

Ontario Court of Appeal finds that worsening GHG emissions tip the scales in favour of section 91 POGG powers

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On August 28, 2019, the Government of Ontario filed its appeal of the June 28, 2019 Ontario Court of Appeal decision in the constitutional reference about the Federal *Greenhouse Gas Pollution Pricing Act*.¹ The reference, heard by the Ontario Court of Appeal, addressed whether the *Greenhouse Gas Pollution Pricing Act* was unconstitutional in whole or in part.

The Ontario Court of Appeal delivered a majority decision written by Justice Strathy and concurred by Justices MacPherson and Sharpe with a minority decision by Justice Hoy, concurring in the result with a slightly different interpretation of the pith and substance analysis. Justice Huscroft dissented.

The majority and minority decisions find the *Greenhouse Gas Pollution Pricing Act* to be constitutional as a matter of national concern in furtherance of the federal Peace, Order and Good Governance (POGG) power found in section 91 of the *Constitution Act, 1867*.

Justice Strathy confirms shared constitutional responsibility for environment

In coming to his conclusion, Justice Strathy reviews the background of greenhouse gas (GHG) emissions and climate change and states as a fact that there is “no dispute that global climate change is taking place and that human activities are the primary cause.”² Justice Strathy concludes that “the environment is an area of shared constitutional responsibility.”³ He further states that “moreover, as a practical matter and indeed as a legislative matter, there is nothing these provinces and territories can do to address the emission of GHGs by their geographic neighbours and constitutional partners. Without a collective national response all they can do is prepare for the worst.”⁴

¹ *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544.

² *Ibid*, para 7.

³ *Ibid*, para 138.

⁴ *Ibid*, para 20.

Justice Strathy notes that the court is not being asked to decide if the GHG emissions pricing scheme under the *Greenhouse Gas Pollution Pricing Act* is a good, correct or effective policy, only whether it is constitutional.⁵

Justice Strathy comes to the conclusion that “there is today a greater appreciation that environmental pollution can transcend national and international boundaries and it is no longer thought of as a purely local concern.”⁶ He references *R v Hydro-Québec* to support this transition, where the Supreme Court of Canada says “...the protection of “the environment” has become a matter of “superordinate importance, and one in which all levels of government and numerous organs of the international community have become increasingly engaged.”⁷

Determining the constitutionality of legislation on federalism grounds involves two considerations – first, the characterization, or “pith and substance”, of the challenged law, and second, the validity of the classification of the legislation under the applicable federal head of power, in this case, the national concern branch of the federal Peace, Order and Good Governance (POGG) power.⁸

Characterization – Pith and Substance

The characterization of the pith and substance focuses on the examination of the purpose and effects, both the legal effects and practical consequences of the law, by reviewing intrinsic and extrinsic evidence.

Justice Strathy reviews many cases and the Preamble to the *Greenhouse Gas Pollution Pricing Act* in completing the characterization analysis⁹, and concludes that Canada’s interpretation of the pith and substance is too broad and Ontario’s is too narrow.¹⁰ Justice Strathy finds the pith and substance that is just right as “establishing minimum national standards to reduce greenhouse gas emissions”,¹¹ with the means by which to achieve this being “a minimum national standard of stringency for the pricing of GHG emissions.”¹²

⁵ *Ibid*, para 109.

⁶ *Ibid*, para 80

⁷ *Ibid*, quoting *R v Hydro-Quebec*, [1997] 3 SCR 213 at paras 85, 123, per La Forest J.

⁸ *Ibid*, paras 67-69.

⁹ *Ibid*, para 72 reviewing *R v Crown Zellerbach*, [1988] 1 SCR 401; *Reference re Firearms Act (Can)*, 2000 SCC 31, [2000], *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48, *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3; *Reference re Securities Act*, 2011 SCC 66; *Re: Anti-Inflation Act*, [1976] 2 SCR 373; *Rogers Communications Inc v Châteauguay (City)*, 2016 SCC 23; *Reference re Employment Insurance Act (Can)*, ss 22 and 23, 2005 SCC 56.

¹⁰ *Ibid*, paras 73-74.

¹¹ *Ibid*, para 77.

¹² *Ibid*.

Classification – Federal POGG Power

Justice Strathy follows the well-established principles enunciated by the Supreme Court of Canada in *R v Crown Zellerbach* in considering the classification inquiry: 1) does the matter have a “singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern” including the effect of a province’s “failure to regulate the ‘matter’”¹³ and 2) “whether the scale of impact of the federal legislation is reconcilable with the constitutional distribution of legislative power”¹⁴

A thorough application of the principles from *Crown Zellerbach* to the *Greenhouse Gas Pollution Pricing Act* is undertaken by Justice Strathy. Justice Strathy finds that whether establishing minimum national standards to reduce GHG emissions “is a new matter that was not recognized at Confederation”¹⁵ or is a matter that was “originally of a local or private nature”¹⁶, today, it is a “matter of national concern in the commonly-understood sense, given the consequences of climate change”¹⁷.

The singleness, distinctiveness and indivisibly aspect of *Crown Zellerbach* according to Justice Strathy is met as GHG emissions “are exactly the type of pollutant... *Crown Zellerbach* contemplated would fall within the national concern branch of POGG power.”¹⁸ In particular, Justice Strathy finds that the indivisibility is clear in that each provinces’ “efforts can be undermined by the action or by the inaction of other provinces”, and that addressing GHG emissions “cannot be dealt with in a piecemeal manner”.¹⁹

Justice Strathy draws on Professor Hogg’s constitutional law commentary to confirm that “the most important element of national concern is a need for one national law which cannot realistically be satisfied by cooperative provincial action because the failure of one province to cooperate would carry with it adverse consequences for the residents of other provinces”²⁰

¹³ *Ibid*, para 102.

¹⁴ *Ibid*.

¹⁵ *Ibid*, para 104.

¹⁶ *Ibid*, para 105

¹⁷ *Ibid*.

¹⁸ *Ibid*, paras 114, 124.

¹⁹ *Ibid*, para 118.

²⁰ *Ibid*, para 121, quoting Peter W Hogg, *Constitutional Law of Canada*, loose-leaf (revision 2018-1), 5th ed (Toronto: Thomson Reuters Canada Ltd, 2007), at para 17.3(b).

Division of Powers respected

Perhaps more significantly, Justice Strathy finds that the *Greenhouse Gas Pollution Pricing Act* respects the division of federal and provincial powers for several reasons:

- the *Greenhouse Gas Pollution Pricing Act* only sets the minimum national standard on a national basis leaving the provinces to decide to meet or exceed that standard²¹
- all regulation of GHGs is not drawn into federal jurisdiction²²
- there is an appropriate balance between federal and provincial laws applicable to the reduction of GHG emissions which are reflected by a harmonious reading of the *Greenhouse Gas Pollution Pricing Act* and provincial laws²³, and
- Ontario does not take the position that the *Greenhouse Gas Pollution Pricing Act* is in conflict with current or proposed provincial laws.²⁴

Justice Strathy concludes “that the *Act* is constitutionally valid under the national concern branch of the POGG power contained in section 91 of the *Constitution Act, 1867*.”²⁵

Tax, cost recovery and behaviour modification

In considering Ontario’s alternative submissions, Justice Strathy finds that the *Greenhouse Gas Pollution Pricing Act* is not a tax and does not fall under the federal taxation power in section 91(3)²⁶. Further, he finds that the charges imposed in the *Greenhouse Gas Pollution Pricing Act* are intended to be behaviour modifying²⁷, are not required to be cost recovery mechanisms²⁸, and the funds obtained from the charges are to be returned to the provinces, taxpayers and institutions, rewarding them for behaviour modification, in keeping with the *Greenhouse Gas Pollution Pricing Act*’s stated purpose.²⁹

²¹ *Ibid*, para 130

²² *Ibid*, para 131.

²³ *Ibid*, paras 135-136.

²⁴ *Ibid*, para 137.

²⁵ *Ibid*, para 139.

²⁶ *Ibid*, para 148.

²⁷ *Ibid*, paras 153-154.

²⁸ *Ibid*, para 160.

²⁹ *Ibid*, para 162.

Justice Hoy’s Refined “Pith and Substance”

Justice Hoy concurs with Justice Strathy’s conclusion on the constitutionality. However, she expressed the pith and substance as “establishing minimum national greenhouse gas emissions pricing standards to reduce greenhouse gas emissions” given the focus on modification of behaviour and reducing national anthropogenic GHG emissions.³⁰

Justice Huscroft’s Cautions to Not Conflate Characterization with Classification

Justice Huscroft prepares a thought provoking dissent highlighting the importance of not conflating characterization (pith and substance analysis) with the classification to determine corresponding heads of power, and the “great uncertainty” and “potentially significant impact on provincial lawmaking authority”³¹ of Justice Strathy’s decision.

Justice Huscroft poses several questions “[c]an Parliament establish “minimum standards” governing such provincial matters as home heating and cooling? Public transit? Road design and use? Fuel efficiency? Manufacturing processes? Farming practices?”³² Justice Huscroft warns of the potential consequences that such “a vaguely worded federal power to establish “minimum national standards” could permit, all with “major impact on provincial jurisdiction”.³³

Justice Huscroft’s Lifeline

Justice Huscroft provides the lifeline for the federal government to his conclusion that the *Greenhouse Gas Pollution Pricing Act* is unconstitutional. There are other law making mechanisms and authority that Canada could have used to address GHG emissions and the environment, including taxation, criminal law, and trade and commerce. Justice Huscroft concluded “[n]ot only can Parliament legislate in a variety of ways to reduce GHGs; it can legislate to accomplish much of what the *Act* aims to do.”³⁴

Cooperation to Achieve National goals

Further Justice Huscroft reminds us of the Supreme Court’s emphasis that “Canadian federalism is characterized by overlapping legislative jurisdiction and cooperation to achieve national goals.”³⁵ Not surprisingly, Justice Strathy’s reminder is the same. However, the national concern associated with worsening impacts of GHG emissions tips the scale in favour of a response under the section 91 POGG power.

³⁰ *Ibid*, para 175.

³¹ *Ibid*, para 237.

³² *Ibid*.

³³ *Ibid*.

³⁴ *Ibid*, para 240.

³⁵ *Ibid*, para 241.

SCC to Have the Last Word

The hearing of Ontario's appeal to the Supreme Court of Canada, filed on August 28, 2019, has been tentatively scheduled for January 15, 2020, one day after Saskatchewan's hearing, in which Ontario has intervened. Stay tuned for the last word on the federal POGG power and addressing GHG emissions from Canada's top Court.

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