

# TOP FIVE 2019

Each year at OJEN's Toronto Summer Law Institute, a leading jurist identifies five cases that are of significance in the educational setting. The 2019 cases were selected and discussed by Mr. Justice Lorne Sossin of the Ontario Superior Court of Justice. This summary, based on these comments and observations, is appropriate for discussion and debate in the classroom setting.

## **REFERENCE RE GREENHOUSE GAS POLLUTION PRICING ACT, 2019 ONCA 544 (CANLII): CARBON TAX REFERENCE<sup>2</sup>**

**Date released: June 28, 2019**

<https://www.canlii.org/en/on/onca/doc/2019/2019onca544/2019onca544.html>

### **Facts**

Gasses that trap heat in the atmosphere are called greenhouse gasses. The increase of greenhouse gasses, and the resulting rise in global temperatures, are some of the primary contributors to climate change and its associated impacts (for example, extreme weather events such as droughts and wildfires, rising sea levels, and species loss and extinction).

The *Greenhouse Gas Pollution Pricing Act* ("the Act") was passed by the federal government on June 21, 2018. The purpose of the Act was to reduce greenhouse gas emissions in Canada by establishing a "charge" on carbon-based fuels. This charge applies to a lot of different producers, distributors, and emitters of carbon and other greenhouse gases. The Act also created a trading system for large industrial emitters of

greenhouse gases. This system gives credits to those who remain within a certain limit of emissions, and charges those who go above that limit. The rates will increase annually by \$10 per tonne, up to \$50 per tonne in 2022.

The Act serves as "backstop" legislation for provinces that have not enacted their own carbon pricing programs.

In July 2018, Ontario withdrew from Canada's national carbon pricing program under the Act. Ontario released its own environmental plan to reduce greenhouse gas emissions in November 2018.

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<sup>2</sup> A reference case is when the federal government or provincial government through their Attorney General asks the court for advice on a legal question. It is different from a civil case where a lawsuit is brought by a plaintiff against a defendant or a criminal case where the Crown prosecutes a charge against the accused.



## Procedural History

Ontario referred to the Court of Appeal the question of whether the Act was constitutional. The hearing was held from April 15 to 18, 2019. Eighteen interveners participated in the hearing, including the provinces of New Brunswick, British Columbia and Saskatchewan and a range of organizations such as the Assembly of First Nations, the Canadian Public Health Association, and the David Suzuki Foundation.

## Issues

1. Is the Act within the power of the federal government?
2. Are the charges imposed by the Act unlawful taxes contrary to s. 53 of the *Constitution Act, 1867*?

## Decision

A majority of the Court of Appeal held that the Act is within the power of the federal government to legislate in relation to matters of “national concern” under the “Peace, Order and Good Government (POGG)” power in s. 91 of the *Constitution Act, 1867*. In addition, the charges imposed by the Act are valid regulatory charges and are not unconstitutional taxes.

## Ratio

The Act’s purpose is to create minimum national standards to reduce greenhouse gas emissions. The need for a collective approach to this issue, and the risk of non-participation by one or more provinces, permits Canada to enact this legislation under the national concern branch of the POGG power.

## Reasons

First, the Court of Appeal held that the purpose of the Act was to establish minimum national standards to reduce greenhouse gas emissions.

Then, the Court needed to determine which government was responsible for legislating (or “making laws”) that protect the environment. By looking first at the *Constitution Act, 1867*, then at the case law, the Court determined that the Act fell within Canada’s jurisdiction to legislate in relation to a single, distinct and indivisible matter of national concern under the POGG power.

The source of the POGG power is section 91 of the *Constitution Act, 1867*. This section authorizes the federal government to “make laws for the peace, order, and good government of Canada”, in relation to certain kinds of issues or political matters that are not specifically within the control of provincial legislatures.



This means that in certain circumstances where the Constitution does not assign either level of government responsibility over a certain area, power (or “jurisdiction”) over that area can be assumed by the federal government.

The Court declared that the protection of the environment from harmful greenhouse gasses is a single, distinct and indivisible matter of national concern. The main reason was that greenhouse gasses are not limited by provincial or national boundaries and can cause potentially catastrophic effects everywhere, so laws passed by one province in relation to greenhouse gases cannot, on their own, reduce Canada’s net emissions. Since the efforts of one province can be undermined by the action or inaction of other provinces, the reduction of greenhouse gas emissions cannot be dealt with by the provinces individually. The Court also noted that the Act did not radically disrupt the constitutional balance between federal and provincial powers, because it left room for provinces to regulate other aspects of greenhouse gas emissions within their boundaries.

The Court also held that the charges imposed by the Act were valid regulatory charges instead of unconstitutional taxes. This was because the charges advanced the purposes of the Act. They created a financial incentive for businesses and individuals to change their behavior in order to reduce greenhouse gas emissions.

## Additional Note

In a parallel reference (the Saskatchewan Carbon Tax Reference) the carbon tax was also upheld by a 3-2 majority of the Court of Appeal for Saskatchewan.

## DISCUSSION

1. What is the purpose of the *Greenhouse Gas Pollution Pricing Act*?
2. Do you agree that protecting the environment is a national concern?
3. Should a province be allowed to “opt out” of the national plan if they don’t have their own plan?
4. The POGG power isn’t used very often by the government. What was the SCC’s main reason for ruling that environmental legislation is a national concern rather than just a provincial matter?
5. Is giving credits to groups who limit their carbon-based fuels emissions a good way to fight climate change?