LIDSTONE & COMPANY
BARRISTERS AND SOLICITORS

BULLETIN

TO: CLIENTS
FROM: OLIVIA FRENCH
DATE: FEBRUARY 28, 2020
RE: CARBON PRICING REFERENCE AT SUPREME COURT OF CANADA

This Spring the Supreme Court of Canada (SCC) will hear two appeals regarding the federal *Greenhouse Gas Pollution Pricing Act*. The Supreme Court's decision will determine whether the federal government has the constitutional authority under its "Peace Order and Good Government Power" to impose minimum national pricing standards for greenhouse gas emissions. The case includes two appeals, one from the Ontario Court of Appeal and one from the Saskatchewan Court of Appeal, and it has already made headlines across the country as people in every province have followed its progress. Climate change, and governments' willingness to mitigate and adapt to it, is the most pressing issue of our time, and this case will determine the extent to which the federal government can require minimum emissions pricing in all provinces.

In both Saskatchewan's and Ontario's appeals to their respective Courts of Appeal, the result was the same: the *Greenhouse Gas Pollution Pricing Act* was held to be constitutional by a majority in both courts, with each Court's Chief Justice upholding the federal legislation. Both provinces have appealed to the SCC.

The cases are due to be heard on consecutive days, currently scheduled for March. But what really is the issue before the Supreme Court? Is it whether climate change is real? Is it a debate on the best measures to tackle climate change, or the most equitable way to pay for adaptation? Ultimately, the question at issue is, predictably, a relatively dry legal question: does the federal government have the power under the *Constitution Act, 1867* to impose minimum pricing standards on greenhouse gas emissions across all provinces? Or is the federal government imposing on provincial powers and treading on provincial toes?

Under the *Constitution Act, 1867* nearly all "matters" to legislate were divided between the provincial and federal governments. The framers were attempting to implement a Westminster, centralized model of government and yet also recognize the diversity, size, and scope of the new country. In order to ensure that all matters, subjects, and issues were given to one head of government or another, the *Constitution Act, 1867* includes two important catch all provisions. Under section 92(16), the Provinces are granted a catch-all for "generally all Matters of a merely local or private Nature in the Province". The federal government, under section 91, was then granted the residual power to "make Laws for the Peace, Order, and good Government of Canada,

in relation to all Matters not coming within the Classes of Subjects by this Act assigned Exclusively to the Legislatures of the Provinces".

Determining when a matter, which is not expressly listed under either section 91 or 92 is either a "Matters of a merely local or private Nature in the Province" or whether it is a "Law for the Peace, Order, and good Government of Canada" (POGG) which falls outside of a matter assigned to the Provinces is a complex and much discussed issue before the Courts.

The current test for determining whether a matter is an issue of national concern and as such falls under the federal government's POGG, was articulated in the Crown Zellerbach case. The Ontario Court of Appeal summarized the principles from Crown Zellerbach as follows:

> [T]he court considers first whether the matter has a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern. In this regard, the court considers the effect on extra-provincial interests of a provincial failure to regulate the "matter". Second, the court considers whether the scale of impact of the federal legislation is reconcilable with the constitutional distribution of legislative power.(para 102)

It is now up to the SCC to define the pith and substance of the *Greenhouse Gas Pollution Pricing Act*. This exercise matters because everything hangs on the articulation of the pith and substance to determine whether the legislation properly falls within the scope of federal power. If the *Greenhouse Gas Pollution Pricing Act* is held to be constitutional, the federal scheme will continue to apply in those provinces which do not have a substantially equivalent system and Canada will be able to ensure all provinces are held to minimum national standards in the fight against climate change. In British Columbia, the carbon tax which has been in place for years has already been held to be equivalent, so we will not see any on the ground changes here.

Finally, to add one more layer of complexity to this case, the Alberta government also referred a question regarding the constitutionality of the *Greenhouse Gas Pollution Pricing Act* to the Alberta Court of Appeal. The case was heard in early December 2019, and as of February 24, 2020 the Alberta Court of Appeal, diverging from the Court of Appeal rulings in Ontario and Saskatchewan, ruled the federal carbon tax to be unconstitutional. It is now likely the appeal from the Alberta Court of Appeal will be heard in the Supreme Court of Canada at the same time as the Ontario and Saskatchewan appeals.

The SCC has approved Vancouver, Victoria, Richmond, Squamish, Nelson and Rossland as intervenors. Lidstone & Company is acting for these municipalities on the appeal.