

THE GGPPA REFERENCE AND THE EXPANSION OF FEDERAL GHG REGULATIONS

JOSH JANTZI & QUINN ROCHON

22 April 2022



THE *GREENHOUSE GAS POLLUTION PRICING ACT* (GGPPA)

- **Two parts:**
 1. Part 1: allows Canada to impose a regulatory charge (i.e. fuel charge) on fossil fuels like gasoline and natural gas.
 2. Part 2: sets out a performance-based system for industries (i.e. the Output-Based Pricing System).

GENISIS OF THE GGPPA

- **The GGPPA arose out of the federal Liberal government’s desire to create incentives for emissions reduction across Canada.**
 - “The Government of Canada knows that a sustainable, clean growth economy is necessary for our collective health, prosperity, and security. Canada is committed to creating a cleaner, more innovative economy that reduces emissions and protects our environment, while creating well-paying jobs for the middle class and those working hard to join it.”
 - “Pricing carbon pollution will give Canada an edge in building a clean-growth economy; it will make Canadian businesses more competitive; it will bring new and exciting job prospects for middle class Canadians; and it will reduce the pollution that threatens our clean air and oceans.”

GENISIS OF THE GGPPA REFERENCE

- **Alberta, Saskatchewan and Ontario each brought references to their respective courts of appeal regarding the constitutionality of the GGPA.**
- **The ABCA held that the *GGPPA* was unconstitutional on the basis that it exceeded federal jurisdiction. the Attorney General of British Columbia (intervener) appealed to the SCC.**
- **The SKCA and ONCA held that the *GGPPA* was within federal legislative jurisdiction and therefore constitutional. Both Ontario and Saskatchewan appealed to the SCC.**
- **The SCC disposed of all three appeals, holding that the GGPPA is within federal jurisdiction and is therefore constitutional.**

REFERENCE RE GREENHOUSE GAS POLLUTION PRICING ACT 2021 SCC 11

- **The GGPPA was found to be constitutional by a majority of the Court.**
- **The GGPPA Reference provides the federal government with a degree of confidence that it can encroach on provincial jurisdiction in the name of reducing GHG emissions and mitigating the effects of climate change.**
- **The decision creates the potential for further, wide-ranging federal regulation, which are likely to have significant impacts on industry across Canada, including the environmental consulting industry.**

REFERENCE RE GREENHOUSE GAS POLLUTION PRICING ACT 2021 SCC 11

- **The Court made relatively strong statements re. climate change and GHGs:**
 - “Climate change is real. It is caused by greenhouse gas emissions resulting from human activities, and it poses a grave threat to humanity’s future. The only way to address the threat of climate change is to reduce greenhouse gas emissions.”
 - “In summary, the evidence clearly shows that establishing minimum national standards of GHG price stringency to reduce GHG emissions is of concern to Canada as a whole. This matter is critical to our response to an existential threat to human life in Canada and around the world. As a result, it readily passes the threshold test and warrants consideration as a possible matter of national concern.”

REFERENCE RE GREENHOUSE GAS POLLUTION PRICING ACT 2021 SCC 11

- **The pith and substance of the GGPPA was held by the majority to be:**
 - “establishing minimum national standards of GHG price stringency to reduce GHG emissions”.
- **The majority’s narrow focus on minimum standards of price stringency, rather than the regulating of emissions more generally, may affect the degree to which Canada can rely on the GGPPA Reference alone to defend future regulation of GHGs.**

REFERENCE RE GREENHOUSE GAS POLLUTION PRICING ACT 2021 SCC 11

- **On POGG Powers, the majority held, in part:**
 - Canada must present actual evidence of the national concern.
 - Matter does not need to be historically new (i.e. not conceived that the time of confederation), it can develop into a matter of national concern.
 - Matter must be qualitatively different from matters of provincial concern (not simply an aggregate of provincial matters).
 - Canada must show that provinces are unable to deal with the matter.
- **The Court's emphasis on the need to provide evidence of the national concern and to provide evidence of provincial inability may impede future attempts by Canada to regulate GHGs solely under the POGG head of power.**

REFERENCE RE GREENHOUSE GAS POLLUTION PRICING ACT 2021 SCC 11

- **On double aspect / cooperative federalism, the Court held, in part:**
 - Matters of national concern are not exclusive federal jurisdiction
 - Where jurisdiction is over a matter that involves a minimum national standard that operates as a backstop there will inevitably be a double aspect, but the federal law is paramount

REFERENCE RE GREENHOUSE GAS POLLUTION PRICING ACT 2021 SCC 11

- **The GGPPA today:**
 - The federal fuel charge applies in **Ontario, Manitoba, Yukon, Alberta, Saskatchewan and Nunavut.**
 - The federal Output-Based Pricing System applies in **Manitoba, Prince Edward Island, Yukon, Nunavut,** and partially in **Saskatchewan.**
 - Carbon pollution pricing systems in **Quebec, Nova Scotia, Newfoundland and Labrador, the Northwest Territories, British Columbia and New Brunswick** continue to meet the federal benchmark stringency requirements.

CANADA'S EXPANDING REGULATION OF GHGS

- **Canada is in the process of expanding the regulation of GHGs beyond the GGPPA in order to meet its climate goals.**
- **These further expansions will likely create opportunities for new work and the forging of new relationships.**

EXAMPLE 1: THE *CANADIAN NET-ZERO EMISSIONS ACCOUNTABILITY ACT* (CNEAA)

- **Among other things, the *CNEAA*:**
 - enshrines in legislation Canada's commitment to achieve net-zero greenhouse gas emissions by 2050;
 - establishes a process to set five-year national emissions-reduction targets and develop emissions-reduction plans to achieve each target;
 - requires the Minister of Environment and Climate Change to report to Parliament with respect to each target.
 - establishes the 2030 greenhouse gas emissions target as Canada's NDC under the Paris Agreement (i.e. emissions reductions of 40-45% below 2005 levels by 2030); and
 - establishes a Net-Zero Advisory Body, which will provide independent advice on targets and emissions reduction plans.

EXAMPLE 2: 2030 EMISSIONS REDUCTION PLAN

- **The Plan is the first of many requirements under the CNEAA, and sets out Canada's plans to legislate in respect of the following goals, among others:**
 - Capping GHG emissions from the oil and gas sector;
 - Reducing methane emissions; and
 - Achieving a net-zero energy grid.
- **The Plan provides few details, but suggests that Canada intends to, or is at least open to the possibility, of regulating activities and industries that are more traditionally thought of as being within provincial jurisdiction.**

EXAMPLE 2: 2030 EMISSIONS REDUCTION PLAN - CAPPING OIL AND GAS SECTOR EMISSIONS

- **Canada is “considering a range of options” to cap emissions from the oil and gas sector at current levels, and require that they decline at the pace and scale needed to achieve net zero by 2050.**

EXAMPLE 2: 2030 EMISSIONS REDUCTION PLAN - REDUCING METHANE EMISSIONS

- **With respect to methane emissions from the oil and gas sector, Canada has launched consultations to inform the development of regulations aimed at achieving at least a 75 percent reduction below 2012 levels from the oil and gas sector by 2030.**
- **Regulations are also being developed and consulted upon to address methane emissions from landfills and agriculture, and supporting the diversion of organics from landfills across the country.**

EXAMPLE 2: 2030 EMISSIONS REDUCTION PLAN - NET-ZERO ELECTRICITY GRID

- **Transitioning to a net-zero emitting electricity grid by 2035.**
- **The Government of Canada has passed regulations to accelerate the phase out of unabated coal-fired electricity by 2030, and the federal natural gas regulations complement the coal regulations and impose performance standards on new natural gas generators.**
- **The Government has now released a discussion paper and launched a collaborative process with provinces, territories, and Indigenous partners to inform the design and scope of a Clean Electricity Standard.**

EXAMPLE 3: STRATEGIC ASSESSMENT OF CLIMATE CHANGE

- **This strategic assessment provides guidance on how federal impact assessments will consider a project's GHG emissions and its resilience to climate change impacts.**
- **This strategic assessment of climate change:**
 - describes the GHG and climate change information that project proponents need to submit at each phase of a federal impact assessment;
 - requires proponents of projects with a lifetime beyond 2050 to provide a credible plan that describes how the project will achieve net-zero emissions by 2050; and
 - explains how the Impact Assessment Agency of Canada (IAAC) or lifecycle regulators, with support from expert federal authorities, will review, comment on and complement the climate change information provided by proponents.

EXPECT MORE COURT CHALLENGES

- Regulation promulgated in relation to any of the 5 examples is likely to encroach on Provincial jurisdiction, and is therefore likely to be challenged by the provinces.
- While the Court's narrow characterization of the pith and substance of the GGPPA (i.e. minimum national price stringency) may limit Canada's ability to rely on the GGPPA Reference to defend further encroachment into provincial jurisdiction, such encroachment may be saved under other heads of federal power (e.g. criminal law).
 - See, for e.g., *Syncrude Canada Ltd. v. Attorney General of Canada*, 2016 FCA 160

KEY TAKEAWAY

- **The majority of new federal regulation targeting GHGs is likely to apply to areas and industries already regulated by the provinces and territories.**
- **This will entail an expansion of regulatory schemes and regulators, which proponents and others will need to familiarize themselves and comply with, providing new opportunities for environmental consultants to create value-add for new and existing clients.**

QUESTIONS?

QUESTIONS?



JOSH JANTZI

Partner



Josh.Jantzi@gowlingwlg.com



+1 403-298-1949



GOWLING WLG