Toronto Law Journal

A Narrow and Myopic National Concern: Climate Change Law and Policy After the SCC's *References re Greenhouse Gas Pollution Pricing Act* Decision

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> In the end, measuring carbon in the atmosphere and the temperature rise it causes is how we're going to actually keep score.
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> — Bill McKibben, *The New Yorker* Climate Crisis Newsletter, April 4, 2021

In *References re Greenhouse Gas Pollution Pricing Act*,[1] a 6-3 majority of the Supreme Court of Canada found that the *Greenhouse Gas Pollution Pricing Act* ("GGPPA") was constitutionally valid as a matter of national concern under the peace, order, and good government ("POGG") clause of section 91 of the *Constitution Act, 1867*. The Court's ruling, which had been predicted with a high level of confidence by serious constitutional and environmental law scholars,[2] and which has been largely – if uncritically – celebrated by environmental law scholars and advocates,[3] is in fact a narrow and myopic ruling that may well do more to undermine rather than facilitate ambitious science-based climate policy in Canada.

Background to the Legislation and Litigation

The UN Paris Agreement was adopted toward the end of 2015. The Paris Agreement aims to limit global warming above the pre-industrial norm to well below 2 degrees Celsius, and, importantly, to pursue efforts to limit warming to 1.5 degrees Celsius. In 2016, the federal government secured provincial and territorial consensus on a coordinated national approach to meeting its commitments under the Paris Agreement – the Vancouver Declaration on Clean Growth and Climate Change. Further collaboration among the federal, provincial, and territorial levels of government produced the Pan-Canadian Framework on Clean Growth and Climate Change, a detailed action plan premised on establishing a rising minimum national price on greenhouse gas ("GHG") emissions that was agreed to by all but for the province of Saskatchewan.[4]

The federal government enacted the GGPPA in 2018 to implement the Pan-Canadian Framework. The GGPPA acts as a kind of national safety net. The first part of the Act imposes

[1] *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 [*GGPPA Decision*].
[2] See e.g. Jason MacLean & Nathalie Chalifour, "Supreme Court case on carbon price is about climate change, not the Constitution", *The Conversation* (22 September 2020), online: https://theconversation.com/supreme-court-case-on-carbon-price-is-about-climate-change-not-the-constitution-146471.
[3] See e.g. Yves Faguy, "A missed opportunity?", *CBA National Magazine* (26 March 2021), online: https://www.nationalmagazine.ca/en-ca/articles/law/in-depth/2021/a-missed-opportunity.
[4] See Maclean & Chalifour, *supra* note 2. For further details, see Jason MacLean, "Climate Change, Constitutions, and Courts: The *Reference re Greenhouse Gas Pollution Pricing Act* and Beyond" (2019) 82:2 Sask L Rev 147.

a regulatory charge – *not a tax* – on a broad range of GHG-emitting fuels. The second part of the Act requires large industrial emitters – who are exempt from the Act's first part – to pay for their emissions that exceed an annual limit, based on average industry thresholds, through what the Act calls an "output-based performance system."[5]

Crucially, the federal carbon price is described as a backstop because it applies only in provinces or territories that request it or that have failed to price emissions through a direct price or cap-and-trade system at the minimum benchmark level established by the federal government. Provinces and territories remain otherwise free – or so the federal government insists – to regulate GHG emissions within their borders, allowing them to impose more stringent limits on GHG emissions if they so choose.

The national consensus on this approach to climate policy, however, soon fell apart. Conservative governments in Ontario and Alberta followed Saskatchewan's opposition to the policy and adopted what was dubbed the "Saskatchewan strategy" of continuing a dispute over climate policy in the courts by asserting a constitutional challenge to the GGPPA asserting that the federal government lacks jurisdiction to set a rising minimum national price on GHG emissions.[6] Saskatchewan, Ontario, and Alberta each referred a constitutional question to its respective Court of Appeal seeking an advisory opinion.

The Saskatchewan Court of Appeal's Advisory Opinion

In 2019, a 3-2 majority of the Saskatchewan Court of Appeal concluded that the GGPPA is constitutionally valid as a matter of national concern under POGG. The majority construed the purpose of the GGPPA as establishing minimum national standards of price stringency for GHG emissions. Finding that purpose constitutionally valid, Chief Justice Richards for the majority asserted that "[i]f it is necessary to apply established doctrine in *a slightly different way* to ensure both levels of government have the tools essential for dealing with something as pressing as climate change, that would seem entirely appropriate."[7]

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[5] See MacLean & Chalifour, *supra* note 2, and MacLean, *supra* note 4.

[6] Even the most ardent academic supporter of the provinces' constitutional arguments, Professor Dwight Newman, acknowledged early on that "[…] the contending parties in the carbon tax reference were obviously in court because of fundamentally differing views on critical policy issues": Dwight Newman, "Wrecking the Federation to Save the Planet", *C2C Journal* (3 April 2019), online: https://c2cjournal.ca/2019/04/wrecking-the-federation-to-save-the-planet/. Indeed, that Professor Newman, a distinguished law professor, insists on referring to what is legally a regulatory charge as a "tax" reflects the irreducibly political nature of these constitutional challenges.

[7] *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40 at para 144 [emphasis added]. For a brief analysis of the opinion, see Jason MacLean, Nathalie Chalifour & Sharon Mascher, "Work on climate, not weaponizing the Constitution", *The Conversation* (7 May 2019), online: https://theconversation.com/work-on-climate-not-weaponizing-the-constitution-116710. For a more detailed account, see MacLean, *supra* note 4. The critical question that Canada will inevitably have to address is what if it is necessary to apply established doctrine in a *radically different way* in order to effectively deal with climate change?

The Ontario Court of Appeal's Advisory Opinion

Soon after the Saskatchewan Court of Appeal's opinion was released, a 4-1 majority of the Ontario Court of Appeal also found that the GGPPA is constitutionally valid as a matter of national concern under POGG.[8] Interestingly, the Court offered three different interpretations of the GGPPA's purpose. The majority opinion of Chief Justice Strathy and Justices MacPherson and Sharpe defined the Act's purpose as establishing minimum national standards to reduce GHG emissions.[9] In a concurring opinion, Justice Hoy defined the Act's purpose in virtually identical – if slightly narrower – terms as establishing minimum national GHG emissions *pricing* standards to reduce GHG emissions.[10] And, writing in dissent, Justice Huscroft interpreted the purpose of the GGPPA – more or less rightly, I think – as "reducing GHG emissions."[11] I will return to Justice Huscroft's interpretation and its implications for climate law and policy below.

The Alberta Court of Appeal's Advisory Opinion

A 4-1 majority of the Alberta Court of Appeal found that the GGPPA was constitutionally invalid. Chief Justice Fraser, writing for the three-judge majority, found that the Act was neither a matter of national concern under POGG nor valid under any other federal head of legislative power. Chief Justice Fraser characterized the "true nature" of the GGPPA as, "at a minimum, [the] regulation of GHG emissions."[12] What does "at a minimum" mean? Earlier in her reasons, Chief Justice Fraser described the GGPPA in the following evocative terms:

> The *Act* is a constitutional Trojan Horse. Buried within it are wide ranging discretionary powers the federal government has reserved unto itself. Their final shape, substance and outer limits have not yet been revealed. But that in no way diminishes the true substance of what this *Act* would effectively accomplish were its validity upheld. Almost every aspect of the provinces' development and management of their natural resources, all provincial industries and every action of citizens in a province would be subject to federal regulation to reduce GHG emissions. It would substantially override ss 92A, 92(13) and 109 of the Constitution.[13]

The Supreme Court of Canada's Narrow and Myopic Decision

A 6-3 majority of the Court found that the GGPPA is a valid matter of national concern under POGG. The Court's analysis begins with language that seemed to surprise many.[14] Writing for

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[8] *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544 [*Ontario GGPPA Opinion*].
[9] *Ibid* at para 77.
[10] *Ibid* at para 166.
[11] *Ibid* at para 213.
[12] *Reference re Greenhouse Gas Emissions*, 2020 ABCA 74 at para 211. Justice Wakeling concurred in the result but not the reasoning, while Justice Feehan dissented, finding that the GGPPA is a valid matter of national concern under POGG.
[13] *Ibid* at para 22.
[14] This is an anecdotal observation I personally gleaned after speaking with over a dozen Canadian journalists about the Court's majority opinion. Almost every media representative I spoke with was surprised by the Court's opening

the majority, Chief Justice Wagner asserts that "[c]limate 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."[15] The Chief Justice further explained that under the UN Paris Agreement, "states around the world undertook to drastically reduce their greenhouse gas emissions in order to mitigate the effects of climate change. In Canada, Parliament enacted the *GGPPA* as part of the country's effort to implement its commitment."[16]

Notwithstanding this sobering opening language, the majority proceeds to interpret the purpose of the GGPPA and the jurisdiction of the federal government over GHG emissions in rather more myopic and narrow terms. The Court defines the purpose of the GGPPA as "establishing minimum national standards of GHG price stringency to reduce GHG emissions."[17] The Court bases its narrow interpretation of the purpose of the GGPPA primarily on what the GGPPA does: The Act establishes minimum national GHG pricing levels.

But the Court's narrow interpretation of the GGPPA's purpose appears to stem far more from the Court's concern with the constitutional implications of classifying the matter of the GGPPA as a national concern under POGG. As the Chief Justice is at considerable pains to explain throughout his reasons, the Court is satisfied that "the consequences of finding that the proposed matter is one of national concern are reconcilable with the division of powers."[18]

The Court then proceeds to set out and apply the national concern test under POGG, which, it affirms, involves a three-step process: (1) the threshold question; (2) the "singleness, distinctiveness and indivisibility" analysis; and (3) the "scale of impact" analysis.[19]

At step one, the threshold question asks, on the basis of "common sense," whether the matter in question is of sufficient concern to Canada as a whole to warrant consideration under the national concern doctrine.[20] The Court answers this in the affirmative: "This matter is critical to our response to an existential threat to human life in Canada and around the world."[21]

At the second step of the test, for a matter to exhibit singleness, distinctiveness, and indivisibility, the matter must be a "specific and identifiable matter that is qualitatively different from matters of provincial concern" where the evidence establishes a "provincial inability" to deal with the matter.[22] The Court finds that this step is also met: "[…] this matter

language. This, however, likely says far more about the mainstream media's own incomplete understanding of the genuine crisis posed by climate change than the Court's opening words, which are basic and uncontroversial.

[15] *GGPPA Decision, supra* note 1 at para 2. Space does not allow for an analysis of the minority opinions here.

[16] *Ibid.*

[17] *Ibid* at para 80.

[18] *Ibid* at para 131.

[19] *Ibid* at para 132.

[20] *Ibid* at para 142.

[21] *Ibid* at para 171.

[22] *Ibid* at para 157.

would empower the federal government to do only what the provinces cannot do to protect themselves from this grave harm, and nothing more."[23]

At the third and final step of the national concern test, provided the first two steps are met, the federal government must show that the proposed matter has "a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution."[24]

The Court finds that this step is also met: "[The GGPPA's] impact on the provinces' freedom to legislate and on areas of provincial life that would fall under provincial heads of power is qualified and limited."[25]

It is only by giving the GGPPA a narrow and myopic interpretation, however, that the Court can accommodate the Act within the federal-provincial division of powers.

Recall that the Court begins its reasons by acknowledging that climate change is a grave existential threat, and that the "only way to address the threat of climate change is to *reduce* greenhouse gas emissions."[26] Pricing emissions is one well established way of reducing emissions, but whether pricing emissions is capable of sufficiently reducing – and ultimately eliminating – emissions in a given jurisdiction depends on the level of the price and the universality of its application.[27] The price under the GGPPA is presently capped at $50 per tonne, well below the level required to sufficiently reduce emissions (*i.e.*, the "social cost of carbon," or the fully internalized cost of one tonne of emitted carbon dioxide).

Moreover, as a close reading of the "output-based performance system" of part two of the GGPPA shows, industrial emitters pay only for those emissions above 80% or 90% of their sectoral average; the latter and even-more-lax standard is for industrial sectors deemed to be trade-exposed.

Canada's own GHG-emissions data illustrate the regulatory insufficiency of its carbon price. In 2019, the first year of the GGPPA's implementation, GHG emissions in Canada actually *increased*, albeit fractionally.[28] To meet its commitments under the Paris Agreement, the

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[23] *Ibid* at para 195.
[24] *Ibid* at para 16o.
[25] *Ibid* at para 205.
[26] *Ibid* at para 2 [emphasis added].
[27] For a comprehensive analysis of the sufficiency of carbon pricing as a form of climate policy in Canada, see Mark Jaccard, *The Citizen's Guide to Climate Success: Overcoming Myths that Hinder Progress* (New York: Cambridge University Press, 2020), especially chapter 6.
[28] In 2019, Canada's GHG emissions were 730 million tonnes of carbon dioxide equivalent, up from 728 million tonnes of carbon dioxide equivalent in 2018, and only 1.1% less than GHG emissions in the baseline year – 2005 – of Canada's Paris Agreement commitment, when emissions totalled 739 million tonnes of carbon dioxide equivalent. See Government of Canada, "Greenhouse gas sources and sinks: executive summary 2021" (2021), online: https://www.canada.ca/en/environment-climate-change/services/climate-change/greenhouse-gas-emissions/sources-sinks-executive-summary-2021.html.

federal government will have to utilize additional climate policies, laws, and regulations. Carbon pricing is but one regulatory mechanism of a broader suite of required mechanisms.

The Court squarely acknowledges this distinction, if not its climate policy implications. In the key passage of the majority opinion, the Chief Justice explains that carbon pricing is a distinct form of regulation: "*GHG pricing does not amount to the regulation of GHG emissions generally. It is also different in kind from regulatory mechanisms that do not involve pricing, such as sector-specific initiatives concerning electricity, buildings, transportation, industry, forestry, agriculture and waste*."[29]

The Court then proceeds to reinforce its narrow reading of the GGPPA's pith and substance:

> It is important to mention that the issue in this case is not the freedom of the provinces and territories to legislate in relation to GHG emissions generally. Here, the matter is limited to GHG pricing of GHG emissions – *a narrow and specific regulatory mechanism*. Any legislation that related to non-carbon pricing forms of GHG regulation – legislation with respect to roadways, building codes, public transit and home heating, for example – *would not fall under the matter of national concern*.[30]

The trouble with this interpretation is that, while it is at pains to mollify the provinces and preserve provincial legislative autonomy in respect of an existential public policy problem that the Court otherwise acknowledges the provinces are unable to address, it severely limits federal jurisdiction over that very same problem. Clearly, additional, sector-specific initiatives will be required to address climate change in Canada. Unwittingly, however, the Court's ruling runs the risk of creating a legislative vacuum where one or more provinces refuse to adopt sufficient sector-specific regulatory initiatives and the federal government is left constitutionally powerless to fill the regulatory gap, one of the core potential problems that the Court's jurisprudence on the division of powers and cooperative federalism is supposed to prevent.

To see how the Court's ruling may soon undermine effective climate policy in Canada, consider first the key proposed planks of Canada's current climate plan, *A Healthy Environment and a Healthy Economy: Canada's strengthened climate plan to create jobs and support people, communities and the planet*.[31] Those planks include cutting energy waste, providing clean and affordable transportation and power in every community, building Canada's "clean industrial advantage," and exceeding Canada's 2030 Paris Agreement GHG-emissions-reduction target, among others. How will the federal government achieve any of these sector-specific goals in the event that one or more provinces or territories – especially one or more high-GHG-emitting provinces – refuse to act in cooperation with Ottawa? Given the Court's narrow and short-sighted ruling, the federal government will not be able to regulate – other than by carbon

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[29] *GGPPA Decision, supra* note 1 at para 175 [emphasis added].
[30] *Ibid* at para 199 [emphasis added].
[31] Environment and Climate Change Canada (2020), online: https://www.canada.ca/content/dam/eccc/documents/pdf/climate-change/climate-plan/healthy_environment_healthy_economy_plan.pdf.

pricing – GHG emissions from transportation, presently Canada's second-largest source of GHG emissions. Or GHG emissions from buildings. Or agriculture. Or waste. Or, for that matter, Alberta's oil sands, the largest and fastest-growing source of Canada's GHG emissions, and the key obstacle to meeting Canada's 2030 Paris Agreement target.

Making matters worse, since the Court released its decision, Canada has, under significant diplomatic pressure from its largest trading partner, the United States, substantially raised the ambition of its 2030 Paris Agreement target, from the original commitment of reducing GHG emissions by 30% from 2005 levels by 2030, to reducing GHG emissions by 40-45% from 2005 levels by 2030. Will Canada be able to achieve this more ambitious target by way of establishing a (rising) minimum national price on GHG emissions? Unless the price is sufficiently high and universal in application, there is no evidence that Canada will be able to do so. What will Ottawa do then if provinces and territories once again decline to cooperate? The Court has expressly ruled out federal jurisdiction over GHG emissions across the economy's highest GHG-emitting sectors, notwithstanding that those emissions are transboundary in nature and cannot be effectively regulated by the provinces and territories, either independently or in concert.[32]

Finally, consider the constitutional and the practical question of whether the Court's interpretation, *i.e.,* that the GGPPA's impact on the provinces' legislative autonomy is minimal, will remain tenable if the federal government follows through on its stated commit to raise the minimum national price on GHG emissions to $170 per tonne by 2030. As Justice Huscroft correctly observed in his dissenting opinion in the reference before the Ontario Court of Appeal below, "GHGs are generated by virtually every [economic] activity regulated by provincial legislation, including manufacturing, farming, mining, as well as personal daily activities including home heating and cooling, hot water heating, driving, and so on."[33]

Effectively, at $170 per tonne, which is over three times as high as the carbon price's present cap under the GGPPA, would not the GGPPA's minimum national price regulate *indirectly* what the federal government cannot, according to the Court, regulate directly? In other words, as the minimum national price on GHG emissions rises and approaches the true social cost of carbon, how much legislative room is really left to provinces and territories? Does this not call into question the medium-to-long-term validity and stability of carbon pricing in Canada?

Conclusion: Federalism, or Effective Climate Law and Policy?

Returning again to Justice Huscroft's dissenting opinion in the GGPPA reference before the Ontario Court of Appeal below, Justice Huscroft concluded that "federal authority over GHG

[32] This issue strikes at perhaps the most important contradiction of the majority's opinion, raised by Justice Brown in his dissent. Effectively, and constitutionally, what is the difference between establishing a rising minimum national *price* on GHG emissions, on the one hand, and establishing rising minimum national sector-specific *standards* in respect of GHG emissions on the other? This issue merits more analysis than space allows here, and it may well be central to future challenges to federal climate laws.
[33] *Ontario GGPPA Decision, supra* note 8 at para 227.

emissions would constitute a massive shift in lawmaking authority from provincial legislatures to the Parliament of Canada."[34]

That is undoubtedly true, and the Supreme Court of Canada agrees, which explains why it reads the GGPPA in such a narrow way. The Court appears much less concerned with ensuring that the federal government is constitutionally capable of effectively addressing climate change than it is concerned with ensuring that climate change regulation does not upset the federal-provincial division of powers.

Its opening existential language notwithstanding, the Court's interpretation of the GGPPA and federalism ultimately fails to meaningfully grapple with the seriousness of climate change and the unprecedented scale of institutional transformation required to address it. In 2018, the UN Intergovernmental Panel on Climate Change's ground-breaking special report on the implications of 1.5 degrees Celsius of global warming sounded a clarion call for "rapid," "far-reaching," and "unprecedented" transitions to achieve "deep emissions reductions in all sectors."[35] So why do Canadian courts continue to tacitly assume that our laws, even our most fundamental of laws, are exempt from this existential transformational imperative? As environmental author and advocate Bill McKibben helpfully reminds us, in the end, measuring carbon in the atmosphere and the temperature rise it causes is how we are going to actually keep score. If federalism, as we presently choose to interpret it, does not assist our climate change mitigation efforts, it too must be reimagined, no matter how unprecedented the result.

[34] *Ibid.*
[35] United Nations Intergovernmental Panel on Climate Change, *Special Report: Global Warming of 1.5 ºC*: Summary for Policymakers" (2018), online: https://www.ipcc.ch/sr15/.