

References re Greenhouse Gas Pollution Pricing Act, 2021 SCC 11:
Supreme Court of Canada upholds constitutionality of the *GGPPA*
as a “Matter of National Concern”



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- Overview of the Decision
 - Issue
 - A Brief Primer on the *GGPPA*
 - The Majority Decision of Chief Justice Wagner
 - The Dissenting Opinions

■ Does the GGPPA fall within federal or provincial jurisdiction?

VI. Distribution of Legislative Powers

Powers of the Parliament

Legislative Authority of Parliament of Canada

91 It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, 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; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

1. Repealed.⁽⁴⁵⁾
- 1A. The Public Debt and Property.⁽⁴⁵⁾
2. ~~The Regulation of Trade and Commerce.~~
- 2A. Unemployment Insurance.⁽⁴⁵⁾
3. ~~The raising of Money by any Mode or System of Taxation.~~
4. The borrowing of Money on the Public Credit.
5. Postal Service.
6. The Census and Statistics.
7. Militia, Military and Naval Service, and Defence.
8. The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of Canada.
9. Beacons, Buoys, Lighthouses, and Sable Island.
10. Navigation and Shipping.
11. Quarantine and the Establishment and Maintenance of Marine Hospitals.
12. Sea Coast and Inland Fisheries.
13. Ferries between a Province and any British or Foreign Country or between Two Provinces.
14. Currency and Coinage.
15. Banking, Incorporation of Banks, and the Issue of Paper Money.
16. Savings Banks.
17. Weights and Measures.
18. Bills of Exchange and Promissory Notes.
19. Interest.
20. Legal Tender.
21. Bankruptcy and Insolvency.
22. Patents of Invention and Discovery.
23. Copyrights.
24. Indians, and Lands reserved for the Indians.
25. Naturalization and Aliens.
26. Marriage and Divorce.
27. ~~The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.~~
28. The Establishment, Maintenance, and Management of Penitentiaries.
29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

vs.

Exclusive Powers of Provincial Legislatures

Subjects of exclusive Provincial Legislation

92 In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

1. Repealed.⁽⁴⁵⁾
2. ~~Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.~~
3. ~~The borrowing of Money on the sole Credit of the Province.~~
4. The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers.
5. The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.
6. The Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province.
7. The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.
8. Municipal Institutions in the Province.
9. Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.
10. ~~Local Works and Undertakings other than such as are of the following Classes:~~
 - (a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province;
 - (b) Lines of Steam Ships between the Province and any British or Foreign Country;
 - (c) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.
11. The Incorporation of Companies with Provincial Objects.
12. The Solemnization of Marriage in the Province.
13. ~~Property and Civil Rights in the Province.~~
14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.
15. The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.
16. ~~Generally all Matters of a merely local or private Nature in the Province.~~

Non-Renewable Natural Resources, Forestry Resources and Electrical Energy

Laws respecting non-renewable natural resources, forestry resources and electrical energy

92A (1) In each province, the legislature may exclusively make laws in relation to

- (a) exploration for non-renewable natural resources in the province;
- (b) development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom; and
- (c) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy.

*analogous to USC Article I, s 8

*analogous to USC Article 4 (?)

- Can the *GGPPA* be upheld as a “matter of national concern” pursuant to Parliament’s *residual* “peace, order, and good governance” (POGG) power (in the introductory chapeau of s 91 *Constitution Act, 1867*)?

- Most recent test set out in *R. v. Crown Zellerbach* (1988):
 1. Separate & distinct from the national emergency doctrine (temporary nature);
 2. Applies to both new matters and to matters that have become national concern;
 3. **Singleness, distinctiveness & indivisibility** that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power;
 - In assessing singleness, distinctiveness and indivisibility, consider what would be the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the intra-provincial aspects of the matter (**provincial inability**).

■ Part I:

- Imposes a regulatory charge (or regulation with the “characteristics of a tax” (at para 213)) through a fuel charge imposed at the point of purchase (s 17(1)).
- The effective price on carbon emissions to be imposed via the fuel charge is specified in Schedule 4 and this price is converted to a charge to be applied to specific fuels on the basis of the emissions generated upon combustion of those fuels, set out in Schedule 2.
- The fuel charge applies only in provinces specified in Part 1 of Schedule 1 of the *GGPPA* (the so-called “backstop mechanism”)

■ Part II:

- Establishes a separate carbon pricing system for large emitters, termed an output-based pricing system (OBPS). The intent of the OBPS is to provide a lower average cost of emissions pricing to firms with exposure to international markets, while also maintaining a financial incentive to undertake investments to reduce the emissions-intensity of production.
- This is accomplished by providing emissions credits at a set rate per-unit output which defines what the *GGPPA* terms an “emissions limit” (see *GGPPA*, s 174. See also, *OBPS Regulations*, s 36).

- Basic facts of global climate change;
- Reviews the history of Canadian climate (in)action;
- Core elements of decision:
 1. **Characterization** of the *GGPPA*: Pith and Substance
 2. **Classification** under which head of power pursuant to sections 91 and 92
 - A revised “national concern” test
 - Clarification that “double aspect” doctrine may apply

- 3 alternative characterizations:
 - (1) a broad formulation to the effect that the *GGPPA*'s pith and substance is the regulation of GHG emissions;
 - (2) establish minimum national standards to reduce GHG emissions; and
 - (3) establish minimum national standards of GHG price stringency to reduce GHG emissions. (at para 57)

- Wagner CJ endorses #3 as most consistent with the purpose and effects of the legislation, as defined with some precision, and having regard to the means chosen by Parliament to achieve its purpose.

1. Threshold question:

- “Canada must adduce evidence to satisfy the court that the matter is of sufficient concern to Canada as a whole to warrant consideration in accordance with the national concern doctrine” (at para 144).

2. Singleness, distinctiveness and indivisibility (SDI) – 2 principles

* According to CJ, SDI “does not amount to a readily applicable legal test” (at para 146);

1. **Qualitative Difference:** There must be “a specific and identifiable matter that is qualitatively different from matters of provincial concern” (para 146, emphasis added).
 - A key consideration is “whether it is predominantly extraprovincial and international in character, having regard both to its inherent nature and to its effects” (at para 148)
2. **Provincial Inability:**
 1. the provinces must be jointly or severally incapable, in the constitutional sense, of enacting the legislation;
 2. refusal by one or more provinces would jeopardize the legislative scheme’s operation in other parts of the country; and
 3. refusal to deal with the matter of the legislation must have “grave extraprovincial consequences” (at paras 152 – 53).



3. Impact of recognizing a matter of national concern on provincial autonomy.

- [...] the intrusion upon provincial autonomy that would result from empowering Parliament to act is balanced against the extent of the impact on the interests that would be affected if Parliament were unable to constitutionally address the matter at a national level. Identifying a new matter of national concern will be justified only if the latter outweighs the former. (at para 161)

1. Threshold?

A. The record fully supported “the importance of carbon pricing” (at para 169) and indeed reflected “a consensus, both in Canada and internationally, that carbon pricing is integral to reducing GHG emissions” (at para 170).

2. Single, Distinct, Indivisible?

1. Qualitative Difference? Yes: GHGs “are a specific and precisely identifiable type of pollutant” that “represent a pollution problem that is not merely interprovincial, but global, in scope” (at para 173);
2. Provincial Inability? Yes (next slide)

3. Scale of Impact?

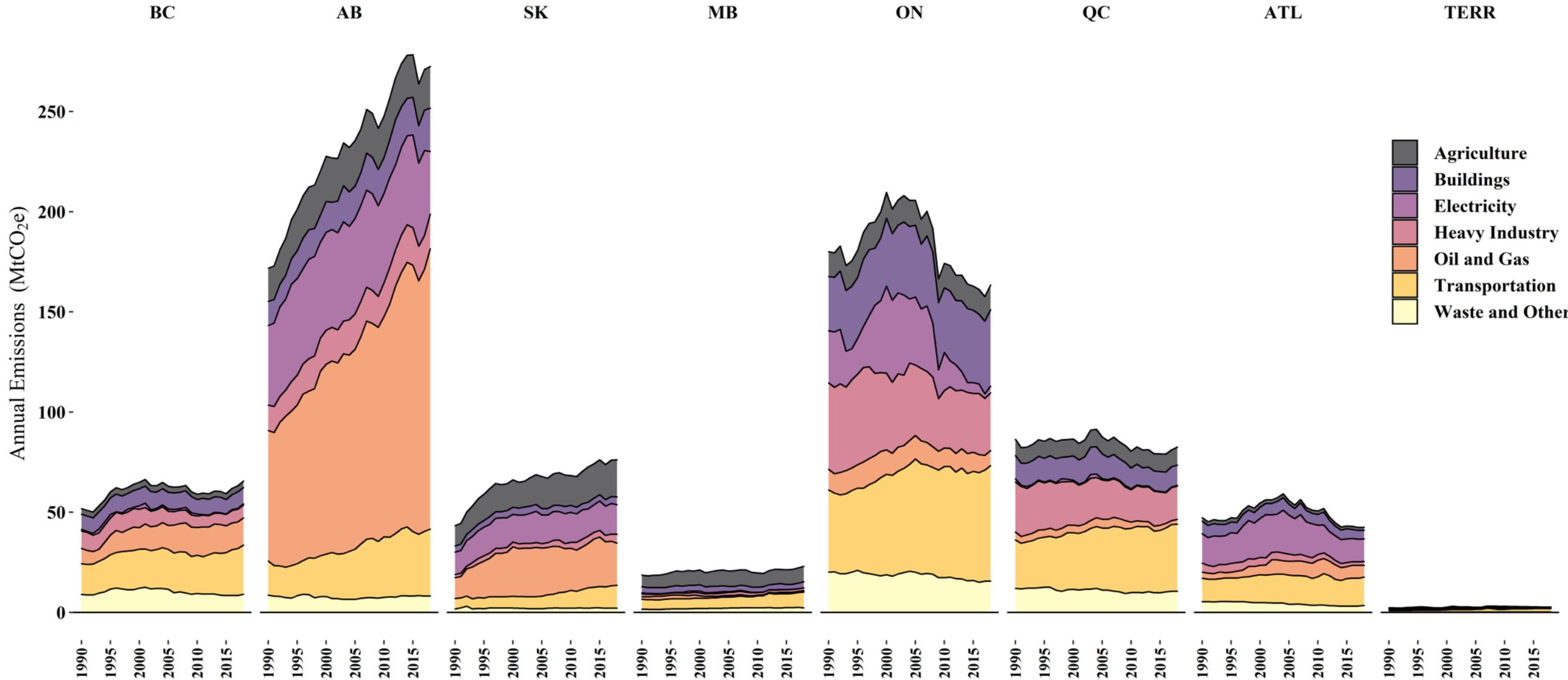
A. interference with autonomy is limited and could be justified or outweighed “by the impact on interests that would be affected if Parliament were unable to constitutionally address this matter at a national level” (at para 196).

[184] The evidence in the instant case shows that even significant emissions reductions in some provinces have failed to further the goals of any cooperative scheme, because **they were offset by increased emissions in other provinces.** Between 2005 and 2016, Canada's total GHG emissions declined by only 3.8 percent... **In that period, emissions fell by 22 percent in Ontario, 11 percent in Quebec and 5.1 percent in British Columbia,** three of the five provinces with the highest levels of emissions in Canada, as well as by over 10 percent in New Brunswick, Nova Scotia, Prince Edward Island and Yukon. **But these decreases were largely offset by increases of 14 percent in Alberta and 10.7 percent in Saskatchewan,** the other two provinces among the five with the highest levels of GHG emissions.

Provincial refusal jeopardizes effectiveness...

Canadian GHG Emissions by Province

2021 National Inventory (1990-2019)



Source: Environment and Climate Change Canada 2021 National Inventory (1990-2019). Graph by @andrew leach.

- [188] Furthermore, I reject the notion that because climate change is “an inherently global problem”, each individual province’s GHG emissions cause no “measurable harm” or do not have “*tangible impacts on other provinces*”: Alta. C.A. reasons, at para. 324; I.F., Attorney General of Alberta, at para. 85 (emphasis in original). Each province’s emissions are clearly measurable and contribute to climate change. **The underlying logic of this argument would apply equally to all individual sources of emissions everywhere, so it must fail.**
- [190] While each province’s emissions do contribute to climate change, there is no denying that climate change is an “inherently global problem” that neither Canada nor any one province acting alone can wholly address. This weighs in favour of a finding of provincial inability. As a global problem, climate change can realistically be addressed only through international efforts. **Any province’s failure to act threatens Canada’s ability to meet its international obligations, which in turn hinders Canada’s ability to push for international action to reduce GHG emissions. Therefore, a provincial failure to act directly threatens Canada as a whole.** This is not to say that Parliament has jurisdiction to implement Canada’s treaty obligations — it does not — but simply that the inherently global nature of GHG emissions and the problem of climate change supports a finding of provincial inability in this case.

- **Justice Cote:**
 - Doesn't like Henry VIII clauses (but these are routine fixtures of federal and provincial environmental, and other, laws);
- **Justice Brown:**
 - Doesn't agree with strengthened role for "provincial inability" test;
 - Appears OK with provinces' affecting each other's autonomy, but not feds;
 - Believes that majority approach is corrosive to federalism;
- **Justice Rowe:**
 - Fundamentally different view of POGG as very restricted in application;
 - Like Justice Brown, appears OK with provinces' affecting each other's autonomy, and views result as inconsistent with federalism bargain.

- [2] The **essential** factual backdrop to these appeals is **uncontested**. 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...
- **Q. Why didn't SK, ON, or AB challenge the science of climate change?**

- Nigel Bankes, Andrew Leach & Martin Olszynski, “Supreme Court of Canada Re-writes the National Concern Test and Upholds Federal Greenhouse Gas Legislation: Part I (The Majority Opinion)” (April 28, 2021), online: ABlawg, http://ablawg.ca/wp-content/uploads/2021/04/Blog_NB_AL_MO_SCC_GGPPA_Ref_Part1.pdf
- Part II (The Dissents)” (April 29, 2021), online: ABlawg, http://ablawg.ca/wp-content/uploads/2021/04/Blog_NB_AL_MO_SCC_GGPPA_Ref_Part2.pdf
- Part III (Commentary)” (April 30, 2021), online: ABlawg, http://ablawg.ca/wp-content/uploads/2021/04/Blog_NB_AL_MO_SCC_GGPPA_Ref_Part3.pdf