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What is the Concern with Recognizing GHGs as a Matter of National Concern?

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Matter Commented On: *Reference re: Greenhouse Gas Pollution Pricing Act*

All eyes are on Saskatchewan this week, as the Saskatchewan Court of Appeal prepares to hear arguments in the federal greenhouse gas pricing reference. To most observers, this reference may appear to be simply about the constitutionality – or not – of the federal government's greenhouse gas (GHG) pricing regime set out in the *Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12, s 186 (*GGPPA*). As further set out in this post, however, for constitutional and environmental lawyers and scholars, this reference is less about *whether* the federal government can regulate GHGs but rather *the basis* upon which it can do so.

It is well settled, for example, that the federal government could pass a straightforward carbon tax pursuant to section 91(3) of *The Constitution Act*, 1867, 30 & 31 Vict, c 3, so long as the purpose of the scheme was primarily directed at the generation of revenue (see *e.g.* Bryan P. Schwartz, "Legal Opinion on the Constitutionality of the Federal Carbon Pricing Benchmark & Backstop Proposals" (October 6, 2017)). It is also the case that Parliament can rely on its section 91(27) power over criminal law for the purposes of environmental protection, as it was held to have done by the Supreme Court of Canada in *R v Hydro-Québec*, 1997 CanLII 318 (SCC) when Quebec challenged the constitutionality of the toxic substances regime found in the *Canadian Environmental Protection Act, 1999*, SC 1999, c 33 (*CEPA, 1999*). Indeed, the federal government's *Renewable Fuel Regulations,* SOR/2010/189 (RFR), enacted under *CEPA, 1999*, were more recently upheld as a valid exercise of the criminal law power in *Syncrude Canada Ltd v Attorney General of Canada*, 2014 FC 776 (CanLII) (*Syncrude FC*) (affirmed in *Syncrude Canada Ltd v Canada (Attorney General)*, 2016 FCA 160 (CanLII) (*Syncrude FCA*) (for related ABlawg posts, see here and here, respectively). In both of these decisions, the courts confirmed that climate change is an "evil" that Parliament may address through the criminal law power: "The evil of global climate change and the apprehension of harm resulting from the enabling of climate change through the combustion of fossil fuels has been widely discussed and debated by leaders on the international stage… this is a real, measured evil, and the harm has been well documented" (*Syncrude FC* at para 83; see also *Syncrude FCA* at para 62).

Perhaps somewhat surprisingly, in arguing for the constitutionality of the *GGPPA* the federal government has opted not to rely on those arguably more reliable heads of power (taxation and the criminal law) – at least not primarily. Rather, it has invoked its relatively controversial *residual* jurisdiction over matters of "Peace, Order and Good Government" (POGG), as set out in the opening text of section 91:

> **91.** It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty… the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated…(emphasis added)

Over time, the POGG power has been interpreted to consist of at least two distinct branches: (i) the "national emergency" branch, which the Supreme Court relied on to uphold federal anti-inflation measures in R*eference re Anti-Inflation Act*, 1976 CanLII 16 (SCC); and (ii) the "national concern" branch, which is the branch that the federal government is relying on for upholding the GGPPA. A third branch, known as the "gap" branch, shares overlapping features with the national concern branch, but may recognize the unique circumstance when a truly new subject matter arises that did not exist at the time of the distribution of powers in 1867 (*Reference re Regulation and Control of Radio Communication*, 1931 CanLII 83 (SCC)).

The requirements for recognizing a matter as one of "national concern" were set out in *R v Crown Zellerbach Canada Ltd*, 1988 CanLII 63 (SCC) at para 33, wherein the Supreme Court upheld federal legislation regulating marine pollution by ocean dumping as a matter of national concern:

1. The national concern doctrine is separate and distinct from the national emergency doctrine of the peace, order and good government power, which is chiefly distinguishable by the fact that it provides a constitutional basis for what is necessarily legislation of a temporary nature;

2. The national concern doctrine applies to both new matters which did not exist at Confederation and to matters which, although originally matters of a local or private nature in a province, have since, in the absence of national emergency, become matters of national concern;

3. For a matter to qualify as a matter of national concern in either sense it must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution;

4. 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.

With respect to the first point, the "national emergency" doctrine is not currently being invoked by the federal government, although the Intergovernmental Panel on Climate Change's (IPCC)

most recent report does suggest that there may be grounds for arguing that that we are in fact at a critical juncture, with only eleven years left to reduce GHG emissions to levels that would prevent less than 2 °C of warming globally. Presumably, however, the federal government has dismissed the emergency branch because the legislation proposed is not temporary in application.
As for the second and fourth criteria, some observers suggest that these are relatively easily met (see *e.g.* Nathalie Chalifour, "Canadian Climate Federalism: Parliament's Ample Constitutional Authority to Legislate GHG Emissions through Regulations, a National Cap and Trade Program, or a National Carbon Tax" (2016) 36 NJCL 331).

It is really the third criterion, "singleness, distinctiveness and indivisibility" and "a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution," that is likely to give the Court cause for pause. With respect to singleness, distinctiveness and indivisibility, Canada contrasts GHGs, which are definable as a class of gases with specific properties (*i.e.* heat-trapping), with the relatively open-ended definition of "toxic substances" at issue in *Hydro-Quebec, supra*, which was deemed too broad to meet this requirement (see *CEPA, 1999* s 64). With respect to the scale of impact, Justice La Forest expressed the concern this way (*Hydro-Quebec* at para 115):

> Determining that a particular subject matter is a matter of national concern involves the consequence that the matter falls within the exclusive and paramount power of Parliament and has obvious impact on the balance of Canadian federalism. In *Crown Zellerbach*, the minority (at p. 453) expressed the view that the subject of environmental protection was all-pervasive, and if accepted as falling within the general legislative domain of Parliament under the national concern doctrine, could radically alter the division of legislative power in Canada. (emphasis added)

Of course, both sections 91 and 92 purport to confer "exclusive" legislative jurisdiction to the federal and provincial governments, respectively, but this has not prevented Canadian courts' application of the "double aspect" doctrine, pursuant to which both levels of government are given room to legislate, recognizing that many, if not most, matters will have a provincial aspect and a federal aspect (see e.g. *Quebec (Attorney General) v. Moses* 2010 SCC 17 (CanLII) at para 36 for an example in the environmental assessment context). It is only where federal and provincial laws conflict, either by operation or by frustrating the federal purpose, that the federal law will be deemed paramount (see most recently *Orphan Well Association v Grant Thornton Ltd*, 2019 SCC 5 (CanLII) at para 65).

Presumably, the "double aspect" doctrine applies equally to matters of national concern; at least I am not aware of any precedent that purports to hold otherwise. The fact that Parliament *could have* enacted a straight-forward carbon tax, or perhaps a *slightly* less regulatory regime pursuant to the criminal law power (though I note that the RFR upheld in *Syncrude, supra*, is strongly regulatory, including the option of purchasing compliance through credits, and this did not preclude it from being upheld as a matter of criminal

law), should be another relevant consideration here. It seems plain that legislation passed under either of these heads of powers would have a similar impact on the provinces' ability to regulate GHGs in accordance with their own preferences and policies. If that is correct, then it is difficult to see how recognizing GHGs as a matter of national concern radically alters the division of legislative power in Canada.

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