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Citation Details

Jocelyn Stacey, "Climate Disruption in Canadian Constitutional Law: *References re Greenhouse Gas Pollution*" (2021) 33:3 J Envtl L 711.

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Climate Disruption in Canadian Constitutional Law: References re Greenhouse Gas Pollution Pricing Act

Jocelyn Stacey*

Abstract

This analysis considers the Supreme Court of Canada’s decision in *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11, in which a majority of the Court upheld as constitutional national carbon pricing legislation. The decision presents an excellent illustration of the legally-disruptive nature of climate change. Illustrating that nothing is static in a climate disrupted world—including constitutional law—this article identifies three shifts the Court makes in relation to climate disruption. First, the decision represents a shift away from climate denialism toward a judicial willingness to confront the environmental, social and legal implications of climate change for Canada. Second, the majority embraces and perhaps strengthens a “culture of justification” in climate decision-making. Third—and more tentatively—the majority moves beyond the erasure of Indigenous peoples from Canadian federalism but still yet fails to engage with Indigenous laws and jurisdiction as part of Canada’s constitutional response to climate change.

1. Introduction

The federalism challenge of regulating greenhouse gas emissions in Canada has long been a subject of academic scrutiny.¹ While carbon pricing, as a regulatory tool for emissions reduction has enjoyed considerable support in policy circles, Canada’s constitutional law and politics has complicated the journey to a national carbon pricing plan. The Supreme Court of Canada (SCC) put to rest decades of academic speculation in its March 2021 decision which upheld as constitutional the federal *Greenhouse Gas Pollution Pricing Act* (GGPPA).²

In contrast to much high-profile climate litigation, the *GGPPA Reference*³ is not a response to institutional failure nor is it part of the ‘rights turn’.⁴ It is rather an example of how a high Court

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¹ Nathalie J. 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; Shi-Ling Hsu & Robin Elliot, ‘Regulating Greenhouse Gases in Canada: Constitutional and Policy Dimensions’ (2009) 54:3 McGill LJ 463; Peter W. Hogg, ‘Constitutional Authority over Greenhouse Gas Emissions’ (2009) 46 Alberta Law Review 507 [Hogg].

² *Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12, s 186 [GGPPA].

³ *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 [GGPPA Reference].

⁴ Joana Setzer & Lisa C. Vanhala, ‘Climate change litigation: A review of research on courts and litigants in climate governance’ (2019) 10 WIREs Climate Change, e580 and Jacqueline Peel & Hari M. Osofosky, ‘A Rights Turn in Climate Litigation?’ (2018) 7:1 *Transnational Environmental Law* 37.

has been thrust into the difficult task of adjudicating on climate change as a result of legislative action on carbon pricing. Thus, the *GGPPA Reference* presents rich case study for understanding the “legally disruptive nature of climate change.”⁵ That is, the decision allows us to see how “existing legal doctrines and frameworks are forced to confront, respond, and perhaps even evolve to respond to climate change, beyond the application and incremental development of existing rules and doctrines.”⁶ In this decision, the SCC is forced to confront and characterize climate change and Parliament’s creative legislative response to it. Doing so provokes the Court to revisit fundamental principles of Canadian constitutionalism in articulating, refining and applying the relevant legal tests.

In this analysis, I set out the factual and legal backdrop to the SCC’s decision in *References re Greenhouse Gas Pollution Pricing Act (GGPPA Reference)*, I distill the main themes of the Court’s lengthy decision and I highlight three notable shifts the Court makes in this decision. First, I argue that this decision represents a shift away from climate denialism toward a judicial willingness to confront the environmental, social and legal implications of climate change for Canada. We will see that this shift is so strong that it may anticipate a form of ‘climate exceptionalism’ with implications for future environmental litigation. The second shift is away from treating climate claims as ‘not justiciable’ to embrace and perhaps strengthen a ‘culture of justification’ in climate decision-making. The third shift is a more tentative one, moving beyond the erasure of Indigenous peoples from Canadian federalism but still yet failing to engage with Indigenous laws and jurisdiction as part of Canada’s constitutional response to climate change. The *GGPPA Reference* is a momentous decision for climate law and policy in Canada, for Canadian federalism, and for appreciating the challenges of adjudicating on climate change.

2. The Constitutional and Political Context of Emissions Regulation in Canada

2.1 The Canadian Constitutional Landscape

Federalism is an influential force in Canadian environmental law and policy because of the perceived ambiguity over the scope of constitutional powers that Parliament and the Legislatures have to regulate the environment. The *Constitution Act, 1867* divides powers between federal Parliament (under section 91) and the provincial legislatures (under section 92). None of “the environment”, “pollution” or “climate change” are matters listed under either section.

While the powers enumerated in the *Constitution Act* may seem to skew in favour of the provinces on matters related to pollution and environmental protection, Canadian constitutional law consistently affirms that Parliament has a meaningfully role to play in environmental protection. Indeed, a series of important SCC decisions in the late 1980s and 1990s solidified this federal role by upholding federal ocean dumping legislation, federal toxics regulation, and federal environmental impact assessment legislation.⁷ Since that time, constitutional jurisprudence has

⁵ Elizabeth Fisher, Eloise Scotford and Emily Barritt, ‘The Legally Disruptive Nature of Climate Change’ (2017) 80 *The Modern Law Review* 173.

⁶ Fisher, Scotford and Barritt, *supra* note 5 at 174.

⁷ *R v Crown Zellerbach Canada Ltd* [1988] 1 SCR 401 (SCC) [*Zellerbach*]; *R v Hydro-Québec* [1997] 3 SCR 213 (SCC); *Friends of the Oldman River Society v Canada (Minister of Transport)* [1992] 1 SCR 3 (SCC) [*Oldman*].

evolved toward an understanding of “cooperative federalism”, which tolerates considerable overlapping spheres of jurisdiction up to the point of direct conflict.⁸ Still Parliament has not taken an especially assertive role in environmental legislation, adopting narrow definitions of its jurisdiction and preferring in many cases to seek informal cooperative mechanisms rather than binding legislation.

There is broad consensus that Parliament has the constitutional power to legislate in relation to greenhouse gas (GHG) emissions.⁹ The only question has been how it can do so. We will see that the complexity of the climate challenge prompted Canada to take a creative and largely uncharted path to a national carbon pricing scheme.

2.2 Canada’s Emissions Reduction Challenge

Canada’s emissions challenge is defined by regional diversity, sectoral differences and decades of delay in taking meaningful action on emissions reduction. Canada is known internationally as the only country to formally withdraw from the Kyoto Protocol after years of inaction under successive governments.¹⁰ While Canada enthusiastically participated in the negotiations of the Paris Agreement, as of spring 2021, it is the only G7 country whose national emissions have increased since signing the agreement.¹¹ Despite a long pattern of setting and then missing targets, in spring 2021 Canada increased its target to 40-45% emissions reduction target by 2030.¹²

Delay at the national level reflects the regional and sectoral challenges in Canada’s emissions profile, which centre on the controversial Alberta oil sands and still growing oil and gas production for export concentrated in Alberta and Saskatchewan.¹³ Emissions reduction has happened in Canada. From 2005 to 2016, seven of thirteen jurisdictions reduced their GHG

⁸ The “double aspect doctrine” recognizes that the provinces and Parliament may both legislate with respect to the same factual scenario (e.g. highways) each in their own constitutionally-valid way. The applicability of the double aspect doctrine was a key issue in the *GGPPA Reference*.

⁹ This was agreed upon by all parties in the *GGPPA Reference*. In 2016 the Federal Court of Appeal upheld fuel standards regulations issued under the *Canadian Environmental Protection Act*, relying on the Criminal Law power (*Synchrude Canada Ltd v Canada* (Attorney General) 2016 FCA 160). Nathalie Chalifour 2016 National Journal on Constitutional Law; [Hogg] *supra* note 1.

¹⁰ Staff and Agencies, ‘Canada pulls out of Kyoto Protocol’ (13 December 2011) <<https://www.theguardian.com/environment/2011/dec/13/canada-pulls-out-kyoto-protocol>> accessed 19 May 2021. By the time of its withdrawal, Canada’s national emissions are reported to have *risen* by approximately 33% compared to 1990 levels far from its Kyoto commitment of 6% reductions.

¹¹ Ian Austen and Christopher Flavelle, ‘Trudeau was a global climate hero, now Canada risks falling behind’ *The New York Times* (New York, 21 April 2021) <<https://www.nytimes.com/2021/04/21/world/canada/trudeau-climate-oil-sands.html>> accessed 19 May 2021.

¹² Christian Noel, Louis Blouin, and Laurence Martin ‘Canada’s new climate change target will exceed 40% cut in emissions: Radio-Canada sources’ (Ottawa, 21 April 2021) <<https://www.cbc.ca/news/politics/ghg-emissions-target-reductions-1.5996400>> accessed 19 May 2021.

¹³ Nia Williams, ‘Canada’s oil sands hit record high production – gov’t data’ (6 January 2021) Reuters, online: <<https://www.reuters.com/article/us-canada-crude-idUSKBN29B2N8>> accessed 21 May 2021.

emissions considerably; however, these reductions were largely offset by increases in the other provinces and territories.¹⁴ At the same time, the regional distribution of climate impacts do not track GHG production. The territories and coastal provinces already experience significant climate impacts. For instance, Yukon has experienced a 2.3°C increase in average temperatures between 1948 and 2016, while average winter temperatures have increased by 4.3°C in the same period.¹⁵ The severity of flooding in recent years has resulted in more military personnel deployed in natural disaster response nationally than those deployed abroad.¹⁶ The City of Vancouver, a coastal urban centre estimates that \$1 billion of flood management infrastructure is needed by 2100 and estimates that a major flood would result in \$7 billion in damage.¹⁷ Indigenous peoples, subject to systemic racism as a result of historic and ongoing colonization, face disproportionate climate harms which disrupt the relationship between Indigenous societies and the land.¹⁸

2.3 The Emergence of a National Pricing Scheme

It is against this backdrop of constitutional culture, prolonged inaction on implementing international climate commitments, and the very real regional and sectoral challenges of emissions that the federal government set to work in 2016 to devise a national pricing scheme. After playing a prominent role in the negotiations of the Paris Agreement, Canada had the difficult task of forging consensus amongst the provinces and territories. That consensus was, in fact, almost achieved. Collaboration across provinces and territories, fostered by the federal government, yielded the 2016 *Pan-Canadian Framework on Clean Growth and Climate Change*. The *Pan-Canadian Framework* detailed the backstop approach to national carbon pricing, which would eventually become the *GGPPA*. The *Pan-Canadian Framework* was adopted by twelve of thirteen jurisdictions, with only Saskatchewan withholding support.

Parliament proceeded with the national plan, enacting the *Greenhouse Gas Pollution Pricing Act* in 2018. The *GGPPA* has two main operative parts. Part 1 implements a fuel charge set according to the GHG emissions intensity of listed fuels. The amount of the fuel charge

¹⁴ Environment and Climate Change, *National Inventory Report 1990-2016: Greenhouse Gas Sources and Sinks in Canada – Executive Summary*, 2018 (online), at p 13; cited by the majority at [24] and [184].

¹⁵ Xuebin Zhang and others, 'Canada's Changing Climate Report, Chapter 4: Changes in Temperature and Precipitation Across Canada' (Environment and Climate Change Canada, 2019) <https://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/energy/Climate-change/pdf/CCCR_FULLREPORT-EN-FINAL.pdf> accessed May 19 2021.

¹⁶ Government of Canada, 'Operation LENTUS' (12 December 2018) <<https://www.canada.ca/en/department-national-defence/services/operations/military-operations/current-operations/operation-lentus.html>> accessed 21 May 2021; David Pugliese, 'Canadian Military has 2,000 personnel dealing with floods but provinces determine priorities' (Ottawa Citizen, 30 April 2019) <<https://ottawacitizen.com/news/local-news/canadian-military-has-2000-personnel-dealing-with-floods-but-provinces-determine-priorities>> accessed 21 May 2021.

¹⁷ Vancouver City Council, 'Motion 2 Ramping Up Vancouver's Climate Action in Response to the Climate Emergency' (16 January 2019) <<https://council.vancouver.ca/20190116/documents/cfsc3.pdf>> accessed 20 May 2021. The \$7 billion figure does not include cost of business disruption nor clean-up and recovery.

¹⁸ See section 4.3 *infra*.

increases over time. For instance, this amounts to 8.84 cents/litre imposed on gasoline in 2021, which increases to 11.05 cents/litre in 2022.¹⁹ An important feature of the legislation is that it requires the federal government to distribute the revenue collected from the fuel charge back to the provinces or territories of origin.²⁰ Part 2 of the Act addresses major emitters. It establishes an output-based emissions scheme whereby industrial facilities must pay the carbon price on GHG emissions that exceed sector-specific output standards. Industrial facilities may also earn surplus emissions credits when their emissions fall below the applicable output standards. Industrial facilities subject to Part 2 are designated by the executive in the regulations and include, for instance, production of thermal coal, and upgrading heavy oil.²¹

Importantly, the *GGPPA* acts as a “federal backstop” for national pricing. That is, if a province or territory already has a sufficiently stringent carbon pricing scheme in place, then Part 1 and/or Part 2 of the *GGPPA* do not apply to that province. When making a determination about whether a territory or province should be listed under the Act and therefore subject to the backstop, the Act prescribes that: “... the Governor in Council shall take into account, as the primary factor, the stringency of provincial pricing mechanisms for greenhouse gas emissions.”²² If this threshold of “stringency” is met, then the *GGPPA* effectively lies dormant, because the objective of a minimum, cross-country carbon price is achieved.

When the *GGPPA* came into force, six provinces and territories were determined by the federal government to meet the stringency requirement for one or both Parts of the Act.²³ In addition, the governments of Yukon and Nunavut requested that the federal scheme apply. While Alberta, Ontario and Manitoba all supported the *Pan-Canadian Framework*, subsequent changes in provincial governments led these provinces to withdraw their support and oppose the *GGPPA*. Alberta and Ontario repealed existing carbon pricing regimes, meaning that they were subject to the *GGPPA*, along with Manitoba and Saskatchewan.²⁴ The governments of Saskatchewan, Ontario and later Alberta each filed reference cases before their provincial Courts of Appeal questioning the constitutionality of the *GGPPA*. Majorities of the

¹⁹ *GGPPA*, *supra* note 2 Schedule 2.

²⁰ *GGPPA*, *supra* note 2 s 165. Current policy is that 90% of the revenue goes to households in the form of a rebate.

²¹ Output-Based Pricing System Regulations SOR2019-266, Schedule 1.

²² *GGPPA*, *supra* note 2, s 166(3), 189(2). Section 166(3) for the determination on Part 1 of the Act and identical language at Section 189(2) for the determination of Part 2.

²³ Canada, ‘How we’re putting a price on carbon pollution’ (Canada, 28 June 2019)

<<https://www.canada.ca/en/environment-climate-change/services/climate-change/pricing-pollution-how-it-will-work/putting-price-on-carbon-pollution.html>> accessed 20 May 2021. BC, Quebec, Nova Scotia, PEI (Part II applies), NFLD & Lab; NWT

²⁴ As of January 1, 2020, Alberta has a new regime for major emitters and is no longer subject to Part 2 of the *GGPPA*. New Brunswick did not initially meet the stringency requirement but later brought in a fuel charge that was determined to meet the federal minimum, though the province offset the price by lowering its excise tax: Jacques Poitras, ‘A made-in-New Brunswick carbon tax is here, but will it actually curb consumption?’ (1 April 2020) CBC News, online: <https://www.cbc.ca/news/canada/new-brunswick/new-brunswick-carbon-tax-1.5516992> accessed 21 May 2021.

Saskatchewan and Ontario Courts of Appeal upheld the *GGPPA* as constitutional.²⁵ A majority of the Alberta Court of Appeal found the Act to be unconstitutional.²⁶

3. The Supreme Court Decision

One of the many notable features of this case is the fact that Canada asserted early on—and throughout the litigation—that it had the constitutional authority to enact the *GGPPA*, not under an enumerated head of federal power, but rather under the national concern branch of its residual Peace, Order and Good Government (POGG) power.²⁷ The POGG power is the subject of enduring interest from constitutional scholars because of its potential for inviting significant federal overreach that would subsume spheres of provincial authority.²⁸ The caselaw on the POGG power is thin, spread over many decades, and is characterized by somewhat ambiguous legal tests and judicial attentiveness to maintaining a balance of power in the federation.

With eight sets of reasons emerging from the Courts of Appeal, and 28 sets of arguments from parties and intervenors before the Supreme Court of Canada, the stage was set for Canada's highest court to rule on one of the thorniest constitutional cases in recent history.

3.1 The Majority Reasons

Writing for a majority of six judges, Chief Justice Wagner upheld the *GGPPA* as constitutional under the national concern branch of POGG. In doing so, the majority also revised the national concern test. The constitutional analysis to determine the validity of legislation consists of two well-worn stages: first, characterizing the legislation (that is, determining its true subject matter or what is called the “pith and substance” analysis), and second, classification of the matter under the appropriate constitutional power. For the majority, classification was focused only on the national concern branch of POGG, rather than other possible powers as advanced by the intervenors.

The majority held that the true subject matter of the *GGPPA* is “establishing minimum national standards of GHG price stringency to reduce GHG emissions.”²⁹ Characterizing the pith and

²⁵ *Reference re Greenhouse Gas Pollution Pricing Act* 2019 ONCA 544; *Reference re Greenhouse Gas Pollution Pricing Act* 2019 SKCA 40.

²⁶ *Reference re Greenhouse Gas Pollution Pricing Act* 2020 ABCA 74.

²⁷ Section 91 of the *Constitution Act, 1867* begins: “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...” Caselaw has held that this constitutional clause contains an “emergency branch” of federal power, a “national concern” branch (the subject of this litigation) and, potentially a “gap branch”: *Hogg, supra* note 1.

²⁸ For an excellent and concise review, see Andrew Leach and Eric M. Adams, “Seeing Double: Peace, Order, and Good Government, and the Impact of Federal Greenhouse Gas Emissions Legislation on Provincial Jurisdiction” (2020) 29 *Constitutional Forum* 1.

²⁹ *GGPPA Reference, supra* note 3 [56], [80].

substance of the legislation was contentious before all courts and with a variety of possibilities suggested by the litigants from the broad “regulating greenhouse gas emissions”³⁰ to the specific “minimum national pricing standards integral to Canada’s treaty commitment to reduce nationwide GHG emissions.”³¹ Ultimately, it was the framing of the majority of the Saskatchewan Court of Appeal which prevailed. The majority considered the title and preamble of the Act, the “mischief” it is intended to address, the legislative history. Each of these features, in the majority’s view, emphasized pricing to reduce emissions on a national scale as both the purpose and effect of the legislation. Anticipating the dissenting reasons, the majority noted that the inclusion of “minimum national standards” as part of the pith and substance gave “expression to the national backstop nature of the GGPPA.”³² And it further noted that the scope of discretionary powers delegated by the Act were constitutional and that any powers exercised under the Act were subject to the requirements of both constitutional and administrative law.³³

Turning to classification, the next analytic step, the majority considered only the national concern doctrine. The majority clarified, refined and applied each step of the national concern test: (i) the matter meets the threshold question of national concern; (ii) the matter is single, distinctive and indivisible; and, (iii) the scale of impact is reconcilable with the division of powers under the Constitution. Mindful of the concern that the national concern branch creates a new and permanent matter of federal jurisdiction,³⁴ it sought to alleviate some of this worry by clarifying that the “double aspect doctrine” applies in this case allowing for overlapping federal and provincial legislation.³⁵

At the threshold stage, the majority observed that the critical question is whether the matter is “of sufficient concern to Canada as a whole” and it described this as a common sense inquiry which must be supported by evidence.³⁶ The matter in this case (establishing minimum national standards of GHG price stringency to reduce GHG emissions) “clearly” met this threshold requirement, with significant evidence of the “existential threat” of climate change and the centrality of carbon pricing to emissions reduction.³⁷ The majority directed much of its attention to the requirement that the matter has a “singleness, distinctiveness and indivisibility” that distinguishes it from matters of provincial concern. It reasoned that two principles of federalism animate this requirement: the prevention of federal overreach into matters of provincial concern and provincial inability to deal with the matter.³⁸ Applying the refined test to this case, the

³⁰ *ibid* (Factum of The Attorney General of Saskatchewan [4]). This is the pith and substance adopted by the dissenting judges at the Saskatchewan and Ontario Courts of Appeal (*Saskatchewan Reference, supra* note 25 [333]); *Ontario Reference, supra* note 25 [213]) and by the majority of the Alberta Court of Appeal (*Alberta Reference, supra* note 25 [256]).

³¹ *In the Matter of the Greenhouse Gas Pollution Pricing Act, SC 2018, c 12, s 186*, SCC No. 38663 (Factum of the Smart Prosperity Institute, intervener) [21].

³² *GGPPA Reference, supra* note 3 [81].

³³ See Part 4.2 *infra*.

³⁴ *GGPPA Reference, supra* note 3 [90].

³⁵ *ibid* [126].

³⁶ *ibid* [142], [133].

³⁷ *ibid* [171].

³⁸ *ibid* [146].

majority emphasized that the matter here was predominantly extra-provincial and international, with extra-territorial GHG emissions having a grave impact locally.³⁹ Moreover, the breakdown of provincial and territorial consensus with respect to national emissions pricing illustrated the risk of provincial non-cooperation.⁴⁰ At the final stage of the analysis, the majority assessed “whether the matter’s scale of impact is reconcilable with the division of powers”⁴¹ and concluded that the backstop nature of the legislation meant there was very little intrusion on provincial powers and, conversely, that the climate impacts of no federal power here were significant, irreversible and borne by vulnerable communities.⁴²

3.2 The Dissenting Reasons

Three judges wrote separate dissenting reasons, each of which I will address briefly.⁴³ Justice Côté agreed with the majority’s statement of the national concern test and she agreed that “Parliament has the power to enact constitutionally valid legislation [establishing minimum national standards of price stringency to reduce GHG emissions].”⁴⁴ However, Côté J. would have held the *GGPPA* unconstitutional in its current form because it delegated “wholly-unfettered” regulation-making powers to the executive.⁴⁵ She worried that “any substance” could be prescribed as subject to Part 1 of the Act and that Part 2 “accords the executive vast discretion to unilaterally set standards on an industry-by-industry basis, creating the potential for differential treatment of industries at the executive’s whim.”⁴⁶ Finally, Côté J. would have overturned longstanding Canadian constitutional law, which permits Henry VIII clauses, to find that such clauses are unconstitutional.⁴⁷

Justice Brown dissented in full, disagreeing with the majority at every stage of the analysis. Brown J. found that it was inappropriate to characterize the Act to include minimal national standards, reasoning that it adds nothing and effectively decides the dispute because only Parliament can set national standards.⁴⁸ For Brown J., Part 1 and 2 of the Act each needed to be characterized separately, each of which would have led to conclusions that the matters fall within provincial

³⁹ *ibid* [173] – [176].

⁴⁰ *ibid* [184] – [186].

⁴¹ *ibid* [160].

⁴² *ibid* [206].

⁴³ For a longer summary and analysis of the dissents see: Nigel Banks, Andrew Leach and Martin Olszynski, ‘Supreme Court of Canada Re-writes the National Concern Test and Upholds Federal Greenhouse Gas Legislation: Part II (The Dissents)’ (ABLawg, 29 April, 2021) [ABlawg]. <<https://ablawg.ca/2021/04/29/supreme-court-of-canada-re-writes-the-national-concern-test-and-upholds-federal-greenhouse-gas-legislation-part-ii-the-dissents/>> accessed 20 May 2021.

⁴⁴ *GGPPA Reference*, *supra* note 3 [295].

⁴⁵ *ibid* [229].

⁴⁶ *ibid* [227], [235].

⁴⁷ *ibid* [242] See: Paul Daly, ‘The Constitutionality of Henry VIII Clauses in Canada: Administrative Law Matter (No. 1) in the References re Greenhouse Gas Pollution Pricing Act, 2021 SCC 11’ (Administrative Law Matters, 22 April 2021) <https://www.administrativelawmatters.com/blog/2021/04/22/the-constitutionality-of-henry-viii-clauses-in-canada-administrative-law-matter-no-1-in-the-references-re-greenhouse-gas-pollution-pricing-act-2021-scc-11/> accessed 20 May 2021 for comment.

⁴⁸ *ibid* [327] – [333].

heads of power and thus ended the analysis.⁴⁹ Curiously, Brown J. dismissed the backstop as a defining feature of the Act under the pith and substance analysis,⁵⁰ despite it featuring at every other stage of his reasoning. Brown J. reasoned that the “Act’s entire scheme is *premised* on the provinces *having* jurisdiction to do precisely what Parliament has presumed to do in the Act” demonstrating that Parliament is treading on provincial jurisdiction.⁵¹ He claimed that the majority was unfaithful to the constitution through its endorsement of a “supervisory model of Canadian federalism.”⁵²

Finally, Justice Rowe agreed with Brown J. in dissent, but offered his own reasons situating the national concern test within his vision of Canadian federalism. He emphasized that POGG is a residual power of last resort⁵³ and he reasoned that the backstop design of the legislation is incompatible with the national concern branch.⁵⁴ Justice Rowe thought that challenges to the regulations made under the *GGPPA* were inevitable, which lead him to propose a methodology for assessing their constitutionality.⁵⁵

4. Analysis

The *GGPPA Reference* is a significant contribution to Canadian constitutional law, Canadian environmental law, and to the growing constellation of climate law rulings from high courts around the world. There is much to unpack from this detailed judgment.⁵⁶ In this analysis, I identify three important shifts made by the SCC in this decision.

4.1 From Climate Denial to Climate Exceptionalism

One of the striking features of the majority’s reasons is the clarity and force with which they describe the challenge of climate change. The judgment begins with the recognition that: “Climate change is real. It is caused by greenhouse gas emissions resulting from human activities, and it poses a grave threat to humanity’s future.”⁵⁷ Notably, this is not merely a judicial preamble—a nod to the social context before pivoting to the ‘black letter law.’ Instead, the

⁴⁹ *ibid* [343] – [346].

⁵⁰ *ibid* [328].

⁵¹ *ibid* [342].

⁵² *ibid* [455].

⁵³ *ibid* [475], [501], [532], [616].

⁵⁴ *ibid* [570] – [571].

⁵⁵ *ibid* [600] – [615].

⁵⁶ Excellent doctrinal scholarship preceded the SCC decision and more is surely forthcoming. See, e.g., Leach and Adams, *supra* note; Martin Olszynski, Nigel Bankes and Andrew Leach, ‘Breaking Ranks (and Precedent): *Reference re Greenhouse Gas Pollution Pricing Act*, 2020 ABCA 74’ (2020), 33 *Journal of Environmental Law and Practice* 159; Nathalie Chalifour, ‘Jurisdictional Wrangling Over Climate Policy in the Canadian Federation: Key Issues in the Provincial Constitutional Challenges to Parliament’s Greenhouse Gas Pollution Pricing Act’ (2019) 50 *Ottawa Law Review* 197.

⁵⁷ *GGPPA Reference*, *supra* note 3 [2].

majority's understanding of climate change is essential at almost every stage of the judgment.⁵⁸ For instance, the majority observes that "the effects of climate do not have a direct connection to the source of GHG emissions"⁵⁹ and then goes on to find that the requirement of being single, distinctive and indivisible is met in large part because of the extra-territorial impacts of GHG pollution.⁶⁰

The majority's willingness to confront and address the complex phenomenon of climate change has both symbolic and practical import. While climate denialism has never been as overt in Canada as in the United States, currents of denialism very much inform climate politics across the country. Just days before the SCC issued its *GGPPA Reference* decision, Canada's official opposition, the Conservative Party, rejected a motion that would recognize the reality of climate change and its willingness to acting on it.⁶¹ To have the country's highest court speak to the reality of the climate change and the validity of a national response, may shift the political discourse around climate policy.

The majority's characterization of climate change also has practical significance, which is made plain in contrast with Justice Brown's dissent. Brown J. consistently downplays the extra-territorial impacts of GHG emissions.⁶² Instead, he focuses on provincial ability to regulate the sources of production with little recognition of the impacts of emissions, which he says are negligible considering the global scale of the problem.⁶³ Indeed, Brown J. claims that it was inappropriate for both the Attorney General and the majority to emphasize the importance of climate change as a justification for federal authority.⁶⁴

The majority's framing of climate change as a real and existential threat and its demonstration of how this informs legal doctrine will undoubtedly shape future climate litigation.⁶⁵ Passages from the judgment which identify specific and grave climate impacts will be advantageous to equity-seeking plaintiffs who are turning to the courts for legal remedies for climate harms.⁶⁶ But there is also a potential legal trap here. The majority's framing of climate change as "an existential challenge" and "a threat of the highest order"⁶⁷ functions analytically to narrow the majority's ruling. The scale and severity of the threat is such that, the majority assures, "Canada is not

⁵⁸ Credit to the many intervenors who presented multiple and varied pathways for integrating climate change into the constitutional analysis. See section 4.3 *infra*.

⁵⁹ *ibid* [12].

⁶⁰ *ibid* [187]. See also the threshold test (where the majority notes the existential threat) [171] and the scale of impact [206] discussed in section 4.2 *infra*.

⁶¹ John Paul Tasker 'Supreme Court rules Ottawa's carbon tax constitutional' (Ottawa, 25 March 2021) <<https://www.cbc.ca/news/politics/supreme-court-federal-carbon-tax-constitutional-case-1.5962687>> accessed 19 May 2021.

⁶² *ABlawg*, *supra* note 45.

⁶³ *GGPPA Reference*, *supra* note 3 [384]. (adopting the reasons of the majority of the ABCA).

⁶⁴ *ibid* [454] Justice Rowe agrees on this point [454], [577].

⁶⁵ *GGPPA Reference*, *supra* note 3 [10] – [11]. (on the specific impacts in Canada).

⁶⁶ *Environnement Jeunesse c Procureur général du Canada* 2019 QCCS 2885; *Mathur v Ontario* 2020 ONSC 6918; *La Rose v Canada* 2020 FC 1008 [*La Rose*].

⁶⁷ *GGPPA Reference*, *supra* note 3 [167].

seeking to invoke the national concern doctrine too lightly.”⁶⁸ It is worth recalling, however, that climate change “is part of a family of interlocking problems... all planetary in scope and all speaking to the fact of an overall ecological overshoot on the part of humanity.”⁶⁹ Some of these challenges, while perhaps not as salient as climate change, may well track the majority’s reasoning in this case, supporting a stronger federal role under the POGG power. ‘Exceptionalizing’ climate change by taking up of the majority’s strong language works to legally distinguish climate change from other pressing, transboundary environmental problems that may well warrant a constitutionally-appropriate federal response long before the reach the tipping point of crisis.

Indeed, climate change as “the exception” lingers in the background of this decision. The Court appears to lay the groundwork for constitutional recognition of “the climate emergency.”⁷⁰ The POGG power also contains an emergency branch, recognizing the need for a national response to emergencies.⁷¹ Unlike the national concern branch, the emergency branch of POGG authorizes a federal response on a temporary basis; once the emergency has abated, federal jurisdiction also recedes. Canada declared a climate emergency in 2019⁷² (after the enactment and implementation of the *GGPPA*) and did not argue the emergency branch in defending the constitutionality of the *GGPPA*.⁷³ However, numerous intervenors in the litigation argued that the Act could be upheld under the emergency power. They emphasized that “[t]here can be no dispute that climate change presents an emergency unlike any we have seen before” and that the emergency branch doctrine should and could be sensitive to different types of emergencies.⁷⁴

As we have seen, the majority did not resort to the emergency branch of POGG, but it did adopt the strong language of existential threat advanced by the intervenors. In addition, Brown J. in dissent suggests that Parliament could have justified the Act as falling under this branch and, indeed, says that relying on this doctrine would have been more consistent with Canada’s division of powers.⁷⁵ Justice Rowe is more guarded on this point, but notes that the “seriousness or immediacy of the threat that climate change poses” would be relevant to the emergency branch.⁷⁶ While of course, this is no guarantee that future federal legislative action would be upheld under the emergency power, the Court is clearly indicating that such arguments are foreseeable, plausible and may well be less constitutionally fraught than the analysis in this case.

⁶⁸ *ibid.*

⁶⁹ Dipesh Chakrabarty, ‘Humanities in the Anthropocene: The Crisis of an Enduring Kantian Fable’ (2016) 47:2-3 *New Literary History* 377 at 380; Mike Hulme, ‘Climate Emergency Politics is Dangerous’ (2019) *Perspectives* 23.

⁷⁰ Oxford Languages, ‘Word of the Year 2019’ (Oxford University Press) <<https://languages.oup.com/word-of-the-year/2019/>> last accessed 20 May 2012.

⁷¹ *Re Anti-Inflation Act* [1976] 2 SCR 373 (SCC)

⁷² House of Commons Vote No 1366, 42nd Parliament 1st session (17 June 2019).

⁷³ AGC endorsed intervenors’ arguments in the alternative. See: *GGPPA Reference, supra* note 3 (Factum of The Attorney General of Canada [167] – [168]).

⁷⁴ *GGPPA Reference, supra* note 3 (Factum of Canadian Labour Congress [1]). See also: *GGPPA Reference, supra* note 3 (Factum of David Suzuki Foundation [1]; Factum of International Climate Coalition [1]).

⁷⁵ *ibid* (Brown J) [399] – [401].

⁷⁶ *ibid* (Rowe J) [577].

4.2 From Not Justiciable to Justification in Climate Litigation

As in many jurisdictions around the world, Canadian courts have repeatedly ruled that climate-related claims are not justiciable.⁷⁷ As recently as 2020, the Federal Court held that the claims of youth that the federal government's conduct is systemically and unjustifiably violating their rights to equality and to life, liberty and security of the person were "so political that the Courts are incapable or unsuited to deal with them."⁷⁸ While the specific issue of justiciability was not engaged here, the majority embraces a "culture of justification"⁷⁹ in contrast to the dissents. That is, the majority affirms that public officials must publicly justify their decisions and that the court plays an essential role in supervising those decisions.

The first place in which the majority's commitment to justification is evident is in its treatment of the broad discretionary powers delegated by the *GGPPA* to the executive. As noted above, this delegation is extensive, and the breadth of the delegation animated Côté J.'s partial dissent. The majority appears unbothered by this and rejects Côté J.'s suggestion that delegated powers are "unfettered." Instead, the majority affirms the requirement of public justification in administrative decision-making, echoing its watershed administrative law decision in *Canada (Minister of Immigration and Citizenship) v. Vavilov*.⁸⁰ The majority reasoned that the executive must exercise its delegated powers in accordance with the purpose of the *GGPPA* and it would be subject to judicial review on that basis.⁸¹ In the majority's view, concerns about intrusive regulations or the improper listing of a province, territory, non-GHG or industrial facility were exaggerated.⁸² This is because the expectation—backed by the prospect of judicial review—is that the executive will justify those decisions in relation to the purpose of the Act, the standards it sets, and with scientific evidence.

The commitment to public justification is also evident in the majority's refinement of the national concern test, specifically the requirement to assess whether the "scale of impact on provincial jurisdiction...is reconcilable with the fundamental distribution of legislative power under the Constitution."⁸³ In the majority's refined test, the inquiry into the scale of impact is the final check to prevent federal overreach. While prior cases had not elaborated the details of "scale of impact", here the majority states:

⁷⁷ E.g. *Julianna v United States* 947 F (3d) 1159 (9th Circuit 2021); Case T-330/18 *Armando Ferrao Carvalho and Others v European Parliament and Council of the EU* [2019] ECR II-324.

⁷⁸ *La Rose*, supra note 66 [40].; *Friends of the Earth v Canada (Governor in Council)* 2008 FC 1183 [*Friends*].

⁷⁹ David Dyzenhaus, 'Law as Justification: Etienne Mureinik's Conception of Legal Culture' (1998) 14 *South African Journal on Human Rights* 11; Jocelyn Stacey, *The Constitution of the Environmental Emergency* (Hart Publishing, 2018).

⁸⁰ 2019 SCC 65. See, e.g. [2] and [14] for introductory remarks on the culture of justification.

⁸¹ *GGPPA Reference*, supra note 3 [73].

⁸² *ibid* [73] – [76].

⁸³ *Zellerbach*, supra note 7 [33].

“at this stage of the analysis, the intrusion upon provincial autonomy that would result from empowering Parliament to act is balanced against the extent of the impact on the interests that would be affected if Parliament were unable to constitutionally address the matter at a national level.”⁸⁴

Curiously this analytical stage receives the least amount of attention from the majority and yet this might be the passage with the most significant impacts for future climate litigation. It is precisely this balancing exercise of having to assess and weigh the impacts of climate change that courts have previously held to be beyond their institutional role. For instance, in declining to review the exercise of delegated power under the *Kyoto Protocol Implementation Act*, the Federal Court stated that the statutory text contained “policy-laden considerations [such as, equitable distributions of emissions reductions] which are not the proper subject matter for judicial review.”⁸⁵ And yet, here, the majority directly engages with similar interests.⁸⁶

“Although this restriction may interfere with a province’s preferred balance between economic and environmental considerations, it is necessary to consider the *interests that would be harmed* — owing to irreversible consequences for the environment, for human health and safety and for the economy — if Parliament were unable to constitutionally address the matter at a national level. This *irreversible harm* would be felt across the country and would be borne *disproportionately by vulnerable* communities and regions, with profound effects on Indigenous peoples, on the Canadian Arctic and on Canada’s coastal regions. In my view, the *impact on those interests justifies* the limited constitutional impact on provincial jurisdiction.” (emphasis added)

A requirement of justification is now embedded in the national concern test, requiring a reasoned basis for Parliament to encroach on provincial autonomy. Permissible reasons for encroachment speak—not to Parliamentary power *per se*—but rather to the underlying interests of those individuals and communities subject to the exercise of federal power. Moreover, the majority identifies particular types of harm as salient to this analysis: irreversible harm and harms borne disproportionately by vulnerable communities are each deserving of particular weight in the analysis. With justification as a ubiquitous feature in public law across jurisdictions,⁸⁷ this short analysis in the *GGPPA Reference* may provoke further judicial engagement with specific climate impacts.

4.3 From Constitutional Erasure to Indigenous Laws and Jurisdiction?

⁸⁴ *GGPPA Reference*, *supra* note 3 [161].

⁸⁵ *Friends*, *supra* note 78 [33].

⁸⁶ *GGPPA Reference*, *supra* note 3 [206].

⁸⁷ Grant Huscroft, Bradley W. Miller and Gregoire Webber, eds, *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press, 2014).

The third shift in the *GGPPA Reference* is more tentative and spotlights a missed opportunity for the Court to engage with Indigenous peoples as constitutional actors. Indigenous scholars describe “climate change as intensified colonialism;” another form of settler-induced environmental change that disrupts Indigenous relationships to land, the non-human world and forces dislocation from traditional territories.⁸⁸ The specific impacts of climate change on Indigenous peoples in Canada were before the Court through the submissions of numerous intervenors. For example, the Athabasca Chipewyan First Nation (ACFN) submitted that

“[t]he ACFN are traditionally known as ‘caribou eaters’, or *Etthen Eldeli Dené* in their language, because the livelihood and survival of their ancestors was based on hunting woodland and barrenland caribou. ...Should climate change progress, the caribou hunting which sustained SCFN people for millennia probably will be fully impossible.”⁸⁹

The submissions of the Athabasca Chipewyan First Nation underscore the existential threat of climate change. The precarity of the caribou means that the very identity and existence of the Athabasca Chipewyan *as a people* are in jeopardy.

The majority was receptive to these submissions and noted at multiple junctures in its reasons the disproportionate impacts of climate change on Indigenous peoples.⁹⁰ As we saw above, these disproportionate impacts informed the application of the national concern test. The majority’s reasons are thus a notable departure from past environmental federalism cases which have largely erased Indigenous peoples whose rights and title in relation to land are profoundly affected by jurisdictional disputes between Canada and the provinces.⁹¹

At the same time, the decision presents a missed opportunity for judicial reflection on the role of Indigenous laws and jurisdiction in Canada’s constitutional order.⁹² Indigenous peoples are not only uniquely vulnerable to climate change, as the majority notes, but also stewards and guardians of the land with obligations flowing from their own legal systems. Moreover, Canadian constitutional law requires that the Crown fulfill distinctive legal obligations with respect to Indigenous peoples. Intervening Indigenous Nations and organizations argued that the Court was required to conduct a division of powers analysis that accounted for the protected rights of Aboriginal peoples in Canada which, in this case, supported a finding of constitutionality.⁹³ While the outcome of the litigation is consistent with the arguments made by these intervenors, the

⁸⁸ Kyle Whyte, ‘Indigenous Climate Change Studies: Indigenizing Futures, Decolonizing the Anthropocene’ (2017) 55 *English Language Notes* 153 at 154-6.

⁸⁹ *GGPPA Reference*, *supra* note 3 [8].

⁹⁰ *ibid* [11], [187], [206].

⁹¹ E.g. *Reference re Environmental Management Act (British Columbia)*, 2019 BCCA 181; *Oldman*, *supra* note 7.

⁹² The division of powers under the *Constitution Act, 1867* addresses Crown powers, it does not directly address Indigenous jurisdiction. Aboriginal and treaty rights are addressed elsewhere in the Constitution, but the Canadian courts have not developed this area of law in a way that recognizes Indigenous peoples as jurisdictional authorities.

⁹³ *GGPPA Reference*, *supra* note 3 (Factum of Assembly of First Nations; Factum of Athabasca Chipewyan First Nation; Factum of Anishinabek Nation and United Chiefs of Mnidoo Mnising; Factum of the Assembly of Manitoba Chiefs). These intervenors also emphasized the extra-territorial impacts of provincial emissions on their traditional territories, which were implicitly taken up by the majority.

Court did not engage with the interpretive questions of understanding sections 91 and 92 (division of powers) in light of section 35 of the Constitution. Further, the Court did not take up the urging of the Assembly of Manitoba Indian Chiefs to “correct the flawed narrative that Canada is a bi-juridical country”⁹⁴ and to begin to shift the paradigm for constitutional interpretation in light of the *UN Declaration on the Rights of Indigenous Peoples*.

Darcy Lindberg is surely correct in observing that the precarious political context surrounding this litigation made it difficult for the SCC to bridge the divide between federalism doctrine and Aboriginal law,⁹⁵ however tentative those steps may have been in this case. In other areas of Canadian law, however, courts are actively engaging with Indigenous laws to resolve legal problems.⁹⁶ With the heightened importance of climate change for Indigenous peoples and their leading roles in defending lands and water, Canadian federalism will soon have to make this shift.

5. Conclusion

In a climate disrupted world nothing is static, including constitutional law. This analysis observes the movement embedded in the *GGPPA Reference* in response to the climate challenge. I have argued that the majority of the Court makes three notable shifts: It abandons climate denialism and refines legal doctrine in relation to the existential threat posed by climate change. It embraces a culture of justification which requires the courts to play an active role in climate adjudication, in stark contrast to past judicial findings of non-justiciability. Finally, it shifts from a posture of Indigenous erasure to one that is sensitive to the specific impacts of Canadian federalism on Indigenous peoples, though it leaves to future federalism litigation the task of engaging with Indigenous peoples as constitutional actors. The *GGPPA Reference* is an instance of inevitable collision between constitutional law and the onrushing reality of climate change. We have seen that the majority has addressed this disruption in legally productive and provocative ways. In the ever-changing world of climate litigation, the only question is which court will make the next move.

⁹⁴ *ibid* [10].

⁹⁵ Darcy Lindberg, ‘Aftermath! Federal Carbon Pricing and the Decision of the Supreme Court of Canada’ (Centre for Constitutional Studies, 31 March 2021) <<https://www.youtube.com/watch?v=IGM1evsOk-E>> starting at 1:14:27 last accessed 21 May 2021.

⁹⁶ E.g. *Beaver v Hill*, 2018 ONCA 816 and *Pastion v Dene Tha’ First Nation*, 2018 FC 648. I do not want to suggest that this is a simple or straight-forward task. See: Darcy Lindberg, ‘Judicial Expertise, UNDRIP & the Renewed Application of Indigenous Laws’ in Hayden King, ed, *The UN Declaration on the Rights of Indigenous Peoples: Lessons from B.C.* (The Yellowhead Institute, 2020), <<https://yellowheadinstitute.org/wp-content/uploads/2020/12/yellowhead-institute-bc-undrip-report-12.20-compressed.pdf#page=21>> accessed 21 May 2021.