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THE CONSTITUTION AND CARBON PRICING

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The Constitution and Carbon Pricing
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EXECUTIVE SUMMARY

Environmental legislation can serve a variety of important ends. For example, it can regulate water and air quality, manage toxic substances, protect fish and migratory birds and their habitats, and determine how infrastructure and natural resource projects can be developed and operated while minimizing or mitigating adverse effects to the environment. Nevertheless, environmental laws must be carefully crafted to ensure that they respect constitutional limits on legislative authority.

Canada's *Constitution Act, 1867* (the Constitution) sets out the respective legislative powers of the federal and provincial governments. Determining which level of government may lawfully legislate with respect to the environment can be problematic because "the environment" as a subject matter is divided between the federal and provincial powers. This constitutional division of powers can be particularly challenging when one level of government enacts environmental legislation that touches on areas reserved for the exclusive jurisdiction of the other level of government.

In two different challenges to federal legislation – *References re* Greenhouse Gas Pollution Pricing Act and *Reference re* Impact Assessment Act – the Supreme Court of Canada (the Court) was asked to interpret federal environmental law in light of Canada's constitutional division of powers. This HillStudy examines the Court's advisory opinion that the federal government's attempt to regulate greenhouse gas emissions through the *Greenhouse Gas Pollution Pricing Act* was a constitutional exercise of federal authority under the national concern doctrine of the peace, order and good government power set out in section 91 of the Constitution. A companion HillStudy, entitled *The Constitution and the* Impact Assessment Act, reviews the Court's opinion with respect to the constitutionality of the *Impact Assessment Act*.

The Court's advisory opinions in these two reference cases offer insight into what is, and is not, constitutionally acceptable and why. These are significant decisions that arrive at their conclusions via different routes, and both are likely to inform the development of environmental legislation at the federal and provincial levels for years to come.

THE CONSTITUTION AND CARBON PRICING*

1 INTRODUCTION

Under Canada's *Constitution Act, 1867* (the Constitution), legislative authority is set out and divided between the federal and provincial governments.[1] Section 91 lists those powers reserved for the exclusive authority of Parliament, while section 92 enumerates the exclusive powers of provincial legislatures. In particular, section 92A states that provinces also have exclusive jurisdiction over the development, conservation and management of non-renewable natural resources, forestry resources and electrical energy in each province.[2]

The term "environment" is not contained in either section 91 or section 92 of the Constitution, and the subject matter cuts across a number of areas that are assigned either to Parliament or to the provincial legislatures.[3] The Supreme Court of Canada (the Supreme Court or the Court) has recognized that, as a subject matter, the environment does not "comfortably fit within the existing division of powers without considerable overlap and uncertainty."[4] As a result, neither level of government has exclusive jurisdiction over laws in relation to the environment; rather, both levels can legislate certain aspects respecting the environment so long as the laws they enact fall within their respective sphere of legislative competence.[5]

Given the "sweeping nature"[6] of environmental legislation and its potential for overlap and uncertainty, it is perhaps unsurprising that provincial governments might challenge a federal law they feel oversteps constitutional boundaries and intrudes into provincial power. Provincial governments may request an advisory opinion (or "reference") on a question of law from their respective courts of appeal; the federal government, for its part, may request such an opinion from the Supreme Court. In *References re* Greenhouse Gas Pollution Pricing Act[7] (GGPPA References), provincial governments in Saskatchewan, Ontario and Alberta referred the question of whether the legislation at issue was constitutional to their respective Courts of Appeal, and those advisory opinions were then appealed to the Supreme Court. Notably, a court does not issue a ruling on a reference question. Instead, a court issues an "advisory opinion" on the constitutionality of the legislation in question. While an advisory opinion is not binding, a court's opinion will be of highly persuasive weight and influence.[8]

2 *REFERENCES RE* GREENHOUSE GAS POLLUTION PRICING ACT

In 2018, as part of efforts to reduce greenhouse gas (GHG) emissions across Canada, Parliament enacted the *Greenhouse Gas Pollution Pricing Act* (GGPPA or the Act) based, in part, on "broad scientific consensus that anthropogenic greenhouse gas emissions contribute to global climate change."[9] The GGPPA established minimum national standards for carbon pricing in Canada. It required provinces and territories to implement a GHG pollution pricing scheme that meets minimum national standards set out in the GGPPA by January 2019. They could do this either through enacting their own legislation or by requesting that the minimum standards set out in the GGPPA (sometimes referred to as the federal backstop) apply to them. Provinces and territories that did not have a carbon pricing mechanism that met minimum national standards by January 2019 would have the federal backstop applied in their jurisdiction.

The governments of Saskatchewan, Ontario and Alberta each asked their respective Courts of Appeal to provide an advisory opinion on the constitutionality of the GGPPA. They argued that, among other things, the GGPPA was beyond Parliament's legislative jurisdiction because it addressed matters that were properly within the provinces' exclusive authority under the Constitution to make laws in relation to property and civil rights (section 92(13)), other matters of a purely local nature within the province (section 92(10)), or with respect to the development and management of non-renewable natural resources in the province (section 92A).

In majority opinions, both the Saskatchewan and Ontario Courts of Appeal held that the GGPPA was within Parliament's jurisdiction to legislate for the "Peace, Order, and good Government" (POGG) of Canada under section 91 of the Constitution to address a matter of national concern (discussed in detail below). A majority of the Court of Appeal of Alberta held that the Act was unconstitutional as it directly intruded into exclusive provincial powers over property and civil rights and management of non-renewable natural resources. The Attorneys General of Saskatchewan and Ontario appealed to the Supreme Court.

On 25 March 2021, the Supreme Court released its opinion[10] upholding the constitutionality of the federal law establishing minimum national standards for carbon pricing.[11] In its decision, the majority, led by Chief Justice Wagner, concluded that the GGPPA is constitutional because it is within the federal government's jurisdiction to legislate in relation to matters of national concern under the federal POGG power in section 91 of the Constitution. Three separate dissenting opinions held that the law was unconstitutional. Therefore, while there was cohesion in the majority finding of constitutionality, each of the dissenting reasons was founded on a different legal basis. These dissents are examined in section 2.2 of this HillStudy.

A key consideration in the question reviewed by the Supreme Court was determining the true nature of the law before it – what is called the "pith and substance" of the legislation. In any constitutional adjudication, once the pith and substance of a law is established, the court must determine whether it falls under a federal head of power (section 91) or a provincial head of power (section 92) under the Constitution. If the statute in question is classified under a head of power belonging to the body that enacted it, the statute is constitutional.

2.1 THE MAJORITY OPINION

The majority of the Supreme Court determined that the true subject matter of the GGPPA was the setting of minimum national standards of GHG price stringency to reduce GHG emissions.[12] The Court held that the wording of the Act, parliamentary commentary and the legal effects of the Act confirm its focus on national GHG pricing and its minimal or backstop nature.[13]

Importantly, the Court held that the GGPPA does not bar certain business or individual activities or tell industry how to operate to reduce GHG emissions. Instead, the Act requires persons to pay a price if they engage in certain activities that result in GHG emissions.[14]

Having established the pith and substance of the GGPPA, the Court then turned to the classification stage of the analysis. This examination involved relating the subject matter of the legislation to the heads of power listed in the Constitution. The Court found that the federal government has jurisdiction to enact the GGPPA as a matter of national concern under the POGG power granted to it in section 91 of the Constitution.[15]

2.1.1 The Peace, Order and Good Government Power and the National Concern Doctrine[16]

The introduction to section 91 of the Constitution includes a clause that grants Parliament additional lawmaking powers beyond its list of enumerated powers. It states, "It shall be lawful for the Queen … to 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."[17] Therefore, the POGG power deals with matters that do not fall within the scope of section 92.

The courts have limited the application of the POGG power. In general, it is an exceptional power that may be used only by the federal government to legislate on matters that fall under one of three branches: the gap branch, the emergency branch and the national concern branch (also known as the national concern doctrine).[18]

The national concern doctrine allows Parliament to have exclusive jurisdiction over matters that affect the nation as a whole. The Supreme Court has only rarely found that a particular matter falls under the national concern doctrine of the POGG power. Until the GGPPA decision, this argument was most recently held valid in 1988 in *R v. Crown Zellerbach Canada Ltd.* (*Crown Zellerbach*), when the Court held that federal regulation of marine pollution and dumping in provincial waters was an appropriate exercise of the national concern doctrine.[19] In that case, the Court clarified a three-pronged analysis (the *Crown Zellerbach* test) for determining whether a particular matter fell within a matter of national concern:

- It must extend beyond provincial interests and be of concern to the country as a whole (this is often referred to as the threshold stage).
- It must "have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern."[20]
- It must have "a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution."[21]

Under the second prong of the analysis, a court must apply the "provincial inability" test, which asks whether a province's failure to deal with the impugned matter would have extra-provincial consequences.

The majority of the Court held that when applied to the GGPPA, the matter of establishing minimum national standards of GHG price stringency to reduce GHG emissions was of sufficient concern to the country as a whole.[22] Upon reviewing the evidence presented before it, the Court found the history of efforts to address climate change in Canada reflects the critical role of carbon pricing strategies in implementing policies to reduce GHG emissions. It further stated that the federal government had demonstrated that the matter is critical in Canada's response to an "existential threat to human life in Canada and around the world."[23]

The majority found that the requirement for the matter to have a singleness, distinctiveness and indivisibility had been met. Specifically, it said that "federal action is indispensable"[24] in Canada's efforts to mitigate climate change due to the provinces' inability to address the matter as a whole through cooperation, noting that "GHG emissions are predominantly extraprovincial and international in their character and implications."[25] Moreover, it noted that while provinces could work together on a shared carbon pricing system, they are "constitutionally incapable of establishing a binding outcome-based minimum legal standard – a national GHG pricing floor – that applies in all provinces and territories at all times."[26] It further stated that the failure of one province to address the matter within its own borders "would have grave extraprovincial consequences."[27] Indeed, this "grave extraprovincial consequences" aspect is required in the context of the national

concern doctrine in order to establish the provincial inability prong of the *Crown Zellerbach* test.[28]

Finally, the majority held that requirement that the matter must have a scale of impact on provincial jurisdiction that is reconcilable with the division of powers had been met.[29] The majority conceded that the GGPPA has a clear impact on provincial jurisdiction; however, in their opinion, its impact on the provinces is qualified and limited.[30] While the GGPPA puts a Canada-wide price on carbon pollution, provinces retain freedom to regulate GHG emissions without federal interference as long as they meet the federal government's outcome-based targets.[31]

The majority emphasized that the GGPPA's impact on the provincial sphere was minimal because the GGPPA creates an emission pricing floor only, retaining provinces and territories' abilities to create their own policies to meet emission reduction targets, including carbon pricing.[32] Furthermore, the majority concluded that any constitutional impact is outweighed by the "irreversible consequences for the environment, for human health and safety and for the economy – if Parliament were unable to constitutionally address [GHG emissions] at a national level."[33]

2.2 THE DISSENTING OPINIONS

Three justices wrote separate dissenting opinions on the constitutionality of the GGPPA. Justice Côté dissented in part, agreeing with the majority of the Court that the matter was one of national concern and that the federal government had the power to enact legislation establishing minimum national standards on GHG pricing to reduce emissions. However, she found that the Act as currently formulated is too broad. Justices Brown and Rowe each found, based on their own reasons, that the Act was unconstitutional as a whole, disagreeing with the majority's use of the national concern doctrine to uphold the legislation.

2.2.1 Justice Côté

While Justice Côté agreed with the majority that the subject matter of the GGPPA is one of national concern, her partial dissent focused on the very broad discretion the Act gives to the Governor in Council. She wrote that the Act was unconstitutional because it failed to put any meaningful limits on the discretion that it confers on the executive branch (that is, the federal Cabinet) to determine what fuels are covered by the legislation and to set standards on an industry-by-industry basis. She found that the minimum standards in question are substantially set by the federal Cabinet and not Parliament, which, in her view, is incompatible with parliamentary sovereignty, the rule of law and the separation of powers.[34]

2.2.2 Justices Brown and Rowe

Justice Brown split sharply with the majority in determining the subject matter of the legislation. He identified the pith and substance of Part 1 of the GGPPA – which established charges on the production, distribution and importation of carbon-based fuel – as "the reduction of GHG emissions by raising the cost of fuel."[35] He identified the core subject matter of Part 2 of the GGPPA, which established an output-based pricing system on industrial-level emissions of GHGs, as "the reduction of GHG emissions by pricing emissions in a manner that distinguishes among industries based on emissions intensity and trade exposure."[36]

Justice Brown stated that both these matters fall within provincial jurisdiction under either section 92(13) of the Constitution, relating to property and civil rights in the province,[37] or section 92(16), granting provincial authority over all matters of a local or private nature.[38] He criticized the majority's use of "minimal national standards" to justify their conclusion.[39] He stated that the federal government could have achieved its goals using other heads of power under the Constitution, such as its taxation power.[40] Justice Brown concluded that the GGPPA "fundamentally alter[s] the division of powers analysis under ss. 91 and 92 of the *Constitution Act, 1867*" and is therefore unconstitutional.[41]

Justice Rowe held that the government did not have authority to establish minimum standards for GHG pricing, stating that the national concern doctrine "is a residual power of last resort."[42] Moreover, he expressed concern about allowing the matter of legislating "minimum national standards" to be deemed a national concern. He said this would open the floodgates to "more easily invade provincial jurisdiction, and has the potential to upset the fundamental distribution of legislative power under the Constitution."[43]

Justice Rowe generally adopted the reasons of Justice Brown, further noting that a provincial inability to legislate on a matter, including a failure to act, does not automatically mean the matter is one of national concern.[44]

Both Justices Brown and Rowe expressed concern about the potential for growing incursions on provincial jurisdiction. They each noted that the power to legislate "minimum national standards" in an area of national concern could encroach on other areas of provincial jurisdiction, such as intra-provincial trade and commerce, health and the management of natural resources, stating, "[a]lmost any provincial head of power is open to federal intrusion simply by recasting the federal matter as one of 'minimum national standards.'"[45]

Indeed, Justice Brown wrote of the majority decision:

> This is a model of federalism that rejects our Constitution and re-writes the rules of Confederation. Its implications go far beyond the *Act*,

> opening the door to federal intrusion — by way of the imposition of national standards — into *all* areas of provincial jurisdiction, including intra-provincial trade and commerce, health, and the management of natural resources. It is bound to lead to serious tensions in the federation. And all for no good reason, since Parliament could have achieved its goals in constitutionally valid ways. I dissent [EMPHASIS IN THE ORIGINAL].[46]

Justices Brown and Rowe also took issue with the "grave extraprovincial consequences" required to establish the provincial inability prong of the *Crown Zellerbach* test of the national concern doctrine. They suggested such a standard, "far from *constraining* federal intrusion, … effectively *invites* it into other areas of provincial jurisdiction" such as public health, the building of energy infrastructure, or management of non-renewable natural resources and forestry.[47] "Simply put, the *gravity* of the extra-provincial consequences should not and (until now) has not dictated the outcome of the provincial inability test" [EMPHASES IN THE ORIGINAL].[48]

3 DISCUSSION

Both the majority and minority opinions in the GGPPA References case emphasized that the use of the national concern doctrine under the POGG power was "rare" and "exceptional." Indeed, as the Court of Appeal of Alberta stated in its 2020 decision *Reference re* Greenhouse Gas Pollution Pricing Act,[49] in the 153 years since Confederation, the "judicially-created national concern doctrine" has been relied on by the Supreme Court or the Judicial Committee of the Privy Council (the final appeal court for Canada until 1949) to expand federal powers a total of six times (three times by each judicial body). Its use in the GGPPA References case is now the seventh time since 1867.

It should be remembered that the national concern doctrine under the POGG power may be used only for legislation that does not come within the classes of subjects set out in section 92. The wording of the POGG clause makes this explicit. Accordingly, if, in determining the pith and substance of legislation, the subject matter falls within one or more of the enumerated heads of provincial power, POGG cannot be relied on for constitutional validity. This is why the characterization of legislation is such a crucial step in the assessment process. It also underscores the deep division between the majority and dissenting opinions on this issue. Had the majority also found that the GGPPA fell within a provincial head of legislative authority, the Act would have been declared unconstitutional.

Identifying the pith and substance, or essential nature, of a law plays a critical role in determining its constitutionality. This is a keystone inquiry, and it must be answered as precisely as possible, taking into account a law's purpose and effect. A law may be characterized as seeking to address a particular issue, but upon closer examination, it

may be found to have quite a different purpose and effect. For example, a municipal by-law purporting to regulate street use and maintain public order was found to have as its primary intent the suppression of prostitution. That pith and substance determination led the Supreme Court to hold that the by-law fell within the realm of criminal law and the jurisdiction of the federal government.[50] Only after a law's true subject matter is defined can it then be classified under the federal or provincial heads of power.

That it can be difficult to determine a law's pith and substance – and that Supreme Court justices are not always in agreement on this matter – underscores how vexing the process can be. This can be particularly so in the case of environmental law, as it engages multi-jurisdictional issues of overlapping federal and provincial powers. The challenge lies in teasing apart the law's dominant purpose from its incidental effects, especially when both federal and provincial governments claim authority.

As outlined above, for a particular subject matter to be considered of national concern, it must meet all three prongs of the *Crown Zellerbach* test: it must fall beyond the threshold of provincial interests; it must have a "singleness, distinctiveness and indivisibility" distinguishing it from provincial matters; and its impact on provincial jurisdiction must be reconcilable with the Constitution's distribution of legislative power. These prongs are cumulative; if a subject matter meets only two of the three prongs, the test is not met.

In applying the first prong of the *Crown Zellerbach* test, the majority found that, in the context of an "existential threat to human life in Canada and around the world,"[51] the establishment of minimum national standards of GHG price stringency to reduce GHG emissions to be of sufficient concern to Canada as a whole that it warranted consideration in accordance with the national concern doctrine.

The majority held that the threshold of "beyond provincial interests" was met since the impugned law is "critical to our response to an existential threat to human life in Canada and around the world."[52] Had the subject matter not met the threshold, the inquiry would have ended there, and the national concern doctrine would have failed. When, as in this case, the threshold is met, the two additional prongs must also be reconciled. If, for example, federal legislation is characterized as falling within the POGG power and meets the first two prongs of the *Crown Zellerbach* test but has too great an impact on provincial jurisdiction, it will not pass constitutional muster.

NOTES

* A companion HillStudy, entitled *The Constitution and the* Impact Assessment Act, reviews the Supreme Court of Canada's opinion with respect to the constitutionality of *the Impact Assessment Act*. Sam N. K. Banks, *The Constitution and the* Impact Assessment Act, Publication no. 2025-02-E, Library of Parliament, 15 October 2025.

1. *Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.). Under the *Constitution Act, 1867* (the Constitution), Canada's three territories do not have any jurisdiction in their own right. Rather, Parliament has full legislative jurisdiction over them. However, over time, much of this power has been delegated to the territorial legislatures through devolution.

2. For a general overview of the constitutional division of powers between the federal and provincial governments to regulate environmental issues, see Penny Becklumb, *Federal and Provincial Jurisdiction to Regulate Environmental Issues*, Publication no. 2013-86-E, Library of Parliament, 29 October 2019.

3. For example, the following areas are assigned to the federal head of power under Canada's Constitution: trade and commerce (section 91(2)); navigation and shipping (section 91(10)), sea coast and inland fisheries (section 91(12)); "Indians and land reserved for the Indians" (section 91(24)); criminal law (section 91(27)); interprovincial works and undertakings (section 92(10)(a)); and works declared to be for the general advantage of Canada (section 92(10)(c)). The following matters fall within the provincial head of power: local works and undertakings (section 92(10)); property and civil rights in the province (section 92(13)); matters of a merely local or private nature in the province (section 92(16)); and the development, conservation and management of non-renewable natural resources in the province (section 92A). Parliament also has the authority to make laws in relation to matters of national concern based on the "Peace, Order, and good Government" (POGG) power set down in section 91. See *Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.), ss. 91–92 and 92A.

4. *Reference re* Impact Assessment Act, 2023 SCC 23, para. 114.

5. That said, there is nothing to prevent different levels of government from consulting, agreeing and cooperating on issues of shared concern despite the constitutional allocation of jurisdiction and powers.

6. *Reference re* Impact Assessment Act, 2023 SCC 23, para. 4.

7. *References re* Greenhouse Gas Pollution Pricing Act, 2021 SCC 11.

8. For a general overview of reference cases, see Charles Feldman, "2 Types of References," *Parliament and Supreme Court of Canada Reference Cases*, Publication no. 2015-44-E, Library of Parliament, 12 August 2015.

9. *Greenhouse Gas Pollution Pricing Act* (GGPPA or the Act), S.C. 2018, c. 12, s. 186, "Preamble" (version in force from 4 December 2020 to 28 June 2021). The GGPPA was enacted when Bill C-74, a budget implementation bill, received Royal Assent. See Bill C-74, An Act to implement certain provisions of the budget tabled in Parliament on February 27, 2018 and other measures, 42nd Parliament, 1st Session (S.C. 2018, c. 12). The Act is summarized in section 2.5 of the *Legislative Summary of Bill C-74: An Act to implement certain provisions of the budget tabled in Parliament on February 27, 2018 and other measures*, Budget implementation bill, Publication no. 42-1-C74-E, Library of Parliament, 22 June 2018.

10. While this was a reference question and therefore technically not a ruling, the terms "decision" and "held" are used for reasons of simplicity.

11. *References re* Greenhouse Gas Pollution Pricing Act, 2021 SCC 11.

12. Ibid., para. 57.

13. Ibid., paras. 58, 60, 63, 66, 71 and 80.

14. Ibid., para. 71.

15. Ibid., para. 207.

16. While the Supreme Court of Canada decision in *References re* Greenhouse Gas Pollution Pricing Act refers to both the "national concern doctrine" and the "national concern branch," for consistency, this HillStudy will use "national concern doctrine" wherever appropriate.

17. *Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.), s. 91.

18. The "gap" branch of the POGG power may be used to fill a particular gap in the distribution of powers; the "emergency" branch power allows Parliament to enact temporary legislation that responds to a national emergency, despite encroaching on provincial jurisdiction. Peter Hogg, *Constitutional Law of Canada*, 2nd ed., 1985, pp. 373–374 and 383–391.
19. *R v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401.
20. Ibid., para. 33(3).
21. Ibid.
22. *References re* Greenhouse Gas Pollution Pricing Act, 2021 SCC 11, paras. 167–171.
23. Ibid., para. 171.
24. Ibid., para. 191.
25. Ibid., paras. 172–195.
26. Ibid., para. 182.
27. Ibid., para. 146.
28. Ibid., para. 153.
29. Ibid., para. 206.
30. Ibid., paras. 199–204.
31. Ibid., para. 206.
32. Ibid., para. 200.
33. Ibid., para. 206.
34. Ibid., paras. 231, 238–240 and 276.
35. Ibid., para. 340.
36. Ibid.
37. Ibid., para. 343.
38. Ibid., para. 345.
39. Ibid., para. 362.
40. Ibid., para. 297.
41. Ibid., para. 454.
42. Ibid., para. 457.
43. Ibid., para. 425.
44. Ibid., para. 557.
45. Ibid., para. 441.
46. Ibid., para. 456.
47. Ibid., para. 447.
48. Ibid.
49. *Reference re* Greenhouse Gas Pollution Pricing Act, 2020 ABCA 74 (CanLII), paras. 16–17.
50. *Westendorp v. The Queen*, [1983] 1 S.C.R. 43.
51. *References re* Greenhouse Gas Pollution Pricing Act, 2021 SCC 11, para. 171.
52. Ibid.