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Alberta Court of Appeal Opines That Federal Carbon Pricing Legislation Unconstitutional

By: Martin Olszynski, Nigel Bankes and Andrew Leach

Decision Commented On: *Reference re Greenhouse Gas Pollution Pricing Act*, [2020 ABCA 74](#)

Last month, the Alberta Court of Appeal released its decision in *Reference re Greenhouse Gas Pollution Pricing Act*, [2020 ABCA 74](#), Alberta's challenge to the constitutionality of the federal government's *Greenhouse Gas Pollution Pricing Act*, [SC 2018, c 12](#) (*GGPPA*). Writing for a majority of three judges, Chief Justice Catherine Fraser concluded that the *GGPPA* could not be upheld on the basis of Parliament's residual power over matters of "peace, order, and good government" (POGG), nor any other potentially relevant federal head of power. Concurring in the result but not the analysis, Justice Wakeling also held that the *GGPPA* was unconstitutional. Justice Feehan, dissenting, would have upheld the law on the basis of POGG, and the "national concern" branch of that power in particular. The Alberta Court of Appeal's decision thus stands in contrast to the earlier decisions of the Courts of Appeal of both Saskatchewan (*Reference re Greenhouse Gas Pollution Pricing Act* [2019 SKCA 40](#)) (Saskatchewan Reference) and Ontario (*Reference re Greenhouse Gas Pollution Pricing Act*, [2019 ONCA 544](#)) (Ontario Reference), where a majority of judges in each court upheld the law as a valid exercise of the national concern branch of the POGG power.

One of us has [previously described](#) the basic issues in the *GGPPA* references, which readers may wish to read first. Briefly, Canada's [constitution](#) divides authority for passing laws, often referred to as "heads of power", between the federal and provincial governments. Federal heads of power are set out in section 91 and include powers with respect to taxation, interprovincial and international trade and commerce, navigation, seacoast and inland fisheries, and the criminal law, to name but a few. Provincial heads of power are set out in section 92 and 92A and include powers with respect to property and civil rights, public lands, and natural resources within the provinces. Section 91 also contains a residual clause granting the federal government jurisdiction over matters not expressly assigned to the provinces:

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...

Over time, this "POGG" power has been interpreted as consisting of at least two distinct branches: the "national emergency" branch, which the Supreme Court relied on to uphold federal anti-inflation measures in *Reference re Anti-Inflation Act*, [1976 CanLII 16 \(SCC\)](#); and the

“national concern” branch, which is the branch that the federal government [is relying on](#) to uphold the *GGPPA*.

Consequently, the question is not whether the federal government has the authority to address greenhouse gas emissions – all parties and all courts have conceded that it does – but rather whether and where the *GGPPA* fits within the national concern branch of POGG, each head of power having its own distinct rules and interpretive principles. In order to qualify as a matter of national concern, the Supreme Court of Canada has set out the following two considerations: (i) the matter must have a “singleness, distinctiveness, and indivisibility” that distinguishes it from matters of provincial concern, one indicator of which is provincial inability to deal effectively with the matter; and (ii) its recognition as a matter of national concern – capable of supporting relatively broad regulatory regimes – must have a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution: *R v Crown Zellerbach Canada Ltd*, [1988 CanLII 63 \(SCC\)](#) at para 33.

This post focuses on the majority judgment of the Alberta Court of Appeal. While we acknowledge that there is some uncertainty in the case law that leaves room for genuine disagreement and arguments both for and against the federal government’s reliance on POGG, in our respectful view the majority is simply incorrect on several fronts and strays far from precedent on others. The judgment is also unhelpfully burdened with rhetoric and value judgments that are hardly relevant to the process of legal reasoning.

The post begins with a summary of the majority judgment (Part I) along with some commentary from us. Part II offers more detailed commentary on section 92A, subsidiarity, the division of powers analysis generally, several aspects of the national concern doctrine, and the overall tenor of the decision.

Part I: The Majority’s Analysis

A. The GGPPA is Legislation in Relation to One or More Provincial Heads of Power

After setting out an overview of the *GGPPA* (paras 31 – 39), the applicable constitutional provisions (including a brief history of section 92A, also known as the natural resources amendment) (paras 40 – 64), the *GGPPA*’s legislative and policy history (paras 66 – 93), and the primary holdings of the Saskatchewan and Ontario References (paras 114 – 124), the majority begins its analysis by setting out what it describes as “foundational constitutional principles”: federalism and subsidiarity (at paras 129 – 142). The majority appears to rely on these background principles to inform its approach to the formal division of powers framework, further set out below.

Federalism “recognizes the autonomy of provincial governments to develop their societies within their spheres of jurisdiction” (at para 130, citing *Reference re Secession of Quebec*, 1998 CanLII 793 (SCC) at para 58). Subsidiarity is the “proposition that law-making and implementation are often best achieved at a level of government that is not only effective, but also closest to the citizens affected and thus most responsive to their needs, to local distinctiveness, and to population diversity” (at para 137, citing *114957 Canada Ltée (Spraytech, Société d’arrosage) v*

Hudson (Town), 2001 SCC 40 (*Spraytech*) at para 3). In one of several passages that is striking for its political undertones, the majority appears to view the principle of subsidiarity through the lens of the most recent federal election:

[139] The principle of subsidiarity also reflects the political realities of our geographically large country whose population is concentrated in certain provinces. Subsidiarity is a counterbalance to centralism and majoritarianism. Those provinces with the largest populations and most Members of Parliament will often have the most substantial influence on the policies of the federal government when, as typically happens, they are responsible for the election of that government. This is reality. So too is the fact that policies chosen by the federal government are often dictated by the wishes of the majority and especially the majority in those areas responsible for their election. That too is reality. What is important to an individual province and its citizens may not be as important to the federal government.

(Emphasis added)

The majority then went on to set out the applicable framework for carrying out a division of powers analysis (paras 143 – 146). The first step is to characterize the “matter” of the challenged law – to describe its true nature or “pith and substance” – and then to classify it, i.e. to determine into which head of power it falls: federal as set out in section 91, or provincial as set out in section 92 and 92A). As one example, though not one used by the majority, in *R v Hydro-Quebec* [1997 CanLII 318 \(SCC\)](#), which involved a constitutional challenge to the *Canadian Environmental Protection Act* [RSC, 1985, c 16](#) (as it then was), Justice LaForest characterized that law as “the protection of the environment, through prohibitions against toxic substances”, which he then classified as falling within the federal government’s criminal law power (at para 132).

Thus, characterization and classification are distinct. In the case of the national concern branch of POGG, however, the majority held that the two can be conflated: the matter of the challenged law is also the alleged matter of national concern.

[156] That characterization determines the “matter” said to be of national concern under POGG. In other words, despite Canada’s assertion to the contrary, the “matter” of the legislation, that is its “pith and substance”, is coextensive with the “matter” of national concern. These are not two different concepts with two different contents for listed heads of jurisdiction and for the national concern doctrine. Thus, there is no justification for classifying the “matter” said to be of national concern differently than the “matter” of the legislation.

This is the first but not only time that the majority appears to break from Supreme Court of Canada precedent and tread new ground insofar as the national concern doctrine is concerned. For example, in *Munro v National Capital Commission*, [1966 CanLII 74](#) (SCC), Justice Cartwright concluded that the impugned sections of the Act were concerned with land use planning and expropriation whereas “the matter in relation to which it is enacted is the

establishment of a region consisting of the seat of the Government of Canada and the defined surrounding area which are formed into a unit to be known as the National Capital Region which is to be developed, conserved and improved ‘in order that the nature and character of the seat of the Government of Canada may be in accordance with its national significance’” (at 669).

The majority also concludes that in order for a matter to qualify as one of national concern, it must originally have fallen within the provincial legislature’s residual power over “all Matters of a merely local or private Nature in the Province” (section 92(16)):

[172] We have concluded that only when the “matter” would originally have fallen within the provinces’ residuary power under s 92(16) does the national concern doctrine have any potential application. Thus, we reject the proposition that the national concern doctrine opens the door to the federal government’s appropriating every other head of provincial power under s 92, s 92A or under provincial proprietary rights under s 109.

In other words, the majority disputes the existence of a “gap” branch under the national concern doctrine, notwithstanding the fact that the leading authority on national concern, *Crown Zellerbach*, explicitly recognized such a branch: “The national concern doctrine applies *to both new matters* which did not exist at Confederation *and to matters which, although originally matters of a local or private nature in a province, have since, in the absence of national emergency, become matters of national concern* (at para 33, emphasis added) (see also *Re: Anti-Inflation Act*, [1976] 2 SCR 373, at 394-419).

Earlier in its reasons, the majority also makes clear that it considers matters of national concern under POGG to be qualitatively different from the other heads of power, whether federal or provincial:

[149] ...Why? Because once a *matter* is assigned to the federal government under this doctrine, that new head of power is not only permanent, it is also an exclusive power of a plenary nature. That effectively means the provinces have no power to legislate in a “matter” allocated to the federal government under the national concern doctrine. We say “effectively”, recognizing there may be some limited room for provincial governments at the margins, but only if, and to the extent that, Parliament so permits...

[150] This point was picked up by Le Dain J in *Crown Zellerbach*. We disagree with the suggestion that Le Dain J misunderstood Beetz J’s reasoning on this point in *Anti-Inflation*. The import and effect of Beetz J’s comments support Le Dain’s interpretation of *Anti-Inflation*. Le Dain J concluded in *Crown Zellerbach* at 433 with the statement that what was emphasized by Beetz J in *Anti-Inflation* was that:

where a matter falls within the national concern doctrine of the peace, order and good government power, as distinct from the emergency doctrine, Parliament has an exclusive jurisdiction of a plenary nature to legislate in

relation to that matter, including its intra-provincial aspects. [Emphasis added]

As we explain in the next part, the majority thus adopts a strong form of the “transfer theory” approach to the national concern doctrine developed by one of us (along with Professor Eric Adams) in a [recent paper](#).

Applying these and other principles to the *GGPPA*, the majority concludes that “its true nature is, at a minimum, regulation of GHG emissions” (at para 211; see also para 256). It is not completely clear what the majority means by “at a minimum” but presumably they mean that the law is concerned with “the regulation of GHG emissions” and perhaps an even broader (unspecified) suite of issues. Indeed, elsewhere the majority refers to the “essentially unrestricted scope of authority” (at para 226) that the Act confers and that it “authorizes coverage and pricing of any substance, material or thing known to mankind” (at para 227). This is grand rhetoric and it helps support the majority’s broad characterization of the Act (indeed it would presumably support characterization of the Act as being concerned with “the regulation of any substance, material or thing known to humankind”) but at the same time it conveniently ignores the fact that the Act is not concerned with regulation generally but instead with a specific form of regulation, namely emissions pricing (in this case, of GHGs) (for a useful overview of the different types of regulation, including command and control, economic instruments, and others, see Barry Barton et al., eds, *Regulating Energy and Natural Resources*, Oxford; New York: Oxford University Press, 2006 at 19 – 31).

Turning to classification, the majority adopts the reasoning of the Saskatchewan majority that the *GGPPA* does not fall within Parliament’s authority over criminal law, trade and commerce, POGG’s emergency branch, or its treaty power (at paras 256-259). Rather, the majority concludes that “the regulation of GHG emissions” falls within the provinces’ jurisdiction under section 92, first and foremost pursuant to subsection 92A, but also on the basis of its ownership (s 109) (in this respect, the majority appears to conflate classification with the second part of the national concern test, *i.e.* the scale of impact on provincial jurisdiction), and authority over property and civil rights in the province (92(13)):

[271] ... The *Resource Amendment* and the provinces’ proprietary rights confer significant powers over the sustainable development of natural resources – and that necessarily includes regulation of GHG emissions through carbon pricing and otherwise. In other words, short of the use of the federal declaratory power and the emergency POGG power, the purpose of s 92A, when passed, was to bar the federal government’s intrusion into a province’s development and management of its natural resources.

[272] Second, s 92A is not the only power the provinces have with respect to their natural resources and control over GHG emissions in their province. To this must be added the provinces’ proprietary rights under s 109 of the Constitution as owners of their natural resources. These rights extend to regulation of resources after recovery from the ground.

[273] This *Act* interferes directly with provincial proprietary rights. The decision to impose a carbon pricing scheme on GHG emissions from natural resources goes directly and deep into provincial jurisdiction over their development and management. The scheme under the *Act* is unlimited in scope and application: it can be used to control every aspect of development from inception to post-production. The courts should not permit the national concern doctrine to be used to render the provinces' potent proprietary rights and powers impotent.

[274] Third, under one of the broadest areas of provincial jurisdiction, s 92(13), property and civil rights, provincial governments have the power to regulate industries and levy charges on consumers. These powers include regulating land use and emissions that could pollute the environment. This power also includes the control and regulation of local trade and commerce generally and commodity pricing in the provincial sectors: *Anti-Inflation* at 452-453.

(Emphasis in original).

In reaching this conclusion on classification, the majority employs the same rhetorical approach as it does in relation to the characterization question. It takes an expansive view of provincial heads of power while at the same time failing to offer any real analysis of how this legislation, with its emphasis on the pricing of emissions, can be said to be, for example, a law in relation to the exploration for, development, conservation or management of natural resources (subparas 92A(1)(a) and (b)) or a law in relation to provincial proprietary rights (section 109).

Given the structure of the majority's argument, this conclusion was enough to decide the reference in favour of Alberta. To summarize, there are three steps in the argument to this point: first, the national concern doctrine cannot be used to "federalize" any matter that would fall under any head of provincial legislative authority or provincial proprietary authority other than section 92(16); second, the *Act* is *characterized* as an *Act* that is concerned with the regulation of GHG emissions; and third, the *Act* is *classified* as falling within any one of a number of provincial heads of power. In our view, each of these three steps in the argument is contestable.

B. The GGPPA Cannot be Saved by the National Concern Doctrine

The majority also goes on to explain (in the alternative) that, even if it were incorrect in concluding that the "national concern" doctrine "cannot intrude on provincial jurisdiction under enumerated heads of power outside of s 92(16)" (at para 286), the *GGPPA* could still not be saved under the national concern doctrine.

First, the majority is of the view that the regulation of GHG emissions fails the "singleness, distinctiveness and indivisibility" criterion of the *Crown Zellerbach* test (at paras 287 – 288). The majority bolsters its conclusion with several additional points. It acknowledges that Parliament has other powers available to it for addressing climate change but this, in its view, mandates caution in recognizing a new matter of national concern (paras 289 – 290). The majority was also unmoved by the transboundary nature of GHG emissions (paras 292 – 293),

and unconvinced that the incorporation of “minimum national standards” made the matter any more single, distinct or indivisible (paras 294 – 297).

With respect to provincial inability, the majority begins by observing that the “parties did not agree on what ‘provincial inability’ means under the national concern doctrine... Does it mean ‘jurisdictional inability’ or ‘the risk a province will fail to act’? Or something else?” (at para 300). Ultimately, the majority concludes that provincial inability “refers to whether the provinces, acting alone or in concert, have the jurisdictional ability to enact the challenged scheme. If they do and that scheme may still operate successfully in other provinces, even if one province or more does not join in, that test is not met” (at para 308). Applying that test in a series of paragraphs that are worth quoting at length, the majority concludes that the test is not met:

[310] Each province can act to reduce GHG emissions – and has. If the provinces continue to do so effectively, they can substantially reduce the GHG emissions that those subject to their jurisdiction produce. Nor is there anything to prevent the provinces working together using their authority, if they choose. Indeed, doing so, provinces have even resolved international environmental issues... The provinces, acting alone or in concert, are constitutionally capable of enacting a comparable scheme or, for that matter, the exact same scheme. The backstop language is a confession the provinces could do just that.

[311] The provinces have the unchallengeable jurisdiction to reduce GHG emissions. But because the provinces might actually choose to exercise their powers in the way they are constitutionally entitled to do – for example, by not imposing carbon pricing on individual consumers – the federal government claims a right to use the provinces’ exercise of their constitutional powers as justification for invoking the national concern doctrine and stripping away those powers. In other words, because the federal government believes a province’s failure to act would not ensure the overall efficacy of the federal government’s policy choice, the jurisdiction of all the provinces should be overridden. This cannot be...

[313] We must say something about the implicit criticism that Alberta is producing a disproportionate share of industrial GHG emissions. This is undeniable – but hardly unexpected. Alberta, because of its oil and gas sector, has been one of the biggest drivers of the Canadian economy for decades. Were that not so, Alberta would not have been one of the largest financial contributors to the federal coffers throughout that entire time. Thus, it is disingenuous, not to mention unfair, to imply that, because Alberta continues to generate the wealth it does, Alberta cannot be counted on to regulate its own industries and do its part in reducing GHG emissions.

[314] That said, the point is this. The fact one or more provinces produce disproportionately higher GHG emissions, and thus more potential for a negative impact on other provinces on this front, does not permit the federal government to deprive the provinces of their incontrovertible jurisdiction over their natural resources or other provincial powers. Under our federal system, what one province or

the federal government does – or does not do – may well adversely affect another province socially, economically or environmentally.

[315] Take for instance certain trade barriers that provinces have been effective in maintaining. To the detriment of other provinces. Or the fact oil is imported into some provinces from countries whose records are not as environmentally progressive as Canada's, enabling and enriching those other countries. To the disadvantage of more responsible oil-producing provinces. Or the fact some provinces export coal to other countries whose burning of that coal has a disproportionately negative impact on the world's atmosphere. To the detriment of non-coal exporting provinces. [...] Hence, the mere fact something one province does might adversely affect another economically, socially or environmentally is not itself a basis for the federal government's taking over provincial jurisdiction under the national concern doctrine.

[316] The bottom line is this. How the provinces exercise their jurisdiction to regulate GHG emissions is a policy question not a legal one. That policy question includes deciding how to balance environmental priorities with other provincial priorities. No government is in favour of pollution. Citizens of each province and territory elect their provincial or territorial governments knowing the platform on which each has run. If the federal government can successfully invoke the national concern doctrine because a province fails to see a policy issue the same way it does, then the federal government could effectively upend the election in any province or territory...

[322] As to whether the scheme can operate successfully in other provinces if a province chooses not to participate, the answer is that it can. A province's decision to opt out would not be destructive of the efforts of the others; the others could readily carry on with their collective scheme.

[323] It was argued that a decision of one or more provinces not to enact precisely the same scheme as imposed by the federal enactment would jeopardize air quality elsewhere because air moves. And that being so, this proved that a failure to act would be detrimental to the interests of others outside a province. But that calls for conjecture on this record as to possible results under different schemes. Canada had the onus to establish that different provinces approaching the problem in a different manner than the Act requires would "jeopardize" the scheme's operation in other provinces. While Canada asserted its choice would work best, it did not prove that variation in provincial approaches would actually jeopardize the operation of the Act in different parts of the country. There was some evidence Canada itself did not apply its scheme uniformly throughout Canada.

[324] Further, factually, in any event, there is no evidence on this record that anything any one province does or does not do with respect to the regulation of GHG emissions is going to cause any measurable harm to any other province now or in the foreseeable future. The scale and proportionality of GHG emissions differ from the immediacy of harm from a toxic chemical. The atmosphere that surrounds us all is

affected largely by what is being done, or not being done, in other countries. Four large countries or groups of countries, the United States, China, India and the European Union generate, cumulatively, 55.5% of the world's GHG emissions. Canada, given its northern climate, vast geography and comparatively small population, generates [sic] 1.8%.

(Emphasis added).

The majority then addresses the second part of the national concern doctrine: whether recognizing the matter, which is to say upholding the legislation, has a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of powers. The majority provides six arguments for why it is not that, as noted above, seem to overlap considerably with its approach to classification.

First, “it interferes with the provinces’ *exclusive* jurisdiction under the Constitution over the development and management of their natural resources under s 92A and 109 of the Constitution. This intrusion...effectively deprives the provinces of their right to balance environmental concerns with economic sustainability” (at para 328). The majority cautions that “tackling climate change...is not an abstract concept nor an exercise in virtue seeking. As with everything in life, meeting the challenges of climate change while sustaining the economy is all about balance. When it comes to achieving the desired balance, it is the provinces, in keeping with the subsidiarity principle, who are best suited to decide...” (at para 330). Finally on this front, the majority observes that “there may well be those who favour ending further oil and gas development and even shutting down the entire oil and gas industry. Chief amongst them would be Alberta’s foreign oil and gas competitors” (at para 332).

Second, “the regulation of GHG emissions intrudes deep into the provinces’ exclusive jurisdiction over property and civil rights. There would be almost no aspect of the daily lives of the citizens of a province that would not be affected and areas into which the federal government could not intrude” (para 333). Third, the *Act* “purports to be neutral but has a disproportionate negative impact on certain provinces and their citizens” (at para 334). Fourth, “if minimum national standards for pricing of GHG emissions or any variation on this were permitted, then, on this theory, the federal government could impose minimum national standards on innumerable areas under provincial jurisdiction: roadways, building codes, public transit, home heating and cooling” (at para 335). Fifth, “granting the federal government the new head of power over GHG emissions and any variations on this theme would negatively impact federalism. What the citizens of each province would lose cannot be measured solely in the context of this one piece of legislation...” (at para 336). Sixth and finally, “courts should be slow to judicially expand federal heads of power under the national concern doctrine since this effectively steps past provinces’ rights and protections under s 38(3) [the amending formula]” of the Constitution (at para 337).

Part II: Commentary

There is a lot to unpack in the majority's reasons. Here we focus on its approach to section 92A, subsidiarity, the division of powers analysis generally, several aspects of the national concern doctrine, and the overall tenor of its decision.

A. Section 92A

We make two points in this section. First we argue that the majority offers an unjustifiably broad reading of both the rationale for adopting section 92A and the interpretation of the section. Second, we point to several obstacles posed by classifying the *GGPPA* as a law in relation to section 92A.

(i) An Expansive Reading of Section 92A

The majority devotes significant attention to s 92A, the Resource Amendment of 1982 in conjunction with a claim to a form of provincial interjurisdictional immunity (at paras 271 – 284). The majority describes the purpose of the amendment as that of barring “the federal government’s intrusion into a province’s development and management of its natural resources” (at para 271). Earlier in its judgment the majority had suggested that

[60] Section 92A provides for exclusive provincial jurisdiction in three areas: (1) the development, conservation and management of non-renewable natural resources (s 92A(1)); (2) the export of resources from the province (s 92A(2)); and (3) taxing powers over resources (s 92A(4)). Not only did s 92A clarify the scope of the provinces’ proprietary rights, it clarified the provinces’ legislative power over natural resources not owned by the Crown. (Reference omitted; emphasis in the original).

The first problem is that the text of s 92A does not support these claims. Subsection 1 of s 92A is the only paragraph that speaks in terms of the exclusive legislative authority of a province. Subsection 2 allows a provincial legislature to make laws in relation to the export of primary production from a province but subsection 3 expressly confirms that this power does not derogate from the authority of parliament to make laws in relation to the same matters and in the event of a conflict the federal law will prevail. Subsection 4 allows a province to enact both indirect as well as direct taxes in relation to natural resources but there is nothing here that limits the more general power of parliament under s 91(3) to raise money by any mode or system of taxation. Subsection 5 references a definition of “primary production” in the Schedule and subsection 6 is a savings clause which provides that nothing in the balance of the section “derogates from any powers or rights that a legislature or government of a province had immediately before the coming into force of this section.”

In other words, it is clearly incorrect to make the claim that s 92A establishes exclusive provincial jurisdiction over exports and taxation as well as the three categories of laws listed in subsection 1 (i.e. exploration for non-renewable natural resources, laws in relation to the development, conservation and management of non-renewable natural resources and forestry resources and laws in relation to sites and facilities in the province for the generation and production of electrical energy). It appears that the majority intended to enumerate those three

categories instead of referencing taxation and exports (this reading is confirmed by reference to the text of note 44 in the judgment).

Second, it is hard to see how there is anything in s 92A that supports the proposition that the section clarifies the scope of a province's proprietary powers. A province's proprietary powers derive from s 109 of the Constitution and from the terms of the Natural Resources Transfer Agreements; section 92A does not mention ownership. Later in its judgment (see paras 265 and note 176) the majority seems to rely on subsection 92A(6) as authority for this proposition but, as noted above, this subsection is nothing more than a savings clause – that is to say it is designed to ensure that the powers and rights of a province are not diminished by the enactment of s 92A. There can, therefore, be nothing in this paragraph that clarifies or strengthens a province's proprietary powers. Those proprietary powers are no more or less extensive immediately after the enactment than they were before.

Third, there is no reason for thinking that subsection 1 of s 92A is any more “exclusive” than any other head of s 92. Thus, while the federal parliament could not make a law in relation to the development of non-renewable natural resources or forestry in a province, it could certainly make a law in relation to any effluent from a project, or wood debris from forestry operations, that might have an impact on fish habitat: see *Northwest Falling Contractors Ltd v The Queen*, [1980 CanLII 210 \(SCC\)](#), [1980] 2 SCR 292. Similarly, notwithstanding paragraph (c) of 92A(1), the federal government may apply federal labour laws to employees within nuclear electricity works and undertakings that are declared to be for the general advantage of Canada, or which by virtue of that form of generation are a matter of national concern: *Ontario Hydro v Ontario Labour Relations Board*, [1993 CanLII 72 \(SCC\)](#), [1993] 3 SCR 327 esp per LaForest J.

Finally, there is good reason to question whether it is accurate to suggest that the principal purpose of the amendment was to bar federal government intrusion into provincial resources management. The majority references *Canadian Industrial Gas & Oil Ltd. v Government of Saskatchewan*, [1977 CanLII 210 \(SCC\)](#), [1978] 2 SCR 545, and *Central Canada Potash Co. v Government of Saskatchewan*, [1978 CanLII 21 \(SCC\)](#), [1979] 1 SCR 42 in support of this proposition, and yet both cases involved a corporation seeking to strike down a provincial law on the basis that the law could not be justified under a provincial head of power. Neither was an example of the federal parliament “invading” provincial areas of jurisdiction.

This background suggests that we should think of s 92A as affirming and extending (in relation to taxation and exports) provincial law-making authority rather than viewing s 92A as a bulwark against the application of federal laws. While there might be something to the bulwark argument with respect to electricity transmission systems (see Justice LaForest in *Ontario Hydro* at 376 – 378) it is clear that the bulwark argument is not of broader application: see *Westcoast Energy Inc. v Canada (National Energy Board)*, [1998 CanLII 813 \(SCC\)](#) at paras 80-84. Neither is there anything to the implied – if not express – claim that ss 92 and 92A support a form of provincial interjurisdictional immunity. Justice LaForest scotched that idea in *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992 CanLII 110 \(SCC\)](#) at 68-69:

The provinces may similarly act in relation to the environment under any legislative power in s. 92. Legislation in relation to local works or undertakings, for example, will

often take into account environmental concerns. What is not particularly helpful in sorting out the respective levels of constitutional authority over a work such as the Oldman River dam, however, is the characterization of it as a "provincial project" or an undertaking "primarily subject to provincial regulation" as the appellant Alberta sought to do. That begs the question and posits an erroneous principle that seems to hold that there exists a general doctrine of interjurisdictional immunity to shield provincial works or undertakings from otherwise valid federal legislation. As Dickson C.J. remarked in *Alberta Government Telephones*, *supra*, at p. 275:

It should be remembered that one aspect of the pith and substance doctrine is that a law in relation to a matter within the competence of one level of government may validly affect a matter within the competence of the other. Canadian federalism has evolved in a way which tolerates overlapping federal and provincial legislation in many respects, and in my view a constitutional immunity doctrine is neither desirable nor necessary to accommodate valid provincial objectives.

What is important is to determine whether either level of government may legislate. One may legislate in regard to provincial aspects, the other federal aspects. Although local projects will generally fall within provincial responsibility, federal participation will be required if the project impinges on an area of federal jurisdiction as is the case here.

(See also *Quebec (Attorney General) v Moses*, [2010 SCC 17 \(CanLII\)](#) at para 36)

The majority takes a similar approach to section 109 of the Constitution and at a number of places in the judgement tries to erect this too as a bulwark to the application of federal law: see amongst other references paras 20, 22, 42-48, 60, 186, 265, 272 - 273. This is even more of a stretch. Section 109 and the equivalent provisions in the NRTA serve as a statement to the effect that public lands within the province are vested in the Crown in right of the province where they are situated (and not the Crown in right of Canada: *St. Catharines Milling and Lumber Co. v R.* (1888) 14 AC 46. It is true that there are a lot of such lands and resources, and that such land and resources are an important form of wealth for provinces, but that does not endow those lands and resources with any immunity from a valid federal law. Neither does it make it more likely that a federal environmental law is invalid. Provincially owned lands and resources have an immunity from taxation under s 125 but no general immunity from federal laws: *Quebec (Attorney General) v Nipissing Central Railway Company*, [1926 CanLII 280 \(UK JCPC\)](#).

(ii) Classifying the GGPPA Under Section 92A

As noted above, the majority does not really provide much by way of analysis for its conclusion that the "regulation of GHG emissions" falls first and foremost within the scope of subsection 92A. Further, while the link between non-renewable resource management and GHG emissions may be obvious in some cases, other emissions will have nothing whatsoever to do with the production of natural resources within that province. As noted [here](#), 72 Mt of Canada's emissions are from agriculture, 52 Mt from waste, and 175 Mt from transportation. Regulation in relation to

these sectors would be beyond the reach of s 92A, and combined they account for far more emissions than the 195 Mt from oil and gas. Nor is it the case that all emissions associated with natural resources could fall under s. 92A(1) given the definition of “primary production” used in that subsection. This definition (see the Sixth Schedule of the *Constitution Act*) excludes substantial portions of the downstream fossil fuel industry from provincial reach:

1. For the purposes of section 92A of this Act,
 - (a) production from a non-renewable natural resource is primary production therefrom if
 - ii) [...] it is not a manufactured product or a product resulting from refining crude oil, refining upgraded heavy crude oil, refining gases or liquids derived from coal or refining a synthetic equivalent of crude oil

While there is no doubt that under s 92A, the province of Alberta has substantial jurisdiction to regulate the production of fossil fuels, the provisions do not themselves provide authority to regulate refined products produced from Alberta resources. This exception was cited as part of the Federal Court decision in *British Columbia (Attorney General) v Alberta (Attorney General)*, [2019 FC 1195](#), which held that Alberta did not have the authority to restrict refined product trade to BC under the *Preserving Canada’s Economic Prosperity Act*, [SA 2018, c P-21.5](#) (at paras 111 and 116-8).

B. Subsidiarity

It is clear that the majority considered the principle of subsidiarity as militating against upholding the *GGPPA*. What is striking about the majority’s approach, and the scholarship that seems to support it (e.g. Dwight Newman, “Federalism, Subsidiarity, and Carbon Taxes” (2019) 82:2 Sask L Rev 187), is how it overlooks the first criterion, or condition precedent, for the application of that principle, which is to say *effectiveness*: “...law-making and implementation are often best achieved at a level of government that *is not only effective, but also closest* to the citizens affected...” It is not obvious to us that provincial governments can be considered effective in the context of a global collective action problem like climate change (we return to this issue later in the context of the provincial inability test).

Not surprisingly, this aspect (i.e. effectiveness) was present in the context of the Supreme Court decision with which the principle is most often associated, *Spraytech* (cited by the majority at para 137). That decision upheld the Town of Hudson’s ability to pass a bylaw restricting the cosmetic use of pesticides within its borders in the face of existing pesticide regimes at *both* the federal and provincial level. It is actually surprising that the *GGPPA*’s detractors continue to cite this paragraph from *Spraytech*, bearing in mind that the remaining half of it supports the federal government’s backstop approach under the *GGPPA*: Justice L’Heureux-Dube cites Justice La Forest in *R. v Hydro-Quebec*, noting that his reasons in that case “quoted with approval” the idea that “local governments [should be] empowered to exceed, but not to lower, national norms” (*Spraytech* at para 3).

C. Approach to Division of Powers

The majority goes to some length to discuss the discretionary provisions in the *GGPPA* pursuant to the notion that if they were to uphold the *GGPPA* then everything done under it – or under any other future legislation that purportedly fell within the scope of the new matter of national concern - would automatically and permanently be deemed constitutional:

[199] Why? Courts have no ability to confine or pre-limit the scope of the *Act* in any way by such pronouncements while at the same time clearing it constitutionally in its entirety. Validating the *Act* means that each and every provision in the *Act* is fully operational. In turn, all exercises of discretion and manners of administration of the *Act* provided for therein are thereby constitutional. Canada would be entitled to claim legitimacy by the Executive – and succeed – for any and all actions taken under the *Act* providing the language of the *Act* so permits...

[202] Further, any new head of power judicially sanctioned under the national concern doctrine permits Parliament to legislate in the future as it sees fit in relation to that head of power...

While we agree that the recognition of a new matter of national concern does create a new basis for future federal legislation, it does not follow that any such legislation will be deemed constitutional. It is always open for the provinces or private parties to challenge the constitutionality of new legislation, just as it is open to these to challenge the exercise of any discretionary power under legislation that has otherwise been deemed constitutional – whether on constitutional or administrative law grounds. Indeed, in *Hydro-Quebec*, both the legislation (*CEPA*) and an order pursuant to it (directed at Hydro-Quebec in relation to polychlorinated biphenyls (PCBs)) were challenged and assessed sequentially. Similarly, long after *Hydro-Quebec*, new renewable fuel regulations under the same Act were challenged (albeit unsuccessfully) in *Synchrude Canada Ltd. v Canada*, [2016 FCA 160](#) (see also *John Deere Plow Co. Ltd. v Wharton*, [1914 CanLII 603 \(UK JCPC\)](#), at 343 and 338-339).

D. National Concern

We address three issues in this section. First, we aim to address the opinion that the recognition of a new matter of national concern necessarily serves to transfer provincial authority to parliament or otherwise transform them as federal powers. Second, we analyze in more detail the claim of the majority that the national concern doctrine of POGG applies only to matters (or aspects of matters) which would otherwise have been captured by the provincial residual clause in s 92 (16) of the *Constitution Act, 1867*. Third, we offer some commentary on the provincial inability test.

i) Transfer Theory

As noted above, the majority adopts what [one of us, along with Professor Eric Adams, has described as the “transfer theory” of POGG](#). The transfer theory of POGG holds that a finding that the subject matter of impugned federal legislation is *intra vires* Parliament under the POGG power conveys permanent, exclusive and plenary jurisdiction over the subject matter and, further, that such exclusivity is not subject to the *double aspect* doctrine nor to *mutual modification* and that a strong form of federal paramountcy applies (see Leach and Adams at 4-5). At paragraph 209, the majority

quotes from *Crown Zellerbach* at page 433 where LeDain J. holds that “[o]nce a subject matter is allocated to the federal government under the national concern doctrine, [...] that effectively removes that subject matter from provincial jurisdiction including its ‘intra-provincial’ aspects.”

The majority goes further though, holding that, “the head of power allocated to the federal government would be permanent, exclusive and plenary (as well as paramount), subject only to constitutional amendment” (at para 209). In *Ontario Hydro*, however, Lamer C.J. notes that POGG is “not plenary” (at 340). For his part, Iacobucci J. held “that the federal government may have jurisdiction over atomic energy by reason of the national concern branch of the [POGG] power does not give Parliament plenary power over all aspects of nuclear power” (at 425).

The transfer theory of POGG is evident in several cases and in the work of several Canadian academics. However, as Leach and Adams argue, the application of POGG in this way is a consequence of the type of subject matter or the character of impugned legislation considered in specific cases rather than a universal doctrine. Most often cited as supporting the transfer theory is the dissent of Beetz J. in *Anti-Inflation* (at 458 as cited in paragraphs 294 and 844 of the ABCA decision). Recall that the impugned legislation in *Anti-Inflation* would have given a wide range of powers to the federal government under the guise of the regulation of inflation: “guidelines for the restraint of prices, profit margins, dividends and compensation in those sectors of the economy which it specifies and which may be described as the federal public sector, the federal private sector and the provincial private sector.” (dissent of Beetz J. at page 440). In this case, the practical and legal effects of the legislation would have imposed drastic limits and allowed federal regulatory control over matters that are ordinarily considered to fall under provincial jurisdiction. While a majority of the court in *Anti-Inflation* determined that these were valid, temporary measures enacted under the emergency branch of POGG, conferring such powers as were found in the *Anti-Inflation Act* to the federal government under the national concern branch would have, in Beetz J.’s words, “rendered provincial powers nugatory” (at 458).

In the *Aeronautics (Re Aerial Navigation 1931 CanLII 466 (UK JCPC))* and *Radio* cases (*Re Regulation and Control of Radio Communication 1932 CanLII 354 (UK JCPC)*), plenary and exclusive jurisdiction was not a *necessary* outcome of jurisdiction under POGG, but rather followed from the nature of these subject matters. The consequences of overlapping inter- and intra-provincial systems would be catastrophic especially in the context of aeronautics. Powers over aeronautics and radio and telecommunication are, in practice, exclusive simply because inoperability and inapplicability would be of broad application given these particular subject matters; not because POGG inherently confers such exclusivity and plenary power.

There are numerous examples in the jurisprudence of the application of the national concern doctrine in a manner which does not negate provincial abilities to legislate with respect to their extant heads of power. In *Munro*, the federal power to make laws in relation to the National Capital Region did not confer plenary and exclusive jurisdiction over that region: provincial laws, for example in relation to municipal planning and building codes, continue to apply insofar as they do not conflict with federal laws. In *Multiple Access v McCutcheon*, [1982 CanLII 55 \(SCC\)](#), [1982] 2 SCR 161, provincial laws of general application (securities law) applied concurrently to laws made in relation to federally-incorporated companies under POGG. *Ontario Hydro* wrestled with the scope of federal jurisdiction conveyed under POGG and concluded that

the power was not plenary, but rather confined to the “national concern aspects of atomic energy” (at 425). It was the *breadth* of the national concern aspects that was the source of disagreement between opinions in that case. All seven judges held that provincial laws of general application would continue to apply where they did not present a direct conflict with federal laws enacted in relation to the national concern aspects of atomic energy.

ii) The Provincial Residuary Power

In addition to employing the transfer theory approach, the majority adds a new twist to an old argument in relation to the national concern branch that, as further set out below, has been repudiated by a century of jurisprudence:

[172] We have concluded that only when the “matter” would originally have fallen within the provinces’ residuary power under s 92(16) does the national concern doctrine have any potential application. Thus, we reject the proposition that the national concern doctrine opens the door to the federal government’s appropriating every other head of provincial power under s 92, s 92A or under provincial proprietary rights under s 109.

In reaching this conclusion, the majority leans heavily on the dissenting opinion of Beetz J. in *Anti-Inflation* (at 457):

[T]he incorporation of companies for objects other than provincial, the regulation and control of aeronautics and of radio, the development, conservation and improvement of the National Capital Region” are clear instances of distinct subject matters which do not fall within any of the enumerated heads of s. 92 and which, by nature, are of national concern. [Emphasis added by the majority at para 174]

The majority then holds that “[the judgement of Beetz J.] implicitly draws a line between specific heads of power under s 92 (and now s 92A), on the one hand, and the provinces’ residuary power under s 92(16), on the other” (para 175). This implied distinction is such that, “the only ‘matters’ exposed to being ‘transformed’ and potentially falling under the national concern doctrine are those that originally would have fallen only within s 92(16).” The majority then builds its own analysis of the text of ss 91 and 92 of the *Constitution Act, 1867* to buttress their claim:

[180] The framers linked s 91 and s 92 together through these words [referring to the concluding words of s 91] to ensure there was no doubt that matters within the 31 classes of subjects assigned to the federal government, some of which might otherwise be considered of a local or private nature, would nevertheless be possessed by Parliament. In other words, matters under specific federal heads of powers are excluded from the class of matters of a local or private nature. What is important for our purposes is what is meant by the “class of matters” to which these words relate. This reference is to a *singular* class only; that singular “class of matters of a local or private nature” must necessarily be s 92(16). (emphasis in original)

This reading of the *Constitution Act, 1867* dates to the Privy Council decision in *Citizens’ Insurance Co. of Canada v Parsons* [1881] 7 App. Cas. 96 at 108, where the Judicial Committee

held that, the concluding paragraph of s. 91 “applies in its grammatical construction only to No. 16 of s. 92.” This view was repudiated by the Privy Council in *Attorney-General of Ontario v Attorney-General of Canada* [1896] AC 359 [*Local Prohibition*] at 360, in which Lord Watson stated that Sir Montague Smith’s views on the grammatical construction of the concluding paragraph of s 91 “does not appear to their Lordships to be strictly accurate.” Lord Watson clarifies that “the language in the exception in s. 91 was meant to include and correctly describes all the matters enumerated in the sixteen heads of s. 92, as being, from a provincial point of view, of a local or private nature.” Lord Watson’s interpretation remains the law today.

The majority uses its conclusion that the national concern doctrine of POGG applies only to matters (or aspects of matters) which would otherwise have been captured by the provincial residual clause in s 92 (16) of the *Constitution Act, 1867* to decide that: “the federal government cannot use the national concern doctrine to commandeer matters assigned exclusively to the provinces unless a matter otherwise within s 92(16) has gone beyond the “local or private nature in a province” and become a matter of concern generally across this country” (at para 185).

This view of the majority, however, is at odds with the unanimous view of the Supreme Court of Canada in the closely-related *Ontario Hydro* case. In deciding that case, Iacobucci J held that “even if s. 92A removed electrical generating works from s. 92(10), Parliament could validly exercise jurisdiction over Ontario Hydro's nuclear generating facilities using its [POGG] power from the opening words of s. 91.” (at 392). LaForest J. was clear that provincial authority under 92A was displaced by the POGG power and the resource amendment was not “meant to interfere with the paramount power vested in Parliament by virtue of the declaratory power (or for that matter Parliament's general power to legislate for the peace, order and good government of Canada)”(at 378). Lamer C.J. that, while labour relations at Ontario Hydro in general were provincially regulated and “the management of their activities falls to the provinces under s. 92A(l)(c),” employees engaged specifically in the production of nuclear energy were to be federally regulated under 92(10)(c) and POGG (at 356).

iii) Provincial Inability Test

As noted in *Crown Zellerbach*, the “provincial inability” test is not a stand-alone factor but rather is intended to assist the courts in determining whether a matter has the requisite singleness, distinctiveness, and indivisibility to qualify as a matter of national concern. In that decision, the test was put this way: “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” (at para 33).

Borrowing – at the urging of Canada and several intervenors – from recent jurisprudence in relation to Parliament’s trade and commerce power (*Reference re Pan-Canadian Securities Regulation*, [2018 SCC 48](#) at para 86) the majority here introduces another novel principle to the national concern doctrine in its (re)formulation of the provincial inability test: “... whether the provinces, acting alone or in concert, have the jurisdictional ability to enact the challenged scheme. If they do and that scheme may still operate successfully in other provinces, even if one province or more does not join in, that test is not met” (para 308).

In the series of paragraphs already excerpted in Part I of this blog (above), the majority concludes that its version of the test is not met (beginning at para 310). At one point, the majority appears to assert that provinces have the right, as part of their 92A jurisdiction, to externalize the pollution associated with resource development (para 314) and that this is a policy dispute, not a legal one (para 316). Ultimately, the majority resorts to other countries' emissions and the [familiar refrain](#) that Canada's emissions are too miniscule to be relevant in the global effort to address climate change:

[324] Further, factually, in any event, there is no evidence on this record that anything any one province does or does not do with respect to the regulation of GHG emissions is going to cause any measurable harm to any other province now or in the foreseeable future...Four large countries or groups of countries, the United States, China, India and the European Union generate, cumulatively, 55.5% of the world's GHG emissions. Canada, given its northern climate, vast geography and comparatively small population, generates [*sic*] 1.8 [the actual number is 1.6%].

In essence, the majority seems to have concluded that provincial inability is not met because Canada alone cannot effectively address climate change. Framed this way, it is hard to conceive of any international environmental problem that would meet the test, including marine pollution by ocean dumping – upheld as the matter of national concern in *Crown Zellerbach*. Indeed, for the majority, the presence of an international aspect would appear to militate *against* a finding of national concern, in direct contradiction of *Crown Zellerbach* (at para 37).

Unlike the Courts of Appeal in Saskatchewan and Ontario, the ABCA majority also seems to ignore Canada's relative importance with respect to global emissions and the role of international cooperation in their mitigation. Canada is among the top 10 nations globally by GHG emissions, as noted [here](#) and indeed in the same Environment and Climate Change Canada [website](#) that the majority references for their numbers. Canada's total GHG emissions are greater than 183 other countries, which together comprise the remaining 45% of global emissions. Even setting aside the fact that Canadians have the [highest per capita emissions among the top 10 emitters](#), it is clear that Canada has a meaningful role to play in global emissions reductions. Indeed, the [Paris Agreement](#) is premised on the idea of peer-pressure. The regime adopts a “pledge and review” approach to treaty implementation and compliance, a key objective of which is to build trust among nation states (see [here](#)). As noted by the majority in the Ontario Reference, “the international community has recognized that the solution to climate change is not within the capacity of any one country and has, therefore, sought to address the issue through global cooperation” (para 21).

Implicit in the majority's approach to provincial inability, as well as to the principle of subsidiarity (discussed previously), is the mistaken notion that provincial and national governments are equivalent insofar as a global threat like climate change is concerned. They are not. National governments can enter into binding international treaties, like the *United Nations Framework Convention on Climate Change* 12 June 1992, 1771 UNTS. National governments also have recourse to principles of international environmental law, including the prohibition against transboundary environmental harm (*The Trail Smelter Arbitration, the United States v Canada* (1938 and 1941), 3 UNRIAA 1905-1982). While provincial governments can and have

entered into agreements with other subnational states, these agreements are not binding as a matter of international law; nor can one province seek recourse against another province for transboundary harm (*Interprovincial Co-operatives Ltd. et al. v R.*, [1975 CanLII 212 \(SCC\)](#) at 512). Simply put, while neither the provinces nor the federal government can address a global threat like climate change alone, the federal government – by virtue of its place in the international legal order – is indisputably the more effective level of government.

E. Legal Analysis or Advocacy?

At the outset of its decision, the majority states that this Reference is not “about which level of government might be better suited to address climate change or GHG emissions. Or whether a uniform approach is desirable. Or who has the best policies. Or what are the best policies. Or who could do more to reduce GHG emissions in the world” (at para 2). Later in its reasons, the majority offers that “courts do not determine constitutionality based on the wisdom or efficacy of legislative choices” (para 113).

And yet, there are numerous passages throughout its judgment suggestive of exactly that. We are reminded that “Alberta, because of its oil and gas sector, has been one of the biggest drivers of the Canadian economy for decades” (para 313) and that “it is disingenuous, not to mention unfair, to imply that, because Alberta continues to generate the wealth it does, Alberta cannot be counted on...” (ibid). We are cautioned that “tackling climate change, including reducing GHG emissions, is not...an exercise in virtue seeking” (para 330) and that there are “those who favour ending further oil and gas development and even shutting down the entire oil and gas industry,” including “Alberta’s foreign oil and gas competitors” (para 332). Minimum national standards are “unfair” to those “who actually took steps to reduce emissions” (para 295) and, in any event, “Canada, given its northern climate, vast geography and comparatively small population, generates [only] 1.8%” of global GHG emissions (para 324).

Individually, each of these passages could perhaps be dismissed, but collectively they are impossible to ignore. None can serve as legal reasons for why the majority concludes that the GGPPA is an impermissible intrusion on provincial authority.

We are grateful to Professors David Wright and Eric Adams for comments and suggestions on earlier drafts of this blog. In the interests of disclosure, Professor Olszynski is co-counsel for an intervener group in support of the GGPPA when the matter comes before the Supreme Court of Canada later this month. Those [submissions](#) focus on the impact on provincial jurisdiction of recognizing a matter of national concern, which we do not discuss in any detail here.

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