

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

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

This is the third in a series of posts regarding 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. The second post summarized the dissenting opinions of Justices Suzanne Côté, Russell Brown and Malcolm Rowe. In this post, we provide commentary on four aspects of the 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

A. Pith and Substance, and the Subject Matter of National Concern: Narrow or Broad?

As our review of demonstrates, there are significant differences in how majority and dissents view the breadth of both the subject matter of the legislation and the subject matter of national concern. While these are, as a matter of law, distinct questions, the majority and dissents follow the same alignment with respect to both questions. That is, while the majority consistently favours a *narrow* view of the pith and substance of the *GGPPA* and of the alleged matter of national concern, the dissents take a broader or more expansive view of both pith and substance and the national concern.

The following table summarizes the main positions:

	Pith and substance	The matter of national concern
Majority	Both parts 1 and 2: establish minimum national standards of GHG price stringency to reduce GHG emissions. (at para 80).	Establish minimum national standards of GHG price stringency to reduce GHG emissions (para 119).

Justice Côté	Dissents from the majority on the grounds that the Act itself does not establish minimum standards (at paras 236-240) and so cannot fall within the matter of national concern; does not offer an alternative characterization.	Concurs with the majority (at para 236).
Justice Brown	Part 1: the reduction of GHG emissions by raising the cost of fuel (at para 340). Part 2: 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).	The reduction of GHG emissions (at para 370).
Justice Rowe	Follows Justice Brown (at para 616).	No clear articulation; appears to base his critique on the national concern as articulated by Canada at para 577: “establishing minimum national standards integral to reducing nationwide [greenhouse gas] emissions.”

The same is also true of the judicial commentary on the scope or reach of the legislation itself. Whereas the majority considers that the federal government is entitled to the usual presumption that it will only make regulations within the four corners of the statute (and to some extent downplays the discretionary powers associated with the OBPS scheme), both Justices Brown and Rowe consider that the breadth of the regulation-making powers in the *GGPPA* creates the risk of abuse. In our view, this risk is overstated and while we acknowledge that Justice Brown offers, in many respects, the clearest exposition of the *GGPPA*, he also exaggerates the scope of the discretion afforded to the federal executive. Thus, while the OBPS scheme affords discretionary powers that will affect the *average* price that different sectors of industry will pay on its carbon emissions, all are subject to the same *marginal* price (the impact on operating costs of increasing emissions by one tonne while holding output and all else constant) and thus have a similar incentive to reduce emissions. Furthermore, insofar as Part II engages in industrial policy, it does so by reducing the total costs to some industries and facilities more than others. The regulatory discretion is bounded implicitly by the fact that the worst-case treatment for any facility covered under Part II of the *GGPPA* would be to receive the treatment of facilities covered under Part I, i.e. having the regulatory charge apply on all emissions.

Much like the majorities in the courts below, the Chief Justice’s version of pith and substance and national concern, which emphasizes the backstop nature of the *GGPPA*, is carefully and narrowly constructed to minimize impairment of provincial autonomy. The dissents, and in particular Justice Brown, take a broader view of both the pith and substance of the legislation and the national concern matter. This in turn makes it easier to find the statute unconstitutional because the expanded federal jurisdiction allows a greater, and in Justice Brown’s view impermissible, level of interference with provincial autonomy.

B. The Role of Minimum National Standards

As our summaries of the majority (Part I of this series) and dissents (Part II) demonstrate, the role of the concept of minimum national standards is one of the key dividing lines between the majority and the dissent of Justice Brown (with Justice Rowe concurring on this issue). The use of the term minimum national standards as part of the characterization of the *GGPPA* first made its appearance in the opinion of Chief Justice Robert Richards in Saskatchewan’s *Reference re Greenhouse Gas Pollution Pricing Act*, [2019 SKCA 40 \(CanLII\)](#) (at para 125) (discussed in the majority opinion in this case at para 39). The majority (at para 77) and concurring opinions (at para 187) in *Reference re Greenhouse Gas Pollution Pricing Act*, [2019 ONCA 544 \(CanLII\)](#) (discussed in this case at paras 41 – 42) adopted this characterization with slight modifications, and Chief Justice Wagner adopts this framing in specifying both the matter of national concern and the pith and substance of the *GGPPA*. In our view, the language of “standards” is both inaccurate and unfortunate. It is inaccurate because the legislation is concerned with ensuring the pricing of emissions rather than setting standards. And it is unfortunate because it suggests more intrusive federal supervisory authority than is actually the case.

The jurisprudence on the national concern branch of POGG reflects a long-standing concern that the federal parliament should not be able to occupy areas of provincial jurisdiction simply by establishing national standards in federal legislation. For example, in *Board of Commerce (Canada (Attorney General) v Alberta (Attorney General))*, [1921 CanLII 399 \(UK JCPC\)](#), [60 DLR 513](#) at 519, Viscount Haldane held that “however important it may seem to the Parliament of Canada that some such policy [...] should be made general throughout Canada”, a desire for national uniformity was not sufficient to establish federal jurisdiction. Nor was a general concern across the country an adequate basis for invoking federal authority. Chief Justice Lyman Duff amplified the implications of the *Board of Commerce* decision in *Reference re the Natural Products Marketing Act, 1934*, [1936 CanLII 21 \(SCC\)](#), [\[1936\] SCR 398](#) at 422-23, holding that “nobody denied the existence of the evil [addressed by the legislation in *Board of Commerce*]. Nobody denied that it was general throughout Canada. Nobody denied the importance of suppressing it” (at 422). It was therefore important for the majority in this case to establish that there were appropriate anchors for federal jurisdiction *beyond the simple desire for coordinated national policy on the part of Parliament*.

The majority does so by emphasizing the qualitative difference between carbon pricing rules in general and rules establishing minimum levels or carbon pricing stringency (at paras 142 – 57 and 167 – 71) and by emphasizing the substantial extraprovincial effects of GHG emissions (at para 173). But in doing so, the majority also recognizes that there are substantial anchors for valid provincial legislation in relation to GHG emissions (para 197). It is thus clear that the

majority relies heavily on the application of the *double aspect* doctrine within the context of POGG (at paras 120 – 31) to minimize the degree of federal intrusion on provincial authority. The double aspect doctrine also provides the necessary underpinning for the backstop nature of the *GGPPA* which provides another key means of minimizing federal intrusion. As the majority notes, the fact that the regulatory charge applies only where provincial policies are not sufficiently stringent ensures that “the *GGPPA* does not create a blunt unified national system” (at para 81).

While a broad application of the double aspect doctrine should serve to protect provincial autonomy, it is important to address two additional questions. First, and as already suggested above, there are a couple of examples in the majority judgment where the Chief Justice seems to suggest that the prescription of national standards may render some forms of provincial legislation invalid or inoperative:

- (1) “the only thing *not permitted* by the *GGPPA* is for a province or a territory not to implement a GHG pricing mechanism, or to implement one that is not sufficiently stringent” (at para 79, emphasis added).
- (2) (In the context of scale of impact on provincial jurisdiction): “[u]nder the *GGPPA*, provinces and territories are free to design and legislate any GHG pricing system *as long as it meets minimum national standards of price stringency*” (at para 200, emphasis added).
- (3) “Emitting provinces retain the ability to legislate, without any federal supervision, in relation to all methods of regulating GHG emissions that do not involve pricing,” and, “[the provinces] are free to design any GHG pricing system they choose *as long as they meet the federal government’s outcome-based targets*” (at paragraph 206, emphasis added).

In our view each of these statements goes too far and serves to bolster claims that the recognition of a new matter of national concern will significantly impair provincial autonomy. We say these statements go too far because they simply do not follow from the application of the double aspect doctrine or the terms of the *GGPPA*. We can take them one at a time.

- (1) It is clear that there is nothing in the *GGPPA* that requires a province or territory to adopt carbon pricing. All that the legislation provides for is that the failure to do so establishes a condition precedent for the backstop application of the legislation. Similarly, the adoption of less stringent carbon pricing scheme than that established as a national standard does not somehow render that scheme invalid or even inoperative – it merely establishes the condition precedent necessary to trigger the backstop to eliminate the difference between the provincial price and the federal benchmark.
- (2) As with the discussion in the previous paragraph, it is clear that provinces and territories are in fact free to establish whatever scheme they like even if it doesn’t meet the minimum national standard. If it doesn’t meet the national standard, that merely gives the federal cabinet the license to trigger the application of the federal carbon price in that jurisdiction.

- (3) Similarly, a province or territory has no obligation to adopt an OBPS scheme of the same stringency as that provided for in the *GGPPA*. Its failure to do so though may trigger the backstop provisions and the application of the federal regulatory charge.

These passages all provide fodder for the dissents of Justices Brown and Rowe who, as noted above, emphasize both the conclusory effect of the “national standards” label as well as what the dissents characterize as the far-reaching supervisory implications of such standards. Justice Brown, for example writes that “the provinces can exercise their jurisdiction however they like, *as long as they do so in a manner that the federal Cabinet also likes*” (at para 358, emphasis added), and that “provinces may legislate [in relation to emissions pricing] *only where such legislation meets the criteria unilaterally set by the federal government*” (at para 378, emphasis added). Similarly, Justice Rowe holds that the federal act serves “to supervise provinces in the exercise of their authority” (at para 574). However, just as with our itemized discussion of the three passages in the majority judgment, each of these statements can be shown to significantly overstate the supervisory or even coercive effect of the *GGPPA*.

In sum, it is inconsistent with our federal system to imply that federal legislation can restrict the provincial legislative ambit. The degree of federal supervision imposed by the *GGPPA* is actually very limited since, as the dissents concede, the provinces will still be able to legislate with respect to GHG emissions including GHG pricing. There is only one thing that the provinces cannot do as a consequence of this ruling: they cannot prevent the federal government from applying regulatory charges to GHG emissions within their province to the extent that the province has not itself imposed a sufficiently stringent charge on those emissions. The *GGPPA* does not place minimum standards on provincial emissions pricing policies; it provides for the contingent application of a federal regulatory charge on GHG emissions where a province or territory fails to make provision for an economy-wide carbon price with a stringency that meets the federal benchmark provided for in regulations made under the *GGPPA*.

The second point that we must address as part of double aspect is the role of federal paramountcy. Federal paramountcy is triggered in two situations: operational conflict and frustration of purpose (see *Orphan Well Association v Grant Thornton Ltd.*, [2019 SCC 5 \(CanLII\)](#)). But neither is likely to be triggered in the context of *GGPPA* because of its backstop nature. There is nothing in the *GGPPA* that prevents a province or territory from establishing more ambitious carbon pricing provisions. And while a provincial regime that is deemed insufficiently stringent may trigger a federal regulatory charge there will be no direct conflict or frustration of purpose. Emissions pricing is such that it will always be possible to comply with both federal and provincial regimes by “just paying money” (at para 391, where Justice Brown is paraphrasing the majority reasons at para 71). While it is true that, in principle, the doctrine of federal paramountcy might have some further supervisory effect, it is hard to think of a practical example of operational conflict short of a province both failing to establish its own carbon pricing scheme and purporting to prohibit payment of any federal levy in relation to carbon pricing or attempting to otherwise negate the federal regulatory charges.

An analogy to income taxes may be illustrative. A provincial government has the authority to exempt entities from provincial income taxes, but it cannot prevent the collection of valid, federal income taxes in its jurisdiction since that would necessarily entail an operational conflict

that would trigger federal paramountcy. Federal and provincial income taxes can also apply concurrently with no barriers to joint compliance. It is, however, unlikely that a court would choose to frame federal income taxes as imposing minimum national standards of income taxation.

C. Provincial Inability and Extraprovincial Effects

A third area of significant disagreement between the Chief Justice and Justices Brown and Rowe relates to the meaning and role of the provincial inability test and whether it is met in this case. Not surprisingly, each side claims fidelity to *R v Crown Zellerbach Canada Ltd.*, [1988 CanLII 63 \(SCC\)](#), [\[1988\] 1 SCR 401](#) and accuses the other of some departure. Perhaps also not surprisingly, the truth lies somewhere in between, though in our view and as further set out below it lies closer to the Chief Justice's approach.

Returning to first principles, in *Crown Zellerbach* provincial inability was described as follows:

In determining whether a matter has attained the required degree of singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern it is relevant to consider what would be the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the intra-provincial aspects of the matter. (at para 33)

At the risk of stating the obvious, this test is very clearly concerned with extraprovincial harms arising from provincial inaction. In tying it to the “singleness, distinctiveness, and indivisibility” inquiry, however, Justice Gerald Le Dain rejected a determinative role for provincial inability; rather, provincial inability was to be but one factor, or indicium, albeit out of an unspecified number of factors.

As summarized in Part I of this series, the Chief Justice approached provincial inability as one of two principles (the other being qualitative difference) informing the “singleness, distinctiveness and indivisibility” inquiry, which he fairly observes “does not amount to a readily applicable legal test” (at para 146). Drawing on *Crown Zellerbach* and recent developments under the trade and commerce power, provincial inability now has three elements: (1) the provinces must be jointly or severally incapable, in the constitutional sense, of enacting the legislation; (2) refusal by one or more provinces would jeopardize the legislative scheme's operation in other parts of the country; and (3) refusal to deal with the matter of the legislation must have grave extraprovincial consequences (at paras 152 – 53). While clearly an elaboration, these three elements can all be fairly traced back to the *Crown Zellerbach* test, which recognized that each province may have jurisdiction over some aspect of the matter (the “intra-provincial aspects”) but not over the whole (the “extra-provincial interests”) (1st element) and that these may be inextricably linked (2nd element) such that a province's refusal to deal with the former has consequences for the latter (3rd element).

Justice Brown rejects the Chief Justice's approach to provincial inability, which he describes as a dilution of the *Crown Zellerbach* test (see e.g. paras 376, 420, 441, 448). Both he and Justice Rowe object to its seemingly strengthened position in the overall national concern analysis,

reminding us several times that provincial inability was but one indicator of singleness, indivisibility, and distinctiveness in *Crown Zellerbach* (see e.g. paras 383, 448, and 558). On this score, Justices Brown and Rowe are clearly correct, although the Chief Justice’s approach also technically meets this requirement (as one of two principles animating that inquiry).

As to the (re)formulation of the test, Justice Brown complains that the “majority does not appear to appreciate that the extra-provincial effects must be such that all or part of the matter is beyond the scope of the provinces’ legislative authority under s. 92 to address, *whether independently or in tandem*” (at para 446, emphasis added). For Justice Brown, the sum of provincial parts is equal to the federal whole, which perspective is made clearer in an earlier passage in his dissent: “Hence the constitutional impossibility of the *Act*’s backstop model: if the provinces *have* jurisdiction to do what the *Act* does — and, that is, again, the very premise of the *Act*’s scheme — then the *Act* cannot be constitutional under the national concern branch of POGG” (at para 350; for Justice Rowe, see para 555). But this is plainly incorrect: the provinces do not have the jurisdiction to do all that the *GGPPA* does because no province has the jurisdiction to regulate the GHG emissions of another. As explained by the Attorney General of British Columbia, “the inability is not of the emitting jurisdiction, but of the jurisdictions experiencing the consequences of the emissions” ([Factum of the Attorney General of British Columbia](#) at para 46). This, as noted by the Chief Justice, lies at the core of the *GGPPA*: “this matter would empower the federal government to do only what the provinces cannot do to protect themselves from this grave harm, and nothing more” (at para 195).

Justice Brown also objects to the addition of the third criterion, “grave extraprovincial consequences”, as “peremptory, almost uselessly subjective and susceptible to change” (at para 447). We agree that qualifiers like “grave” or “significant” do inject some subjectivity to the exercise (see the international case law on “*significant* adverse environmental effects”, for example, *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* and *Construction of a Road in Costa Rica Along the San Juan River (Nicaragua v Costa Rica)*, [2015] ICJ Rep 665), but it seems clear enough that the intention here is to discourage indiscriminate invocation of the national concern branch and that such a qualifier does at least provide an intelligible basis for debate. Justice Brown’s concern for subjectivity is also hard to reconcile with his apparent disdain for the provincial inability test, which in the wake of the Supreme Court’s decision in *R v Hydro-Québec*, 1997 CanLII 318 (SCC), [1997] 3 SCR 213 was championed for establishing “an objective and normatively attractive standard for coordinating federal and provincial initiatives” (David Beatty, “[Canadian Constitutional Law in a Nutshell](#)” (1998) 36:3 Alta L Rev 605 at 610). At the very least, it is doubtful that Justice Brown’s approach, which amounts to provincial inability and “something more” (at para 382) is any less subjective.

The majority and dissenters also disagree on the significance, or gravity, of the harm that one province’s failure to mitigate its own GHG emissions may have on other provinces. Drawing on the record before him, the Chief Justice sees a straight and increasingly dire line from such failure to Canada’s inability to meet its international commitments and its knock-on effects on global efforts to address climate change (at para 190). Justice Brown, on the other hand, endorses the Alberta Court of Appeal majority’s reasoning that no “measurable harm” could be linked to any one province’s failure to limit its emissions (at para 384). The same can be inferred for

Justice Rowe, who begins with the somewhat jarring proposition that some extra-provincial effects must be compatible with provincial jurisdiction:

Clearly, some extra-provincial effects are compatible with provincial jurisdiction, considering that, under the federal structure, provinces can adversely affect extra-provincial interests if they are acting within their sphere of jurisdiction... If the pith and substance of provincial legislation comes within the classes of subjects assigned to the provinces, incidental or ancillary extra-provincial effects are irrelevant to its validity... Given the potential displacement of provincial authority, courts should have a “strong empirical base” for concluding that the extra-provincial effects are such that the matter is beyond the powers of the provinces to deal with on their own or in tandem... (at para 556, citations omitted)

Of course, the *vires* of provincial legislation was not at issue in the *GGPPA* references, and even if it was, it only tells part of the story. While it is true that pursuant to current doctrine (*British Columbia v Imperial Tobacco Canada Ltd.*, [2005 SCC 49 \(CanLII\)](#)), provincial legislation cannot be struck down on the basis of *incidental or ancillary* extraprovincial provincial effects (setting aside for the moment whether such effects are indeed merely incidental), this does not mean that such effects are lawful. The Supreme Court’s decision in *Interprovincial Co-operatives Ltd. et al v R.*, [1975 CanLII 212 \(SCC\)](#), [\[1976\] 1 SCR 477](#) is perhaps most widely known for holding that one province cannot modify the legal rights of a company in another province, but a majority of the Supreme Court also held that provinces cannot authorize harms beyond their own borders (at 499 per Justice Laskin and at 511 per Justice Pigeon). Alberta conceded as much in its supplemental factum when it attempted to distinguish GHG emissions from “provincial actions with an immediate and tangible impact on other provinces – such as toxic waste flowing directly from one province to the other.” ([Factum of the Attorney General for Alberta](#) at para 28).

This is essentially the state of affairs as between nation states, where national governments have recourse to litigation and principles of international environmental law, including the prohibition against significant transboundary environmental harm (*The Trail Smelter Arbitration, the United States v Canada* ([\(1938 and 1941\)](#)), [3 UNRIAA 1905-1982](#)). Framed this way, the question is whether respect for provincial autonomy – as envisioned by Justices Brown and Rowe – requires British Columbia (or perhaps one of its municipalities) to sue Alberta or members of its oil and gas sector for climate change-related harms (see e.g. Martin Olszynski, Sharon Mascher and Meinhard Doelle, “[From Smokes to Smokestacks: Lessons from Tobacco for the Future of Climate Change Liability](#)” (2018) 30:1 *Geo Envtl L Rev* 1), or whether Canadian federalism can accommodate a “legislative solution,” in which case “Parliament is the only forum competent to weigh the *competing provincial interests* and reach a policy decision based on a perception of what will best serve the national welfare” (Ruth Sullivan, “Interpreting the Territorial Limitations on the Provinces” (1985) 7 *SCLR* 511 at 551, emphasis added).

In our view, the majority and dissenting justices’ disagreements regarding provincial inability can ultimately be traced back to competing visions of federalism – indeed, both Justices Brown and Rowe essentially admit as much. For Justice Brown, a strengthened role for provincial inability means embracing a “centralized vision” of Canadian federalism (at para 365). Justice

Brown rather boldly claims that “[n]o province, and not even Parliament itself, ever agreed to — or even contemplated” such an approach (at para 456), while Justice Rowe concludes that it “permanently alter[s] the Confederation bargain” (at para 592). The Chief Justice, for his part, does not really engage in this discussion, except perhaps in a subtle reminder “that courts, *as impartial arbiters*, are charged with resolving jurisdictional disputes over the boundaries of federal and provincial powers on the basis of the principle of federalism” (at para 50, emphasis added).

We cannot help but remark that both Justices Brown and Rowe appear to view provincial autonomy as something that can only be impaired by the federal government rather than something that may also be impaired by the effects of one province’s action or inaction on another province. This same omission can be found in the Alberta Court of Appeal majority’s opinion (*Reference re Greenhouse Gas Pollution Pricing Act*, [2020 ABCA 74 \(CanLII\)](#)), as noted by the Attorney General for British Columbia in what can be considered a full reply:

The [Alberta Court of Appeal] majority is right that individual provinces may find themselves “on the outside looking in” at federal policy if popular opinion in that province is at odds with the national majority. They are also right that the guarantees of provincial autonomy in the division of powers are there to protect such regional majorities/national minorities from unnecessary interference with their collective self-government. This was why the colonies opted for a federal union in 1867. *But the majority does not consider – and indeed discounts – the possibility that provinces may find themselves on the “outside looking in” at the unilateral action or inaction of other provinces that affects their vital interests. But this was above all why those colonies opted for a federal union.* ([Supplemental Factum of the Attorney General of British Columbia](#) at para 47, emphasis added)

The potential for unilateral action or inaction is another gap in Justices Brown and Rowe’s reasoning. They appear to be of the view that provinces should have a unilateral right to balance environmental concerns with economic sustainability even where it is abundantly clear, both conceptually and from the very record before the Court, that these competing interests are not situated wholly within any one province. This, in turn, can have profound and readily foreseeable incentivizing or disincentivizing effects. As noted by Ruth Sullivan almost thirty years ago, in such situations “the best solution for each [province] will likely be to sacrifice the interests in the other” (Sullivan, *supra* at 544). GHG emissions and their effect, in the form of climate change, are diffuse, transcending not only provincial boundaries but international ones as well (at para 173). The preponderance of the benefits of resource development (*i.e.* jobs, royalties, and other taxes), on the other hand, remain within each province (acknowledging that the federal government also benefits from the revenues and taxes generated by such development). Fundamentally, when Alberta or Saskatchewan are considering the pace and scale of oil and gas development, they are weighing the majority of the benefits against only a part of the environmental costs. The remainder are essentially externalities, which predictably distort the balancing exercise – as is clear from the record before the Court in this Reference (at para 184).

D. The Role of Domestic Courts in Addressing Global Climate Change

Around the world, domestic courts are increasingly being called upon to adjudicate disputes in relation to climate change. The response from some courts, especially in the United States, has recently been described as a form of “judicial nihilism”. where the complexity and global scale of the challenge serve to excuse domestic inaction (Scott Novak, [“The Role of Courts in Remediating Climate Chaos: Transcending Judicial Nihilism and Taking Survival Seriously”](#) (2020) 32:4 Geo Envtl L Rev 743 at 755). This approach is implicit in the Alberta Court of Appeal majority’s approach to the issue of extraprovincial harm (*Alberta GGPPA Reference* at para 324) as endorsed by Justice Brown (at para 384).

The problem, as noted by the Chief Justice, is that the “underlying logic of this argument would apply equally to all individual sources of emissions everywhere, so it must fail” (at para 188). In rejecting this approach, the Chief Justice very explicitly tethers his judgment to other recent and internationally renowned climate change judgments:

I note that similar arguments have been rejected by courts around the world. In *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497 (2007), for instance, the majority of the U.S. Supreme Court rejected the federal government’s argument that projected increases in other countries’ emissions meant that there was no realistic prospect that domestic reductions in GHG emissions in the U.S. would mitigate global climate change. The Supreme Court reasoned that “[a] reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere”: p. 526. Similarly, in *The State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v. Stichting Urgenda*, ECLI:NL:HR:2019:2007, the Supreme Court of the Netherlands upheld findings of The Hague District Court and The Hague Court of Appeal that “[e]very emission of greenhouse gases leads to an increase in the concentration of greenhouse gases in the atmosphere” and thus contributes to the global harms of climate change: para. 4.6. The Hague District Court’s finding that “any anthropogenic greenhouse gas emission, no matter how minor, contributes to . . . hazardous climate change” was thus confirmed on appeal: *Stichting Urgenda v. The State of the Netherlands (Ministry of Infrastructure and the Environment)*, ECLI:NL:RBDHA:2015:7196, at para. 4.79. In *Gloucester Resources Limited v. Minister for Planning*, [2019] N.S.W.L.E.C. 7, a New South Wales court rejected an argument of a coal mining project’s proponent that the project’s GHG emissions would not make a meaningful contribution to climate change. The court noted that many courts have recognized that “climate change is caused by cumulative emissions from a myriad of individual sources, each proportionally small relative to the global total of GHG emissions, and will be solved by abatement of the GHG emissions from these myriad of individual sources”: para. 516 (AustLII). (at para 189)

In our view, the Chief Justice’s approach is vastly more tenable to the judicial shrugging offered by the dissenting justices and the Alberta Court of Appeal majority. It is also bound to affect the course of current and future Canadian climate litigation, beyond division of powers cases and even public law matters.

We can see evidence of this already. Consider for example *Mathur v Ontario*, [2020 ONSC 6918 \(CanLII\)](#) a representative action on behalf of the plaintiff youths and on behalf of their generation and future generations of Ontarians seeking certain declaratory and mandatory orders against the Province on the basis that the Province's climate change standards and targets were insufficiently stringent and as such violated the plaintiff's Charter rights. In the course of dealing with Ontario's unsuccessful motion to strike, Justice Carole Brown began her judgment by citing from the-then recent Ontario Court of Appeal majority's reference opinion that "global climate change is taking place and that human activities are the primary cause," (*Mathur* at para 4 citing *Ontario GGPPA Reference* at para 7), and then returned to several findings from that opinion to conclude that the *Mathur* applicants could marshal scientific evidence to establish the requisite harm (*Mathur* at para 97, citing *Ontario GGPPA Reference* at paras 9, 10, 11, and 16). The Supreme Court's opinion is similarly bound to be cited by applicants and courts over the course of this and other litigation. In fact, it has already been cited four times since its release less than a month ago. In *Teal Cedar Products Ltd. v Rainforest Flying Squad*, [2021 BCSC 605 \(CanLII\)](#), the applicant company was granted an injunction prohibiting road blockades intended to obstruct its logging activities on Vancouver Island. Justice Frits Verhoeven went out of his way, however, to acknowledge and validate the Flying Squad's concerns:

The protestors have serious and passionate concerns about the environment. There is no doubt that climate change is real, and poses a grave threat to humanity's future. The Supreme Court of Canada has said so just a few days ago: *Reference re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11, at para. 2. But as I have said, the effect of old growth forest logging on climate change and biodiversity is not before me and is not for me to say. (at para 74)

Of course, the Supreme Court's findings were not directly relevant to the matter before the Court, and so their actual influence was limited. But it is not difficult to imagine a wide range of litigation contexts, both public and private, where the Supreme Court's findings and its approach to the global nature of climate change will be relevant. With respect to the former, the contributions of major projects to climate change are now formally part of Canada's environmental assessment regime under the *Impact Assessment Act* [SC 2019, c 28](#) at sections 22 and 63). Setting aside for the moment the constitutionality of such consideration (a matter that is currently before the Alberta Court of Appeal in the *Reference Re Impact Assessment Act*), both proponents and the Agency should expect the *GGPPA Reference* to figure prominently in legal challenges to any assessment that would purport to minimize a project's GHG emissions as insignificant relative to global emissions (for previous examples, see Mark Friedman , "[Assessing Greenhouse Gas Emissions in the Oil Sands: Legislative or Administrative \(in\)Action?](#)", (2016) 6:3 online: UWO J Leg Stud 5). The Chief Justice's approach could also reasonably be invoked in the civil litigation context (e.g. if a municipality were ever to sue oil and gas companies for climate change-related harms, as is increasingly happening in the United States), where a traditional approach to *de minimis* causation might exclude all but the largest emitters. To be clear, we are not suggesting that the *GGPPA Reference* will be determinative in such disputes, but there is little doubt in our minds that the trajectory of this body of case law would be different in its absence.

Conclusion

As one would expect of any decision in which the Supreme Court recognizes a new matter of national concern, the *GGPPA* Reference is significant. But this decision is particularly significant insofar as it recognizes a new matter of national concern in the context of developing appropriate legislative responses within the Canadian federation to an existential threat – global climate change. It confirms that the federal parliament is not confined to the blunt instruments of the criminal law power and the taxation power and that it may also craft less intrusive backstop legislation, in this case in the form of selectively applied regulatory charges.

The Reference has also clarified some aspects of the national concern doctrine. Perhaps the most important clarification is that the national concern (or any other branch of POGG) is not so exclusive as to eliminate the application of the double aspect doctrine whenever national concern is triggered. POGG does not confer plenary jurisdiction, and “plenary” as it has been used in previous POGG cases does not mean no double aspect. This is crucial since it allows the national concern power to be wielded in a carefully crafted manner to fill in gaps and to take account of provincial inability rather than as something that necessarily limits provincial legislative authority. Indeed, there is nothing in this decision that limits provincial legislative authority, and the very narrowness of the matter of national concern that has been recognized means that the federal paramountcy doctrine has little if any role to play.

The decision has also modified the framework for recognizing new matters of national concern from that adumbrated by Justice Le Dain in *Crown Zellerbach*. While the majority judgment still uses the language of “singleness, distinctiveness and indivisibility” it has layered on top of this some additional considerations. While layering-on does result in a proliferation of tests, principles and factors that, as Justice Brown suggests, can be somewhat confusing (at para 300), there appear to be three main changes. First, the analysis begins with a new threshold question “a common-sense inquiry into the national importance of the proposed matter” (at para 142). Second, and as part of applying the concept of distinctiveness, the majority introduces the concept of “qualitative difference” which effectively serves to sanction the linked concepts of national standard-setting and backstopping. Third, and as part of analysing the idea of provincial inability which informs the *Crown Zellerbach* framework, the majority places increased emphasis on extraprovincial effects in the context of collective action problems, as amply demonstrated in the section above on provincial inability and extraprovincial effects.

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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