The federal tax will only apply to those provinces who do not have their own carbon tax or cap-and-trade system in place to reduce carbon emissions. Some provinces such as Alberta have already imposed their own taxes, and others are planning to do so.

Other provinces are unwilling to implement a carbon tax and have questioned whether the federal government has the authority to implement the tax. The *Constitution Act, 1867* splits powers between the provincial and federal governments (through the [division of powers](#)). [2] If either the federal or the provincial governments legislate in an area that is outside their jurisdiction, then the law will be found to be unconstitutional.

Manitoba was one of the initial opponents to the tax and conducted a legal inquiry to determine whether or not they could succeed in challenging the federal government's authority to implement the tax. The result of that inquiry was that the federal government would likely succeed, convincing the province that it should implement its own tax. [3]

Saskatchewan has launched a legal challenge to the authority of the federal government to impose the tax. It claims that the federal government does not have the jurisdiction to impose the tax on provinces. Interestingly, the newly elected Ontario government seems to be of the same view. And that province's recently elected premier, Doug Ford, has indicated he will scrap their cap-and-trade system. Saskatchewan has brought forward a constitutional [reference case](#) to the Saskatchewan Court of Appeal, asking the question: "The Greenhouse Gas Pollution Pricing Act was introduced into Parliament on March 28, 2018 as Part 5 of Bill C-74. If enacted, will this Act be unconstitutional in whole or in part?" [4]

Can the federal government impose its current carbon tax plan over provincial opposition? Is a federally enforced carbon tax, intended to curb greenhouse gas emissions, unconstitutional as claimed by Saskatchewan [5] and Ontario [6]?

## Canada's Plan to Reduce Carbon Emissions

The federal government introduced the Greenhouse Gas Pollution Pricing Act (GGPP) in

March 2018.<sup>[7]</sup> This Act provides the framework for the federal carbon levy, which will take effect in 2019. The Act prices carbon at \$20.00 per tonne in 2019, which is an increase of \$10.00 per tonne from current rates. This amount will increase to \$50.00 per tonne in 2022.<sup>[8]</sup> The bill includes a 'backstop' feature, meaning that the levy will only be imposed in provinces that do not have their own carbon tax plan in place.<sup>[9]</sup> The backstop provision is significant because it acknowledges that the tax is not universally applied, in the way that taxes like the general sales tax (GST) are. It encourages provinces to have their own carbon tax plans in place. Further, the backstop feature makes it appear as though the federal government will approve whatever carbon tax a province imposes, so long as the province has such a scheme in place.

It is clear that consumers will be paying more to put gas in their cars and to heat their homes as of 2019. Exactly how much they will be paying though is unclear because each province may impose its own tax, at its own rate. For example, Alberta's carbon tax is based on a progressive model, meaning that it will increase overtime. In Alberta, the carbon tax rose to \$30.00 per tonne in 2018, raising the carbon tax on gasoline up to 6.73 cents per litre, from 4.49 cents per litre. The tax increased by 50 cents per gigajoule for natural gas - the most common source of fuel for heating homes in Alberta.<sup>[10]</sup> Manitoba has imposed a tax based on a flat rate model, meaning that the price of carbon in that province will remain at \$25.00 per tonne.<sup>[11]</sup> It will not be progressive, as the federal and the Alberta taxes are. Its decision to implement a flat tax came after learning that it would not succeed in a legal challenge to the federal tax.<sup>[12]</sup>

### **Carbon Tax and Jurisdiction: Can the federal government force Saskatchewan to take on the tax?**

The Reference to the Saskatchewan Court of Appeal will be determined based on the federal government's constitutional jurisdiction to impose a carbon tax on the provinces. The province has its own comprehensive plan to reduce emissions in place, however its noncompliance with the federal framework may be worthy of the court's consideration. To determine whether the federal tax is constitutional, one must look to sections 91 and 92 of the *Constitution Act, 1867*.

The jurisdictional dispute is about who has the authority to make legislation concerning the environment. Neither the federal nor provincial governments have exclusive control over the environment according to the *Constitution* as neither the environment nor climate change are explicitly mentioned in sections 91 or 92. Either level of government can make laws that impact the environment as long as they do so through powers that the Constitution gives them.<sup>[13]</sup>

#### ***Federal powers***

The *Constitution Act, 1867* grants the federal government several powers such as the POGG power and the criminal law power that enable it to implement or enforce the carbon tax. These are in addition to its taxation powers, outlined in Section 91 (23) of the *Constitution*.

## *National Concern – the POGG Power*

The federal government can make laws on matters that are of national concern because of its authority to govern under the “Peace Order and Good Government (POGG) power”.<sup>[14]</sup> If greenhouse gas emissions are considered a national concern, then it is within their authority to legislate and tax on the issue.

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.<sup>[15]</sup> Therefore, the federal government could use its POGG power to create laws against the dumping of substances (including wood waste) into coastal waters.<sup>[16]</sup> Some academics argue that courts are likely to find that, like marine pollution, greenhouse gas emissions are an issue of national concern that the federal government has the power to regulate.<sup>[17]</sup>

Therefore, it is likely the carbon tax would be deemed constitutional if imposed on Saskatchewan because reducing greenhouse gas emissions is an issue of national concern and imposing a carbon tax is an effective way of reducing them.

## *Criminal Law*

While the criminal law power may not be relevant to the federal government’s ability impose the tax, it is worth remembering that it has this power available to it for the enforcement of the tax.

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.<sup>[18]</sup> 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.<sup>[19]</sup> In that case, the Supreme Court found that the federal government could restrict the release of toxic substances into the environment and enforce penalties for non-compliance.

More recently, the Federal Court of Appeal in *Syncrude Canada Ltd v Canada (AG)* (2016) 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.<sup>[20]</sup> The Court found that limiting greenhouse gas emissions from fossil fuels to protect human health and the environment is a valid criminal law purpose.<sup>[21]</sup>

It appears then that the federal government does have significant power to impose a carbon tax on the provinces.

## ***Provincial powers***

Provincial governments can also rely on several powers granted to them in the *Constitution Act, 1867* to reduce greenhouse gas emissions. Provinces have their own taxation powers, in addition to their jurisdiction over property and civil rights, outlined in section 92(2) of the *Constitution*.<sup>[22]</sup>

## *Property and Civil Rights*

Provinces may charge a levy or place a limit on greenhouse gas emissions through their authority over property and civil rights and matters of a local and private nature.<sup>[23]</sup> The Ontario High Court of Justice, in *R v Lake Ontario Cement Ltd*, found that those provincial powers allow a province to make laws regulating emitting “contaminants” into the environment.<sup>[24]</sup> In addition, provincial governments have the power to regulate industries such as mining, forestry, oil and gas, construction, and manufacturing.<sup>[25]</sup> The provinces may use that power to set restrictions on those industries for the purpose of environmental protection.<sup>[26]</sup>

The federal government’s taxation power does not disable provinces from implementing their own taxes, however they cannot evoke their own taxation powers as a way to evade federal taxes.

## **Conclusion**

While the federal and provincial governments both have a jurisdictional claim to the ‘environment,’ it is clear the federal government is acting within its jurisdiction through its imposition of a carbon tax. Given the federal government’s POGG powers, it seems likely that it can impose the tax on the provinces. therefore neither Saskatchewan nor Ontario appear to have a strong case for opposing it.

The federal government’s Bill C-74, the *Greenhouse Gas Pollution Pricing Act*, will likely pass scrutiny by the courts. The feedback from Manitoba’s legal inquiry suggests that the bill can withstand a legal challenge brought by one or more provinces.<sup>[27]</sup> This means that the federal government’s carbon tax will likely be found to be constitutional, because it is within the federal government’s jurisdiction to establish it. Further, the opinion offered in the inquiry by University of Manitoba law professor Bryan Schwartz, suggested that the backstop function of the federal carbon tax - the feature that allows the federal government to impose their carbon tax on those provinces who do not have their own carbon tax or cap-and-trade system- “should be accepted as part of ‘[cooperative federalism](#).’”<sup>[28]</sup>

Any decision made by the courts on the validity of a federal carbon tax will likely leave room for both levels of government to play a role in regulating greenhouse gases. <sup>[29]</sup> 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.” <sup>[30]</sup> Both levels of government are committed to reducing carbon emissions, and the issue of jurisdiction should not serve as a barrier to this important goal. This leaves Saskatchewan with the option to either incorporate some kind of carbon tax into its pre-existing tax plan, or be subject to the federal government’s federal tax scheme.<sup>[31]</sup> Whether or not a carbon tax will be effective in reducing emissions and meeting the Paris Conference commitments remains to be seen, but it appears likely that Saskatchewan and Ontario will have to get on board with the tax (regardless).

<sup>[1]</sup>Dennis Mahoney, *The Law of Climate Change in Canada*, student ed (Toronto: Thomson

Reuters, 2015) at 15:20.60. 10-15:20.60.20; Andrew Leach, "The economic cost of carbon policy" *Macleans* (19 June 2016), online: <http://www.macleans.ca/economy/economicanalysis/the-economic-cost-of-carbon-policy/>; Canada's Ecofiscal Commission, "The Way Forward: A Practical Approach to Reducing Canada's Greenhouse Gas Emissions" (April 2015) at 32, online: <http://ecofiscal.ca/wp-content/uploads/2015/04/Ecofiscal-Commission-Report-The-Way-Forward-April-2015.pdf>.

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

[3] Jason Markusoff, "Saskatchewan is launching a court reference that just might kill the carbon tax", *Macleans* (25 April 2018) online: <https://www.macleans.ca/politics/saskatchewan-is-launching-a-court-reference-that-just-might-kill-the-carbon-tax/>

[4] *Ibid.*

[5] D.C. Fraser, "Saskatchewan turns to high court on constitutionality of carbon tax law", *Regina Leader-Post* (25 April 2018), online: <http://leaderpost.com/news/politics/sask-turns-to-high-court-on-constitutionality-of-carbon-tax-law>

[6] Paula Loriggio, "Ford determined to scrap Ontario's 'disastrous' cap-and-trade system: spokesman" *iPolitics* (13 June 2018), online <https://ipolitics.ca/2018/06/13/ford-determined-to-scrap-ontarios-disastrous-cap-and-trade-system-spokesman/>

[7] Fraser, "Saskatchewan turns to high court on constitutionality of carbon tax law" *supra* note 5.

[8] *Ibid.*

[9] Bryan P. Schwartz, "Legal Opinion on the Constitutionality of the Federal Carbon Pricing Benchmark and Backstop Proposals" (6 October 2017), online: Government of Manitoba [http://www.gov.mb.ca/asset\\_library/en/climatechange/federal\\_carbon\\_pricing\\_benchmark\\_backstop\\_proposals.pdf](http://www.gov.mb.ca/asset_library/en/climatechange/federal_carbon_pricing_benchmark_backstop_proposals.pdf)

[10] Andrea Ross, "Here's how Alberta carbon tax increase will affect you in 2018", *CBC* (28 December 2017), online: <http://www.cbc.ca/news/canada/edmonton/alberta-carbon-tax-2018-1.4444573>

[11] Fraser, "Saskatchewan turns to high court on constitutionality of carbon tax law," *supra* note 5.

[12] *Ibid.*

[13] 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 .

[14] *Constitution Act, 1867*, *supra* note 2, s 91. See generally Peter W Hogg, *Constitutional Law of Canada*, vol 2, 5th ed (Toronto: Thomson Reuters, 2007) (loose-leaf 2010 supplement), ch 17 at 17.1, 17.3-17.4 [Hogg, *Constitutional Law of Canada*]

[15] [1988] 1 SCR 401 at 436-438.

[16] *Ibid*.

[17] Peter Hogg, “Constitutional Authority over Greenhouse Gas Emissions” (2009) 46:2 *Alta L Rev* 707 at 516; 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/](http://ipolitics.ca/2016/10/04/the-feds-have-every-legal-right-to-set-a-carbon-price/)> [Chalifour, “The feds have every legal right”]. But see Hsu & Elliot, *supra* note 13 at 494-495. Maura Forest, “Saskatchewan launches constitutional challenge of federal carbon tax” *National Post* (25 April 2018), online <<http://nationalpost.com/news/politics/saskatchewan-launches-constitutional-challenge-to-federal-carbon-tax>>

[18] *Constitution Act, 1867*, *supra* note 2, ss 91(27); Hogg, “Constitutional Authority”, *supra* note 17 at 512-515; Chalifour, “The feds have every legal right”, *ibid*. But see Hsu & Elliot, *ibid* at 492.

[19] [1997] 3 SCR 213 .

[20] 2016 FCA 160.

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

[22] *Constitution Act, 1867*, *supra* note 2 ss 92(2).

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

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

[25] *Constitution Act, 1867*, *supra* note 2, ss 92(5), 92A, Hsu & Elliot, *supra* note 13 at 480, 487.

[26] *Constitution Act, 1867*, *ibid*, ss 92(10); Hsu & Elliot, *ibid* at 487; *Friends of the Oldman River Society*, *supra* note 13 at 68.

[27] Stephen Hui, *ibid*; 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/](http://ipolitics.ca/2016/09/24/can-trudeau-keep-his-carbon-tax-out-of-court/)>.

[28] Markusoff, “Saskatchewan is launching a court reference that just might kill the carbon

tax”, *supra*note 12.

[29]Hsu & Elliot, *supra* note 12 at 481; *Hydro-Québec*, *supra* note 19 at para 131; 114957 *Canada Ltée (Spraytech) v Hudson (Town)*, 2001 SCC 40; *Friends of the Oldman River Society*, *supra* note 13 at 63-65.

[30]*Hydro-Québec*,*supra* note 19 at para 127.

[31]Saskatchewan has their own plan to reduce carbon emissions in place, however there is no taxation component to this plan. Saskatchewan, Government of Saskatchewan, *Prairie Resilience: A Made-in-Saskatchewan Climate Change Strategy*, December 2017 <<http://publications.gov.sk.ca/documents/66/104890-2017%20Climate%20Change%20Strategy.pdf>>