Constitutional forum constitutionnel

Seeing Double: Peace, Order, and Good Government, and the Impact of Federal Greenhouse Gas Emissions Legislation on Provincial Jurisdiction

Andrew Leach* and Eric M. Adams**

Abstract

Federal regulation of greenhouse gas (GHG) emissions presents a difficult challenge for Canadian constitutional law. The federal government's legislation to implement a national minimum standard of GHG emissions pricing, the *Greenhouse Gas Pollution Pricing Act* (*GGPPA*), and the trio of reference cases launched by Saskatchewan, Ontario, and Alberta questioning its constitutional validity, have brought the law and politics of GHG emissions pricing to the forefront of Canadian federalism. In the two appellate court decisions delivered to date, the legislation has been sustained as a valid exercise of Parliament's power to legislate for the Peace, Order, and Good Government (POGG) of Canada. In each case, however, judges have expressed significant concern with respect to the impact of the legislation on provincial jurisdiction.

We draw on recent and historic jurisprudence to characterize conceptual errors that have bedevilled POGG, specifically in the tendency to overestimate its impact on provincial jurisdiction. We then examine the existing interpretive principles that limit POGG's ability to upend the critical balance inherent in the division of powers. Finally, we discuss how a properly empowered, calibrated, and constrained POGG relates to the *GGPPA*. We argue that the reduction of national GHG emissions constitutes a valid federal subject under the national concern branch of POGG, and that the *GGPPA* is a valid exercise of federal jurisdiction. We see no reason under the double aspect doctrine and cooperative federalism why provinces would lose any existing provincial jurisdiction as a result of the implementation of the *GGPPA*. Rather, a restrained approach to paramountcy, and the mechanics of the *GGPPA* itself suggest that provincial and federal legislation will work concurrently on GHGs. That seems entirely appropriate given the nature of the climate change crisis before us. In the legislative challenge of our time, we believe Canada's Constitution is up to the task.

Résumé

La réglementation fédérale sur les émissions de gaz à effet de serre (GES) soulève de problèmes très difficiles pour le droit constitutionnel canadien. La législation du gouvernement fédéral visant à mettre en œuvre une norme nationale minimale de tarification des émissions de GES, la *Loi sur la tarification de la pollution causée par les gaz à effet de serre*, et les trois cas de référence lancés par la Saskatchewan, l'Ontario et l'Alberta remettant en question sa validité constitutionnelle, ont mis la loi et la politique de tarification des émissions de GES au premier plan du fédéralisme canadien. Dans les deux décisions de la cour d'appel rendues à ce jour, la législation a été maintenue comme un exercice valide du pouvoir du Parlement de légiférer pour la paix, l'ordre et le bon gouvernement (POBG) du Canada. Il importe toutefois dans les deux cas que les juges aient exprimé des préoccupations importantes concernant l'impact de la législation sur la juridiction provinciale.

Nous nous appuyons sur la jurisprudence récente et ancienne pour définir les erreurs conceptuelles qui ont affecté le POBG, notamment la tendance à surestimer son impact sur les compétences provinciales. Ensuite, nous examinons les principes d'interprétation existants qui restreignent la capacité du POBG à bouleverser l'équilibre critique inhérent à la division des pouvoirs. Finalement, nous discutons de la manière dont un POBG correctement habilité, calibré et limité est associé à la *Loi sur la tarification de la pollution causée par les gaz à effet de serre*. Nous considérons que la réduction des émissions nationales de GES doit constituer l'un des sujets fédéraux valables dans le cadre des préoccupations nationales du POBG, et que la *Loi sur la tarification de la pollution causée par les gaz à effet de serre* est un exercice valable de la compétence fédérale. Nous ne voyons aucune raison, en vertu du principe du double aspect et du fédéralisme coopératif, pour laquelle les provinces risqueraient de perdre toute compétence provinciale existante à la suite de la mise en œuvre de la *Loi sur la tarification de la pollution causée par les gaz à effet de serre*. Au contraire, une approche modérée de la primauté, et les mécanismes de la *Loi sur la tarification de la pollution causée par les gaz à effet de serre* elle-même suggèrent que les législations provinciales et fédérales vont travailler en parallèle sur les GES. Cette démarche semble tout à fait appropriée face à la nature de la crise du changement climatique actuelle. Dans le contexte du défi législatif de notre époque, nous jugeons que la Constitution canadienne est à la hauteur de la tâche.

* Associate Professor, School of Business, University of Alberta

** Professor, Faculty of Law, University of Alberta

Introduction

Federal regulation of greenhouse gas (GHG) emissions presents a difficult challenge for Canadian constitutional law. Perhaps the most important policy area of our time, tackling climate change — and the GHGs that produce it — is a political necessity of the twenty-first century. Since neither the environment in general nor GHGs in particular are specifically enumerated subjects in the *Constitution Act, 1867*, constitutional controversies surrounding the nature and extent of jurisdictional authority in relation to them are as inevitable as the policy disagreements concerning the appropriate regulatory approach to limiting their use.[1]

The federal government's legislation to implement a national minimum standard of GHG emissions pricing, the *Greenhouse Gas Pollution Pricing Act* (*GGPPA*), and the trio of reference cases launched by Saskatchewan, Ontario, and Alberta questioning its constitutional validity, have brought the law and politics of GHG emissions pricing to the forefront of Canadian federalism.[2] As with the shared jurisdiction over environmental protection more generally, the authority to regulate GHGs exists within a number of the enumerated heads of power in both Sections 91 and 92 of the *Constitution Act, 1867*, granting scope for valid provincial and federal legislation under existing heads of power.[3] Depending on the nature of the statutory regime, of course, the regulation of GHGs might validly fall within provincial authority over property and civil rights in the province, matters of a local nature, taxation powers, or in relation to local works and undertakings, just as they may reside within the federal power to make laws in relation to trade and commerce, taxation, interprovincial undertakings, or perhaps the criminal law.[4] The *GGPPA* poses a broader question striking at the heart of Canada's constitutional arrangements and fundamental norms: does the *GGPPA* fall under the national concern branch of the peace, order, and good government (POGG) power?

The positive answer to that question, we argue, lies in reconciling the competing demands that have always animated Canadian federalism: enabling necessary federal unity concerning national matters while protecting the provincial autonomy and diversity essential to a federation. As difficult as resolving such tensions appears, doing so is the life story of Canada's federal arrangements. The principles animating that story must guide the constitutional challenge of GHG emissions regulation now before us.

Even though the particular policy problems are new, the challenges posed by POGG are not. POGG and its variously worded antecedents are older than Canada itself. Traced to English statutes in the fifteenth century, the transfer of authority from one law-making body to another enabled the British Crown to extend, but also circumscribe, jurisdictional power to a local entity: a necessary process to govern a diverse realm. In the era of the British Empire, POGG morphed into boilerplate (often worded as the power to make laws concerning "peace, welfare, and good government") by which the Crown empowered executive government in its distant colonies to make law in the Crown's name. Versions of POGG appeared in countless instructions to North America's colonial governors, and most of Canada's early constitutional instruments.[5] POGG's presence in the opening words of Section 91 of the *Constitution Act, 1867* authorizing Parliament to "make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects" assigned to the Provinces would not have been a surprise to Canada's nineteenth-century lawyers, judges, and politicians. Its meanings, most would have assumed, were reasonably well settled by centuries of constitutional use, tradition, and expectation.

But, of course, times change and constitutions along with them. While the Judicial Committee of the Privy Council's decision in *Russell v The Queen* suggested a reasonably generous interpretation of the legislative power conferred by POGG on the federal Parliament, it did not take long for the rulings of the Privy Council to swing in the other direction as the challenges of protecting the law-making authority of provinces captured the attention of the Privy Council.[6] Lord Watson was the first to recognize explicitly that

POGG "ought to be strictly confined" in order to preserve "the autonomy of the provinces."[7] Lord Haldane famously took that task to heart in interpreting POGG as a limited emergency power in a series of cases in the 1920s.[8] POGG, W.P.M. Kennedy lamented as the Great Depression worsened, had vanished "with the winds." [9]

That was not quite true, as Privy Council decisions in the *re Aeronautics* and *re Radio Communication* reference cases revealed,[10] but it was true enough for an influential handful of Canadian constitutional lawyers and scholars such as Frank Scott, Bora Laskin, and Kennedy. They pushed judges to find in POGG's capacious wording greater federal legislative authority, especially in relation to economic matters.[11] The scholarly project to invigorate POGG dominated Canadian constitutional law in the 1930s and 40s, so much so that Laskin worried he was in danger of wearing out the arguments by the time his classic article on POGG appeared in 1947.[12] Perhaps with some fatigue, then, the controversies surrounding POGG's constitutional role quieted in the postwar decades as the Supreme Court of Canada replaced the Privy Council as Canada's highest appellate authority, and courts turned to the more specific heads of federal power to ground federal legislation.

POGG returned briefly to the spotlight in the 1970s in *Anti-Inflation*, enabling Laskin, now as Chief Justice of the Supreme Court, to revive his expansive views on POGG, although without convincing a majority of the Court to endorse his broader conception of the national concern branch.[13] A majority of the Supreme Court upheld federal legislation regulating dumping in provincial marine waters under the national concern branch in *Crown Zellerbach* a decade later, although Justice La Forest's trenchant dissent echoed in the case's aftermath as least as strongly as Justice Le Dain's majority judgment.[14] Certainly, Justice La Forest had convinced himself enough to issue a further warning on POGG in *Hydro-Québec*, noting that the national concern branch "inevitably raises profound issues respecting the federal structure of our Constitution," and should not be used when other heads of federal authority could authorize the legislation at issue.[15] Despite the attention POGG still holds as a constitutional provision of symbolic meaning, the judicial reality of POGG is of a seldom litigated constitutional power defined by a handful of decades-old Supreme Court decisions — until now.

In the reference cases involving the *GGPPA*, majorities in both the Saskatchewan and Ontario Courts of Appeal found the *GGPPA intra vires* Parliament under POGG's national concern branch, with dissenting judges in both courts finding the legislation invalid.[16] In Saskatchewan, Justices Ottenbreit and Caldwell held that the legislation imposed too great an impact on provincial jurisdiction and thus was "not reconcilable with the fundamental distribution of legislative powers under the Constitution."[17] At the Ontario Court of Appeal, Justice Huscroft's dissent equated the finding of the *GGPPA*'s validity under POGG to "a change to the constitutional order" and a distortion of "the POGG power and the limited purpose it is designed to serve."[18]

In this article, we draw inspiration from long-standing efforts in Canadian constitutional history to resolve tensions between unity and diversity in adjudicating the division of powers. We argue that there exist several means by which broadly enumerated jurisdictional powers of the federal government can be given purposive life, while also being necessarily and productively constrained in the name of balanced federalism and provincial autonomy.[19] The principles of mutual modification, subject matter precision, the double aspect doctrine, and cooperative federalism and concurrency provide important conceptual tools to serve the twin purposes of federalism: squaring unity with diversity.[20] The error in many of the cases has been to imagine that POGG, ominous and omnivorous in its capacity to eradicate provincial authority, exists in a realm beyond the existing mechanisms of constraint that work to protect and promote a balanced federalism. We share this concern for provincial jurisdiction if POGG operates on its own rules of federalism. We do not think it does.

We make the case for a POGG embedded in the dynamic web of federalism's constraints in the argument that follows. First, we draw on

recent and historic jurisprudence to characterize the conceptual errors that have bedevilled POGG, specifically in the tendency to overestimate its impact on provincial jurisdiction. We then examine the existing interpretive principles that limit POGG's ability to upend the critical balance inherent in the division of powers. Finally, we discuss how a properly empowered, calibrated, and constrained POGG relates to the *GGPPA*.

2. Competing Views of the National Concern Branch of POGG

POGG's potential to unbalance federalism has led to justified wariness about its use. In *Crown Zellerbach*, Justice La Forest warns that POGG requires "judicial strategies to define its ambit" in order to avoid an approach that will "effectively gut provincial legislative jurisdiction and sacrifice the principles of federalism enshrined in the Constitution."[21] "[T]he challenge for the courts, as in the past," Justice La Forest observes, "will be to allow the federal Parliament sufficient scope to acquit itself of its duties to deal with national and international problems while respecting the scheme of federalism provided by the Constitution."[22] That challenge has been made more difficult by confusion about how POGG impacts provincial jurisdiction.[23]

2.1 Transfer Theory

A persistent error has been to describe POGG as transferring jurisdiction from provincial to federal jurisdiction in a zero-sum exchange. We call this the transfer theory of POGG. The transfer theory posits that a finding of validity under POGG effectively amends the division of powers by transferring jurisdiction from provincial to federal authority resulting in the dramatic and permanent alteration, and unbalancing, of federal arrangements. As we will argue, there is no reason for POGG to work in such a manner given the existing mechanisms and judicial interpretations of the division of powers, nor is there any rationale to burden POGG with such powers precisely because of the importance of the balance of federalism as an animating principle upon which the division of powers rests. Nonetheless, the transfer theory appears to lesser and greater extents in a good deal of writing about POGG. Put most bluntly, in the *Ontario GGPPA Reference*, Associate Chief Justice Hoy suggests that "the national concern branch of the POGG power creates new and permanent federal jurisdiction *by taking powers away from the provinces*."[24] Justice Huscroft agrees that a judicial finding of validity under POGG represents a "transfer of power from provincial legislatures to Parliament."[25] In the *Saskatchewan GGPPA Reference*, Chief Justice Richards explains that "the problem is not only that recognizing federal jurisdiction over something as broad as GHG emissions would give Parliament wide authority in positive terms. It is that, in negative terms, provincial legislatures would be significantly denied the authority to deal with GHG emissions." In dissent, Justices Ottenbreit and Caldwell offer similar concerns, finding that "if GHG emissions are recognized as a matter of exclusive federal jurisdiction […] provincial legislatures would be significantly denied the authority to deal with GHG emissions."[26]

Some academic commentary shares the view that federal jurisdiction under POGG entails an equivalent loss of provincial jurisdiction. Joseph Castrilli characterizes POGG as "by definition … removing the area from the possibility of concurrent provincial legislation."[27] Shi-Ling Hsu and Robin Elliot interpret *Crown Zellerbach* to hold that "if federal legislation is upheld under the national concern branch of POGG the 'matter' of that legislation is foreclosed to the provincial legislatures."[28] In the context of the *GGPPA*, Sujit Choudhury argues that concerns over federal overreach into provincial jurisdiction are amplified by "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."[29] Dwight Newman similarly maintains that "something classified within the national concern branch of the POGG power is no longer subject to any provincial aspects but becomes permanently and exclusively within federal jurisdiction."[30]

The transfer theory also finds support in a number of POGG cases. In *Johannesson v Muni-*

cipality of West St Paul, the Supreme Court appears to confirm that a finding of national concern leaves no further room for provincial jurisdiction. "[O]nce the decision is made that a matter is of national interest and importance, so as to fall within the peace, order and good government clause," Justice Kellock writes,

> *the provinces cease to have any legislative jurisdiction with regard thereto and the Dominion jurisdiction is exclusive.* If jurisdiction can be said to exist in the Dominion with respect to any matter under such clause, that statement can only be made because of the fact that *such matters no longer come within the classes of subject assigned to the provinces.*[31]

Holdings in the *Reference re Regulation and Control of Radio Communication* at both the Supreme Court and Judicial Committee of the Privy Council also stress the exclusive nature of federal authority under POGG.[32]

POGG's capacity to promote federal domination by expanding Parliament's jurisdiction while shrinking the powers of the provinces equally animates the dissenting judgments in the Supreme Court's most recent trio of POGG cases: *Anti-Inflation*, *Crown Zellerbach*, and *Hydro-Québec*. Justice Beetz's trenchant dissent in *Anti-Inflation* warns of POGG's potential to "render most provincial powers nugatory."[33] For Justices La Forest, Beetz, and Lamer in *Crown Zellerbach*, allocating "environmental control to the federal sphere under its general power would effectively gut provincial legislative jurisdiction and sacrifice the principles of federalism enshrined in the Constitution."[34] In *Hydro-Québec*, Justice La Forest explains that "determining that a particular subject matter is a matter of national concern involves the consequence that the matter falls within the exclusive and paramount power of Parliament and has obvious impact on the balance of Canadian federalism."[35]

Judges are right to be worried about the balance of federalism and POGG's role within that delicate calculus. By definition, the division of powers requires interpretive techniques that sustain the integrity of both federal and provincial jurisdiction. As one of us has previously argued, "[i]nterpretations of particular heads of power… presuppose the continued and essential existence of the other heads of power in order to protect an essential balance of both federal and provincial power."[36] Perhaps needless to say, mutual respect for the jurisdictional integrity of both levels of government is essential to federalism. A valid concern for balance, however, has sometimes led to overstating how POGG interacts with provincial jurisdiction in practice. As we shall see, addition rather than subtraction better characterizes the role of the national concern branch of POGG in the division of powers.

2.2 Positive Sum Theory

What we are calling the positive sum theory of POGG recognizes that a finding of federal jurisdiction under POGG does not typically involve the *removal* of a subject from provincial jurisdiction, but rather confers federal jurisdiction over new, necessarily national, subjects or aspects of them. In most instances, the development of national dimensions to subjects arises alongside the perseverance of the local and provincial aspects of those subjects. This is true whether dealing with POGG's residual clause concerning the emergence of new subjects, the so-called gap branch, or in situations in which existing subjects develop new national aspects.[37]

POGG's emergency branch probably comes closest to reflecting the temporary transfer of jurisdictional authority from provinces to Parliament but even then falls short of truly transferring jurisdiction. Courts have consistently held that in times of crisis the federal government may validly enact legislation for the peace, order and good government of the nation. To limit the scope of such power, courts have insisted that use of the emergency branch is available only when the government has a rational basis to believe that an emergency or crisis exists, and when the legislation is temporary in nature and operative only so long as the emergency and its significant after-effects remain.[38] While the existence of an emergency is necessary, it is not sufficient in and of itself to validate federal legislation. In *Canada Temperance Federation*, Viscount Simon explains that "an emergency may be the occasion which calls for the legislation, but it is the nature of the legislation itself, and not the existence of emer-

gency, that must determine whether it is valid or not."[39] Even though an emergency may grant federal authority over subjects which would ordinarily fall within provincial authority, it is not the subject which has become suddenly federal, but rather that the emergency creates jurisdictional space for federal legislation.

Emergencies, on this view, add aspects to subjects rather than moving those subjects from provincial to federal authority. We would not imagine, for example, that an emergency which enabled federal jurisdiction over some aspects of municipal affairs would transfer jurisdiction in relation to municipalities entirely to federal authority thus rendering all existing provincial legislation constituting city governments invalid. In any event, the emergency powers have not been applied since *Anti-Inflation,* and were not invoked by the federal government in support of the *GGPPA*. Given that climate change and the solutions to it are likely to require sustained efforts to reduce emissions over decades, it is unlikely the emergency branch of POGG would support federal legislation such as the *GGPPA*.

While scholars disagree on the precise boundaries of POGG's branches (emergency, gap, and national concern), it is generally agreed that, in the absence of emergency, Parliament may legislate under POGG only if such legislation falls outside provincial jurisdiction. Section 91 of the *Constitution Act, 1867* makes clear that, in the event that truly new, distinct subjects arise, absent constitutional amendment, jurisdiction over them falls to the federal Parliament under POGG's residuary capacity. As Guy Régimbald and Dwight Newman note, jurisdiction under POGG follows when "the 'pith and substance' or 'matter' of the impugned statute is not listed or implicit in any enumerated power."[40] In a similar vein, existing subjects may develop new national aspects as the result of significantly altered social conditions. In such cases, the national concern branch of POGG grants federal jurisdiction, but only to the extent of the national aspects of those subjects. As Dale Gibson argues, "'national dimensions' are possessed by only those aspects of legislative problems which are beyond the ability of the provincial legislatures to deal because they involve either federal competence or that of another province."[41] In both cases, either because the subject as a whole did not exist at the division of powers, or because an existing subject came to take on significant and discernable national dimensions, a subject or aspect of a subject is added to federal powers, while leaving the existing jurisdiction of the provinces intact.

By definition, the new national aspects of existing subjects lie beyond the reach of provincial jurisdiction. In *Local Prohibition*, Lord Watson distinguishes between "that which is local and provincial, and therefore within the jurisdiction of the provincial legislatures and that which has ceased to be merely local or provincial, and has become a matter of national concern, in such sense as to bring it within the jurisdiction of the Parliament of Canada."[42] Accordingly, while federal authority may emerge over time as subject matters of legislation evolve, it is because a subject develops new national aspects that fall within federal authority, rather than the transfer of an entire subject matter from provincial to federal jurisdiction.

The continuation of provincial jurisdiction alongside a finding of federal legislative authority under POGG also flows from the double aspect doctrine, cooperative federalism, and the judicial preference to support "the ordinary operation of statutes enacted by both levels of government."[43] In these respects, earlier jurisprudence from an era more strongly committed to maintaining exclusivity and jurisdictional line drawing should be read with some caution. The modern trend, in which a meaningful role for POGG can comfortably fit, is to favour legislative overlap over jurisdictional displacement. As *Multiple Access* demonstrates, the federal jurisdiction over the incorporation of companies "with other than provincial objects" under POGG can live in parallel with provincial jurisdiction over incorporation of companies with provincial objects, and continuing provincial authority to regulate securities as a matter of property and civil rights.[44] Gibson argues that federal jurisdiction under POGG entails legislative authority for "no more federal legislation than is necessary to fill the gap in provincial powers."[45] For that reason,

the finding of federal jurisdiction under POGG over the national capital region in *Munro* only conveyed federal jurisdiction in relation to the narrow national features of the national capital region, not plenary power over all municipal matters involving Ottawa and its environs.[46] Those issues, of course, continue to fall under provincial authority.[47] And rightly so.

Proponents of the transfer theory point to cases involving aeronautics and broadcasting to claim that federal validity under POGG leaves no room for provincial jurisdiction.[48] One might begin by questioning how much provincial jurisdiction could have existed over such subjects in the first place given the necessarily national and international characteristics of those subjects. POGG, in other words, could not have taken away that which was never there to begin with. In any event, we contend that POGG's scope is always bounded by the nature of the subject itself.

The jurisdictional reach of aeronautics is defined by the nature and particular characteristics of the subject: federal legislative authority exists over all aspects of aeronautics, not because POGG powers are always inherently broad and all encompassing, but because the safe regulation of air travel *requires* a unified national approach over all aspects of the subject of aeronautics. Most subjects which develop national dimensions are not so unified. There is no reason that the national aspects of subjects concerning environmental regulation, language rights, or companies law need to completely subsume or displace the provincial aspects of those same subjects.[49] In POGG, as in all federalism disputes, the task for courts is to ensure continued integrity of the heads of power of both levels of government by defining subject matters with practical precision and due respect for the impact on Parliament and provinces alike. Happily, the same techniques that assist in pursuit of that balance in the interaction of other heads of power, apply to POGG as well.

3. Constraining federal power

Ensuring the productive exercise of federal powers and the meaningful preservation of provincial jurisdiction equally arises in matters falling under other federal powers, especially the trade and commerce power in Section 91(2) of the *Constitution Act, 1867*, but also with respect to criminal law, and shipping and navigation.[50] From the outset, courts have limited the potentially pervasive federal authority of the trade and commerce power of Section 91(2) to avoid what a literal reading of those words might have entailed, by interpreting the scope of federal jurisdiction alongside provincial heads of power (the doctrine of mutual modification), protecting the continuation of provincial jurisdiction over plural subjects (cooperative federalism, concurrency, and the double aspect doctrine), and ensuring the operation of provincial jurisdiction with a restrained approach to the paramountcy doctrine. There is no reason to do differently in cases involving POGG. In fact, much of the case law with respect to POGG shares common elements with trade and commerce cases, at least insofar as POGG has been applied to economic and environmental policy problems.

3.1 Mutual Modification and Narrowing the Subject Matter

It did not take long after Confederation for courts to recognize that the division of powers only made sense when the specifically enumerated powers were read in relation to one another. In *Parsons*, the Judicial Committee of the Privy Council insisted on a definition of the federal power over trade and commerce in Section 91(2), constrained by provincial powers over property and civil rights in Section 92(13) of the *Constitution Act, 1867*.[51] As a result, courts have confined the trade and commerce power to the national aspects of trade; that is, situations in which provinces are constitutionally incapable of action.[52] To determine the necessarily national aspects of the regulation of trade and commerce, the case law has developed tests to determine whether the dominant purpose of the federal legislation at issue relates to interprovincial or international trade, or the general regulation of trade.

Under this more amorphous latter branch, the jurisprudence demands necessarily national economic regulation typified by economic matters that transcend provincial borders *and* require for their resolution national legislative action.[53] In the context of complex legislative schemes, the Supreme Court of Canada in *Re Securities Act* further reminds that "Parliament cannot regulate the whole of the securities system simply because aspects of it have a national dimension."[54]

The constraining features of the national concern branch of POGG work in a similar fashion. Interpretations of the meaning of POGG, like the broad language elsewhere in the division of powers, require mutual modification with the enumerated heads of provincial power. Pointing to Parliament's expansive powers under the declaratory power in Section 92(10)(c) of the *Constitution Act, 1867*, Chief Justice Lamer argues that Parliament's jurisdiction "must be limited so as to respect the powers of the provincial legislatures while remaining consistent with the appropriate recognition of the federal interests involved."[55] The POGG power, he observes, "is similarly subject to balancing federal principles, limiting in this case the POGG jurisdiction to the national concern aspects of atomic energy."[56] As Gibson puts it, "the language of Sections 91 and 92 simply does not permit [POGG] to be given priority over the enumerated provincial powers in any circumstances."[57] And, as in the limits imposed on the boundaries of trade and commerce, what distinguishes federal from provincial jurisdiction are subjects or aspects of them that provinces are constitutionally incapable of effectively dealing with as a result of the nature and characteristics of those subjects.

In applying the gap branch of the POGG power, such precision is synonymous with identifying the extent of the gap. In *Anti-Inflation*, for example, Justice Beetz writes that aeronautics, the national capital region, and radio and telecommunications were all "clear instances of distinct subject matters which do not fall within any of the enumerated heads of Section 92 and which, by nature, are of national concern."[58] The same rationale is present in *Interprovincial Co-operatives* where the Court held that "general legislative authority in respect of all that is not within the provincial field is federal," and thus that jurisdiction over inter-provincial water pollution fell within the federal authority.[59] Highlighting the importance of narrowing the subject with precision in *Interprovincial Co-operatives*, Katherine Swinton notes that "the logical implication of allowing national action [on inter-provincial pollution] would be to fill a legal gap, not to permit regulation of water pollution in general."[60]

If the scope of the head of power under the national concern branch of POGG is limited to truly national subjects, so must the subject matters, or dominant purpose, of any legislation authorized by it. In *Crown Zellerbach*, the Court lays out the test to identify federal subject matters capable of residing under POGG. Justice LeDain, writing for the majority, holds that "[f]or a matter to qualify as a matter of national concern [either for new or existing matters], it must have a *singleness, distinctiveness and indivisibility* that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the [*Constitution Act, 1867*]."[61] Overly broad or imprecise subject matters — environmental protection, health, economic productivity, or innovation, for example — cannot find their validity under POGG because such matters necessarily contain within them important areas of provincial jurisdiction. Accordingly, *Crown Zellerbach* rightly requires that subject matters within POGG satisfy the *provincial inability* test, specifically focusing on "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."[62] Justice Le Dain quotes Gibson in holding that the provincial inability test ensures "a limited or qualified application of federal jurisdiction" and finds it does so by "assisting in the determination of whether a matter has the requisite singleness or indivisibility from a functional as well as a conceptual point of view."[63] Like the factors to determine necessarily national economic regulation under Section 91(2), under POGG the provincial inability test narrows the permissible federal

legislative reach by requiring the presence of not merely national application and aspiration, but *substantive rationale* underpinning the need for a national regulatory approach.[64]

3.2 Cooperative Federalism, Double Aspect, and Paramountcy

Although not a substantive doctrine capable of overriding the text of the Constitution, the modern doctrine of cooperative federalism nonetheless urges courts to adopt constitutional interpretations which "favour, where possible, the ordinary operation of statutes enacted by *both* levels of government."[65] The first step in doing so is recognition, in the famous phrasing of Lord Fitzgerald in *Hodge v The Queen*, that "subjects which in one aspect and for one purpose fall within Section 92, may in another aspect and for another purpose fall within Section 91."[66] Implicit in the double aspect doctrine are two important propositions for federalism. First, as a descriptive matter, subjects are clearly capable of plurality, and as composites of multiple aspects, some of those aspects may fall within federal or provincial jurisdiction. Second is the normative suggestion that courts should allow different levels of government to pursue their policy objectives so long as they are legislating in relation to an aspect of a subject properly rooted within one of their heads of power. Such an approach can often result in the concurrent overlap of legislative regimes, a problem only if one is committed to an unrealistic conception of the indivisibility of subjects and the watertight constitutional divisions between them. Contemporary federalism, Justices Binnie and LeBel note, by contrast, "recognize[s] that overlapping powers are unavoidable."[67] In a diverse federation in which local and national aspects of subjects often coincide, we should think of overlapping legislative powers as more than simply unavoidable; they are the best way to ensure full democratic participation by the different national and provincial constituencies with a stake in the subject matter at issue.[68]

Disagreement remains as to whether the double aspect doctrine applies in cases where federal legislation is sustained under the national concern branch of POGG. Recall that proponents of the transfer theory posit that once a subject falls under the national concern branch, it "is no longer subject to any provincial aspects but becomes permanently and exclusively within federal jurisdiction."[69] As discussed, although some national subjects require a broad scope of legislative unity in order to regulate them effectively such as aeronautics, radio, and telecommunications, a similar breadth of exclusivity is not true of most subjects. The *Crown Zellerbach* test, properly applied, reserves for Parliament only those *aspects* of a subject beyond provincial jurisdiction. More importantly, there is no reason to suspect that the double aspect doctrine disappears under POGG. Once a sufficiently narrow federal subject matter has been identified, the double aspect doctrine continues to preserve the provincial ability to legislate all aspects falling under provincial heads of power. In *Multiple Access*, for example, POGG jurisdiction over the national aspects of the regulation of companies did not impede the ongoing validity of provincial law in relation to provincial aspects of incorporation.[70] Similarly, a finding that the regulation of the interprovincial and international aspects of GHG emissions falls within the national concern branch of POGG has no impact on the scope of provincial jurisdiction or the validity of provincial legislation enacted under Sections 92 or 92A of the *Constitution Act, 1867*.[71]

If overlapping powers are unavoidable, so too will be occasional conflicts between the legislative regimes resulting from them. In this respect, the balance of federalism promoted by mutual modification, cooperative federalism, and the double aspect doctrine has the potential to be undone by interpretations of the paramountcy doctrine that too readily allow federal law to override the operation of valid provincial legislation.[72] Recognizing this risk, the Supreme Court articulates a necessarily restrained approach to paramountcy, one premised on a presumption of concurrency and a high threshold required to demonstrate "true incompatibility".[73] Accordingly, the Supreme Court has sustained the operation of concurrent federal and provincial legislation in cases of overlap and duplication, and where legislative purposes align notwithstanding substan-

tive differences between the valid regimes.[74] The judicial commitment to a restrained approach to paramountcy is especially important in cases where the federal government gains jurisdiction over national aspects of subjects under POGG in order to ensure the continued operation of provincial legislation concerning the provincial aspects of those subjects.

These presumptions will not be sufficient to protect provinces if not also paired with a very restrictive approach to implicit or explicit attempts by federal legislation to cover the field. As William Lederman warns, the doctrine of paramountcy contains the possibility that "federal legislation may carry the express or tacit implication that there shall not be any other legislation on the concurrent subject by a province."[75] Courts must continue to limit the unitary implications of such an approach by presuming, as a matter of the mutual respect owed to each jurisdiction underpinning federalism itself, that federal legislation intends to coexist alongside equally valid provincial laws. Attempts by Parliament to displace that presumption should be strictly construed and narrowly interpreted to allow for the widest operation of provincial law possible in the circumstances. True operational conflicts should remain limited and the exception to the concurrent operation of laws by both levels of government. Here too, POGG presents the same challenges but also the same solutions to preserving the balance of federalism structuring the interaction between the heads of federal and provincial authority.

4. POGG and the *GGPPA*

The looming decision on the constitutionality of the *GGPPA* enables the Supreme Court to return to POGG in a case of unquestioned national attention and importance. The provinces challenging the validity of the law — Saskatchewan, Ontario, and Alberta — express united concern that the use of POGG in this instance imperils provincial jurisdiction over critical aspects of industry, economic development, transportation, utilities, manufacturing, and natural resources.[76] In the *Saskatchewan GGPPA Reference*, Chief Justice Richards was clearly alive to such concerns: in writing that "if GHG emissions are recognized as a matter of exclusive federal jurisdiction, any provincial law would be unconstitutional if, in pith and substance, it was in relation to such emissions."[77] The balance of federalism, so it would seem, hangs in the balance.

The balance of federalism, we contend, remains so long as POGG is interpreted in light of the positive sum theory and the necessary constraints outlined above. To begin, we reject suggestions that a finding of validity for the *GGPPA* under POGG removes any jurisdiction from the provincial heads of power — as in a finding of validity under any other head of federal authority listed in Section 91 of the *Constitution Act, 1867*. POGG simply does not work that way. If the federal government has jurisdiction over aspects of the regulation of GHG emissions it is only because of the emergence of necessarily national aspects of that subject. If so, federal jurisdiction only exists to the extent of those national aspects. Nothing has been transferred to federal power because no jurisdictional authority over those national aspects resided in provincial authority in the first place. The climate change crisis undoubtedly alters the context of GHG emissions in Canada, adding new national and international dimensions to their existence not previously recognized. If federal jurisdiction has emerged in relation to them, provincial jurisdiction has also been maintained. To the extent that the regulation of GHGs touches upon a host of existing provincial heads of power, provincial laws — both existing and future — remain valid in relation to the provincial aspects of GHGs. In these ways, the positive sum theory of POGG aligns with the doctrine of mutual modification and the demand that the jurisdictional scope of the heads of power of both levels of government can only be determined when read in balance with one another.

Against this background, we turn to characterizing the subject matter of the *GGPPA* with the necessary precision required under POGG. In keeping with the preference for concrete particulars in common law reasoning, division of powers analysis does not ask courts to abstractly determine the scope of heads of power for all

purposes and then to inquire about the placement of laws within them. The task, rather, is to determine the dominant purpose of specific laws and then to see if such a purpose can fit within the authority granted by relevant heads of power. A judicial finding of validity in relation to a particular law is always just simply that; it does not purport to define the scope of the head of power in relation to other laws. As Justice Cartwright advised in *Munro* with respect to division of powers cases, the court should "confine itself to the precise question raised in the proceeding which is before it."[78] What is before the courts in the present dispute is federal legislation that prices GHG emissions in order to reduce them, with the potential for prices to differ across provinces, fuels, and facilities.

Part I of the *GGPPA* imposes a fuel charge on the consumption of transportation and heating fuels; Part II contains a separate emissions pricing system for large facilities, including an exemption of these facilities from Part I of the Act where Part II applies.[79] This so-called *output-based* pricing system applies only to facilities with high levels of annual emissions, and allows for such facilities a lower average cost of GHG emissions, while still providing them with a reward for each tonne of emissions reduced.[80] Part I of *GGPPA* applies only in provinces listed in a Schedule to the Act and the decision to list a province is at the directed discretion of the Governor in Council.[81] In making a determination that the federal GHG emissions pricing regime should apply, the Governor in Council must consider, as the primary factor, the stringency of the GHG emissions pricing system in place in the province in question and, implicitly, whether more stringent pricing is required in that province to ensure comparable stringency with policies in other provinces and that national objectives are met.[82] The Governor in Council has similar discretion over Part II of the *GGPPA*: it applies only in provinces listed in a Schedule to the Act and the decision to list a province is at the discretion of the Governor in Council.[83] As with Part I, the Governor in Council must consider, as the primary factor, the stringency of the GHG emissions pricing system in place in the province in question.[84]

In both the *Saskatchewan* and *Ontario GGPPA Reference* cases, judges divided on the dominant purpose of the *GGPPA*'s interlocking parts. In Saskatchewan, the majority held that "the pith and substance of the *GGPPA* is about establishing minimum national standards of price stringency for GHG emissions," while the dissent argued that the purpose of Part I of the *GGPPA* was to enact a tax, Part II was a scheme to regulate GHG emissions.[85] In Ontario, the majority held that the *GGPPA*'s main thrust was "establishing minimum national standards to reduce GHG emissions," while Associate Chief Justice Hoy's concurring opinion described the *GGPPA*, in slightly narrower fashion, as "establishing minimum national GHG emissions pricing standards to reduce GHG emissions."[86] As in Saskatchewan, Justice Huscroft's dissent held that the matter of the *GGPPA* was the broad regulation of GHG emissions.[87]

As always, determining the pith and substance plays a critical role in the outcome and tenor of the constitutional analysis which follows. In these respects, characterizing the main purpose of the Act too broadly — as the dissenting court of appeal judges were inclined to do — runs two risks that can distort the question of its validity and assessments of the nature of POGG. Defining the federal law at high levels of abstraction — the regulation of GHG emissions — ends, in effect, the classification analysis before it begins since POGG could not, and certainly should not, authorize federal jurisdiction over amorphous subjects containing an abundance of provincial aspects of authority. As we have argued, constraining POGG to discernable limits in keeping with the balance of federalism requires ensuring that federal subject matters are not described at a level of generality that are either obviously self-defeating in the classification analysis or would suggest the possibility of federal jurisdiction over a boundless field of provincial activity. The heart of Saskatchewan's concern, Chief Justice Richards notes,

> was that the production of GHGs is so intimately and broadly embedded in every aspect of intra-provincial life that a general authority in relation to GHG emissions would allow Parliament's legislative reach to extend

> very substantially into traditionally provincial affairs. […] Given the absolutely pervasive nature of GHG emissions, *the boundaries of possible regulation in respect of such emissions are limited only by the imagination*.[88]

Avoiding that scenario requires adherence to the classic techniques of the pith and substance analysis: combining purpose *and* legal mechanics in order to realistically capture what the law is truly about. However the *GGPPA* is precisely characterized, it is clear that the purpose and workings of the Act are directed at the national *reduction* of GHG emissions by the imposition of complementary federal GHG emissions prices where provincial policies fall below a required level of stringency.

An important feature of the GGPPA relevant to its narrow characterization is its capacity to exist alongside, rather than to displace, provincial legislation. The legal and practical effects of the interactions between the federal and provincial regimes matter for the purposes of pith and substance and, ultimately, validity as demonstrated in the contrasting fates of the federal legislation considered in *Re Securities Act* and *Pan Canadian Securities*.[89] In *Re Securities Act*, the Court held that legislation which proposed "to regulate, on an exclusive basis, all aspects of securities trading in Canada, including the trades and occupations related to securities in each of the provinces" interfered too deeply into provincial jurisdiction.[90] The *GGPPA* does not entail the "wholesale takeover" of all aspects of the "day-to-day regulation" of long-standing areas of provincial responsibility.[91] The *GGPPA* will most often work in concert with valid and operative provincial regimes. Unlike the impugned legislation in *Re Securities Act*, there is no reasonable expectation that the *GGPPA* would lead to provincial governments abandoning their responsibilities to their local publics in addressing climate change in general, or GHG emissions in particular.

Indeed, the opposite has already occurred. In Alberta, provincial policies in relation to GHG emissions from two successive governments remain operative.[92] So does similarly-aimed provincial legislation in British Columbia and Quebec.[93] The *GGPPA* allows the federal government to impose an incremental regulatory charge on GHG emissions in provinces, or in specific economic sectors within provinces, where existing provincial policies are deemed insufficiently stringent by cabinet.[94] As in the legislation considered in *Pan-Canadian Securities*, the *GGPPA* also effectively serves as a model policy to which provinces can voluntarily subscribe. While the legislation reviewed in *Pan-Canadian Securities* did not include a backstop provision by which the federal government could impose policies in the manner of the *GGPPA*, the *GGPPA* does not impose such policies by default and provinces can still legislate their own GHG policy, with federal prices added to the regime when the situation demands.

Can such legislation fall under the national concern branch of POGG? We argue that it can. Courts have consistently held that federal jurisdiction resides in discrete aspects of subjects when a province is or provinces are incapable of addressing the dimensions of that subject, the matter has material extra-provincial or international aspects, and the ability of provinces to legislate with respect to provincial aspects of the subject matter is preserved. The *GGPPA*, like valid federal legislation respecting the regulation of companies with national objects, marine and freshwater pollution, competition, and systemic risk in the trade of securities, meets these criteria.[95] We agree with the Chief Justice of Ontario that "[w]hile a province can pass laws in relation to GHGs emitted within its own boundaries, its laws cannot affect GHGs emitted by polluters in other provinces — emissions that cause climate change across all provinces and territories."[96] While reductions in emissions in individual provinces may reduce Canada's overall net emissions, no individual province can impose policies that will constrain emissions elsewhere in Canada; nor could provinces acting alone or together ensure the coordination required to meet international targets and obligations.[97]

The lowering of emissions in one province may be more than offset, for example, by the rise of emissions in another. In these respects, the *GGPPA* meaningfully parallels valid federal

competition policies. In *General Motors,* Chief Justice Dickson held that competition "is not an issue of purely local concern but one of crucial importance for the national economy." More importantly, he noted that the *Combines Investigation Act* was a "genre of legislation that could not practically or constitutionally be enacted by a provincial government" since the negative impacts of anti-competitive practices had consequences for the national economy, and required national coordination to regulate them effectively.[98] The Supreme Court found a similar rationale underlying the validity of the national regulation of systemic risk in the trade of securities.[99] So it is with GHGs: lax emissions policies in one province or sector will place a greater burden on other provinces and/or sectors with respect to meeting national emissions reduction commitments.[100]

In addition, GHG emissions have clear extra-provincial and international effects similar to pollution in interprovincial rivers in *Interprovincial Co-operatives*, or the pollution of marine waters by the dumping of substances in *Crown Zellerbach*. "[T]he principal effect of GHG emissions — climate change," Chief Justice of Ontario Strathy points out, "often bears no relationship to the location of the source of the emissions."[101] Rather, because GHGs are so pervasive in all of our economic activities, they are similar to pollution, labour relations or language rights, subjects capable of subdivision into many aspects over which different levels of government may act when anchored to appropriate heads of power.[102]

As we have argued, even with a finding of federal jurisdiction over the necessarily national aspects of regulation to reduce GHG emissions, provincial jurisdiction over the provincial aspects of the subject persist by virtue of the double aspect doctrine and the imperatives of cooperative federalism. Any federal grant of authority under POGG would not, indeed could not, impact the validity of provincial regulation of aspects of GHG emissions falling within the ample provincial jurisdiction provided under property and civil rights, matters of a local and private nature, raising of revenues, or the management of electricity and natural resources. And, given the nature of the *GGPPA*, and the restrained approach to paramountcy, provincial regimes touching upon GHG emissions will most often remain both valid *and* operative. The *GGPPA* contains no explicit or implicit exclusion of provincial legislation, no attempts to cover the field, and ample provision for coordination with provincial policies. There is no reason to think that compliance with the *GGPPA* would be inconsistent with compliance with any existing provincial GHG policies for the purposes of triggering the paramountcy doctrine.[103] Alongside the *GGPPA*, provinces will continue to take action on GHGs in line with local political choices and economic considerations. British Columbia's *Carbon Tax Act*, for example, would remain a valid exercise of provincial jurisdiction to regulate provincial emissions and/or to raise revenue for provincial purposes.[104] Similarly, Alberta's GHG emissions pricing policies would continue to be sustained either as an exercise of provincial powers over property and civil rights, the management of natural resources, or matters of a local and private nature.[105]

The *GGPPA* also leaves discretion to the individual provinces to legislate more stringent policies than would be mandated federally, as is presently the case in British Columbia, or the discretion to voluntarily opt-in to the federal policy.[106] The *GGPPA* does not exclude or invalidate less stringent provincial policies: federal GHG emissions prices supplement less stringent provincial policies, acting solely to *top up* provincial prices or other policies in order to achieve a coordinated level of stringency.[107] The *GGPPA* stipulates explicitly that the Governor in Council must take into account extant provincial policies in setting any federal GHG emissions price.

This is not to say that concerns regarding the addition of federal jurisdictional powers are insignificant, as in any case involving validity under POGG. Even if a valid *GGPPA* under POGG would not remove provincial jurisdiction or render invalid existing provincial legislation, it would allow federal legislation to affect aspects of subjects traditionally in the exclusive domain of provincial governments. The *GGPPA* allows for the federal government to impose GHG

emissions pricing in specific provinces and does not require that the rates charged be uniform either by province, industry, or fuel.[108] Federal GHG emissions pricing applied within one province or to a particular fuel within that province could have significant impacts on the viability of emissions-intensive industries. A high average GHG emissions price applied to the oil sands in Alberta for example, could impact natural resource extraction falling within Section 92A of the *Constitution Act, 1867*.[109]

The potential to impact areas of provincial jurisdiction is not, however, unique to the *GGPPA* or federal jurisdiction over the national aspects of GHG reduction. Federal laws often carry local impacts, and not everyone will agree with the distribution of costs and benefits that constitutionally valid federal policies entail. The federal authority under the *Canadian Environmental Protection Act*, upheld in *Hydro-Québec*, allows the federal government to significantly affect aspects of resource development and electricity production through the regulation of toxic emissions including GHGs.[110] Federal authority over environmental assessment, originally clarified in *Oldman River*, extends to federal assessments over resource development and electricity-generating assets.[111] Federal authority of interprovincial works and undertakings affects oil and gas pipelines and power transmission assets which, in turn, affect provincial economies, populations, and resources falling within provincial jurisdiction.[112] These effects are important, but do not imperil the validity of legislation. Writing in *Munro,* Justice Cartwright clarified that "once it has been determined that the matter in relation to which the Act is passed is one which falls within the power of Parliament it is no objection to its validity that its operation will affect civil rights in the provinces."[113] That case involved the expropriation of property related to enhancing the National Capital Region, but the rationale applies to effects on other aspects of provincial jurisdiction as well. Political questions aside, questions of constitutional validity matter in protecting the balance of federalism essential to Canada's constitutional order and well-being. That is not a reason to wish POGG out of textual existence, or to burden it with extravagant powers it does not possess, but it is a reason to calibrate its capacities deliberately, and to assess legislation purporting to fall within it rigorously and cautiously. The *GGPPA* provides that opportunity.

5. Conclusion

This article encourages us to see past the tendency in Canadian constitutional law to treat POGG as an outlier, a head of power too sweeping in scope and too disruptive of balance to meaningfully integrate into Canadian federalism analysis. Properly and purposively interpreted, POGG is neither. The constraining features of POGG, we argue, are those that have always worked to maintain the balance of Canadian federalism, and the integrity of the jurisdictions of both levels of government. Some heads of power are broad, others are narrow. In both cases, their meaning can only be understood as a matter of mutual modification and respect for the underlying principles of federalism. No interpretation of any head of power can exist in isolation from the others. Since POGG is meant to exist alongside provincial jurisdiction, by definition POGG cannot be interpreted in a manner that would eradicate the authority of provinces. That said, POGG has an important role to play in the division of powers in ensuring that completely new subjects do not fall beyond legislative reach, that the national government can respond to national emergencies, and that the subjects which develop national aspects lying beyond provincial capacity do not fall between jurisdictional cracks. In none of these instances does jurisdiction transfer from provincial to federal authority. New subjects arise and recede, take on or shed new aspects. That is a fact of life. POGG adds, rather than subtracts, these subjects or aspects of subjects to the division of powers and, in so doing, enables limited federal jurisdiction while maintaining ongoing provincial authority.

POGG can only maintain the balance of federalism when constrained by the existing principles of federalism: the double aspect doctrine, cooperative federalism, and a restrained paramountcy. The importance of seeing double in matters of Canadian constitutional law, we con-

tend, entails recognizing the capacity of subjects to contain multiple aspects, some of which will fall within either federal or provincial jurisdiction. In a world in which local issues can take on national and international dimensions, and in which national and international policies play out with different local impacts, there are strong reasons to promote democratic engagement, and capacities to legislate, at both national and provincial levels. There is no reason to imagine that jurisdiction over the national aspects of subjects eradicates the equally important provincial jurisdiction over local aspects of that same subject. So long as courts continue to enable the concurrent application of legislation by both levels of government, POGG takes its appropriate place in a federalism that holds in tension the productive balance between unity and diversity.

We have also claimed that POGG is a power, like other heads of federal and provincial jurisdiction, better deployed in the concrete practice of assessing the validity of specific laws, rather than in an abstract exercise of philosophical constitutional boundary drawing. There is no need to decide, in any particular case, what POGG must mean in all cases. Nonetheless, courts must continue to articulate its characteristics as a head of power and the nature of laws capable of residing within it in order to maintain balance with provincial authority. In this respect, we advocate continuing focus on the provincial inability test as the best way to ensure POGG remains restricted to truly national aspects of subjects residing beyond full provincial capacities. In our view, the *GGPPA* meets that standard. If the reduction of national GHG emissions constitutes a valid federal subject under the national concern branch of POGG, we see no reason under the double aspect doctrine and cooperative federalism why provinces would lose any existing provincial jurisdiction. Further, a restrained approach to paramountcy, and the mechanics of the *GGPPA* itself, suggest that provincial and federal legislation will work concurrently on tackling GHGs with a range of policy approaches. That seems to us entirely appropriate given the nature of the climate change crisis facing all of us. In the legislative challenge of our time, we believe Canada's Constitution is up to the task.

Endnotes

1 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985 [*Constitution Act, 1867*].

2 *Greenhouse Gas Pollution Pricing Act, SC 2018, c 12, s 186* [*GGPPA*]; *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544 [*Ontario GGPPA Reference*]; *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40 [*Saskatchewan GGPPA Reference*]; *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ABCA 349 [*Alberta GGPPA Reference*].

3 As Chief Justice Lamer reminded in *R v Hydro-Québec*, [1997] 3 SCR 213 [*Hydro-Québec*], "the environment is a subject matter of shared jurisdiction, that is, that the Constitution does not assign it exclusively to either the provinces or Parliament" (at 255). Similar conclusions are reached in *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3 [*Oldman River*] at 63.

4 For summaries of federal authority to enact GHG emissions policies see Nathalie J Chalifour, "Canadian Climate Federalism: Parliament's Ample Constitutional Authority to Legislate GHG Emissions through Regulations, a National Cap and Trade Program, or a National Carbon Tax" (2016) 36 NJCL 331; see also Peter W Hogg, "Constitutional Authority Over Greenhouse Gas Emissions" (2009) 46:2 Alta L Rev 507.

5 See Hakeem O Yusuf, *Colonial and Post-Colonial Constitutionalism in the Commonwealth: Peace, Order and Good Government* (Abingdon, UK: Routledge, 2014) at 39-41.

6 *Russell v The Queen*, [1882] 7 AC 829 (PC) [*Russell*].

7 *Attorney General for Ontario v Attorney General for the Dominion*, [1896] AC 348 (PC) at 360-1 [*Local Prohibition*].

8 *Attorney-General of Canada v Attorney-General of Alberta*, [1922] 6 DLR 5423, 1 AC 191 (PC) [*Board of Commerce*]; *Fort Frances Pulp and Paper Co v Manitoba Free Press Co*, [1923] 3 DLR 629, AC 695 (PC) [*Fort Frances*]; *Toronto Electric Commissioners v Snider*, [1925] 2 DLR 5, AC 396 (PC) [*Snider*].

9 Vincent MacDonald, "The British North America Act: Past and Future" (1937) 15:6 Can Bar Rev 393 at 398-9; See generally Richard Risk, "The Scholars and the Constitution: P.O.G.G. and the Privy Council" (1995) 23 Man LJ 496 at 501.

10 *Attorney General of Canada v Attorney General of Ontario*, [1932] 1 DLR 58, AC 54 (PC) [*re Aeronautics*]; *Reference re Regulation and Control*

of Radio Communication in Canada, [1932] 2 DLR 81, AC 304 (PC) [*re Radio Communication*].

11 Risk, *supra* note 9; See Eric M Adams, "Canada's "Newer Constitutional Law" and the Idea of Constitutional Rights" (2006) 51 McGill LJ 435. Other scholars from Quebec worried about maintaining provincial constitutional autonomy in the face of pressures to expand federal jurisdictional power. See Léo Pelland, "Problèmes de droit constitutionnel" (1937-38) 16 R du D 86.

12 Bora Laskin, "'Peace, Order and Good Government' Re-Examined" (1947) 25:10 Can Bar Rev 34.

13 *Reference Re Anti-Inflation Act*, [1976] 2 SCR 373, 68 DLR (3d) 452 [*Anti-Inflation*]. A majority of the Court did, however, uphold wide-ranging federal legislation to combat inflation as a valid use of POGG's emergency branch.

14 *R v Crown Zellerbach Canada Ltd*, [1988] 1 SCR 401, 49 DLR (4th) 161 [*Crown Zellerbach*].

15 *Hydro-Québec*, *supra* note 3 at 285.

16 *Saskatchewan GGPPA Reference*, *supra* note 2; *Ontario GGPPA Reference*, *supra* note 2.

17 *Saskatchewan GGPPA Reference*, *supra* note 2 at para 474.

18 *Ontario GGPPA Reference*, *supra* note 2 at paras 195-7.

19 For the larger argument on constitutional interpretation as a matter of text, purpose, and context see Eric M. Adams, "Canadian Constitutional Interpretation" in Cameron Hutchison, *The Fundamentals of Statutory Interpretation* (Toronto: LexisNexis, 2018).

20 *Reference re Secession of Quebec*, [1998] 2 SCR 217, 161 DLR (4th) 385 at para 43.

21 *Crown Zellerbach*, *supra* note 14 at 447.

22 *Ibid* at 448.

23 Sujit Choudhry, "Recasting Social Canada: A Reconsideration of Federal Jurisdiction over Social Policy" (2002) 52:3 UTLJ 163. Pointing to conflicting interpretations of *Crown Zellerbach*, Choudry writes: "Before the judgment, the operative legal regime for marine pollution in provincial waters was provincial. After the judgment, the status of provincial jurisdiction is unclear. On one reading, *Crown Zellerbach* vested exclusive jurisdiction over marine pollution with the federal government. If that is true, then the impact on provincial jurisdiction was dramatic. But on another reading, pollution in provincial marine waters is still a provincial subject-matter, such that there is concurrent jurisdiction" (at 230).

24 *Ontario GGPPA Reference*, *supra* note 2 at para 178 [emphasis added].

25 *Ibid* at para 203.

26 *Saskatchewan GGPPA Reference*, *supra* note 2 at paras 131-2.

27 Joseph E Castrilli, "Legal Authority for Emissions Trading in Canada" in Elizabeth Atkinson, ed, *The Legislative Authority to Implement a Domestic Emissions Trading System* (Ottawa: National Roundtable on the Environment and the Economy, 1999) at 11.

28 Shi-Ling Hsu & Robin Elliot, "Regulating Greenhouse Gases in Canada: Constitutional and Policy Dimensions" (2009) 54:3 McGill LJ 463, n 134, citing *Crown Zellerbach, supra* note 14 at 433.

29 Sujit Choudhury, "Constitutional Law and the Politics of Carbon Pricing in Canada" (November 2019), online: *IRPP* <https://perma.cc/ZN6M-GT7X> at 15-6.

30 Dwight Newman, "Federalism, Subsidiarity, and Carbon Taxes" (2019) 82:2 Sask L Rev 187 at 196.

31 *Johannesson v Municipality of West St Paul* (1951), [1952] 1 SCR 292 at 312, 4 DLR 609 [*Johannesson*] [emphasis added]. In a concurring opinion, Justice Estey notes that "[t]he Judicial Committee having decided that legislation in relation to aeronautics is within the exclusive jurisdiction of the Dominion, it follows that the province cannot legislate in relation thereto, whether the precise subject matter of the provincial legislation has, or has not already been covered by the Dominion legislation" (at 318). Justice Locke similarly finds that the "whole subject of aeronautics lies within the field assigned to Parliament as a matter affecting the peace, order and good government of Canada," and that legislation which "clearly trespasses upon that field … must be declared ultra vires the province" (at 328-9).

32 *re Radio Communication*, *supra* note 10; Alone in dissent in *Reference re Regulation and Control of Radio Communication*, [1931] SCR 541, 4 DLR 865 [*re Radio Communication (SCC)*], Justice Rinfret would have held that Parliament did not have plenary and exclusive jurisdiction over all aspects of radio and telecommunications (at 566).

33 *Anti-Inflation*, *supra* note 13 at 458.

34 *Crown Zellerbach*, *supra* note 14 at 455.

35 *Hydro-Québec*, *supra* note 3 at 288.

36 Eric M Adams, "Judging the Limits of Cooperative Federalism" (2016) 76 SCLR 26 at 31.

37 There is no consistent delineation between the so-called gap, residual, and national concern branches of POGG. In his recent commentary on the *GGPPA*, Newman, *supra* note 30, goes so far as to argue that "the 'national concern' branch was effectively created out of whole cloth to meet

purported needs in a particular case, there are real arguments for considering its legal status suspect" (at n 47). Newman also claims that "the case law does not support the three-branch description of it often cheerily offered by those who would centralize the federation" (at n 26).

38 *Anti-Inflation*, *supra* note 13; See also *Crown Zellerbach*, *supra* note 14 at 432; *Fort Frances*, *supra* note 8.

39 *Attorney General of Ontario v Canada Temperance Federation*, [1946] 2 DLR 1, AC 193 (PC) [*Canada Temperance Federation*].

40 Guy Régimbald & Dwight Newman, *The Law of the Canadian Constitution*, 2nd ed (Toronto: LexisNexis Canada, 2017), s 6.13. Régimbald and Newman cite the finding in *R v Hauser*, [1979] 1 SCR 984, that narcotics control represents a genuinely new matter, and thus the *Narcotic Control Act* was properly the domain of Parliament under POGG.

41 Dale Gibson, "Measuring National Dimensions" (1976) 7:1 Man LJ 15 at 34-5, as cited by Justice Le Dain in *Crown Zellerbach, supra* note 14 at 433.

42 *Local Prohibition*, *supra* note 7 at 361.

43 *Canadian Western Bank v Alberta*, 2007 SCC 22 at para 37 [*Canadian Western Bank*].

44 *Multiple Access Ltd v McCutcheon*, [1982] 2 SCR 161 at para 21, 138 DLR (3d) 1 [*Multiple Access*]; See also Lord Simon's recognition in *Canada Temperance Federation*, *supra* note 39, of continuing "room for enactments by a provincial legislature dealing with an aspect of the subject in so far as it specially affects that province," despite the presence of federal jurisdiction under POGG (at 205-6).

45 Gibson, *supra* note 41 at 34.

46 *Munro v National Capital Commission*, [1966] SCR 663, 57 DLR (2d) 753 [*Munro*].

47 See Nathalie J Chalifour, "Jurisdictional Wrangling over Climate Policy in the Canadian Federation: Key Issues in the Provincial Constitutional Challenges to Parliament's Greenhouse Gas Pollution Pricing Act" (2019) 50:2 Ottawa L Rev 197 at 234. Chalifour, *supra* note 4 makes similar points (at 335).

48 *re Aeronautics*, *supra* note 10; *re Radio Communication*, *supra* note 10.

49 See *Multiple Access*, *supra* note 44; See also *Jones v AG of New Brunswick*, [1974] 2 SCR 182, 45 DLR (3d) 583 [*Jones v NB*]; See also *Interprovincial Co-operatives Ltd et al v R* (1975), [1976] 1 SCR 477, 53 DLR (3d) 321 [*Interprovincial Co-operatives*], respectively.

50 *Hydro-Québec*, *supra* note 3; *Desgagnés Transport Inc v Wärtsilä Canada Inc*, 2019 SCC 58 [*Desgagnés v. Wärtsilä*].

51 See *The Citizens Insurance Company v Parsons*, [1880] 4 SCR 215, 7 AC 96 (PC) [*Parsons*]. Mutual modification goes in both directions. As Viscount Haldane points out in *John Deere Plow Company v Wharton* (1914), [1915] 18 DLR 353, AC 330 [*John Deere Plow*], "the expression 'civil rights in the Province' is a very wide one, extending, if interpreted literally, to much … of the field of s. 91. But the expression cannot be so interpreted and it must be regarded as excluding cases expressly dealt with elsewhere … notwithstanding the generality of the words" (at 340).

52 Newman, *supra* note 30 at n 14.

53 *General Motors of Canada Ltd v City National Leasing*, [1989] 1 SCR 641 at 678, 58 DLR (4th) 255 [*General Motors*]; This section is cited in *Reference re Securities Act*, 2011 SCC 66 at para 81 [*re Securities Act*]. Paragraphs 70-85 of this decision provide an overview of the interpretation of the general trade and commerce power.

54 *re Securities Act*, *supra* note 53 at para 7.

55 *Ontario Hydro v Ontario (Labour Relations Board)*, [1993] 3 SCR 327 at para 1, 107 DLR (4th) 457 [*Ontario Hydro*].

56 *Ibid* at para 2. Similarly, in dissent, Justices Sopinka, Cory and Iacobucci held that, "the extent of what is swept within Parliament's jurisdiction is circumscribed to the national concern aspects of atomic energy" (at 425).

57 Gibson, *supra* note 41 at 17.

58 *Anti-Inflation*, *supra* note 13 at 457. This two-step test is similar to that proposed by W R Lederman, "Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation" (1976) 35:1 Alta L Rev 34.

59 *Interprovincial Co-operatives*, *supra* note 49 at 514.

60 Katherine Swinton, "Federalism under Fire: The Role of the Supreme Court of Canada" (1992) 55:1 Law & Contemp Probs 121 at 132.

61 *Crown Zellerbach*, *supra* note 14 at 402 [emphasis added].

62 *Ibid* at 432.

63 *Crown Zellerbach*, *supra* note 14 at 432, 434.

64 As Swinton, *supra* note 60, puts it, the criteria in General Motors, "incorporate concepts of provincial inability," in order to promote "a case-by-case balancing of the interests of federal and provincial governments" (at 121).

65 *Canadian Western Bank*, *supra* note 43 at para 37; See generally Adams, *supra* note 11.

66 *Hodge v The Queen*, [1883] 9 AC 117 at 130 (PC).

67 *Canadian Western Bank*, *supra* note 43 at para 42.

68 See e.g. *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40 [*Spraytech*].

69 Newman, *supra* note 30 at 17.

70 *Multiple Access*, *supra* note 44 citing Peter W Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1977) at 102; Peter W Hogg, *Constitutional Law of Canada*, student ed (Toronto: Carswell/Thomson Reuters, 2018).

71 Provincial jurisdiction persists, despite the presence of federal jurisdiction under POGG, over municipal subjects in *Munro*, *supra* note 46 and official languages in the administration of justice in *Jones v NB*, *supra* note 49. By implication, in *Ontario Hydro*, *supra* note 55, a majority of the Court (Chief Justice Lamer's concurrence as well as the dissent of Justices Sopinka, Cory and Iacobucci) preserves provincial jurisdiction as well by insisting that POGG jurisdiction was "circumscribed to the national concern aspects of atomic energy" (at 425). Also, see generally Chalifour, *supra* note 47 at 234.

72 *Desgagnés v. Wärtsilä*, *supra* note 50 at para 48. Justices Moldaver, Karakatsanis, Gascon, Côté, Rowe and Martin here cite *re Securities Act*, *supra* note 53 at paras 71-2.

73 *Alberta (AG) v Moloney*, 2015 SCC 51 at paras 27, 63.

74 *Multiple Access*, *supra* note 44; *Ontario Hydro*, *supra* note 55 at 420; *Rothmans, Benson & Hedges Inc v Saskatchewan,* 2005 SCC 13.

75 W R Lederman, "The Concurrent Operation of Federal and Provincial Laws in Canada" (1963) 9:3 McGill LJ 185 at 192; Lederman cites Justice Cartwright's dissent in *O'Grady v Sparling*, [1960] SCR 804, 25 DLR (2d) 145 [*O'Grady v Sparling*] but is clear that this view is not the law.

76 *Attorney General for Saskatchewan v Attorney General of Canada*, 2020 [*SCC GGPPA Reference*], (Factum of the Attorney General for Saskatchewan) at para 92; *ibid*, (Factum of the Attorney General of Ontario) at para 87; *Alberta GGPPA Reference*, *supra* note 2 (Factum of the Attorney General of Alberta), at paras 6-7.

77 *GGPPA*, *supra* note 2, ss 129-130.

78 *Munro*, *supra* note 46 at 672.

79 *GGPPA*, *supra* note 2, s 17(2)(ii).

80 For the economic theory underlying the policy, see Carolyn Fischer & Alan K Fox, "Output-Based Allocation of Emissions Permits for Mitigating Tax and Trade Interactions" (2007) 83:4 Land Econ 575. Output-based allocations are designed to mitigate competitiveness issues for trade-exposed industries. The system provides, in effect, credits used against the regulatory charge which are issued per unit output. As such, a firm reducing emissions per unit output will benefit in the amount of the carbon emissions charge, but a firm reducing emissions solely through reducing output will see lower net rewards. Canada's Ecofiscal Commission, "Explaining Output-Based Allocations (OBAs)" (2017), online: *Canada's Ecofiscal Commission* <https://perma.cc/N97L-Z8NP> provides an accessible explanation of the policy tool.

81 *GGPPA*, *supra* note 2, s 17(1) specifies the charge to apply only in provinces appearing in Schedule 1. The decision to list a province in Schedule 1 falls to the Governor in Council under s 166(2).

82 *Ibid*, ss 166(2) and 166(3).

83 See the definition of a covered facility in *ibid*, s 169. s 189(1) specifies that the decision to list a province in Part 2 of Schedule 1 for the purposes of applying the output-based pricing system falls to the Governor in Council, and s 189 (2) specifies the factors which must be considered in making such a decision.

84 *Ibid*, s 189(2).

85 *Saskatchewan GGPPA Reference*, *supra* note 2 at paras 125, 335, 337 respectively.

86 *Ontario GGPPA Reference*, *supra* note 2 at paras 77,166 respectively.

87 *Ibid* at para 213.

88 *Saskatchewan GGPPA Reference*, *supra* note 2 at para 128 [emphasis added].

89 *re Securities Act*, *supra* note 53; *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48 [*re Pan-Canadian Securities*].

90 *re Securities Act*, *supra* note 53 at paras 106,122.

91 *Ibid* at paras 6, 128.

92 Until 2019, provincial emissions from large, industrial facilities were priced under the *Carbon Competitiveness Incentive Regulation*, Alta Reg 255-2017 [*CCIR*] and the output-based pricing system under Part II of the *GGPPA* did not apply in Alberta. From 2020 onward, the *Technology Innovation and Emissions Reduction Regulation*, Alta Reg 133-2019 [*TIER*] will apply to these same facilities in Alberta, and Part II of the *GGPPA* will not apply. This decision was confirmed in Government of Canada, "Integrating Alberta's Carbon Pollution Pricing System for Large Industrial Emitters With the Federal Fuel Charge" (6 December 2019), online: *Department of Finance Canada* <https://perma.cc/5CYK-NG84>.

93 *Carbon Tax Act*, SBC 2008, c 40 [*BC Carbon Tax Act*]; *Environment Quality Act*, CQLR c Q-2 [*Environment Quality Act*].

94 *GGPPA*, *supra* note 2, ss 166, 189.

95 In *re Pan-Canadian Securities*, *supra* note 89, the Supreme Court held that federal legislation which addressed systemic risks in relation to the trade of securities was intra vires Parliament.

96 *Ontario GGPPA Reference*, *supra* note 2 at para 117.

97 Recall that in *Interprovincial Co-operatives*, *supra* note 49, Manitoba was unable to impose restrictions on polluting industries in Ontario via provincial statute.

98 *General Motors*, *supra* note 53 at 678, 683. These passages are cited in *re Securities Act*, *supra* note 53 at para 87.

99 *re Securities Act*, *supra* note 53 at para 90; *re Pan-Canadian Securities*, *supra* note 89 at para 90.

100 In *Ontario GGPPA Reference*, *supra* note 2 at para 119, Chief Justice Strathy writes: "the inability of one province to control the deleterious effects of GHGs emitted in others, or to require other provinces to take steps to do so, means that one province's failure to address the issue would endanger the interests of other provinces". We also consider that Canada's national GHG emissions targets, stated in Government of Canada, "Canada's 2017 Nationally Determined Contribution (NDC) Submission to the United Nations Framework Convention on Climate Change" (2017), online (pdf): *UNFCC* <https://perma.cc/BCZ9-LCQ6>, imply a zero-sum relationship between the actions taken or not taken in one province and the burden implicitly placed on others to meet these targets.

101 *Ibid* at para 17.

102 Lederman, *supra* note 58 at 45.

103 *Ontario GGPPA Reference*, *supra* note 2 at para 4.

104 *BC Carbon Tax Act*, *supra* note 93.

105 *TIER*, *supra* note 92.

106 *Ontario GGPPA Reference*, *supra* note 2 at para 115.

107 *GGPPA*, *supra* note 2, ss 166, 189.

108 *GGPPA*, *supra* note 2, Schedules 1-2.

109 See, for example Branko Bošković & Andrew Leach, "Leave It in the Ground? Oil Sands Development Under Carbon Pricing" (forthcoming) Canadian J Econ, online: <https://papers.ssrn.com/abstract=2920341>. Here, the authors assess the impacts of GHG emissions prices on oil sands viability and show that, where high carbon prices are applied, there is a potential to affect project-level investment decisions such that new projects which would otherwise proceed are not built.

110 Hogg, *supra* note 4 at 513; *Canadian Environmental Protection Act*, SC 1999, c 33.

111 *Oldman River*, *supra* note 3.

112 *Reference re Environmental Management Act (British Columbia)*, 2019 BCCA 181.

113 *Munro*, *supra* note 46 at 671.