

# Yes, the Federal Government Can Put a Price on Greenhouse Gas Emissions

In 2018, the federal government put a price on greenhouse gas emissions across Canada with its *Greenhouse Gas Pollution Pricing Act* (“GGPPA” or “the Act”).<sup>[1]</sup> Since its inception, the GGPPA’s validity has been contentious. The provinces of Alberta, Ontario, and Saskatchewan [asked](#) their respective Courts of Appeal whether the federal government has the constitutional power to enact the GGPPA. While both Ontario’s and Saskatchewan’s Courts of Appeal ruled that the GGPPA was within the federal government’s power and therefore valid, Alberta’s Court of Appeal found that it was not.

Finally, on March 25, 2021, the [Supreme Court of Canada](#) weighed in on the issue and released its *References re Greenhouse Gas Pollution Pricing Act* (“GGPPA Reference”) decision.<sup>[2]</sup> A [majority](#) of the Court found that the GGPPA is constitutional. To reach its decision, the Court had to determine the law’s “[pith and substance](#)” (or its “essential character”) before asking whether the Constitution permits the federal government to make such a law.<sup>[3]</sup> This article is Part 1 of a two-part series that reviews the Supreme Court of Canada’s majority decision in the GGPPA Reference. Part 1 examines how the GGPPA prices carbon-based products, and what the law’s essential character is. Part 2 will examine how the Supreme Court of Canada determined that the GGPPA is a valid exercise of Parliament’s legislative power.

## **The Division of Powers: No, the Federal Government Cannot Make Laws on Everything**

The main question in the GGPPA Reference is whether the federal government has the constitutional power to make laws that create minimum standards for pricing greenhouse gas emissions. This issue exemplifies Canada’s [federal system](#) in which two levels of government, the federal and the provincial, have powers to govern in particular areas. In this regard, sections 91 and 92 of the *Constitution Act, 1867* divide legislative powers between the provincial legislatures and federal Parliament. This means that the federal Parliament cannot make laws relating to just any matter it finds important. Instead, federal laws must be within Parliament’s legislative authority as set out by the Constitution.

Insofar as it concerns Parliament’s constitutional power (or lack thereof) to enact the GGPPA, the GGPPA Reference is a federalism-based constitutional challenge. Courts approach these federalism-based issues by way of a [division of powers](#) analysis. First, a court must characterize the law. To do this, the court will consider the purpose and effects of the impugned legislation to identify its essential character or “[pith and substance](#).” Second, once the court identifies the law’s pith and substance, it must classify the law under section 91 or 92 of the *Constitution Act, 1867*. This article focuses only on the first of these

steps: the characterization or “pith and substance” analysis.

## **Climate Change is a “grave threat to humanity’s future”[\[4\]](#) and the GGPPA is Parliament’s Response to This Threat**

To clarify, the GGPPA’s pricing schemes only apply to provinces that lack a sufficiently stringent carbon pricing scheme of their own. Whether a specific person or organization is responsible for paying the charges depends on which part of the *Act* applies to that particular party. The GGPPA has 4 parts in total, but only Parts 1 and 2 were at issue in the *GGPPA Reference*.

### Part 1: Fuel Charge

Part 1 of the GGPPA establishes a fuel charge on certain carbon-based fuel products specified in the *Act*. This fuel charge applies to producers, distributors, and importers. Although this charge is not directly levied on consumers of energy products, the cost of the charge will likely be indirectly passed onto consumers through higher energy prices.[\[8\]](#) Despite paying higher energy prices upfront, consumers can expect to get some money back. Currently, 90% of the funds generated by this fuel charge are distributed through consumer rebates.[\[9\]](#)

### Part 2: Industrial Greenhouse Gas Emissions

Industrial facilities are not exempt from charges. Part 2 of the GGPPA sets out a separate carbon pricing system for industrial facilities that emit large amounts of greenhouse gas emissions.[\[10\]](#) This system is called an output-based pricing system (“OBPS”). The OBPS only applies to covered facilities. A covered facility does not have to pay the fuel charge set out in Part 1 of the *Act*. However, the OBPS requires industrial facilities to pay for emissions in excess of a set limit.

Not all industrial facilities will qualify as a covered facility. The *Output-Based Pricing System Regulations* set out the criteria for a covered facility.[\[11\]](#) If a facility does not meet the criteria, the Minister of the Environment has the authority to designate a facility as a covered facility.

### The GGPPA Sets Out Minimum National Standards that Operate as a Backstop

One of the Court’s findings in the *GGPPA Reference* was that the GGPPA acts as a backstop and does not displace the ability of provinces or territories to create their own carbon pricing systems.[\[12\]](#) As such, provinces and territories can create their own policies to meet greenhouse gas emission reduction targets that reflect their own circumstances as long as the policies meet the minimum standards imposed by the GGPPA.

Parts 1 and 2 of the GGPPA will not apply to a province or territory that has implemented a sufficiently stringent greenhouse gas pricing system. The GGPPA’s fuel charge and OBPS will only apply in a province or territory if:

- the [Governor in Council](#) determines that the province or territory does not have a sufficiently stringent system in place to meet the minimum national standards;
- the province or territory requests that it apply; or
- the province or territory does not have any greenhouse gas pricing system in place.[\[13\]](#)

### **Characterization: The Pith and Substance of the GGPPA is to Establish Minimum National Standards of Greenhouse Gas Price Stringency**

To determine whether the federal government can validly enact legislation creating minimum standards for greenhouse gas pricing schemes across Canada, the Supreme Court first had to “characterize” the GGPPA. That is, the Court had to identify the law’s essential character (known as its “pith and substance”). In doing so, the Court adopted a narrow characterization of the GGPPA: “the true subject matter of the GGPPA is establishing minimum national standards of GHG price stringency to reduce GHG emissions.”[\[14\]](#)

To arrive at this characterization, the Court considered intrinsic and extrinsic evidence regarding the GGPPA’s purpose, as well as its legal and practical effects. It first considered the intrinsic evidence, which involves an assessment of the legislation itself to determine what it really means. To be more precise, this entailed an analysis of the GGPPA’s text including the statute’s long and short title, the preamble, and its references to the UNFCCC, the *Paris Agreement*, and the *Pan-Canadian Framework*.[\[15\]](#) Next, the Court looked to the extrinsic evidence regarding the law’s purpose, which included parliamentary debates and background documents. This provided the law’s background and historical context, which led the Court to conclude that the GGPPA is concerned with pricing greenhouse gas emissions.[\[16\]](#)

Finally, the Court assessed both the legal and practical effects of the GGPPA. Beginning with the legal effects, the Court found that Parts 1 and 2 of the GGPPA create a greenhouse gas pricing scheme that prices emissions in a way that is consistent with other provinces in Canada.[\[17\]](#) Due to the GGPPA’s backstop nature, these legal effects only apply if the Governor in Council determines that Part 1 or 2 of the Act should apply to a specific province. As such, provinces and territories are still able to establish their own greenhouse gas pricing policies to meet emission reduction targets as long as they meet the standards set out by the GGPPA. These legal effects show that the GGPPA focuses on setting minimum standards for greenhouse gas pricing.

With respect to the practical effects, the Court noted that it is difficult to definitively say what the GGPPA’s consequences are because the legislation has been in force for a short time.[\[18\]](#) However, the Court found that practically, the only thing a province or territory cannot do under the GGPPA is to not implement a greenhouse gas pricing scheme at all or to implement one that does not meet the GGPPA’s national standards.[\[19\]](#) After considering the purpose and effects of the GGPPA, the Court finally concluded that the pith and

substance of the *GGPPA* is “establishing minimum national standards of GHG price stringency to reduce GHG emissions.”<sup>[20]</sup> This narrow construction of the law’s pith and substance led the majority to later classify the law as a matter of national concern and, hence, as constitutionally valid exercise of Parliament’s legislative power. The *GGPPA*’s classification is the focus of Part 2 of this article series.

### Broad or Narrow Characterization? Does it Matter?

How a law is characterized, narrowly or broadly, has the potential to impact how a court determines the constitutionality of an impugned law. If a law’s pith and substance is characterized too broadly, it can be difficult to fit it under a specific head of power without intrusions on another level of government’s jurisdiction. A narrow characterization, on the other hand, will likely interfere less with another jurisdiction’s legislative authority.

The *GGPPA Reference* demonstrates the consequences of choosing a narrow characterization over a broad one. While the [majority](#) adopted a narrow view of the law’s pith and substance, Justice Brown (with Justice Rowe agreeing on this point) took a more expansive, broad view in dissent. Parts 1 and 2 of the *Act* were characterized separately by the dissenters: Part 1 as reducing GHG emissions by “raising the cost of fuel” and Part 2 as reducing GHG emissions by “pricing emissions in a manner that distinguishes among industries based on emissions intensity and trade exposure.”<sup>[21]</sup> This broad characterization likely led to the dissenting Justices finding that the *GGPPA* constitutes an impermissible intrusion on provincial jurisdiction.

### **Conclusion**

Since the enactment of the *GGPPA* in 2018, there has been polarized debate on whether the federal government has the power to put a price on greenhouse gas emissions. Finally, the Supreme Court of Canada weighed in with its judgment in the *GGPPA Reference*. The majority of the Supreme Court of Canada concluded that Parliament’s *GGPPA* is constitutional. This means that the federal government can validly put a price on greenhouse gas emissions.

Identifying a law’s pith and substance is an important first step in determining whether a government has the power to enact a certain law. Once the law’s essential character is identified, courts can determine whether it falls under a provincial or federal head of power. In the *GGPPA Reference*, the majority adopts a narrow view of the *GGPPA*, concluding that the *GGPPA*’s pith and substance concerns the reduction of greenhouse gas emissions by establishing minimum national standards of greenhouse gas pricing.

A second article will continue reviewing the Court’s division of powers analysis by looking at its next step: classification under a head of power.

<sup>[1]</sup> *Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12, s 186 .

<sup>[2]</sup> *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 .

[3] “Pith and Substance” (18 June 2021 last visited), online: *Centre for Constitutional Studies* <<https://www.constitutionalstudies.ca/2019/07/pith-and-substance/>>.

[4] *GGPPA Reference*, *supra* note 2 at para 2.

[5] Government of Canada, “The Paris Agreement” (6 January 2016), online: *Government of Canada* <<https://www.canada.ca/en/environment-climate-change/services/climate-change/paris-agreement.html>>.

[6] *GGPPA Reference*, *supra* note 2 at para 13.

[7] *GGPPA*, *supra* note 1, Preamble.

[8] *GGPPA Reference*, *supra* note 2 at para 30.

[9] *Ibid* at para 31.

[10] *Ibid* at para 34.

[11] *Output-Based Pricing System Regulations*, SOR/2019-266.

[12] *GGPPA Reference*, *supra* note 2 at para 27.

[13] *Ibid* at paras 18, 27.

[14] *Ibid* at para 57.

[15] *Ibid* at paras 58-61.

[16] *Ibid* at paras 62-69.

[17] *Ibid* at para 71.

[18] *Ibid* at para 78.

[19] *Ibid* at para 79.

[20] *Ibid* at para 80.

[21] *Ibid* at para 340.