THE ENVIRONMENT AND THE CONSTITUTION SERIES

IT'S GETTING HOT IN HERE:

Greenhouse Gas Regulation and the Constitution

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by Rebecca Kauffman

Environmental Law Centre

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GHG REGULATION & THE CONSTITUTION

In 1867, greenhouse gas (GHG) emissions were not considered for an enumerated ground in sections 91 or 92 of the *Constitution Act, 1867* – unsurprisingly, given the information available at the time. As such, neither the provincial nor the federal government are directly assigned the power to legislate GHGs. The provinces have jurisdiction over their natural resources through section 92A of the *Constitution Act, 1867* which assigns the provinces the ability to "exclusively make laws in relation to (a) exploration for non-renewable natural resources in the province; (b) development, conservation and management of non-renewable natural resources and forestry resources, including laws in relation to the rate of primary production thereform; and (c) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy."[1] Additionally, provinces have the broad jurisdiction to regulate local works and undertakings, public lands in the province, and property and civil rights.[2] In Alberta, the regulation of GHGs is primarily through the *Technology Innovation and Emissions Reduction Regulation*.[3]

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[1] *Constitution Act, 1867* (UK), 30 & 32 Vict, c 3, reprinted in RSC 1985, App II, No 5, s 92A [*Constitution Act, 1867*].
[2] *Ibid*, ss 92(5), (10) & (13).
[3] *Technology Innovation and Emissions Reduction Regulation*, Alta Reg 133/2019 [TIER].

However, the regulation of greenhouse gas emissions is also done at the federal level. For example, the *Greenhouse Gas Pollution Pricing Act* and specifically "minimum national standards of GHG price stringency to reduce GHG emissions" were the subject of a recent Supreme Court of Canada ("SCC") decision.[4] Specifically, the SCC found the *Greenhouse Gas Pollution Pricing Act* could be upheld under the federal peace, order, and good government power.[5] Decisions made by the SCC are binding on courts across the country and this will impact on future decisions with regard to the management and regulation of GHGs. The federal government has also included certain GHG emissions under the List of Toxic Substances in the *Canadian Environmental Protection Act* and plans to enact further management of emissions through the *Canadian Net-Zero Emissions Accountability Act*. Thus, while we begin with a description of the SCC decision in *Reference re GGPPA,* we also consider the use of other federal powers. From there, we will summarize the clear provincial jurisdiction and how Alberta has chosen to enact the same.

Constitutional Jurisdiction over Greenhouse Gas Emissions

Section 91 of the *Constitution Act, 1867* sets out the federal heads of power with no reference to GHG emissions. Instead, federal legislative jurisdiction over GHGs in Canada has been upheld by the courts in separate instances under the peace, order and good government clause (for carbon pricing) and the criminal law power (for renewable fuel regulation).[6] In addition, the trade and commerce power has been touted as a possible option.[7] We consider each in our discussion of the constitutionality of a cap on GHG emissions.

Similarly, there is no direct reference to GHGs in Section 92. However, provincial jurisdiction over the management of GHG emissions could be situated in a number of provisions including local works and undertakings, property and civil rights, generally all matters of a merely local or private nature in the Province, and the section 92A jurisdiction over non-renewable natural resources.[8]

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[4] *Reference re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at para 4 [*Reference re GGPPA* - SCC].
[5] *Constitution Act, 1867, supra* note 1, s 91.
[6] *Reference re GGPPA* - SCC, *supra* note 4 & *Syncrude Canada Ltd. v. Canada (Attorney General),* 2016 FCA 160 [*Syncrude*].
[7] *Constitution Act, 1867, supra* note 1, ss 91(2) & (27).
[8] *Ibid,* ss 92(10), (13), (16) & 92A.

Federal Regulation of GHGs

In the following section, we consider three major pieces of federal legislation and their use in the regulation of GHG emissions. First, the *Greenhouse Gas Pollution Pricing Act* which has been considered at the SCC and declared constitutional. Next, we consider the *Canadian Environmental Protection Act* and whether GHGs could fall under the toxic substances regime upheld under the criminal law power. Finally, we move on to the *Canadian Net-Zero Emissions Accountability Act* and the proposed cap on GHG emissions.

Greenhouse Gas Pollution Pricing Act

The federal government's primary piece of legislation managing greenhouse gas emissions ("GHGs") is the *Greenhouse Gas Pollution Pricing Act* ("GGPPA"). The GGPPA is divided into four main parts:[9]

1. the fuel charge;
2. industrial greenhouse gas emissions;
3. the application of provincial schemes; and
4. required reporting to Parliament.

We focus on parts 1 and 2.

Part 1: The Fuel Charge

The fuel charge is applied at the point of purchase and becomes the price on carbon.[10] The amount of the fuel charge is set out in Schedule 4 with prices rising on a yearly basis from $10.00 per CO2e Tonne in 2018 to $50.00 per CO2e Tonne in 2022.[11] In turn, Schedule 2 sets out the charge rates for different substances including fossil fuels and combustible waste.[12]

This part of the Act applies in those provinces that do not have an equivalent pricing system that meets the federal benchmark. For example, in 2020-2021, the federal fuel charge applied in Ontario, Manitoba, Saskatchewan, Alberta, Yukon, and Nunavut.[13]

The use of these funds is restricted under the Act and may be distributed to a listed province or area, to prescribed persons or a class of prescribed persons in the listed province or area, or a combination of the two.[14] Thus far, fuel charges have been returned to either the government of

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[9] *Greenhouse Gas Pollution Pricing Ac*t, SC 2018, c 12, s 186 [GGPPA].
[10] *Ibid*, s 17.
[11] *Ibid*, sched 4.
[12] *Ibid*, sched 2.
[13] *Ibid*, sched 1, part 1.
[14] *Ibid*, ss 165(2) & 186.

those jurisdictions that chose to adopt the federal system, to individuals through Climate Action Incentive payments, or to federal programming in those jurisdictions that did not meet the federal benchmark.[15]

Part 2: Industrial Greenhouse Gas Emissions

Part 2 of the GGPPA sets out details of the Output-Based Pricing System which applies to industrial GHG emissions. It does this through emissions-industry standards or "output-based standards…on an emissions per-unit of output basis."[16] The Output-Based Pricing System ("OBPS") does not apply in Alberta. Instead, Alberta uses the TIER system which will be discussed in more detail below.

As Nigel Bankes & his co-authors highlight, "[t]he intent of the OBPS is to provide a lower average cost of emissions pricing to firms with exposure to international markets, while also maintaining a financial incentive to undertake investments to reduce the emissions-intensity of production."[17] Emissions pricing applies to emissions above a certain threshold level while those facilities that fall below their emissions limit receive credits for the remaining amount.[18] Facilities covered by the Output-Based Pricing System can also generate federal offset credits under the *Canadian Greenhouse Gas Offset Credit System Regulations* which can be sold or used for compliance or other voluntary targets.[19]

The accompanying *Output-Based Pricing System Regulations* provide the details of the OBPS for those facilities covered under the Regulations and where industrial GHG emissions are generated.[20] Covered facilities are defined as those facilities located in a province or area set out in Part 2 of Schedule 1 of the GGPPA that either meet the criteria set out in the accompanying Regulations or that are otherwise designated as such by the Minister.[21] The Regulations require facilities to emit "a quantity of GHGs equal to 50kt or more of CO_2e … for the 2014 calendar year or any subsequent calendar year" and "the primary activity engaged in at the facility" must be "set out in column 1 of Schedule 1, of a province or area, other than

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[15] The Honourable Steven Guilbeault - Minister of Environment and Climate Change, "*Greenhouse Gas Pollution Pricing Act:* Annual report for 2020" (23 Mar 2022) at section 2.2 online: https://www.canada.ca/en/environment-climate-change/services/climate-change/pricing-pollution-how-it-will-work/greenhouse-gas-annual-report-2020.html#toc5.

[16] *Ibid* at section 3.1.

[17] Nigel Bankes et al., "Supreme Court of Canada Re-writes the National Concern Test and Upholds Federal Greenhouse Gas Legislation: Part 1 (The Majority Opinion)" (28 Apr 2021) *ABLawg* online: https://ablawg.ca/2021/04/28/supreme-court-of-canada-re-writes-the-national-concern-test-and-upholds-federal-greenhouse-gas-legislation-part-i-the-majority-opinion/.

[18] GGPPA, *supra* note 9, ss 174 & 175.

[19] *Canadian Greenhouse Gas Offset Credit System Regulations*, SOR/2022-111.

[20] *Output-Based Pricing System Regulations*, SOR/2019-266 [OBPS Regulations].

[21] GGPPA, *supra* note 9, s 169.

Saskatchewan, set out in Part 2 of Schedule 1 to the Act" or "an industrial activity set out in item 5 or 38, column 1, of Schedule 1, in Saskatchewan."[22]

Reference re *Greenhouse Gas Pollution Pricing Act*

In 2021, the Supreme Court of Canada ("SCC") ruled on the constitutionality of the GGPPA. This case was the culmination of three provincial reference cases, from Alberta, Saskatchewan, and Ontario in which the provincial governments submitted a reference question to their respective courts of appeal as to the constitutionality of the Act.[23] At the provincial level, the Saskatchewan and Ontario courts of appeal found the Act constitutional while the Alberta court declared it *ultra vires* Parliament's jurisdiction.

However, at the SCC, the majority (6 of 9 justices) found the GGPPA to be constitutional and *intra vires* Parliament's jurisdiction under the Peace, Order, and Good Government ("POGG") clause.[24] This was a major SCC decision for its discussion of POGG and because it started to situate the jurisdiction to regulate GHG emissions (albeit in a limited fashion) with the federal government.

To begin their analysis, the majority assessed the core nature of the legislation, referred to as a pith and substance test. According to the SCC, the pith and substance of the GGPPA is "establishing minimum national standards of GHG price stringency to reduce GHG emissions."[25] The SCC held that with the legislation focused on minimum national standards, the provinces would be free to legislate on GHGs beyond this minimum, as they saw fit.[26] As Allison Boutillier points out, in their decision the SCC clarified that the characterization of a legislation's pith and substance "should be as precise as the legislation allows."[27] Boutillier describes this conclusion as "the description of a piece of legislation can include not only what it is about, but how it goes about achieving its goals."[28] In this case it achieves its goals through a minimum price on GHG emissions.

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[22] OBPS Regulations, *supra* note 20, s 8.
[23] *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40 [SASK Ref re GGPPA]; *Reference* re Greenhouse Gas Pollution Pricing Act, 2019 ONCA 29; Reference re Greenhouse Gas Pollution Pricing Act, 2020 ABCA 74.
[24] *Reference re GGPPA* – SCC, *supra* note 4.
[25] *Ibid* at para 57.
[26] Nigel Bankes, Andrew Leach & Martin Olszynski, "Supreme Court of Canada Re-writes the National Concern Test and Upholds Federal Greenhouse Gas Legislation: Part III (Commentary)" (April 30, 2021) at 5 online: *ABlawg*, http://ablawg.ca/wpcontent/uploads/2021/04/Blog_NB_AL_MO_SCC_GGPPA_Ref_Part3.pdf [Bankes, Leach & Olszynski].
[27] *Reference re GGPPA* – SCC, *supra* note 4 at para 52; Allison Boutillier, "I Read the Carbon Tax Decision So You Don't Have To: A Detailed Summary of the Main Issues" (7 Apr 2021) *Environmental Law Centre* online: https://elc.ab.ca/i-read-the-carbon-tax-decision-so-you-dont-have-to-a-detailed-summary-of-the-main-issues/ [Boutillier].
[28] *Reference re GGPPA* – SCC, *supra* note 4 at para 53; Boutillier, *supra* note 27.

Once the Court completed their pith and substance analysis, they went on to consider whether the subject matter of the legislation properly falls under a subject matter assigned to the government that passed it.[29] In this case, the federal government and the national concern branch of POGG. In their decision, the SCC refined the test for the national concern branch from its iteration in *R v Crown Zellerbach* in three steps:

1. The first step asks if the subject matter of the legislation is something of concern to the nation as a whole?[30]

In this case, the majority answered in the affirmative, finding that due to the seriousness of climate change as "a threat of the highest order to the country, and indeed to the world" and the evidence that carbon pricing "is a critical measure for the reduction of GHG emissions," the subject matter of the GGPPA is a concern to Canada as a whole.[31]

2. The second step looks at whether the subject matter of the legislation has a "singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern."[32] To answer this, the SCC set out two sub-tests:

    a. Is the matter specific and identifiable in such a way so as to distinguish it from provincial matters?

The answer to this first sub-test was yes, in part because, as the majority highlighted, GHG emissions are "a specific and precisely identifiable type of pollutant" and they are "predominantly extraprovincial and international in their character."[33]

    b. Is it something the provinces are able to deal with themselves? This is known as the provincial inability test.

To determine provincial inability, the Court began by highlighting that "the provinces, acting alone or together, are constitutionally incapable of establishing minimum national standards of GHG price stringency to reduce GHG emissions" in part because any province could withdraw, thereby hampering the efforts.[34] They also held that "a failure to include one province in the scheme would jeopardize its success in the rest of Canada" and that "a province's failure to act or refusal to cooperate would in this case have grave consequences for extraprovincial interests."[35]

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[29] *Canadian Western Bank v Alberta*, 2007 SCC 22 at para 27.
[30] *Reference re GGPPA* – SCC, *supra* note 4 at para 143; Boutillier, *supra* note 27.
[31] *Reference re GGPPA* – SCC, *supra* note 4 at paras 167-171.
[32] *Ibid* at para 145.
[33] *Ibid* at para 173.
[34] *Ibid* at para 182.
[35] *Ibid* at paras 183 & 187.

3. The final step asks "whether recognizing the subject matter as a national concern would have an impact on provincial jurisdiction that is reconcilable with the balance of power between the federal and provincial governments under the Constitution?"[36]

At this stage of the analysis, the Court stated:[37]

> "while it is true that finding that the federal government has jurisdiction over this matter will have a clear impact on provincial autonomy, the matter's impact on the provinces' freedom to legislate and on areas of provincial life that fall under provincial heads of power will be limited and will ultimately be outweighed by the impact on interests that would be affected if Parliament were unable to constitutionally address this matter at a national level."

As Boutillier points out, "if this subject matter were recognized as a national concern, all the provinces would lose would be the ability to create a carbon pricing scheme that is less effective than the national standards."[38] They retain the ability to legislate with regard to all other aspects of GHG emissions. In the end, the GGPPA was upheld as constitutional.

Canadian *Environmental Protection Act*: GHGs as Toxic Substances

The federal government may also derive jurisdiction to manage GHG emissions through their classification as a toxic substance which could fall under the federal criminal law power.[39] Nathalie Chalifour argues that "[t]here is a solid case for a finding that GHG emissions are a single, distinct, and indivisible form of pollution."[40] She notes that GHG emissions are an identifiable group of gases that can be scientifically measured and reported upon.[41] In fact, the GGPPA provides such a list which includes carbon dioxide, methane, nitrous oxides, sulphur hexafluoride, nitrogen trifluoride, hydrofluorocarbons, and perfluorocarbons.[42] Chalifour argues this simple identification means that GHGs could easily be classified, and governed, as toxic substances.[43]

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[36] *Ibid* at para 160; Boutillier, *supra* note 27.
[37] *Reference re GGPPA* – SCC, *supra* note 4 at para 196.
[38] Boutillier, *supra* note 27.
[39] In the SCC decision *R v Hydro-Quebec,* [1997] 3 SCR 213 the SCC held that toxic substances could be regulated under the federal criminal law power.
[40] 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 Law Review* 197 at 221 [Chalifour].
[41] *Ibid* at 222.
[42] GGPPA*, supra* note 9, s 186, Sched 3.
[43] Chalifour, *supra* note 40 at 222.

Legislation has already been amended to facilitate this process as all of these substances, except nitrogen trifluoride, have already been included on the *Canadian Environmental Protection Act's* List of Toxic Substances.[44] These GHGs were added to the List of Toxic Substances in 2005 when the Governor in Council argued that there is "worldwide scientific consensus that there is sufficient and compelling evidence to conclude that greenhouse gases constitute or may constitute a danger to the environment on which life depends."[45]

If GHGs were classified as a toxic substance under the CEPA, they would still need to be properly situated within a federal head of power. The most likely option would be the federal criminal law power. The SCC decision in *R v Hydro-Quebec* is the leading decision on the extent of the federal jurisdiction to regulate toxic substances under the criminal law power.[46] This decision involved a challenge of the constitutionality of the *Chlorobiphenyls Interim Order* which was an order adopted under the previous CEPA. The majority in this case held that the "impugned provisions are valid legislation under the criminal law power."[47] In coming to this conclusion, Justice La Forest began with a pith and substance review, finding that the criminal law power assigned to the federal government is "the criminal law in its widest sense."[48] However, despite this finding, the Court placed certain limits on this power including that the criminal law power cannot be used to colourably invade areas of provincial legislative competence and that some legitimate public purpose must underlie the prohibition.[49] In the end, the Court concluded "that Parliament may validly enact prohibitions under its criminal law power against specific acts for the purpose of preventing pollution or, to put it in other terms, causing the entry into the environment of certain toxic substances."[50]

A similar finding was made by the Federal Court in the decision *Syncrude Canada Ltd. v Canada (Attorney General)*.[51] In this decision, Syncrude challenged the "validity and applicability" of federal regulations requiring that diesel fuel contain at least 2% renewable fuel – the *Renewable Fuels Regulation*.[52] The federal court in this decision held that the regulation fell within the criminal law power, reiterating that protection of the environment was a valid purpose under this head of power. This decision was upheld on appeal, and we provide a brief discussion of this decision below.[53]

It is likely; therefore, that if the federal government chose to regulate GHG emissions under the CEPA, they could do so. Similar to the GGPPA, this would not prohibit provincial governments

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[44] *Canadian Environmental Protection Act*, 1999, SC 1999, c 33, Sched 1 [CEPA].
[45] News Release, "The Government of Canada Takes a Significant Step to Implement Its Climate Change Plan and Reduce Greenhouse Gas Emissions" Environment Canada, November 22, 2005.
[46] *R v Hydro-Quebec,* [1997] 3 SCR 213 [Hydro-Quebec].
[47] *Ibid* at para 110.
[48] *Ibid* at paras 112 & 119.
[49] *Ibid* at para 121.
[50] *Ibid* at para 130.
[51] *Syncrude Canada Ltd. v Canada (Attorney General)*, 2014 FC 776.
[52] *Ibid* at para 1.
[53] Syncrude, *supra* note 6.

from enacting similar legislation so long as it did not interfere with the federal legislation. The SCC confirmed this in *R v Hydro-Quebec* when they stated that the use of the criminal law power does not "preclude the provinces from exercising their extensive powers under s. 92 to regulate and control the pollution of the environment either independently or to supplement federal action."[54] Similar to other areas of criminal law there is "a broad area of concurrency between federal and provincial powers."[55]

Canadian Net-Zero Emissions Accountability Act

On June 29, 2021, another plank in the federal government's plan to manage GHG emissions and in turn, climate change, was released: the *Canadian Net-Zero Emissions Accountability Act*.[56] This Act sets national targets for reducing GHGs including a planning, reporting, and assessment process to achieve the goal of net-zero emissions by 2050.[57] For the purposes of the Act, net-zero is defined as a situation wherein "anthropogenic emissions of greenhouse gases into the atmosphere are balanced by anthropogenic removals of greenhouse gases from the atmosphere over a specified period."[58] Milestones along the path to net-zero begin in 2030 with targets increasing every subsequent 5 years.[59]

The Act requires the Minister to take a number of factors into account when setting GHG emission targets including:[60]

- the best scientific information available;
- Canada's international commitments with respect to climate change;
- Indigenous knowledge; and
- submissions provided by the advisory body.

In addition, the Minister must establish a GHG emissions reduction plan to achieve the 'net-zero by 2050' target and any earlier targets, the first of which (an emissions reduction plan for 2030) must be released within six months of the Act coming into force.[61] From there, each subsequent

[54] Hydro-Quebec*, supra* note 46 at para 131.
[55] *Ibid* at para 153.
[56] *Canadian Net-Zero Emissions Accountability Act*, SC 2021, c 22 [Net-Zero Act]
[57] Ross Linden-Fraser, "Bill C-12: An Act Respecting Transparency and Accountability in Canada's Efforts to Achieve Net-Zero Greenhouse Gas Emissions by the Year 2050" (7 May 2021) *Parliamentary Information, Education and Research Services* at 1 online: https://lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/LegislativeSummaries/PDF/43-2/43-2-C12-E.pdf.
[58] Net-Zero Act, *supra* note 56, s 2.
[59] *Ibid,* ss 7(2) & (4).
[60] *Ibid*, s 8.
[61] *Ibid*, ss 9(1) & (2).

emissions reduction plan must be released "at least five years from the beginning of the year to which it relates."[62] Emission reduction plans must contain:[63]

- the relevant GHG emissions target;
- a summary of Canada's most recent official GHG emissions inventory and information relevant to the plan that Canada submitted under its international commitments with respect to climate change;
- a description of the key emissions reduction measures the Government of Canada intends to take to achieve the GHG emissions target;
- a description of the key emission reduction measures Canada intends to take;
- a description of how Canada's international commitments with respect to climate change are taken into account;
- a description of any relevant sectoral strategies;
- a description of emission reduction strategies for federal government operations;
- a projected timetable for implementation for each of the measures and strategies;
- projections of the annual greenhouse gas emission reductions resulting from those combined measures and strategies; and
- a summary of key cooperative measures or agreements with provinces and other governments in Canada.

Notably, while reference to international climate treaties in the Act is not an issue, the implementation of international treaties is not a federal heard of power and is not sufficient to make an otherwise *ultra vires* piece of legislation fall properly within federal control. We discuss this in more depth in our section on International Climate Treaties below.

Progress reports are also required for each milestone target and the 2050 target and must be published at least two years before the beginning of the relevant year.[64] Progress reports must summarize:[65]

- any progress the government has made towards achieving the relevant target;
- the most recently published GHG emissions projections for the next milestone year;
- a summary of the most recent GHG emissions inventory;
- an update on the implementation of the federal measures, sectoral strategies, federal government operations strategies, and any updated projections;
- an update on the implementation of key cooperative measures or agreements with provinces and other governments in Canada;

[62] *Ibid*, s 9(4).
[63] *Ibid*, s 10(1).
[64] *Ibid*, s 14(1).
[65] *Ibid*, s 14(2).

- if projections indicate that a target will not be met, details about additional measures that can be taken; and
- any other information the Minister considers appropriate.

Assessment reports are then required *after* each milestone year and must summarize the GHG emissions from that year, indicating whether Canada has achieved its emission target, including any measures taken and any further measures that could be taken to meet future targets.[66]

Canada has released the "2030 Emissions Reduction Plan: Canada's Next Steps for Clean Air and a Strong Economy."[67] It is an extensive report with sectoral details including heavy industry, electricity, oil and gas, agriculture, waste, and more. The goal is the achievement of Canada's Nationally Determined Contribution under the Paris Agreement of a 40-45% economy-wide reduction in GHG emissions below 2005 levels by 2030.[68] However, the signing of an international treaty does not bypass the need for Canada to situate each federal law in a jurisdictional head of power. As the SCC stated in the *Reference re GGPPA,*[69]

> "As a global problem, climate change can realistically be addressed only through international efforts. Any province's failure to act threatens Canada's ability to meet its international obligations, which in turn hinders Canada's ability to push for international action to reduce GHG emissions. Therefore, a provincial failure to act directly threatens Canada as a whole. **This is not to say that Parliament has jurisdiction to implement Canada's treaty obligations — it does not —** [emphasis added]."

Considering this, we will look at one of the promises resulting from this report - the plan for a cap on oil and gas emissions in the country.

Oil and Gas Emissions Cap

In July 2022, the federal government released a discussion paper setting out proposed options for an *Oil and Gas Emissions Cap* (the "Emissions Cap 2022") in Canada.[70] The two proposed options were:[71]

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[66] *Ibid*, s 15.
[67] Environment and Climate Change Canada, "2030 Emissions Reduction Plan: Canada's Next Steps for Clean Air and a Strong Economy" (2022) online: https://publications.gc.ca/collections/collection_2022/eccc/En4-460-2022-eng.pdf.
[68] *Ibid* at 15.
[69] *Reference re GGPPA* – SCC, *supra* note 4 at para 190.
[70] Environment and Climate Change Canada, "Options to Cap and Cut Oil and Gas Sector Greenhouse Gas Emissions to Achieve 2030 Goal and Net-Zero by 2050" (July 2022) online: https://www.canada.ca/content/dam/eccc/documents/pdf/climate-change/oil-gas-emissions-cap/oil-gas-emissions-cap-discussion-document-july-2022-en.pdf.
[71] *Ibid*.

1. the development of a cap-and-trade system under the *Canadian Environmental Protection Act, 1999*; and
2. the modification of existing carbon pollution pricing systems under the *Greenhouse Gas Pollution Pricing Act*.

In both cases, the constitutionality of such a program will need to be considered. The following section will look at the history of this type of proposal and provide some analysis in this regard.

This is not the first time that a federal cap and trade or emissions trading regime has been proposed. A few documents are worth noting. The first is the 2005 *Canada Emissions Reduction Incentives Agency Act* which established the Canada Emissions Reduction Incentives Agency with the object of "providing incentives for the reduction or removal of greenhouse gases through the acquisition, on behalf of the Government of Canada, of eligible credits created as a result of the reduction or removal of those gases."[72] The Agency was never established; however, the Act remains in force.

The second was the 2007 *Regulatory Framework for Air Emissions* (the "Regulatory Framework").[73] By 2008 this had morphed into the *Regulatory Framework for Industrial Greenhouse Gas Emissions* which proposed a system of emissions management tools through *Canadian Environmental Protection Act* regulations although, again they were never finalized.[74] While we do not have the details of the proposed Emissions Cap 2022, these frameworks may help to understand how the federal government could implement such a tool within their jurisdiction.

We have confirmation from the SCC that the GGPPA is *intra vires* Parliament's jurisdiction and as such, we will focus on the proposed CEPA route, under which the Emissions Cap 2022 would likely employ a cap-and-trade system. To understand the constitutionality of such a move, we can look to the 2007 Regulatory Framework which also proposed a similar cap-and-trade program. In this regard, Professor Peter Hogg described the program as a system in which "[a] regulated firm will be able to purchase "emissions credits" from other regulated firms that have gone beyond the regulated level of reduction and "offset credits," which result from reductions in emissions in unregulated sectors of the economy."[75] The question is, under which head of power would a cap-and-trade system be *intra vires* Parliament?

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[72] *Canada Emissions Reduction Incentives Agency Act*, SC 2005, c 30, s 87, s 6.
[73] Government of Canada, "Regulatory Framework for Air Emissions" (2007) online: https://www.ec.gc.ca/doc/media/m_124/report_eng.pdf [GOC – Regulatory Framework].
[74] Government of Canada, "Turning the Corner: Regulatory Framework for Industrial Greenhouse Gas Emissions" (March 2008) online: https://publications.gc.ca/collections/collection_2009/ec/En84-60-2008E.pdf; Kai D. Sheffield, "The Constitutionality of a Federal Emissions Trading Regime" (2014) 4-1 *Western Journal of Legal Studies* at 2-3 [Sheffield].
[75] GOC – Regulatory Framework, *supra* note 73 at iv; Peter W. Hogg, "Constitutional Authority over Greenhouse Gas Emissions" (2009) 46:2 Alta L Rev 507 at 509 [Hogg].

Is a Federal Cap-and-Trade Program Constitutional?

In light of this proposal, the question remains whether the trading regime would fall properly within a federal head of power. It is clear that the regulation of GHG emissions, including through a cap and trade program, would properly fall within provincial constitutional heads of power including jurisdiction over property and civil rights, local works and undertakings, matters of a merely local nature, or the development of natural resources.[76]

However, similar to the GGPPA, there are a few heads of federal power that could be relied upon to enact a federal cap-and-trade program: POGG, the criminal law power, and the trade and commerce power.[77] As Kai Sheffield highlighted with regard to some of these earlier frameworks, "[t]he most constitutionally contested aspect of a federal cap-and-trade regime is not the regulation of GHG emissions per se but rather the creation of, and provision for the trading of, emissions credits."[78] This remains even after the *Reference re GGPPA* which relied on a narrow subject matter to find the GGPPA constitutional. On the other hand, Sheffield highlights that the definition of "GHG Emissions" is more discrete than that of "toxic substances" as was an issue in the decision of *R v Hydro-Quebec*.[79] We consider these three options below.

Peace, Order, and Good Government

One way that the Emissions Cap 2022 may be deemed constitutional is under the peace, order and good government clause of the *Constitution Act, 1867*. Section 91 of the *Constitution Act, 1867* sets out the legislative authority of the Parliament of Canada, including the authority to legislate over enumerated classes and to legislate for peace, order, and good government ("POGG"). This clause assigns the federal government with residual power applying to matters "not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces."[80]

Professor Peter Hogg explains that the POGG power can be divided into three branches – the gap branch, the emergency branch, and the national concern branch:[81]

- The emergency branch allows the federal government to pass legislation in the event of an emergency; however, the legislation must be time limited and can only last as long as the emergency it was intended to manage.[82]

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[76] *Constitution Act, 1867, supra* note 1, ss 92(13), (10), (16) & 92A.
[77] *Ibid,* ss 91(2), 91(27) & 91; Sheffield, *supra* note 74 at 5; Hogg, *supra* note 75.
[78] Sheffield, *supra* note 74 at 6.
[79] *Ibid* at 7.
[80] *Constitution Act, 1867, supra* note 1, s 91.
[81] Peter W. Hogg, *Constitutional Law of* Canada, vol 1, 5th ed loose-leaf (Scarborough, Ont: Carswell, 2007), ch 17 at 5.
[82] *Ibid* at 27.

- The gap branch authorizes the federal government to legislate over any subject matter that does not fall under one of the headings in sections 91 or 92 and usually applies to subject matter recognized by the *Constitution* but left out of the list.[83]
- The national concern branch allows the federal government to legislate over any subject that becomes a concern to the nation as a whole and requires a coordinated federal response. Some examples have included aviation, the national capital region, marine pollution, and minimum pricing standards of greenhouse gas emissions.[84]

It is most likely that the Emissions Cap 2022 would be classified under the national concern branch[85] – similar to the conclusion in *Reference re GGPPA,* discussed above.[86] Specifically, the SCC has confirmed that GHG emissions are a concern to the nation as a whole. In the *Reference re GGPPA* they found that "climate change is an existential challenge" and "a threat of the highest order to the country, and indeed the world" concluding that this "provides some assurance … Canada is not seeking to invoke the national concern doctrine too lightly."[87] A similar argument could be made for the Emissions Cap 2022.

The next step in the POGG test considers whether a cap-and-trade program has a "singleness, distinctiveness and indivisibility" to distinguish it from provincial concerns. In this regard, Philip Barton highlights the discrete nature of GHG emissions – specifically that they are distinct from air pollution more generally and therefore may be properly considered a single, distinct, and indivisible matter.[88] We see this argument from Kai Sheffield above as well. He argues that "for emissions trading to function, participation must be mandatory amongst competing businesses" and this participation "is most likely to be consistent under a federal system."[89] Provincial inability is clear in part because as Barton notes, "[t]he GHG emissions from any province will, during their lifespan in the atmosphere contribute to climate change outside the province and outside Canada."[90]

Finally, part three considers whether the impact on provincial jurisdiction is reconcilable with the balance of power. This is a more complicated question and as Stewart Elgie notes "[o]pponents

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[83] *Ibid* at 7.
[84] *Johannesson v West St Paul*, [1952] SCR 292; *Munro v National Capital Commission*, [1966] SCR 663; *R v Crown Zellerbach Canada Ltd*, [1988] 1 SCR 401; *Reference re GGPPA* – SCC, *supra* note 4.
[85] The 3-step test for national concern asks: (1) Is the subject matter of the legislation something of concern to the nation as a whole? (2) Does the subject matter of the legislation have a "singleness, distinctiveness and indivisibility that clearly distinguishes it from matters or provincial concern?" (3) Will "recognizing the subject matter as a national concern have an impact on provincial jurisdiction that is reconcilable with the balance of power between the federal and provincial governments under the Constitution?""
[86] Sheffield, *supra* note 74 at 18; see *Reference re GGPPA* – SCC, *supra* note 4.
[87] *Reference re GGPPA* – SCC, *supra* note 4 at para 167.
[88] Philip Barton, "Economic Instruments and the *Kyoto Protocol:* Can Parliament Implement Emissions Trading Without Provincial Co-operation?" (2002) 40:2 Alta L Rev 417 at 428-429 [Barton]; Stewart Elgie, "Kyoto, the Constitution, and Carbon Trading: Waking a Sleeping BNA Bear (or Two)" (2007) 13:1 Rev Const Stud 67 at 84 [Elgie].
[89] Barton, *supra* note 88 at 430.
[90] *Ibid* at 430. See also Elgie, *supra* note 88 at 84.

of the Act can argue, with some merit, that it is likely to have significant impacts on a range of activities that are normally considered matters of provincial jurisdiction."[91] If the Emissions Cap 2022 is set in such a way so as to unduly restrict the development of natural resources that fall under section 92A provincial jurisdiction, it may not be reconcilable with the balance of power. Stewart Elgie considers how the Court could measure this intrusion in asking whether the Courts, "in assessing the acceptable level of impact on provincial jurisdiction, take into account factors such as: the subject matter at issue, its scope and importance, and the inherent level of impact its regulation will have."[92]

Regardless, the Emissions Cap 2022 will have to ensure that impact on provincial jurisdiction is properly balanced. The Emissions Cap 2022 will also have to be clear enough so as to assure the Courts that any potential intrusion into provincial jurisdiction is not available through the Act's discretionary provisions. We see this discussion in the *Reference re GGPPA*. In the dissenting judgment, Justice Cote opined that the GGPPA was not constitutional because "the breadth of the discretion conferred by the Act on the Governor in Council results in the absence of any meaningful limits on the power of the executive."[93] The majority of the Court did not agree with this assertion stating instead that "no aspect of the discretion provided for in Part 2 permits the Governor in Council to regulate GHG emissions broadly or to regulate specific industries in any way other than by setting GHG emissions limits and pricing excess emissions across the country."[94] However, we can see from the majority's statement that the broad regulation of GHGs or GHG producing industries beyond the identified pith and substance could veer into unconstitutional discretion.

Notably, there are also scholars that disagree with this concern including Philip Barton who argues that "[t]rading only sets mandatory targets – it does not specify the measures to be taken to reach those targets" which allows for "clear boundaries that minimize intrusion into local or provincial matters."[95]

It seems that there is a strong case that the Emissions Cap 2022 could be upheld under the national concern doctrine although it would need to ensure that the scale of impact on provincial jurisdiction was managed.

The Criminal Law Power

Another option would be to argue that the Emissions Cap 2022 is valid under the federal criminal law power.[96] The test for a valid law under the criminal law power is set out in *R v Hydro-Quebec* in which the SCC held that the criminal law power assigned to the federal

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[91] Elgie, *supra* note 88 at 85.
[92] *Ibid* at 86.
[93] *Reference re GGPPA* – SCC, *supra* note 4 at para 222.
[94] *Ibid* at para 76.
[95] Barton, *supra* note 88 at 431.
[96] *Constitution Act, 1867, supra* note 1, s 91(27).

government is "the criminal law in its widest sense" albeit with certain limits.[97] These limits include that the criminal law power cannot be used to colourably invade areas of provincial legislative competence and some legitimate public purpose must underlie the prohibition.[98] The majority also confirmed there is "no doubt that the protection of a clean environment is a public purpose within Rand J.'s formulation in the *Margarine Reference* … sufficient to support a criminal prohibition" or "to put it another way, pollution is an 'evil' that Parliament can legitimately seek to suppress."[99] For a more fulsome discussion of *R v Hydro-Quebec,* find it in our accompanying report "Drowning in Plastic: Toxic Substances and the Constitution."

Further, as we highlight above, the proposed cap-and-trade system is intended to fall under regulations to the CEPA and as Professor Hogg notes past CEPA regulations have been upheld as constitutional under the criminal law power.[100]

So, can we apply the three criteria to the Emissions Cap 2022?

1. A valid public purpose:

As we note, the protection of the environment was found to be a valid public purpose in the decision of *R v Hydro-Quebec*. If GHG emissions were properly classified as toxic substances under the CEPA (which we consider above) it is likely that the valid public purpose would be satisfied.[101]

We can already look to the Federal Court of Appeal for such a finding. In their decision in *Syncrude Canada Ltd. v Canada*, the FCA held that "it is uncontroverted that GHGs are harmful to both health and the environment and as such, constitute an evil that justifies the exercise of the criminal law power."[102] To come to this conclusion, they cite evidence that GHG emissions have significant global warming potentials, are long lived and therefore of global concern [and] have the potential to contribute significantly to climate change."[103]

On the other hand, in the *Reference re Impact Assessment Act*, the Alberta Court of Appeal considers whether "the degree of threat of *harm* to the public interest" is sufficient and focuses on whether the prohibition is "limited to protecting against objectively harmful effects to the environment."[104] It may be that a GHG such as carbon dioxide which is not objectively harmful (in limited quantities) would not fulfill this definition. We consider the *Reference re Impact Assessment Act* in our accompanying report "All things Considered: Impact Assessment and the Constitution."

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[97] Hydro-Quebec*, supra* note 46 at paras 112 & 119.
[98] *Ibid* at para 121.
[99] *Ibid* at para 123.
[100] Hogg, *supra* note 75 at 511.
[101] Hydro-Quebec*, supra* note 46; Hogg, *supra* note 75 at 513; Sheffield, *supra* note 74 at 10.
[102] *Syncrude, supra* note 6 at para 62.
[103] *Ibid* at para 9.
[104] *Reference re Impact Assessment Act,* 2022 ABCA 165 at para 405 [Ref re IAA].

The Courts of Appeal in both Saskatchewan and Alberta in relation to the GGPPA reference rejected that criminal law jurisdiction was a valid way for the federal government to regulate GHGs.

2. A prohibition:

While we do not have the details for prohibitions under the proposed Emissions Cap 2022, it may be safe to assume there would be a prohibition associated with missing targets. However, due to the multiple compliance options and the goal not to eliminate *all* GHG emissions but rather to limit them to a certain level it does seem to suggest it is not in fact a full prohibition. This lack of prohibition led the Saskatchewan Court of Appeal to reject arguments about applying the criminal law power in the context of carbon pricing (in the GGPPA reference).[105]

For this, we may be able to look to the decision of *RJR-Macdonald Inc. v Canada (Attorney General)* in which the SCC upheld a law prohibiting tobacco advertising finding that "[g]iven the addictive nature of tobacco products, and the fact that over one-third of Canadians smoke, it is clear that a legislative prohibition on the sale and use of tobacco products would be highly impractical" and that "the mere fact that it is not practical or realistic to implement a prohibition on the use or manufacture of tobacco products does not mean that Parliament cannot, or should not, resort to other intermediate policy options."[106] Professor Hogg argues this is applicable to an emissions cap as the purpose of a cap-and-trade program is "the overall reduction of emissions" and therefore "[a] reduction anywhere is equally beneficial and serves the purpose of the law."[107] Hogg also cites *RJR-Macdonald Inc. v Canada (Attorney General)* stating that "alternative means of compliance that pursue the same public purpose, namely the reduction in overall greenhouse gas emissions, are likely to be upheld as a valid part of the legislative scheme."[108]

3. Backed by a penalty:

Similarly, we can assume that penalties would be included to incentivize proper behaviour; however, without further details it is more difficult to predict.

Existing Provisions: CEPA

If the Emissions Cap 2022 were upheld under the criminal law it would likely fall under the auspices of the CEPA. Below we highlight existing provisions in the Act that allow the federal Minister to "establish guidelines, programs and other measures for the development and use of economic instruments and market-based approaches" including "deposits and refunds and tradeable units."[109] In addition, the Act already enables regulations for systems relating both to

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[105] SASK REF Re GGPPA, *supra* note 23 at 98.
[106] *RJR-Macdonald Inc. v Canada (Attorney General)*, [1995] 3 SCR 199 at paras 34 & 35.
[107] Hogg, *supra* note 75 at 515.
[108] *Ibid* at 515.
[109] CEPA, *supra* note 44, s 322.

deposits and refunds and for the establishment of a tradable unit system.[110] Section 167 enables further regulation making power including regulations respecting "the quantity or concentration of the substance that may be released into the air."[111] Each of these provisions may be used to enact the proposed Emissions Cap 2022 without significant amendment to the existing CEPA.

Additionally, Division 6 of the CEPA applies directly to international air pollution.[112] Section 166 defines international air pollution as "a substance released from a source in Canada that creates or may reasonably be anticipated to contribute to (a) air pollution in a country other than Canada; or (b) air pollution that violates, or is likely to violate, an international agreement binding on Canada in relation to the prevention, control or correction of pollution."[113] The section goes on to state that in the event the air source is not federal and the government in charge of the source cannot prevent, control or correct the air pollution or does not do so, the Minister can step in and has the option to recommend regulations for the purpose of preventing, controlling, or correcting the air pollution.[114]

Finally, greenhouse gas emissions, including carbon dioxide and methane, have already been included on the List of Toxic Substances under the CEPA.

Notably however, none of these provisions have been tested in court.

The Trade and Commerce Power

Finally, the potential trading regime in the Emissions Cap 2022 may be upheld under the federal Trade and Commerce Power.[115] The trade and commerce section has not yet been used to uphold environmental legislation in Canada; however, there is scholarship which considers how it may be applied. The test for the general trade and commerce power is set out in the SCC decision of *General Motors of Canada v National Leasing*.[116] In this decision, the SCC established a five-part test that "form[s] the basis of the test for valid legislation under the general branch of the trade and commerce power."[117] The five criteria are:[118]

1) the impugned legislation must be part of a general regulatory scheme;

The Emissions Cap 2022 would likely meet the criteria for a general regulatory scheme so long as the purpose was found to be economic rather than environmental. Kai Sheffield argues "that

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[110] *Ibid*, ss 325 & 326.
[111] *Ibid*, s 167(a).
[112] *Ibid*, Div 6.
[113] *Ibid*, s 166(1).
[114] *Ibid*, ss 166(2) & (3).
[115] *Constitution Act, 1867, supra* note 1, s 91(2).
[116] *General Motors of Canada Ltd. v City National Leasing*, [1989] 1 SCR 641 [GM v City National].
[117] Andrew Leach, "Environmental Policy is Economic Policy: Climate Change Policy and the General Trade and Commerce Power" (2021) 52-2 *Ottawa L Rev* 97 at 123 [Leach].
[118] GM v City National, *supra* note 116.

emissions trading is far more trade-related than normal environmental protection legislation because it commoditizes emissions reductions and provides for market-driven regulation."[119] Stewart Elgie agrees stating that what emissions trading aims "to achieve is lower cost emissions reductions" which would signal an economic purpose.[120]

2) the scheme must be monitored by the continuing oversight of a regulatory agency;

This also seems to be easily met as Nathalie Chalifour argues that "the rules governing trading would be part of a general regulatory scheme for the cap and trade program and under the oversight of an agency to manage the program."[121] Professor Andrew Leach also concedes that "national GHG emission policy – whether it involved regulatory charges, quantity restrictions, or technology standards – would be all but impossible without both a complex scheme and an oversight body."[122]

3) the legislation must be concerned with trade as a whole rather than with a particular industry;

While Elgie considers the fact that a cap-and-trade system would apply to "all large GHG emitting facilities, regardless of their industry sector" sufficient to meet this test, this criterion is not as easily met.[123] For example, Elizabeth DeMarco and her co-authors, in their consideration of a previous cap-and-trade proposal highlighted that if the cap-and-trade program is targeted at only certain high emitting industries, it may not meet this test.[124]

4) the legislation should be of a nature that the provinces jointly or severally would be constitutionally incapable of enacting; and

With regard to the provincial inability step, Sheffield highlights the provincial inability to bind other jurisdictions to a cap-and-trade regime, despite having the jurisdiction to enact one themselves.[125] Elgie agrees arguing that "[w]hat is being traded is a unit of compliance with a particular Act" and for "that reason, a province would be constitutionally incapable of regulating the trading" of the credits in question.[126] Again; however, DeMarco points to American state emissions trading regimes and their success at lowering emissions to suggest that although

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[119] Sheffield, *supra* note 74 at 15.
[120] Elgie, *supra* note 88 at 116-117.
[121] Nathalie J Chalifour, "Canadian Climate Federalism: Parliament's Ample Constitutional Authority to Legislate GHG Emissions Through Regulations, a National Cap and Trade Program, or a National Carbon Tax" (2016) 36 NJCL 331 at 397.
[122] Leach, *supra* note 117 at 129.
[123] Elgie, *supra* note 88 at 117.
[124] Elisabeth DeMarco, Robert Routliffe & Heather Landymore, "Canadian Challenges in Implementing the Kyoto Protocol: A Cause for Harmonization" (2004) 42-1 *Alberta L Rev* 209 at 237 [DeMarco].
[125] Sheffield, *supra* note 74 at 16.
[126] Elgie, *supra* note 88 at 118.

"such patchwork trading systems are far less effective and efficient than a coordinated scheme" that does not necessarily rise to the level of inability.[127]

5) the failure to include one or more provinces or localities in a legislative scheme would jeopardize the successful operation of the scheme in other parts of the country.

Finally, if as DeMarco suggests, the "majority of Canadian GHG emissions are produced in a small number of provinces" would the failure to include one or more result in a failure of the entire program?[128] Elgie focuses on the fact that if one or more provinces were excluded from such a program it would raise the prices for everyone but does note that this may not necessarily "jeopardize" the scheme.[129]

It seems therefore that the trade and commerce power may be a less likely jurisdictional silo for the proposed Emissions Cap 2022. However, some of the questions noted may be answered with the specifics of the cap.

International Climate Treaties

Throughout many of the historical and current acts that purport to manage climate change at the federal level the federal government often refers to their international climate obligations. However, we highlight below that the existence of an international treaty is not sufficient to ground legislation within a federal head of power.

Until 1926, section 132 of the *British North America Act* gave the federal government the authority to implement treaties signed by the United Kingdom on Canada's behalf – known as 'empire treaties.' [130] It was not until 1926 that Canada received the authority to sign treaties on its own behalf.[131] However, unlike, treaties entered into by the British Empire, the SCC has made it clear that the signing of an international treaty by the federal government is not sufficient to move the content of the treaty into federal jurisdiction.[132] In other words, if the subject matter of an international treaty does not fall within federal jurisdiction it cannot be made law by the federal government simply by virtue of the treaty.

The first decision to consider federal jurisdiction to enter into international treaties, was the 1932 *Radio Reference* case heard by the British Privy Council – the highest court at the time.[133] In this decision, the Privy Council found that although section 132 of the *British North America Act*

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[127] DeMarco, *supra* note 124 at 237.
[128] *Ibid* at 238.
[129] Elgie, *supra* note 88 at 119.
[130] *Ibid* at 91.
[131] *Ibid* at 91.
[132] See for example *AG Can v AG Ont,* [1937] AC 326 [*Labour Conventions*]; *Reference re GGPPA – SCC, supra* note 4.
[133] *AG Que v AG Can et al*., [1932] AC 304 [*Radio Reference*].

no longer applied, the authority to implement treaties signed by Canada was properly situated within the federal government's POGG power.[134] However, only a few years later, in 1937, the Privy Council went back on this decision in *Labour Conventions*.[135]

In the *Labour Conventions* decision, the Privy Council found that the power to implement treaties did not fall within POGG but rather the subject matter at issue needed to be considered.[136] They held that if the subject matter fell within provincial jurisdiction, the power to implement the treaty would fall under provincial jurisdiction and the opposite would apply if the subject matter was properly within federal jurisdiction.[137] To distinguish *Labour Conventions* from the previous *Radio Reference* decision, they argued that radio communication was properly a national concern.[138]

Many years later, in his description of the *Kyoto Protocol* Professor Peter Hogg noted, "Canada's accession to the treaty did not confer on Parliament any additional legislative power to implement the treaty."[139] He went on to explain that this means "that Parliament could not use the treaty as a constitutional basis for a law controlling greenhouse gas emissions, even if the true purpose of the law was to implement the treaty."[140] This remains the case for current international climate change treaties.

Despite these limits, in the *Reference re GGPPA*, the majority considered Canada's ability, or inability, to meet its international commitments and the connection with global efforts to address climate change as a sign of the harm that would arise if one province failed to mitigate its own GHG emissions – an argument that contributed to the finding that the GGPPA was valid under the national concern doctrine.[141] While the international commitments weighed in favour of a finding of provincial inability, the Court reiterated that Parliament did not have the jurisdiction to implement Canada's treaty obligations.[142]

As Gib van Ert explains, "Parliament cannot necessarily implement treaties made by the Federal Government. Whether it can do so or not is determined according to the ordinary division of powers."[143] However, he argues that while the court must determine whether the subject matter of a contested enactment goes beyond local or provincial concern or interests to attain national dimensions it may use the existence and content of a treaty obligation on an evidentiary

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[134] *Ibid*.
[135] *Labour Conventions, supra* note 132.
[136] *Ibid*.
[137] *Ibid*.
[138] *Ibid*.
[139] Hogg, *supra* note 75 at 518.
[140] *Ibid* at 518.
[141] *Reference re GGPPA* – SCC, *supra* note 4 at para 190.
[142] *Ibid* at para 190.
[143] Gib van Ert, "POGG and Treaties: The Role of International Agreements in National Concern Analysis" (2020) 43:2 Dal L J 901 at 907.

basis.[144] This is relevant for POGG cases, as during their analysis Courts can "look to treaties as evidence that the impugned Act's subject matter falls within Parliament's residual power."[145]

Thus, while international climate obligations may be relied upon as evidence in a POGG case, it is no guarantee of a finding of federal jurisdiction.

Provincial Regulation of GHGs

Under section 92 of the *Constitution Act, 1867* the provincial governments have the jurisdiction to legislate with regard to local works and undertakings, property and civil rights, and generally all matters of a merely local or private nature.[146] In addition, they have broad jurisdiction to "exclusively make laws in relation to (a) exploration for non-renewable natural resources in the province; (b) development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production thereform; and (c) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy."[147]

Clearly, section 92A assigns the provinces jurisdiction to manage natural resources. The majority of the Alberta Court of Appeal in their opinion in the *Reference re Impact Assessment Act* hold that "the purpose of the s 92A, when passed, was to ensure that the approval of projects for the exploration, development, conservation and management of 92A natural resources was vested exclusively in the province that owned them."[148] This would certainly extend to the management of GHG emissions. We also saw this acknowledgment in the *Reference re GGPPA* when the SCC held that beyond the narrow pith and substance of the legislation the provinces would be free to legislate on GHGs beyond this minimum, as they saw fit.[149]

In fact, Alberta was the first jurisdiction in Canada to enact legislation to manage GHG emissions with the *Specified Gas Emitters Regulation*.[150] At the time Peter Hogg stated that "there is no doubt that each province has the power to control the emission of greenhouse gases by industrial firms operating within the province" and that the "constitutional validity of Alberta's *Specified Gas Emitters Regulation* is not in doubt."[151] We consider the most recent version of this type of provincial legislation next.

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[144] *Ibid* at 909.
[145] *Ibid* at 920.
[146] *Constitution Act, 1867, supra* note 1, ss 92(10), (13), (16).
[147] *Ibid,* s 92A.
[148] Ref re IAA, *supra* note 104 at para 81.
[149] Bankes, Leach & Olszynski, *supra* note 26 at 5.
[150] *Specified Gas Emitters Regulation*, Alta Reg 139/2007.
[151] Hogg, *supra* note 75 at 510.

Alberta's TIER system

While Part 1 of the GGPPA (the fuel charge) applies in Alberta, the Output-Based Pricing Scheme from Part 2 does not. Instead, Alberta has implemented a provincial equivalent with the *Technology Innovation and Emissions Reduction Regulation* ("TIER").[152] The following section provides a summary of the TIER program. The TIER program is the Albertan version of an "industrial greenhouse gas emissions pricing regulation and emissions trading system."[153] It is enabled under the *Emissions Management and Climate Resilience Act* and is designed to meet the benchmark criteria for an equivalent provincial program under the federal GGPPA.[154]

The TIER program applies to "large facilities" defined as any facility "that has direct emissions of 100 000 CO2e tonnes or more in 2016 or a subsequent year."[155] The program is mandatory for these facilities; however other facilities can choose to opt-in. Opted-in facilities must be approved by the director and must either "compete directly with a facility to which this Regulation applies"; or be "in an emissions-intensive-trade-exposed sector" and have "direct emissions of 10 000 CO2e tonnes or more in 2017 or any subsequent year or is likely to have direct emissions of 10 000 CO2e tonnes or more in its 3rd year of commercial operation."[156] Aggregate facilities may also apply to be included in the program, allowing "[t]he person responsible for 2 or more conventional oil and gas facilities [to] apply to the Director for a group of 2 or more of the conventional oil and gas facilities to be designated as an aggregate facility or for an amendment of a designation … to add a conventional oil and gas facility."[157]

TIER-regulated facilities can choose to adhere to either a high-performance benchmark as set out in Schedule 2 for specific emission types or to a facility-specific benchmark which assigns a benchmark based on historical emissions.[158] In each case, the benchmarks may change over time. From there, facilities can choose to improve facility efficiency to meet benchmark targets, submit emission performance credits, emission offsets, or purchase fund credits.

The TIER program operating in conjunction with the fuel charge from the GGPPA provides an example of overlapping constitutional jurisdiction to manage GHG emissions in Alberta.

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[152] TIER, *supra* note 3.
[153] Government of Alberta, "Technology Innovation and Emissions Reduction Regulation" online: https://www.alberta.ca/technology-innovation-and-emissions-reduction-regulation.aspx.
[154] *Emissions Management and Climate Resilience Act*, SA 2003, c E-7.8.
[155] TIER, *supra* note 3, s 1(cc).
[156] *Ibid,* s 4(4)(b).
[157] *Ibid*, s 5(1).
[158] *Ibid*, ss 6 & 7.

FINAL THOUGHTS

At first glance, it may have seemed that the *Reference re GGPPA* provided a final jurisdictional analysis on the management of GHG emissions in Canada, firmly situating it under federal control. However, this is not the whole story. While the federal government will play a significant role in the management of GHG emissions and climate change more generally, through both the GGPPA and the CEPA, they will not be able to do so alone. The provinces retain jurisdiction to manage GHGs under several heads of power including local works and undertakings, property and civil rights, generally all matters of a merely local or private nature in the Province, and the section 92A jurisdiction over non-renewable natural resources.[159] The SCC confirmed this balance in the *Reference re GGPA* stating that with the identification of a narrow pith and substance focused on minimum national standards, the provinces would be free to legislate on GHGs beyond this minimum, as they saw fit.[160] It is imperative; therefore, that both levels of government enact strong and proactive legislation to manage the GHG emissions across Canada.

Despite this, it seems the constitutional heat between Alberta and Canada will remain high, as the federal government continues to set its sights on minimizing GHGs and the province asserts its position on exclusive jurisdiction over development of its natural resources.

[159] *Constitution Act, 1867, supra* note 1, ss 92(10), (13), (16) & 92A.
[160] Bankes, Leach & Olszynski, *supra* note 26 at 5.