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Supreme Court of Canada Re-writes the National Concern Test and Upholds Federal Greenhouse Gas Legislation: Part II (The Dissents)

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

This is the second in a series of posts on the Supreme Court of Canada's much-anticipated reference opinion regarding the constitutionality of the federal government's greenhouse gas (GHG) pricing regime: *Reference re Greenhouse Gas Pollution Pricing Act* , 2021 SCC 11 (CanLII) (*GGPPA Reference*) (*Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12, s 186 (*GGPPA*). The first post summarized the legislation and the majority opinion written by Chief Justice Richard Wagner. In this post, we summarize the dissenting opinions of Justices Suzanne Côté, Russell Brown and Malcolm Rowe. Our goal in reviewing the dissents is to highlight areas of agreement and disagreement between the majority and the dissents.

I. Brief Summary of the Reasons for Dissents

A. Dissent of Justice Côté

Justice Côté concurs with the majority with respect to the *formulation* of the national concern branch of POGG, (at paras 222) but concludes that the *GGPPA* does not fit within that formulation because of the breadth of discretion the legislation provides to the Governor in Council which results in the absence of any meaningful limits on the power of the executive. In addition, she considers that these broad discretionary powers independently "violate the *Constitution Act, 1867* , and the fundamental constitutional principles of parliamentary sovereignty, rule of law, and the separation of powers" (at para 222).

For Justice Côté the crux of the matter is that the minimum national standards contemplated by the *GGPPA* are established by the executive branch and not explicitly in the *GGPPA* itself (at para 236), and that Part II of the *GGPPA* "empowers the executive to establish variable and inconsistent standards on an industry-by-industry basis" (at para 238). Justice Côté concludes that regulations under the Act could "impose such strict limits on the fossil fuel or potash industries, both heavy emitters of GHG emissions, that the industries would be decimated" (at para 238). As discussed in our first post of this series, Part II of the *GGPPA* does set output-based standards at the industrial level and so there may well be differing impacts across industries from the imposition of these policies. However, Part II ensures a standard of treatment that would be no more disadvantageous than would be the case for a regulatory charge applied on all emissions. The output-based standards in Part II amount to the allocation of emissions credits on a per-unit output basis, so Part II serves as a mechanism to reduce costs for large

emitters relative to what would be the case if they were covered only under the fuel charge structure of Part I.

Justice Côté's principal concern with the degree of discretion afforded to the federal cabinet lies with the "Henry VIII" clauses in section 168 of Part 1 and section 192 of Part II of the *GGPPA.* A Henry VIII clause is a statutory clause that permits "the executive to amend by regulation the very statute which authorizes the regulation" (at para 231). Sections 168 and 192 of the *GGPPA* do, indeed, delegate broad authority to the Governor in Council to adjust a broad range of parameters which define the functioning of the fuel charge or the OBPS. Section 168 allows discretion to set rates, coverage, rebates, compliance assurance, and to set the benchmarking system to determine the listing of provinces for application of the backstop. Section 192 allows the executive to make regulations for the OBPS including definitions of a covered facility, constraints on record-keeping, compliance periods and payment deadlines, and emissions quantification and verification. These powers are all integral to the legislation. Only subsection 192(n) which allows for regulations "providing for user fees" seems to lack a clear nexus with the legislative scheme. Justice Côté also highlights the broad discretion conferred by subsections 166(2) and (3) with respect to the fuel charge in Part I, and especially subsection 168(4) which allows regulations to be made "in respect of the fuel charge system." She states that "despite any provision of [Part 1 of the *GGPPA*]", such a regulation prevails over the text of the statute in the event of a conflict (at para 276). This is indeed a classic Henry VIII clause and, for Justice Côté, such clauses "that purport to confer on the executive branch the power to nullify or amend Acts of Parliament are unconstitutional" (at para 294).

This conclusion runs counter to long-standing and high authority including, as the majority notes (at paras 85 – 87), *Re George Edwin Gray*, 1918 CanLII 533 (SCC), 57 SCR 150 as well as more recent lower court authorities such as *Waddell v Governor in Council*, 1983 CanLII 189 (BC SC), 8 Admin LR 266. Broad delegations of legislative authority to the executive are also common features of most – if not all – federal and provincial environmental and natural resources statutes in Canada (see e.g. section 59 of Alberta's *Environmental Protection and Enhancement Act*, RSA 2000, c E-12, which authorizes Cabinet to designate or exempt activities from environmental assessment; section 81(a) of Saskatchewan's *Environmental Management and Protection Act, 2002*, SS 2002, c E-10.21, which authorizes Cabinet to make regulations "defining, enlarging or restricting the meaning of any word or expression used in this Act but not defined in this Act.")

In sum, while Justice Côté supports the majority's formulation of the national concern test she still finds the *GGPPA* unconstitutional partly because the GGPPA does not fit with the national concern matter as formulated and partly because of what she considers extraordinary discretionary powers conferred on the executive. One can infer that she would have found the *GGPPA* to be valid under the national concern test had parliament been more prescriptive as to standards within the legislation itself (however difficult this might be from a drafting perspective) rather than delegating this to the executive.

B. Dissent of Justice Brown

While Justice Côté focuses on the scope of the regulation-making powers in the *GGPPA* and while Justice Rowe, as we will see in the next section, focuses on the implications of the residual nature of the POGG power, Justice Brown takes issue with all of the main conclusions of the majority with the exception of the decision to characterize the levy embedded in Parts 1 and 2 of the *GGPPA* as a regulatory charge and not a tax (at para 409). At its core, and as further discussed in the commentary (Part III of this blog series), Justice Brown's analysis systematically downplays the issue of extraprovincial harms, both generally and in the specific instances of GHGs.

Justice Brown offers the most detailed and nuanced discussion of the legislation, in particular with respect to the differences between Parts 1 and 2 of the *GGPPA*, emphasizing that, in his view, the OBPS of Part 2 affords the federal cabinet significant discretion to reach far into the details of industrial regulation (at paras 331, 339, and 346). He argues that this potentially allows the federal cabinet to play favourites since it may lead to significant differences in the *average* carbon prices paid by different industrial sectors (at para 338). In expressing this view, Justice Brown very much concurs with Justice Rowe's comments on the potential for review of any implementing regulations on constitutional grounds (at para 413), which also leads him to sympathize with Justice Côté's concerns with respect to the scope of the regulation-making power (at para 414). Most significantly, however, the differences between Parts 1 and 2 of the *GGPPA* ultimately lead Justice Brown to insist that Parts 1 and 2 should be characterized separately (at para 340).

For Justice Brown, the purpose of characterization is to facilitate classification of a law (at para 317) and as such he rejects not only the broad characterization of the *GGPPA* adopted in Alberta's *Reference re Greenhouse Gas Pollution Pricing Act*, 2020 ABCA 74 (CanLII) as a law relating to the regulation of GHG emissions (at para 256), but also the narrower characterizations offered by Canada and British Columbia and ultimately endorsed by the majority, i.e. minimum national standards of GHG price stringency to reduce GHG emissions (at paras 321 – 25). In particular, Justice Brown finds the inclusion of minimum national standards within the characterization of the legislation completely unhelpful, an "artifice" (at para 327) that "effectively decides the jurisdictional dispute" insofar as it short-circuits the analysis "by describing the means as something that only federal legislative authority can undertake" (at para 329). Justice Brown is surely correct that provinces are incapable of enforcing minimum national standards, and thus legislation characterized as imposing minimum national standards "effectively decides the jurisdictional dispute" (at para 329). The imposition of national policies, however, is not the sole anchor for provincial inability in the majority opinion, and Justice Brown does not really engage with the fundamental role that extraprovincial harms play in the Chief Justice's analysis (at para 190). Justice Brown also would have held that the backstop attributes of the legislation were not material to its purpose and legal effects, despite referring to them as a key feature of the Act (at para 312). Instead, Justice Brown ultimately settles on characterizing Part 1 of the Act as concerned with "the reduction of GHG emissions by raising the cost of fuel," and Part 2 as concerned with "the reduction of GHG emissions by pricing emissions in a manner that distinguishes among industries based on emissions intensity and trade exposure" (at para 340).

While the majority moved immediately to consider Canada's proposed classification of the *GGPPA* under the national concern head of POGG, both Justices Brown and Rowe insist that this is inappropriate given the residual nature of POGG, and that it was important to begin with the enumerated heads of power (Justice Brown at para 341; Justice Rowe at para 480). And having removed the language of minimum national standards from the characterization of the legislation, Justice Brown concludes that both Parts 1 and 2 of the *GGPPA* fell under one or more heads enumerated in section 92 or section 92A (at paras 343 – 51); after all "the Act's entire scheme is premised on the provinces having jurisdiction to do precisely what Parliament has presumed to do in the Act – that is, to impose carbon pricing through a comparable scheme" (at para 342).

But while it is certainly the case that provincial governments could enact valid legislation to regulate GHGs under the heads of power described by Justice Brown, his discussion omits several considerations. First, the territorial limits of provincial jurisdiction preclude provinces from pricing or otherwise regulating GHG sources in other provinces (as further discussed in Part III of this series). Second, it omits any meaningful consideration of the double aspect doctrine which has been applied in other national concern cases. For example, while labour conditions normally fall under provincial jurisdiction, the close connection between such conditions and nuclear safety brings labour conditions associated with nuclear plants within federal jurisdiction (*Ontario Hydro v Ontario (Labour Relations Board)*, 1993 CanLII 72 (SCC), [1993] 3 SCR 327). Similarly, while zoning and property are clearly provincial jurisdiction, federal laws in relation to the National Capital Region can validly include zoning and restrictions on property rights (*Munro v National Capital Commission*, 1966 CanLII 74 (SCC), [1966] SCR 663). In short, the fact that legislation in relation to carbon pricing can be classified under a provincial head or heads of power does not establish that similar legislation, enacted with a view to a federal aspect of the subject matter, cannot be classified under POGG's national concern branch.

Having classified the *GGPPA* under one or more heads of provincial power, it was not strictly necessary for Justice Brown to return to POGG and the national concern test, given his views as to the residual nature of POGG. However, Justice Brown did go on to further explain why, in his view, the *GGPPA* could not be sustained under POGG. Here again, Justice Brown was critical of the work done by the phrase "minimum national standards" insofar as it effectively prejudged the idea of national concern and deprived elements of the existing *R v Crown Zellerbach Canada Ltd*, 1988 CanLII 63 (SCC), [1988] 1 SCR 401 framework of much of their value (at paras 376 and 378). What he meant by this is that *national* standards must by definition be qualitatively different from provincial concerns and at the same time must also be beyond the authority of the provinces. For Justice Brown, characterizing the legislation in this way was a cheat code, allowing the majority to assume the result.

Justice Brown accepted that a narrow description of the matter that is alleged to be of national concern might make it easier to meet the C*rown Zellerbach* framework (at para 354) but he was clearly sceptical of the idea that a matter of national concern could be framed as narrowly as the pith and substance of the impugned law (he stepped back from saying it could never be) (at paras 369 – 70). But in this case, even if the matter of national concern could be confined to the scope

of the legislation, however, the matter must still be described in terms broad enough to embrace both Parts 1 and 2 of the *GGPPA* (at para 370). For Justice Brown, this meant that the alleged matter of national concern would have to be framed as broadly as "*the reduction of GHG emissions*" (at para 370, emphasis in original).

Having stripped away any reference to both minimum national standards and carbon pricing from the statement of the matter of national concern, it became much easier for Justice Brown to conclude that the legislation did not measure up to the *Crown Zellerbach* test. Justice Brown gave three reasons for this conclusion. First, such a matter could not meet the test of *distinctiveness* in the sense of it being a matter that is distinct from matters falling within provincial jurisdiction under section 92 (at para 371). For Justice Brown, as noted above, this point was confirmed by the backstop nature of the legislation (at para 372). The double aspect doctrine could not *confer* jurisdiction on the federal parliament where there was none, and neither could such jurisdiction be conferred simply by invoking minimum national standards (at paras 374 – 77). Second, the matter could not meet the test of *indivisibility* since, by their nature, GHG emissions are divisible by source and therefore by geography and jurisdictional boundaries (at para 381). The fact that emissions might have extraprovincial effects was far from conclusive and does not make the issue indivisible (at para 382). Under the *Crown Zellerbach* test, Justice Brown reminds us, provincial inability is an indicium of singleness and indivisibility and not itself proof of either (at para 383). Finally, Justice Brown was of the view that "[e]ven *were* the reduction of GHG emissions a single and indivisible area of jurisdiction, its impact on provincial jurisdiction would be of a scale that is completely irreconcilable with the division of powers" (at para 387, emphasis in original). Justice Brown reached this conclusion on the basis that the *GGPPA* was about much more than just paying money and would have profound effects on behaviour. The fact that backstop legislation based on a national concern would be far less invasive than a federal law based on either the taxation power or the criminal law power was irrelevant:

> … within their sphere of jurisdiction, the provincial legislatures are sovereign, which sovereignty connotes provincial power to act - or not act - as they see fit, not as long as they do so in a manner that finds approval at the federal Cabinet table … The very idea of recognizing federal jurisdiction to legislate "minimum national standards" of matters falling within provincial jurisdiction is corrosive of Canadian federalism (at para 394, references and emphasis omitted).

C. Dissent of Justice Rowe

Justice Rowe adopts Justice Brown's reasons for concluding that *GGPPA* is *ultra vires* in whole (at para 616) but adds reasons of his own (at paras 457 – 594) for that conclusion. He also adds some observations as to how the Court might, in a future case, examine the constitutional validity of any regulations enacted pursuant to the provisions of the *GGPPA* (at paras 595 – 615). With the exception of this discussion of the regulation-making powers under the Act, Justice Rowe's dissent focuses entirely on the national concern power, which he contextualizes within his vision of Canadian federalism. Thus, he has nothing to say about the characterization of the legislation beyond generally adopting Justice Brown's views (at para 616).

Justice Rowe's vision of federalism is one that privileges a certain type of provincial autonomy and celebrates difference and the opportunity to act differently (at paras 464 – 69). Much like Justice Brown, this leads him to a strong (but arguably lop-sided) view of provincial sovereignty (at para 557) that allows provinces to "adversely affect extra-provincial interests if they are acting within their sphere of jurisdiction" (at para 556) – without recognizing that such adverse effects must also diminish the sovereignty of the affected province(s). This vision of federalism informs Justice Rowe's emphasis on the residual nature of POGG and specifically the national concern head of POGG (which in his view (at para 478) also embraces the 'gap' head of POGG) (at paras 480 and 532). This, at least according to Justice Rowe, seems to be the principal difference between him and the majority. Whereas for him the wording of the POGG power in section 91 ("not coming within") is such that at the categorization stage one must look first to provincial powers (at para 480) and with specific heads of power before moving to the general (at para 532). He contrasts this with the approach taken by the Chief Justice which sees POGG as a primary source of authority that can be triggered or generated by the invocation of "minimum national standards." This, according to Justice Rowe, "is not residual authority. It is the antithesis of residual authority, as it would operate to encroach on jurisdiction conferred on the provinces" (at para 574). Indeed, like Justice Brown, Justice Rowe sees the entire idea of a national concern power based on minimum national standards as contrary to the Canadian version of federalism. This is because, in his view, it denies provinces autonomy and amounts to a supervisory view of federalism: "where provinces become subordinate units, the nation is no longer federal in its nature. In other words, supervisory federalism isn't federalism at all" (at para 570). Thus, while the double aspect doctrine may still allow a province to make laws with respect to aspects of carbon management, the federal paramountcy power effectively undermines provincial autonomy if the court adopts a broad view of national concern (at paras 566 – 70).

Ultimately, Justice Rowe's analysis of national concern remains firmly grounded within Justice Le Dain's articulation of the relevant test in *Crown Zellerbach* and he was at pains to emphasize that the threshold for each of Le Dain's indicia was high. The *importance* of the matter is irrelevant (at paras 540 and 577) and a matter could not attain the status of national concern just because it was the subject of an international agreement or agreements for that would be inconsistent with *Attorney-General for Canada v. Attorney-General for Ontario*, 1937 CanLII 362 (UK JCPC), [1937] A.C. 326 (*Labour Conventions* case) (at para 578). The *distinctiveness* of the matter, for Justice Rowe, turns not just on the distinctive nature of the gases in question (at para 580) but also required the federal government to show how the impugned matter was "distinct from matters falling under the enumerated heads of s. 92" (at para 541). But this was "inherently incompatible with the backstop nature of the Act" (at para 580). As for singleness and indivisibility, Justice Rowe seems to have been of the view that carbon pricing, much like "the environment", represented an aggregate that could be shared between federal and provincial government and did not have a "singleness" that required exclusive federal competence (at paras 545 and 579 – 587). Finally, on the matter of provincial inability and extraprovincial effects, as already noted, Justice Rowe's strong views of provincial sovereignty led him to think that extraprovincial effects, while relevant, would not be determinative of provincial inability (at para 556) and neither would the mere risk of non-co-operation (at para 557). All this said, it is difficult to get a reading from his judgment as to what Justice Rowe would consider to be sufficient to meet the test of provincial inability.

With respect to the broad regulation-making powers in Parts 1 and 2 of the Act, the main difference between Justice Rowe and the Chief Justice related to the question of whether it was appropriate to offer much in the way of comment on *GGPPA*-implementing regulations, given that they were not before the court. For the majority it was enough to observe that any such regulations would potentially be amenable to review on constitutional grounds. Justice Rowe went well beyond that (at paras 600 – 615). In particular, he expressed concerns that the breadth of the regulation-making powers under the Act create opportunities for favouritism and for regulating on grounds that have nothing to do with the effectiveness of GHG pricing (at para 614 for Part 2 and para 609 for Part 1). Justice Rowe also expressed some concerns as to the lack of transparency typically associated with regulation-making (at para 606). In our view, these comments represent a significant break with the traditional (and appropriate) reluctance of courts to comment on matters that are not before them. Furthermore, instead of offering the executive the benefit of the presumption that the executive will exercise its powers in conformity with the statute, Justice Rowe draws attention to the *possibility* that it may not and that the executive may exercise those powers for extraneous and preferential purposes. Furthermore, while Justice Rowe notes that some regulation-making powers may not attract much transparency, he must also know (indeed he references this at para 607) that *GGPPA* regulations will require the preparation of a regulatory impact assessment statement (RIAS) that will be published in the *Canada Gazette* (see, for example, here).

This concludes our summaries of the dissenting judgments. The next post (Part III) offer our comments on four aspects of the entire Reference: 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.

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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