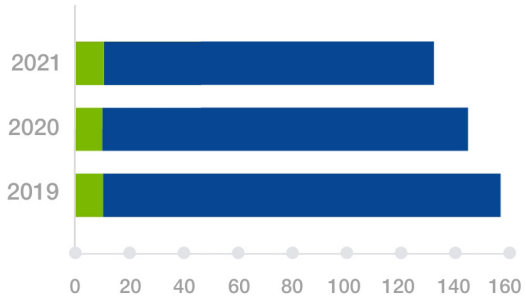
Significant Cases and Statistics

from the Supreme Court of Canada in 2021

Even as COVID-19 continued to affect Canada and Canadians in 2021, there were a number of key appellate decisions from the Supreme Court of Canada (SCC) and provincial appellate courts across the country.

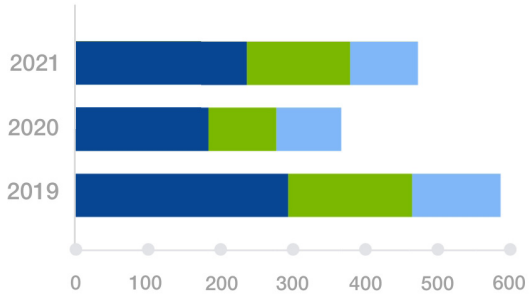
In this article, members of our Appellate Law group provide insight into SCC cases from 2021, sharing their knowledge on the far-reaching impacts these decisions could have.

Supreme Court of Canada Appeal Applications



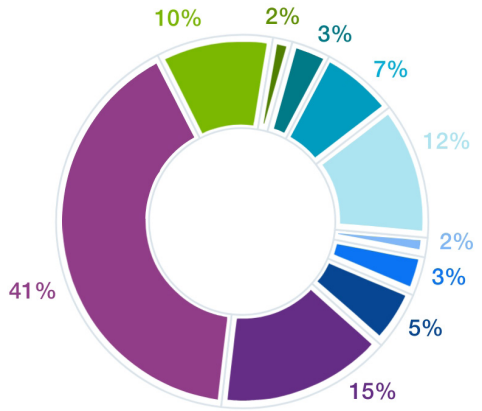
- Number of Appeals Filed
- Number of Appeals Granted

Supreme Court of Canada Judgments



- Judgments Rendered
- Split Decisions
- Unanimous Decisions

Judgments by Area of Law



- Aboriginal law
- Bankruptcy and insolvency
- Civil/Courts
- Constitutional
- Criminal
- Family
- Intellectual property
- Taxation
- Other
- Commercial

Case Snapshots

Case 1

KEY TAKE-AWAY

Ward v. Québec is an important part of the ongoing discussion surrounding the limits to freedom of expression under s. 3 of the *Québec Charter* and s. 2(b) of the *Canadian Charter of Rights and Freedoms.* Notably, this decision reinforces the concept that offensive or repugnant expression that results in harm is not enough to justify limitations on an individual's freedom of expression.

This case serves as a reminder of the significance underlying a party's choice of remedy at the outset of a claim. The SCC explicitly noted that although this claim did not meet the test for discrimination, it may have been better framed as a claim for defamation or protection against harassment provided for in s. 10.1 of the *Québec Charter*.

BLG (Christopher Bredt and Laura Wagner) acted on behalf of the intervener, the Canadian Civil Liberties Association.

Case 2

KEY TAKE-AWAY

In *York University v. Access Copyright*, the SCC clarifies that licenses or contracts cannot be imposed on an unwilling party, and that authors, collective societies, and end users all have an active role in negotiating terms. Collective societies that represent copyright holders in Canada must understand that they are not monopolies over the content they possess.

Furthermore, in obiter the SCC mentions that fair dealing will consider both the author's ownership rights and that of the users and the public interest in disseminating the content as well. In the realm of Canadian copyright law, this decision suggests the issue is not always a property/ownership one, but rather one of fairness.

BLG (Guy Pratte and Nadia Effendi) acted as co-counsel to York University.

Case 3

KEY TAKE-AWAY

In *Wastech Services Ltd. v. Greater Vancouver Sewage and Drainage District*, the SCC's expansion of the duty of good faith provides some protection against the risk discretionary clauses carry.

Parties are no longer able to exercise their discretion arbitrarily and instead, must now judge their decisions against the standard of reasonableness.

Following *Bhasin, C.M,* and *Wastech*, the parties' intention is paramount and central to the court's analysis. Accordingly, when negotiating a clause that provides for discretionary decision-making, parties should clearly demonstrate the reasons behind the clause in the contract.

Case 4

KEY TAKE-AWAY

In *Sherman Estates v. Donovan*, the SCC restates the *Sierra Club* test while affirming the high threshold that must be met in order to justify placing discretionary limits on the open court principle, such as where there is a serious risk to an important public interest. While privacy may be classified as an important public interest, it is sufficient to warrant a sealing order only where the information goes to the biographic core or core dignity of the person.

The probability and gravity of the potential harm are central to the analysis. But, even if a serious risk exists, the courts must consider whether reasonable alternatives would suffice to prevent the risk. Courts must also consider whether the benefits of the order outweigh its harmful effects.

BLG (Teagan Markin) acted on behalf of the intervener, the Income Security Advocacy Centre.

Case 5

KEY TAKE-AWAY

In *Toronto (City) v. AG*, the SCC clarifies the distinctions between positive vs. negative s. 2(b) *Charter* claims. Where a s. 2(b) claim is characterized as a positive claim, it may be an uphill battle for the rights holder. The core question in positive rights claims is whether the government has substantially interfered with or had the purposes of doing so by denying access to a statutory platform or otherwise failing to act.

The SCC also confirms the role of constitutional principles as incapable of being standalone grounds to invalidate impugned legislation. Rather, unwritten constitutional principles can be used to fill gaps or ambiguity in the text of the Constitution.

BLG (Christopher Bredt and Pierre Gemson) acted on behalf of the intervener Centre for Free Expression at Ryerson University.

Case 6

KEY TAKE-AWAY

In *Canadian Broadcasting Corp. v. Manitoba*, the SCC's decision strengthens the constitutionally-protected open court principle by allowing affected persons to ask the issuing court to reconsider the continued need for a publication ban or sealing order without going through the difficult and often cost-prohibitive appeal at a higher level court.

BLG (Nadia Effendi) acted as agent for the intervener. Ontario AG.

Case 7

KEY TAKE-AWAY

In *Prelco v. Createch*, the SCC found that a limitation of liability clause was operative despite the effect of the clause on the performance of a fundamental obligation of the underlying agreement. The SCC concluded that public order was insufficient on its own and also said that in the limited circumstances of the case, the limitation on liability clause did not deprive "the obligation of its cause," as there remained a sanction for non-performance of the fundamental obligation.

BLG (Guy J. Pratte, Stéphane Richer, Julien Boudreault and Nadia Effendi) acted for 6362222 Canada Inc. "Createch".

Case 8

KEY TAKE-AWAY

In *Grant Thornton LLP v. New Brunswick*, the SCC unanimously concluded that a claim is discovered when a plaintiff has knowledge, actual or constructive, of material facts that support a plausible inference of the defendant's liability.

Constructive knowledge may be established when the plaintiff "ought to have discovered" material facts "by exercising reasonable diligence" and a plausible inference is one which gives rise to a "permissible fact inference" of liability.

BLG (Guy J. Pratte, Nadia Effendi and Julien Boudreault) acted for the intervener Chartered Professional Accountants of Canada.

Case 9

KEY TAKE-AWAY

In the *Greenhouse Gas Pollution Pricing Act* references, the SCC's decision represents a major victory for the Government of Canada, upholding its flagship climate policy and affirming its constitutional authority to establish minimum national standards of carbon pricing. Importantly, this decision provides much needed clarity and finality with respect to federal and provincial jurisdiction over climate policy.

The SCC's reasoning, particularly with respect to its application of POGG, may have implications for future energy-related division of powers disputes, including the ongoing constitutional challenge to the federal *Impact Assessment Act* currently before the Alberta Court of Appeal.

BLG (Guy Pratte) acted as co-counsel to the Attorney General of Canada before the Supreme Court of Canada.

Case Summaries

1. *Ward v. Quebec,* 2021 SCC 43

Overview

In *Ward v. Quebec*, the SCC considered the limits of freedom of expression in the context of a discrimination claim.

Background

The appellant, Mike Ward, is a stand-up comedian. One of his routines involved mocking certain Québec community members that he deemed “sacred cows.”

The respondent, Jeremy Gabriel, is a member of the community referred to in Ward’s routine. Gabriel was born with Treacher Collins syndrome, a condition causing deafness and malformations of the head. Ward also published a video to his website containing disparaging comments about and mocking Gabriel’s physical characteristics. Gabriel’s parents filed a discrimination complaint with Québec’s Human Rights Commission, alleging. Ward’s conduct interfered with Gabriel’s right “to the safeguard of his dignity” under the Québec *charter*. The Tribunal found elements of discrimination under the *charter*, and the Québec Court of Appeal dismissed Ward’s subsequent appeal.

The ruling

The SCC held that a discrimination claim could not be established based on hurtful expression and the resulting harm alone. The tribunal found that Ward singled out Gabriel for his routine because he was a public figure, not due to his disability.

Even if Gabriel had established differential treatment based on a prohibited ground, his right to the safeguard of his dignity had not been impaired. A high threshold must be met before establishing infringement of the right to the safeguard of one’s dignity. On an objective (rather than subjective) analysis, a person must be stripped of their dignity by being subjected to treatment that debases, subjugates, objectifies, humiliates or degrades them.

At the same time, a presupposition underlying the exercise of freedom of expression is society's tolerance of unpopular, offensive or repugnant expression. In light of the conflict between freedom of expression and the right to the safeguard of dignity, the SCC outlined a two-part test to reconcile both rights:

(1) whether a reasonable person, aware of the relevant context and circumstances, would view the expression targeting an individual or group as inciting others to vilify them or to detest their humanity on the basis of a prohibited ground of discrimination; and

(2) it must be shown that a reasonable person would view the expression, considered in its context, as likely to lead to discriminatory treatment of the person targeted, that is, to jeopardize the social acceptance of the individual or group.

The majority found that neither requirement had been met. On the first requirement, a reasonable person aware of the relevant circumstances would not view Ward's comments about Gabriel as inciting others to vilify him or to detest his humanity on the basis of a prohibited ground of discrimination. On the second requirement, a reasonable person could not view the comments made by Ward, considered in their context, as likely to lead to discriminatory treatment of Gabriel.

2. *York University v. Access Copyright,* 2021 SCC 32

Overview

In *York University v. Access Copyright*, the SCC clarified the law around Canada's copyright regime and the doctrine of "fair dealing." Justice Abella, writing for the majority, ruled that collective copyright licenses under the *Copyright Act* were not mandatory and emphasized the need to consider more than ownership in enforcing copyright.

Background

Access Copyright (AC) is a collective society that represents writers, artists, and publishers that own a copyright in Canada. Under the *Copyright Act* (the Act), an individual or institution could pay AC for a license under a statutory tariff to use its various copyrighted content.

York University purchased a license from AC and complied with the statutory tariff up until 2010, when it decided to implement a fair dealing policy to shield it from copyright infringement claims. Relying on previous rulings in *CCH Canadian Ltd. v Law Society of Upper Canada* and *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)*, York argued its' fair dealing policy meant it did not have to comply with the statutory tariff regime. AC sued York, arguing the tariff was mandatory.

The ruling

The SCC held that the Act did not impose a mandatory tariff regime. The court recognized this would hinder AC's ability to enforce infringement actions, but the Act's purpose is not to protect collective societies like AC. To interpret otherwise would give societies an anti-competitive tool, instead of allowing parties to negotiate with the copyright holders or through intermediaries. Ultimately, the SCC held AC could not force York to comply with a voluntary tariff.

Since the tariff regime was not mandatory, the fair dealing issue was moot. However, in *obiter*, the SCC commented on the fair dealing doctrine and its application.

First, the SCC shifted the emphasis away from exclusively protecting the rights of authors, towards a "proper balance between protection and access." On one hand, there is a need to recognize and protect ownership over work, but on the other, there are issues of fairness and the public interest in disseminating information and spurring innovation and growth.

Second, the SCC applied these principals to the fair dealing doctrine, providing a two-step analysis: (1) Whether the dealing is for an allowable purpose enumerated in section 29 of the Act; and (2) Whether, on balance, the dealing is "fair."

In assessing whether the dealing is "fair," the SCC held it was an error to consider only the interests of copyright owners and not the users or the public interest. In this case, the interests of the "ultimate users," the students, and the public interest of promoting education, were equally important considerations. However, the court refused to answer whether York's guidelines actually struck that balance.

3. *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District,* 2021 SCC 7

Overview

Following the rulings in *C.M. Callow Inc. v. Zollinger* and *Bhasin v. Hrynew,* where the SCC recognized the duty of good faith and honest performance to a party's contractual obligations, the court answered how this doctrine would apply to discretionary powers provided under a contract.

In *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, the SCC ruled that the duty of good faith requires a party to exercise a discretionary right in a way consistent with why it was granted.

Background

Wastech, a trash collections company, and Greater Vancouver, the defendant, entered into a contract where Wastech would collect solid waste and take it to three landfills, two closer to Vancouver and one farther away. Under the contract, Wastech's payment depended on which facility was used, with farther landfills being more profitable. Greater Vancouver had sole discretion regarding what percentage of the waste would go to which landfill.

In 2011, Wastech was directed to a closer facility and as a result, did not meet its operating ratios that year. Wastech sued, alleging a duty of good faith was breached when Greater Vancouver chose the closer facilities.

The ruling

Although affirming the B.C. Court of Appeal's decision, the SCC disagreed with the legal framework to establish a breach of good faith – saying that Wastech did not need to prove the decision "nullified" the contract. The company needed to show that Greater Vancouver's decision was unreasonable when examining the purpose behind the discretionary powers and the parties' intentions.

The SCC applied principles of contractual interpretation to determine the scope of reasonableness, primarily looking at the commercial structure of the parties' bargain. The SCC found that the intention behind giving Greater Vancouver the discretion was to give it flexibility to allocate waste efficiently and minimize operating costs. Though this reduced Wastech's profit margin, the SCC held that the parties did not intend to have Greater Vancouver's discretion be constrained by this consideration, and therefore found the decision reasonable.

4. *Sherman Estate v. Donovan,* 2021 SCC 34

Overview

In *Sherman Estate v. Donovan,* the appellant, trustees for the estate, wanted a sealing order to protect themselves and the beneficiaries from intrusions into their privacy and an alleged safety risk. Initially granted, the request was later overturned on appeal by a journalist and the newspaper he wrote for. The SCC dismissed the appeal, saying that open justice should only be limited when there is serious risk to an important public interest.

Background

After Barry and Honey Sherman passed, the trustees of their estates requested sealing orders over court files related to the Shermans' estate, which included information like names, addresses, identity of estate administrators, the extent of assets dealt with in the estate and beneficiaries' identities.

The ruling

The court unanimously agreed that the party requesting the sealing order must justify an exception to the open court principle. By establishing that: (1) court openness poses a serious risk to an important public interest; (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and, (3) as a matter of proportionality, the benefits of the order outweigh its negative effects.

The public interest in privacy is aimed at allowing individuals to preserve control over their core biographical data in the public sphere to the extent necessary to preserve their dignity. The risk to this interest will be serious only where the information that would be disseminated as a result of court openness is sufficiently sensitive such that openness can be shown to meaningfully strike at the individual's biographical core in a manner that threatens their integrity. In other words, certain information, even if may be disadvantageous, embarrassing or even distressing will not be sufficient to warrant a sealing order. The information sought to be protected in this case was not near enough to the 'core of biographical data' which the public interest protects.

5. *Toronto (City) v. Ontario (AG)*, 2021 SCC 34

Overview

In *City of Toronto*, a narrow majority of the SCC held that it was constitutional for the Ontario government to reduce the number of electoral wards in Toronto during its 2018 municipal election.

Background

On May 1, 2018, a municipal election campaign started in Toronto. Candidate nominations were due on July 27 and more than 500 people registered. On the day the nominations closed, the Ontario government announced its intention to introduce a law to reduce the number of electoral seats from 47 to 25.

On August 14, 2018, the *Better Local Government Act*, ***2018*** came into force. Soon after, the city challenged the constitutionality of the law. The city argued that it:

- Violated the unwritten constitutional principle of democracy;
- Violated the freedom of expression of both voters and candidates protected under s. 2(b) of the *Charter*; and
- Compromised effective representation, which the City argued was a constitutional requirement flowing from s. 2(b) of the *Charter* and s. 92(8) of the *Constitution Act, 1867*.

The city could not argue that its democratic process was protected under s. 3 of the *Charter*, as that applies only to the federal and provincial levels of government.

The ruling

The majority decision, written by Chief Justice Wagner and Justice Brown, affirmed that the *Better Local Government Act* fell within the province's legislative authority over municipalities and did not violate unwritten constitutional principles or limit freedom of expression under s. 2(b). Two principles emerged from the majority decision: the importance of characterizing positive and negative rights claims in s. 2(b) jurisprudence, and the proper role of unwritten constitutional principles.

The majority held that when considering a claim under s. 2(b) of the *Charter*, courts must first determine whether the claim is for a positive or a negative right. Typically, s. 2(b) imposes negative obligations on government, rather than positive obligations. Since the city had not established a limit on s. 2(b), but rather sought access to a specific statutory platform, the majority characterized the claim as a positive rights claim.

The threshold for relief turned on the characterization of the right. In the context of a positive rights claim, the majority stated that substantial interference must radically frustrate expression, such that "meaningful expression is effectively precluded." It is rare that claimants succeed in imposing obligations on government in positive rights claims.

The role of unwritten constitutional principles

The majority identified two ways courts can use unwritten constitutional principles when deciding cases.

First, courts may use unwritten constitutional principles to interpret constitutional provisions where the text of the *Constitution* is not sufficiently clear to provide the answer. However, where such principles are used, their "substantive legal force must arise by necessary implication from the *Constitution*'s text." Second, courts may use unwritten constitutional principles to develop structural doctrines that are not explicitly provided in the *Constitution*, but are necessary to fill the gaps and make the text coherent.

In this case, the majority found that the text was sufficiently clear, and held that unwritten constitutional principles could not be used to invalidate the impugned legislation.

6. *Canadian Broadcasting Corp. v. Manitoba,* 2021 SCC 33

Overview

In an 8-1 decision in *Canadian Broadcasting Corp. v. Manitoba*, the SCC ruled that appellate courts have jurisdiction to lift their own publication bans once a case is closed.

Background

Facts in this case trace back to Stanley Ostrowski's 1987 life sentence following a conviction for first-degree murder. In 2009, Ostrowski was released from prison pending the outcome of the review into his conviction to determine whether there had been miscarriage of justice. He filed a supporting affidavit made subject to a publication ban until the Manitoba Court of Appeal ruled on its admissibility as new evidence. The court did not admit the affidavit as new evidence, but ordered the publication ban to remain in place indefinitely.

CBC brought a motion asking to have the publication ban lifted. The Court of Appeal declined to consider CBC's motion, citing its rule of practice against rehearings and the doctrine of *functus officio* that prevents judges from revisiting their final decisions.

The ruling

Writing for the majority, Justice Kasirer distinguished between the loss of jurisdiction by operation of the doctrine of *functus officio* that stops the court from reconsidering the merits of its final decision and the court's ongoing supervisory jurisdiction over its records.

As proceedings to reconsider publication bans or sealing orders do not reopen the merits of the case, there was no reason for the Court of Appeal to tie its hands from hearing CBC's motion.

In her dissenting opinion, Justice Abella stated that CBC was not entitled to a reconsideration of the publication ban given the unexplained six-month delay in filing the motion. Accordingly, media outlets and others should bring publication ban challenges in a timely manner to ensure their day in court.

7. *6362222 Canada inc. v. Prelco inc.*, 2021 SCC 39

Overview

In *6362222 Canada inc.* v. *Prelco inc.*, the SCC considered whether, under Québec civil law, a party could limit its liability from faulty performance of a contractual obligation fundamental to the agreement.

Background

6362222 Canada Inc. (Createch), a consulting firm, worked on various projects for Prelco Inc. (Prelco), a company that makes and transforms glass for the construction industry.

Prelco asked Createch to present a proposal to implement a new management system. Createch prepared a draft contract for the new project, which it submitted to Prelco for review. Negotiations followed, but Prelco did not ask for any changes to the proposed general conditions, which included a "Limited Liability" clause. Both parties signed the agreement.

There were several issues with the new management system and Prelco terminated its contract with Createch, claiming the company was at fault. Prelco brought an action against Createch for $6.2 million in damages for reimbursement of an overpayment, costs for restoring the management system, claims from customers and loss of profits. In defense to this claim, Createch relied on clause 7 – the "Limited Liability" provision found in the agreement – and counterclaimed for unpaid fees.

The ruling

The SCC unanimously ruled that clause 7 was valid despite the alleged breach of a fundamental obligation.

The court dismissed Prelco's argument that public order was sufficient to render a non-liability clause affecting the performance of a fundamental obligation inoperative. The Supreme court found that the scheme of the *Civil Code of Québec* already provides for circumstances in which the courts may intervene to temper the effects of a limitation of liability clause.

There are conflicting views amongst authors as to whether a limitation of liability clause can deprive the correlative obligation of its cause, since it is akin to a no claims clause that has the effect, in practice, of denying the creditor any remedy in the event of non-performance. However, the Court did not settle this debate; it instead concluded that in the present case it could not be said that the stipulation in clause 7 deprived the obligation of its cause, as there remained a sanction for non-performance of the fundamental obligation.

The SCC concluded that the Superior Court and court of Appeal erred in finding that the limitation of liability clause was inoperative.

8. *Grant Thornton LLP v. New Brunswick,* 2021 SCC 31

In *Grant Thornton LLP v. New Brunswick*, the SCC clarified when a claim is considered to have been 'discovered' when deciding when the limitations period begins to run.

Background

In 2008, the Atcon Group (Atcon) sought loans from the Bank of Nova Scotia. The Province of New Brunswick agreed to provide $50 million in loan guarantees on the condition that Atcon undergo a review by an external auditor (the Accounting Firm). The audit concluded that Atcon's financial position was fairly presented in its financial statements. The province then executed and delivered $50 million in loan guarantees. Atcon ran out of working capital four months later, and the province paid the loan guarantees on March 18, 2010.

The province retained RSM Richter Inc. (Richter) to prepare a second report on Atcon's financial position. Richter issued a draft report on February 4, 2011, and a substantially similar final report on November 30, 2012. Both reports concluded that Atcon's financial position had been materially misstated in its financial statements.

The ruling

The SCC held that the province's claim was limitation-barred. The SCC reviewed the provincial limitations legislation, which provides that a claim is "discovered" on the day that the claimant first knew, or ought to have reasonably known, that their loss was caused, in full or in part, by an act or omission of the defendant.

The SCC unanimously held that a claim is "discovered" when the plaintiff has "knowledge, actual or constructive, of the material facts upon which a plausible inference of liability on the defendant's part can be drawn" (para 42). The SCC provided the following guidance:

- The material facts are generally set out in the applicable limitations statute;
- A plaintiff's knowledge may be established through direct and circumstantial evidence;
- Constructive knowledge may be imputed if a plaintiff is not reasonably diligent in investigating potential claims; and
- A plausible inference of liability requires more than suspicion or speculation, but less than certainty or perfect knowledge.

The SCC used this refined approach to discoverability to conclude that the province had "discovered" its claim when it received the draft report from Richter on February 4, 2011. At that time, the province had knowledge, actual or constructive, of material facts that supported a "plausible inference" of the Accounting Firm's negligence.

9. Climate change: *Greenhouse Gas Pollution Pricing Act*, S.C. 2018, c. 12, s. 186

The Supreme Court of Canada decided three references out of Saskatchewan, Ontario and Alberta, upholding the constitutionality of the federal *Greenhouse Gas Pollution Pricing Act*, S.C. 2018, c. 12, s. 186 (the GGPPA). In a 6-3 decision, the Supreme Court held the GGPPA is a valid exercise of the federal government's power to legislate for the peace, order and good government of Canada (the POGG power).

Background

The GGPPA is the cornerstone of the Government of Canada's climate policy. It is designed to mitigate the effects of climate change by establishing minimum national standards of carbon pricing. Part 1 of the GGPPA establishes a fuel charge that applies to producers, distributors, and importers of various carbon-based fuels, while Part 2 provides for output-based limits on large industrial emitters.

The GGPPA ensures a minimum national price on greenhouse gas (GHG) emissions by operating as a backstop. Provinces and territories have the flexibility to design their own GHG pricing policies. The GHG pricing mechanisms described in Parts 1 and 2 only apply in provinces or territories that fail to adopt their own GHG pricing mechanisms, or whose mechanisms are determined by the Governor in Council to fall short of the stringency required by the GGPPA.

The ruling

The issue, at its core, was whether Parliament had the constitutional authority to enact the GGPPA. Chief Justice Wagner, writing for a majority of six judges, held that the GGPPA is a constitutional exercise of the federal government's POGG power. This analysis consists of two stages: first, the court must determine what are the purpose and effects of the legislation (also described as the pith and substance). Then, the court must classify the matter under one of the heads of power set out in sections 91 and 92 of the *Constitution Act, 1867*.

Chief Justice Wagner characterized the true subject matter of the GGPPA as "establishing minimum national standards of GHG price stringency to reduce GHG emissions." In doing so, he rejected broader characterizations put forward by many of the provinces, and by the majorities of the courts of Appeal for Ontario and Alberta, that the pith and substance is the regulation of GHG emissions.

In his reasons, Chief Justice Wagner emphasized the importance of describing the pith and substance of a challenged statute as precisely as possible. The description, he noted, should capture the law's essential character in terms that are as precise as the law will allow. Chief Justice Wagner also held that it may be permissible to consider the legislative choice of means in determining a statute's pith and substance. In cases where the legislator's choice of means is central to the legislative objective, treating the means as irrelevant to the analysis would make it difficult to define the matter of the statute precisely.

At the second stage of the analysis, a majority of the court confirmed that finding a matter is of national concern involves a three-step analysis:

1. The matter is of sufficient concern to the country as a whole to warrant consideration as a possible matter of national concern;
2. The matter was "single, distinct, and indivisible," in that the specific and identifiable matter is qualitatively different from matters of provincial concern and evidence establishes provincial inability to deal with the matter; and
3. The matter has a scale of impact on provincial jurisdiction that is reconcilable with constitutional division of powers.

Chief Justice Wagner agreed that the matter of national standards of GHG price stringency to reduce GHG emissions is of sufficient concern to Canada as a whole. The majority went on to find that "minimum national standards of GHG price stringency to reduce GHG emissions" satisfies the singleness, distinctiveness, and indivisibility test. GHGs are specific and precisely identifiable. GHG emissions are predominantly extra provincial and international in both character and implications. The chosen regulatory mechanism – minimum national standards of GHG price stringency, implemented by way of a backstop via the GGPPA – relates to a federal role that was qualitatively distinct from matters of provincial concern.

The majority then turned to whether there was a "provincial inability" to deal with the matter at the core of the GGPPA. Firstly, the provinces, acting alone or together, are constitutionally incapable of establishing minimum national standards of GHG price stringency to reduce GHG emissions. While the provinces could co-operate to establish a uniform carbon pricing scheme, they cannot establish a national GHG pricing floor applicable in all provinces and territories at all times. Secondly, a failure to include one or more provinces in this scheme would jeopardize its success in the rest of Canada. Thirdly, a province's failure to act or co-operate would have grave consequences for extra provincial interests. Finally, the majority held that the scale of impact of the GGPPA on the provinces' jurisdiction was acceptable. Although the GGPPA had a clear impact on provincial autonomy to regulate GHG pricing from a local perspective, this impact was qualified and limited to the narrow scope of pricing of GHG emissions.

The court was also asked to determine whether the fuel and excess emission charges imposed by the GGPPA were constitutionally valid regulatory charges or unconstitutionally disguised taxes, as was alleged by the Province of Ontario. The majority found that the levies imposed by the GGPPA had a sufficient nexus with the regulatory scheme to be considered valid regulatory charges. Their purpose was to advance the GGPPA's regulatory purpose by altering behaviour, and as such, they could not be characterized as taxes. ■

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