

# TOP FIVE 2021

Each year at OJEN's Toronto Summer Law Institute, a leading jurist identifies five cases that are of significance in the educational setting. The 2021 cases were selected and discussed by Professor Sonia Lawrence of Osgoode Hall Law School in Toronto. Professor Lawrence is a leading scholar in Canadian constitutional law and a prolific champion working at the intersection of law and social justice. This summary, based on these comments and observations, is appropriate for discussion and debate in the classroom setting.

## **References re Greenhouse Gas Pollution Pricing Act 2021 SCC 11**

**Date released: March 25, 2021**

<https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/18781/index.do>

Special note on the principle of federalism:

Canadian Federalism is a political system that divides legislative responsibilities and powers between the federal and provincial governments. Section 91 of the *Canadian Constitution Act, 1867* (the "Constitution") defines the powers of the federal government while section 92 defines the provincial powers. Any matter that is not assigned to the provincial governments under s. 92 fall in the jurisdiction of the federal Parliament. The power to act in these cases is called "residual power".

Section 91 of the *Constitution* says that the federal Parliament has jurisdiction to make laws for the "Peace, Order and good Government of Canada" ("POGG"). If the government wants to use residual power in this way, it must show that the subject matter of the legislation is of "national concern". Under the National Concern Doctrine, the federal government has jurisdiction over matters that are of inherent

or fundamental national concern, and these matters go beyond provincial powers.

### **Facts**

Greenhouse gas (GHG) emissions, which come from human activities such as landfills, coal mines and agriculture activities pose a grave threat to humanity's future. In the *Paris Agreement* U.N. 2015, countries around the world undertook to drastically reduce their emissions in order to lessen the effects of climate change. In Canada, Parliament enacted the *Greenhouse Gas Pollution Pricing Act* (GGPPA; the "Act") as part of the country's effort to implement its commitment. This legislation required all Canadian provinces and territories to establish minimum standards for limiting their GHG emissions. Because the power to do so was not specifically set out as a part of Canadian federalism, this law was challenged as a potential violation of the constitutionally-divided powers between the federal and provincial governments.



## Procedural History

Three provinces challenged the constitutionality of the *Act* by references to their respective provincial courts of appeal. The Courts of Appeal for Saskatchewan and Ontario held that the *Act* is constitutional. The Court of Appeal of Alberta held that it is unconstitutional. Those decisions were all appealed to the Supreme Court of Canada (SCC).

## Issue

Is the *Act* unconstitutional?

## Decision

The *Act* is constitutional.

## Ratio

Global warming causes harm beyond provincial boundaries and that it is a matter of national concern under the “peace, order and good government” clause of the *Constitution*.

## Reasons

The court followed the two-stage approach to decide whether Parliament had jurisdiction to enact the *GGPPA*.

1. Consider the purpose and effects of the *GGPPA* in order to characterize the subject matter (also known as the pith and substance) of the statute.

2. Determine whether the subject matter of the *GGPPA* falls under the federal or provincial powers as set out in the *Constitution*.

### Question 1: Identifying the “pith and substance” of the legislation in question

Upon analyzing the *GGPPA* the SCC found its main area of concern is national GHG pricing, not the reduction of GHG emissions specifically, and that the intention of this focus is to establish minimum national standards of GHG pricing to reduce emissions.

### Question 2: Classifying the matter - Is the *GGPPA* “Subject Matter” of National Concern?

Regulating greenhouse gases is not an enumerated power in s. 91 of the *Constitution*. The government argued that they were entitled to enact the *GGPPA* under its residual POGG power. The Supreme Court, therefore, considered whether the government had met the “national concern” test.

This test consists of three steps. First, the government must establish that the matter is of sufficient concern to the country as a whole to warrant consideration as a possible matter of national concern.



Second, the matter must have a “singleness, distinctiveness and indivisibility” that clearly separates it from provincial concern. Third, the government must show that the proposed matter has a scale of impact on provincial jurisdiction that is reconcilable with the division of powers.

The SCC found that the evidence clearly shows that establishing minimum national standards of GHG price stringency to reduce GHG emissions is of concern to Canada as a whole. They also acknowledged that this matter is critical to our response to an existential threat to human life in Canada and around the world.

On the question of “singleness, distinctiveness and indivisibility”, the SCC found that minimum national standards of GHG pricing relate to a federal role in carbon pricing that is different from matters of provincial concern. Further, the SCC ruled that federal jurisdiction should be found to exist only where the evidence establishes provincial inability to deal with the matter. In other words, this would empower the federal government to do only what the provinces cannot do to protect themselves from this grave harm, and nothing more.

The court then continued on to the third step to determine whether the scale of impact of the proposed matter of national concern is reconcilable with the division of powers. The majority found that while

it did impact provinces, this impact was not outside of the intention of dividing federal and provincial power, because it left enough discretion to the provinces to develop and implement unique programs and policies to meet emission targets.

Therefore, the subject matter of the *GGPPA* is one that transcends the provinces and should be recognized as a matter of national concern.

## Dissent

Justice Côté agreed with the Chief Justice’s analysis of the national concern but disagreed with his application of the law to the facts of this case. Justice Côté held that the *Act* does not set minimum standards and delegates a legislative power to the executive. Justice Brown, also dissenting, found that the *Act’s* subject matter falls within provincial, rather than federal, jurisdiction, that it cannot be supported by any source of federal legislative authority. Finally, Justice Rowe’s dissenting analysis led him to conclude that POGG power was always intended to be used as a power of last resort and was not appropriate in this instance.



## Discussion

1. What is federalism?
2. What are some ways in which federalism presents advantages or challenges for Canadian society?
3. What are some of the impacts of Greenhouse Gas emissions on the environment or on society?
4. With the notion of division of powers in mind, do you agree with the majority, who stated both the federal and provincial governments must play a role to combat global warming?
5. POGG powers are only used in rare circumstances: why did the majority of the SCC support the use of POGG powers in this case?