Constrained Optimization: Climate Change Policy and the Canadian Constitution

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Abstract

Greenhouse gases (GHGs) represent a pressing policy challenge for Canada and for the world. Canada has made international commitments to reduce emissions to 40-45% below 2005 levels by 2030. If Canada is to meet its targets, it will need more – or more stringent – policies. And, when economists are called upon to design those policies, we risk giving poor advice if we are not well-informed about Canadian federalism. Economists study constrained optimization, but when it comes to climate change our discipline has often ignored or under-estimated one of the most important constraints facing policy-makers: *The Constitution Act, 1867*. The Constitution defines the legislative reach of provincial and federal governments, and thus places important limits on climate change policy design and implementation. The purpose of this paper is to summarize, in the language of economists to the degree possible, the nature of the Constitutional constraints which bind federal legislation to reduce emissions.

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1. Introduction

Greenhouse gases (GHGs) represent a pressing policy challenge for Canada and for the world. Our global climate has already changed significantly due to anthropogenic emissions of GHGs, and emissions today will affect global climate long into the future. Global average temperatures are today at least 1°C above pre-industrial levels,[1] and current policy, technology, and demographic trends suggest that we should expect warming of about 3°C above pre-industrial levels by the end of this century.[2] Canada has made international commitments to reduce emissions to 40-45% below 2005 levels by 2030, but official projections show that will need more – or more stringent – policies to meet these targets.[3] And, when economists are called upon to design those policies, we risk giving poor advice if we are not well-informed about Canadian federalism.

Economists study constrained optimization, but when it comes to climate change our discipline has often ignored or under-estimated one of the most important constraints facing policy-makers: *The Constitution Act, 1867*. The Constitution defines the legislative reach of provincial and federal governments, and thus places important limits on climate change policy design and implementation. Sometimes, these limits are clear from the constitutional text but, in most cases, the limits are the product of sometimes-arcane jurisprudence built up over more than a century. Recent decisions of the Supreme Court of Canada (SCC) in the *GGPPA References* and *Re: IAA* provide some clarification of the constraints that bind Parliament in setting GHG emissions policies, but do not establish a complete characterization of federal jurisdiction.[4]

Sections 91 and 92 of the Constitution allocate legislative authority to federal and provincial governments, but neither the environment nor climate change are specifically mentioned.[5] Canadian courts have defined the environment an area of shared jurisdiction between both levels of government, but that does not mean both levels of government have *carte-blanche* with respect to environmental policies.[6] On the contrary, it means that each level of government must find its authority to legislate with respect to the environment

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[1] Myles Allen et al, "Summary for Policymakers" in Valerie Masson-Delmotte et al, eds, Global Warming of 1.5°C: An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development and efforts to eradicate poverty (Cambridge, UK and New York, NY, USA: Cambridge University Press, 2022) at 3.
[2] Zeke Hausfather & Glen P Peters, "Emissions–the 'business as usual' story is misleading" (2020) 577:7792 Nature 618.
[3] Government of Canada, Department of Environment and Climate Change, "Canada's Greenhouse Gas Emissions Projections" (2023), online: <https://www.canada.ca/en/environment-climate-change/services/climate-change/greenhouse-gas-emissions/projections/2023-report.html> [perma.cc/375Y-JV8Y].
[4] The validity of the federal *Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12, s 186 [*GGPPA*], was affirmed by the Supreme Court of Canada in *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 [*GGPPA References*]. The SCC found that the federal *Impact Assessment Act*, SC 2019, c 28, s 1 [*IAA*], was largely invalid in *Reference re: Impact Assessment Act*, 2023 SCC 23 [*Re: IAA*].
[5] *Constitution Act, 1867 (UK)*, 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5 [*Constitution Act, 1867*].
[6] See in particular *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3 [*Oldman River*]. See also *R v Hydro-Québec*, [1997] 3 SCR 213 [*Hydro-Québec*], and *R v Crown Zellerbach Canada Ltd*, [1988] 1 SCR 401 [*Crown Zellerbach*] for the earliest consideration of environmental policy by the SCC.

under other heads of power. For the federal government, the relevant heads of power are the jurisdiction to legislate in relation to trade and commerce, criminal law, taxation, and Parliament's residual power to legislate for the peace, order, and good government of Canada (POGG). Each of these heads of power, though, is constrained in ways which limit the tools available to the federal government to reduce GHGs.

In what follows, I provide an economists' guide to the constitutional constraints on GHG policies in Canada through an analysis of legal scholarship and jurisprudence. This analysis focusses on the division of legislative powers, not litigation under the Charter of Rights and Freedoms. I begin with a discussion of constitutional review of legislation, and then discuss the constraints which bind the application of the taxation, criminal law, and trade and commerce heads of power, as well as the residuary POGG power. I conclude with a brief discussion of the spending power, the treaty power, and the declaratory power.

2. A Digression on the Division of Powers for Non-Lawyers

The division of legislative jurisdiction between federal and provincial governments is primarily derived from sections 91, 92 and 92A of the *Constitution Act, 1867*.[7] Of relevance to environmental policy, the Constitution assigns Parliament the authority to make laws with respect to:

- the regulation of trade and commerce in (s. 91(2));
- the raising of money by any mode or system of taxation (s. 91(3)); and
- the criminal law (s. 91(27)).

The federal government also has residuary authority to "make Laws for the Peace, Order, and good Government of Canada, [8] and authority (ss. 92(10) and 92(29)) over "works and undertakings" crossing provincial or international borders as well as over any local works and undertakings declared to be in the national interest.[9]

The provinces have, in many ways, more solid constitutional foundations upon which to enact GHG policies than does the federal government. The provinces are allocated exclusive legislative authority over:

- matters of a local and private nature in the province (s. 92(16));

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[7] A notable exception is that ss. 93 and 95 of the *Constitution Act, 1867* respectively define jurisdiction over education and agriculture.
[8] *Constitution Act, 1867*, *supra* note 6, s 91 [punctuation and capitalization as in the original text].
[9] Section 91(29) of *Constitution Act, 1867*, *supra* note 6, assigns to Parliament the exclusive authority to make laws in relation to "Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces." Sections 92(10)(a) and 92(10)(c) except from provincial jurisdiction "Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province," and "Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces," respectively.

- property and civil rights (s. 92(16));
- natural resource management and electricity generation (s. 92A);[10]
- direct taxation within the province (s. 92(3));
- licensing regimes (s. 92(9)); and
- local works and undertakings (s. 92(10)).

Disputes over the division of legislative powers are matters for the courts. Legislation may be subjected to constitutional review by the courts through a reference case, wherein a provincial or federal government seeks the advice of the highest court in its jurisdiction.[11] Or, alternatively, a question of constitutional validity may be raised by private parties, at which time governments may choose to become involved in the litigation.[12]

Applying the division of powers during the constitutional review of legislation is not a mechanical exercise, but rather a complex and evolving task of constitutional interpretation.[13] The modern approach begins with the presumption that laws are enacted in good faith and are within the powers of (*intra vires* in legal Latin) the enacting level of government. The court's analysis will proceed through two-steps: the characterization and classification of laws. Characterization relies on a *pith and substance* analysis wherein a court identifies the purpose of the legislation along with its legal and practical effects.[14] The next step is classification which determines whether the legislation's *pith and substance* lies within the powers of the enacting level government.[15] Specific tests have been developed for classification under broad federal heads of power such as taxation, trade and commerce, or the criminal law power, as well as for the residuary POGG power which are discussed in more detail below. Simply put, constitutional review asks what the legislation does and whether the enacting level of government has the power to do it.[16] It is not customary to consider whether

[10] For a complete review of the jurisprudence regarding Section 92A, see Nigel Bankes & Andrew Leach, "Preparing for a Midlife Crisis: Section 92A at 40" (2023) 60:4 Alta L Rev 853. For detailed analysis of the use of the interpretation of the exclusivity of provincial resource jurisdiction, see Nigel Bankes & Andrew Leach, "The word 'exclusive' does not confer a constitutional monopoly, nor a right to develop provincial resource projects1" (2023) 11:4 ERQ 17.
[11] See Carissima Mathen, *Courts Without Cases*, 1st ed (Oxford, UK: Hart Publishing, 2019), or Kate Puddister, *Seeking the Court's Advice: The Politics of the Canadian Reference Power* (UBC Press, 2019), for comprehensive reviews of the use of the reference power in Canada.
[12] *Responsible Plastic Use Coalition v Canada (Environment and Climate Change)*, 2023 FC 1511 [*Single-Use Plastics*]; *Syncrude Canada Ltd v Canada (Attorney General)*, 2014 FC 776 [*Syncrude (FC)*]; *Hydro-Québec*, *supra* note 7.
[13] Eric M Adams, "Judging the Limits of Cooperative Federalism" (2016) 76:1 SCLR (2d) 27 at 31–32.
[14] *Reference re Securities Act*, 2011 SCC 66 [*Re: Securities Act*] at paras 63–4.
[15] *Ibid* at para 65. The Court holds that "if the main thrust of the legislation is properly classified as falling under a head of power assigned to the adopting government, the legislation is intra vires and valid."
[16] Katherine Swinton, *The Supreme Court and Canadian federalism: the Laskin-Dickson years* (Toronto, Ontario: Carswell, 1990) at 26–31.

the legislation fits *better* under the heads of power of the other level of government, only whether it is within the powers of the enacting level of government.[17]

It is worth noting here a point which will be frustrating to economists: there is little to no deference to effective policy in determining constitutional validity. As the Court held in the *Firearms Reference*, "efficaciousness is not relevant to the Court's division of powers analysis."[18]

The heads of power enumerated in sections 91 and 92 allow for significant overlap and many subjects including the environment and climate change were omitted entirely from the *Constitution Act, 1867*. Canadian courts have adopted a variety of doctrines to deal with both the overlapping and non-exhaustive division of enumerated powers. The four most important of these with respect to understanding the federal authority to regulate in relation to GHGs are the doctrines of *mutual modification*, *double aspect*, federal *paramountcy*, and *interjurisdictional immunity*.

The enumerated powers must not be read in isolation but with reference to each other via the doctrine of *mutual modification*.[19] In the case of *Parsons*, one of our most consequential precedents, the Judicial Committee of the Privy Council (the highest court in Canada until 1949) held that sections 91 and 92 of the *Constitution Act, 1867* must "be read together, and the language of one interpreted and, where necessary, modified by that of the other, so as to reconcile the respective powers they contain and give effect to all of them."[20] In *Parsons*, the Privy Council applied this doctrine to find that the federal power over trade and commerce in section 91(2) could not be interpreted so as to negate provincial jurisdiction over property and civil rights in section 92(13).[21] The federal power was therefore restricted to matters of extraprovincial trade, as well as to matters of national importance.

No matter how the enumerated powers are constrained through *mutual modification*, they will overlap.[22] There will be legislation which addresses subjects enumerated in both federal and provincial powers: federal legislative authority over banking and bankruptcy, for example, will necessarily overlap with provincial control over property and civil rights in the provinces.[23] The *double aspect doctrine* allows for

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[17] This contrasts with earlier jurisprudence which took a "watertight compartments" approach to federalism, where there was seen to be no overlap between the provincial and federal heads of power. See, for example *Reference re Firearms Act (Can)*, 2000 SCC 31 [*Firearms Reference*] at para 146, or *Re: Securities Act*, *supra* note 15 at para 56.
[18] *Firearms Reference*, *supra* note 18 at para 18.
[19] Adams, *supra* note 14 at 31.
[20] *The Citizens Insurance Company v Parsons*, [1881] 7 AC 96 (PC) [*Parsons*] at 96.
[21] W R Lederman, "Classification of Laws and the British North America Act" in *Continuing Canadian Constitutional Dilemmas* (Toronto: Butterworths, 1981) 236 at 192–93.
[22] *Ibid* at 193.
[23] The recent case in *Orphan Well Association v Grant Thornton Ltd*, 2019 SCC 5 [*Redwater*] pitted provincial authority over natural resource development, licensing regimes, and property and civil rights against federal bankruptcy provisions.

federal and provincial legislation in relation to the same subject to be simultaneously valid, but with certain caveats.[24] So long as "the federal law pursues an objective that […] falls within Parliament's jurisdiction, while the provincial law pursues a different objective that falls within provincial jurisdiction," both laws are valid.[25] A useful environmental policy example of this is seen in *Spraytech*, in which the SCC concluded that municipal, provincial, and federal laws governing the local application of pesticide, pesticide use throughout the province, and the manufacturing and trade of pesticides respectively were each valid because each was within the jurisdiction of the enacting level of government.[26] Each piece of legislation was in relation to the same subject – pesticides – but focussed on aspects of the subject appropriate to the jurisdiction enacting each piece of legislation. This is not inconsistent with even a strict interpretation of the allocation of "exclusive" areas of legislative jurisdiction as enumerated in the Constitution; the *double-aspect doctrine* requires that each level of government anchor its legislation in its exclusive enumerated or residuary powers.

Where joint compliance with federal and provincial laws is not possible, or where provincial laws are deemed to frustrate a federal purpose, federal laws are *paramount* and provincial laws are inoperative to the extent they conflict with federal laws.[27] This does not mean the provincial law is unconstitutional. Rather, the provincial law stands down only to the extent necessary to eliminate the conflict with the federal law.[28] This narrow definition is important, since, for example, any federal legislation on GHGs will necessarily overlap with provincial legislation, for example with respect to royalties charged on oil extraction. Overlap per se does not negate the provincial policy. Rather, so long as firms can feasibly comply with both, federal *paramountcy* plays no role.

The doctrine of *interjurisdictional immunity*, or IJI, serves a role analogous to paramountcy, but its attention is on the subject of the legislation. If legislation is deemed to be such that it impairs a core power of the other level of government, courts may confer immunity from the application of the impugned law on certain activities. For example, in litigation relating to the construction of the TransMountain pipeline, otherwise valid laws enforced by the City of Burnaby which thwarted surveying for the project were deemed

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[24] Asher Honickman, "Watertight Compartments: Getting Back to the Constitutional Division of Powers" (2017) 55:1 Alta L Rev 225.
[25] *Re: Securities Act*, *supra* note 15 at para 66. See also *Canadian Western Bank v Alberta*, 2007 SCC 22 [*Canadian Western Bank*] at para 30.
[26] *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40 [*Spraytech*].
[27] See *Redwater*, *supra* note 24 at paras 183 and 232. Note that paramountcy does not impact the validity of provincial legislation, only its operation. The majority decision holds at paragraph 64 in the decision that "valid provincial legislation of general application continues to apply in bankruptcy until Parliament legislates pursuant to its exclusive jurisdiction in relation to bankruptcy and insolvency. At that point, the provincial law becomes inoperative to the extent of the conflict." To support this interpretation, Wagner C.J.C. cites *Husky Oil Operations Ltd v Minister of National Revenue*, [1995] 3 SCR 453 [*Husky Oil*] at para 3.
[28] *Redwater*, *supra* note 24 at para 64.

inapplicable to the project in a decision of the National Energy Board citing both *paramountcy* and *interjurisdictional immunity*. Regarding the latter, the NEB found that since the Burnaby laws prevented the surveying necessary to construct a pipeline, they impaired the core federal power over interprovincial works and undertakings, and thus Burnaby's laws were inapplicable to the project.[29] The SCC has cautioned against the continued use of the doctrine of *interjurisdictional immunity*, and Alberta argued unsuccessfully for its application to shield provincial natural resource development from federal impact assessment legislation in *Re: IAA*.[30]

Finally, Canadian courts have embraced the idea of *cooperative federalism*.[31] This concept posits that federal and provincial governments might seek "cooperative solutions that meet the needs of the country as a whole as well as its constituent parts."[32] The treatment of cooperative federalism has differed over time and, in some cases, it has been treated as a substantive constitutional obligation.[33] The *GGPPA References* decision clarified that this is not the case, stating that "cooperation, while important to federalism, cannot override or modify the constitutional division of powers."[34] In an environment of increasing federal-provincial tension over climate change, cooperative federalism seems a less likely outcome than intransigent provincialism. But, intransigence on the part of the provinces does not confer upon the federal government a license for legislative incursion into provincial jurisdiction.

With these basic tenets in mind, we can continue to consider the constitutional constraints on climate policy.

3. The Federal Power to Tax GHG Emissions

Carbon taxes are the most straightforward of emissions pricing regimes. When faced with a pollution externality, it is a natural economists' reflex to recommend a Pigouvian tax to correct the market failure. And, it is also easy to pick up a copy of the Constitution and read that Parliament has the power to tax, but all is not as simple as it seems. Legal scholars do generally agree that the federal government has the power

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[29] See National Energy Board, Reasons for Decision (18 January 2018) in support of Order MO-057-2017 (6 December 2017) re Trans Mountain Expansion Project [perma.cc/TC3H-DA9S].
[30] *Re: IAA*, *supra* note 5.The dissent would have held that interjurisdictional immunity did not apply, while the majority did not need to rule on interjurisdictional immunity as it was of the opinion that the impugned federal legislation was invalid.
[31] See, generally, Adams, *supra* note 14.
[32] *Re: Securities Act*, *supra* note 15 at para 132. Adams, *supra* note 14 at 34–35, argues that cooperative federalism is, itself, a metaphor.
[33] Adams, *supra* note 14 at 39. Adams cites the dissent in *Quebec (Attorney General) v Canada (Attorney General)*, 2015 SCC 14 [*Re: Long-gun Registry*] at paras 153–54, as one example of this interpretation. He writes that dissent suggests that "a cooperative scheme from which both the federal and provincial governments benefit cannot be dismantled unilaterally by one of the parties without taking the impact of such a decision on its partner's heads of power into account," which he argues is inconsistent with the division of powers in the Constitution.
[34] *GGPPA References*, *supra* note 5 at para 50. See also *Re: Securities Act*, *supra* note 15 at para 62, which holds that, "notwithstanding the Court's promotion of cooperative and flexible federalism, the constitutional boundaries that underlie the division of powers must be respected."

to implement a tax on carbon emissions under section 91(3) of the Constitution.[35] But, this comes with a very important limitation: the tax cannot be primarily aimed at reducing GHG emissions. As Canada's Chief Justice writes, "while 'carbon tax' is the term used among policy experts to describe GHG pricing approaches that directly price GHG emissions, it has no connection to the concept of taxation as understood in the constitutional context."[36] Economists might wonder whether this interpretation was introduced expressly to frustrate us, but this provides an important lesson in the importance of constitutional constraints on policy.

The federal taxation power has been interpreted more as a power to raise revenues rather than a power to implement policies in the form of taxation. Policies primarily enacted to reduce GHG emissions would be more likely to be characterized as regulation "with the characteristics of a tax," as was the case for the *GGPPA*.[37] Those who would have reached a rapid conclusion that federal carbon pricing legislation was obviously valid via that taxation power would have ignored a very important constraint.

So, when does the economists' definition of a tax align with the constitutional definition? Canadian courts have adopted a five-step test formalized in *Westbank* to differentiate constitutional taxes from levies, user fees, and regulatory charges. The *Westbank* tests asks whether a charge is: (1) compulsory and enforceable by law; (2) imposed under the authority of the legislature; (3) levied by a public body; (4) intended for a public purpose; and (5) unconnected to a regulatory regime which seeks primarily to affect the behavior of individuals.[38] When we consider Pigouvian taxes, the fifth criterion would be most problematic insofar as the intent of the charge is to reduce GHGs.[39] It was this criterion that carried the day in the *GGPPA References*, as the majority of the Court found that emissions prices were a regulatory regime aimed at changing behavior, not a constitutional tax.[40]

There is a good chance that a tax on emissions could be upheld under the federal taxation power. For example, a federal green tax shift comparable to BC's carbon tax could be upheld under section 91(3), under certain conditions. The courts would look to intrinsic and extrinsic evidence (legislative text, as well

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[35] Peter W Hogg, "Constitutional Authority Over Greenhouse Gas Emissions" (2009) 46 Alta L Rev 507. See also Chris Rolfe & Linda Nowlan, *Economic Instruments and the Environment: Selected Legal Issues*, Ann Hillyer, ed. (Vancouver: West Coast Environmental Law Research Foundation, 1993), which argues that "an energy tax or a carbon tax applied either on the retail sale or production and import of fossil fuels almost undoubtedly would be valid federal legislation," subject to caveats that the tax not be an attempt to invade provincial jurisdiction. Elisabeth DeMarco, Robert Routliffe & Heather Landymore, "Canadian Challenges in Implementing the Kyoto Protocol: A Cause for Harmonization" (2004) Alta L Rev 209 raise the federal power to tax, but only in the context of the potential characterization of an emissions trading regime as a tax.
[36] *GGPPA References*, *supra* note 5 at para 16.
[37] This language is adopted by the Chief Justice in *ibid* at para 213.
[38] *Westbank First Nation v British Columbia Hydro and Power Authority*, [1999] 3 SCR 134 [*Westbank*] at para 21.
[39] 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 at 28.
[40] *GGPPA References*, *supra* note 5 at paras 215–16.

as House of Commons debates, and other evidence as to the intended effects of the tax shift) to verify that the carbon tax had, as its primary purpose the raising of revenue, and that the reduction of emissions were ancillary benefits coming along with overall improvements to the efficiency of the tax system.[41] So, the fact that the *GGPPA* was found to not be a constitutional tax does not mean that all levies on emissions would be viewed in the same way. And, note that the definition of a constitutional tax does not imply that it must induce an overall increase in the size of government. So long a tax is enacted with the primary objective of generating revenues, it is likely to be upheld under section 91(3).

But, the story does not end there for economists. The economic efficiency of emissions taxes wanes if sources are exempted from the tax. And, broad coverage would be a challenge for a carbon tax classified under Parliament's subsection 91(3) power, as a consequence of restrictions imposed by section 125 of the Constitution. Parliament's power to tax does not extend to provincial property, which legal scholars generally agree would limit the applicability of a carbon tax enacted under section 91(3) to emissions from provincial Crown corporations.[42] This would mean, for example, that a federal carbon tax, using tax in the constitutional sense, would *not* apply to emissions from SaskPower, which operates coal- and natural-gas-fired power plants, while the tax *would* apply to similar privately-owned power plants in Alberta.

The limits of the section 125 exemption have been explored in a few cases. For example, in *Re: Exported Natural Gas Tax*, the SCC determined that a federal tax on natural gas did not apply to provincially-owned natural gas, although the contrived set of facts in that reference case are such that the precedent is of narrow application.[43] In *Re: Exported Natural Gas*, the challenge applied to gas that remained in provincial ownership after production, and the decision does not imply that s. 125 would prevent the application of a federal carbon tax to emissions related to provincially-owned natural resources.[44] Electricity, however, and

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[41] The reduction in both pollution and the marginal cost of public funds that may result from revenue-neutral environmental taxes is known as the double dividend. See, for example Lawrence H Goulder, "Environmental taxation and the double dividend: A reader's guide" (1995) 2:2 International Tax and Public Finance 157.

[42] Hogg, *supra* note 36 at 518. Also see *Constitution Act, 1867*, *supra* note 6, s 125 which holds that "No Lands or Property belonging to Canada or any Province shall be liable to Taxation." There is also some question as to whether a tax would apply to provincially-owned resources. See, for example, Philip Barton, "Economic Instruments and the Kyoto Protocol: Can Parliament Implement Emissions Trading without Provincial Co-operation" (2002) Alta L Rev 417 at 444. Barton cites *Re: Exported Natural Gas Tax*, [1982] 1 SCR 1004 [*Re: Exported Natural Gas Tax*], but the contrived fact pattern of that reference case suggests that provincial ownership of resources beyond the well-head would restrict the application of a carbon tax, but this is not generally the case as resources are severed from provincial ownership when they are produced. For more extensive discussion of this point, see Nigel Bankes & Alastair R Lucas, "Kyoto, Constitutional Law and Alberta's Proposals" (2004) Alta L Rev 355 at 379.

[43] *Re: Exported Natural Gas Tax*, *supra* note 43. For a discussion of the contrived set of facts, see Troy Riddell & F L Morton, "Government Use of Strategic Litigation: The Alberta Exported Gas Tax Reference" (2004) 34:3 American Review of Canadian Studies 485.

[44] Bankes & Lucas, *supra* note 43 at 382.

any other emissions from Crown-owned entities would be exempt from taxation so long as the tax was enacted under section 91(3).

Economists might rightly wonder why these limits exist. And, in the context of the *GGPPA,* we have a couple of excellent explanations. The strongest is that of Justice Brown, writing in dissent but not on this point, who explains that "it would afford the Dominion an 'easy passage into the Provincial domain' were every monetary measure to be regarded as a tax."[45] If Parliament could legislate in any area so long as they legislated in a manner which raised revenue, provincial jurisdiction over many areas would be left wanting.

In summary, while carbon taxes might seem at first blush to fit within Parliament's taxation power, the requirement for a primary connection to the raising of revenue means that a federal carbon charge implemented to reduce emissions cannot be upheld under this head of power. Further, a federal carbon tax underpinned by the taxation power would not apply to a wide range of provincial undertakings, some of which generate significant GHG emissions. This is not by any means the end of the story for what economists think of as carbon taxes: as we've seen in the recent *GGPPA References* decision, a regulatory charge on emissions indistinguishable to an economist from a prototypical carbon tax could be grounded in the national concern branch of the POGG power.[46] Since the arguments for federal jurisdiction to enact GHG regulation with the characteristics of taxation apply in general to broader regulatory regimes, they are discussed in that context below.

4. Crimes Against the Environment

Like the taxation power, there is a broad consensus among legal scholars that Parliament can implement environmental protection legislation through the criminal law power, and substantial legal precedent supports this view. Section 91(27) has, from its earliest interpretations, been plenary in nature and supported a broad swath of economic policy as well as more classic criminal laws. The test for classification under the criminal law power requires a prohibition and a penalty, enacted to achieve a public purpose, commonly referred to as the three 'P's'.[47] A public purpose in this context has generally but not exclusively been seen as the prevention of something evil or harmful.[48] Interestingly, protectionist economic policy, or an attempt at it, provided the precedent for the third 'P' as the SCC ruled that federal laws prohibiting the production

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[45] *GGPPA References*, *supra* note 5 at para 408, quoting from *Canada (Attorney General) v Ontario (Attorney General) Reference re The Employment and Social Insurance Act, 1935*, [1937] AC 355 [*Re Employment and Social Insurance*] at 367.
[46] The majority opinion in the *GGPPA References*, *supra* note 5, did not consider at any length whether the legislation could be upheld under other federal heads of power, choosing to turn immediately to POGG.
[47] *Firearms Reference*, *supra* note 18 at para 27.
[48] Eric M Adams, "Touch of Evil: Disagreements at the Heart of the Criminal Law Power" (2022) 101 SCLR (2d) 29.

or sale of butter substitutes including margarine was outside the reasonable bounds of the federal criminal law power.[49]

There is no dispute that environmental protection, and by extension the reduction in GHG emissions, constitutes a valid public purpose for the criminal law. Legal opinion on the potential application of Parliament's criminal law power to environmental management is anchored by the SCC's decision to uphold the validity of the *Canadian Environmental Protection Act* in *Hydro-Québec*, in which the Court was unanimous on this point.[50] *Hydro-Québec* related to prohibitions on toxic pollutant releases (polychlorinated biphenyls, or PCBs), and GHGs were added to the list of toxic substances regulated under *CEPA* in 2005, opening the door to the use of similar prohibitions to combat climate change.[51] The majority in *Hydro-Québec* held that, as *CEPA* combined the purpose of environmental protection with both prohibitions and penalties, it was valid criminal law.[52] The dissent would have held that *CEPA* was regulatory in nature, and thus would not have upheld the legislation. Building on this precedent, *CEPA* has been used in GHG emissions management policies including renewable fuel mandates and regulations to reduce emissions from electricity.[53] Recently, though, legal consensus on the use of the criminal law to protect the environment has been thrown into some disarray with a Federal Court ruling that prohibitions on single-use plastics could not be classified under the criminal law power.[54]

Economists will be heartened to learn that valid criminal law can reach beyond a pure command-and-control regulation. In *RJR-McDonald*, a case involving a ban on tobacco advertising, the SCC affirmed that a "circuitous route" to restrict an activity was sufficient to meet the requirement for a prohibition under the criminal law power.[55] This precedent was crucial in the Federal Court of Appeal decision in *Syncrude* upholding renewable fuel content standards under *CEPA* as a valid exercise of the criminal law power.[56]

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[49] *Reference re Validity of Section 5 (a) Dairy Industry Act*, [1949] SCR 50 [*Margarine Reference*].
[50] *Canadian Environmental Protection Act*, SC 1999, c 33 [*CEPA*]; *Hydro-Québec*, *supra* note 7.
[51] Hogg, *supra* note 36 at 513. See also Order in Council SOR/2005-345 November 21, 2005 adding the six *Kyoto Protocol* GHGs to Schedule 1 of *CEPA*, *supra* note 51.
[52] *Hydro-Québec*, *supra* note 7. Although they dissented with respect to the majority's overall conclusion of validity, Chief Justice Lamer and Justice Iacobucci would have held that "the protection of the environment is itself a legitimate basis for criminal legislation" at para 43.
[53] *Clean Fuel Regulations* SOR/2022-140, Government of Canada, 21 June 2022, Canada Gazette, Part II, Vol 156, N 14 [*Clean Fuel Regulations*]; *Regulations Amending the Reduction of Carbon Dioxide Emissions from Coal-fired Generation of Electricity Regulations* SOR/2018-263, Government of Canada, 30 November 2018, Canada Gazette, Part II, Volume 152, Number 25 [*Coal regulations*].
[54] *Single-Use Plastics*, *supra* note 13. The prohibition made under the CEPA can be found in *Single-use Plastics Prohibition Regulations,* SOR/2022-138, Government of Canada, 20 June 2022, Canada Gazette, Part II, Volume 156, Number 13 [*Plastics Ban*].
[55] *RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199 [*RJR-MacDonald*]. See also *Reference re ss 193 and 1951(1)(C) of the Criminal Code (Man)*, [1990] 1 SCR 1123 [*Prostitution Reference*]; *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519 [*Rodriguez*].
[56] *Syncrude Canada Ltd v Canada (Attorney General)*, 2016 FCA 160 [*Syncrude*].

Syncrude is notable not only because the standards were intended to reduce GHGs, but also because the regulatory regime allowed for trading of compliance credits and did not include absolute prohibitions on emissions at the facility level nor a fixed, aggregate emissions limit.[57] This opens the door for more flexible regulations to be enacted under the criminal law power.

With that said, the degree to which GHG regulation would interfere with provincial jurisdiction is likely to constrain the use of the criminal law power in this context. There is a long history of Parliament being prevented from using "the machinery of criminal law" to attempt to legislate in areas of provincial jurisdiction.[58] In *Hydro-Québec*, the majority opinion of Justice La Forest concludes that Parliament may enact prohibitions with respect to what it deems to be toxic substances, but also identified the potential for such prohibitions to be too broadly-aimed at elements of provincial jurisdiction.[59] The dissent too worried that, if environmental protection were swept into the criminal law, there would be little scope remaining for provincial regulatory jurisdiction.[60] There is certainly a plausible scenario in which federal GHG policies with a focus on a major emitting sector such as the oil sands or fossil-fueled electricity generation could trench too deeply into exclusive provincial jurisdiction to manage natural resources and electricity under ss. 92(10) and 92A(1) of the Constitution and thus be found invalid.[61] And, with proposed federal emissions caps on oil and gas clean electricity regulations looming along with the on-going plastics litigation, further tests seem unavoidable.[62]

There is also the potential that GHGs prove too diffuse and omnipresent to be compatible with the precedent established in *Hydro-Québec.* In the majority opinion in *Hydro-Québec*, Justice La Forest writes of the importance of limiting *CEPA* to substances which are "toxic in the real sense" and which "constitute or will constitute a significant danger to human health or the environment." La Forest drew comfort from the extant

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[57] Just as the decision in Syncrude, *ibid*, reinforced the applicability of criminal law in the context of the environment, more recent decisions in *Reference re Assisted Human Reproduction Act*, 2010 SCC 61 [*Re: AHRA*], and *Reference re Genetic Non-Discrimination Act*, 2020 SCC 17 [*Re: GNDA*], have applied broad definitions of a legitimate public purpose under the criminal law.

[58] *Re: Reciprocal Insurance Legislation*, [1924] 1 DLR 789 (JCPC) [*Reciprocal Insurance*] at 800. See also *Attorney-General For The Province Of Ontario v Attorney-General For The Dominion Of Canada*, [1922] 1 AC 191 (PC) [*Board of Commerce (PC)*] at 192–193.

[59] *Hydro-Québec*, *supra* note 7 at para 130.

[60] *Ibid* at 256. The dissenting opinion of Lamer C.J.C. and Iacobucci J. allows that the criminal law finding would not rule out all potential other regulations, but nonetheless wonders how, if everything we do involves polluting the environment in some way, whether any role will be left for the provinces in regulation such pollution.

[61] See e.g. the discussion of coal-fired power regulation in Alastair R Lucas & Jenette Yearsley, "The Constitutionality of Federal Climate Change Legislation" (2011) 4:15 University of Calgary School of Public Policy Research Papers, online: <https://dx.doi.org/10.2139/ssrn.1970007> [perma.cc/SFY3-5RJX] at 27–28, 33–34.

[62] Government of Canada, "Options to cap and cut oil and gas sector greenhouse gas emissions to achieve 2030 goals and net-zero by 2050" (18 July 2022), online: <https://www.canada.ca/en/services/environment/weather/climatechange/climate-plan/oil-gas-emissions-cap/options-discussion-paper.html> [perma.cc/6QXS-PHT5]; *Clean Electricity Regulations*, 19 August 2023, Canada Gazette, Part I, Volume 157, Number 33 [*Clean Electricity Regulations*].

list of substances containing only nine items, including asbestos, lead, and mercury, which he described as "substances that even to the uninitiated are well known to be toxic in certain circumstances when they enter into the environment."[63] The dissent in *Hydro-Québec* worried that the definitions of toxic substances in the impugned legislation were too broad, and took issue with the lack of focus on defining which effects might be sufficiently harmful to warrant prohibition.[64] Will courts continue to see GHGs as sufficiently "toxic" to underpin criminal law jurisdiction?[65] Concerns of this sort were allayed to some degree by the decision in *Syncrude* which upheld as criminal law restrictions intended to reduce GHGs, but were shown to be a credible threat in the recent ruling on single-use plastics.[66] Consider the decision of Gonthier J. in *Canadian Pacific* which held that "generally framed pollution prohibitions are desirable from a public policy perspective,"[67] but when the pollutant itself is as pervasive as GHGs, a general framing necessarily implies a dramatic broadening of federal legislative jurisdiction through the criminal law power.

The pervasiveness of GHGs in the economy, not their relative lack of toxicity, may be the key barrier to applying the *Hydro-Québec* precedent broadly.[68] These concerns echo in the majority opinion of Justice La Forest who worried about the potential breadth of prohibitions of toxic emissions.[69] The dissenting opinion in *Hydro-Québec* also expressed concern that the definition of toxic substances was overly broad and that "many human activities could involve the use of materials falling within the meaning of toxic substances."[70] The unanimous concern of the Court in this regard would surely have been amplified if the listed toxic substances at the time had included GHGs and/or other ubiquitous pollutants such as plastic manufactured items.

So what does this mean for economists? The criminal law power remains an important underpinning for federal environmental policies and its application to classic toxics regulation is general uncontested. We've seen, in recent years, a focus on more ubiquitous pollutants like GHGs and single-use plastics which challenge the traditional conception of federal jurisdiction. Economists should be wary of advice built on

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[63] *Hydro-Québec*, *supra* note 7 at 307–308.
[64] *Ibid* at 241 and 243.
[65] See, for example, Shi-Ling Hsu & Robin Elliot, "Regulating Greenhouse Gases in Canada: Constitutional and Policy Dimensions" (2009) 54:3 McGill LJ 463 at 492.
[66] *Single-Use Plastics*, *supra* note 13. For example, Justice Furlanetto writes at para 184 of her reasons that, "the broad and all-encompassing nature of the category of [plastic manufactured items] poses a threat to the balance of federalism as it does not restrict regulation to only those [plastic manufactured items] that truly have the potential to cause harm to the environment."
[67] *Ontario v Canadian Pacific Ltd*, [1995] 2 SCR 1031 (1995 CanLII 112 (SCC)) [*Canadian Pacific*] at para 52, aff'd *Hydro-Québec*, *supra* note 7 at 301.
[68] This concern is raised by many writing after the decision in *Hydro-Québec*, such as Chris Rolfe, *Turning Down the Heat: Emissions Trading and Canadian Implementation of the Kyoto Protocol* (Vancouver, Canada: West Coast Environmental Law Research Foundation, 1998), online: <https://www.wcel.org/sites/default/files/publications/Turning Down the Heat.pdf> [perma.cc/T4EW-PXE4] at 364.
[69] *Hydro-Québec*, *supra* note 7 at 121 [emphasis added].
[70] *Ibid* at 260.

the presumption that any policy with a prohibition and a penalty that seeks to protect the environment or to reduce GHGs will ultimately be upheld by the courts.

5. Trade and Commerce: a dead letter or under-used tool in the federal toolbox?

The Constitution's section 91 sets a number of traps for economists in that it can appear to allocate very broad legislative authority to Parliament. Like the taxation power in section 91(3), a plain-language reading of section 91(2) which states that Parliament's exclusive legislative authority extends to "all matters coming within […] the regulation of trade and commerce," suggests plenary jurisdiction over a wide range of activities. But, as mentioned above, courts have restricted Parliament's legislative reach to matters of extraprovincial trade as well as to matters of national importance.[71] This interpretation still leaves some room for policy intervention to address GHG emissions.

The general branch of the trade and commerce power – the matters of national importance identified in *Parsons* – has been applied in ways economists will readily identify as the correction of market failure. To economists, the economic motivation for the regulation of competition, the protection of reputation value through trademarks, and the regulation of systemic risks in securities markets has much in common with the rationale for policies to reduce GHGs.[72] Courts, however, have generally drawn a line between what they view as *economic* versus *environmental* policies. For GHG emissions pricing, the general trade and commerce power may provide support for regulatory charges on emissions, and perhaps more complex regulatory regimes including emissions trading programs. But, to date, this is merely speculative as no such policies have been successfully upheld under the trade and commerce power.

The SCC decision in *General Motors*, a competition policy case, sees Chief Justice Dickson set out five indicia to determine whether legislation may be classified under the general branch of the trade and commerce power. The first two of the five indicia ask whether the legislation involves a regulatory regime overseen by a regulator, differentiating a public law regulatory regime from private law causes of action. Most any national GHG emissions regime enacted by the federal government could satisfy these criteria. The third indicium, whether the legislation in question involves the regulation of trade as a whole, means that regulation of individual commodities or industries cannot be sustained under the trade and commerce

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[71] Lederman, *supra* note 22 at 192–93.

[72] This argument is fleshed out in much more detail for Canada in Andrew Leach, "Environmental Policy is Economic Policy: Climate Change Policy and the General Trade and Commerce Power" (2021) 52:2 OLR 97. A similar argument with respect to the US Commerce Clause is advanced in Mollie Lee, "Environmental Economics: A Market Failure Approach to the Commerce Clause" (2006) 116:2 Yale LJ, online: <https://digitalcommons.law.yale.edu/ylj/vol116/iss2/4>. The SCC upheld federal legislation in each of these areas in *General Motors of Canada Ltd v City National Leasing*, [1989] 1 SCR 641 [*General Motors*], *Kirkbi AG v Ritvik Holdings Inc*, [2005] 3 SCR 302 [*Kirkbi v. Ritvik*], and *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48 [*Re Pan-Canadian Securities*].

power.[73] The final two indicia from *General Motors* speak clearly to economists, asking whether the subject matter is inherently federal and whether national legislation is necessary for regulation to be effective.[74]

In many cases, national policies will eliminate material inefficiencies that would be present in a patchwork of provincial policies. And, when it comes to GHG policies, there are many recent examples of provincial unwillingness to act as aggressively as Ottawa might prefer. Neither of these constitute justification for upholding legislation under the general branch of the trade and commerce power. Rather, likely to the chagrin of economists, interpretation of these indicia has centered on questions of "legislative competence, not policy," as judges have attempted to cut against efficiency arguments for national policies.[75] It cannot simply be the case that national policy would be better; it must be shown that national policy is the only viable option. And, it must be the case that "the provinces jointly or severally would be constitutionally incapable of enacting" the proposed legislation, not that they have merely chosen not to do so.[76] These last two indicia substantially limit the classes of legislation that might be upheld under this head of power.

The federal power over interprovincial trade and commerce also offers significant latitude for federal measures to mitigate GHG emissions, including polices already enacted in other jurisdictions. Unlike the highly-constrained power over general trade and commerce, it is widely accepted that the federal government has broad jurisdiction to legislate in relation to cross-border trade including the imposition of customs duties, tariffs and quotas. As a result, policies such as carbon tariffs, border carbon adjustments, and restrictions on the imports or exports of carbon intensive goods, if enacted with the clear motivation to affect international or even interprovincial trade, would be upheld without much debate.

The degree to which the federal government could restrict interprovincial trade in order to reduce emissions is less clear, due to the free trade clause in Section 121 of the Constitution.[77] Section 121 is less restrictive than it would appear on a plain language reading, since the juridical interpretation of the clause merely "prohibits governments from levying tariffs or tariff-like measures."[78] Furthermore, section 121 "does not prohibit governments from adopting laws and regulatory schemes directed to other goals that have incidental effects on the passage of goods across provincial borders."[79] An exception to this would likely

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[73] *General Motors*, *supra* note 73. See also the reasons of Justice Dickson (as he then was) in *AG (Can) v Can Nat Transportation*, [1983] 2 SCR 206 [*Canadian National*] at 262–63.
[74] *General Motors*, *supra* note 73 at 662–63.
[75] *Re: Securities Act*, *supra* note 15 at para 90. See also Malcolm Lavoie, "Understanding 'Trade as a Whole' in the Securities Reference" (2013) 46:1 UBC L Rev 157 at 162–64.
[76] *General Motors*, *supra* note 73 at 661–663, citing *Canadian National*, *supra* note 74.
[77] For more detail on the law and economics of section 121, see Malcolm Lavoie, "R. v Comeau and Section 121 of the Constitution Act, 1867: Freeing the Beer and Fortifying the Economic Union" (2017) 40:1 Dal LJ 189, and Malcolm Lavoie, *Trade and Commerce: Canada's Economic Constitution* (McGill-Queen's Press, 2023).
[78] *R v Comeau*, 2018 SCC 15 [*Comeau*] at para 53.
[79] *Ibid.*

lie in measures implemented to punish provinces with insufficiently stringent domestic GHG emissions policies as, in *pith and substance*, such a policy would not be directed at trade but rather would be using trade restrictions to accomplish an unrelated goal.

6. Peace, order, and good government

Like the taxation, criminal law, and trade and commerce powers, a plain language reading of Parliament's jurisdiction to "make Laws for the Peace, Order, and good Government of Canada" as set out in the preamble to the Constitution's section 91 appears broad. The balance of the preamble makes clear the most important restriction on this power: it is residuary, applying only to matters not in provincial jurisdiction. Judicial interpretation has established two branches of the POGG power: the emergency branch and the national concern branch.

POGG's emergency branch allows the federal government to enact temporary legislation which trenches on provincial jurisdiction in times of crisis, as was the case for anti-inflation policy in the 1970s.[80] While climate change is often termed an emergency,[81] the emergency branch of POGG will not likely sustain efforts to reduce emissions over decades required to address climate change.[82]

The national concern branch of POGG is a natural home for GHG policies, since neither the environment nor climate change are listed among the heads of provincial power in section 92. The federal carbon pricing backstop was upheld under POGG in the *GGPPA References*, but this precedent tells us little about what *other* GHG mitigation policies might also fall within its reach. The narrow definition of federal jurisdiction in the *GGPPA References* decision at a minimum confirms that POGG does not provide unconstrained legislative capacity to act on climate change

The majority opinion in the *GGPPA References* clarified the constraints that must be met for legislation to be upheld under the national concern branch of POGG. First, and in a departure from earlier jurisprudence, Chief Justice Wagner wrote that courts should begin with "a common-sense inquiry into the national

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[80] *Reference Re Anti-Inflation Act*, [1976] 2 SCR 373 [*Anti-Inflation*]. See, in particular, the plurality reasons at page 427 and the concurring reasons at 436-37.

[81] Parliament voted to declare a climate emergency in 2019 (House of Commons, Journals, 42nd Parl, 1st Sess, No 435 [June 17, 2019] at p. 5661). See also Jocelyn Stacey, *The Constitution of the Environmental Emergency* (Bloomsbury Publishing, 2018), which frames the law of environmental emergency, but without explicitly addressing the emergency powers under POGG.

[82] Andrew Leach & Eric M Adams, "Seeing Double: Peace, Order, and Good Government, and the Impact of Federal Greenhouse Gas Emissions Legislation on Provincial Jurisdiction" (2020) 29:1 Constitutional Forum 1 at 6. For extensive discussion, see Chalifour, *supra* note 40 at 355–360. Chalifour argues that the emergency branch might be used to uphold "short-term, kickstart legislation" or other more temporary measures to combat the long-term problem of climate change. Note that interveners did argue in favour of upholding the federal GGPPA under the emergency branch of POGG in the reference cases assessing its validity. See, for example, *Reference re Greenhouse Gas Pollution Pricing Act*, 2020 ABCA 74 (CanLII) [*Alberta GGPPA Reference*] (Factum of the David Suzuki Foundation).

importance of the proposed matter," noting that this is a necessary but not sufficient condition.[83] The matter must also have a "singleness, distinctiveness, and indivisibility that distinguishes it from matters of provincial concern."[84] In other words, only legislation which applies to a "specific and identifiable matter" rather than a broad subject should be upheld under POGG, if and only if "evidence establishes provincial inability to deal with the matter."[85] Provincial inability here means that provinces cannot act alone or in combination to address the matter and that this incapacity, not mere intransigence, would result in consequences on other provinces. This two-part constraint is important in the context of climate mitigation: we know that GHGs from any one province have extra-provincial effects, but provinces are capable of acting to reduce GHG emissions. What provinces cannot do is impose action on other provinces, and therein lay the narrow rationale for upholding the federal carbon pricing law.

Finally, to be upheld under Parliament's POGG power, legislation must have "a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution."[86] This is a subjective test and so, in the parlance of economists, its impact will likely depend on the stringency and the incidence of any proposed GHG emissions policies, as well as the degree to which these costs are distributed throughout the federation.

It's challenging to reach general conclusions on the POGG power as to what might or might not be upheld under its terms. But, for economists, the constraints imposed on the POGG power through the test elaborated in the *GGPPA References* are important to understand. It is not sufficient to show that the subject matter is important, nor of a national character. Legislation in relation to GHGs must also satisfy the provincial inability and scale of impact tests which, while subjective in nature, will be satisfied by only the least intrusive of federal actions. Insofar as stringent federal legislation focused on emissions from provincial resource extraction and/or electricity, which are explicitly assigned to the provinces in Section 92A of the Constitution, it would be a substantial challenge to see it upheld under POGG.

7. Application: The Federal Authority to Implement Emissions Pricing Programs

To help build intuition for the application of these concepts, I consider the potential validity of a hypothetical federal cap-and-trade program which imposed a binding cap on emissions from a subset of economic activities. While they may result in similar economic incentives, the federal power to enact more

[83] *GGPPA References*, *supra* note 5 at para 142.
[84] *Ibid* at paras 145–159, where the quote is from *Crown Zellerbach*, *supra* note 7 at 432.
[85] *GGPPA References*, *supra* note 5 at para 157.
[86] *Ibid* at para 160, affirming the test as quoted from *Crown Zellerbach*, *supra* note 7 at 432.

complex regimes to reduce emissions is more speculative than that for prototypical carbon taxes, and more dependent on the path to enactment of such policies.[87]

Scholars generally see two promising avenues for classification of more complex federal regulatory regimes for GHG emissions: the criminal law power or the national concern branch of POGG, and some suggest that the trade and commerce power could also apply.[88] I discuss each of these below.

7.1. The Criminal Law Power

To be upheld under the criminal law power, legislation must have a criminal law purpose, and must include a prohibition backed by a penalty. Environmental protection has been upheld as a valid criminal law purpose, and any comprehensive GHG regulatory regime would contain penalties for violating firm-specific or aggregate emissions limits. The more challenging constraints on GHG policy underpinned by the criminal law power are likely to come from the requirement of a prohibition.

Courts have found that regulatory means of achieving a targeted prohibition are permissible under the criminal law, even if this entails a "circuitous path."[89] The Federal Court of Appeal in *Syncrude* upheld renewable fuel regulations wherein an aggregate requirement for renewable fuel blending was set based on total fuel sold, and individual firms could generate tradeable credits through over-compliance with blending requirements. Compliance trading under an aggregate cap could thus fall within the reach of federal criminal law power, either for a specific industry or for a set of emitters. Financial compliance, though, unless linked explicitly to a reserve allowance share of an aggregate cap, might be a bridge too far. For example, writing in dissent in the *GGPPA References* although on a point not addressed by the majority, Justice Brown drew the distinction between charges intended to discourage consumption and criminal law prohibitions.[90] Similarly, the majority opinion in the *Saskatchewan GGPPA Reference* held that the lack of an overall prohibition on emissions meant that the *GGPPA* was not criminal law.[91] The distinction between prohibition and regulation raised by Justice Brown and the provincial appellate courts is not new. Rather, it split the Court in *Hydro-Québec* two decades ago.[92]

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[87] Positing a sharp divide between emissions trading programs and carbon taxes makes black and white what, in reality, tends to be shades of grey. Most policies implemented to date are hybrids of the two. See, for example, discussion in Tom H Tietenberg, "Reflections—Carbon Pricing in Practice" (2013) 7:2 Rev Environ Econ Policy 313.
[88] See Leach, *supra* note 73. A similar argument using parallels to market failures in other areas of economics was made by Lee, *supra* note 73, with respect to the US Interstate Commerce power.
[89] *RJR-MacDonald*, *supra* note 56 at para 51.
[90] *GGPPA References*, *supra* note 5 at para 404.
[91] *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40 [*Saskatchewan GGPPA Reference*] at para 191. The reasons of Richards C.J.S. were adopted by the majority in the *Alberta GGPPA Reference*, *supra* note 83 at para 257.
[92] Joseph E Castrilli, "Legal Authority for Emissions Trading in Canada" in Elizabeth Atkinson, ed, The Legislative Authority to Implement a Domestic Emissions Trading System (Ottawa: National Roundtable on the Environment and the Economy, 1998),

The closer an emissions pricing regime tends toward command-and-control, the more likely it is to be upheld as valid criminal law. A cap-and-trade regime with an aggregate prohibition (a 'hard' cap) and limited other flexibility mechanisms could pass this test. Regulation in the form of a carbon tax, or even hybrid systems like the *GGPPA* where no aggregate prohibition is in place, would likely not.[93]

7.2. Trade and Commerce

The arguments for upholding a broad-based cap-and-trade or emissions-pricing regime under the general branch of the trade and commerce power do not depend as much on the form of the legislation as on its scope. Any emissions pricing policy would satisfy Justice Dickson's definition of a regulatory regime overseen by a regulator. And, so long as the program was not focused on a single industry, Dickson's third indicium would be satisfied as well. It would be more challenging for a cap-and-trade program to satisfy the provincial inability criteria. Provinces are constitutionally capable of addressing their own emissions, but cannot legislate in relation to the emissions of others. Does that mean that they are incapable of effectively addressing GHG emissions? The reasons for a national cap-and-trade program, at least insofar as a program national in scope would prevent emissions leakage to provinces with less stringent policies, align perfectly with the rationale for national competition policies set out in *General Motors*. Whether this rationale would carry the day for emissions policies, though, is speculative, since it speaks to questions of policy effectiveness rather than legislative competence.[94]

The interprovincial branch of the trade and commerce power provides Parliament with the means to enforce import and export limits which might complement emissions pricing regimes including a domestic cap-and-trade program. However, don't be fooled by the "trade" part of cap-and-trade here. The essential part of the policy would be the cap and the enforcement of it upon domestic emitters, which would lie beyond the scope of the interprovincial trade power of the federal government.

It is possible, perhaps even likely, that Canada would argue a combination of heads of power to support domestic emissions restrictions (criminal law), border carbon adjustments (trade and commerce) and perhaps POGG for some elements of the regulatory regime. Legislation need not be upheld under a single head of power, and the trade and commerce may well play a part in underpinning federal legislation even where it doesn't take on a starring role.

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online: <https://publications.gc.ca/collections/collection_2013/trnee-nrtee/En133-5-1-1999-eng.pdf> [perma.cc/R3G7-PL3T] at 13.

[93] The industrial emissions regulations in the *GGPPA*, *supra* note 5, are an example of such a situation. The regulations include emissions trading and other flexible compliance mechanisms, but there is no express or implied aggregate limit on emissions from the sector or from any individual facility.

[94] See *Re: Securities Act*, *supra* note 15 at para 90.

7.3. Peace, Order, and Good Government (POGG)

We can glean some sense of what might be possible under POGG from the *GGPPA References* decision. The majority emphasizes that "[the *GGPPA*] does not require those to whom it applies to perform or refrain from performing specified GHG-emitting activities [or] tell industries how they are to operate in order to reduce their GHG emissions."[95] In the view of the majority, "*all* the GGPPA does is to require persons to pay for engaging in specified activities that result in the emission of GHG."[96] This does not necessarily imply that legislation which delved further into these areas would not be valid under POGG, but the fact that the Chief Justice saw fit to emphasize this is, at the very least, instructive.

Policies to address climate change in general, which Chief Justice Wagner refers to as "a threat to the future of humanity cannot be ignored," would almost certainly stand as matters of sufficient concern to Canada as a whole to warrant consideration.[97] The majority could have carried on with climate change as the matter of national concern in deciding the *GGPPA References*, but settled upon the more restrictive "minimum national standards of GHG price stringency to reduce GHG emissions." This is, in part, a function of the test for classification under POGG. For any climate change policy, regardless of form, the key tension arises in the answers to the second and third elements of Chief Justice Wagner's test: provincial inability and the degree to which legislation impinges on provincial autonomy. A carte blanch for federal action on climate change would not pass that test.

The *GGPPA References* decision holds that broadly and nationally-applied carbon pricing is critical to addressing climate change, treading very close to what economists will recognize as a metric of policy cost-effectiveness. Having held that harmonized policy was necessary for effectiveness, and given that the provinces cannot impose policies on other provinces, the majority was able to conclude that the federal government is constitutionally capable of setting backstop prices. This, along with the contention that "a failure to include one province in the scheme would jeopardize its success in the rest of Canada," where I might add the qualifier of 'could' rather than 'would', was sufficient to carry the day. The latter concept is economic in nature as well – it invokes the notion of emissions leakage.

In contrast to the criminal law, where the legislative reach of the head of power might not be stretched far enough to uphold a complex regulatory regime like a cap-and-trade program for GHGs, the key question with POGG will be whether Courts can be convinced that the legislation is appropriately constrained.[98] The potential for POGG to unbalance federalism is grounded in a long judicial history. In cases such as *Board*

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[95] *GGPPA References*, *supra* note 5 at para 71.
[96] *Ibid* [emphasis added].
[97] *Ibid* at para 167.
[98] Leach & Adams, *supra* note 83 at 4.

of Commerce or *Anti-Inflation*, federal policies which sought to regulate individual trades and transactions within the provinces were ruled beyond Parliament's jurisdiction for trenching too deeply into the provincial domain of property and civil rights.[99]

So, what does this mean for a hypothetical cap-and-trade regime or emissions pricing policies in general? POGG is less likely to be able to support regulation which forces particular behaviour at the facility level, either with regard to technology, prices, or production because of its intrusion into provincial jurisdiction. And so, while the criminal law power is likely to be better suited to quantity-based rather than price-based policies, the reverse may well be true for POGG. Price-based policies, or policies in the form of taxation, require less facility-level enforcement than a cap-and-trade regime, and do not require further regulation of the trade in credits. The simpler a regime, I would argue, the more likely it is to be upheld under POGG.

8. Discussion and Conclusion

This overview of the climate policy implications of the division of powers in the Canadian Constitution necessarily has some omissions. I have not discussed at any length Canada's treaty power because, for the purposes of climate change, it serves little use. Section 125 of the Constitution would grant Parliament jurisdiction to implement the terms of a treaty, but only if that treaty (as with, for example, the *Migratory Birds Convention*)[100] were between the British Empire and another country. Treaties like the Paris Agreement confer no additional jurisdiction onto the federal government to implement their terms, although such treaties may serve as evidence of the national importance of the subject matter of a particular piece of legislation. Similarly, I have avoided much discussion of federal powers to regulate infrastructure and the associated declaratory power. Federal jurisdiction over works and undertakings includes any cross-border infrastructure like pipelines and powerlines, and any other works declared in legislation to be for the general advantage of Canada. Canada has invoked the latter power, for example, to regulate the grain trade. The federal government could, potentially, use its powers over works and undertakings to substantially restrict emitting activities, but at a substantial political cost. As it is, these powers have been used to impose emissions tests on pipelines, but further reach into provincial jurisdiction in order to regulate intraprovincial projects was rejected in the recent *re: IAA* decision. Finally, I have not addressed Charter litigation. A series of litigants in Canada, following trends elsewhere in the world, have sought to force Canadian governments to mitigate climate change in order to safeguard rights to life, liberty and security of the person (s. 7) and/or

[99] *Board of Commerce (PC)*, *supra* note 59; *Anti-Inflation*, *supra* note 81.
[100] The original Migratory Birds Convention Act, 1917, was passed to implement a treaty with the United States signed in 1916. It has been updated since to the current version the *Migratory Birds Convention Act*, SC 1994, c 22 [*Migratory Birds Convention*].

to prevent material disadvantages to younger Canadians (s. 15). Thus far, this litigation has not been successful, and lies separate from the consideration of the legislative division of powers.

Economists study constrained optimization, and our policy advice often focusses on maximizing the efficiency or minimizing the costs of reducing emissions. However, as I argue in this paper, one of the key constraints on policies to address climate change is the division of powers in the Canadian Constitution. Some elements constrain the form, the scope, or even the description of policies designed to mitigate climate change. A thorough understanding of these constraints will lead to better policy advice and, by extension, to the development of policies more likely to be sustained when the Courts examine their constitutionality. In addition to political constraints, constitutional constraints impose a substantial challenge for policy economists. We cannot design optimal policies without accounting for them.