

Constitutional Law and the Politics of Carbon Pricing in Canada

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ABOUT THIS STUDY

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SUMMARY

Which level or levels of government can regulate greenhouse gas (GHG) emissions under the Canadian constitution? This is one of the most difficult policy issues Canada has ever faced. Climate change is the greatest challenge confronting humanity. A scientific consensus has emerged that GHG emissions reductions are necessary to stabilize global temperatures. But carbon emissions per capita vary considerably in Canada's provinces and territories, and a key issue is how to distribute the burden of reducing them. For Alberta and Saskatchewan, GHG emissions reductions pose a fundamental economic challenge.

The *Greenhouse Gas Pollution Pricing Act (GGPPA)* is the federal government's legislation to reduce GHG emissions. Alberta, Ontario and Saskatchewan have launched constitutional challenges to the *GGPPA*, and the Supreme Court of Canada will hear the Ontario and Saskatchewan cases in March 2020 as the *Greenhouse Gas Reference*. This study analyzes the politics behind the court challenges and the main legal issues.

The *GGPPA* sets a floor for carbon pricing across Canada, known as the benchmark. Jurisdictions that do not meet it are subject to the backstop. The backstop has two components: fuel charges and a cap-and-trade system for large industrial emitters. Fuel charges apply to all fuel delivered or used within a province or imported into a province. The cap-and-trade scheme subjects each facility that is not subject to the fuel charge to a carbon price (equal to the benchmark) on the portion of emissions above a facility emissions limit. The federal government has applied the backstop in Manitoba, New Brunswick, Ontario and Saskatchewan, and it intends to do so in Alberta.

Author Sujit Choudhry's assessment is that there is a strong constitutional case to be made for the *GGPPA*. However, he believes the position the federal government has advanced thus far – that GHG emissions are a "matter of national concern" under the federal government's peace, order and good government (POGG) power – is not a sufficiently strong argument. It has been rejected by all the 10 judges who considered it in the Ontario and Saskatchewan appeal courts.

Instead, says Choudhry, the federal government should base its case for the constitutionality of the *GGPPA* on the federal authority under the POGG power to regulate the systemic risk posed by GHG emissions – that is, a self-reinforcing feedback loop in global warming that cannot be stopped once it passes a threshold, with dire consequences for the earth's future. To make this argument persuasively, it will need to present evidence based on the latest scientific research.

RÉSUMÉ

Selon la Constitution canadienne, à quel(s) ordre(s) de gouvernement revient-il de réglementer les émissions de gaz à effet de serre (GES) ? C'est une question politique particulièrement épineuse pour le Canada. La nécessité de réduire les émissions de GES pour stabiliser les températures du globe rallie les scientifiques. Mais étant donné la grande variation des émissions par habitant selon les provinces et territoires du Canada, la répartition des efforts de réduction revêt une importance clé. Notamment pour l'Alberta et la Saskatchewan, ces efforts constituent un défi économique majeur.

Ottawa a adopté la *Loi sur la tarification de la pollution causée par les gaz à effet de serre* (LTPCGES) en vue de réduire les GES. L'Alberta, l'Ontario et la Saskatchewan ont déposé des contestations constitutionnelles de la loi auprès de la Cour suprême, qui entendra ces deux dernières provinces en mars 2020 dans le cadre du renvoi relatif à la LTPCGES. La présente étude analyse la dimension politique de ces contestations et les questions de droit qu'elles soulèvent.

La LTPCGES fixe un prix plancher pour le carbone à l'échelle du pays, aussi appelé « modèle fédéral ». Les provinces ou territoires qui ne respectent pas ce modèle peuvent se voir imposer par Ottawa un « filet de sécurité » comprenant deux éléments : une redevance sur les combustibles fossiles et un système de plafonnement et d'échange pour les grands émetteurs industriels. La redevance s'applique à tous les combustibles livrés, utilisés ou importés dans une province. Le système de plafonnement et d'échange fixe un prix sur la pollution par le carbone (équivalant à la norme fédérale) à chaque entreprise non assujettie à la redevance pour sa part d'émissions au-dessus de la limite de l'installation. Après avoir imposé ce filet au Manitoba, au Nouveau-Brunswick, à l'Ontario et à la Saskatchewan, Ottawa entend faire de même pour l'Alberta.

Selon l'auteur de l'étude, Sujit Choudhry, la constitutionnalité de la LTPCGES semble solide. Mais il estime que l'argument jusqu'ici défendu par le gouvernement fédéral n'est pas assez convaincant. Ottawa soutient que les émissions de GES constituent une « préoccupation nationale » relevant de la disposition POBG (« paix, ordre et bon gouvernement ») de la Constitution. Cet argument a d'ailleurs été rejeté par les 10 juges des cours d'appel de l'Ontario et de la Saskatchewan qui l'ont examiné.

Ottawa devrait plutôt défendre la constitutionnalité de sa loi en invoquant le pouvoir fédéral en matière de POBG, qui l'autorise à réglementer le risque systémique que présentent les émissions de GES en autoalimentant la boucle de rétroaction du réchauffement planétaire. Celui-ci deviendra irréversible au-delà d'un certain seuil et entraînera de graves conséquences pour l'avenir de la planète. Pour se montrer vraiment persuasif, Ottawa devra toutefois s'armer de preuves fondées sur les dernières avancées de la recherche scientifique.

INTRODUCTION

Which level or levels of government can regulate greenhouse gas (GHG) emissions under the Canadian constitution? This is one of the most important questions in Canadian constitutional law and public policy today.

The Canadian government has committed to reducing its GHG emissions to 30 per cent below 2005 levels by 2030, pursuant to the Paris Agreement of December 2015. A central question of Canadian climate policy is how to distribute the burdens of reducing Canada's GHG emissions across the provinces and territories (Boothe and Boudreault 2016a,b).

The *Greenhouse Gas Pollution Pricing Act (GGPPA)* is the federal government's signature legislation to reduce GHG emissions.¹ It has two key components: a *benchmark* for carbon prices across Canada, and a *backstop* to set a carbon price in provinces or territories that fail to meet the benchmark. The federal government initially determined that four provinces – Manitoba, New Brunswick, Ontario and Saskatchewan – do not meet the benchmark and therefore are subject to the backstop. It added a fifth on June 13, 2019, when it announced its intention to apply the backstop in Alberta, effective January 1, 2020, because that province no longer meets the benchmark.

The political debate over the reduction of GHG emissions reductions has broadened to encompass a constitutional debate over the federal government's power to impose the backstop on provinces that oppose it. Alberta, Ontario and Saskatchewan have launched constitutional challenges to the *GGPPA* before their respective courts of appeal. In split decisions, the Ontario and Saskatchewan appellate courts upheld the *GGPPA*. Saskatchewan has appealed to the Supreme Court of Canada, which has set a tentative hearing date of March 17, 2020. Ontario has also appealed to the Supreme Court of Canada, and its appeal will be heard consecutively with Saskatchewan's.² By that time, the Alberta Court of Appeal will likely have heard Alberta's challenge, and may have had sufficient time to weigh in with its own ruling.

The fate of the *GGPPA* now rests with the Supreme Court. The issues before the Court are legally complex and politically divisive. The goal of this study is to situate the combined cases – which I refer to for the sake of convenience as the *Greenhouse Gas Reference* – in their political context and to provide an analysis of the constitutional issues distilled to their essential details. The study describes the origins of the *GGPPA* and explains its key components, then discusses the strategic goals of the seven jurisdictions that contest the constitutionality of the *GGPPA*: Alberta, Manitoba, New Brunswick, the Northwest Territories, Ontario, Quebec and Saskatchewan. I argue that this coalition is unstable, because it brings together jurisdictions with lesser and greater

¹ SC 2018, c. 12. Full citations of statutes and cases referred to frequently in this study are listed at the end of the reference list.

² For updates on the progress of the cases at the Supreme Court of Canada, see <https://www.scc-csc.ca/case-dossier/info/dock-regi-eng.aspx?cas=38663> and <https://www.scc-csc.ca/case-dossier/info/dock-regi-eng.aspx?cas=38781>.

carbon-intensive economies, with the former seeking leverage to negotiate transitional measures to ease the impact of carbon pricing on consumers, and the latter seeking to renegotiate Canada's whole approach to reducing GHG emissions.

A further section examines the constitutional question at the heart of this case: Under which circumstances can the federal government legislate unilaterally, even if it is possible for a federal-provincial-territorial or provincial-territorial arrangement to functionally replicate federal legislation? I argue that the federal government has the constitutional authority to do so to address systemic risks, because the harm posed to the success of the intergovernmental arrangement by the negative extraprovincial externalities arising from the nonparticipation of one or more governments is sufficiently grave to justify federal legislative action. The chance that GHG emissions could push global temperatures beyond a tipping point, which could trigger a self-reinforcing cascade of rising temperatures that would be impossible for humanity to stop, is arguably the paradigmatic example of a systemic risk. The study's conclusion situates the *Greenhouse Gas Reference* in the context of other constitutional litigation at the nexus of climate change, energy, the environment and natural resources.

THE GREENHOUSE GAS POLLUTION PRICING ACT

The origins of the *Greenhouse Gas Pollution Pricing Act (GGPPA)* lie in federal-provincial-territorial negotiations over how to meet Canada's obligations under the Paris Agreement, which began almost immediately after the agreement was signed. These negotiations led to the Vancouver Declaration on Clean Growth and Climate Change on March 3, 2016. Canada's First Ministers agreed to "[i]mplement GHG mitigation policies in support of meeting or exceeding Canada's 2030 target of a 30% reduction below 2005 levels of emissions" (First Ministers' Meeting 2016, 1). The Vancouver Declaration also established the Working Group on Carbon Pricing Mechanisms, which unanimously reported that "putting a price on emissions is an efficient and cost-effective way to create incentives to reduce their production as well as their consumption" (Environment and Climate Change Canada 2016c, 6).

Relying on the working group's report, Prime Minister Trudeau announced the Pan-Canadian Approach to Pricing Carbon Pollution in Parliament on October 3, 2016 (Environment and Climate Change Canada 2016a). It introduced the concepts of the benchmark and the backstop. Both the benchmark and the backstop were also included in the Pan-Canadian Framework on Clean Growth and Climate Change, which was signed by the federal government, the territories and eight provinces (not Manitoba and Saskatchewan) on December 9, 2016 (Environment and Climate Change Canada 2016b). Manitoba joined the Pan-Canadian Framework on February 23, 2018. At that stage, Saskatchewan was the only province that had declined to do so.

The *GGPPA* was introduced in the House of Commons on March 27, 2018, and received royal assent on June 21, 2018. It contains the backstop and the benchmark. The backstop and the benchmark are functionally related: jurisdictions that do not meet

the benchmark are subject to the backstop without their consent, by the exercise of discretion under the *GGPPA*. In addition, jurisdictions may opt into the backstop. The imposition of the backstop is at the heart of the provinces' constitutional objections.

The backstop has two components: fuel charges and a cap-and-trade system for large industrial emitters. Fuel charges apply to all fuel delivered or used within a province or imported into the province from elsewhere in Canada or abroad. The price per tonne of GHG emissions is set at \$20 per tonne for 2019; the *GGPPA* sets out the specific fuels to which it attaches a price and a unit price for each. Charges are paid by producers, distributors and importers of fuel; it is anticipated they will pass these charges on to consumers. Fuel charges (net of refunds, rebates or remittances) are remitted to the federal government, which returns them to jurisdictions and/or persons or institutions within those jurisdictions. In jurisdictions where the backstop is imposed, the federal government returns 90 percent of the net fuel charges to individuals in the form of the Climate Action Incentive Payment; the remaining 10 percent is transferred to the Climate Action Incentive Fund, to fund GHG reduction investments by institutions in the MUSH sector (municipalities, universities, schools and hospitals), SMEs (small and medium-sized enterprises) and nonprofit organizations.

The *GGPPA* terms the cap-and-trade scheme the Output-Based Pricing System (OBPS). Regulations for the OBPS component of the backstop enumerate 38 different kinds of industrial activity and 135 industry-specific activities that are subject to the OBPS.³ The OBPS applies to designated facilities that are not subject to the fuel charge in backstop provinces and operates to set a cap on total emissions for each facility based on a performance level of approximately 80 to 95 percent for most sectors. Facilities that emit below their cap receive a credit; facilities that exceed their limit must pay for their emissions through credits and/or a "charge payment" to the federal government. The *GGPPA* authorizes the federal government to create a market for these credits. While the federal government has not yet established a trading system, it recently released an options paper for public comment as a first step in doing so (Environment and Climate Change Canada 2019a).

The benchmark is a floor for carbon pricing across Canada and is inspired by British Columbia's GHG emissions regime. The *GGPPA* grants the federal cabinet the power to set a benchmark and to assess whether jurisdictions meet it, both for fuel charges and for the OBPS, in order to determine whether they are subject to the backstop. The text of the *GGPPA* with respect to the benchmark, however, appears to leave considerable room for the exercise of administrative discretion. Thus, the *GGPPA* states that the purpose of the assessment is "ensuring that the pricing of greenhouse gas emissions is applied broadly in Canada at levels that the Governor in Council considers appropriate" – a far cry from an assessment of whether a jurisdiction's carbon price satisfies a hard benchmark (sections 166[2] and 189[1]). In addition, the *GGPPA* provides that "the primary factor" in making this assessment is "the stringency of provincial pricing mechanisms" for GHGs. The *GGPPA* does not expressly refer to the scope of activities

³ SOR/2019-266, Schedule 1.

that produce GHGs to which carbon pricing applies in assessing compliance with the benchmark. Put another way, the *GGPPA* sets up a process to assess provincial and territorial carbon pricing primarily with respect to tax rates, not the tax base.

It is helpful to draw a comparison with another major piece of federal legislation with a benchmark and backstop: the *Personal Information Protection and Electronic Documents Act (PIPEDA)*.⁴ *PIPEDA* imposes a privacy rights regime on the private sector but authorizes the federal government to exempt private sector entities falling within provincial jurisdiction from its application only if a province's laws are "substantially similar." This is a more demanding standard than the one found in the *GGPPA*. As explained in the next section of this study, defining the benchmark primarily in terms of carbon pricing, as opposed to the scope of GHG-producing activities, has enabled the federal government to administer the backstop asymmetrically. This suggests that the application of the *GGPPA* is being shaped by federal-provincial negotiations over whether the benchmark is met, and therefore whether the backstop applies, which in turn might explain the strategy behind some of the constitutional challenges.

Pursuant to the *GGPPA*, as of November 2019 the fuel charge and the OBPS apply to Manitoba, New Brunswick, Ontario and Saskatchewan, and will soon apply to Alberta. In addition, Nunavut, Prince Edward Island and Yukon have opted into the OBPS.

THE POLITICAL STRATEGY BEHIND THE *GREENHOUSE GAS REFERENCE*

The *GGPPA*'s constitutionality was challenged by some provincial governments from its inception. Saskatchewan, which declined to sign the Pan-Canadian Framework, launched its constitutional challenge on April 19, 2018⁵ – before the *GGPPA* had even received second reading in the House of Commons. Alberta and Ontario launched their court cases immediately after elections brought to power Conservative governments opposed to the federal carbon pricing scheme. The Conservatives won Ontario's July 2018 election, and the government launched that province's constitutional challenge on August 1, 2018.⁶ Alberta followed the same pattern: the Conservatives were elected in April 2019 on a pledge to withdraw Alberta from the Pan-Canadian Framework, and the province launched its constitutional challenge on June 20, 2019.⁷ (The main constitutional provisions referred to in these cases are set out in box 1.)

Alberta, Ontario and Saskatchewan brought their constitutional challenges directly to their respective courts of appeal through a legal procedure known as a reference. In most constitutional cases, private parties raise constitutional challenges when objecting to the law's application to them, on real facts, in trial courts that make findings of fact and

⁴ SC 2000, chapter 5.

⁵ Saskatchewan Order in Council 194/2018.

⁶ Ontario Order in Council 1014/2018.

⁷ Alberta Order in Council 112/2019.

Box 1. Constitutional provisions in the *Greenhouse Gas Reference* and related constitutional debates

The relevant provincial power is in section 92(13) of the *Constitution Act, 1867*, which grants the provinces jurisdiction over “Property and Civil Rights in the Province.”

The federal government’s POGG power is found in the opening language of section 91:

It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

The federal government’s taxation power is in section 91(3): “The raising of Money by any Mode or System of Taxation.” Section 91(3) is subject to section 125: “No Lands or Property belonging to Canada or any Province shall be liable to Taxation.”

The federal trade and commerce power is found in section 91(2): “The Regulation of Trade and Commerce.”

law; the losing party can appeal the decision to a higher court and, ultimately, the Supreme Court of Canada. Canadian governments have a second option, which is to refer questions of law to their respective appellate courts: provincial and territorial courts of appeal for the provinces and territories (and in British Columbia, the provincial superior court), and the Supreme Court for the federal government. Unlike a standard constitutional challenge, a reference proceeding is traditionally non-adversarial: the court’s ruling is advisory and nonbinding. In practice, reference proceedings function largely like adversarial proceedings, with other governments and entities intervening in the case. Moreover, governments treat reference decisions as binding.

References offer certain attractions for governments. Proceedings before appellate courts are relatively brief compared with lower court proceedings, principally because there is no lengthy fact-finding process; rather, evidence is adduced in the form of a record filed with the court. A case can reach the Supreme Court much more quickly: the federal government can send a reference there directly, and provinces have an automatic right of appeal from their courts of appeal. Governments can craft reference questions carefully to shape the litigation.

For decades, provincial governments of all political stripes have used references to resolve jurisdictional disputes with the federal government, across a wide variety of policy areas (Puddister 2019; Mathen 2019a,b). There have been provincial references on constitutional amendment procedures: for example, the *Patriation Reference* (1980)⁸ and the *Quebec Veto Reference* (1982).⁹ A number of provincial references have addressed areas of public policy where there is concurrent jurisdiction or shared responsibility, such as agricultural marketing in *Re Agricultural Products Marketing Act* (1978),¹⁰ criminal

⁸ *Re: Resolution to amend the Constitution*, [1981] 1 SCR 753.

⁹ *Re: Objection by Quebec to a Resolution to amend the Constitution*, [1982] 2 SCR 793.

¹⁰ *Reference re Agricultural Products Marketing*, [1978] 2 SCR 1198.

justice in the *Firearms Reference* (2000),¹¹ economic policy in the *Anti-Inflation Reference* (1976),¹² natural resources in the *Exported Natural Gas Reference* (1982)¹³ and taxation in the *GST Reference* (1992).¹⁴ Provinces have initiated references in areas of public policy where constitutional jurisdiction was unclear, such as the continental shelf in *Reference re: Mineral and Other Natural Resources of the Continental Shelf* (1994),¹⁵ new reproductive technologies in *Reference re Assisted Human Reproduction Act* (2010),¹⁶ parental leave in the *Employment Insurance Reference* (2005)¹⁷ and shared-cost programs in *Reference re Canada Assistance Plan* (1991).¹⁸

Provincial governments have also used references in connection with intergovernmental disputes to pursue policy objectives. While the provincial goal is sometimes to veto a federal policy (the *Firearms Reference* is an example), in other cases it is to drive the federal government back to the negotiating table, with increased provincial leverage from a victory in court. Governments can bargain around allocations of constitutional jurisdiction in order to achieve shared goals.

What are the strategic goals of the provinces challenging the constitutionality of the *GGPPA*? Alberta, Ontario and Saskatchewan launched constitutional challenges against the *GGPPA* but have been joined by two more provinces – Manitoba and New Brunswick – in opposing federal carbon pricing. New Brunswick considered launching its own constitutional challenge but decided not to. Instead, it intervened on the side of Ontario and Saskatchewan in their respective references. Alberta, Manitoba, New Brunswick, Ontario and Quebec have intervened on the side of Saskatchewan in its appeal to the Supreme Court.

Quebec has stated that it is intervening to oppose the constitutionality of the *GGPPA* but not carbon pricing itself. By contrast, Alberta, Manitoba, New Brunswick, Ontario and Saskatchewan are beginning to act together on closely related issues, providing clues to an emerging overall strategy. On June 10, 2019, the premiers of those five provinces and the Northwest Territories wrote to Prime Minister Trudeau to express their concerns regarding Bill C-69, the *Impact Assessment Act*,¹⁹ and Bill C-48, the *Oil Tanker Moratorium Act*.²⁰ They argued that Bill C-69 would “present insurmountable roadblocks for major infrastructure projects” and that Bill C-48 “discriminates against western Canadian crude products.” This letter was a targeted provincial intervention in the federal legislative process. The premiers framed their arguments in economic, constitutional and political terms: the bills would “damage ... the economy, jobs and investment”; the “[p]rovinces and territories have clear and sole jurisdiction over the development of their non-renewable natural resources, forestry resources, and the generation and production of electricity”; and “our five provinces

¹¹ *Reference re Firearms Act*, 2000 SCC 31.

¹² *Reference re Anti-Inflation Act*, [1976] 2 SCR 373.

¹³ *Re: Exported Natural Gas Tax*, [1982] 1 SCR 1004.

¹⁴ *Reference re Goods and Services Tax*, [1992] 2 SCR 445.

¹⁵ *Reference re: Mineral and Other Natural Resources of the Continental Shelf*, (1983) 145 DLR (3d) 9.

¹⁶ *Reference re Assisted Human Reproduction Act*, 2010 SCC 61.

¹⁷ *Reference re Employment Insurance Act, ss. 22 and 23*, 2005 SCC 56.

¹⁸ *Reference Re Canada Assistance Plan*, [1991] 2 SCR 525.

¹⁹ SC 2019, chapter 28.

²⁰ SC 2019, chapter 26.

and territory represent 59 per cent of the Canadian population and 63 per cent of Canada’s GDP” (Ford et al. 2019).

It is possible that the constitutional challenges to the *GGPPA* are part of a larger strategy: namely, the development of a provincial-territorial coalition in favour of the extraction and processing of fossil fuels, the building of infrastructure (such as pipelines) to deliver them and the shipping of these products to foreign markets. In other words, we might be witnessing the rise of a “carbon economy coalition” that is opposed to significantly reducing the role of fossil fuels in the Canadian economy and, by extension, is committed to limiting the reduction of GHG emissions. As part of this larger strategy, the constitutional challenges to the *GGPPA* might aim to veto federal carbon pricing policy.

However, this coalition of provincial and territorial governments is unstable. The reason is the wide variation among jurisdictions in per capita GHG emissions (Snoddon and VanNijnatten 2016). As of 2017, Canada’s per capita emissions were 19.5 tonnes (see table 1). Ontario’s and New Brunswick’s were below this figure; the Northwest Territories had per capita emissions that were 38 percent higher. Alberta and Saskatchewan had significantly higher numbers – indeed, they have among the highest per capita GHG emissions of any jurisdiction in the world.

These sharp divergences reflect different underlying economic realities. The coalition brings together jurisdictions with carbon-intensive economies (Alberta, Saskatchewan, Northwest Territories) with jurisdictions that have less carbon-intensive economies (Manitoba, New Brunswick, Ontario). Consequently, as a matter of politics, their reasons for opposing charges on GHG emissions are different.

Table 1. Total and per capita GHG emissions by jurisdiction, 2017

Jurisdiction	Population	Total GHG emissions (Mt)	Per capita GHG emissions (t)
Alberta	4,286,134	273	63.7
British Columbia	4,817,160	62	12.9
Manitoba	1,338,109	22	16.4
New Brunswick	759,655	14	18.4
Newfoundland and Labrador	528,817	10	18.9
Nova Scotia	953,869	16	16.8
Northwest Territories	44,520	1.2	27.0
Nunavut	37,996	0.6	15.8
Ontario	14,193,384	159	11.2
Prince Edward Island	152,021	1.8	11.8
Quebec	8,394,034	78	9.3
Saskatchewan	1,163,925	78	67.0
Yukon	38,459	0.5	13.0
Canada	36,708,083	716	19.5

Sources: Environment and Climate Change Canada (2019b); Statistics Canada (2019).

For jurisdictions with less carbon-intensive economies, the principal political concern is the possible impact on consumer prices for gasoline, electricity and home heating. For jurisdictions with more carbon-intensive economies, the concern is much more fundamental: carbon pricing poses an enormous challenge to the very structure of their economies, which are closely tied to fossil fuel production – especially Alberta and Saskatchewan.

The *GGPPA* varies in its ability to accommodate these two categories of provinces. To understand why, consider the basis on which the federal government has determined that the carbon pricing schemes of the following jurisdictions have met the benchmark: British Columbia, Quebec, Nova Scotia, Prince Edward Island (except for large industrial emitters, where PEI has opted into the OBPS component of the backstop), Newfoundland and Labrador, Nunavut and Yukon. The federal government has provided no reasons or analysis to explain its decisions; rather, it has issued one-page announcements and published the relevant orders-in-council, which are uninformative.

There is nevertheless evidence that the *GGPPA* is being implemented asymmetrically in terms of the scope of GHG-emitting activities that is covered, even though the public case for the benchmark is the need for national consistency.

Based on 2015 emissions data, Dobson, Winter and Boyd (2019) estimate that the backstop would apply to 78 percent of Canada-wide GHG emissions (approximately 44 percent consisting of the fuel charge and approximately 35 percent, the OBPS) and that the federal benchmark would apply to 72 percent of these emissions.²¹ The federal benchmark is therefore lower than the federal backstop. Dobson, Winter and Boyd also compare the application of the backstop with the plan in each approved province and the federal benchmark as applied in each province (table 2).

Table 2. Percentage of GHG-producing activity covered by carbon pricing

Province	Provincial plan	Federal benchmark	Federal backstop
British Columbia	75	75	83
Newfoundland and Labrador	76	89	91
Nova Scotia	86	90	91
Prince Edward Island	47 to 54	68	68
Quebec	81	69	80

Source: Dobson, Winter and Boyd (2019).

²¹ As Dobson, Winter and Boyd further explain: “British Columbia’s carbon tax applies only to combustion emissions in the province, meaning the federal benchmark does not price emissions from controlled venting, nor does it price industrial process and fugitive emissions from facilities that meet the criteria for participating in the federal government’s OBPS. Industrial process emissions from large industrial facilities account for just under five per cent of national emissions, while non-methane flaring, controlled venting and fugitive emissions from large facilities account for an additional 1.4 per cent. Coverage of the federal benchmark is therefore six percentage points lower than the federal carbon pricing backstop, covering 72 per cent of national emissions” (8).

Dobson, Winter and Boyd make three key observations: (a) the benchmark varies by jurisdiction because of variations in the structure of provincial economies; (b) the carbon pricing programs in Nova Scotia, Prince Edward Island and Newfoundland and Labrador have been approved by the federal government even though they fall short of the benchmark in terms of the scope of GHG-emitting activities covered; and (c) the backstop for those three provinces is equal to or slightly higher than the benchmark, such that the gap between the approved provincial plan and the backstop is even greater than the gap between the plan and the benchmark. The programs in Nova Scotia, Prince Edward Island and Newfoundland and Labrador likely do not meet the benchmark because of exemptions that narrow their scope: aviation and marine fuels (Nova Scotia) and home heating fuels (Prince Edward Island, Newfoundland and Labrador).

The most likely explanation for why asymmetry has been achieved through variations in scope, but not price, is political economy. Price is visible to the public and relatively easy to benchmark, creating stronger political incentives toward uniform pricing. By contrast, scope can be highly technical and opaque, creating weaker political incentives for uniformity and providing the space for intergovernmental negotiations that may result in asymmetry.

For the less carbon-intensive jurisdictions of Manitoba, New Brunswick and Ontario, their likely goal is the flexible interpretation of the *GGPPA*, especially since their GHG emissions are below the Canada-wide average, to ease any potential burden on consumers. Their support of constitutional challenges is probably a way to mobilize supporters and to articulate demands against the federal government. Winning would be valuable, but the mere fact of participating in a court challenge has political benefits.

For the producer jurisdictions of Alberta and Saskatchewan, the strategic value of a Supreme Court win would be different. For them, the asymmetric application of the *GGPPA* through intergovernmental negotiation would be very difficult. Moreover, the imposition of the backstop could require significant structural adjustments. It is likely that Alberta and Saskatchewan's shared goal is a much greater degree of asymmetry than the federal government could accept. The strategic value of a Supreme Court judgment finding that the *GGPPA* is unconstitutional would be to give these provinces leverage to renegotiate Canada's whole approach to GHG emissions reductions, because the federal government's Plan B – the imposition of a carbon tax – is subject to a provincial immunity that shields Crown property and agencies, including utilities, sharply reducing its effectiveness (as discussed below).

THE CONSTITUTIONALITY OF THE *GGPPA*

On May 3, 2019, in a three-to-two decision, the Saskatchewan Court of Appeal ruled that the *GGPPA* is constitutional (the *Saskatchewan Reference*);²² and on June 28, 2019, in a four-to-one decision, the Ontario Court of Appeal followed suit (the *Ontario*

²² *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40.

Reference).²³ These judgments bear scrutiny because they reflect the views of 10 judges from two appeal courts. Indeed, if we were to consider the 10 judges as a single court, the *GGPPA* was upheld by a majority of seven to three.

The two constitutional questions

There were two main constitutional issues before the Ontario and Saskatchewan courts: (a) whether the *GGPPA* falls within federal jurisdiction; and, assuming that the *GGPPA* does fall within federal jurisdiction, (b) whether the fuel charge and the excess emissions charge for the OBPS are “regulatory charges” that further the purposes of the *GGPPA*, as opposed to “taxes.” Since the first issue is at the heart of the case and will be my focus, I address these questions in reverse order.

Does the *GGPPA* impose regulatory charges or taxes?

There are two ways in which the federal government can attach a price to GHGs: a “regulatory charge” or a “tax.” A regulatory charge is incidental to the enforcement of a validly enacted regulatory regime, such as the *GGPPA*. By contrast, a tax can be freestanding and unrelated to a regulatory regime.

The provinces opposed to the *GGPPA* contend that it imposes a “carbon tax.” This is more than a matter of political rhetoric; it is also a constitutional argument. The main reason is that, under section 125 of the *Constitution Act, 1867*, federal taxes cannot be applied to provincial property (Chalifour 2008). This provincial immunity from federal taxation would extend to resources extracted from provincial Crown lands – for example, oil wells in Alberta (Hogg 2009) – if the province retains ownership of the oil (*Exported Natural Gas Reference*) but not if it transfers ownership to a private entity, which would be subject to a tax (*GST Reference*). As well, provincial utilities – such as GHG-emitting power plants – would also be immune from a federal carbon tax (Schwartz 2018). For Alberta and Saskatchewan, there are advantages in having the *GGPPA*’s regime of carbon pricing characterized for constitutional purposes as a carbon tax, as this would give them greater leverage to renegotiate the federal framework for GHG emissions reductions.

Understandably, the federal government has argued that the carbon pricing under the *GGPPA* is a regulatory charge, not a tax. For a regulatory charge to be constitutional, a few conditions must be met. The regime that it enforces must itself be constitutional. Thus, for carbon pricing to be constitutional, so too must the *GGPPA* – the primary issue in the *Greenhouse Gas Reference*. In addition, the Supreme Court has held that, for a price to count as a regulatory charge, any revenues raised must be related to the costs of the regulatory regime. This condition is problematic, since the whole point of the *GGPPA* is to be revenue-neutral for taxpayers. However, in the *Westbank First Nation* decision (1999), the Supreme Court suggested that regulatory charges could potentially be constitutional if “the charges themselves have a regulatory purpose, such

²³ *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544.

as the regulation of certain behaviour” (paragraph 44).²⁴ Although the Supreme Court will face this argument squarely for the first time only in the *Greenhouse Gas Reference*, it is likely that it will accept this justification for carbon pricing under the *GGPPA*.

Does the *GGPPA* fall within federal jurisdiction?

Carbon pricing applies to fuel that is delivered and used within a province but that does not cross an interprovincial or international border. In addition, the OBPS requires facilities that exceed emissions targets to pay a charge to the federal government. Both measures fall within provincial jurisdiction over intraprovincial economic activity, which derives from section 92(13) of the *Constitution Act, 1867*. That provision grants the provinces jurisdiction over “Property and Civil Rights in the Province,” which includes commercial relationships structured through contracts in respect of property. Indeed, the logic of the benchmark *presupposes* that the provinces have the constitutional authority to enact such policies themselves; if they did not, the benchmark would serve no purpose.

The POGG power as the constitutional basis for the *GGPPA*

For the *GGPPA* to be constitutional, it must therefore be rooted in a federal power. The federal government’s principal constitutional basis for the *GGPPA* is the “Peace, Order, and good Government” (POGG) power in section 91 of the *Constitution Act, 1867*. The courts have interpreted the POGG power to have three branches: the emergency branch, the “gap” branch and the national dimensions branch. The emergency branch operates to give Parliament plenary legislative authority, including in respect of issues normally within provincial jurisdiction, on a temporary basis, in cases of crisis. The emergency branch is not central to the *Greenhouse Gas Reference*, because the *GGPPA* is not temporary but permanent.²⁵ The “gap” branch is a federal residual power that encompasses matters not assigned to either federal or provincial jurisdiction. It has been interpreted very narrowly and is largely confined to matters arising from Canada’s evolution from a self-governing dominion within the British Empire to an independent country – such as the continental shelf.

The national dimensions branch of the POGG power: the *Crown Zellerbach* test

The national dimensions branch, by contrast, is not subject to any temporal limitation. Seven judges in the *Ontario Reference* and the *Saskatchewan Reference* upheld the *GGPPA* on the basis of the national dimensions branch of the POGG power. The Supreme Court’s decision in *Crown Zellerbach* (1988)²⁶ sets out the criteria for determining whether a policy area falls under the national dimensions branch, stating that it grants federal jurisdiction over “a matter of national concern” (paragraph 33). Matters of national concern include “new matters which did

²⁴ *Westbank First Nation v. British Columbia Hydro and Power Authority*, [1999] 3 SCR 134.

²⁵ In the *Ontario Reference*, four intervenors – the Athabasca Chipewyan First Nation, the David Suzuki Foundation, the Intergenerational Climate Coalition, and the United Chiefs and Councils of Mniidoo Mnising – argued that climate change is an emergency. The David Suzuki Foundation argued that temporary legislation is not required. The Athabasca Chipewyan First Nation and the United Chiefs and Councils of Mniidoo Mnising argued that the *GGPPA* is impliedly time-limited.

²⁶ *R. v. Crown Zellerbach*, [1988] 1 SCR 401.

Box 2. The scale of impact analysis under the *Crown Zellerbach* test – a proposed reformulation

Crown Zellerbach examined the scale of impact on provincial jurisdiction to determine whether a policy area was a matter of national concern. However, the scale of impact inquiry could be shifted toward the federal legislation itself, such that with respect to matters of national concern, Parliament would have the constitutional authority to legislate a minimum standard. The scale of impact analysis is the tool for the Court to assess whether legislation only sets a minimum standard or goes beyond it.

The *Ontario Reference* majority appears to take this approach, holding that the *GGPPA* imposes minimum standards on the provinces and territories but leaves them considerable room to supplement with additional measures “that meet or exceed that minimum” (paragraph 130). The appeal court says the *GGPPA* “recognizes and respects ... the ability of provinces to legislate fuel charges, to set emissions limits and to participate in output based pricing systems” (paragraph 132).

This approach is also consistent with *Reference re Securities Act*, where the Supreme Court suggested that “[l]egislation aimed at imposing minimum standards applicable throughout the country and preserving the stability and integrity of Canada’s financial markets might well relate to trade as a whole” (paragraph 114) – a point the Court reiterated in the *Pan-Canadian Securities Regulation Reference* (paragraph 112).

not exist at Confederation” or matters that are not new, and that were “originally matters of a local or private nature,” but “have since ... become matters of national concern.” A matter of national concern of either variety must meet two criteria. First, it “must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern,” with respect to which “it is relevant to consider what would be the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the intra-provincial aspects of the matter” (cumulatively known as the “provincial inability” test). This issue is the focus of my analysis. Second, it must have “a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution” (see box 2 for a discussion of this issue).

How the *Ontario Reference* and *Saskatchewan Reference* majorities applied *Crown Zellerbach* to the *GGPPA*

Majorities in the *Ontario Reference* and the *Saskatchewan Reference* applied the *Crown Zellerbach* criteria to uphold the *GGPPA* on the basis of the national dimensions branch of POGG. However, the judges in those majorities divided on what precisely was the matter of national concern. Over 25 years ago, in the *Oldman River* (1992) case,²⁷ the Supreme Court categorically rejected the idea that the environment was a matter of national concern, because it was too broad to meet the criteria of the *Crown Zellerbach* test. As a consequence of *Oldman River*, the constitutional case for the *GGPPA* under the POGG power must be framed more narrowly.

²⁷ *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 SCR 3.

The federal government argued that “GHG emissions” in their entirety were the matter of national concern. The 10 judges who sat in the *Ontario Reference* and the *Saskatchewan Reference* – both those who upheld the *GGPPA* and those who found it unconstitutional – unanimously rejected this submission, on the basis that this policy area was too broad. Thus, the *Ontario Reference* and the *Saskatchewan Reference* decisively rejected the principal federal argument for the constitutionality of the *GGPPA* under the POGG power.

In addition, four judges (the three-judge majority in the *Saskatchewan Reference* and Associate Chief Justice Alexandra Hoy in the *Ontario Reference*) also rejected Canada’s alternative submission that “the cumulative dimensions of GHG emissions” were a matter of national concern. They settled on the matter of national concern being “GHG pricing,” a position argued for by British Columbia, not Canada (even though it would be more accurate to refer to the matter of national concern as “carbon pricing”). This subject matter encompasses “minimum national standards of price stringency for GHG emissions.” The *Ontario Reference* majority took a broader view and decided that “minimum national standards to reduce GHG emissions” were the matter of national concern, which encompasses minimum carbon pricing but goes beyond it. Notwithstanding the divergent approaches taken by the judges who upheld the *GGPPA*, it was British Columbia’s arguments that carried the day.

Rationale 1 for the *Crown Zellerbach* test: checking federal overreach

There is no strictly legal answer to the question of how to characterize which policy issues count as matters of national concern for the purposes of the POGG power (Choudhry 2002). This area of constitutional law is driven by pragmatics. Beneath the language of “singleness, distinctiveness and indivisibility” – seemingly physical and inherent qualities – is an underlying constitutional objective: to define the scope of federal jurisdiction under the national dimensions branch in a relatively limited manner, so as not to swallow up provincial jurisdiction (Hsu and Elliot 2009). The “scale of impact” element of the *Crown Zellerbach* test is also designed to check potential federal overreach.

This concern arises because of the other elements of the *Crown Zellerbach* test. The national dimensions branch contemplates the expansion of federal jurisdiction over areas that have grown or changed in such a manner that they are no longer “local or private.” Consider the facts in *Crown Zellerbach* itself, a case arising out of British Columbia. The Court held that marine pollution – be it in provincial marine waters or federal marine waters – was a matter of national concern under the POGG power. Before the judgment, the operative legal regime for marine pollution in provincial waters was exclusively provincial. As a consequence of the judgment, the federal government acquired jurisdiction over marine pollution in provincial waters. Thus, *Crown Zellerbach* expanded federal jurisdiction into an area historically under sole provincial control: a dramatic result for a determination that an issue is a matter of national concern.

What amplifies these concerns is the Supreme Court’s view that federal jurisdiction under the POGG power over matters of national concern is exclusive and would

therefore preclude provincial legislation. This issue was front and centre in the *Saskatchewan Reference* majority's unequivocal rejection of Canada's characterization of GHG emissions as a matter of national concern. This majority stated: "Because any Parliamentary authority over GHG emissions would be exclusive, recognizing such authority would foreclose provinces from legislating directly in relation to such emissions" (paragraph 129). That is, the scale of impact on provincial jurisdiction would be too great (although there would be scope for provinces to legislate on matters such as energy and pollution, indirectly reducing carbon emissions).

The *Saskatchewan Reference* majority also rejected Canada's alternative submission: that the cumulative effect of GHG emissions is a matter of national concern. This majority reasoned that "[t]here is no practical or operational break point between individual GHG emissions and *cumulative* GHG emissions," since "the latter is no more than the direct and simple sum of the former" (paragraph 136 [emphasis in original]). As a consequence, "recognizing federal authority over 'the cumulative effect of GHG emissions' ... amounts to the same thing as recognizing Parliamentary authority over 'GHG emissions' in the general sense."

The *Saskatchewan Reference* majority expressed one of the primal fears of Canadian constitutional law: that defining a matter of national concern broadly under the POGG power, and thereby placing that matter under exclusive federal jurisdiction, would lead to a massive loss of provincial jurisdiction. The Supreme Court's decision in the *Anti-Inflation Reference* is the leading example of the Court rejecting a national dimensions branch argument under the POGG power because of this concern. The Court was asked to rule on the constitutionality of the wage and price controls enacted by Parliament in 1975, in response to skyrocketing inflation. The Court refused to recognize inflation as a matter of national concern under the POGG power, on the basis that doing so would be tantamount to granting Parliament a plenary power over price regulation. In the *Ontario Reference*, Ontario argued by analogy that the GGPPA poses a similar risk:

If Parliament has jurisdiction over greenhouse gas emissions, it could control the activities of the largest to the smallest undertakings, industries, and trades. It could ration fuel, establish quotas, regulate food and organic waste, product packaging, land use planning, and housing, and limit the output of goods and services that carbon-emitting industries should produce in any given period. Like inflation, greenhouse gas emissions do not pass muster as a new subject matter. The activities that contribute to greenhouse gas emissions, like the activities that contribute to inflation, are so pervasive that they too know no bounds.²⁸

The prospect of exclusive federal jurisdiction explains the pressure to narrow the scope of issues of national concern and explains why the majorities in the *Ontario Reference* and the *Saskatchewan Reference* flatly rejected the federal government's characterization of GHG emissions in their entirety as a matter of national concern.

²⁸ Factum of the Attorney General of Ontario, paragraph 65, <http://www.ontariocourts.ca/coa/GGPPA/files/C65807.FAP.pdf>.

Rationale 2 for the *Crown Zellerbach* test: requiring a positive rationale for federal jurisdiction

However, this fear does not in itself provide a positive case as to which aspect of the regulation of GHGs should be regarded as a matter of national concern. *Crown Zellerbach* began to set out criteria for identifying and assessing why an issue historically within provincial jurisdiction may have evolved into a matter of national concern under the POGG power. In the *Greenhouse Gas Reference*, the Supreme Court should further develop these criteria, as the *Ontario Reference* majority began to do (paragraphs 104 and 105). I propose three pathways for the Court.

First, modern scientific research into a phenomenon may lead us to appreciate, in a way we had not before, that it has national dimensions. Science has dramatically changed our understanding of the environment, and it is a major challenge for the Canadian courts to interpret our nineteenth-century constitution in light of scientific knowledge not available 150 years ago. For example, in *Crown Zellerbach* the Supreme Court relied heavily on the report of the Joint Group of Experts on the Scientific Aspects of Marine Pollution, appointed by the United Nations, for the position that “marine pollution...is a distinct and separate form of water pollution having its own characteristics and scientific considerations” (paragraph 38). This supported the claim to federal jurisdiction over pollution in both federal and provincial marine waters.

Second, an underlying phenomenon might evolve and change, giving it an interjurisdictional dimension that it did not have before. The causes of this change may vary. GHGs are not new; humankind has generated GHGs since we learned how to start fires. However, what is new is the impact of GHGs on the global climate, because of sustained human activity over centuries. Indeed, in many cases, we might be witnessing both enhanced scientific research and a changing phenomenon.

Third – and most relevant for the *Greenhouse Gas Reference* – the “provincial inability” test in *Crown Zellerbach* embraces a functional logic that would suggest that some policy issues that appear to lie under provincial authority ought instead to fall within federal jurisdiction (for criticism, see Leclair 2005). This might occur when there are interjurisdictional policy spillovers, especially negative extraprovincial externalities whereby the policy choices of one province impose costs on another (Chalifour 2016).

The provincial inability test: negative extraprovincial externalities and federal-provincial-territorial cooperation

A classic example of the Supreme Court relying on negative extraprovincial externalities as a justification for federal jurisdiction under the POGG power is the *Interprovincial Cooperatives* (1976) case.²⁹ Two companies – one operating in Saskatchewan, the other in Ontario – operated chlor-alkali plants close to rivers that flow into Manitoba. The allegation was that both companies discharged mercury into these rivers, which then carried the mercury into Manitoba, where it was ingested by fish, rendering them unfit for human consumption. The two companies were operating under the laws of

²⁹ *Interprovincial Cooperatives v. R.*, [1976] 1 SCR 477.

their respective provinces. The negative extraprovincial externality was created by the environmental laws and policies of Saskatchewan and Ontario, which did not prohibit the dumping of mercury into the rivers that flowed into Manitoba.

In *Interprovincial Cooperatives*, a plurality of the Supreme Court reached the conclusion that this scenario led to federal jurisdiction under the POGG power (Choudhry 2002). This example illustrates that it is not entirely accurate to describe a situation involving extraprovincial negative externalities as one of “provincial inability.” Ontario and Saskatchewan certainly had the ability – that is, the jurisdiction – to regulate the mercury discharges that found their way into Manitoba. However, they were unwilling to do so. What this means is that the national dimensions branch of the POGG power is really about whether provinces should bear the risk that other provinces would be unwilling to make regulatory choices to avoid negative extraprovincial externalities.

The issue is why those circumstances should warrant expanding federal jurisdiction, especially since an obvious alternative would have been a cooperative solution whereby Saskatchewan and Ontario regulated industries in their borders for Manitoba’s benefit. In parallel fashion, provincial-territorial or federal-provincial-territorial agreements may be an alternative to the *GGPPA*. Indeed, the *GGPPA* itself contemplates a scenario in which every province and territory satisfies the benchmark and the backstop does not apply – in essence, a federal-provincial-territorial agreement.

Significantly, in the area of economic policy, the Supreme Court has pointed to the possibility of achieving policy goals through federal-provincial-territorial and provincial-territorial agreements as a reason to reject constitutional arguments, including those that seek to expand federal jurisdiction. In *Reference re Securities Act* (2011),³⁰ the Court viewed draft federal legislation to establish a single, Canada-wide system of securities regulation as unconstitutional because it fell outside the scope of Parliament’s trade and commerce power, under section 91(2) of the *Constitution Act, 1867*. It suggested that an alternative to achieve the same goal would be a federal-provincial-territorial agreement. Likewise, in *Comeau* (2018),³¹ the Supreme Court refused to interpret section 121 of the *Constitution Act, 1867* – which provides that “All Articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces” – as prohibiting nontariff barriers that did not have the object of restricting interprovincial trade in goods (such as beer, the good in question). By implication, the liberalization of these trade barriers could be achieved through a provincial-territorial or federal-provincial-territorial agreement. Indeed, it can be argued that the Supreme Court has a general preference for cooperative federalism.

The *Ontario Reference* majority offered one answer to this argument: that federal-provincial-territorial cooperation to develop a Canada-wide approach to reducing GHG emissions had been tried and had failed. The *GGPPA*, it observed, “is the product

³⁰ *Reference re Securities Act*, 2011 SCC 66.

³¹ *R. v. Comeau*, 2018 SCC 15.

of extensive efforts – efforts originally endorsed by almost all provinces, including Ontario – to develop a pan-Canadian approach to reducing GHG emissions and mitigating climate change” (paragraph 107). This majority drew an important lesson from the subsequent lack of federal-provincial-territorial agreement, reasoning that “the failure of those efforts reflects the reality that one or more dissenting provinces can defeat a national solution to a matter of national concern.” Indeed, the majority went one step further. It held that this failure was a reason for federal jurisdiction under the national dimensions branch of the POGG power. It drew an analogy to the situation in *Munro* (1966), where the Supreme Court held that Canada’s unsuccessful attempt to regulate zoning in the National Capital Region through federal-provincial-municipal cooperation provided a justification for federal jurisdiction.³² The *Ontario Reference* majority reasoned, “[i]n the case before us, Canada’s unsuccessful efforts to achieve a national cooperative solution, which was supported at one time by most provinces, is a factor to be considered in assessing the national nature of the concern” (paragraph 108).

Indeed, the inability of federal-provincial-territorial processes to yield an agreement on the distribution of the burden of GHG emissions reductions predates the Paris Agreement. The Canadian National Climate Process attempted to arrive at a common climate change policy between 1998 and 2002, through federal-provincial negotiations (Macdonald, Donato-Woodger and Hostetter 2015). This process was triggered by the controversy created by Canada’s commitment to reduce its GHG emissions to 6 percent below 1990 levels by 2010 under the Kyoto Protocol, which Canada signed in December 1997. These negotiations foundered when the parties could not reach agreement because “they refused to publicly and explicitly address the central question of what national action would cost each province and how that cost might be equitably shared” (Macdonald, Donato-Woodger and Hostetter 2015, 14) – the same problem Canada faces today.

In his dissent in the *Ontario Reference*, Justice Grant Huscroft tackled this argument head on:

No doubt, action or inaction by one province could undermine the effectiveness of another province’s efforts to establish carbon pricing, but this does not speak to provincial inability to address the GHG problem; it is, instead, a reflection of legitimate political disagreement on a matter of policy, and in particular the suitability of carbon pricing as a means of reducing GHG emissions in a particular province. (paragraph 231)

On his approach, the risk of noncooperation, even where it results in negative extraprovincial externalities, must be lived with as part and parcel of living in a federation. In essence, he would extend the logic of *Reference re Securities Act* and *Comeau* to the national dimensions branch of the POGG power: that is, if a federal scheme that could be replicated through an intergovernmental arrangement (federal-provincial-territorial or provincial-territorial) is an option, then there is no exclusive federal jurisdiction.

³² *Munro v. National Capital Commission*, [1966] SCR 663.

Huscroft threw down the gauntlet and set out the case that Canada must meet in the *Greenhouse Gas Reference*. The majorities in the *Ontario Reference* and the *Saskatchewan Reference* did not directly answer Huscroft's challenge. Nor did Canada or British Columbia, in their submissions. So at the heart of the *Greenhouse Gas Reference* is this question: What are the circumstances under which the federal government can legislate unilaterally to address interjurisdictional spillovers in the form of negative extraprovincial externalities, even if it is possible for a federal-provincial-territorial or provincial-territorial agreement to functionally replicate federal legislation? The Supreme Court must squarely address this issue.

From provincial inability to provincial incapacity and systemic risk

Even though the federal government has sought to uphold the GGPPA under the POGG power, the answer to this question can be found in the jurisprudence under the federal trade and commerce power, for two reasons. First, in *General Motors* (1989), the Supreme Court also invoked a version of the "provincial inability" test with respect to the general regulation of the trade branch of the federal trade and commerce power, which confers federal jurisdiction on national economic issues affecting the Canadian economy as a whole.³³ Like its counterpart in *Crown Zellerbach*, the provincial inability test in *General Motors* is defined in terms of the lack of provincial jurisdiction: "the legislation should be of a nature that the provinces jointly or severally would be constitutionally incapable of enacting" (662). In addition, *General Motors* held that the risk of negative extraprovincial externalities – that is, a concern that "the failure to include one or more provinces or localities in a legislative scheme would jeopardize the successful operation of the scheme in other parts of the country" – was a factor counting in favour of provincial inability. Underlying both *General Motors* and *Crown Zellerbach* is the same pair of concerns: to check the risk of federal overreach and to identify a positive case for federal jurisdiction (Choudhry 2002).

Second, the GGPPA is as much economic as environmental legislation. A goal of the GGPPA is to create a low-GHG-emissions economy. Creating economic incentives for consumers and businesses furthers this goal. Carbon pricing is a means to this end. Indeed, it is arguable that the constitutional bases of the GGPPA are both the trade and commerce power and the POGG power.

The most important development in the trade and commerce case law since *General Motors* is the emergence of the concept of "systemic risks," which the Supreme Court of Canada introduced in *Reference re Securities Act*. This concept appeared in expert evidence from Michael Trebilcock, who defined them as "risks that occasion a 'domino effect' whereby the risk of default by one market participant will impact the ability of others to fulfil their legal obligations, setting off a chain of negative economic consequences that pervade an entire financial system" (paragraph 103).

Securities regulation, until recently, has fallen within exclusive provincial jurisdiction (with some narrow exceptions – for example, insider trading – addressed under the

³³ *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 SCR 641.

federal criminal law power). But since the 1970s, there have been ongoing policy debates in Canada over the establishment of a single integrated system of securities regulation, either through federal legislation or on a provincial-territorial or federal-provincial-territorial basis. A key legal issue in this debate is the constitutional basis for a federal role in securities regulation, in the face of the provincial objection that the purchase and sale of securities falls within the provincial power over property and civil rights. In *Reference re Securities Act*, the Supreme Court found draft federal securities legislation for a comprehensive regime of securities regulation to be unconstitutional because it intruded into provincial jurisdiction. However, the Court opined that federal legislation confined to systemic risks would fall within federal jurisdiction. The Court reasoned, “By definition, such risks can be evasive of provincial boundaries and usual methods of control” (paragraph 103):

The expert evidence adduced by Canada provides support for the view that systemic risk is an emerging reality, ill-suited to local legislation. Prevention of systemic risk may trigger the need for a national regulator empowered to issue orders that are valid throughout Canada and impose common standards, under which provincial governments can work to ensure that their market will not transmit any disturbance across Canada or elsewhere. (paragraph 104)

The obvious rejoinder is that the provinces could enact coordinated legislation to address systemic risk. For example, “[b]y way of administrative delegation, they could delegate provincial regulatory powers to a single pan-Canadian regulator” (paragraph 118). In essence, this is Justice Huscroft’s argument in his dissent in the *Ontario Reference*. However, the Supreme Court in *Reference re Securities Act* rejected this argument:

Inherently sovereign, the provinces will always retain the ability to resile from an interprovincial scheme and withdraw an initial delegation to a single regulator. This may not be problematic in many areas. Indeed, it is in the nature of a federation that different provinces adopt their own unique approaches consistent with their unique priorities when addressing social or economic issues.

The provinces’ inherent prerogative to resile from an interprovincial scheme aimed for example at managing systemic risk limits their constitutional capacity to achieve the truly national goals of the proposed federal Act. The point is not that the provinces are constitutionally or practically unable to adopt legislation aimed at systemic risk within the provinces. Indeed, some provincial securities schemes contain provisions analogous to the ones aimed at systemic risk found in the proposed Act. The point is simply that because provinces could always withdraw from an interprovincial scheme there is no assurance that they could effectively address issues of national systemic risk and competitive national capital markets on a sustained basis. (paragraphs 119-20 [emphasis in original])

The Supreme Court accepted the factual proposition that withdrawal by a province could undermine the effectiveness of an interprovincial arrangement – for example,

by creating a negative extraprovincial externality. It reasoned that this would be the price of federalism “in many areas,” which the Court referred to as “lesser regulatory matters” (paragraph 123). But in the case of “managing systemic risk,” the Court held that that price would be too high, because achieving “truly national goals” or “genuine national goals” (paragraph 121) would be jeopardized by unilateral provincial action. In respect of these issues, “a federal regime would be qualitatively different from a voluntary interprovincial scheme” (paragraph 123), and the federal government could legislate unilaterally.

Based on the Supreme Court’s decision in *Reference re Securities Act*, the federal government drafted a revised statute, which the Supreme Court accepted as constitutional in *Reference re Pan-Canadian Securities Regulation* (2018).³⁴ The scope of this statute was confined to systemic risk, which the statute defined as having three components: representing a threat to the stability of country’s financial system as a whole, being connected to capital markets and having the potential for an adverse effect on the Canadian economy (paragraph 90).

The Supreme Court viewed the draft legislation as constitutional. In the course of doing so, the Court reframed “provincial inability” as “provincial incapacity.” This is a subtle but significant shift:

In other words, the fact that any one province can opt against participating in (or can subsequently resile from) such a cooperative scheme could seriously impair that scheme’s capacity to protect the Canadian economy from systemic risk. The Draft Federal Act, with its carefully tailored scope, constitutes a response to this provincial incapacity, with Parliament stepping in to fill this constitutional gap. (paragraph 113 emphasis added)

Provincial incapacity arises in situations where a province is unwilling to prevent negative extraprovincial externalities. This is better understood not as a case of provincial inability but rather as one of provincial unwillingness. The shift in terminology from “provincial inability” in *General Motors* to “provincial incapacity” in *Reference re Pan-Canadian Securities Regulation* makes explicit that the constitutional question is the functional one of comparative institutional advantage, not whether provinces lack the jurisdiction to act.

Indeed, the Court clarified that the issue was not whether, in theory, provincial legislation was a *possible* response. Rather, the question was whether provincial laws could be sufficiently effective:

[W]e are of the view that the effective management of systemic risk requires market-wide regulation, such that any one jurisdiction’s failure to participate would jeopardize the scheme’s successful operation. Put simply, the management of systemic risk across Canadian capital markets must be regulated federally, if at all. (paragraph 115)

³⁴ *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48.

Provincial incapacity and the systemic risk of global climate change: the constitutional case for the GGPPA

The concept of systemic risk – developed under the general regulation of trade branch of the trade and commerce power – is one that the Supreme Court should incorporate into the test for the national dimensions branch of POGG in the *Greenhouse Gas Reference*. The Court should distinguish “lesser regulatory areas” from “truly national goals” – the latter term being tantamount to matters of national concern. For the former, negative extraprovincial externalities are the price of federalism, and the policy area remains within provincial jurisdiction. But for the latter, negative extraprovincial externalities are a reason why the matter “must be regulated federally.” Systemic risks are a kind of negative extraprovincial externality that falls into this category.

The constitutional question is whether GHG emissions pose a systemic risk – and hence fall under federal jurisdiction. The federal government’s argument would have to run as follows. If global temperatures rise beyond a certain level, a tipping point will be reached, leading to an uncontrollable cascade of events. GHGs would be released into the atmosphere at an ever-accelerating rate, which would fuel a self-reinforcing feedback loop that, once commenced, would be impossible for humanity to arrest, and that would make the planet uninhabitable. This is a “domino effect” of the kind referred to by the Supreme Court in *Reference re Securities Act*.

In *Reference re Securities Act*, the Court stated that “[b]y definition” systemic “risks can be evasive of provincial boundaries and usual methods of control.” In other words, systemic risks transcend jurisdictional boundaries. In that case, the systemic risk was economic, and the boundaries were interprovincial. In the case of GHG emissions and climate change, the systemic risk is environmental, and the boundaries are international.

One piece of evidence of extraprovincial negative externalities – including international externalities – is the international legal regime governing GHG emissions itself. The model here is *Crown Zellerbach*, where the relevant federal statute – the *Ocean Dumping Control Act*³⁵ – was enacted to implement Canada’s international legal obligations under the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter. Canada argued that the *Ocean Dumping Control Act* was constitutional because it had been enacted pursuant to a federal power to implement international treaties. The lower courts rejected this argument on the basis of the long-established constitutional rule that no such federal power exists: that is, jurisdiction to implement international treaties tracks the federal division of powers. However, the Supreme Court relied on this treaty for a different purpose: as evidence of the distinctiveness or singularity of marine pollution, for the purposes of concluding that marine pollution fell within federal jurisdiction under the national dimensions branch of the POGG power. In the *Greenhouse Gas Reference*, the Court could likewise reason that the international legal regime governing climate change, including the United Nations Framework Convention on Climate Change, the Kyoto Protocol

³⁵ SC 1974-75-76, chapter 55.

and the Paris Agreement, is evidence of the international and transboundary character of the problem of climate change.

However, this evidence does not establish that there is systemic risk. The record before the Supreme Court will be crucial to making such a factual finding. In *Reference re Securities Act*, the Court stated that the record before it did not support the constitutionality of the draft legislation. Its reasons bear repeating, because this factor was so central to its decision:

[T]he fact remains that Canada must establish that the Act, read as a whole, addresses concerns that transcend local, provincial interests. Canada's argument is that this area of economic activity has been so transformed that it now falls to be regulated under a different head of power. This argument requires not mere conjecture, but evidentiary support. The legislative facts adduced by Canada in this reference do not establish the asserted transformation ... On the basis of the record presented to us, we conclude ... that the day-to-day regulation of securities within the provinces, which represents the main thrust of the Act, remains essentially a matter of property and civil rights within the provinces and therefore subject to provincial power. (paragraph 116)

The message from the Supreme Court is clear: policy arguments, on their own, are not enough to carry the day. Rather, to have weight in constitutional analysis, they must be rooted in evidence put before the courts. In the *Greenhouse Gas Reference*, there must be evidence that GHG emissions pose a systemic risk in order for them to fall with federal jurisdiction under the POGG power.

Canada did not advance the systemic risk argument in the *Ontario Reference* and the *Saskatchewan Reference*. As a consequence, the record of the Attorney General of Canada does not contain probative scientific evidence.³⁶ The one partial exception in this record is a report titled *Assessing and Mitigating the Cost of Climate Change* (Alfredsdottir 2017), which is blunt:

The problems of Arctic warming and dramatically thinning Arctic ice illustrate the kind of tipping points of which environmental scientists have long warned. In other words, these phenomena demonstrate how global warming might accelerate to a point of no return once certain levels of warming have been breached; there is thus a risk that climate change could reach a point at which no concerted human action could reverse warming trends. (paragraph 3)

Other feedback loops could be accelerating climate change in ways that exceed expectations expressed in earlier climate change models. For example, permafrost is melting and as it does, it releases more carbon into the atmosphere, which, in turn, further accelerates warming thereby releasing even more

³⁶ Record of the Attorney General of Canada, vol. I. <http://www.ontariocourts.ca/coa/GGPPA/files/C65807.RecordAGC1.pdf>.

carbon etc. These feedback loops help explain why the Arctic is changing so precipitously. (paragraph 51)

[I]ce retreat is having an amplified impact on global climate change. As white ice is replaced by dark water, the earth absorbs and retains more solar heat and this feedback loop could be accelerating climate change in ways that exceed expectations expressed in earlier climate change models. Climate change, however, is altering these weather bands, and far more heat appears to be moving northward. This is accelerating sea level rise as ice around Greenland and in Svalbard, among other High North locations, begins to melt. (paragraph 52)

The most compelling scientific evidence is found in the record filed by an intervenor, the Intergenerational Climate Coalition.³⁷ This record includes a scientific article that reviews a large body of climate science and offers a sobering analysis (Steffen, Rockström, Richardson, et al. 2018). The authors address “the risk that self-reinforcing feedbacks could push the Earth System toward a planetary threshold that, if crossed, could prevent stabilization of the climate at intermediate temperature rises and cause continued warming ... even as human emissions are reduced” (8252):

In the future, the Earth System could potentially follow many trajectories, often represented by the large range of global temperature rises simulated by climate models. In most analyses, these trajectories are largely driven by the amount of greenhouse gases that human activities have already emitted and will continue to emit into the atmosphere over the rest of this century and beyond – with a presumed quasilinear relationship between cumulative carbon dioxide emissions and global temperature rise. However, here we suggest that biogeophysical feedback processes within the Earth System coupled with direct human degradation of the biosphere may play a more important role than normally assumed... We argue that there is a significant risk that these internal dynamics, especially strong nonlinearities in feedback processes, could become an important or perhaps, even dominant factor in steering the trajectory that the Earth System actually follows over coming centuries. (8253)

The authors suggest that “even if the Paris Accord target of a 1.5°C to 2.0°C rise in temperature is met, we cannot exclude the risk that a cascade of feedbacks could push the Earth System irreversibly” onto a self-reinforcing feedback loop (8254):

Cascades could be formed when a rise in global temperature reaches the level of the lower-temperature cluster, activating tipping elements, such as loss of the Greenland Ice Sheet or Arctic sea ice. These tipping elements, along with some of the non-tipping element feedbacks (e.g., gradual weakening of land and ocean physiological carbon sinks), could push the global average temperature even higher ... If Greenland and the West Antarctic Ice Sheet melt in the

³⁷ Record of the Intergenerational Climate Coalition, <http://www.ontariocourts.ca/coa/GGPPA/files/Record-ICC.pdf>.

future, the freshening and cooling of nearby surface waters will have significant effects on the ocean circulation. While the probability of significant circulation changes is difficult to quantify, climate model simulations suggest that fresh-water inputs compatible with current rates of Greenland melting are sufficient to have measurable effects on ocean temperature and circulation. Sustained warming of the northern high latitudes as a result of this process could accelerate feedbacks or activate tipping elements in that region, such as permafrost degradation, loss of Arctic sea ice, and boreal forest dieback. (8255)

The question is whether the record offers a sufficient basis for the Supreme Court to find that GHG emissions pose a systemic risk. In my view, it does not. To put forward such a claim successfully, Canada will need to introduce new evidence before the Court. The Supreme Court should take a flexible and pragmatic approach and permit parties to broaden the record. Alternatively, the *Rules of the Supreme Court of Canada* allow the Court on its own initiative to “require further evidence in respect of any question that the Court considers relevant” (section 6[2]).³⁸ One piece of evidence would be the *Special Report on the Ocean and the Cryosphere in a Changing Climate*, released by the Intergovernmental Panel on Climate Change in September 2019. Although focused on the ocean and cryosphere, the report does address the issue of feedback loops. With a suitably amended record, Canada would be in a better position to advance the systemic risk argument and the Court would be able to address it.

CONCLUSION

The regulation of GHG emissions is as difficult a policy issue as Canada has ever faced. Climate change is the greatest challenge now confronting humanity. A scientific consensus has emerged that GHG emissions reductions are necessary to stabilize global temperatures. For Canada to meet its GHG emissions reduction targets under the Paris Agreement will require significant reductions in carbon producing activities. But Canada’s provinces and territories vary considerably in per capita carbon emissions. A central question of Canadian climate politics is how to distribute the burden of GHG emissions reductions. What makes this political challenge even greater is that these variations are due to major structural differences in the economies of the provinces and territories.

For Alberta and Saskatchewan, GHG emissions reductions pose a fundamental economic challenge. Those provinces have decided to launch constitutional challenges against the *GGPPA* in order to gain leverage to renegotiate the framework for Canadian GHG emissions reductions. Moreover, the constitutional litigation should be seen as part of a larger strategy to promote the “carbon economy,” which is built on the extraction and processing of fossil fuels, the building of infrastructure to deliver them and the shipping of these products to foreign markets.

³⁸ SOR/2002-156.

There is a strong constitutional case to be made for the *GGPPA*. However, it is not the case that Canada has made in the *Ontario Reference* and the *Saskatchewan Reference*: that GHG emissions are a matter of national concern under the POGG power. That argument has been singularly unsuccessful – indeed, it was rejected by all 10 judges who have considered it, including those who upheld the *GGPPA*. The federal government should abandon it before the Supreme Court. Instead, it should justify the *GGPPA* on the basis of federal authority under the national dimensions branch of POGG to regulate the systemic risks posed by GHG emissions – that is, a self-reinforcing feedback loop in global warming that, once commenced, cannot be stopped.

The viability of this argument would require the Supreme Court to further develop the national dimensions branch of the POGG power. *Crown Zellerbach* was handed down 30 years ago. The relevant jurisprudence on federalism has evolved since, in the closely related area of economic policy, to encompass federal jurisdiction over systemic risks. The Court should incorporate the concept of systemic risk into the legal test for the national dimensions branch of the POGG power. In cases of systemic risk, provinces have a “constitutional incapacity” to regulate a policy area: a provincial unwillingness to prevent negative extraprovincial externalities relates to “truly national goals” that are too important to be left to the provinces. Whereas in the case of lesser regulatory matters, the lack of comprehensive, national action is the price of federalism, with respect to matters of national concern, the price is too high.

Finally, for Canada to make this alternative argument persuasively, it will need to supplement its record to establish the systemic risk posed by GHG emissions. It must draw on the latest scientific research to provide evidence of a self-reinforcing feedback loop in global warming that cannot be stopped. Alternatively, the Supreme Court could require that such evidence be presented.

The *Greenhouse Gas Reference* is not the only occasion on which the Supreme Court of Canada will wade into this politically and constitutionally complex terrain. On January 16, 2020, it is scheduled to hear British Columbia’s appeal from a decision of its Court of Appeal that the province lacks constitutional authority to amend its environmental protection legislation to permit it to restrict or prohibit oil that would be shipped by the Trans Mountain pipeline expansion from crossing its territory. British Columbia has challenged Alberta legislation that would authorize Alberta to cut off its oil exports and has persuaded the Federal Court of Canada to issue an injunction to temporarily suspend this law. Alberta has launched a constitutional challenge to the 2019 federal *Impact Assessment Act* that could also end up before the Supreme Court. These four cases – which will likely be joined by others – raise a set of complex constitutional issues in a highly politicized environment. They could define the Court’s legacy for a generation.

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