Toronto Law Journal

Magnotta v. Yu: Navigating the Intricacies of Rule 49 Settlement Offers

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Although the vast majority of cases settle, Rule 49 of the Ontario *Rules of Civil Procedure*[1] contains nuances that can trip up even the most experienced litigator. In this article, we will focus on three such nuances, two of which were highlighted by the Ontario Court of Appeal's decision in *Magnotta v. Yu*:[2]

1. Judges have discretion and can refuse to enforce settlement agreements created when parties accept settlement offers;
2. Rule 49 offers can be accepted at any time unless they are withdrawn or expire; and
3. Plaintiffs are entitled to costs unless Rule 49 offers explicitly provide otherwise.

The Story

In 2017, Yu entered into an agreement of purchase and sale for a property owned by the Magnottas. The sale did not close after a dispute about whether valid building permits had been obtained for past renovations on the property. The Magnottas began a proceeding against Yu.

In May 2019, the parties exchanged offers to settle. The case did not settle and, shortly thereafter, Yu switched counsel.

After the change of counsel, in July 2019, the Magnottas accepted Yu's May 2019 offer to settle. Yu's new counsel did not know that the May 2019 offer had been made and took the position that the offer was no longer open for acceptance. The Magnottas brought a motion under Rule 49.09(a) to enforce a settlement based on their acceptance of the May 2019 offer.

The motion judge found the May 2019 offer was valid and held that it would be inappropriate in the circumstances of the case to exercise his discretion not to enforce a settlement based on the acceptance of that offer. His decision was upheld by Court of Appeal.

Rule 49.09(a): Judicial Discretion Exists in Enforcing Settlements

Rule 49.09(a) is permissive, not prescriptive. When a party to an accepted offer to settle fails to comply with the terms of the offer, the other party may bring a motion for a judgment in the terms of the accepted offer, which the judge *may* grant. This rule provides judicial

[1] R.R.O. 1990, Reg. 194.
[2] 2021 ONCA 185 [*Magnotta*].

discretion, and the court may choose not to enforce a settlement flowing from acceptance of a valid Rule 49 offer.

That discretion is governed by a basic principle: A court will not enforce a Rule 49 settlement if it is not in the interests of justice to do so. The Court of Appeal in *Magnotta* emphasized that evaluating the interests of justice is a contextual inquiry which the motion judge is best placed to undertake. In determining whether an injustice would result if a settlement is or is not enforced, the relevant factors will depend on case.[3] A deferential approach should be given to the motion judge's decision based on her review of the evidentiary record and findings of fact.[4]

There are two circumstances in which courts have consistently found that enforcing Rule 49 settlements would not be in the interests of justice. First, judges typically decline to enforce settlements where one party takes advantage of the other party's mistake.[5] Courts will consider whether a party or their counsel are aware of the mistake and knowingly capitalize on the error.[6]

However, not all mistakes will give rise to circumstances where a court finds it contrary to the interests of justice to enforce a valid settlement. In *Magnotta*, the Court of Appeal accepted the motion judge's finding of fact that, as far as the Magnottas' counsel was aware, Yu's counsel had the full file for over a month before the Magnottas accepted the May 2019 offer. As such, the Magnottas did not take advantage of a mistake by accepting an offer of which Yu's new counsel was unaware.[7] When taking over an ongoing case, counsel should take steps to identify all outstanding offers to settle, even ones the client may consider to be stale.

Second, courts have found that enforcing Rule 49 settlements where there is evidence of duress or unconscionability would not be in the interests of justice. Courts will consider evidence of economic duress, fraud, coercion or exploitation.[8] In the case of self-represented litigants, courts will also taken into account a lack of opportunity to obtain independent legal advice.[9]

As a best practice, counsel should consider how a court will view the process through which a Rule 49 settlement was reached. Particularly in the context of high pressure negotiations and when dealing with self-represented litigants, counsel must take care to avoid tactics that may support a court refusing to enforce a settlement.

Rule 49.04: Settlement Offers are Outstanding Unless Expired or Withdrawn

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[3] *Ibid.* at para. 38.

[4] *Ibid.* at para. 29.

[5] See, for example, *Fox Estate v. Stelmaszyk* (2003), 65 O.R. (3d) 846 (Ont. C.A.) [*Fox Estate*]; and *Milios v. Zagas* (1998) 38 O.R. (3d) 218 (Ont. C.A.).

[6] See *Fox Estate* (2003), 65 O.R. (3d) 846 (Ont. C.A.) at para. 11.

[7] *Magnotta, supra* note 2 at para. 40.

[8] See *Royal Bank v. Central Canadian Industrial Inc.* [2003] O.J. No. 5251 (Ont. C.A.) [*Royal Bank*]; [2000] O.J. No. 4583 (Ont. S.C.J.).

[9] *Ibid.* at para. 12.

The dispute in *Magnotta* could have been avoided had counsel sent a letter withdrawing the May 2019 offer or, more generally, all offers to settle outstanding when the file was transferred. Pursuant to Rule 49.04, an offer is capable of being accepted unless it is withdrawn in writing or contains a time limit after which it expires. If an offer is not withdrawn, that offer remains open for acceptance even if it has been rejected.[10] Similarly, where an offer to settle is met with a counteroffer, the original offer remains open for acceptance if it is not withdrawn.[11] As a result, it is a best practice to prioritize understanding what offers to settle have been made before counsel serves a notice of change of lawyer and, in some complicated matters with large files to review, it may make sense to send a written withdrawal of all outstanding offers to avoid any surprises.

Magnotta offers insight into practical steps that counsel can take to ensure their clients are not bound by outdated yet still open settlement offers. If there has been a development in the case that fundamentally changes the nature of their settlement offer, counsel should be prompt in sending a written withdrawal of the offer. Finally, when making a subsequent Rule 49 offer, counsel should clarify whether previous Rule 49 offers remain open for acceptance.

Rule 49.07(5): Plaintiffs Have Default Entitlement to Costs

Although not at issue in *Magnotta*, Rule 49.07(5) contains similar nuances to the two issues described above which, if overlooked, may fundamentally alter the nature of the settlement between the parties. Where a Rule 49 offer does not provide for costs, Rule 49.07(5) states that the plaintiff is entitled to costs, and sets out the framework for how costs are assessed.

The language of the offer must be clear and precise to ensure that it supersedes the plaintiff's default entitlement to costs. The Ontario Court of Appeal has held that an offer to settle "in full and complete satisfaction of the plaintiff's claim" is exclusive of costs, and the plaintiff was entitled to costs pursuant to Rule 49.07(5).[12] Where the terms of the offer state "costs to be assessed or agreed upon", courts have typically awarded costs to the date the offer was served, in accordance with Rule 49.07(5).[13]

Clients often think about offers to settle in terms of the all-in amount they will be required to pay or will receive. Rule 49.07(5) can alter the bargain that clients think they are offering to make, and does so in the plaintiff's favour. Parties should be alive to this Rule when making a

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[10] *York North Condominium Corp. No. 5 v. Van Horne Clipper Properties Ltd.*, (1989) 70 O.R. (2d) 317 (Ont. C.A.) at para. 10.

[11] *Roma Construction (Niagara) Ltd. v. Dykstra Bros. Roofing (1992) Ltd.*, [2008] O.J. No. 2755 (Ont. S.C.J.) at para. 17.

[12] See *Puri Consulting Ltd. v Kim Orr Barristers PC*, 2015 ONCA 727 at paras. 24, 34.

[13] See, for example, *Milancovic v Le* (2015), 125 OR 3d 758 (Ont. S.C.J.) at paras. 7, 9-10; *Rosero v Hunag* (1999), 44 OR (3d) 669 (Ont. S.C.J.) at paras. 8-10. Note that under Rule 49.07(5), costs are assessed to the date the plaintiff was served with the offer where an offer was made by the defendant. Where an offer was made by the plaintiff, costs are assessed to the date the notice of acceptance was served.

Rule 49 offer and include in the offer a clear statement about the client's intention with respect to costs.

Conclusion

The Court of Appeal's decision in *Magnotta* reminds us that Rule 49 settlement offers are not straightforward and can contain traps for the unwary. First, as a result of the judicial discretion embedded in Rule 49.09(a), not all Rule 49 settlements are enforced. Second, outstanding offers continue to be open for acceptance unless they contain an expiry date or are explicitly withdrawn. Third, plaintiffs are entitled to costs unless the language of the offer states otherwise. Counsel must approach all stages of the settlement process with the goal of ensuring that any settlement offer will ultimately be enforced by the courts and, if so, will accurately reflect their client's intentions.

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Medical Assistance in Dying: An Overview for Estate Lawyers

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A major turning point with respect to the legality of physician-assisted death (also known as medical assistance in dying, or "**MAID**" for short) came in 2015 with the Supreme Court of Canada's decision in *Carter v Canada (Attorney General)*.[1] Since that time, federal legislation has been updated and the option of physician assistance in dying has introduced several important considerations in respect of incapacity and estate planning.

Historically, MAID was prohibited under the Canadian *Criminal Code*.[2] The Supreme Court, however, found that the provisions prohibiting MAID infringed upon the right of Canadians to life, liberty and security of the person, in violation of the Canadian *Charter of Rights and Freedoms*.[3] The Court suspended the invalidity of the prohibition against MAID to allow the federal government the opportunity to update legislation to reflect this landmark decision.[4] In 2016, *An Act to amend the* Criminal Code *and to make related amendments to other Acts (medical assistance in dying)*[5] received Royal Assent. The resulting amendments decriminalized MAID and provided criteria for its authorized access by Canadians.

We take this opportunity to briefly review the continually-evolving state of the law involving MAID and its eligibility requirements, and to review a few possible implications for estate lawyers and related professionals.

Who Has Been Able to Access MAID?

Until recently, MAID was available only to individuals able to satisfy the following test:

a) they are eligible - or, but for any applicable minimum period of residence or waiting period, would be eligible - for health services funded by a government in Canada;

b) they are at least 18 years of age and capable of making decisions with respect to their health;

c) they have a grievous and irremediable medical condition;

d) they have made a voluntary request for medical assistance in dying that, in particular, was not made as a result of external pressure; and

[1] [2015] 1 SCR 331.
[2] RSC 1985, c C-46.
[3] Enacted as Schedule B to the *Canada Act 1982*, 1982, c 11 (UK), which came into force on April 17, 1982.
[4] *Supra* note 1; *Carter v Canada (Attorney General),* [2016] 1 SCR 13.
[5] SC 2016, c 3.

e) they give informed consent to receive medical assistance in dying after having been informed of the means that are available to relieve their suffering, including palliative care.[6]

As it currently stands, an individual who qualifies for MAID must provide express consent to receive it immediately prior to the procedure and their natural death must be "reasonably foreseeable" as a result of their condition, amongst other requirements outlined in the *Criminal Code*.[7]

How Are Eligibility Rules For MAID Changing?

A number of individuals and groups, including Dying with Dignity Canada, have advocated for the amendment of MAID eligibility requirements to provide for the option of providing advanced requests for MAID. Country-wide surveys suggest that Canadians from across the country are both highly engaged and generally supportive of the enhancement of access to MAID.

In *Truchon c Procureur général du Canada,*[8] the Quebec Superior Court of Justice considered the constitutional validity of the requirement that the natural death of individuals accessing MAID be reasonably foreseeable. Ultimately, the Court found that this requirement infringed the applicants' fundamental rights under sections 7 and 15 of the *Charter* and declared these provisions of Quebec and Canadian MAID laws unconstitutional. Rather than appealing the *Truchon* decision, the federal government announced that it would propose legislative amendments to enhance access to MAID. Since then, legislators have been tasked with finding a better balance between the rights of those with grievous and irremediable medical conditions to die with dignity on one hand, and the protection of individuals who are vulnerable and whose capable wishes can no longer be confirmed on the other.

Proposed legislative amendments to enhance access to MAID further to the *Truchon* decision and in response to complaints regarding inaccessibility were ultimately introduced by way of Bill C-7 in 2020.[9] Most notably, Bill C-7 sought to repeal the provision requiring a person's natural death to be reasonably foreseeable, and to permit access to MAID by individuals who had previously consented to receive it but are no longer capable on the basis of their prior consent and agreement with the medical practitioner to receive MAID.

Bill C-7 recently received Royal Assent, significantly enhancing the class of individuals who are able to access MAID.

Can an Attorney or Guardian of Personal Care Consent to MAID?

As it currently stands, although the scope of authority of an attorney or guardian of personal care (or another substitute decision-maker authorized to act under the *Health Care Consent Act*) are broad, in order to access MAID, it is currently the patient him/herself who mush

[6] *Criminal Code*, *supra* note 2, s 241.2(1).
[7] *Ibid*, ss 241.2(2)(d), 241.2(3)(h).
[8] 2019 QCCS 3792.
[9] Bill C-7, *An Act to amend the Criminal Code (medical assistance in dying)*, 1st Sess, 43rd Parl, 2020.

consent to its administration. What is currently being contemplated is a change to the time at which consent must be provided, not the extension of such rights to substitute decision-makers.

What Impact Does MAID Have on Life Insurance?

The terms of life insurance policies typically address the issue of whether a beneficiary will be entitled to the insurance proceeds if the insured commits suicide. Policy terms typically include a restriction as to the payout of the policy if the insured dies by his or her own hand within a certain number of years from the date on which the policy is taken out (most often two years).

The change in the law regarding MAID raised concerns in terms of whether it could be distinguished from suicide and should, accordingly, attract different treatment under the terms of a life insurance policy. Depending on the terms of the policy, the definition of suicide as it relates to voiding a life insurance policy may or may not encompass MAID. Accordingly, early on, there was some concern that MAID could have a significant impact on the implementation of the estate plans of those who chose to access it. Since then, the Ontario government has implemented legislation that provides protection and clarity for patients who have accessed MAID and their families.[10] The legislation specifies that MAID does not impact a person's rights that otherwise exist under a contract or statute, including life insurance policies or other survivor benefits, unless an express contrary intention appears in the statute.[11]

What Impact Might MAID Have on Estate Litigation?

We are beginning to see estate disputes where the deceased accessed MAID. Some practitioners may be beginning to encounter the issue of whether MAID may impact a will challenge or other challenged disposition on the basis of the deceased's lack of mental capacity and, if so, how.

Capacity is task-, time- and situation-specific. Presumably, the standard of capacity applying to the decision to access MAID is that required to make other personal care decisions, such as receiving or refusing medical treatment. Section 45 of the *Substitute Decisions Act, 1992*,[12] defines incapacity for personal care as follows:

> A person is incapable of personal care if the person is not able to understand information that is relevant to making a decision concerning his or her own health care, nutrition, shelter, clothing, hygiene or safety, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.

The standard for testamentary capacity typically applied remains that set out in the old English authority of *Banks v Goodfellow*.[13] While, historically, standards of mental capacity were viewed as hierarchical, recent case law and commentary have strayed from this understanding, instead viewing the different standards of mental capacity as just that: different. Courts will

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[10] *Medical Assistance in Dying Statute Law Amendment Act, 2017*, SO 2017, c 7.
[11] *Excellent Care for All Act, 2010*, SO 2010, c 14, s 13.9.
[12] SO 1992, c 30.
[13] (1870) LR 5 QB 549.

consider whether an individual understood the nature of the decision being made and appreciated the reasonably foreseeable consequences of their decision.

While possessing the capacity to confirm consent to obtain MAID may not correspond to testamentary capacity, it may nevertheless become evidence suggestive of a degree of mental capacity that is valuable (in conjunction with other evidence) in establishing that a last will and testament executed shortly before death is valid. Similarly, the evidence of those administering MAID may be of considerable relevance.

Conclusion

Some clients may ask us during the incapacity and estate planning process about MAID and under what circumstances it may be available.

As with other end-of-life preferences, clients should be encouraged to communicate their wishes with their loved ones. A recent decision of the Nova Scotia Court of Appeal saw a scenario in which a wife of nearly 50 years petitioned to prevent her husband from receiving MAID after he had told her of his plan to access assisted death, highlighting the importance of having open discussions with family regarding this aspect of end-of-life care.[14]

[14] *Sorenson v Swinemar*, 2020 NSCA 62. The wife's application and appeal were unsuccessful, and the husband accessed MAID the day after the Court of Appeal's decision was released.

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Modern Families: Assisted Human Reproduction, Private Sperm Donations & The Deciphering of Parentage

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For many people, regardless of their age, sex or sexual orientation, biological complications to reproduction affect their ability to naturally conceive a child, thereby necessitating the use of donated sperm or ova, or both, and/or insemination or other assisted human reproductive procedures such as *in vitro* fertilization. As a result of these complications, federal and provincial governments have adapted their laws regarding assisted human reproduction and parentage to facilitate a process of family planning more conducive to these realities. For many of these laws, the genesis of change has been the Court and reflects the Court's reaction to the biological restrictions on family planning within the LQBTQ+ community (see *Rutherford v. Ontario (Deputy Registrar General),*[1] *A.A. v. B.B. and C.C.*[2] and *Grand v. Ontario (Attorney General)*[3]).

While the circumstances driving the need for reproductive assistance vary greatly (i.e., singles, heterosexual or homosexual couples, or arrangement between any combination of those three), the process of conceiving a child and becoming a parent is the same for all persons and can be quite cumbersome to navigate, especially given the intersection between assisted human reproduction and criminal law.

Restrictions on the Donation of Gametes (Sperm and Eggs) or In Vitro Embryos

In order to be a sperm or ova donor in Canada, the donor must be eighteen years or older[4] and must provide written consent for the use of their genetic material.[5] The same is true regarding the posthumous use of someone's sperm or egg; they must have previously consented to the use of their genetic material.[6] Similarly, an *in vitro* embryo donor must provide their written consent for the use of their *in vitro* embryo.[7]

Prohibition on Financial Gain and the Reimbursement of Expenses

Under the *Assisted Human Reproduction Act* ("*AHRA*"), the donation of sperm or ova must be altruistic, that is, the purchase, or offer to purchase, sperm, ova or *in vitro* embryos is

[1] *M.D.R. v. Ontario (Deputy Registrar General),* 2006 CanLII 19053 (Ont. S.C.J.)
[2] *A.A. v. B.B. and C.C.* 2007 CarswellOnt 2 (C.A.)
[3] *Grand v. Ontario (Attorney General)* 2016 CarswellOnt 8390 (S.C.J.)
[4] *Assisted Human Reproduction Act*, SC 2004, c 2, as am, at s.9
[5] *Ibid* at s.8(1)
[6] *Ibid* at s 8(2)
[7] *Ibid* at s.8(3)

prohibited in Canada.[8] It is a criminal offence to violate these provisions. If found guilty, they could face a fine between $250,000.00 and $500,000.00 and/or between five and ten years in jail.[9]

However, the donor is entitled to the reimbursement of expenses reasonably related to the course of donating the sperm or ova or the maintenance and transportation of an *in vitro* embryo as outlined in the *AHRA*[10] and sections 2 and 3 of the *Reimbursement Related to Assisted Human Reproduction Regulations* ("*Regulations*").[11] Further guidance on these expenditures is available in Health Canada's "Guidance Document: *Reimbursement Related to Assisted Human Reproduction Regulations.*"[12]

Form and Substance of a Request for Reimbursement

A request for reimbursement must be made by the donor in writing, dated and signed. Additionally, any relevant receipts must be provided.[13] The *Regulations* contain specific and detailed requirements to document these requests.

If applicable, the reimbursement request must include a copy of any relevant written referral provided by a treating physician in Ontario prior to the incurrence of the expense.[14]

Automobile Travel Expenses (for which no printable receipt is provided (such as Uber))

If automobile travel expenses are being requested, no receipt is required. However, the reimbursable amount will depend on the kilometres travelled and the CRA's allowance rate for the relevant year.[15]

Distribution of Sperm and Ova Prohibited, Subject to Regulations

The distribution of sperm (that is, sperm that is not intended to be used by the spouse of the sperm donor) and ova (that is, ova intended to be used by another female that is not the donor or their spouse) is prohibited unless they have been tested; obtained, prepared, preserved, quarantined, identified, labelled and stored and its quality assessed; and, the donor has been screened and tested, and the donor's suitability has been assessed, all in accordance with the

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[8] *Ibid* at s.7(1) to (2)
[9] *Ibid at* s.60(a) to (b)
[10] *Ibid at* s.12(1)(a) to (b)
[11] *Reimbursement Related to Assisted Human Reproduction Regulations,* SOR/2019-193, as am.
[12] Canada, Guidance Document: Reimbursement Related to Assisted Human Reproduction, (Ottawa: Health Canada, 2019)
[13] *Supra* note 4 at s.12(2)
[14] *Ibid* at s.6
[15] *Supra* note 11 at s. 5. The CRA outlines the automobile allowance rates at any given year online on the Government of Canada website at: https://www.canada.ca/en/revenue-agency/services/tax/businesses/topics/payroll/benefits-allowances/automobile/automobile-motor-vehicle-allowances/automobile-allowance-rates.html

regulations. The same is true regarding ova obtained from a donor that is intended to be used by the donor as a surrogate.[16]

Violating these provisions is a criminal offence. If found guilty a person, they could face a fine between $100,000.00 and $250,000.00 and/or between two and five years in jail.[17]

Presumptions of Parentage in Sperm, Egg, and In Vitro Donations

Under the *Children's Law Reform Act* ("*CLRA*"),[18] as amended by the *All Families are Equal Act*, the donor of sperm, ova or *in vitro* embryos is not, by law, a parent to the child unless, in the case of sperm, the donation is performed through sexual intercourse.[19] In that case, unless the sperm donor consented pre-conception to non-parentage,[20] the person whose sperm was used to conceive the child through sexual intercourse is a parent.[21]

Furthermore, unless the contrary is proven on a balance of probabilities, if the child was conceived through sexual intercourse, a person is presumed to be the parent of the child under 7(1) of the *CLRA* if that person:

(a) was the birth parent's spouse at the time the child was born;

(b) was married to the birth parent by marriage that was terminated by death, judgement, or divorce granted within 300 days before the child was born;

(c) was living in a conjugal relationship with the birth parent before the child's birth and the child was/were born within 300 days after they ceased living in a conjugal relationship with the birth parent;

(d) certified the child's birth as a parent under the *Vital Statistics Act*[22], or similar act within Canada; or,

(e) was found to be a parent by of the child by a Court of competent jurisdiction outside of Ontario.[23]

If any of these presumptions applies to more than one person, that presumption is deemed not applicable for the purpose of determining parentage and any interested party or parties whose presumption is negated may file an application for the declaration of parentage under s. 13 of the *CLRA*.[24]

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[16] *Supra* note 4 at s.10(2) to (3)
[17] *Ibid* at s.61(a) to (b)
[18] *Children's Law Reform Act*, R.S.O. 1990, c. C.12, as am.
[19] *Ibid* at s.7(1)
[20] *Ibid* at s.7(4) and (5)
[21] *Ibid* at s.7(1)
[22] *Vital Statistics Act*, R.S.O. 1990, c. V.4, as am.
[23] *Supra* note 19 at s.7(2)(1) to (5)
[24] *Ibid* at s.7(3). Currently, there does not appear to be any caselaw dealing with the consequences of negating the presumptions which apply to two or more people, nor does the *CLRA* specifically provide for a remedy for this

If the birth parent who conceived either through the insemination of donor sperm or assisted reproduction, including *in vitro* fertilization of an embryo, had a spouse (meaning a person to whom the birth parent is married or with whom the birth parent is living in a conjugal relationship outside marriage, as defined by the *CLRA*)[25] at the time of conception, that spouse is a parent of the child,[26] unless that spouse did not consent to being a parent or they previously consented to being a parent but withdrew their consent;[27] the birth parent was a surrogate;[28] or the child is conceived after the death of a person declared to be a parent of the child posthumously pursuant to s.12 of the *CLRA*.[29]

Pre-Conception Parenting Agreement

Prior to the conception of a child, a birth parent and other relevant parties may enter into an enforceable written agreement regarding the parentage of the child. Pursuant to the *CLRA*, this document is referred to as a "Pre-Conception Parenting Agreement".[30]

A Pre-Conception Parenting Agreement must be entered into prior to the conception of the child to displace any presumptions of parentage. In the case of *M.R.R. v J.M.*, the Ontario Superior Court of Justice confirmed that a retroactive attempt (in this case, nine months after the child was born) to contract out of the presumption that someone who donates sperm through sexual intercourse is a parent of the child is non-binding.[31]

Parties may only enter into a pre-conception parenting agreement if: there are no more than four parties to the agreement; the birth parent is not a surrogate and is a party to the agreement; and, if applicable, the sperm donor who donated through sexual intercourse is a party to the agreement; or, if applicable, the spouse of the birth parent is a party to the agreement if the child was conceived either through assisted reproduction, such as *in vitro fertilization*, or insemination.[32]

The spouse of the birth parent need not be party to the agreement (in the case of *in vitro* or insemination) if the spouse provides written consent not to be a parent of that child and does not withdraw their consent. Each party to the pre-conception agreement will be recognized, in law, as the parents of the child on the birth of that child.[33]

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negation under the applicable section. While the *CLRA* permits four or more people to be a parent of a child and the spirit of the *All Families are Equal Act*, which amended the *CLRA*, is to streamline the issue of parentage, s. 7(3) effectively requires interested parties

[25] *Supra* note 19 s.1(1)
[26] *Ibid* at s.8(1) to (2)
[27] *Ibid* at s.8(3)
[28] *Ibid* at s.8(4)
[29] *Ibid* at s.8(4)
[30] *Ibid* at s.9(1)
[31] *M.R.R. v J.M.*, 2017 ONSC 2655 (CanLII) at para. 65-66, 82-83
[32] *Supra* note 19 at s.9(2)
[33] *Ibid* at s.9(4)

Displacing the Presumption of Parentage Post-Conception by a Sperm Donor Through Sexual Intercourse

The Court in *M.R.R. v J.M.* further analyzed the availability of a declaration of non-parentage under section 13 of the *CLRA* to a sperm donor who donated sperm through sexual intercourse without a valid Pre-Conception Parenting Agreement. In doing so, the Court considered the settled intention of the parties, whether the settled intension changed post-conception and the best interest of the child. With regard to the parties' intentions, the Court found that the parties acted in a way which was consistent with the settled intention that the sperm donor was not a parent.[34] The Court also found that "[examining] the "best interests of the child" in a parentage case could produce results that directly contradict the spirit and purpose of Part I of the *CLRA*."[35] It further stated that, "Part I of the amended *CLRA* was designed to protect the security of children regardless of family composition; a family can be comprised of one parent and one or more children."[36] Finally, the Court determined that, in cases where both parties had the settled intentions that the birth parent would be a single parent, the argument that financial support from the sperm donor would be in the best interest of the child is not consistent with the spirit of the *CLRA* of providing parents with autonomy in defining their family unit, including excluding known sperm donors or surrogates as parents and could, if permitted, discriminate against those who choose to be single parents prior to the conception of the child.[37] As such, "the court is not required to look to the child's 'best interests' in the traditional sense in every case when making a declaration of parentage" under section 13 of the *CLRA*."[38]

Although the Court in *M.R.R. v J.M.* displaced the presumption of parentage for the sperm donor who conceived the child through sexual intercourse, Justice Fryer was clear in her decision that,

> This case *should not stand for the proposition that parties are not required to reduce their agreement to writing*. Rather the facts in this case highlight how crucial it is for parties to have a written agreement clearly defining their intentions before a child is conceived. Decisions as to whether or not to be a parent to a child are far better reached in a dispassionate setting than in the emotional place following the conception and birth of the child. [Emphasis added.][39]

Summary of Parentage

In summary, regarding parentage of a child conceived through assisted human reproduction, such as *in vitro* fertilization, or through sexual intercourse and not for the purpose of surrogacy,

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[34] *Supra* note 34 at para 88-135
[35] *Ibid* at 149
[36] *Ibid* at 149
[37] *Ibid* at 149
[38] *Ibid* at 150
[39] *Ibid* at 164

In all cases, the birth parent *is* a parent of the child;

In all cases of insemination or assisted human reproduction, such as *in vitro* fertilization, the sperm donor *is not* a parent;

In all cases of insemination or assisted human reproduction, such as *in vitro* fertilization, the egg donor *is not* a parent;

In all cases of insemination or assisted human reproduction, such as *in vitro* fertilization, the spouse of the birth parent *is* a parent, unless the spouse of the birth parent consents to non-parentage and does not withdrawn their consent; and,

In all cases of donation of sperm by sexual intercourse, subject to an agreement, in writing, whereby the donor consents to non-parentage prior to conception of the child, the sperm donor *is* a parent.

In all cases of donation of sperm by sexual intercourse the presumption is that anyone under s.7(2)(1) to (5) *is* a parent, unless proven otherwise on a balance of probabilities, including the spouse of the birth parent at the time the child was born.

Restrictions on Surrogacy and the Prohibition on Financial Gain

A surrogate must be twenty-one years or older.[40] Surrogacy must also be an entirely altruistic act — that is, it is prohibited to pay, offer to pay, or advertise payment for a surrogate's services. Furthermore, it is prohibited to pay or accept payment for the arrangement of a surrogate's services, offer to pay or accept payment for the arrangement of a surrogate's services or advertise payment or receipt of payment for the arrangement of a surrogate's services.[41] If any person violates these provisions and is found guilty, they could face a fine between $100,000.00 and $250,000.00 and/or between two and five years in jail.[42]

Reimbursement of Surrogate's Expenses

Surrogates are entitled to be reimbursed for some expenses incurred during their surrogacy as outlined in the *AHRA*[43] and section 4 of the *Regulations*.[44] Further guidance on these expenditures is available in Health Canada's "Guidance Document: Reimbursement Related to Assisted Human Reproduction Regulations."[45]

Criminal Sanctions for Violation of the AHRA and Regulations Regarding Reimbursement of Surrogate's Expense

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[40] *Supra* note 4 at s.6(4)
[41] *Ibid* at s.6(1) to (3)
[42] *Ibid* at s.61(a) to (b)
[43] *Ibid at* s.12(c)
[44] *Supra* note 11 at s.4
[45] *Supra* not 12

The reimbursement or payment of funds for any other purpose not permitted by the *Regulations* is a criminal offence. If any person violating these provisions and is found guilty, they could face a fine between $100,000.00 and $250,000.00 and/or between two and five years in jail.[46]

Unenforceability of a Surrogacy Agreement

Under the *CLRA*, a surrogacy agreement (that is, a written agreement between a surrogate and one or more persons respecting a child to be carried by the surrogate, in which, the surrogate agrees to not be a parent of the child, and each of the other parties to the agreement agrees to be a parent of the child)[47] is unenforceable and may only be used as evidence of the parties' intentions, including the intended parent(s)' intention to be a parent and the surrogate's intention not to be a parent of the child.[48]

Consequently, if a surrogate refuses to consent to relinquish her rights as a parent after the child's birth, the intended parents must bring an application.

Parentage and Surrogacy

A surrogacy agreement must be in writing[49] and recorded prior to the conception of the child, with all parents and the surrogate receiving independent legal advice. The maximum number of parties to a surrogacy agreement permitted by the *CLRA* is five, being the surrogate and up to four intended parents.[50] Additionally, a precondition to a surrogacy agreement is the conception of the child through assisted reproduction such as *in vitro* fertilization.[51] An oral agreement is not enforceable as a surrogacy agreement.[52]

A surrogate must consent in writing to the relinquishment of their entitlement to parentage of the child no earlier than 7 days after the birth.[53] If this is done, the child becomes the child of the intended parents who were parties to the surrogacy agreement and the child ceases to be the surrogate's child.[54] Between the date of the child's birth and the seventh day, all parties to the surrogacy agreement are entitled to share the rights and responsibilities of a parent.[55] There is no requirement for any party to a surrogacy agreement to apply to the court for the declaration of parentage pursuant to s. 13 of the *CLRA* under these circumstances.[56]

If the surrogate refuses to provide the consent required to relinquish her rights has a parent to the child (or if the surrogate has died or cannot be located) any party to the surrogacy

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[46] *Supra* note 4 at s.61(a) to (b)
[47] *Supra* note 19 at s.10
[48] *Ibid* at s.10(9)
[49] *Ibid* at s.10(1)
[50] *Ibid* at 10(2)(3)
[51] *Ibid* at s.10(2)(4)
[52] *M.L. v. J.C.*, 2017 ONSC 7179 a para. 64-65
[53] *Supra* note 19 at s.10(4)
[54] *Ibid* at s.10(3) and (4)
[55] *Ibid* at s.10(5)
[56] *Ibid* at s.10(3)

agreement may make an application to the Court for the declaration of parentage pursuant to s.10(6) and 13 of the *CLRA*. The Court may either grant the declaration sought in the application or make any other declaration respecting the parentage of the child born to the surrogate. In doing so, the Court must consider the best interest of the child as the paramount consideration.[57]

For the purpose of clarification, no more than four persons may be a parent of the child. If that limit is exceeded and the surrogate has relinquished her parentage, the parties to the agreement must apply to the Court for a declaration of parentage of the child under s. 11(1) and (4) of the *CLRA*.[58]

Limitation Period for the Application for Declaration of Parentage Under the CLRA

An application for the declaration of parentage must be made before the child's first birthday.[59]

In summary,

> If there are no more than four intended parents and the surrogate has relinquished her rights as a parent in writing no earlier than seven days after the child's birth, the intended parents *are* parents and *do not* need to file an application for the declaration of parentage.[60]
>
> If there are no more than four intended parents and the surrogate has not provided written consent to relinquish her rights as a parent no earlier than seven days after the birth, *an application for the declaration of parentage under s. 10 and 13 of the CLRA is required.*[61]
>
> If there are more than four intended parents, whether or not the surrogate has provided written consent to relinquish her rights as a parent within the requisite time period, *an application for the declaration of parentage under s. 11 and 13 of the CLRA is required.*[62]

Conclusion

While the changes to the *CLRA* have certainly provided all persons more autonomy in family planning, the intersection between assisted human reproduction or sperm donation and parentage under the *CLRA* and the substantial regulations and potential criminal sanction under the *AHRA* creates a complicated legal regime. Prospective parents, donors, and surrogates all need advice as to their respective rights and responsibilities before a child is conceived,

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[57] *Ibid* at s.10(8)
[58] *Ibid* at s. 11(1) and (4)
[59] *Ibid* at s.11(2)(b) and s.13(5)(1)
[60] *Ibid* at s. 10(3)
[61] *Ibid* at s.10 and 13
[62] *Ibid* at s.11 and 13

Lawyers practicing in this field need continued legal education on these issues in order to provide adequate advice to their clients.

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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.
>
> — 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/.