Clearing the air: Supreme Court upholds federal carbon pricing regime

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"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." – Chief Justice Wagner

The Supreme Court of Canada released its decision yesterday in three references out of Saskatchewan, Ontario and Alberta concerning the constitutionality of the *Greenhouse Gas Pollution Pricing Act*, S.C. 2018, c. 12, s. 186 (the GGPPA). In a 6-3 decision, the Supreme Court upheld the GGPPA as a valid exercise of the federal government's power to legislate for the peace, order and good government of Canada (the POGG power).

The Court's decision represents a major victory for the Government of Canada[1], upholding its flagship climate policy and affirming its constitutional authority to establish minimum national standards of carbon pricing. Importantly, this decision provides much needed clarity and finality with respect to federal and provincial jurisdiction over climate policy. Further, the Supreme Court's reasoning, particularly with respect to its application of POGG, may have implications for future energy-related division of powers disputes, including the ongoing constitutional challenge to the federal *Impact Assessment Act* currently before the Alberta Court of Appeal.

Background

The GGPPA is the cornerstone of the Government of Canada's climate policy. It is designed to mitigate the effects of climate change by establishing minimum national standards of carbon pricing. Part 1 of the GGPPA establishes a fuel charge that applies to producers, distributors, and importers of various carbon-based fuels, while Part 2 provides for output-based limits on large industrial emitters.[2]

The GGPPA ensures a minimum national price on greenhouse gas (GHG) emissions by operating as a backstop. Provinces and territories have the flexibility to design their own GHG pricing policies. The GHG pricing mechanisms described in Parts 1 and 2 only apply in provinces or territories that fail to adopt their own GHG pricing mechanisms, or whose mechanisms are determined by the Governor in Council to fall short of the stringency required by the GGPPA.

Several provinces challenged Parts 1 and 2 and related schedules of the GGPPA as being an unconstitutional intrusion into provincial jurisdiction. The legislation was upheld by majorities of the Saskatchewan and Ontario Courts of Appeal, but found to be unconstitutional by the Court of Appeal of Alberta.

In total, eight justices at the provincial appellate level sided with the federal government, while seven sided with the challenging provinces. Appeals from all three decisions were argued together on Sept. 23 and 24, 2020. In addition to the Attorneys General of Canada, Alberta, British Columbia, Ontario, Québec, New Brunswick, Manitoba, and Saskatchewan, submissions were made by dozens of other interveners on both sides of the issue.

The majority decision

The issue, at its core, was whether Parliament had the constitutional authority to enact the GGPPA. Chief Justice Wagner, writing for a majority of six judges, held that the GGPPA is a constitutional exercise of the federal government's POGG power. This analysis consists of two stages: first, the court must determine what are the purpose and effects (often referred to as the "pith and substance") of the legislation. Then, the court must classify the matter under one of the heads of power set out in sections 91 and 92 of the *Constitution Act, 1876*.

a) Pith and Substance of the GGPPA – Minimum National Standards of GHG Price Stringency

Chief Justice Wagner characterized the true subject matter of the GGPPA as "establishing minimum national standards of GHG price stringency to reduce GHG emissions." In doing so, he rejected broader characterizations put forward by many of the provinces, and by the majorities of the Courts of Appeal for Ontario and Alberta, that the pith and substance is the regulation of GHG emissions.

In his reasons, Chief Justice Wagner emphasized the importance of describing the pith and substance of a challenged statute as precisely as possible. The description, he noted, should capture the law's essential character in terms that are as precise as the law will allow. Wagner CJC's review of the language in the GGPPA itself (including the title and the preamble), the legislative history, and the statute's legal and practical effects, demonstrated that the focus was on national standards of GHG *pricing* and not just minimum national standards or GHG emission regulations generally.

Agreeing with Associated Chief Justice Hoy's concurrence in the Court of Appeal for Ontario, Chief Justice Wagner also held that it may be permissible to consider the legislative choice of means in determining a statute's pith and substance. In cases where the legislator's choice of means is central to the legislative objective, treating the means as irrelevant to the analysis would make it difficult to define the matter of the statute precisely. Rejecting the broader characterizations advanced by the majorities of the Court of Appeal for Ontario and the Court of Appeal of Alberta (and all the provincial attorneys general, except British Columbia), Chief Justice Wagner recognized that a national GHG pricing scheme was not merely the means of achieving GHG emissions reductions, it was the entire matter of the statute.

b) Classification of the GGPPA –the National Concern Branch of POGG

Once the "pith and substance" of the statute has been determined, the second stage of the analysis is to classify the statute under one of the federal or provincial heads of power set out in sections 91 and 92 of the *Constitution Act, 1867*. The Attorney General of Canada argued that Parliament had the constitutional authority to enact the GGPPA by virtue of its POGG power, specifically the doctrine enabling Parliament to legislate with respect to matters of "national concern."

A majority of the Court confirmed that finding that a matter is one of national concern involves a three-step analysis:

1. The matter is of sufficient concern to the country as a whole to warrant consideration as a possible matter of national concern;
2. The matter was "single, distinct, and indivisible," in that the specific and identifiable matter is qualitatively different from matters of provincial concern and evidence establishes provincial inability to deal with the matter; and
3. The matter has a scale of impact on provincial jurisdiction that is reconcilable with Constitutional division of powers.

Wagner CJC agreed with the federal government's position. As a threshold matter, Canada presented sufficient evidence that establishing minimum national standards of GHG price stringency to reduce GHG emissions is of sufficient concern to Canada as a whole. The Majority noted that the matter at hand is critical to Canada's response to climate change and the threat it poses in Canada and around the world. There is a broad consensus among expert international bodies that carbon pricing is integral to reducing GHG emissions.

Wagner CJC went on to find that "minimum national standards of GHG price stringency to reduce GHG emissions" satisfies the singleness, distinctiveness, and indivisibility test. GHGs are specific and precisely identifiable. GHG emissions are predominantly extra provincial and international in both character and implications. The chosen regulatory mechanism – minimum national standards of GHG price stringency, implemented by way of a backstop via the GGPPA – relates to a federal role that was qualitatively distinct from matters of provincial concern.

The GGPPA is tightly focused on its distinct federal role and does not descend into the detailed regulation of GHG pricing. It is 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. The role of the GGPPA is instead to address national risks posed by insufficient provincial carbon pricing stringency. It does so in a manner distinct from provincial GHG pricing systems – on a distinctly national basis, one that neither represents an aggregate of provincial matters nor duplicates provincial GHG pricing systems.

The Majority then turned to whether there was a "provincial inability" to deal with the matter at the core of the GGPPA.

First, it noted that the provinces, acting alone or together, are constitutionally incapable of establishing minimum national standards of GHG price stringency to reduce GHG emissions. While the provinces could co-operate to establish a uniform carbon pricing

scheme, they cannot establish a national GHG pricing floor applicable in all provinces and territories at all times.

Second, a failure to include one or more provinces in this scheme would jeopardize its success in the rest of Canada. Emissions reductions that are limited to a few provinces would fail to address climate change if they were offset by increased emissions in other Canadian jurisdictions. The failure of any province to implement a sufficiently stringent GHG pricing mechanism could undermine the efficacy of the entire scheme through the risk of carbon leakage – where businesses with high levels of carbon emissions relocate to jurisdictions with less stringent carbon pricing policies.

Third, a province's failure to act or co-operate would have grave consequences for extra provincial interests. The Majority rejected 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." Each province's emissions are clearly measurable and contribute to climate change.

Finally, the Majority held that the scale of impact of the GGPPA on the provinces' jurisdiction was acceptable. Although the GGPPA had a clear impact on provincial autonomy to regulate GHG pricing from a local perspective, this impact was qualified and limited. The matter was limited only to the narrow scope of pricing of GHG emissions. Furthermore, the provinces were free to design and legislate any GHG pricing system as long as it met the minimum national standards of price stringency. The GGPPA took on a more "supervisory" aspect, designed only to address provincial incapacity. The risk of grave extra provincial and international harm justified this limited impact on provincial jurisdiction.

c) The Levies: Valid regulatory charges

The Court was also asked to determine whether the fuel and excess emission charges imposed by the GGPPA were constitutionally valid regulatory charges or unconstitutionally disguised taxes, as was alleged by the Province of Ontario. Wagner CJC found that the levies imposed by the GGPPA had a sufficient nexus with the regulatory scheme to be considered valid regulatory charges. Their purpose was to advance the GGPPA's regulatory purpose by altering behaviour, and as such, they could not be characterized as taxes.

The dissenting judgments

Three Justices dissented, either in whole or in part, each with separate reasons.

Justice Coté, dissenting in part, agreed with the Chief Justice's formulation of the national concern branch analysis, and agreed that Parliament has the power to enact legislation establishing minimum national standards of price stringency to reduce GHG emissions. She found, however, that the GGPPA as drafted is unconstitutional, as it vests inordinate discretion in the Governor in Council, with no meaningful limits on Parliament's executive power. In her view, the GGPPA could not fit within a matter of national concern, because the minimum standards are set by the Executive rather than by the statute. She also held that sections of the GGPPA conferring on the executive the

power to amend the GGPPA were unconstitutional as contrary to parliamentary sovereignty, the rule of law, and separation of powers.

Justice Brown, dissenting, found that the GGPPA's subject matter fell squarely within provincial jurisdiction, and therefore could not be supported by the national concern branch of POGG. In his view, the backstop nature of the legislation – premised on the provinces having authority to enact their own GHG pricing mechanisms – was fatal to any assertion that the legislation could be valid under Parliament's residuary power. He also disagreed with the Majority's characterization of the statute's pith and substance, proposing instead two separate characterizations for Parts 1 and 2 of the GGPPA.

In his dissenting reasons, Justice Rowe agreed with Justice Brown's analysis and conclusion that the GGPPA is *ultra vires* Parliament, but wrote separately about the nature of the POGG power. In his view POGG only confers residual authority, namely the authority to legislate in relation only to matters that "would otherwise fall into a jurisdictional vacuum." As such, it is available only as a power of last resort.

Implications going forward

The Supreme Court's decision marks a major victory for the Government of Canada. It provides clarity and finality with respect to jurisdiction over carbon pricing, as well as regulatory certainty for market participants.

Furthermore, this decision has important implications for energy-related division of powers jurisprudence in Canada. First, it contributes to a growing and important body of recent case law that is etching out provincial and federal jurisdictional boundaries over modern environmental legislation.[3] In recent years, various levels of government have become increasingly motivated to regulate in this area, which has invariably led to disputes, uncertainty and judicial intervention. The Supreme Court's decision has provided important clarity and regulatory certainty with respect to the regulation of GHG's emissions, as well as the application of POGG in the environmental context.

Second, the Court's decision may have an impact on ongoing and future division of powers disputes, including the constitutional challenge to the *Impact Assessment Act*[4] (the IAA Reference), currently before the Alberta Court of Appeal. In particular, and while the subject matter in that case involves the constitutionality of federal environmental assessments under the *Impact Assessment Act*, parties in that case will be studying closely the Supreme Court's recent application of POGG. Like the decision in the present case, the IAA Reference will have important ramifications for federal-provincial jurisdiction over environmental assessments.

[1] Borden Ladner Gervais LLP acted as co-counsel to the Attorney General of Canada before the Supreme Court of Canada.

[2] Part 3 authorizes the Governor in Council to make regulations providing for the application of provincial law concerning GHG emissions to federal works and undertakings, federal land and Indigenous land located in that province, as well as to internal waters located in or contiguous with the province. Part 4 requires the Minister of the Environment to prepare an annual report on the administration of the GGPPA and

have it tabled in Parliament. The constitutionality of Parts 3 and 4 of the GGPPA was not challenged.

[3] *See, e.g.*, *Orphan Well Association v. Grant Thornton Ltd,* 2019 SCC 5 and *Reference re Environmental Management Act*, 2021 SCC 1 (the EMA Reference). Borden Ladner Gervais LLP acted as counsel in the EMA Reference to an intervener in support of the Attorney General of Canada before the Supreme Court of Canada.

[4] Borden Ladner Gervais LLP is acting as counsel to an intervener in support of the Attorney General of Alberta before the Alberta Court of Appeal.

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