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Legal update

Climate change and Canadian federalism: examining the constitutional dispute sparked by Parliament's *Greenhouse Gas Pollution Pricing Act*

October 2019
Environmental law
Climate change and sustainability

Introduction

Climate change is an increasingly central issue for governments, regulators and businesses around the world, and it is widely seen as significant risk to a sustainable future.[1] Mitigating and adapting to its effects is causing far-reaching transitions in sectors such as energy, land and agriculture, banking and finance, infrastructure, transport and industry. As a result, we are witnessing significant and ongoing legal developments at the international, national and regional levels with respect to climate change and sustainability.[2]

This article looks at a recent legal development in Canada regarding climate change and examines how Parliament's introduction of minimum national standards for greenhouse gas emissions, pursuant to the *Greenhouse Gas Pollution Pricing Act* (the *GGPPA* or the *Act*),[3] has sparked a constitutional dispute about the appropriate balance of power between the federal and provincial legislatures in regulating greenhouse gas emissions.

Specifically, this article looks at two recent appellate court decisions dealing with the constitutionality of the *GGPPA*: one from the Saskatchewan Court of Appeal and one from the Ontario Court of Appeal.[4] In each case, a majority of the Court of Appeal upheld the constitutionality of the *GGPPA* in the face of a strong dissenting opinion. And in each case, the dissenting minority took the position that the majority had erred in its characterization and classification of the *Act* under the "national concern" branch of Parliament's "peace, order and good government" power (the POGG power), an important but rarely-invoked federal constitutional authority deriving from the preamble to section 91 of Canada's *Constitution Act, 1867*.[5]

The Supreme Court of Canada is expected to hear appeals from these two decisions in January 2020.[6]

Although both courts of appeal upheld the constitutionality of the *GGPPA*, the multiple dissenting opinions create uncertainty. By the time the Supreme Court considers the *GGPPA*, there will have been at least five judicial analyses of *Act*'s constitutionality.[7] The Supreme Court could endorse any one of them. Further, because the leading Supreme Court decision on the national concern branch of the POGG power, *R v Crown Zellerbach*,[8] is over 30 years old, the Supreme Court could also take this opportunity to revisit the test for the national concern branch altogether.

This article suggests that one way to analyze the pending appeals, and understand the divergence between the judges who found the *Act* constitutional and those who found the *Act* unconstitutional, is to focus on the correlation that emerges between the opinions that relied on the notion of "national standards" to characterize the *Act* and the opinions

that classified the *Act* as a matter of "national concern" falling within Parliament's legislative authority under the POGG power. Tracing this correlation does not resolve the issues surrounding the *GGPPA*, but it does provide a lens for thinking about some questions the Supreme Court might grapple with when it considers the constitutionality of the *Act* in the new year.

The *GGPPA*

On March 27, 2018, the federal government introduced the *GGPPA* in Parliament as part of the *Budget Implementation Act, 2018, No. 1*. On June 21, 2018, the *Act* received royal assent, becoming law.

The *GGPPA* places a price on carbon pollution in order to reduce greenhouse gas emissions and encourage innovation and the use of clean technologies.[9] It does so in two ways:

- First, it places a regulatory charge on carbon-based fuels. This charge is imposed on certain producers, distributors and importers, but is passed on to consumers both directly and indirectly. It is passed on indirectly through increases to the cost of doing business generally, and directly through the price consumers pay for carbon-based fuels. The charge will increase from 2019 through to 2022.

- Second, it establishes a regulatory trading system applicable to large industrial emitters. This system is known as an Output-Based Pricing System (the OBPS). The OBPS includes limits on emissions, a "credit" to those who operate within their limit, and a "charge" on those who exceed it. The OBPS is independent of the carbon-based fuel charge.

The *GGPPA* does not apply to all Canadian provinces. Instead, the *Act* and its regulations serve as a "backstop" in provinces that have not adopted sufficiently stringent carbon pricing mechanisms. In other words, the *Act* permits provinces to enact laws to reduce greenhouse gas emissions through whatever legislative framework they prefer, provided that the provincial laws in question satisfy the *GGPPA*'s minimum national standards.[10]

Provincial Challenges to the Constitutionality of the *GGPPA*

Four Canadian provinces have challenged the constitutionality of the *GGPPA*: Saskatchewan, Manitoba, Ontario and Alberta. The chart below outlines the pending challenges:

Constitutional Challenges to the *GGPPA* as of October 17, 2019					
No.	**Province**	**Procedure**	**Court**	**Decision**	**Status**
1	Alberta	Constitutional Reference	Alberta Court of Appeal	NA	Pending Reference
2	Ontario	Constitutional Reference	Ontario Court of Appeal	Constitutional	Decided. Pending Appeal to SCC
3	Manitoba	Application for Judicial Review	Federal Court of Canada	NA	Pending Application
4	Saskatchewan	Constitutional Reference	Saskatchewan Court of Appeal	Constitutional	Decided. Pending Appeal to SCC

As noted above, both Ontario and Saskatchewan have appealed their respective reference decisions to the Supreme Court. They are tentatively scheduled for January 14 and 15, 2020.[11]

Manitoba commenced its application for judicial review in the Federal Court of Canada in April 2019. The application remains in progress and a hearing date has not been scheduled.

Alberta brought a constitutional reference to the Alberta Court of Appeal in June 2019. Alberta has applied to have the reference expedited, so that the Alberta Court of Appeal's decision will be available by the time the Supreme Court

hears the Ontario and Saskatchewan appeals. However, Alberta's reference remains in progress. A hearing date has not been scheduled.

British Columbia and New Brunswick intervened in the Saskatchewan and Ontario proceedings, and have sought intervener status in the Alberta proceeding as well. In the Ontario and Saskatchewan proceedings, the Attorney General for British Columbia agreed with the Attorney General for Canada, arguing in support of the constitutionality of the *GGPPA* while the Attorney General for New Brunswick agreed with the Attorney General for Ontario, arguing that the *GGPPA* is unconstitutional in its entirety.

The constitutional question before the Supreme Court of Canada

The Ontario and Saskatchewan appeals to the Supreme Court will likely be heard before the Alberta and Manitoba proceedings are adjudicated at first instance. As a result, the Supreme Court's decision may render those challenges moot. Accordingly, this article focuses on the Ontario and Saskatchewan appeals.

The crux of the Ontario and Saskatchewan decisions was a constitutional question regarding the appropriate balance of power between Canada's federal and provincial governments in regulating greenhouse gas emissions.[12] The decisions were not directly concerned with the efficacy of carbon pricing or the viability of the federal government's strategy for reducing greenhouse gas emissions. In fact, both Ontario and Saskatchewan acknowledged that climate change is real and requires proactive measures.[13] Rather, the decisions concerned Ontario and Saskatchewan's disagreement with the federal government's approach to reducing greenhouse gas emissions through carbon pricing and denied that the federal government has the constitutional jurisdiction under the national concern branch to impose its chosen approach to greenhouse gas emissions on the provincial and territorial governments.

As a result, the Supreme Court's analysis of the *GGPPA's* constitutionality will likely focus on whether Parliament can use the national concern branch of the POGG power to impose minimum standards for carbon pricing on provinces that would prefer to pursue their own strategies for reducing carbon emissions. As detailed below, the applicable analysis has two main steps: (i) **characterization** of the subject matter of the *Act;* and (ii) **classification** of that subject matter under a federal head of power.

Analyzing the constitutionality of legislation in Canada

The Canadian Constitution consists of the *Constitution Act, 1982* and the *Constitution Act, 1867*.[14] In the latter, sections 91 and 92 delineate the heads of power, or jurisdictions, of Parliament and the provincial legislatures, respectively, to enact laws on various subjects.

In Canada, the approach to analyzing the constitutionality of legislation challenged on federalism grounds is well established. It has two main steps.

In the first step, "**characterization,**" the court determines the true subject matter or "pith and substance" of the challenged law. This requires examining the law's purpose and effects to identify its "main thrust." The purpose of a law is determined by examining both intrinsic evidence, such as the preamble of the law, and extrinsic evidence, such as the circumstances in which the law was enacted. The effects of a law include both its legal effects and the practical consequences of the law's application. This step is about identifying the dominant characteristic of the challenged legislation.

In the second step, "**classification,**" the court determines whether that subject matter falls within the head of power relied upon by the enacting government to support the validity of the challenged legislation. This requires a consideration of sections 91 and 92 of the *Constitution Act, 1867*.[15]

Characterizing the *GGPPA*

Saskatchewan Court of Appeal – Majority's Characterization

The Saskatchewan Court of Appeal split two ways on the characterization of the *GGPPA*.

Writing for the majority, Richards CJS held that the pith and substance of the *Act* is "the establishment of minimum national standards of price stringency for greenhouse gas emissions."[16] First, in his view, the purpose of the *Act* is aimed at greenhouse gas pricing. Among other things, this can be seen from the context in which the law was enacted, including the 2016 *Final Report* produced by the Federal-Provincial-Territorial Working Group on Carbon Pricing Mechanisms.[17] Chief Justice Richards also emphasized that the substantive provisions of the *Act* reflect this purpose because the *Act* defers to the regulatory efforts of the provinces, and comes into play only when those efforts fail to satisfy certain criteria.

Second, Richards CJS held that the *Act*'s effects are consistent with establishing minimum national standards of price stringency. Part 1 of the *Act* imposes a charge on emissions-intensive fuels and Part 2 of the *Act* puts a price on greenhouse gas emissions above prescribed levels for large industrial operations. Again, in his view, insofar as both parts only apply to provinces that have failed to establish their own acceptable standards, the *Act's* effect is to defer to the provinces' regulatory efforts.

Saskatchewan Court of Appeal – Minority's Characterization

Writing in dissent, Ottenbreit and Caldwell JJA held that the schemes in Part 1 and Part 2 of the *Act* should be characterized independently.

In their view, the dominant characteristic of Part 1 is taxation and the dominant characteristic of Part 2 is the regulation of greenhouse gas emissions. Specifically, applying the Canadian jurisprudence regarding the difference between taxes and regulatory charges, the justices found that the fuel levy in Part 1 bears the hallmarks of taxation and lacks sufficient indicia of a regulatory charge. In contrast, they found that the taxation characteristics of Part 2 are merely incidental to its main, regulatory thrust.[18]

On that basis, the dissenting minority at the Saskatchewan Court of Appeal found that Part 1 of the *Act* was a scheme of taxation and Part 2 a scheme to regulate greenhouse gas emissions.

Ontario Court of Appeal – Majority's Characterization

The Ontario Court of Appeal split three ways on characterization. Writing for the majority, Strathy CJO held that the *Act*'s pith and substance could be distilled as "establishing minimum national standards to reduce greenhouse gas emissions."[19] In his view, the means chosen by Parliament to achieve this objective is a minimum national standard of stringency for the pricing of greenhouse gas emissions.

As a result, the Ontario majority's characterization overlaps with Saskatchewan majority's characterization. The chief difference between them is that the Ontario majority distinguished price stringency as the means by which the legislation achieves its purpose whereas the Saskatchewan majority treated price stringency as an aspect of the *Act*'s purpose.

Ontario Court of Appeal – Concurring Minority's Characterization

Similarly, the limited disagreement between the majority and the concurring minority of the Ontario Court of Appeal resulted from different views about the role of "means" in the characterization analysis.[20]

Writing in concurrence with the majority, Hoy ACJO agreed that the *Act* was constitutional, but disagreed that the pith and substance of the *Act* is properly distilled as "establishing minimum national standards to reduce greenhouse gas emissions." She reasoned that the majority's characterization was too broad, and risked unnecessary federal government infringement on provincial jurisdiction. She preferred a narrower characterization that identified the specific type of standard being established. In her view, the pith and substance of the *Act* should be characterized as "establishing minimum national greenhouse gas emission pricing standards to reduce greenhouse gas emissions."[21]

The divergence between the majority and the concurring minority at the Ontario Court of Appeal regarding the role of "means" reflects a broader question about the appropriate level of abstraction at which the pith and substance of an *Act* should be analyzed. In the past, the Supreme Court has cautioned that when determining the pith and substance of a challenged law, a court should not confuse the purpose of the law with the means chosen to achieve that purpose.[22] However, the Supreme Court has not said that the characterization of a law cannot include any reference to its means. Accordingly, it remains an open question whether, in some circumstances, the choice of means may be so central to the legislative objective that the main thrust of the law is to achieve a result *in a particular way*.

Ontario Court of Appeal – Dissenting Minority's Characterization

Writing in dissent, Huscroft JA held that both Parts 1 and 2 of the *Act* are unconstitutional.

Justice Huscroft agreed with the Ontario majority that both the Saskatchewan majority and the Ontario concurring minority erred in characterizing the *Act* by focusing on the *means* Parliament chose to give effect to the *Act*'s purpose. However, he argued that while the Ontario majority's characterization avoided this problem, it introduced another one. In particular, the characterization "minimum national standards to reduce greenhouse gas emissions" leaves unanswered the question: minimum standards of what? This characterization leaves "standards" free-floating. In his view, this problem is especially serious because the issue before the court was effectively a "normative question" about whether the *GGPPA* fits under a new federal subject matter that *ought* to be recognized by the Court of Appeal pursuant to the national concern branch of the POGG power, rather than a pre-established federal subject matter.

In contrast, Huscroft J. proposed a simple characterization of the pith and substance of the *GGPPA*, namely, "regulat[ing] greenhouse gas emissions."[23]

Comparison of Characterizations of the *Act*

As a result of the divided panels at the Saskatchewan Court of Appeal and Ontario Court of Appeal, there are currently five appellate court characterizations of the *Act*'s pith and substance.

In addition, both the federal government and the Ontario government proposed characterizations of the *GGPPA* that neither court of appeal adopted.[24] The Attorney General for Canada submitted that the *GGPPA* should be characterized as "the cumulative dimensions of GHG emissions" and the Attorney General for Ontario submitted that the *GGPPA* should be characterized as "a comprehensive regulatory scheme for the reduction of greenhouse gas emissions from all sources in Canada."[25]

The following chart compares these seven characterizations:

Comparison of Characterizations of the *GGPPA*		
No	**Decision/Submission**	**Characterization**
1	Majority Decision, Saskatchewan Court of Appeal	The establishment of minimum national standards of price stringency for greenhouse gas emissions.
2	Minority Decision, Saskatchewan Court of Appeal	Part 1: a scheme of taxation. Part 2: a scheme to regulate greenhouse gas emissions.
3	Majority Decision, Ontario Court of Appeal	The establishment of minimum national standards to reduce greenhouse gas emissions.
4	Concurring Minority Decision,	The establishment of minimum national

Comparison of Characterizations of the *GGPPA*		
No	**Decision/Submission**	**Characterization**
	Ontario Court of Appeal	greenhouse gas emission pricing standards to reduce greenhouse gas emissions.
5	Dissenting Minority Decision, Ontario Court of Appeal	The regulation of greenhouse gas emissions.
6	Submission, Attorney General for Canada	The cumulative dimensions of greenhouse gas emissions.*
7	Submission, Attorney General for Ontario	The establishment of a comprehensive regulatory scheme for the reduction of greenhouse gas emissions from all sources in Canada.*
*Submitted characterization not accepted by either Court of Appeal.		

Classifying the *GGPPA*

The second step of the constitutional analysis requires a court to determine whether the characterized subject matter of an act can be classified within the head of power relied upon by the enacting government to support the validity of the challenged legislation. If the characterized subject matter of an act does not fall within a head of power available to the enacting government, then it will be found unconstitutional.

In both cases, the federal government took the position that the *GGPPA* could be classified under the "national concern branch" of Parliament's constitutional authority pursuant to the POGG power.

The National Concern Branch of the Federal Government's POGG Power

POGG power is derived from the preamble for s. 91 of the *Constitution Act, 1867*, which provides that Parliament may "make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces."[26] The POGG power is residual, in the sense that it is confined to matters not assigned exclusively either to Parliament or to the provincial legislatures. There are three "branches" of the POGG power: (1) the "gap" branch; (2) the "emergency" branch; and (3) the "national concern" branch. The only branch of the POGG power at issue in this case was the national concern branch.[27]

The Elements of the National Concern Doctrine

Parliament's constitutional authority under the national concern doctrine is well established. It applies to new matters that did not exist at the time of Confederation and to matters which, although originally local or private in nature to a particular province, have since become matters of national concern. The Supreme Court's decision in *Crown Zellerbach* is the governing legal authority.[28]

In *Crown Zellerbach*, Le Dain J., writing for the majority, reviewed the existing law and summarized the legal test for determining whether the pith and substance of a challenged law fell under the national concern branch of the federal Parliament's POGG power. There are two main considerations:

- *singleness, distinctiveness and indivisibility*: whether the matter has a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern, including the effect on extra-provincial interests of a provincial failure to regulate the matter; and

- *the scale of the federal legislation's impact*: whether the scale of the federal government's impact is reconcilable with the constitutional distribution of legislative power.

The scale of the federal legislation's impact is an important consideration. The national concern branch of the POGG power creates new and permanent federal jurisdiction by taking away powers from the provinces. As Justice Huscroft noted, it is not about constitutional classification in the conventional sense. The broader the characterization of a law classified under the national concern branch, the greater the impingement on provincial jurisdiction for the matter in question.[29]

Correlation between the Characterization and Classification of the *GGPPA*

In both courts of appeal, the majority found that the *GGPPA* satisfies the test from *Crown Zellerbach*, and therefore classified the *Act* under the national concern branch of the federal Parliament's POGG power. In contrast, in both Courts of Appeal, the dissenting judges found that the *Act* did not fall under the national concern branch of the POGG power.

The following chart compares the judicial characterizations of the *GGPPA* with the judicial classifications of the *GGPPA* regarding the national concern branch:

Comparison of Judicial Characterizations and Classifications of the *GGPPA*				
No	**Decision**	**Characterization**	**Classification**	**Constitutionality**
1	Majority Decision, Saskatchewan Court of Appeal	The establishment of minimum national standards of price stringency for greenhouse gas emissions.	Falls under national concern branch of POGG power.	Constitutional
2	Minority Decision, Saskatchewan Court of Appeal	Part 1: a scheme of taxation. Part 2: a scheme to regulate greenhouse gas emissions.	Does not fall under national concern branch of POGG power.	Unconstitutional
3	Majority Decision, Ontario Court of Appeal	The establishment of minimum national standards to reduce greenhouse gas emissions.	Falls under national concern branch of POGG power.	Constitutional
4	Concurring Minority Decision, Ontario Court of Appeal	The establishment of minimum national greenhouse gas emission pricing standards to reduce greenhouse gas emissions.	Falls under national concern branch of POGG power.	Constitutional
5	Dissenting Minority Decision, Ontario Court of Appeal	The regulation of greenhouse gas emissions.	Does not fall under national concern branch of POGG power.	Unconstitutional

The above comparison indicates a correlation between the characterization and classification of the *Act*. In particular, all of the judges who characterized the matter of the *GGPPA* as involving, in some manner or another, the establishment of "national standards" also classified the *Act* as falling within the "national concern" branch of Parliament's POGG power. In contrast, the judges who found that the pith and substance of the *GGPPA* involved the regulation of greenhouse gas emissions rejected the federal government's submission that the *Act* satisfied the *Crown Zellerbach* criteria.

Classification of the *GGPPA* in the Majority Decisions

Writing for the Saskatchewan majority, Richards CJS held that establishing minimum national standards of price stringency for greenhouse gas emissions was a matter of national concern, satisfying both requirements of *Crown Zellerbach*.

Likewise, writing for the Ontario majority, Strathy CJO found that the *Act* fell within the national concern branch of the POGG power. In arriving at this conclusion, Strathy CJO endorsed the following three-part summary of the singleness, distinctiveness and indivisibility requirement proposed by counsel for the British Columbia Attorney General,[30] who intervened in the appeal in support of the *GGPPA*:

- singleness requires that the matter be characterized as specifically and narrowly as possible, at the lowest level of abstraction consistent with the fundamental purpose and effect of the statute;

- distinctiveness requires that the matter be one beyond the provinces' practical or legal capacity because of the constitutional limitation on their jurisdiction to matters "in the Province"; and

- indivisibility means that the matter must not be an aggregate of matters within provincial competence, but must have its own integrity. This normally occurs where the failure of one province to take action primarily affects extra-provincial interests, including the interests of other provinces, other countries and Indigenous and treaty rights.

Chief Justice Strathy found that the *GGPPA* satisfied these requirements, placing emphasis on the provincial inability component. In his view, establishing minimum national standards to reduce greenhouse gas emissions is a single, distinct and indivisible matter because "[w]hile a province can pass laws in relation to greenhouse gas emissions emitted within its own boundaries, its laws cannot affect greenhouse gases emitted by polluters in other provinces – emissions that cause climate change across all provinces and territories."[31]

The Ontario majority rejected the argument that the federal government's assertion of jurisdiction in relation to greenhouse gas emissions would entrench upon provincial autonomy or displace broad swaths of exclusive provincial jurisdiction. Like his counterpart on the Saskatchewan Court of Appeal, Strathy CJO emphasized that this argument results from a mischaracterization of the *Act*. In his view, when properly characterized, the *Act* deals only with establishing minimum national standards to reduce greenhouse gas emissions, leaving scope for provincial standards that meet or exceed that minimum. Given this characterization, the federal jurisdiction is, according to Strathy CJO, narrowly constrained to address the risk of provincial inaction regarding a problem that requires cooperative action.

Writing in concurrence, Hoy ACJO adopted the majority's analysis, recognizing that it would differ somewhat given her narrower characterization of the *Act*.

Classification of the *GGPPA* in the Dissenting Decisions

Writing in dissent, Ottenbreit and Caldwell JJA of the Saskatchewan Court of Appeal focused their critique on the question of whether the *Act* possessed sufficient distinctiveness. Among other criticisms, the justices charged that the majority erred in its classification of the *Act* because the *Act* effectively mirrors what the provinces can enact, and have enacted, regarding local greenhouse gas emissions. Aside from the *Act* purporting to set a "national" benchmark, the *GGPPA*, in their view, is not qualitatively or functionally different from anything that the provinces could enact to regulate greenhouse gas emissions by exercising their law-making powers under the *Constitution.*[32]

They conceded that characterizing the *Act* with the descriptive phrase "minimum national standards of stringency" gives the matter an appearance of distinctiveness, but held that such a narrow description of the matter is constitutionally suspect. In particular, they reasoned that provincial inability becomes a self-fulfilling prospect under such a characterization: by definition, only Parliament can enact national pricing standards because provinces can only act intra-provincially.

Justice Huscroft refined this criticism in his dissenting opinion in the Ontario reference. In his view, the Ontario majority's reasoning regarding the provincial inability test "begs the question" on classification. It does so by assuming that a national standard is, in fact, required for reducing greenhouse gas emissions – something which, by definition, no province can establish. However, as Huscroft JA explains, "[t]here are many things that individual provinces cannot establish, but it does not follow that those things are matters of national concern on that account. If it were otherwise, any matter could be transformed into a matter of national concern simply by adding the word 'national' to it."[33]

Is the reasoning in the majority decisions problematic?

Both the majority of the Court of Appeal for Saskatchewan and Court of Appeal for Ontario characterized the pith and substance of the *GGPPA* as involving the establishment of minimum national standards for greenhouse gas emissions, and then relied upon that characterization to classify the *Act* as constitutional pursuant to the national concern branch of Parliament's POGG power.

This correlation between the characterizations that relied on "national standards" and the classifications of the *Act* as a national concern provides a tool for thinking about the divergence between the majority opinions and the dissenting opinions regarding the *GGPPA*. It helps us understand why both courts of appeal split on the question of constitutionality, and it highlights a potential issue for the Supreme Court to address when it hears the appeals from these decisions in January 2020.

In particular, when the Supreme Court hears Ontario and Saskatchewan's appeals, it will likely consider whether the majority's classification of the *Act* "begs the question" by assuming, as a premise, the conclusion that the *GGPPA* is a matter of national concern.

To summarize, in both cases, the majority upheld the constitutionality of the *GGPPA* because it found the *Act's* subject matter raised the need for one national law, a need that could not realistically be satisfied by cooperative provincial action. However, as Justice Huscroft observed, if the matter of the *Act* involves establishing minimum national standards, then it necessarily creates a need for one national law because one province's failure to cooperate would undermine the establishment of national standards. The danger of this type of constitutional analysis is that it opens the door for Parliament to enact laws on a wide range of subject matters falling within provincial jurisdiction, provided that those laws also involve establishing "national standards."

On the other hand, appearances can be deceiving. If reducing greenhouse gas emissions does, in fact, require establishing national standards, then the majority's analysis does not necessarily rely on a premise that assumes the truth of its conclusion, as Justice Huscroft suggests. In particular, if the evidence is that greenhouse gases cannot be reduced in a piecemeal manner, then "minimum national standards" may be a necessary aspect of regulating greenhouse gases. In other words, it would be the evidence of the pervasive and destructive nature of these emissions that brings the *GGPPA* within the national concern branch of the POGG power, not the words 'national standards.'"

This analysis is consistent with the Ontario majority's emphasis on the unique character of greenhouse gas emissions. As Strathy CJO notes, "They have no concern for provincial or national boundaries. Emitted anywhere, they cause climate change everywhere, with potentially catastrophic effects on the natural environment and on all forms of life."[34]

Accordingly, while Huscroft JA's concerns about the majority's reasoning may be valid, generally speaking, in the case of climate change, and in light of the evidence before the courts of appeal that greenhouse gas emissions anywhere are causing climate change everywhere, there may be no missing premise in the majority's conclusion that the *GGPPA* is constitutional as a matter of national concern. On the other hand, in light of the dissenting minority decisions, it remains an open question whether this premise, even if accepted, validates the majority's reasoning. In particular, if the suitability of carbon pricing as a means for reducing GHG emissions is a legitimate policy dispute between two orders of government, as Huscroft, Ottenbreit and Caldwell JJA suggest it is, then the premise that minimum national standards are a necessary aspect of regulating greenhouse gas emissions could still be challenged.

Conclusion

It remains to be seen how the Supreme Court will approach the constitutional analysis of the *GGPPA*. However, in light of the correlation outlined above, and the fact that both of the dissenting opinions from the Saskatchewan Court of Appeal and the Ontario Court of Appeal criticized the reasoning of the majority opinions on the "minimum national standards" aspect of characterization, it would not be surprising for the Supreme Court to address this question directly and provide guidance for lower courts regarding the national concern doctrine. Either way, the Supreme Court's decision on these appeals will have a significant impact on future climate change legislation in Canada.

Ted Brook

The author wishes to thank articling student Saba Samanianpour for her help in preparing this legal update.

Footnotes

[1] In June 2019, Canada's federal House of Commons passed a motion (186 to 63 votes) to declare a national climate emergency. Likewise, in May 2019, the Parliament of the United Kingdom declared a climate emergency.

[2] Our firm's global multidisciplinary team works with clients to navigate evolving climate change and sustainability laws and regulations across the globe, identifying significant, emerging opportunities as well as mitigating and managing risks.

[3] S.C. 2018, c. 12, s. 186.

[4] *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40 (***Saskatchewan Reference***); *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544 (***Ontario Reference***).

[5] *The Constitution Act, 1867*, 30 & 31 Vict, c 3.

[6] Hearings are tentatively scheduled for January 14 and 15, 2020. See Docket Nos: 38663 and 38781.

[7] In both cases, a five-member panel of the Court of Appeal heard the constitutional reference. In the Saskatchewan Court, the panel split 3-2. In the Ontario Court, the panel split 3-1-1. As detailed below, the Alberta Court of Appeal may render its own decision regarding the *GGPPA* before the Supreme Court hears any appeals from the Ontario and Saskatchewan Courts of Appeal.

[8] *R v Crown Zellerbach Canada Ltd*, [1988] 1 SCR 401 (***Crown Zellerbach***).

[9] Alan Harvie, *Canada unveils backstop carbon pricing details: the Greenhouse Gas Pollution Pricing Act*.

[10] The federal government decides whether a province's legislative scheme meets the minimum requirements. In particular, the *GGPPA* gives authority to the Governor-in-Council to designate the "listed provinces" in which the fuel charge and OBPS regimes will apply, taking into account "the stringency of provincial pricing mechanisms for greenhouse gas emissions" as the primary factor.

[11] The appeals have not been formally consolidated, but they are tentatively scheduled to be heard together.

[12] The Ontario and Saskatchewan references also dealt with the issue of whether the *GGPPA* imposes a "tax" on carbon. If the *GGPPA* imposes a tax, rather than a regulatory charge, this has implications for how the *Act* ought to have been enacted by Parliament. This question is outside the scope of this article, which focuses instead on the federal government's claim that the national concern branch of the peace, order and good government power furnished its constitutional authority to enact the *GGPPA*.

[13] The Ontario Court of Appeal made the submissions available online here: http://www.ontariocourts.ca/coa/ggppa/.

[14] *Supra* note 6; *Canadian Charter of Rights and Freedoms*, s 8, Part 1 of the *Constitution Act*, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

[15] Notably, for climate change issues, the "environment" was not expressly identified as a constitutional head of power in 1867, and is not considered a matter of exclusive jurisdiction resting with one level of government or the other. Legislatures and courts have identified it as an area of shared jurisdiction. Accordingly, both Parliament and the provincial legislatures, can, within their enumerated powers, legislate to protect the environment and address problems such as pollution.

[16] *Saskatchewan Reference, supra* note 5 at para 11.

[17] This was a working-group that arose out of a meeting between the Prime Minister of Canada and the provincial and territorial premiers in March 2016 regarding responses to climate changes.

[18] Why was the dissent focused on taxation? The taxation aspect of the Saskatchewan and Ontario decisions is beyond the scope of this paper. However, it bears noting that this was a live issue before both courts of appeal because of the manner in which taxation legislation must be enacted by the federal Parliament. In particular, under section 91(3) of the Constitution, Parliament has a broad jurisdiction to enact laws for raising money by any mode or system of taxation. However, section 53 of the Constitution requires any bill for imposing a tax to originate in the House of Commons. Section 53 codifies the principle that there should be no taxation without representation by ensuring that the executive branch must call the legislative branch into session to raise taxes: see *620 Connaught Ltd. v Canada (Attorney General)*, 2008 SCC 7.

[19] *Ontario Reference*, supra note 5 at para 77.

[20] Here, "means" refers to the means by which the legislation achieves its purpose.

[21] *Ontario Reference*, supra note 5 para 166.

[22] See *Ward v Canada (Attorney General)*, 2002 SCC 17 at para. 25.

[23] *Ontario Reference*, *supra*, note 7 at para 213.

[24] In the *Saskatchewan Reference*, the Attorney General for Saskatchewan took the position that it was not necessary for the court to engage in a pith and substance analysis because the *GGPPA* was constitutionally illegitimate because it flies in the face of the principles of federalism irrespective of its pith and substance. However, as an alternative submission, the Attorney General argued that Part 1 and Part 2 must be

assessed separately, and that the pith and substance of Part 1 was imposing a national carbon tax, whereas the pith and substance of Part 2 was the detailed industrial regulation of specific businesses.

[25] *Ibid* at para 73.

[26] *Supra* note 6.

[27] In the final sentence of its reply factum at the Ontario Court of Appeal, the Attorney General for Canada submitted that the *GGPPA* could also be upheld on the basis that climate change constitutes an emergency. None of the judges of the Court of Appeal accepted this submission. Legislation enacted under the POGG power must be of a temporary nature, whereas the *GGPPA* is not, and does not purport to be, a temporary measure.

[28] *Crown Zellerbach*, *supra*, note 9.

[29] *Ontario Reference*, *supra* note 7 at para 181.

[30] *Ontario Reference*, *supra* note 7 at para 113.

[31] *Ontario Reference*, *supra* note 7 at para 117.

[32] For Ottenbreit and Caldwell JJA, the important question is whether the provinces are *capable* of dealing with the matter. In their view, the provinces are capable of dealing with the matter, and could, if they desired, collectively arrive at a benchmark or uniform law, as they have in other situations. Hence, for them, Canada's claim that the provinces are incapable of enacting a uniform law is really an argument about adequacy: i.e. that the provinces might be unable or unwilling to *adequately* legislate regarding the matter of greenhouse gas emissions. However, according to Ottenbreit and Caldwell JJA, this argument devolves into a policy dispute about the optimal approach to reducing greenhouse gases. And the courts do not have the power to declare legislation constitutional simply because they conclude it may be the best option from the point of view of policy.

[33] *Ontario Reference, supra*, note 7 at para 229.

[34] *Ontario Reference*, *supra* note 7 at para 114.

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