LIDSTONE & COMPANY
BARRISTERS AND SOLICITORS

BULLETIN

TO:	Clients
FROM:	Lidstone & Company
DATE:	April 1, 2021
RE:	Reference re Greenhouse Gas Pollution Pricing Act, 2021 SCC 11
FILE:	10095-110

Overview

In the ***Reference re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 ("GGPPA")**, a Majority decision of the Supreme Court of Canada held that the GGPPA is constitutional and the federal government has jurisdiction to enact minimum national standards of Green House Gas ("GHG") pricing as a matter of national concern under the peace, order and good government clause of s. 91 of the *Constitution Act, 1867*.

In this landmark decision, Canada's highest court concluded that the GGPPA establishes minimum national standards of GHG pricing, which sets a floor across the country in respect of a broad set of GHG emissions sources, to reduce GHG emissions. The Court also concluded that the federal GHG pricing system does not displace provincial and territorial jurisdiction or regulate GHG emissions generally. Instead, the GHG pricing system gives the provinces and territories the flexibility to design their own policies, including carbon pricing, to meet emissions reductions targets adapted to each province and territory's specific circumstances. The GGPPA also recognizes carbon pricing policies already implemented or in development. Further, it does not require those to whom it applies to perform or refrain from performing specified GHG emitting activities and it does not tell industry how to operate.

The Court also held that a federal GHG pricing system is critical to respond to an existential threat to human life in Canada and around the world.

What is perhaps most interesting or relevant to local governments, is the Court's analysis of levies as regulatory charges versus taxes.

Validity of the Levies as Regulatory Charges (Part VII from paras 212 – 219)

The part of the judgment which likely impacts local governments most directly is the conclusion of the majority on the issue of "regulatory charges". The issue arose because the Attorney-General for Ontario argued that the GHG levies were really taxes, which had been enacted without following the requirements for creating a tax.

Specifically, Ontario argued that the fuel and excess emission charges imposed by the GGPPA did not have a sufficient nexus with the regulatory scheme to be considered constitutionally valid regulatory charges. Ontario argued that the revenues of a regulatory charge must be used to recover the cost of the scheme or spent in a manner connected to the regulatory purpose.

The Attorney-General for Canada responded arguing that the GHG levies were not taxes, but valid regulatory charges. The Court upheld this argument. In so doing, it clarified the basis on which a levy will be characterized as a regulatory charge, as opposed to a tax. The principal conclusions of the Majority were as follows:

- A levy can be classified as a regulatory charge when it is connected to a regulatory scheme and has a regulatory purpose.
- The requirement for a regulatory purpose can be satisfied where the purpose of the levy is to alter the behavior of parties that are subject to the regulatory scheme.
- As a result, there is no requirement that the amount of a regulatory charge be tied to the government costs incurred in a regulatory scheme. The amount of the regulatory charge can be set at a level designed to deter the conduct sought to be discouraged.
- There is also no requirement that the monies raised be spent in support of the regulatory scheme.

In the case of the GGPPA, where the regulatory charge is itself a regulatory mechanism that promotes compliance with the regulatory scheme or to further its objectives, the nexus between the scheme and the levy is inherent in the charge itself [GGPPA at para 216].

The Court concluded that there is ample evidence that the fuel and excess emission charges imposed by the GGPPA have a regulatory purpose. The Court held that the GGPPA's regulatory purpose is not to generate revenue, but to advance the GGPPA by altering behaviour. Therefore, Parts 1 and 2 of the GGPPA are not taxes. Instead, they are regulatory charges that are constitutionally valid.

Impact on Canada's Local Governments

At first blush, the decision might appear to create broader scope for local governments to use regulatory charges as a regulatory tool, and also for raising revenue, as local governments are generally permitted to collect regulatory charges, even when they do not have a power to tax.

The decision might even be used to justify setting higher charges where the regulatory purpose is to incentivize or disincentivize public behaviour or choices. For example, to increase charges on waste, deposit fees on reusable materials like glass and plastics, and on parking fees and parking permits. Local governments may also consider creating different business license or building permit fees to

either incentivize the use of more sustainable materials or practices, or disincentivize the use of others.

A word of caution should be noted, however. It is not clear how far the courts will go in applying this liberal approach to municipal bylaws, and the courts may well be concerned that local governments will try to seize on this doctrine as an indirect means of expanding their jurisdiction.

One possible way in which the courts might limit the use of regulatory charges by municipalities would be to apply stringently the requirement for a "regulatory scheme" to which a regulatory charge attaches. Accordingly, a local government seeking to enact new regulatory charges should ensure that the charges are connected to activities which the local government has the power to regulate, and that the charge is also connected to a comprehensive regulatory scheme, rather than a bare, isolated charge which might be impugned as a tax.