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## Supreme Court of Canada Re-writes the National Concern Test and Upholds Federal Greenhouse Gas Legislation: Part I (The Majority Opinion)

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**Case Commented On:** *References re Greenhouse Gas Pollution Pricing Act*, [2021 SCC 11 \(CanLII\)](#)

The essential factual backdrop to these appeals is uncontested. 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. The only way to address the threat of climate change is to reduce greenhouse gas emissions... (*References re Greenhouse Gas Pollution Pricing Act*, [2021 SCC 11 \(CanLII\)](#) at para 2)

On March 25, 2021, the Supreme Court of Canada released its much-anticipated reference opinion regarding the constitutionality of the federal government's greenhouse gas (GHG) pricing regime. In *Reference re Greenhouse Gas Pollution Pricing Act*, [2021 SCC 11 \(CanLII\)](#) (*GGPPA Reference* or the *Reference*), a majority of the Supreme Court held that the *Greenhouse Gas Pollution Pricing Act*, [SC 2018, c 12, s 186](#) (*GGPPA*) fell within Parliament's residual power to make laws for "peace, order, and good government" (POGG), as set out in section 91 of the [Constitution Act, 1867](#). Writing for the majority, Chief Justice Richard Wagner concluded that setting minimum national standards of GHG price stringency to reduce GHG emissions was a "matter of national concern" (at para 4), a recognized branch of the POGG power. Justices Suzanne Côté, Russell Brown, and Malcolm Rowe dissented, each for different reasons. Importantly, Justice Côté agreed with the majority on the national concern issue.

This is the third ABlawg post on the *GGPPA* Reference litigation. A first [post](#), published on the eve of the first hearing before the Saskatchewan Court of Appeal, provided a brief overview of the controversy surrounding the application of the national concern doctrine. A second [post](#) reviewed the majority opinion of the Alberta Court of Appeal, which concluded that the *GGPPA* was unconstitutional.

As set out in those two earlier posts, the basic issue at the core of this Reference was not *whether* the federal government has jurisdiction to address climate change; all of the parties acknowledged that Parliament has several heads of power at its disposal, including its criminal law power (for examples of regulations promulgated under the *Canadian Environmental Protection Act, 1999*, [SC 1999, c 33](#) (*CEPA*), which was previously upheld pursuant to Parliament's criminal law power, see [here](#) and [here](#)). Rather, the issue was whether Parliament could rely on the "national concern" branch of its *residual* POGG power in support of a relatively intricate regulatory regime that does not fall comfortably under any of the federal government's *enumerated* heads of power (as set out in sections 91 and 92(10) of the *Constitution Act, 1867*). The Reference also provided the Supreme Court with an opportunity to

revisit the national concern doctrine itself, thirty years having passed since the *R v Crown Zellerbach Canada Ltd.*, [1988 CanLII 63 \(SCC\), \[1988\] 1 SCR 401](#) (*Crown Zellerbach*) decision that last formalized a test for classification under POGG's national concern branch.

Our analysis is organized as follows. This post begins with an overview of the *GGPPA*, followed by a review of Chief Justice Wagner's majority opinion. A subsequent post (Part II in this series) will consider the three dissenting judgments. Our aim in summarizing the dissenting judgments is to highlight the key differences between the majority and the dissents. A third post (Part III) comments on four aspects of the entire opinion: the breadth of the matter and the characterization of the *GGPPA*, the constitutional implications of minimum national standards as defined in this case, the role of provincial inability and extraprovincial effects, and finally the role of domestic courts in adjudicating a global problem like climate change.

## I. The Impugned Legislation

The *GGPPA* is the centrepiece of the federal government's climate change plan and provides for the imposition of regulatory charges on GHG emissions in Canada. The legislation contains four parts, of which only the first two were examined in the *GGPPA Reference*.

Part I of the *GGPPA* imposes a regulatory charge (or regulation with the "characteristics of a tax" (at para 213), as further discussed below) through a fuel charge imposed at the point of purchase (s 17(1)). The effective price on carbon emissions to be imposed via the fuel charge is specified in Schedule 4 and this price is converted to a charge to be applied to specific fuels on the basis of the emissions generated upon combustion of those fuels, set out in Schedule 2. The fuel charge applies only in provinces specified in Part 1 of Schedule 1 of the *GGPPA*. While there has been much public bickering over whether these charges amount to carbon taxes, the decision holds that, from a constitutional perspective, they are not taxes but are more properly described as regulatory charges with the "characteristics of a tax" (at paras 213-219). However, the Chief Justices notes that a "carbon tax" is "the term used among policy experts to describe GHG pricing approaches that directly price GHG emissions," which is what Part I of the *GGPPA* does (at para 16).

The *GGPPA* restricts the use of funds collected by the fuel charge. Specifically, section 165(1) stipulates that funds collected net of any rebates or exemptions must be distributed "in respect of the province". It may be distributed directly to the province (s 165(2)(a)), or to prescribed persons or classes of persons in the province (s 165(2)(b)), or to a combination of the two. In practice, the federal government has chosen to distribute most of the funds through consumer rebates which vary based on province, household size, and whether the household is in an urban or rural location ([see 2021 Climate Action Incentives here](#)). The balance of funds is returned by specific investments in emissions reductions in the province in question.

Part II establishes a separate carbon pricing system for large emitters, termed an output-based pricing system (OBPS). Necessary conditions for facilities to be covered are defined in the *Output-Based Pricing System Regulations*, [SOR/2019-266](#) (*OBPS Regulations*), which stipulate that facilities must have annual emissions greater than 50,000 tonnes of carbon dioxide equivalent (CO<sub>2e</sub>) in any year after or including 2014 (*OBPS Regulations*, s 8). To be covered under the OBPS, facilities must also be engaged in one of 38 activities listed in Schedule 1 of the

*OBPS Regulations* (only facilities in 2 of the 38 sectors, natural gas pipelines and power generation, qualify for the OBPS as applied in Saskatchewan).

The intent of the OBPS is to provide a lower average cost of emissions pricing to firms with exposure to international markets, while also maintaining a financial incentive to undertake investments to reduce the emissions-intensity of production. This is accomplished by providing emissions credits at a set rate per-unit output which defines what the *GGPPA* terms an “emissions limit” (see *GGPPA*, s 174. See also, *OBPS Regulations*, s 36). This is not a hard emissions limit, but rather determines a threshold above which the carbon price will apply. A carbon price must be paid on emissions above the emissions limit (*GGPPA*, s 174), while facilities with emissions below their emissions limit will be issued surplus credits (*GGPPA*, s 175), which facilities can bank or transfer to another facility. Since the carbon price applies at the margin, a facility increasing its emissions by 1 tonne (all else equal) will incur the same incremental costs as a consumer increasing their emissions by one tonne, and the same is true for the financial benefit of reduced emissions. The system is intended to protect industry competitiveness because the effective exemption from a carbon price on emissions up to the emissions limit reduces the total cost of the policy, thereby reducing incentives for firms to either relocate out of a jurisdiction or to target new investments elsewhere because of increased costs. This is referred to as [emissions leakage](#), emphasizing that where these dynamics occur, a facility will relocate rather than reduce emissions.

A quick example may be helpful here as the OBPS is a complex regulatory policy. Consider a large carbon-based electricity producer in Saskatchewan. The producer would be covered by the OBPS because Saskatchewan is listed in Part II, section 5 of Schedule 2 of the *GGPPA* and because, per section 8(b)(ii) of the *OBPS Regulations*, electricity is a covered sector in Saskatchewan (Schedule 1, item 38 of the *OBPS Regulations*). The facility would be subject to a carbon price, in 2021, of \$40 per tCO<sub>2e</sub> (Schedule 4, item 4 of the *GGPPA*) and its *output-based standard* would be set at 0.622 tCO<sub>2e</sub> per MWh (Schedule 1, item 38 of the *OBPS Regulations*). The facility’s *emissions limit* is defined by multiplying the output-based standard by the facility’s annual output (*OBPS Regulations*, section 36). Supposing that the facility had an operating emissions intensity, on average through the year, of 1tCO<sub>2e</sub> per megawatt-hour (MWh) of electricity generated, its net charge would be the equivalent of \$15.12 per MWh, since it would be exempt from \$24.88 per MWh (0.622 tCO<sub>2e</sub> x \$40 per tCO<sub>2e</sub>) of carbon charges on emissions below its *emissions limit*, which offsets more than half of what would otherwise be a \$40 per MWh (1tCO<sub>2e</sub> x \$40 per tCO<sub>2e</sub>) emissions charge. In the case of electricity, this assures that large cost increases aren’t passed through power bills, and in the case of industrial production, reduces any cost disparity introduced between Canadian firms and global competitors.

Most importantly, despite the terminology of emissions limits and output-based standards, the legislation does not set performance standards or otherwise directly regulate or limit technology, production, or other facility activities; nor does it expressly forbid behaviour in any way other than in relation to compliance with the regulatory charges and reporting requirements.

As in Part I of the *GGPPA*, Part II also fetters the use of funds collected under the OBPS. As such section 188 of the *GGPPA* is a parallel provision to section 165 referenced above. There is

substantial discretion afforded the Minister of National Revenue in determining the timing and manner of distribution of collected funds.

The *GGPPA* functions as a backstop, applying only in provinces or territories that are listed in Schedule 1 of the *Act*. Provinces or territories are listed through regulatory action by the Governor in Council (a process that is central to the dissent of Justice Côté). With respect to Part I, the fuel charge, section 166(2) stipulates that, “for the purpose of ensuring that the pricing of GHG emissions is applied broadly in Canada at levels that the Governor in Council considers appropriate, the Governor in Council may [list a province in Schedule 1, thus applying the fuel charge in that province].” The discretion is not unfettered, since section 166(3) requires that “the Governor in Council shall take into account, as the primary factor, the stringency of provincial pricing mechanisms for GHG emissions” in making any listing decisions. Section 189 is a parallel provision for the purposes of the OBPS.

Other parts of the legislation define reporting requirements, exemptions, penalties, appeal provisions, inspections, and records keeping. These provisions were not central to the decision. Parts III and IV were not contested in this case and are not discussed in detail here either. Part III establishes the discretion for the federal Governor in Council to stipulate that provincial laws may apply to federally-regulated activities (s 263(1)). Part IV requires that the government provide an annual report to Parliament on the administration of the *GGPPA*, beginning on the second anniversary of its coming into force (s 270). The initial (2019) report is available [here](#).

## **II. Chief Justice Wagner’s Majority Opinion**

Facts matter in constitutional cases and they are particularly important in cases where a party is seeking to establish a new matter of national concern. It is therefore not surprising that, in addition to the opening passage cited at the outset of this post, the Chief Justice devoted paragraphs 7-24 to the background facts. This includes sections on the global climate crisis, Canada’s efforts to address climate change, and a summary of provincial action with respect to climate change, all of which we summarize briefly below.

### ***A. The Global Climate Crisis***

The Chief Justice emphasized that global climate change driven by human activities is real (at para 7) and that the effects of climate change “have been and will be particularly severe and devastating in Canada” (at para 10). Particularly crucial for the national concern analysis were the following observations:

Climate change has three unique characteristics... First, it has no boundaries; the entire country and entire world are experiencing and will continue to experience its effects. Second, the effects of climate change do not have a direct connection to the source of GHG emissions. Provinces and territories with low GHG emissions can experience effects of climate change that are grossly disproportionate to their individual contributions to Canada’s and the world’s total GHG emissions. ... Yet the effects of climate change are and will continue to be experienced across Canada, with heightened impacts in the Canadian Arctic, coastal regions and Indigenous territories. Third, no one

province, territory or country can address the issue of climate change on its own. Addressing climate change requires collective national and international action. This is because the harmful effects of GHGs are, by their very nature, not confined by borders. (at para 12)

## ***B. Canada's Actions on Climate Change***

The subsection on Canada's efforts to address climate change recounts the history of the *United Nations Framework Convention on Climate Change* (1992) ([UNFCCC](#)), the [Kyoto Protocol](#) (1997), and the [Copenhagen Accord](#) (2009), as well as Canada's failure to fulfill its commitments under these latter two instruments (at para 13). Canada ratified the most recent agreement, the [Paris Agreement](#), in 2016 following its adoption at the end of 2015. As the Chief Justice observed, Canada's current-at-the-time commitment under the *Paris Agreement*, its [NDC or Nationally Determined Commitment](#), is to reduce its GHG emissions by 30 percent below 2005 levels by 2030. (at para 13. Note that Prime Minister Justin Trudeau indicated on April 22, 2021 that Canada's target would be revised to [40-45% below 2005 levels by 2030](#).)

Prior to ratifying the *Paris Agreement*, the federal government had convened a First Ministers' meeting in Vancouver that resulted in the adoption of the [Vancouver Declaration on Clean Growth and Climate Change](#) in which the parties recognized the commitment that Canada had made, as well the importance of adopting a collaborative approach to meet that commitment. The *Vancouver Declaration* led to the establishment of a federal-provincial-territorial Working Group on Carbon Pricing Mechanisms which in turn informed the adoption of the [Pan-Canadian Framework on Clean Growth and Climate Change](#) (the Framework) in December 2016 (at para 14). The Framework provided the policy direction for the *GGPPA* and contemplated that each province or territory would have to have in place a carbon pricing system in the form of a tax (or a carbon levy, as the Chief Justice qualified at para 16) or a cap-and-trade system by 2018. The Framework was initially adopted by all provinces except Saskatchewan but, as the Chief Justice noted, that support soon dissipated:

On the day the federal government released the *Pan-Canadian Framework*, it was adopted by eight provinces, including Ontario and Alberta, and by all three territories. Manitoba adopted the framework in February 2018, but Saskatchewan has not done so yet. Later in 2018, Ontario, Alberta and Manitoba withdrew their support from the *Pan-Canadian Framework*. (at para 19)

The federal government followed up the release of the Framework with further guidance documents on the elements of the proposed federal carbon pricing system, including a [benchmarking document](#) to inform the decision to apply federal carbon pricing in the provinces (at para 20, with the application discussed at para 64).

The Chief Justice also referenced the various measures taken by different provinces and territories, noting that only four of the provinces – British Columbia, Alberta, Ontario and Quebec – had actually adopted a carbon pricing system at the time that the Pan-Canadian Framework was adopted, but all other provinces except Saskatchewan and Manitoba had indicated that they planned to do so (at para 23). The Chief Justice closed his review of the



factual background with the following observation referencing the “collective action problem of climate change”:

Despite the actions that had been taken, Canada’s overall GHG emissions had decreased by only 3.8 percent between 2005 and 2016, which was well below its target of 30 percent by 2030. Over that period, GHG emissions had decreased in British Columbia, Ontario, Quebec, New Brunswick, Nova Scotia, Prince Edward Island and Yukon, but had increased in Alberta, Saskatchewan, Manitoba, Newfoundland and Labrador, Northwest Territories and Nunavut. Illustrative of the collective action problem of climate change, between 2005 and 2016, the decreases in GHG emissions in Ontario, Canada’s second largest GHG emitting province, were mostly offset by increases in emissions in two of Canada’s five largest emitting provinces, Alberta and Saskatchewan. Canada’s remaining emissions reduction between 2005 and 2016 came from two of Canada’s remaining five largest emitting provinces, Quebec and British Columbia, as well as from decreases in GHG emissions of over 10 percent — well above Canada’s 3.8 percent overall GHG emissions reduction — in New Brunswick, Nova Scotia, Prince Edward Island and Yukon. (at para 24)

Armed with this assessment of the facts as well as a review of the legislation (see our summary in the previous section) the Chief Justice was ready to embark on the legal analysis. This began with some remarks on the principle of federalism before turning to the division of powers analysis, characterization of the *GGPPA*, and finally its classification. The Chief Justice dealt with the all-important issue of the scope and applicability of the national concern doctrine as part of the issue of categorization. The judgment concludes with the Chief Justice’s reasons for characterizing the levies in Parts 1 and 2 of the *GGPPA* as regulatory charges rather than true taxes. In a final comment, the Chief Justice gave his reasons for thinking that it was inappropriate to comment on the validity of any implementing regulations for the *GGPPA* since they were not properly before the Court. We summarize each of these sections of the judgement in turn below.

### ***C. Principle of Federalism***

The Chief Justice’s discussion of the principle of federalism that inform the subsequent analysis is short (at paras 48-50). He affirms that the objectives of Canadian federalism “are to reconcile diversity with unity, promote democratic participation by reserving meaningful powers to the local or regional level and foster cooperation between Parliament and the provincial legislatures for the common good” (at para 48, references omitted). The provinces are to have the autonomy to develop their societies while at the same time the federal government has “powers better exercised in relation to the country as a whole to provide for Canada’s unity” but those powers “cannot be used in a manner that effectively eviscerates provincial power” (at para 49). While the Court now adheres to a flexible view of federalism rather than “a rigid division of federal-provincial powers as watertight compartments” such a cooperative federalism “cannot override or modify the constitutional division of powers” (at para 50).

### ***D. Characterization: Pith and Substance***

The characterization of the *GGPPA* in the three provincial Courts of Appeal generated a range of judicial responses as well as an evolution in counsel for Canada’s articulation of the “pith and substance” of the legislation. The Chief Justice helpfully identified three different formulations of the *GGPPA*’s pith and substance:

(1) a broad formulation to the effect that the *GGPPA*’s pith and substance is the regulation of GHG emissions; (2) a national standards-based formulation to the effect that the *GGPPA*’s pith and substance is to establish minimum national standards to reduce GHG emissions; and (3) a national standards pricing-based formulation to the effect that the *GGPPA*’s pith and substance is to establish minimum national standards of GHG price stringency to reduce GHG emissions. (at para 57)

In the end, the Chief Justice preferred the third formulation on the grounds that this was most consistent with the purpose and effects of the legislation, as defined with some precision, and having regard to the means chosen by Parliament to achieve its purpose. The intrinsic evidence in favour of this conclusion included the long title of the statute, the preamble including its references to the UNFCCC and the *Paris Agreement*, as well as the emphasis on GHG pricing in the *Pan-Canadian Framework* (at paras 58-60). The extrinsic evidence, in the form of background documents as well as parliamentary debates and testimony before the Standing Committee, all confirmed that the *GGPPA* was concerned with “imposing a Canada-wide GHG pricing system” and not “regulating GHG emissions generally” (at para 68; we return to this latter formulation in our commentary on the decision). The legal effects of both impugned Parts of the *GGPPA* are similarly concerned with price stringency rather than instructing individuals and industries “how they are to operate in order to reduce their GHG emissions” (at para 71). And while the Act affords considerable discretion to the Governor in Council in triggering the actual application of the Act to a particular province or territory, that discretion is not open-ended and subjective but must be exercised in both Parts 1 and 2 in a manner “consistent with the specific guideline of ensuring that emissions pricing is applied broadly in Canada and would have to take the stringency of existing provincial GHG pricing mechanisms into account as the primary factor” (at para 73). See ss *GGPPA* sections 165(2) & 189(2) and paras 73 and 76.

As for the practical effects of the legislation, the Chief Justice observed that it was difficult to conclude much since the legislation had only been in force for a short period of time. However, the experience to date did indicate that the legislation was being implemented in a manner that “is consistent with the principle of flexibility and support for provincially designed GHG pricing schemes” (at para 79). The backstop nature of the legislation was also crucial; in this case “a national GHG pricing scheme is not merely the means of achieving the end of reducing GHG emissions” (at para 80). Rather, the means was part of the rationale for the legislation. The Chief Justice also explains the reasons for characterizing the selective application of regulatory charges as imposing a “minimum national standard” (at para 81), a subject to which we devote significant attention in the commentary (Part III of this blog series).

### ***E. Classification***

Having identified the pith and substance of the legislation and having dismissed arguments to the effect that the important regulation-making powers of the Act constituted unconstitutional sub-

delegation (at paras 83-86), the Chief Justice turned to the classification of the Act, beginning with Canada's contention that the legislation should be upheld on the basis of the national concern doctrine, with no consideration given to upholding the legislation under other federal heads of power.

### ***F. The National Concern Doctrine***

The Chief Justice began this part of his judgment by emphasizing both the residual and permanent nature of the “national concern” branch of the POGG power. As a result, “a finding that the federal government has authority on the basis of the national concern doctrine raises special concerns about maintaining the constitutional division of powers” (at para 90). The Chief Justice then proceeded to carefully review the evolution of the national concern doctrine through the case law, emphasizing Justice Jean Beetz's judgment in the *Anti-Inflation Reference*, [1976 CanLII 16 \(SCC\), \[1976\] 2 SCR 373](#), Justice Gerald Le Dain's judgment in *Crown Zellerbach*, as well as cases in which the Court had declined to recognize a national concern on the grounds that there was nothing in the proposed matter that transcended provincial boundaries or the power of local authorities to resolve: *Labatt Breweries of Canada Ltd. v Attorney General of Canada*, [1979 CanLII 190 \(SCC\), \[1980\] 1 SCR 914](#) (brewing and labelling of beer), *Schneider v The Queen*, [1982 CanLII 26 \(SCC\), \[1982\] 2 SCR 112](#) (treatment of drug dependency) and *R v Wetmore*, [1983 CanLII 29 \(SCC\), \[1983\] 2 SCR 284](#) (regulation of the pharmaceutical industry).

Having conducted this chronological review, the Chief Justice then addressed what he referred to as two “preliminary” issues (at para 112). The first was whether a new matter of national concern could be framed in terms of the subject matter of the statute (its “pith and substance”), or whether it had to be framed “at a level of generality that is broader than the matter of the statute” (at para 114). The point was an important one insofar as the broader the articulation of the matter, (e.g. the regulation of GHGs, as the Alberta Court of Appeal had framed the matter), the greater the likelihood that the matter would not have the required “singleness, distinctiveness and indivisibility” (at para 110), and the greater the threat to provincial autonomy if jurisdiction under the national concern branch of POGG was deemed to be both plenary and exclusive.

The Chief Justice gave four reasons for rejecting the need for a broader and more abstract formulation of the matter. First, the Chief Justice pointed to the actual text of sections 91 and 92, which distinguish between “matters” and “classes of subjects” and observed that there is “[n]othing in the words of the Constitution that supports the construction of a class of subjects under the POGG power that is broader than the matter of the statute” (at para 115). Second, the Chief Justice observed that it was not unprecedented for the statement of the matter to be framed in the same terms as the pith and substance of the impugned legislation (at para 116). Such was the case, for example, in both *Anti-Inflation* and *Crown Zellerbach*. Third, consistent with the principle of judicial constraint, the Court should confine itself to the precise question before it. Simply put, “if Parliament has not indicated in a statute that its intention is to exercise jurisdiction over a broad matter, there is no reason for a court to artificially construct such a broad matter” (at para 117. See also, *Munro v National Capital Commission*, [1966 CanLII 74 \(SCC\), \[1966\] SCR 663](#) at 672). Finally, the Chief Justice pushed back against the contention that this approach conflates the characterization and categorization stages. An impugned statute



must still be subject to categorization and if “the matter is not legally viable as a matter of national concern, then ... the statute cannot be upheld on the basis of that doctrine” (at para 118).

The second preliminary issue related to an even more significant point, namely, the presumed exclusiveness of the federal power to legislate with respect to any matter that qualifies as a national concern. The backstop nature of the federal legislation raises this issue directly, since backstop legislation is premised on the capacity of a provincial or territorial government to pass a law or laws that establishes carbon prices that meet or exceed a national stringency standard. If the federal parliament’s power to make laws dealing with the stringency of carbon pricing was literally exclusive, there would be a question as to whether and how provincial laws could survive (see discussion of what one of us terms the *transfer theory* of POGG [here](#)). The Chief Justice answered this seeming conundrum by pointing out that the use of the word “plenary” to describe a matter that qualifies as a national concern is “unhelpful” because plenary speaks to the “scope of the power” and does not speak to the exclusiveness of such a power (at para 122). The scope of the power is determined by the nature of the relevant matter. Thus, in *Ontario Hydro v Ontario (Labour Relations Board)*, [1993 CanLII 72 \(SCC\), \[1993\] 3 SCR 327](#) labour relations fell within the scope of the matter of nuclear energy because of the link between labour relations and the safe operation of nuclear facilities. Other matters (e.g. aeronautics) might result in an even wider reach (e.g. aerodrome siting in *Johannessen v Municipality of West St. Paul*, [1951 CanLII 55 \(SCC\), \[1952\] 1 SCR 292](#)), but in each case the scope or plenary nature of the power must be determined by reference to the nature of that matter. The ability of a province to regulate with respect to the same subject area should be determined through the application of the double aspect doctrine which permits “the same fact situation to be regulated from different perspectives” (at para 125, quoting *Desgagnés Transport Inc. v Wärtsilä Canada Inc.*, [2019 SCC 58 \(CanLII\)](#), at para 84):

If a fact situation can be regulated from different federal and provincial perspectives and each level of government has a compelling interest in enacting legal rules in relation to that situation, the double aspect doctrine may apply.

Crucially, the double aspect doctrine is equally applicable to national concern powers as to other federal and provincial heads of power; but that is not to say “that it *will* apply in a given case” (at para 128, emphasis in original). The “fact situation” must lend itself to being viewed from different perspectives. But if it can, both laws may be valid, subject to federal paramountcy (at paras 129 and 130). The importance of this conclusion was not lost on the Chief Justice:

The double aspect doctrine takes on particular significance where, as in the case at bar, Canada asserts jurisdiction over a matter that involves a minimum national standard imposed by legislation that operates as a backstop. The recognition of a matter of national concern such as this will inevitably result in a double aspect situation. This is in fact the very premise of a federal scheme that imposes minimum national standards: Canada and the provinces are both free to legislate in relation to the same fact situation — in this case by imposing GHG pricing — but the federal law is paramount. (at para 129)

Having addressed these “preliminary” concerns, the Chief Justice turned to two other methodological considerations associated with identifying matters of national concern. The first

was to emphasize that the recognition of a matter as being of national concern must be based on evidence (at para 133). This points to the importance of building an adequate record, particularly with respect to such matters as provincial inability but also, as we shall see, with respect to what the Chief Justice describes as the important threshold question, namely “whether the matter is of sufficient concern to Canada as a whole to warrant consideration under the doctrine” (at para 142). The second point relates to the issue of “newness” and the question as to whether the proposed matter should be something that must have been historically unknown at the time of Confederation (at para 134). The Chief Justice rejected the requirement of “newness.” In his view, references to newness in the case law must be read such that “[t]he critical element of this analysis is the requirement that matters of national concern be inherently national in character, not that they be historically new” (at para 136). Thus, original appreciation of a matter (such as uranium mining) as something that was local in nature coming within “various enumerated provincial classes of subjects: ss. 92(5), 92(9), 92(10) and 92(13)” might evolve over time such that “the production of its raw materials [could be] ... found to be a matter which is, by nature, of national concern because of its safety and security risks, particularly the risk of catastrophic interprovincial harm ...” (at para 138).

### **G. Crown Zellerbach, Refreshed and Refurbished**

With these important clarifications in hand, the Chief Justice turned to the test for identifying matters of national concern. While Chief Justice Wagner’s refurbished test draws significantly on Justice Le Dain’s test as articulated in *Crown Zellerbach*, there are some important modifications which draw extensively on the test for classification under the trade and commerce power developed in *General Motors of Canada Ltd v City National Leasing*, [1989 CanLII 133 \(SCC\)](#), [\[1989\] 1 SCR 641](#), as applied in the two Securities References: *Reference re Pan-Canadian Securities Regulation*, [2018 SCC 48 \(CanLII\)](#); *Reference re Securities Act*, [2011 SCC 66 \(CanLII\)](#). Chief Justice Wagner’s test is effectively a three-step test. It begins with a threshold question (is the matter of sufficient concern to Canada as a whole to warrant consideration under the doctrine?) before proceeding to consider, as a second step, the question of “singleness, distinctiveness and indivisibility,” a strong indicator of which is provincial inability to effectively address the matter. The third and final step is to assess the impact of recognizing a matter of national concern on provincial autonomy. We discuss each of these in turn below.

#### 1. The Threshold Question

The threshold question involves “a common-sense inquiry into the national importance of the proposed matter” (para 142). The inquiry is designed to ensure “that the national concern doctrine cannot be invoked too lightly and provides essential context for the analysis that follows” (para 143). This step will not be satisfied by merely asserting the *importance* of a matter: “Canada must adduce evidence to satisfy the court that the matter is of sufficient concern to Canada as a whole to warrant consideration in accordance with the national concern doctrine” (at para 144). If the federal government is able to discharge this burden, the inquiry turns to the ideas of “singleness, distinctiveness and indivisibility,” informed by provincial inability *but now also viewed through the lens of two “principles”* (at para 146).

#### 2. Singleness, Distinctiveness and Indivisibility

The first *principle* is that there must be “a specific and identifiable matter that is qualitatively different from matters of provincial concern” (para 146, emphasis added).

How then does one ascertain whether something is qualitatively different? The Chief Justice suggests that a key consideration is “whether it is predominantly extraprovincial and international in character, having regard both to its inherent nature and to its effects” (at para 148). In addition, “[i]nternational agreements may in some cases indicate that a matter is qualitatively different from matters of provincial concern” (at para 149). While not determinative of federal jurisdiction (*Labour Conventions Case* [1937 CanLII 362 \(UK JCPC\)](#), [\[1937\] AC 326](#)), such agreements “may help to show that a matter has an extraprovincial and international character, thereby supporting a finding that it is qualitatively different from matters of provincial concern.” (As an aside, it is worth recalling that international agreements were a part of the context in *Crown Zellerbach* (at 408), as well as in previous POGG cases such as *Canada (Attorney-General) v Ontario (Attorney-General) (Re Aerial Navigation)*, [1931 CanLII 466 \(UK JCPC\)](#), [\[1932\] AC 54](#) (at 62-63) and *Re Regulation & Control of Radio Communication in Canada*, [1932 CanLII 354 \(UK JCPC\)](#), [\[1932\] AC 304](#) (at 312-13)). A further limiting consideration is that the matter “must not be an aggregate of provincial matters”, and “federal legislation will not be qualitatively distinct if it overshoots regulation of a national aspect of the field and instead duplicates provincial regulation or regulates issues that are primarily of local concern” (at para 150).

The second principle is that “the evidence establishes provincial inability to deal with the matter” (at para 146). In developing this principle, the Chief Justice drew on the fourth and fifth indicia from *General Motors*. Thus:

(1) the legislation should be of a nature that the provinces jointly or severally would be constitutionally incapable of enacting; and (2) the failure to include one or more provinces or localities in a legislative scheme would jeopardize the successful operation of the scheme in other parts of the country. While Chief Justice Dickson frames the indicia in *General Motors* as not being individually necessary for classification under the trade and commerce power, for provincial inability to be established for the purposes of the national concern doctrine, both of these factors are required. (at para 152)

In adopting this framing, the Chief Justice rejected the argument made during the proceedings that provincial inability should be interpreted literally to mean that the provinces are without jurisdiction to address the matter whatsoever (for an argument that provincial *ability* to legislate in relation to GHG emissions should be determinative of a negative answer to the provincial inability indicium, see [Factum of the Attorney General of Saskatchewan](#) at para 86, and [Factum of the Attorney General of Quebec](#) at para 36).

To these two principles, the Chief Justice adds a third indicium, namely that “a province’s failure to deal with the matter must have grave extraprovincial consequences” (at para 153, emphasis added). While the Chief Justice suggested that this added element constitutes a “high bar” (at para 155) it apparently encompasses a fairly broad range of scenarios. For example, the Chief

Justice references *Johannessen* (the “intolerable” consequences of isolating northern communities were federal jurisdiction not to apply to aeronautics), *Munro* (the absence of federal jurisdiction “would have resulted in the denial of a suitable national capital to all Canadians”, *Local Prohibition* (referencing the discussion in that case of arms trafficking), and *Ontario Hydro* (the risk of a nuclear disaster) (at para 154). In an attempt at further clarification, the Chief Justice went on to say that the requirement of grave national consequences “can be satisfied by actual harm or by a serious risk of harm being sustained in the future. It may include serious harm to human life and health or to the environment, though it is not necessarily limited to such consequences” (at para 155). At the same time “[m]ere inefficiency or additional financial costs stemming from divided or overlapping jurisdiction is clearly insufficient” (at para 155).

The two principles between them give effect to the requirement that a matter be indivisible as enunciated in *Crown Zellerbach*. As the Chief Justice explains:

The first of these principles requires a specific and identifiable matter which is not a boundless aggregate. The second principle requires provincial inability, as it is clearly defined in *Crown Zellerbach* and, indeed, throughout the Court’s national concern jurisprudence, which is a marker of indivisibility. (at para 158)

### 3. Scale of Impact on Provincial Jurisdiction

The final step in the analysis is the scale of impact test, which is a contextual test designed to “prevent federal overreach.” Thus,

[...] the intrusion upon provincial autonomy that would result from empowering Parliament to act is balanced against the extent of the impact on the interests that would be affected if Parliament were unable to constitutionally address the matter at a national level. Identifying a new matter of national concern will be justified only if the latter outweighs the former. (at para 161)

## ***H. Applying the New Test to the GGPPA***

### 1. Threshold Question: Significant Concern for Canada as a Whole

As with all of the provincial appellate courts, the majority accepts that climate change is an “existential challenge” and “a threat to the future of humanity” (at para 167). However, and much as in *Crown Zellerbach* where the matter was not marine pollution *simpliciter* but rather marine pollution by ocean dumping, “the specific question before the Court is whether establishing minimum national standards of GHG price stringency to reduce GHG emissions is a matter of national concern” (at para 168). The record fully supported “the importance of carbon pricing” (at para 169) and indeed reflected “a consensus, both in Canada and internationally, that carbon pricing is integral to reducing GHG emissions” (at para 170). As such, the proposed identification of a new matter of national concern “readily passes the threshold test” and warrants further consideration (at para 171).

As we further discuss in the third post of this series, these findings by the Supreme Court are significant. While not the central issue, the majority’s holdings with respect to climate change go beyond mere *obiter* and are bound to influence other types of climate litigation in Canada, including current *Charter*-based litigation, future tort-based litigation (e.g. for climate change related costs), and disputes with respect to project-related impact (see, for example, the Government of Alberta’s reference to the Alberta Court of Appeal (decision pending) with respect to the validity of the *Impact Assessment Act*, [SC 2019, c 28, s 1](#)).

## 2. Singleness, Distinctiveness and Indivisibility

With respect to the first principle of the test outlined above, the Chief Justice holds that the matter of the legislation is qualitatively different from matters of provincial concern. Here again, the reasons lead with the nature of GHG emissions, which “are a specific and precisely identifiable type of pollutant” that “represent a pollution problem that is not merely interprovincial, but global, in scope” (at para 173). International agreements are brought to bear as “both the *UNFCCC* and the *Paris Agreement* help illustrate the predominantly extraprovincial and international nature of GHG emissions and support the conclusion that the matter at issue is qualitatively different from matters of provincial concern” (at para 174). The reasons next look at emissions pricing, holding that the *Vancouver Declaration* and other federal/provincial initiatives reflect the status of GHG pricing as a “distinct form of regulation” (at para 175). It does “not amount to the regulation of GHG emissions generally” and “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” (at para 175). Finally, the implementation of minimum standards of carbon pricing through backstop architecture is deemed to be qualitatively different from matters of provincial concern. The federal approach complements provincial schemes and “does so on a distinctly national basis, one that neither represents an aggregate of provincial matters nor duplicates provincial GHG pricing systems” (at para 177). While there is a sense in which the federal scheme is always applicable, it is only directly operable where a province or territory fails to implement a sufficiently stringent pricing mechanism and the federal government lists the province in a schedule by regulation (at para 178). In sum:

... the *GGPPA*’s fundamental role is a distinctly federal one: evaluating provincial pricing mechanisms against an outcome-based legal standard in order to address national risks posed by insufficient carbon pricing stringency in any part of the country. The *GGPPA* does not prescribe any rules for provincial pricing mechanisms as long as they meet the federally designated standard. (at para 179)

We discuss in our commentary (Part III of this blog series) the distinction between prescribing rules that a province must meet as opposed to the application of federal rules to supplement provincial rules that fail to establish the requisite degree of price stringency. We take the view that the *GGPPA* does the latter and not the former.

The Chief Justice gave three reasons for concluding that the evidence established provincial inability to deal with the proposed matter. First, “the provinces, acting alone or together, are constitutionally incapable of establishing minimum national standards of GHG price stringency



to reduce GHG emissions” (at para 182). While they might be able to achieve the same result through cooperation, there could be no guarantee that such cooperation would continue; “any province could choose to withdraw at any time” (at para 182). Here the Chief Justice draws upon the *2018 Securities Reference* to support an interpretation of provincial inability which relies in part on the inability of provinces to pre-commit to future policies.

Second, the risk of a province opting out could undermine the efficacy of the entire scheme. Reduced emissions by provinces remaining in the scheme could be more than offset by increased emissions (whether as a result of emissions leakage or otherwise) in provinces failing to implement a sufficiently stringent GHG pricing mechanism (at para 183). The record reinforced the reality of this risk, as set out in what are arguably two of the most important paragraphs in the decision. The Chief Justice noted that “[b]etween 2005 and 2016... emissions fell by 22 percent in Ontario, 11 percent in Quebec and 5.1 percent in British Columbia... But these decreases were largely offset by increases of 14 percent in Alberta and 10.7 percent in Saskatchewan” (at para 184). He went on to observe that “when provinces that are collectively responsible for more than two thirds of Canada’s total GHG emissions opt out of a cooperative scheme, this illustrates the stark limitations of a non-binding cooperative approach” (at para 185; the provinces referred to here are the three provinces which had launched reference proceedings: Saskatchewan, Ontario, and Alberta).

Finally, the Chief Justice emphasized that a province’s failure to cooperate would “have grave consequences for extraprovincial interests” (at para 187). The reasoning that justifies this conclusion is necessarily complex. It begins with a passage that revisits the risks associated with climate change:

It is uncontroversial that GHG emissions cause climate change. It is also an uncontested fact that the effects of climate change do not have a direct connection to the source of GHG emissions; every province’s GHG emissions contribute to climate change, the consequences of which will be borne extraprovincially, across Canada and around the world. And it is well established that climate change is causing significant environmental, economic and human harm nationally and internationally, with especially high impacts in the Canadian Arctic, in coastal regions and on Indigenous peoples. This includes increases in average temperatures and in the frequency and severity of heat waves, extreme weather events like floods and forest fires, significant reductions in sea ice and sea level rises, the spread of life-threatening diseases like Lyme disease and West Nile virus, and threats to the ability of Indigenous communities to sustain themselves and maintain their traditional ways of life. (at para 187)

The Chief Justice then moved from this statement of global effects to confront the argument that a province’s failure to cooperate could hardly “have grave consequences for extraprovincial interests,” since the impact of any single province’s emissions could not result in measurable harm to other provinces (at para 188). His response to this argument, which is increasingly confronting domestic courts in different jurisdictions in a range of climate change litigation contexts (as further discussed in our third post), was concise: “[e]ach province’s emissions are clearly measurable and contribute to climate change. The underlying logic of this argument [that emissions from any individual jurisdiction are immaterial to climate change] would apply

equally to all individual sources of emissions everywhere, so it must fail” (at para 188, bracketed clarification added). This conclusion was bolstered by further references to the dire implications of climate change together with the problem of defection in the context of collective action and the problems of emissions leakage. While the Chief Justice does not use this precise language at this point in the judgment (although he does recognize the problem of collective action earlier and as quoted above at para 24), this appears to be the message underlying the following passage:

While each province’s emissions do contribute to climate change, there is no denying that climate change is an “inherently global problem” that neither Canada nor any one province acting alone can wholly address. This weighs in favour of a finding of provincial inability. As a global problem, climate change can realistically be addressed only through international efforts. Any province’s failure to act threatens Canada’s ability to meet its international obligations, which in turn hinders Canada’s ability to push for international action to reduce GHG emissions. Therefore, a provincial failure to act directly threatens Canada as a whole. This is not to say that Parliament has jurisdiction to implement Canada’s treaty obligations — it does not — but simply that the inherently global nature of GHG emissions and the problem of climate change supports a finding of provincial inability in this case. (at para 190)

Indeed, this is reinforced by the backstop nature of the *GGPPA* which only kicks in operationally when a province defects (at para 195).

### 3. The Final Test: The Scale of Impact on Provincial Jurisdiction

The scale of impact on provincial jurisdiction was at the core of the objections of each of the provinces challenging the constitutionality of the *GGPPA*, in particular Alberta. The Chief Justice acknowledged that “the recognition of a previously unidentified area of double aspect in which the federal law is paramount” would have “a clear impact on provincial autonomy” (at para 197). But this interference with autonomy is limited and could be justified or outweighed “by the impact on interests that would be affected if Parliament were unable to constitutionally address this matter at a national level” (at para 196).

The Chief Justice gave two reasons for this conclusion. First, he observed that the interference with the provinces’ “freedom to legislate is minimal” (at para 199). A province would still be able to legislate with respect to a broad range of matters pertaining to GHG emissions. Indeed a province is still “free to design and legislate any GHG pricing system as long as it meets minimum national standards of price stringency” (at para 200). Second, “the matter’s impact on areas of provincial life that would generally fall under provincial heads of power is also limited” (at para 201). Individual consumers could choose how they responded to the price signals that might result from federal minimum standards, and while the new matter would entail some level of federal “supervisory” jurisdiction, this too would be limited by the purpose of the *GGPPA* and administrative law principles (at paras 201-202). Provinces would retain the ability to legislate in most areas related to GHG emissions without any federal supervision (at para 206). In sum:

The result of the *GGPPA* is therefore not to limit the provinces’ freedom to legislate, but

to partially limit their ability to refrain from legislating pricing mechanisms or to legislate mechanisms that are less stringent than would be needed in order to meet the national targets. Although this restriction may interfere with a province’s preferred balance between economic and environmental considerations, it is necessary to consider the interests that would be harmed — owing to irreversible consequences for the environment, for human health and safety and for the economy — if Parliament were unable to constitutionally address the matter at a national level. This irreversible harm would be felt across the country and would be borne disproportionately by vulnerable communities and regions, with profound effects on Indigenous peoples, on the Canadian Arctic and on Canada’s coastal regions. In my view, the impact on those interests justifies the limited constitutional impact on provincial jurisdiction. (at para 206)

Our third post addresses in more detail the suggestion that a province may not legislate a less stringent measure perhaps implying that such a provincial scheme may be invalid or inapplicable. In short, we do not believe that this implication is warranted. The failure of a province to legislate a carbon price or to legislate a carbon price of sufficient stringency to satisfy the federal standard merely exposes the province to the backstop application of the federal scheme; it does not render the provincial scheme invalid or inapplicable (unless there is actual inconsistency sufficient to trigger paramountcy).

The Chief Justice concluded his discussion of the national concern test by anticipating at least some of the criticisms of the dissenting Justices, in particular Justice Brown. More specifically, he addressed the concern that the inclusion of national standard setting within the new matter posed the risk of opening the door to a broad suite of federal national standard setting legislation and federal supervision of provincial governments in a manner that would be inconsistent with Canada’s version of federalism. After all, national standard setting will always be beyond the reach of the provinces and territories. The Chief Justice responded by emphasizing the cumulative requirements that the federal government would have to satisfy to qualify a matter as a new matter of national concern. In particular, he chose to emphasize (at para 209) the need to establish that the failure to recognize the matter would endanger the interests of other provinces. We pick up on this and other points in the next two posts of our series.

*In the interests of disclosure, Professor Olszynski was co-counsel for an organization that intervened in support of the GGPPA before the Supreme Court of Canada.*

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