Yes, the Federal Government Can Put a Price on Greenhouse Gas Emissions – Part 2

Which level of government can make laws on a new matter that is not specifically addressed in Canada's Constitution? This was the broad issue at stake in the Supreme Court of Canada's 2021 decision: *References re Greenhouse Gas Pollution Pricing Act* ("*GGPPA Reference*").[1] In this case, the Court was tasked with determining whether the Constitution permits the federal government to enact a statute — the *Greenhouse Gas Pollution Pricing Act* ("*GGPPA*") — that establishes "minimum national standards of GHG price stringency to reduce GHG emissions."[2] The Court found that the federal government has the power to enact the *GGPPA* because the establishment of minimum national standards of GHG price stringency is a matter of national concern.[3] This decision is significant because not many matters in Canadian history have been designated by the courts as matters of national concern.[4] As such, this case gave the Court a rare opportunity to further clarify what constitutes a matter of national concern under Canadian constitutional law.

This article is Part 2 of a two-part series that explores the majority's decision in the *GGPPA Reference*. Part 1 focused on the Court's characterization of the *GGPPA* as a law establishing "minimum national standards of GHG price stringency to reduce GHG emissions."[5] Part 2 examines how the Supreme Court of Canada reached its conclusion that the *GGPPA* is a valid exercise of Parliament's legislative power under the national concern doctrine.

The Federal Power to Make Laws for Peace, Order, and Good Government

After a court determines a law's "pith and substance" (or essential character), the next step in the division of powers analysis is to classify the law under a head of power. This means that the court must identify whether the federal government or the provincial governments have the power to enact the law. A government will only have the power to enact legislation on matters that are assigned to them by the Constitution. The key provisions that set out the division of powers are sections 91 and 92 of the *Constitution Act, 1867*. Section 91 sets out the powers assigned to the federal government, while section 92 lists the powers assigned to the provincial governments.

In the *GGPPA Reference*, the Supreme Court determined that the *GGPPA* was a valid exercise of the federal government's power to "make Laws for the Peace, Order, and good Government of Canada."[6] The introductory clause in section 91 of the *Constitution Act, 1867* empowers Parliament to make laws for these purposes. This power is commonly called "POGG" (an acronym for peace, order, and good government) and has three branches: emergency, national concern, and residual.

Broadly speaking, the national concern branch allows the federal government to make laws on matters that transcend the boundaries of any one province and that are of interest to the country as a whole. It is a significant finding when a court rules that the national concern branch applies. Once the court finds that a matter is one of national concern, the federal government will have the permanent power to make laws on that matter moving forward.[7]

Judicial History: *R v Crown Zellerbach Canada Ltd*[8]

Prior to the *GGPPA Reference*, the most recent successful use of the national concern doctrine was in *Crown Zellerbach* in 1988. This case asked whether federal legislation addressing marine pollution and dumping (including in provincial waters) was valid under the national concern doctrine. The Supreme Court of Canada said yes and provided four "firmly established"[9] conclusions on how to analyze whether the national concern doctrine applies to a proposed matter:

1. The national concern branch is distinct from the national emergency branch of POGG;
2. The national concern doctrine applies to new matters and matters that were originally provincial matters but that have become matters of national concern over time;
3. A matter of national concern "must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern."[10] Further, the impact on provincial jurisdiction as a result of granting federal jurisdiction over a matter must be reconcilable with the Constitution's division of legislative power; and
4. To assess singleness, distinctiveness, and indivisibility, courts should consider whether there would be consequences to extra-provincial interests if provinces failed to regulate the matter.[11]

The limited history of the national concern doctrine shows that it is only applied in exceptional cases where it is necessary for the federal government to make laws to address distinctly national problems.

Out with the Old, in with the New: Clarifying the National Concern Test

The national concern test set out in *Crown Zellerbach* remains largely unchanged by the Court's decision in the *GGPPA Reference*. However, the Court provided clarity on the application of this rarely used doctrine. The Court began by addressing three preliminary issues.

First, it clarified the "matter" to which the national concern doctrine applies. The Court found that the "matter" is identified in the characterization stage of the division of powers

analysis.[12] In other words, the legislation's "pith and substance" (or essential character) determines "the breadth and content" of the matter of national concern.[13]

Second, the Court addressed the impact on the constitutional division of powers when a new matter of national concern is found. When a new matter of national concern is recognized, exclusive and permanent jurisdiction is given to the federal government to make laws that involve that matter. However, the power given to the federal government is limited to the regulation of matters that have a "sufficient connection" to the matter of national concern.[14]

Third, the Court found that the double aspect doctrine can apply to matters of national concern.[15] A matter is said to have a double aspect when "both levels of government have an equally valid constitutional right to legislate on a specific issue or matter."[16] This finding is consistent with the principle of cooperative federalism, which holds that federal and provincial jurisdiction may overlap to achieve common goals.[17]

After addressing these preliminary issues, the Court proceeded to articulate and clarify the national concern test. Under this test, there are three steps to determine whether a matter qualifies as a matter of national concern.

1. Threshold Question

The national concern analysis begins by asking whether the matter at issue is of "sufficient concern to Canada as a whole."[18] At this step, the onus is on the federal government to provide evidence to prove that the proposed matter warrants "consideration in accordance with the national concern doctrine."[19] As the Court put it, "[t]his invites a common-sense inquiry into the national importance of the proposed matter."[20]

2. Singleness, Distinctiveness, and Indivisibility

The second step requires courts to find that a matter has a "singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern."[21] There are two principles underlying this requirement.

First, this requirement seeks to prevent federal overreach by ensuring that the doctrine only applies to matters that are not just "specific and readily identifiable," but also "qualitatively different" from matters of provincial concern.[22] What then makes a matter "qualitatively different"? The Court set out three considerations for this stage of the analysis. First, a key consideration set out by the Court is: "whether [the matter] is predominantly extra provincial and international in character, having regard both to its inherent nature and to its effects."[23] Second, courts can look to related international agreements to see whether the matter has extra-provincial aspects that make it qualitatively different from a provincial matter.[24] Finally, the federal role must be different than that of the provinces, rather than a duplicate.[25] This means that federal laws on the matter must be national in character and focused on national goals rather than focusing on issues that "are primarily of local concern."[26]

Second, federal powers should only be found under this doctrine when "evidence establishes provincial inability to deal with the matter."[27] This is commonly known as the "provincial inability test," which has three criteria.[28] First, the provinces must be "constitutionally incapable of enacting" the legislation alone or in tandem with other provinces.[29] Second, the failure of one or more provinces to act would endanger the success of the scheme in other parts of the country.[30] And third, the failure of a province to deal with the matter must have "grave extraprovincial consequences."[31]

3. Scale of Impact

The third and final step of the national concern analysis requires the federal government to show that the "scale of impact on provincial jurisdiction … is reconcilable with the fundamental distribution of legislative power under the Constitution."[32] The purpose of this final balancing act is to prevent federal overreach and protect against unreasonable intrusions on provincial jurisdiction.[33]

Summary of the National Concern Doctrine Framework

In sum, to find that a matter is of national concern, the federal government must demonstrate compliance with a three-step test that the Supreme Court of Canada clarified in the *GGPPA Reference*:

1. Threshold Question: The federal government must prove that the proposed matter is of sufficient concern to the entire country to warrant considering it as a potential matter of national concern.
2. Singleness, Distinctiveness, and Indivisibility: The federal government must demonstrate that: a) the matter is qualitatively different from a matter of provincial concern, and b) the provinces are unable to deal with the matter.
3. Scale of Impact: The federal government must demonstrate that the impact on provincial jurisdiction is reconcilable with the constitutional division of powers.

Matter of National Concern: Climate Change is a "threat of the highest order to the country, and indeed to the world"[34]

After clarifying the national concern doctrine, the Court turned its mind to classifying the *GGPPA*, which in this case meant determining whether the matter that the *GGPPA* seeks to address falls under the national concern branch of POGG. Before beginning the analysis, it is important to note what that matter is. As discussed in Part 1 of this two-part series of articles, the Court did not regard the *GGPPA* as a law regulating greenhouse gas emissions in general. Instead, the Court narrowly framed the *GGPPA* as a law establishing minimum standards for pricing GHG emissions in Canada to reduce such emissions.

Creating Minimum National Standards for Greenhouse Gas Pricing is a Matter of National Concern

In the initial, "threshold" prong of the national concern test, the Supreme Court of Canada found that the *GGPPA*'s subject matter *does* concern Canada as a whole. Canada has a history of efforts aimed at reducing greenhouse gas emissions.[35] Further, evidence from international bodies shows that carbon pricing plays an important role in reducing emissions.[36] The Court concluded this step of the analysis by stating that "this matter is critical to our response to an existential threat to human life in Canada and around the world."[37]

Next, the Court found that the matter meets the second requirement of the national concern test: the requirement of singleness, distinctiveness, and indivisibility. With respect to the first principle underlying this requirement — that the matter is qualitatively different from provincial matters — the Court noted that GHGs are specific and identifiable, that the pollution problem is global in scope, and that international agreements exist and support the conclusion that the matter is more than a matter of provincial concern.[38] With respect to the second principle, the provincial inability test, the Court found that provinces are constitutionally unable to establish minimum national standards for greenhouse gas pricing, that the risk of a province opting out of the scheme could undermine its success, and that legislative inaction would have grave consequences for extra-provincial interests.[39] To illustrate the last point further, the Court remarked 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."[40]

Finally, turning to the third requirement of the national concern test ("scale of impact"), the Court found that assigning this matter to the federal government does not unduly disrupt the federal/provincial balance of power. Here, the Court acknowledged that classifying this matter as a matter of national concern would clearly impact provincial jurisdiction.[41] However, the Court balanced this impact against the federal government's interest in making laws on greenhouse gas pricing.[42] In this regard, the Court reasoned that the federal government has an interest in addressing the risk of grave harm that would arise if some provinces did not adopt sufficiently stringent greenhouse gas pricing schemes.[43] Further, the impact on provincial jurisdiction is limited because it does not prevent provinces and territories from designing their own pricing systems as long as they meet the minimum national standards.[44]

As all three steps of the national concern test were established, the Court was able to classify the law under the national concern branch of POGG. This means that the federal government has the power to make laws that establish minimum standards in Canada for pricing greenhouse gas emissions for the purpose of reducing emissions. The Court concluded that this matter has a "real, and compelling, federal perspective on [greenhouse gas] pricing, focused on addressing only the well-established risk of grave extraprovincial harm."[45]

Conclusion

Following an almost three-year debate on whether the *GGPPA* is valid or not, we finally have an answer. The Supreme Court of Canada definitively settled once and for all that the *GGPPA* is constitutional. This means that this legislation will remain in force and is likely to be permanent unless a change in government facilitates its repeal. As such, all provinces and territories must have a climate plan in place that aligns with the standards set out by the *GGPPA*. In reaching this final decision, the Court took the opportunity to provide clarity on the national concern branch of POGG. The *GGPPA Reference* sheds important light on the three-pronged analysis for determining if a proposed matter falls within federal jurisdiction as a matter of "national concern."

Now that we have received this decision, what happens next? For many, this decision marks a step forward in Canada's climate change response and has the potential to facilitate progress towards national and international climate targets. However, provincial governments in Alberta and elsewhere do not see this decision as a victory, but as an intrusion on provincial powers to regulate resource industries.[46] Despite these concerns, the Supreme Court's decision leaves these critics with no realistic way forward. For the time being, the dispute over the validity of the *GGPPA* can be regarded as legally settled.

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

[2] *Ibid* at para 57.

[3] *Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12, s 186 .

[4] See *Johannesson v Municipality of West St Paul*, [1952] 1 SCR 292, [1951] 4 DLR 609. See *Munro v National Capital Commission*, [1966] SCR 663, 57 DLR (2d) 753. See *Ontario Hydro v Ontario (Labour Relations Board)*, [1993] 3 SCR 327, 107 DLR (4th) 457.

[5] *GGPPA Reference*, *supra* note 1 at para 57.

[6] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91, reprinted in RSC 1985, Appendix II, No 5.

[7] "Peace, Order and Good Government" (29 June 2021 last visited), online: *Centre for Constitutional Studies* <https://www.constitutionalstudies.ca/2019/07/peace-order-and-good-government/>.

[8] *R v Crown Zellerbach Canada Ltd,* [1988] 1 SCR 401, 1988 CanLII 63 .

[9] *Ibid* at para 33.

[10] *GGPPA Reference*, *supra* note 1 at para 105.

[11] *Crown Zellerbach*, *supra* note 8 at para 33.

[12] *GGPPA Reference*, *supra* note 1 at para 116.

[13] *Ibid*.

[14] *Ibid* at para 122.

[15] *Ibid* at para 126.

[16] "Double Aspect" (29 June 2021 last visited), online: *Centre for Constitutional Studies* < https://www.constitutionalstudies.ca/2019/07/double-aspect/>.

[17] *GGPPA Reference*, *supra* note 1 at para 126.

[18] *Ibid* at para 142.

[19] *Ibid* at para 144.

[20] *Ibid* at para 142.

[21] *Ibid* at para 145.

[22] *Ibid* at para 146.

[23] *Ibid* at para 148.

[24] *Ibid* at para 149.

[25] *Ibid* at para 150.

[26] *Ibid*.

[27] *Ibid* at para 152.

[28] *Ibid*.

[29] *Ibid*.

[30] *Ibid*.

[31] *Ibid* at para 153.

[32] *Ibid* at para 160.

[33] *Ibid* at para 161.

[34] *Ibid* at para 167.

[35] *Ibid* at para 169.

[36] *Ibid* at para 170.

[37] *Ibid* at para 171.

[38] *Ibid* at paras 172-80.

[39] *Ibid* at paras 182-87.

[40] *Ibid* at para 187.

[41] *Ibid* at para 197.

[42] *Ibid* at para 198.

[43] *Ibid*.

[44] *Ibid* at para 200.

[45] *Ibid* at para 211.

[46] Elise Von Scheel, "Kenney concerned carbon tax ruling enables future intrusions on provincial jurisdiction" (25 March 2021), online: *CBC* < https://www.cbc.ca/news/canada/calgary/kenney-alberta-carbon-tax-reaction-environment-1.5963722>.