TOP FIVE 2021

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R v Desautel, 2021 SCC 17

Date released: April 23, 2021
https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/18836/index.do
Companion Case: *R v Williams*

Facts

On October 14, 2010, Richard Lee Desautel (Desautel) shot and killed an elk in British Columbia. Mr. Desautel is a member of the Lakes Tribe of the Colville Confederated Tribes, a successor group of the Sinixt people, who were present in British Columbia until they were forced out in the 19th century. He is a citizen of the United States of America and lives in Washington State.

Section 47(a) of the *Wildlife Act* (the *"Act"*) requires a person hunting big game in British Columbia to be a resident of that province. Desautel was charged under the *Act* for hunting without a license. Desautel argued that he had an Aboriginal right to hunt, protected by section 35(1) of the *Constitution Act, 1982* (the *"Constitution"*), which recognizes and affirms Aboriginal peoples of Canada's existing treaty rights. He argued that because the Sinixt people have ancestral territory in British Columbia he is entitled to hunt there without a license, even though he lives in what is now the United States of America.

Procedural History

The trial judge found that Desautel is a member of the Lakes Tribe and successor of the Sinixt. The trial judge used the *R v Van der Peet* test, which determines whether certain practices, established pre-European settler contact and continued today, are integral to the distinctive culture of an Aboriginal group.

The *Van der Peet* test lays out a number of factors for courts to consider when assessing whether an Aboriginal right exists. In applying this test, a court must consider (among other points):

- The perspective of Aboriginal peoples themselves;
- The exact claim being made;

- The cultural significance of the custom, practice or tradition in question;
- Whether the practice represented a distinctive aspect of cultural practice prior to European contact;
- Whether the activity has been practiced continuously since contact; and
- The relationship of Aboriginal peoples to the land and the distinctive societies and cultures of Aboriginal Peoples.

The trial court found that Desautel's Aboriginal rights were protected and guaranteed by section 35(1) of the *Constitution* and that the criteria for the *Van der Peet* test were met. Accordingly, the trial judge acquitted Desautel of his charges.

On appeal to the British Columbia Superior Court, the judge affirmed that the phrase "Aboriginal peoples of Canada" in section 35(1) of the *Constitution* must be interpreted in a purposive way. A purposive interpretation relies on the purpose, and intended meaning, of the text. The Superior Court judge held that Aboriginal peoples who occupied Canada before contact, are still considered "Aboriginal peoples of Canada", regardless of where they now reside. The Superior Court upheld the trial judge's application of the *Van der Peet* test.

At the British Columbia Court of Appeal, the Court upheld the Superior Court's interpretation of section 35(1) *Constitution* rights. The Court held that Aboriginal peoples do not need to live in British Columbia to hold treaty rights set out in the laws of that province.

Issue

The issue in this case was whether s. 35(1) of the *Constitution* only protects Aboriginal and treaty rights for Aboriginal people living in Canada.

Decision

The Supreme Court of Canada (SCC) was divided 7-2, deciding that the Crown's appeal should be dismissed as Aboriginal rights according to section 35 of the *Constitution* include Indigenous Peoples who reside outside of Canada.

Ratio

The SCC majority held that "Aboriginal peoples of Canada" refers to tribes who established themselves in Canada before European-settler contact, but either moved or were forced to relocate as a result of historical injustices. The majority agreed that despite the lack of continuity of the Lake Tribes' practices between 1930 and 2010, Desautel's claim to an Aboriginal hunting right met the criteria in the *Van der Peet* test.

Dissenting, Côté J. held that Aboriginal rights are geographically confined to persons residing within Canadian borders.

Reasons

The SCC considered the purpose of reconciliation when interpreting section 35(1) *Constitution* rights. The court held that one of the objectives of reconciliation is to allow modern-day treaty members to assert s. 35(1) rights, regardless of whether they live in Canada. The Court also considered the reason for the lack of continuity of Aboriginal peoples, which is a required criterion to meet the *Van der Peet* test. The court recognized that historical injustices associated with colonialism often denied Aboriginal peoples access to their traditional lands. As a result, traditional practices could not continue in their traditional territories. The lack of continuity was clearly caused by the colonial displacement of Desautel's ancestors, and so should not be a factor weighing against his claim.

Discussion

1. Which test did all the courts involved in this case use to make their determinations concerning Mr. Desautel?

2. List two of the criteria used in that test and explain them in your own words.

3. Why do you think the SCC ruled that the definition of "Aboriginal peoples of Canada" can include groups whose descendants now reside outside of Canada?

4. How do national borders, such as those that separate Canada from the United States, complicate claims and negotiations between Aboriginal peoples and the governments of these countries?

5. The court relied on the objectives of reconciliation to determine the verdict in this case. How do you think reconciliation will impact future cases surrounding Aboriginal treaty rights?

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R v Chouhan, 2021 SCC 26

Date released: June 25, 2021
https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/18932/index.do

Case Background

In 2018, Gerald Stanley, a White man, was acquitted of second-degree murder and manslaughter for killing Colton Boushie, a Cree man[1]. At his trial, Stanley had used peremptory challenges to exclude five Indigenous jurors from the jury, leading to an all-white jury.

Peremptory challenges allow lawyers for both the Crown and the accused person to dismiss a prospective juror without having to give any explanation. This case led to wide-spread public awareness of racial prejudice in the criminal justice system and debate about the use of peremptory challenges when selecting jurors for criminal trials. Mr. Stanley was ultimately found not guilty. The verdict prompted the federal government to abolish peremptory challenges in Bill C-75, *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*.

Facts

Pardeep Singh Chouhan (Chouhan) was charged with first-degree murder. His trial began on September 19, 2019, the same day Bill C-75 came into effect.

Under Bill C-75, the Crown and defence no longer had the right to any peremptory challenges. However, both could still challenge prospective jurors for cause according to section 638 of the *Criminal Code*. Peremptory challenges do not require that a reason be provided for dismissing a juror whereas challenges for cause require this.

Procedural History

Prior to trial, Mr. Chouhan challenged the abolition of peremptory challenges, arguing it infringed his rights to an independent and impartial jury according to sections 11(d) and 11(f) of the *Charter of Rights and*

[1] See R v Stanley, 2018 SKQB 27

Freedoms. In the alternative, he argued that the amendments to the *Criminal Code* were important to his case because he had chosen to have a jury trial before the law was changed. He made this challenge because during the selection of jury members, Chouhan wanted three prospective jurors to be dismissed based on perceived racial micro-aggressions.

The trial judge denied Mr. Chouhan's request, finding that there are a range of procedural protections that protect the independence and impartiality of juries even if peremptory challenges are eliminated, including:

- the random selection of jurors;
- the challenge for cause process; and
- the judge's power to stand aside prospective jurors.

Accordingly, the trial judge found that Chouhan's *Charter* rights were not infringed. The trial judge also found that the amendments were purely procedural and applied to all cases as soon as they came into force. Mr. Chouhan's trial proceeded without peremptory challenges and he was convicted of first degree murder.

The Ontario Court of Appeal unanimously held that abolishing peremptory challenges was constitutional. However, the court determined that the amendments abolishing peremptory challenges were substantive and could not apply to any case where the accused person's right to a jury trial had "vested" on or before September 19, 2019. Not all criminal trials use a jury. An accused's right to a jury trial "vests" when they are charged with an offence that must be tried by the Superior Court of Justice or, if the option exists, when they have elected to be tried by a jury.

The Court of Appeal ruled that Chouhan should not have been deprived of his right to peremptory challenges. The Crown appealed the Court of Appeal's finding that the amendments were substantive and only applied prospectively (going forward). Chouhan cross-appealed the Court of Appeal's ruling on the constitutionality of the abolishment of peremptory challenges.

Issues

Two issues arose in this case:

1. Does the abolition of peremptory challenges violate the rights of accused persons under sections 11(d) and 11(f) of the *Charter of Rights and Freedoms*?
2. If not, does the abolition of peremptory challenges apply to accused persons who were awaiting trial on September 19, 2019?

Decision

The Supreme Court of Canada (SCC) held in a 7-2 decision that the Crown's appeal for retroactive application should be allowed, Chouhan's cross-appeal for the constitutionality aspect dismissed, and Chouhan's conviction restored.

Ratio

In this case, the Court had to balance trial fairness and maintaining public confidence in the criminal justice system. According to the *Charter*, an accused has the right to a fair trial and an impartial and independent jury. The *Charter* protects an accused person's right to remove prospective jurors based on perceived prejudices, stereotypes, or biases.

The SCC ruled that there are safeguards and features of the jury selection regime in the *Criminal Code*. Despite the abolishment of peremptory challenges, these safeguards identified by lower courts continue to protect racialized accused and ensure an independent and impartial jury. Thereby, the abolishment of peremptory challenges continues to uphold the rights of accused persons under sections 11(d) and 11(f) of the *Charter*.

Regarding the retroactive application of Bill C-75, the majority held that abolishing peremptory challenges is purely procedural. The Court, therefore, held that the amendments apply to all proceedings as soon as it comes into effect.

Dissent

Dissenting in part and agreeing with the Ontario Court of Appeal, Abella J. held that the abolishment of peremptory challenges is constitutionally valid but should not apply retroactively. Côté J. also dissented, holding that the appeal should be dismissed and the cross-appeal allowed. Côté J. found that abolishing peremptory challenges infringes on section 11(f) *Charter* rights. She also found the abolishment affects substantive rights and therefore should not be applied retrospectively to Mr. Chouhan's trial.

Discussion

1. What is the difference between a peremptory challenge and a challenge for cause?

2. What do you think the courts mean when they distinguish between "substantive" and "procedural" matters in trials?

3. Mr. Chouhan chose to have his trial decided by a jury before the law changed. Why might he have made a different choice if he knew that peremptory challenges would not be allowed?

4. Peremptory challenges can lead to an all-white jury as was the case in *R v Stanley*. Could they also be used to ensure a racially-diverse jury, or in other ways to promote trial fairness?

5. Which, in your opinion, would do more to improve people's perception of the criminal justice system: restoring peremptory challenges or leaving the law as it now stands? Why?

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1688782 Ontario Inc. v Maple Leaf Foods Inc., 2020 SCC 35

Date released: November 6, 2020
https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/18539/index.do

A "class proceeding" is a lawsuit commenced by one person on their own behalf and on behalf of others who have suffered the same loss or damage, arising from the same incident or cause, which occurred because of the actions of the same person, company or group. A lawsuit of this type is also sometimes referred to as a "class action" lawsuit.

Facts

Maple Leaf Foods is a large-scale supplier of processed meat products. Among other clients, it provided prepared meats to the "Mr. Submarine" ("Mr. Sub") chain of sandwich restaurants. This class action was brought by a corporation called 1688782 Ontario Inc., on behalf of 424 Mr. Sub franchisees against Maple Leaf Foods.

In 2008, there was an outbreak of listeria, a bacteria that can cause serious illness or death, at a Maple Leaf Foods facility in Toronto. Maple Leaf responded by recalling products it supplied to many clients, including Mr. Sub. The contracts between the Mr. Sub franchisees and the parent company prevented franchisees from seeking an alternative meat supplier.

1688782 Ontario Inc. argued that class members were affected by Maple Leaf Foods' decision to recall these meat products. 1688782 Ontario Inc. claimed that they experienced a meat shortage for six to eight weeks causing economic loss and reputational harm due to their association with recalled contaminated meat products. 1688782 Ontario Inc. (and the other franchisees) did not have a contract with Maple Leaf Foods. They had a contract with Mr. Sub that required the franchisees to purchase meat products from Maple Leaf Foods. The franchisees placed an order with a distributor who would in turn place an order with Maple Leaf Foods. Because the franchisees did not have a contract with Maple Leaf Foods, they had no recourse under contract law. Instead they advanced a claim in tort law seeking compensation for lost past and future sales, past and future profits, capital value of the franchises and goodwill.

To be successful under tort law, the plaintiffs needed to show that Maple Leaf Foods had a legal duty of care to the franchisees despite having no formal relationship with them under the law, and that they had been negligent in this duty. This would be a novel ruling, as courts have generally held no such duty exists for purely economic losses.

Procedural History

At trial, the plaintiff advanced claims against Maple Leaf Foods for economic loss, in the form of lost profits, sales, capital value and goodwill and reputation. The motion judge found that Maple Leaf was responsible for the shop owners' losses. Maple Leaf Foods appealed this decision.

The Court of Appeal held that Maple Leaf did not owe a duty of care to the franchisees and dismissed that part of the claim. 1688782 appealed the decision to the Supreme Court of Canada (SCC).

Issue

Did Maple Leaf Foods owe the franchisees a duty of care as the exclusive supplier of meat products?

Decision

The SCC found that 1688782 Ontario Inc. and the other members of the class action were not in a sufficiently close business relationship with Maple Leaf Foods to establish that Maple Leaf Foods owed them a duty of care. The appeal was dismissed.

Ratio

Pure economic loss (i.e. loss unrelated to personal injury or damage to property) may be recoverable through monetary compensation in some cases but there is no general right in tort law protecting against the negligent or intentional infliction of pure economic loss.

Reasons

The SCC defined three recognized categories of pure economic loss: (1) negligent misrepresentation or performance of a service; (2) negligent supply of poorly made goods or structures; and (3) relational economic loss. These three categories acted as analytical tools, relevant to the duty of care analysis. The proximity of the relationship between the parties is, however, the controlling concept.

To determine if Maple Leaf owed a duty of care to the franchisees, the SCC applied to the Anns Test, which considers the proximity (the closeness or the distance) of relationship between parties, and the foreseeability of injury.

- The Court found the relationship between Maple Leaf and the franchisees was not proximate

because that the franchisees had a contract with Mr. Sub, and not with Maple Leaf Foods. Contracts are only between the parties who agree to them. Maple Leaf did not have a contract with any of the franchisees saying it had to supply the meat to them. Proximity could not be established.

- Regarding the "foreseeability of injury", the SCC found that the class action was claiming only "pure economic loss" because they were seeking damages for lost profits, sales, value, or goodwill. The Court found that Maple Leaf's duty was to protect the public from getting sick from eating their meats, not to protect the franchisees' business interests. Maple Leaf Foods was found responsible for removing the danger (by recalling the meat), but it was not found responsible for the shop owners' lost profits, sales, value, or goodwill. Therefore, no duty of care could be established.

Dissent

Justice Karakatsanis found that Maple Leaf owed the franchisees a duty to take reasonable care not to place unsafe goods into the market that could cause economic loss to the franchisees as a result of reasonable consumer response to the health risk posed by those goods.

Discussion

1. What is a class proceeding?

2. Why might Mr. Sub require that all its franchisees use the same meat supplier?

3. The SCC found that Maple Leaf had met its responsibility to the public by recalling the contaminated meat. In your opinion do they have responsibilities to Mr. Sub or its franchisees?

4. What responsibilities does Mr. Sub have in this case?

5. Although 22 people ultimately died from eating the contaminated meat, nobody became sick from eating food from Mr. Sub. In your opinion, would the Court have ruled differently if this was not the case?

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Fraser v Canada (Attorney General), 2020 SCC 28

Date released: October 16, 2020
https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/18510/index.do

Special Note

"Substantive equality" involves understanding that simply treating everyone exactly the same does not always lead to equitable outcomes. Supporting substantive equality can require that laws do more to address making sure that people have sufficient and equitable outcomes and opportunities to thrive. "Adverse impact" discrimination occurs when a seemingly-neutral law (one that is not plainly or obviously discriminatory) has a disproportionate impact on a group of people. To achieve what the Supreme Court calls "substantive equality", the *Charter* protects against adverse impact discrimination as well as simple discrimination.

Facts

Ms. Fraser, Ms. Pilgrim and Ms. Fox were former officers of the Royal Canadian Mounted Police (RCMP). To allow greater flexibility in caring for their young children, they decided to reduce their full-time working hours and opted in to the RCMP's job-sharing program. The job-sharing program allowed employees to work reduced hours by sharing a full-time job with another RCMP officer. The program was designed to help employees who were having difficulty balancing full-time work hours and additional obligations. It was intended to provide an alternative to taking leave without pay. It also helped the RCMP to retain trained members, and to address staffing shortages.

Most of the job-sharing participants were women with young children.

The RCMP also provides a pension program for full-time employees. Under the rules of the program, full-time employees who had been suspended or taken an unpaid leave were allowed to replace (or, "buy back") the pension contributions they would have made if they not been on unpaid leave. The inability to do so meant their pension benefits would be reduced.

Also under the rules of the pension program, employees who participated in the job-sharing program were not considered full-time employees. Participating in the job-sharing program made Ms. Fraser and her colleagues ineligible for their full pension benefits because they were prevented from buying back to cover the missed contributions.

The officers argued that the manner in which the RCMP calculated their pensionable hours infringed upon their equality rights under s. 15 of the *Canadian Charter of Rights and Freedoms*. They argued the policy disproportionately impacted RCMP women, as mothers.

Issues

Does the RCMP's pension plan policy have a discriminatory or adverse impact on women (more specifically women with children) contrary to s.15(1) of the *Charter?*

Procedural History

The Trial Division Federal Court held that job-sharing was not disadvantageous when compared to unpaid leave and, even if it was, any disadvantage was result of employees' choice to job-share, not gender or family status. This ruling was supported by the Federal Court of Appeal. The applicants appealed to the Supreme Court of Canada (SCC).

Decision

The SCC found that full-time RCMP members who job-shared had to sacrifice pension benefits because of the temporary reduction in working hours. The RCMP's pension design perpetuated a long-standing source of economic disadvantage for women contributing to continuing their historical disadvantage. The SCC found that this pension policy breached the right to equality under s. 15(1) of the *Charter* and that this infringement could not be justified under s. 1 of the *Charter.*

Ratio

Substantive equality requires courts to look at a number of factors in their unique context, not just what lies on the surface of a law or government action. Courts should adopt a broader understanding of adverse impact discrimination to prevent harm when seemingly-neutral laws have discriminatory effects.

Reasons

Section 15 of the *Charter* states that: "every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability".

This test for deciding whether a law violates s. 15 of the *Charter* has two steps:

1. Does the law, on its face or in its impact, create a distinction on the basis of an enumerated (listed by section 15) or analogous (comparable) ground?
2. Does the law fail to respond to the actual capacities and needs of the group and instead impose burdens or deny a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating their disadvantage?

Part 1 of the s. 15 test

The first part of the s. 15(1) test was met.

The Court held that denying a buy-back option for job-sharing employees imposed less favourable pension circumstances for women. Sex is an enumerated ground under s. 15 of the *Charter*. RCMP members who participated in the job-sharing program were predominantly women with young children. From 2010-2014, 100 percent of members working reduced hours through job-sharing were women, and most of them cited childcare as their reason for participating in the program. The job-sharing program was introduced because some members required an alternative to taking leave without pay "due to their personal or family circumstances". For many women, the decision to work on a part-time basis, far from being an unencumbered choice, "often lies beyond the individual's effective control". Deciding to work part-time, for many women, is not a true choice because the alternative could mean falling into poverty.

Part 2 of the s. 15 test

The Court agreed with Ms. Fraser that the negative consequences of job-sharing perpetuate a long-standing gender bias against women in pension plans. The Court found that pension plans have historically been designed "for middle and upper-income full-time employees with long service, typically male."

Can the law be justified under s. 1 of the *Charter*?

After determining that a law violates s. 15 of the *Charter*, the court must turn to s.1 of the *Charter*, which gives the government the opportunity to justify the breach. This is known as the *Oakes* Test. Under this test, the Crown must first establish that there is a pressing and substantial objective for limiting the *Charter* right. If it meets this part of the test, the Crown must then show that the limitation is proportionate to this objective. In other words, it must show that the benefit outweighs the harm. This second part of the test has three steps as

well, and if the government fails to pass any element of either part, the law is not justified.

In this case, the majority of SCC found that the government was not able to pass the first step. There was no pressing and substantial objective to the rule that permitted some employees to maximize the pension contributions they could make without working while preventing it for part-time employees participating in a program intended to alleviate personal and financial stress. Accordingly, the court found that there was no need to undertake the rest of the *Oakes* analysis.

Discussion

1. What was the intention of the job-sharing program?

2. What is the difference between substantive equality and simply treating everyone the same (formal equality) in a group?

3. Section 15 prohibits discrimination of "enumerated" or "analogous" grounds. Enumerated grounds like race and religion were included by name when the law was written – why do you think the authors chose to include analogous grounds?

4. What was the main argument about sex discrimination made by Fraser and the other officers?

5. Does the SCC's decision support the goal of substantive equality?

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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?