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The Greenhouse Gas Pollution Pricing Act and the National Concern Doctrine: A Rights-Based Approach?

Over the past two days, the Supreme Court of Canada heard appeals from decisions of the Alberta, Saskatchewan, and Ontario Courts of Appeal on the constitutionality of the federal government's *Greenhouse Gas Pollution Pricing Act* (the "*GGPPA*" or the "Act").

The *GGPPA*, also known as the federal "carbon tax", is a mechanism for carbon pricing that seeks to set a minimum national standard for the reduction of greenhouse gas emissions across the country. It is the federal government's primary method of addressing climate change and achieving Canada's international emissions reduction commitments under the Paris Agreement.

In the spring of last year, the Ontario and Saskatchewan Courts of Appeal each held that the *GGPPA* is constitutional and a valid exercise of Parliament's power to legislate matters of national concern under the Peace, Order, and Good Government ("POGG") power set out in s. 91 of the *Constitution Act, 1867*.

By contrast, in February 2020, the Alberta Court of Appeal held that the Act does not fall within any federal head of power, would infringe on the province's exclusive jurisdiction, and therefore Parts 1 and 2 of the Act are unconstitutional in their entirety.

Argument before the Supreme Court over the past two days focused on Parliament's ability to legislate under the national concern branch of the POGG power. In addition to the parties, more than 25 interveners gave submissions on the *GGPPA*'s constitutionality. They included the Attorneys General of the Provinces of British Columbia, Manitoba and New Brunswick as well as Indigenous nations, and non-governmental organizations including environmental and economic-affairs organizations.

The National Concern Test and Provincial Inability:

In 1988, in *R v Crown Zellerbach Canada Ltd*, the Supreme

Court of Canada held that to determine whether a matter can be justified under the national concern power, the Court must consider:

- Whether the matter is “single, distinct, and indivisible”, a factor that is designed to limit issues of national concern to those that can be discretely and distinctly bounded;
- The Provincial Inability Test: that is, “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”; and
- Whether the scale of impact of the matter at issue on provincial jurisdiction is reconcilable with the fundamental distribution of legislative powers under the Constitution.

A key theme of the two-day hearing was the factual implication of striking down the *GGPPA* if provinces chose not to fill the gap by establishing their own emission-reduction strategies. A recurring question raised by several Justices was how to consider the impacts of a province’s failure to regulate GHG emissions in the face of the existential threat of climate change, and the provincial inability to set a minimum national GHG emissions standard.

Several interveners advanced a rights-based approach to the division of powers analysis along similar lines, asking the Court to consider the impact of finding the *GGPPA* unconstitutional on other parts of the Constitution and on internationally protected rights. They argued that the Court should consider in its analysis that if the *GGPPA* is found to be *ultra vires*, the actual effect of striking down a law aimed at addressing climate change would be to impair other constitutionally protected rights, including:

- constitutionally protected Aboriginal and Treaty Rights under s. 35 of the *Constitution Act, 1982*;
- the constitutional principle of “protection of minorities”, which encompasses children and future generations;
- the commitment to substantive equality under the Charter, bearing in mind that individuals who already face systemic inequality and who have been historically marginalized, will bear the brunt of the social, economic and environmental effects of climate change; and,
- Canada’s obligations under international human rights commitments, including the *Convention on the Rights of the Child*, the *Convention on the Rights of Persons with Disabilities*, and the *UN Declaration on the Rights of Indigenous Peoples*

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The Athabasca Chipewyan First Nation and the Anishinabek Nation and the United Chiefs and Councils of the Mnidoo Mnising (jointly) gave submissions on how global warming and changes to the environment would affect the spirit and intent of Canada's treaties with Indigenous peoples, and disproportionately impact Indigenous communities, notably by potentially extinguishing constitutionally protected s. 35 Aboriginal and Treaty rights.

In the *Quebec Secession Reference*, the Supreme Court held that the Constitution must be read as a whole, without any one principle trumping or excluding another. In essence, the question these interveners invited the Supreme Court to answer is how, or whether, constitutional rights, unwritten constitutional principles and international human rights commitments can, or should, impact what constitutes an issue "of national concern" under the POGG power, and, more generally, the division of powers.

During the hearing, Justice Rowe noted that s. 31 of the Charter clarifies that the Charter does not extend the legislative powers of either the federal or provincial governments. In other words, s. 31 makes it unlikely that Charter rights can, or will, be directly incorporated into the division of powers analysis.

However, in the *Quebec Secession Reference*, the Supreme Court held that Canada's unwritten constitutional principles, which include the protection of minorities, can give rise to substantive obligations that have "full legal force" carrying with them "a powerful normative force" binding upon both courts and governments.

As submitted by the intervener, the National Association of Women and the Law and Friends of the Earth, substantive equality rights could play an interpretive role to approach POGG in a more flexible and purposive manner that favours cooperative federalism.

In addition, Aboriginal and Treaty Rights under s. 35 of the *Constitution Act, 1982* lie outside of the Charter, and therefore any restrictions under s. 31 of the Charter would not apply.

At the Ontario Court of Appeal, the majority held, in considering the constitutionality of the *GGPPA*, that Canada's international obligations were an appropriate "contextual factor" to consider whether a matter is both "national" and a "concern" constitutionally. Chief Justice Strathy, writing for the majority, also quoted with approval from a submission of the counsel for the Attorney General of British Columbia that when the failure of one province to take action, in this case by failing to

implement measures to reduce greenhouse gas emissions, “primarily affects extra-provincial interests, including the interests of other provinces, other countries and Indigenous and treaty rights”, this would go to the indivisibility of a matter under the *Crown Zellerbach* test.

It remains to be seen to what extent the Supreme Court will take up this line of reasoning and interpret the rights engaged by a division of powers analysis as contextual factors, which favour more cooperative, or narrow, approaches to federalism. While the elements required for the kind of holistic approach to the division of powers being advocated by several of the interveners here do exist in the Constitution’s architecture, linking them would be a significant step in the jurisprudence.

Whether the Court will accept the invitation to incorporate the concerns articulated by these interveners into its s. 91 and s. 92 analysis remains one of the many interesting aspects to look out for in this multi-faceted appeal.