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?

**The Issue**

**VI. Distribution of Legislative Powers**

**Powers of the Parliament**

Legislative Authority of Parliament of Canada

1. 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, to regulate 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 limit the Extent of the foregoing Terms of the Section, it is hereby declared that (wherever pugnacious in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects specified in this Section, that is to say,

1. Revenue
2. The Public Debt and Property
3. The armed Forces of the Crown
4. The granting of Money by any Mode or System of Taxation
5. The Surgeoning of Money on the Public Credit
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. Beaus, Bays, Light Houses, and Sailing Island
10. Navigation and Shipping
11. Quarantine and the Establishment and Maintenance of Marine Hospitals
12. Sea Coast and Island Fisheries
13. Ferries between a Province and any British or Foreign Country or between Two Provinces
14. Currency and Coinage
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 or Discovery
23. Copyrights
24. Inquests, and Lands reserved for the Inquests
25. Naturalization and Alienage
26. Marriage and Divorce
27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including

**Exclusive Powers of Provincial Legislatures**

Sectors of exclusive Provincial Legislation

1. Property and Civil Rights in the Province

2. 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 these Courts

3. The Impunity of Punishment by Fines, Penalties, or Imprisonment for enjoining any Law of the Province made in violation of any statute coming within any of the Classes of Subjects enumerated in this Section

4. Generally all Matters of a mostly local or private Natures in the Province

5. Non-Renewable Natural Resources, Forestry Resources and Electrical Energy

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

   Section 2 (1) The legislative authority on exclusive power to enjoin laws in relation to the reservation 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 thereon; and

   (c) development, conservation and management of sites and facilities in the province for the production and production of electrical energy.

*analogous to USC Article I, s 8

*analogous to USC Article 4 (?)
The Issue

- 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)?

  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**).
The GGPPA

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: GHGgs “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)

Annual Emissions (MtCO₂)

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

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?
