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**Legal Opinion on the Constitutionality of the
Federal Carbon Pricing Benchmark & Backstop Proposals**

I. INTRODUCTION

A request was made for a legal opinion on the constitutionality of the proposed federal carbon tax/levy, carbon trading add-on and selective backstop. More specifically, by terms of reference dated August 3, 2017, an independent legal opinion was requested with respect to the following questions:

1. Does the federal government have the constitutional authority as set out in Section 91(1) of *The Constitution Act 1867* to enact legislation directed at the reduction of greenhouse gas emissions into the atmosphere?
2. If the answer to Question 1 is "yes", then does it fall within federal constitutional authority to enact legislation directed at the reduction of carbon and other greenhouse gases in the form of "backstop legislation" that will apply in one province, but not others, only if the federal government determines that it applies in that province?
3. If the answer to Question 2 is "yes", then are there any constitutional limits as to the scope or reach of this authority including the ability to enact specific types of measures to reduce greenhouse gas emissions such as a carbon tax, a cap-and-trade system, or a hybrid carbon levy and output-based pricing system as set out in the federal "benchmark" and "backstop" policy directions?
4. Based on the answer to Question 3, does a province have the constitutional authority to develop their own approach to reduce carbon and greenhouse gas emissions in a matter it deems appropriate or equivalent, or can the federal government override provincial legislation and actions in the form of its "backstop" proposal?

It was understood the opinion would be formed based strictly on independent judgment, and that the findings within would be reported forthrightly. There was no suggestion whatsoever that the Government of Manitoba wished to obtain support for any particular policy position, rather than obtaining an independent assessment of the legal landscape in which it would make its policy choices.

This legal opinion will proceed in the following structure. First, a summary of the views expressed herein and a response to the questions posed above will be provided. Next, the background to the legislation, including the national and international developments which provide the necessary backdrop, will be reviewed. The opinion will then proceed to a substantive analysis of the various heads of power upon which this legislation might be upheld, together with an analysis of relevant non-legal considerations which, while not strictly substantive in nature, may nonetheless be equally persuasive to the Court. In order to arrive at this opinion, academic literature on these issues has also been canvassed. **Appendix "A"** attached hereto provides an encapsulation of that academic opinion. As will be seen, there is a considerable diversity of views on the issues which are material to this opinion.

II. SUMMARY

This legal opinion focuses on a proposed federal measure, substantively similar to what has been proposed by the federal government in its *Technical Paper on the Federal Carbon Pricing Backstop* (the "**Technical Paper**").¹ For the reasons which are discussed below, it would be difficult (if not impossible) to provide meaningful answers to the more abstract question of whether any proposed federal measures would exceed the federal government's jurisdiction.

The method of analysis used in this opinion results in a prediction of what the Supreme Court of Canada would hold, in light of the wording of constitutional precedents, and the general principles that guide the Supreme Court of Canada in difficult constitutional cases.

This opinion takes no position on whether the proposed federal measure would be good or bad public policy.

In response to the questions above, the view of this opinion is that:

1. There is a strong likelihood that the Supreme Court of Canada would uphold the proposed carbon tax/levy. It would probably do so on the basis of the federal government's taxation power. The cap-and-trade feature of the proposed carbon tax/levy would probably be upheld as a necessary add-on to the basic carbon tax/levy.

It is entirely possible that the Supreme Court of Canada would *also* uphold the proposed measure on some other head or heads of federal authority.

It is unlikely that the Supreme Court of Canada would say that the taxation power is *not* a basis for federal authority, and that *only* another head of authority would justify the imposition of the feature.

¹ Government of Canada, *Technical Paper on the Federal Carbon Pricing Backstop* (2017), accessed at: <https://www.canada.ca/content/dam/eccc/documents/pdf/20170518-2-en.pdf>.

The precedents are insufficiently clear and specific to conclusively resolve these questions, and in any event, the Supreme Court of Canada can depart from its earlier precedents. The conclusions in this opinion are therefore largely based on general principles and values that the Supreme Court of Canada tends to adopt, rather than the specific language of precedents. The Supreme Court of Canada is wary of allowing the division of powers between the federal and provincial levels of government to stand in the way of activist government, including in the subject matter of the environment. It is also concerned about maintaining the federal-provincial balance of powers. Using the federal taxation power, and *only* the federal taxation power, to uphold the legislation, would accomplish several objectives:

- (a) allowing the federal government to pursue legislative initiatives on greenhouse gas ("**GHG**") emissions;
 - (b) upholding a method of so doing – in this case, sending a price signal via a tax – that does not involve potentially more intrusive methods of federal intervention. A price signal permits actors to find their own way to adapt to the measure, rather than seeing government micromanage them or use command-and-control dictates;
 - (c) permitting some protection for sensitive provincial industries, such as provincial Crown corporations that extract and generate power. The provinces and these Crown corporations have a degree of immunity from a federal tax, arising from Section 125 of the *Constitution Act, 1867*, as amended (the "**Constitution**");² and
 - (d) leaving some room for the provinces to pursue their own carbon pricing measures.
2. The “backstop” nature of the proposed measure means that it would only apply in provinces that have not adopted their own laws which satisfy federal benchmarks.

The backstop measure, in and of itself, is unlikely to render an otherwise valid federal carbon tax/levy unconstitutional. The Supreme Court of Canada would probably see the space given to the provinces to craft their own means of compliance as an exercise of "cooperative federalism".

A credible (though untested) argument, however, could be made about the potentially discriminatory application of the backstop feature. Suppose Manitoba adopted its own "made-in-Manitoba" overall GHG reduction plan, which would reduce GHG emissions just as effectively as the approved federal measures (these are a specific carbon tax/levy or a cap-and-trade scheme, to the exclusion of all other types of measures which might be adopted by other provinces). This short list of approved approaches might work for other provinces, but may not be consistent with Manitoba conditions or the legislative preferences of Manitoba's own elected leaders.

Manitoba could then argue the federal government was arbitrarily denying its authority to craft its own legislative measures in response to the issue of GHG

² *Constitution Act, 1867* (UK), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, Appendix II, No. 5.

emissions. The federal government, according to the argument, would as a result be acting inconsistently with the principle that all provinces have equal authority to legislate within areas of provincial jurisdiction.

The principle of the equality of the provinces has been a centrepiece of constitutional reform in the past decades. It was accepted by all Canadian governments as a fundamental principle of Canada, in the Charlottetown Accord.

Given that this is an argument without any precedent to date in the Supreme Court of Canada's cases on federalism, it is difficult to predict how the Court might respond. It remains a credible argument, however, that might actually succeed.

3. The federal government likely cannot legislate in the area of GHG emissions in any way it chooses. It is unlikely that the Supreme Court of Canada would find that GHG regulation is an implied head of federal authority under its "peace, order and good government" power. Particular measures may be found to be beyond federal authority, because they:
 - (a) intrude too extensively into matters that are ordinarily within provincial jurisdiction;
 - (b) do not respect the immunity of the provincial Crown from federal taxation;
 - (c) do not respect any other interjurisdictional immunity pertaining to a provincial entity or operations (such additional provincial immunities might in theory exist, but the courts rarely, if ever, recognize them);
 - (d) do not respect the principle of the legal equality of the provinces (as noted above, this would be an untested position); and
 - (e) are inconsistent with Aboriginal or Treaty Rights.
4. The provinces undoubtedly have the authority to adopt their own carbon pricing measures – and in fact have already done so, in cases like British Columbia's carbon tax or Québec's cap-and-trade. The federal government and the provinces, however, often have concurrent authority to act in a field, each using their own heads of authority under the Constitution. In cases of conflict, federal measures prevail over provincial measures. To the extent that the federal government has authority to legislate in this area, its measures might have the legal or practical effect of interfering with a "made-in-Manitoba" carbon pricing regime.

III. BACKGROUND

The background for the proposed federal carbon tax/levy includes the Paris Agreement³ and the Pan-Canadian Framework on Clean Growth and Climate Change (the "**Pan-Canadian Framework**")⁴ that followed it. As will be seen, the decision of any Court which is asked to

³ UN Doc. FCCC/CP/2015/L/9, Dec. 12, 2015, accessed at <http://unfccc.int/resource/docs/2015/cop21/eng/l09r01.pdf>.

⁴ Pan-Canadian Framework on Clean Growth and Climate Change (2016), accessed at: <https://www.canada.ca/content/dam/themes/environment/documents/weather1/20170125-en.pdf>.

decide upon the constitutionality of a carbon tax/levy will be highly context-specific. These documents, together with Manitoba's response, will therefore be reviewed next.

1. **The Paris Agreement**

The Paris Agreement is an international treaty which was signed in 2016. Almost 160 states, including Canada, have now ratified it.⁵ It recognizes the need for "an effective and progressive response" to the "urgent threat of Climate Change."

The Paris Agreement calls on states to join in a global effort to limit the increase to the global average temperature to 1.5°C above pre-industrial levels. Its premise is that global warming (of at least 1.5°C above pre-industrial levels, or more) would be on balance a threat to "human societies and the planet". A further premise is that global warming is largely driven by GHG emissions.⁶ Each state is called upon to make a "Nationally Determined Contribution" ("**NDC**") toward limiting increases to the global average temperature, including by way of lowered GHG emissions.

No formula is set out for determining the size of each state's NDC. The Paris Agreement does not specifically link a state's NDC to its share of world population, GDP or the current global amount of GHG emissions. Rather, the NDC should reflect:

... equity and the principle of common but differentiated responsibilities and respective capabilities in light of different national circumstances.⁷

The Paris Agreement identifies some of the considerations a state may take into account in defining its NDC:

- (a) concerns of states with economies most affected by the impacts of response measures, particularly developing countries;⁸
- (b) fostering sustainable development;⁹
- (c) the rights of vulnerable communities, and of minorities such as Indigenous Peoples;¹⁰ and
- (d) the right of development.¹¹

⁵ On August 4, 2017, the United States provided formal notice of its intent to withdraw from the Paris Agreement, accessed at <https://treaties.un.org/doc/Publication/CN/2017/CN.464.2017-Eng.pdf>.

⁶ The Paris Agreement does not expressly adopt any detailed position on the scientific or economic debates that are involved with its subject matter, e.g., over the reliability of historic temperature measurements and proxy data; the sensitivity of temperature to CO₂; the percentage contribution of human-generated GHGs to temperature change; or the evaluation of the costs and benefits of various climate conditions. In practice, the Courts considering any litigation about federal measures might take the view that the scientific evaluations of the International Panel on Climate change provide important background on the considerations taken into account by Parties to the Paris Agreement.

⁷ Paris Agreement, Article 2(2).

⁸ Paris Agreement, Article 4(15).

⁹ Paris Agreement, Article 6 generally.

¹⁰ Paris Agreement, Article 6 generally.

¹¹ Paris Agreement, preamble.

The approach appears to acknowledge the potential for negative trade-offs, arising from the impact of GHG reduction measures. A carbon reduction response might in some cases lower economic growth in a state. Or, that reduction might slow the rate at which a less developed country catches up economically. To the extent that human well-being is promoted by GHG reduction, there might be counterbalancing human costs which are associated with lower economic growth (e.g., in areas like health care delivery or lessening poverty). It is even possible that some carbon reduction initiatives might on balance harm the environment (e.g., adopting a nuclear energy or windmill program that harms people or wildlife).¹² Many policies on sustainable development hold that economic growth and environmental protection can be mutually reinforcing. With rising national wealth, a state may be better equipped to invest in environmental protection.

The Paris Agreement does not define the meaning of "equity", as a guide to states in setting their NDC. The term suggests that a NDC might be expected to depend on a wide variety of

¹² The activities of any one state can have only a limited impact on overall GHG emissions, and by extension, on overall climate change. (The extent to which temperatures rise due to GHG emissions – "climate sensitivity" – remains a subject of debate, but the Paris Agreement assumes the correlation is substantial.) The Paris Agreement seeks to pool GHG emissions and contributions to reduce them from around the world. There may be benefits, in addition to the costs of rising global temperatures (e.g., longer growing seasons), and the cost-benefit balance at various temperatures has also been debated. The Paris Agreement is premised on the view that there would be, at the very least, too much risk of net adverse effects, if the temperature warms by more than 1.5°C above pre-industrial levels. On the other side of the equation, some argue there are: risks of forgoing economic activity (poverty and ill health associated with a lack of development); lost opportunity costs arising from expending on GHG reduction resources that could be spent on other projects that promote human well-being; and risks of losing some of the benefits of global warming, or even of forestalling eventual global cooling that might otherwise occur. Surrounding all of the potential debate are differences in views over science, including: the reliability of historic temperature records and proxies for measuring temperature (e.g., tree rings); the physics of the climate; the extent to which computer models sufficiently reflect actual physical conditions and causal links between external factors and the climate; and the extent to which the complexity of the climate and the inability to conduct controlled experiments at a small scale makes scientific certainty more difficult to achieve. There is a meta-debate about whether there is a scientific consensus about global warming and the human contribution to it through GHG emissions, and whether disagreement as to the effects of human contribution is anti-scientific "denialism" or should even be criminalized. Judith Curry, a prominent climatologist, recently retired from the field, saying politicization was making rational scientific debate difficult or impossible.

The controversies are unlikely to affect the outcome of a Supreme Court of Canada case (at least, not if the case is decided in the next year or two). None of the governments involved, including Manitoba and Saskatchewan, have thus far challenged any of the basic scientific or economic assumptions behind the Paris Agreement. Views on the science and economics may evolve, but there will likely be no drastic shifts in the next few years. The Supreme Court of Canada is not going to be interested in entering into a scientific or economic debate about global warming. The global community has implicitly adopted a particular view: that GHGs contribute to global warming, that GHG reduction can abate global warming, and that it is necessary, or at least a good risk management strategy, to take measures to reduce GHG emissions. The Government of Canada shares that view. No provincial government is challenging it. The Supreme Court of Canada has repeatedly said that the wisdom of legislation is not a factor in its validity. Even in the *Charter* context, where Courts are more comfortable in assessing the wisdom of legislation, the Supreme Court of Canada has commented that in the event of uncertainty about the science involved with a policy, and about the impact of various public policy measures, the legislatures must be allowed considerable leeway to make decisions.

factors, such a state's share of global GHG emissions, the cost of reducing GHG emissions and the money and technology the state has at its disposal.

The Paris Agreement contemplates a variety of measures which may be used to achieve NDC goals. Some combination of emission reduction and absorption can be achieved by measures that include:

- (a) reduction of GHG emissions;
- (b) increase of sinks and reservoirs for GHGs;
- (c) non-market measures, such as direct prohibition of various carbon-producing activities; and
- (d) carbon pricing.

Carbon pricing may be implemented through several mechanisms (or hybrids of them).

The carbon tax is often presented as an attractive alternative to detailed state regulation of economic activity. The price of carbon emission is quantified and charged on activities which result in GHG emission, and within that framework, actors can determine for themselves the most efficient ways to reduce usage. Carbon pricing is also thought of as a way of promoting fairness; it makes the emissions producer itself responsible for the cost to society of its emissions activities.

Carbon taxes can be designed so as to be "revenue neutral" – the increase in government net revenues is offset by tax reductions or rebates in other respects. Revenue neutrality is intended to underline the message that governments are not engaged in a "tax grab", but rather are trying to influence behaviour. Revenue neutrality might also reduce any adverse impact of a carbon tax on overall economic growth; citizens can spend or invest money that has been returned to them.

The other main carbon pricing mechanism is a "carbon trading add-on" system. The government places an overall limit on carbon emissions, and allocates or sells permits which allow holders to emit an aggregate amount of carbon which does not exceed that overall limit. Permits can be bought or sold in the marketplace. Jurisdictions can cooperate to establish a shared marketplace. A carbon trading add-on seeks to use free market decisions to achieve a public objective. One producer might find it can reduce emissions at a minimal cost, or lower its production and sell its credits. Another producer might find that it makes more economic sense to buy credits; the cost might be offset by gains in production.

Under the Paris Agreement, the international community does not attempt to exert command-and-control¹³ over individual states. Instead, it sets out:

- (a) an ultimate international objective (limiting global warming);
- (b) an instrumental objective (limiting the amount of GHGs in the atmosphere);
- (c) a state's obligation to define a commitment to doing its part for the international GHG reduction objective; and

¹³ As opposed to a more permissive framework which might let the market drive behaviour, command-and-control legislation sets and enforces direct standards.

- (d) a reporting system for the state's practical results.

The Paris Agreement does not require any state to adopt one or both of a carbon tax or carbon trading add-on mechanism. A 2016 report found that over 50 states had already adopted some form of carbon pricing, and that 40 percent of global GDP is produced by jurisdictions which use emission trading systems.¹⁴ The flip side of this statistic is that many jurisdictions have not yet adopted carbon-pricing. The statistic also does not reveal how rigorous each state's constraints are, as a matter of law, or in their actual enforcement.

A state's failure to meet its stated objective results in no penalties. The enforcement mechanism operates on a "name and shame" basis – states report on how well or poorly they did in achieving their NDC objectives. This does not mean that states are legally free to make insincere commitments, or to refrain from engaging in honest efforts to meet their commitments. Rather, under public international law, states are required to perform treaty obligations in good faith.¹⁵

2. *The Vancouver Declaration*

After the Paris Agreement was signed at the end of 2016, federal and provincial¹⁶ governments agreed on the Vancouver Declaration on Clean Growth and Climate Change (the "**Vancouver Declaration**").¹⁷ According to one press account:

Pricing carbon pollution emerged as a source of contention in advance of the First Ministers' Meeting. Prior to the Vancouver event, the premiers of Saskatchewan, Yukon, and Manitoba made it clear they would not support Ottawa imposing a national minimum carbon price on the provinces and territories.

During his election campaign Trudeau promised to implement a national price on carbon and indicated a carbon price was an intended outcome of the Vancouver meeting.

A compromise was found in the end. The Vancouver Declaration commits the premiers to "adopting a broad range of domestic measures, including carbon pricing mechanisms" but not an actual per tonne price of GHG emissions found in carbon tax or carbon trading add-on systems.¹⁸

¹⁴ Environmental Defense Fund and the International Emissions Trading Association, *Carbon Pricing: The Paris Agreement's Key Ingredient* (April 2016), accessed at: http://www.ieta.org/resources/Resources/Reports/Carbon_Pricing_The_Paris_Agreements_Key_Ingredient.pdf. The word jurisdiction could mean subnational units, like U.S. states or Canadian provinces, so the percentage of sovereign states with carbon-pricing might be smaller.

¹⁵ *Vienna Convention on the Law of Treaties*, 23 May 1969, [1980] Can T.S. No. 37, Article 26.

¹⁶ In the context of the Vancouver Declaration and the Pan-Canadian Framework, references in this opinion to the Provinces should be read as including the Territories.

¹⁷ *Vancouver Declaration on Clean Growth and Climate Change* (March 3, 2016), accessed at http://www.itk.ca/wpcontent/uploads/2016/04/Vancouver_Declaration_clean_Growth_Climate_Change.pdf.

¹⁸ DeSmog Canada, *Vancouver Declaration Moves Canada Closer To A National Climate Plan* (March 5, 2016), accessed at: <https://www.desmog.ca/2016/03/05/vancouver-declaration-moves-canada-closer-national-climate-plan>.

On carbon pricing, the Vancouver Declaration does not contain any agreement that the federal level of government may impose a nation-wide system, regardless of provincial jurisdiction. It acknowledges that provinces have been "early leaders" on climate change, including with respect to the adoption of carbon pricing mechanisms, and endorses the view that provinces should have flexibility to craft their own approaches toward addressing climate change.¹⁹

3. The Working Group on Carbon Pricing Mechanisms

After the Vancouver Declaration, a series of federal-provincial working groups were established. One of those groups focused on carbon pricing mechanisms. Its Final Report²⁰ examined carbon pricing mechanisms that have been established in various provinces. These include:

- (a) British Columbia's revenue neutral carbon tax;
- (b) Alberta's carbon levy;
- (c) Ontario's cap-and-trade;
- (d) Québec's cap-and-trade; and
- (e) Nova Scotia's commitment to cap-and trade.

The working group's Final Report sets out various options for carbon pricing on a pan-Canadian basis, but does not specifically contain a proposal (from the Government of Canada or the working group) for federal selective backstop legislation.²¹

4. The Pan-Canadian Framework

The Government of Canada and the provinces (excluding Manitoba and Saskatchewan)²² considered various working group reports and then agreed upon the Pan-Canadian Framework. The document includes this statement of principles:

¹⁹ An excerpt from Article 2 of the Vancouver Declaration states as follows:

Recognizing that carbon pricing mechanisms are being used by governments in Canada and globally to address climate change and drive the transition to a low carbon economy;

Recognizing that provinces and territories have been early leaders in the fight against climate change and have taken proactive steps, such as adopting carbon pricing mechanisms, placing caps on emissions, involvement in international partnerships with other states and regions, closing coal plants, carbon capture and storage projects, renewable energy production (including hydroelectric developments) and targets, and investments in energy efficiency;

Recognizing that the federal government has committed to ensuring that the provinces and territories have the flexibility to design their own policies to meet emission reductions targets, including their own carbon pricing mechanisms, supported by federal investments in infrastructure, specific emission reduction opportunities and clean technologies; ...

²⁰ Working Group on Carbon Pricing, *Final Report* (2016), accessed at: http://www.climatechange.gc.ca/Content/6/4/7/64778DD5-E2D9-4930BE59D6DB7DB5CBC0/WG_Report_Carbon%20Pricing_e_v4.pdf.

²¹ The concept of federal "backstop" legislation involves the setting of a benchmark which will apply, if that benchmark is not otherwise met or addressed by provincial legislation. See Government of Canada, "Technical paper: federal carbon pricing backstop", accessed at: <https://www.canada.ca/en/services/environment/weather/climatechange/technical-paper-federal-carbon-pricing-backstop.html>.

The Pan-Canadian Framework reaffirms the principles outlined in the Vancouver Declaration, including

- recognizing the diversity of provincial and territorial economies and the need for fair and flexible approaches to ensure international competitiveness and a business environment that enables firms to capitalize on opportunities related to the transition to a low-carbon economy in each jurisdiction;
- recognizing that growing our economy and achieving our GHG-emissions targets will require an integrated, economy-wide approach that includes all sectors, creates jobs, and promotes innovation;
- recognizing that a collaborative approach between provincial, territorial, and federal governments is important to reduce GHG emissions and enable sustainable economic growth;
- recognizing that provinces and territories have been early leaders in the fight against climate change and have taken proactive steps, such as adopting carbon pricing mechanisms, placing caps on emissions, involvement in international partnerships with other states and regions;
- closing coal plants, carbon capture and storage projects, renewable energy production (including hydroelectric developments) and targets, and investments in energy efficiency;
- recognizing that the federal government has committed to ensuring that the provinces and territories have the flexibility to design their own policies to meet emission-reductions targets, including their own carbon pricing mechanisms, supported by federal investments in infrastructure, specific emission-reduction opportunities and clean technologies.²³

The Pan-Canadian Framework covers a wide sweep of activities, and reduction strategies: areas from energy-efficient building codes for residential housing to carbon emission by heavy industry are addressed. Many of the sectors referenced in the document are essentially within provincial jurisdiction. The Pan-Canadian Framework generally emphasizes collaboration among governments, not overriding federal authority.²⁴

The Pan-Canadian Framework does, however, contain a proposal for a "Federal Carbon Pricing Benchmark". Its key elements include:²⁵

- (a) all Canadian jurisdictions will have carbon pricing by 2018;

²² The Pan-Canadian Framework does not include a review of any developments in Saskatchewan or Manitoba. These provinces did not participate in the development of the Pan-Canadian Framework, out of their concerns over the possible introduction of carbon pricing by the federal level of government.

²³ Pan-Canadian Framework at page 3.

²⁴ The Pan-Canadian Framework makes numerous references to collaboration among levels of government, including at pages 3, 4, 9, 22, 28, 30, 32, 36, 37, 40, 43, 45, 48, 51, 53, 56, 58, 61, 62, 63, 65, 67, 68, 69, 72, 74 and 76 thereof.

²⁵ Pan-Canadian Framework at page 49.

- (b) carbon pricing will cover a broad range of activities, as illustrated by the British Columbia carbon tax;
- (c) jurisdictions can choose either a carbon tax/levy or cap-and-trade;
- (d) the carbon tax/levy should be similar in substance to British Columbia's carbon tax or Alberta's levy and performance-based emission system (the carbon pricing regimes in both of these provinces adopt a hybrid approach, which combines a fee levied on fuel sales with a form of carbon trading add-on that can be used by heavy emitters to meet legislated emissions targets);
- (e) a cap-and-trade regime should emulate what has been established in Ontario and Québec;
- (f) a minimum GHG reduction benchmark, to be adopted by the provinces:
 - (i) a carbon tax/levy should start at \$10/tonne in 2018, rising \$10/tonne per year to \$50/tonne by 2022;
 - (ii) a carbon trading add-on system must aim at either:
 - (A) a 2030 emission target equal to or greater than Canada's overall target of a 30 percent reduction of GHG emissions by 2030; or
 - (B) steadily more stringent caps on emissions that match the projected emissions to be targeted by carbon tax/levies;
- (g) each jurisdiction can use revenues that have been raised according to their needs, including offsetting, if they wish, the impact of the reduction measure on vulnerable groups, or investing in green economic growth.

There is an "or else" element to the federal carbon pricing benchmark: if the provinces do not meet the federal benchmark, a "selective backstop" measure will apply. This measure will take the form of a federal government measure, being a carbon tax/levy and carbon trading add-on. It will directly apply in any province that does not meet the federal benchmark.²⁶

It should be noted that the federal benchmark requires each province to individually adopt measures as stringent as those that are required on an overall Canada-wide basis, to achieve Canada's emission reduction commitments. In other words, there is no flexibility for a province to adopt less stringent measures that might be based on equitable considerations, such as the fact that:

- (a) it is more in need of economic development,
- (b) its people would disproportionately bear an economic burden (e.g., it has a relatively high percentage of rural residents who cannot readily access green energy);
- (c) it already produces, on a per capita basis, a much lower than average share of GHGs; or

²⁶ Pan-Canadian Framework at page 49.

- (d) it has adopted, or will adopt, other measures that reduce or capture emissions.

Manitoba, as shall be seen, claims that all of these considerations apply to it.

In fact, there is no flexibility provided to a province which actually adopts alternative measures to reduce GHG emissions that are as stringent as carbon pricing. A province that reduces its net emissions by a combination of other means apparently would not escape the application of federal carbon tax/levy measures. For example, a province might have a program which includes phasing out coal plants, carbon capture and subsidizing green technologies. While this program might be as effective as carbon pricing (or even more effective), the federal carbon tax/levy would still apply.

To put it another way, the Paris Agreement is more flexible about the global-state (including global-Canada) relationship, than the carbon tax/levy is flexible about the Canada-provinces relationship. As noted above:

- (a) under the Paris Agreement:
 - (i) there is an overall international objective which is stated by the international committee;
 - (ii) states define their own contributions;
 - (iii) the contribution may take into account equity and differentiated responsibility among the states;
 - (iv) there is no specific requirement to use carbon pricing; and
 - (v) there are no backstop global measures or sanctions, if states fail to achieve their objectives;
- (b) under the federal government selective backstop concept:
 - (i) there is an affirmation, by Canada, of its national objective;
 - (ii) there is a specific requirement to use carbon pricing to meet that objective;
 - (iii) provinces are expected to meet or exceed the level of carbon tax/levy or carbon trading add-on stringency that has been defined by Canada;
 - (iv) provinces are provided no flexibility to vary from benchmarks that are set by Canada, based on their adoption of other mechanisms (even if those other mechanisms are equally effective), or to aim for a less ambitious GHG reduction goal, based on factors such as the impact on their economy, populations and Indigenous communities, or the province's relatively low share of GHG emissions, to begin with.

5. *Manitoba's Response to the Pan-Canadian Framework*

Manitoba responded to the federal carbon tax/levy and selective backstop proposal on June 29, 2017. In that response, it argued as follows:

- (a) Manitoba takes climate change seriously;

- (b) the cooperative spirit of the Vancouver Declaration should be maintained;
- (c) Manitoba's massive commitment to hydroelectric development is a strategic and ongoing commitment to green energy – 98 percent of Manitoba's electrical generation is produced by hydroelectric development;
- (d) its latest hydroelectric projects, the Bipole III Transmission Line and the Keeyask generating station, will cost over \$10,000 per Manitoban;
- (e) hydroelectric generation reduces Manitoba's emissions profile to less than half of what it otherwise would be;
- (f) Manitoba will introduce carbon pricing, but the household impact of moving to the benchmark of \$50 per tonne would be over \$335 per household every year, or over \$1,000 for the five-year life of the carbon tax/levy provisions;
- (g) the "Made in Manitoba" plan will include carbon pricing (albeit not at Canada's benchmark level), but also continued investments in green electricity, energy efficiency and carbon sequestration; and
- (h) while the emissions profile of other provinces is based largely on the burning of fossil fuels, Manitoba has a distinctive profile in which much of its GHG emissions come from agricultural activities (including the release of GHGs from soil, livestock and manure). Manitoba's own plan will address these issues and therefore be more efficient than Canada's benchmark at achieving GHG reduction.

Manitoba stated it would seek a constitutional opinion on the Government of Canada's proposed carbon tax/levy and selective backstop legislation. This opinion has been prepared in response to that request.

6. *The Approach toward Delivering this Opinion*

This opinion focuses on the law, rather than whether the proposed carbon tax/levy is good or bad public policy. It takes no position in the latter respect.

A legal opinion might be viewed as the identification of an existing body of doctrine and interpretive rules, followed by their application to a particular fact situation (in this case, the proposed carbon tax/levy).

Uncertainties and inconsistencies in the legal materials can, however, give rise to an element of subjectivity – the tendency to interpret the law in light of an individual's own sense of what is fair, what is good public policy, and what makes practical sense. This opinion therefore goes beyond attempting a pronouncement of what the law objectively dictates (or is perceived to objectively dictate), and instead provides *a prediction of what the Supreme Court of Canada is likely to decide*.

A prediction about what the Supreme Court of Canada would likely decide is likely to be of far more practical value to the Government of Manitoba than a statement of subjective beliefs as to the state of the law. The reality is that if the proposed federal carbon tax/levy and carbon trading add-on are litigated, the case will very likely end up in the Supreme Court of Canada, and everyone will have to live with the results of what the Court actually decides.

A focus on predicting what the Supreme Court of Canada would decide also helps to identify relevant factors in the constitutional analysis, as well as the facts of the particular situation. When the Supreme Court of Canada decides a case:

- (a) it is not strictly bound by precedent. It can refine or even reject earlier decisions, and move in a new path;
- (b) it will decide in light of how the questions are framed by the litigation process. A provincial government might frame a series of questions and refer those questions to its own Courts. The Supreme Court of Canada might then deal with an appeal of that decision.²⁷ The Government of Canada might refer the question directly to the Supreme Court of Canada. It is also possible that some aspect of the carbon tax/levy might be constitutionally challenged by a private party, or a provincial Crown corporation in the context of an actual dispute;
- (c) its decision will be made in light of the legal arguments that are put before it by the parties to the case. The Court can and sometimes does take an approach that it has created of its own initiative,²⁸ but usually, it will be influenced by the input it receives from the parties to the case. In a case before the Supreme Court of Canada, the federal government and provincial governments will have a right to make representations. The Court may also permit many other interest groups or organizations to make submissions;
- (d) it is not certain what positions other provinces would argue before the Court. Alberta and Québec, for example, might take no part in any Supreme Court of Canada proceedings. Instead, they might take the view that they agree with the policy direction the federal government has adopted, and that the legislation will have no immediate impact on them, as they are compliant with the federal benchmarks. On the other hand, some of the compliant provinces might still object to the selective backstop feature of the legislation, on constitutional principle. They might argue that the full compliance of most provinces, and the partial compliance of a few others, shows that the voluntary cooperation approach to federalism actually can and does produce satisfactory results most of the time. These provinces might not wish to accede to a constitutional scenario in which the federal government might in the future adopt an approach to GHG emissions which they find objectionable, and to which they are precluded from objecting on constitutional grounds; and
- (e) it will make its decision in light of the facts it has before it, at the time of its decision. What those facts might be is not pre-determined. In this case, if the

²⁷ For example, *Re: Resolution to amend the Constitution*, [1981] 1 S.C.R. 753, 1981 CanLII 25 (SCC) (known as the Patriation Reference) was decided by the Supreme Court of Canada *after* provincial courts in Manitoba, Québec and Newfoundland had considered questions posed to them by provincial governments.

²⁸ In *Re: Anti-Inflation Act*, [1976] 2 S.C.R. 373, 1976 CanLII 16 (SCC) (known as the Anti-Inflation Reference), for example, the federal government argued the law was supported by the national concern branch of the POGG doctrine, the provinces argued the law was *ultra vires* the federal government, and the Court decided the law was supported by the emergency branch of the POGG doctrine.

Government of Manitoba ends up adopting a made-in Manitoba plan that addresses GHG emissions as effectively as the carbon tax/levy does, but in its own distinctive way, the Court might be much more sympathetic to Manitoba's case that federal law should not be imposed upon it.

IV. ON WHAT GROUNDS COULD THE LEGISLATION BE UPHELD?

In Canada, legislative authority is divided between the federal level of government and the provinces.²⁹ The powers of the federal government are mostly set out in Section 91 of the Constitution; the powers of the provinces are mostly set out in Section 92 of the Constitution. It is therefore necessary to embark on an analysis of each level of government's authority to legislate in this area (as well as a characterization of the particular legislative mechanism which has been proposed). That analysis follows.

1. *Provincial Authority to Legislate a Carbon Pricing Regime*

The federal government has the authority to legislate in any matters which are not assigned to the provinces. There is no question, however, that it is within the authority of the provinces to enact their own carbon pricing measures.³⁰ The federal selective backstop legislation would be a "failsafe", in case provinces fail to enact legislation that satisfies the federal benchmark; but the federal government has not expressed any concern that the provinces lack the authority to pass their own carbon pricing measures. The potential issue for the federal government is one of the willingness, not the legal authority, of each province to establish carbon pricing that meets the federal benchmark. In fact, the federal benchmark proposal adopts elements of carbon pricing regimes which have already been implemented by other provinces.³¹

Provinces have the authority to impose direct taxes and to otherwise legislate over both commercial and non-profit activities.³² They can use their powers of local direct taxation, or to

²⁹ Indigenous governments may have legislative authority as well, which in various cases might be an inherent Aboriginal right, a treaty right or delegated from other levels of government.

³⁰ Heads of provincial authority that could be used to justify carbon pricing measures (either in the form of a carbon tax/levy or a carbon trading regime) include authority over property and civil rights (Subsection 92(13) of the Constitution), management of provincial Crown lands (Subsection 92(5) of the Constitution), municipal institutions, such as waste management matters (Subsection 92(8) of the Constitution), matters of a local or private nature (Subsection 92(16) of the Constitution) and non-renewable natural resources (Subsection 92A of the Constitution). As was noted by Justice Beetz in the Anti-Inflation Reference, the provinces hold general authority over the regulation of business within their borders (at page 441): "The control and regulation of local trade and of commodity pricing and of profit margins in the provincial sectors have consistently been held to lie, short of a national emergency, within exclusive provincial jurisdiction."

³¹ As noted above, the Pan-Canadian Framework provides that provinces will be permitted to implement either an "explicit price-based system", such as a carbon tax (the British Columbia model) or a carbon levy and performance-based emissions system (the Alberta model), or a cap-and-trade system (the Ontario and Québec model). The Pan-Canadian Framework, however, indicates the proposed backstop will take the form of an explicit price-based system, only (see page 49).

³² There are a few limits on the use of the provincial taxing power. One limit is that the taxes must be "direct", and so cannot be imposed on carbon consumption outside a provincial border. Federal Crown corporations might be immune from a provincial tax measures as well (see the discussion on Section 125 immunity elsewhere in this opinion). First Nations citizens living on reserves cannot have their property taxed under Subsection 87(1) of the *Indian Act*, R.S.C., 1985, c. I-5. Provincial measures also cannot infringe on Aboriginal or Treaty Rights, at least in the absence of a justification

regulate local industries and non-profits by way of a carbon pricing regime created under provincial heads of authority which include "property and civil rights". Their authority over resource development is another source of authority with respect to energy production (e.g., the refining of oil) that could support a carbon pricing regime.

Provincial authority is not unlimited. One limit is territorial – if a provincial carbon tax/levy is characterized as flowing from provincial authority over "direct taxes in the province", it cannot be applied on a sale to a consumer in another province.³³ This is a function of federal control over the regulation of interprovincial and international trade and commerce, which is discussed below. More broadly, another limit to provincial authority is the inability to legislate in areas of federal competence (such as control over oceans). These types of exercises of power are limited by the doctrine of interjurisdictional immunity, which is also discussed below.

Sometimes areas of federal and provincial jurisdiction may overlap. Insider trading, for example, might be regulated by a province, using authority over its property and civil rights to set rules which apply to securities trading. The federal government might also address the matter, using its powers in relation to federally-incorporated companies. If there is a conflict between provincial and federal measures, then the federal measure will prevail and the provincial measure will be deemed inapplicable. This is the doctrine of "federal paramountcy". Note, however, that "conflict" in these circumstances is interpreted narrowly to mean that a person is unable to comply with both laws at the same time. The mere fact that a person is doubly regulated is not sufficient to strike down a law or to otherwise render it inoperative.

2. Framing the Pith and Substance of the Proposed Carbon Tax/Levy

The proposed carbon tax/levy has the unusual feature of only applying in provinces that have not enacted their own laws that satisfy the federal benchmark. Let us for now leave aside the "selective application/backstop" feature,³⁴ and focus first on whether the Government of Canada has the authority to enact a carbon tax/levy, generally (and more precisely, whether the Government of Canada has the authority to enact a carbon tax/levy along the lines indicated in its Technical Paper).

An opinion about whether the federal government can in principle enact "a carbon tax/levy" is unlikely to be useful. It is possible to refer such general questions to the Courts, but a Court may then respond with a vague and qualified answer. In almost all cases, the question before a Court is not a general proposition – can a level of government legislate in such-and-such an area? – but is instead a more specific one – *is this particular piece of legislation* within the jurisdiction of a province, or the federal level (or both)? As the Supreme Court of Canada explains clearly in *Canadian Western Bank v. Alberta*:

... While it is true that the enumerations of ss. 91 and 92 contain a number of powers that are precise and not really open to discussion, other powers are far

that the courts accept as compelling (pursuant to the test set out in *R. v. Sparrow*, [1990] 1 S.C.R. 1075, 1990 CanLII 104 (SCC) and *R. v. Badger*, [1996] 1 S.C.R. 771, 1996 CanLII 236 (SCC)).

³³ See Subsection 14(2) of the *Carbon Tax Act*, S.B.C. 2008, c. 40 (the "**B.C. Carbon Tax Act**"), which exempts fuel that is purchased in British Columbia for use outside of British Columbia in a number of circumstances, including, for example, fuel that is sold in British Columbia and exported by the seller from British Columbia for a consumer's own use outside British Columbia.

³⁴ See Part V of this opinion below, "The Proposed Selective Backstop".

less precise, such as those relating to the criminal law, trade and commerce and matters of a local or private nature in a province. Since the time of Confederation, Courts have refrained from trying to define the possible scope of such powers in advance and for all time: *Citizens Insurance*, at p. 109; *John Deere Plow*, at p. 339. For example, while the Courts have not eviscerated the federal trade and commerce power, they have, in interpreting it, sought to avoid draining of their content the provincial powers over civil law and matters of a local or private nature. A generalized application of interjurisdictional immunity related to “trade and commerce” would have led to an altogether different and more rigid and centralized form of federalism. It was by proceeding with caution on a case-by-case basis that the Courts were gradually able to define the content of the heads of power of Parliament and the legislatures, without denying the unavoidable interplay between them, always having regard to the evolution of the problems for which the division of legislative powers must now provide solutions.³⁵

In developing constitutional doctrines on a case-by-case basis, the Supreme Court of Canada is attentive to the particular features of the legislation that is at issue.

The main features of the proposed carbon tax/levy, as set out in the Technical Paper, are:

- (a) it is a consumption tax on fuel;
- (b) it applies to a broad range of fuels;
- (c) it is collected by the fuel distributor;
- (d) the amount of the tax depends on the category of fuel;
- (e) the Government of Canada will return the equivalent of the overall amount raised in each province to that province's residents, perhaps in the form of an annual payment to taxpayers; and
- (f) there is an exception to the tax for "heavy emitters". They will have the choice of either paying the tax, or participating in a carbon trading add-on scheme which is established by the same legislation (and reviewed in further detail below).

3. *The Most Promising Potential Basis of Federal Authority – Power over Taxation*

(A) *A Review of the Proposed Carbon Tax/Levy*

As indicated above, any exercise of the Government of Canada's legislative authority must be consistent with the federalism principles that are a part of Canadian law. This means the Government of Canada must either ground its legislation in a particular federal head of power, or show that the matter is such that it does not fall under any power which has been expressly reserved to the provinces.

As noted above, however, the first step toward determining whether a level of government is competent to pass a law involves a characterization of the subject matter of the law.

³⁵ At para. 43.

In this case, the proposed federal government carbon tax/levy has the formal features of a typical tax:

- (a) a government exaction on an activity (essentially, fuel sales);
- (b) the amount of the payment is defined by a formula (so much per kilogram for each type of fuel); and
- (c) the tax is remitted to the taxing authority.

The legislation also includes a carbon trading add-on option for heavy industrial emitters – they can pay the carbon tax/levy if they wish, but they can also earn, buy or sell emission credits. For now, let us focus on the tax feature of the legislature, which applies far more broadly than the “heavy emitter” carbon trading add-on option.

The "explicit price-based system" contemplated by the federal carbon pricing framework contains elements that have already been implemented in Alberta and British Columbia. This opinion will, however, now review the British Columbia carbon tax in further detail, because, as will be seen, the regime in British Columbia has been labelled and understood by all parties to be a "tax", rather than a "levy", which is the term that is used in the Alberta regime and in the proposed federal carbon pricing framework. The characterization of the substance of a law is an important part of the analysis which determines the basis of power upon which the law might ultimately be upheld.

The British Columbia carbon tax is plainly identified as a tax, in the legislation, its regulations and related government communications. It is, however, “revenue neutral” (at least as originally introduced, although that may be changing).³⁶ Historically, British Columbia has balanced the increase in government revenues by measures that include:³⁷

- (a) a 5 percent reduction in the first two personal income tax rates;
- (b) a low income climate action tax credit;
- (c) a northern and rural homeowner benefit of up to \$200;
- (d) reductions in the general corporate income tax rate;
- (e) reductions in the small business corporate income tax rate; and
- (f) an industrial property tax credit.

The concept of revenue neutrality means that the government does not retain a net tax intake due to the carbon tax/levy. The detailed choices which are required to determine how to redistribute the revenue back to residents – in the form of tax relief or subsidies – involve many

³⁶ Subsection 2(2) of the B.C. Carbon Tax Act provides that, "the carbon tax is revenue neutral if the dollar amount of the carbon tax collected in a fiscal year is less than or equal to the estimated dollar amount of the reduction in Provincial revenues in the same fiscal year as a result of revenue measures". Pursuant to paragraph 3(2)(c) of the B.C. Carbon Tax Act, the government must annually prepare a carbon tax plan that, "forecast[s] that the carbon tax will be revenue neutral in relation to each fiscal year of the carbon tax plan".

³⁷ Government of British Columbia, "British Columbia's Revenue-Neutral Carbon Tax", accessed at: <http://www2.gov.bc.ca/gov/content/environment/climate-change/planning-and-action/carbon-tax>.

policy decisions. The relief for lower income earners, for example, reflects the fact that a carbon tax/levy, like other sales taxes, tends to work regressively, because people earning less money tend to end up paying a bigger percentage of their income toward the tax. The measures reviewed above indicate British Columbia wishes to offset that perceived unfairness. Reductions in other rates, such as corporate tax, might reflect a desire to reduce or eliminate any net harm to business investment and activity. The instruments used in British Columbia include measures that only a province is constitutionally permitted to address, such as a reduction in provincially-imposed property taxes.

The British Columbia carbon tax legislation also modulates its initial impositions to reflect policy choices. For example, it does not apply with full force to certain farming activities, or when a fuel mix includes biomethane.³⁸

Like the proposed federal carbon pricing framework, the British Columbia carbon pricing regime also includes a carbon trading add-on option for heavy industrial emitters, in addition to a carbon tax.³⁹

With that backdrop in mind, the focus of this opinion will shift to whether the proposed federal carbon tax/levy could be sustained under the federal government's taxation power.

(B) *The Taxation Power of Subsection 91(3)*

Subsection 91(3) of the Constitution confers taxing power on the federal level of government that is cast in sweeping terms:

The raising of Money by any Mode or System of Taxation.

The federal taxation power is thus extremely broad and generally subject to restriction only on the grounds that the measure in question can be classified as something other than a tax.⁴⁰ As such, it would seem obvious that the taxation power is the base for federal authority that most naturally applies to the federal carbon tax/levy.⁴¹

³⁸ See Division 2 of the B.C. Carbon Tax Act and Part 4.1 of the *Carbon Tax Regulation*, B.C. Reg. 125/2008, which provide for biomethane credits.

³⁹ The *Greenhouse Gas Industrial Reporting and Control Act*, S.B.C. 2014, c. 29 (the "**B.C. Cap-and-Trade Act**") sets out B.C.'s cap-and-trade regime. The law applies to operators of "industrial operations", which are "one or more facilities, or a prescribed activity, to which greenhouse gas emissions are attributable". Such operators are subject to an emissions reporting and control system, the latter of which includes the ability to purchase and sell emissions credits (see Part 3 thereof).

⁴⁰ The case law holds that even if the federal government passes legislation that includes a tax, that legislation will be struck down if it in substance amounts to a regulatory scheme in an area of provincial jurisdiction. Examples of legislation struck down for being unduly intrusive on another level of government's regulatory authority, despite having a taxation component, as listed in Hogg, *Constitutional Law of Canada*, 5th ed. (Toronto: Thomson Reuters Canada, 2016) at Section 31.1 include: *Re Insurance Act of Can.*, [1932] A.C. 41 (on insurance), *A.-G. Can. v. A.-G. Ont.*, [1937] A.C. 355 (on unemployment insurance), *A.-G. Alta. v. A.-G. Can.*, [1939] A.C. 117 (on bank taxation), *Texada Mines v. A.-G. B.C.*, [1960] S.C.R. 713 (on export trade), *Commn. du Salaire Minimum v. Bell Telephone Co.*, [1966] S.C.R. 767 (on labour standards) and *Re Agricultural Products Marketing Act*, [1978] 2 S.C.R. 1198 (on marketing).

⁴¹ In *Westbank First Nation v. British Columbia Hydro and Power Authority*, [1999] 3 S.C.R. 134, 1999 CanLII 655 (SCC), the Court indicated the charges in question in that case bore the "traditional hallmarks" of a tax, being: "They are enforceable by law, imposed pursuant to the authority of

There are, no doubt, strong counterarguments that the proposed carbon tax/levy would *not* be sustained under the federal government's Subsection 91(3) power.

The first potential objection to applying the taxation power is that it appears the Government of Canada has made a clear choice not to use the word "tax" to describe the scheme in its statements in Parliament,⁴² as well as in its official documents. It refers instead to a "carbon pricing levy" or a "behaviour changing levy".

Reasons why the federal government may be avoiding the term tax include:

- (a) public messaging: the term "tax" might invite public opposition. It may create the sense that the federal government is increasing its impositions on the Canadian taxpayer. The federal communications strategy might wish to instead emphasize that the levy is aimed at altering conduct – the reduction of GHG emissions – rather than increasing the federal treasury;
- (b) immunity of provincial Crown: if the measure is a tax for the purposes of the constitutional division of powers, then provinces can claim immunity under Section 125 of the Constitution, which reads:

No Lands or Property belonging to Canada or any Province shall be liable to Taxation.

The Government of Saskatchewan might argue that applying the carbon tax/levy to the sale of energy by its Crown corporation energy producers is contrary to Section 125 of the Constitution. But Section 125 may not block the application of a federal law, if that law is based on a head of federal power other than taxation;⁴³

- (c) not a Subsection 91(3) tax: the federal government might be concerned (as are some scholars) that the carbon tax/levy does not meet the definition of taxation set out in Subsection 91(3) of the Constitution, e.g., because it is revenue neutral and is actually aimed at regulating behaviour. The scheme could therefore be characterized as being "regulatory" in nature, rather than something that raises funds for general purposes; and
- (d) aiming for the maximum range of federal powers: the federal government might wish to establish, in practice or in any Court tests, that it can address GHG issues through a variety of federal powers, including: its general authority to legislate for peace, order and good government (the "**POGG**" power); criminal law; and trade and commerce. Other existing or future GHG emission control laws might not be sustainable as Subsection 91(3) taxes.

Parliament, levied by a public body, and are imposed for a public purpose" (at para. 4). In this case, the proposed carbon tax/levy could be similarly characterized to satisfy these criteria.

⁴² Global News, "It's not a carbon tax, it's a 'behaviour-changing measure': government officials" (May 18, 2017), accessed at: <http://globalnews.ca/news/3462251/carbon-tax-behaviour-changing-measure-government/>.

⁴³ Section 125 immunity is discussed further at subsection (E) of this Section below.

It is unlikely that the Supreme Court of Canada would consider itself bound, when adjudicating this potential case, by the federal government's choice to use the word "levy", rather than "tax". At an eventual argument before the Supreme Court of Canada, the federal government might argue that (while not its preferred position) an alternative basis for upholding the carbon tax/levy is that it is a valid Subsection 91(3) tax. It is also possible that another participant in the Court proceedings – a province or a private intervenor in the case – might put forward the Subsection 91(3) argument. In any event, the Supreme Court of Canada would likely not consider itself to be strictly limited by the parties' submissions. If the Court considered that on a fair reading of the Constitution, the measure should be characterized as a valid Subsection 91(3) tax, then it would do so.⁴⁴

A second objection to the applicability of the taxation power in these circumstances is that, even if the federal government passes legislation that includes a tax, the law will be struck down if it *in substance* amounts to a regulatory scheme in an area of provincial jurisdiction. The Courts in division of powers cases look at the "pith and substance" of legislation, meaning its real character and purpose. Courts do not confine themselves to looking at the way a contested measure is labelled by the legislator. Whether legislation contains certain features that, considered in isolation, might render it constitutional, is not decisive in the eyes of a Court.

A third objection to the application of the taxation power might be that a revenue-neutral tax does not "raise revenues" that enhance the federal government's ability to spend for general purposes.

So it is entirely possible, as some academic commentators have suggested, that the Supreme Court of Canada may ultimately refuse to uphold a federal carbon tax/levy as Subsection 91(3) tax. A reasonable case can be made that the federal carbon tax/levy would amount to federal regulation of a vast array of conduct that is ordinarily exclusively within provincial authority. Local industries would be affected. Transactions that begin and end in the province would be affected. These are classic examples of areas of provincial jurisdiction.

The doctrinal and "big picture" considerations, however, would probably lead the Supreme Court of Canada to conclude that the proposed carbon tax/levy *is* capable of being characterized as a tax and is sustainable by Subsection 91(3).

(C) *The Need to Examine the "Big Picture"*

In making predictions about what the Supreme Court of Canada might decide, it is just as important to look at "big picture" considerations, as it is to parse the language of various judicial precedents. Again, the focus for the present purposes is on a carbon tax/levy similar to the one suggested in the federal Technical Paper, leaving aside for now the issues of its selective application and its carbon trading add-on feature.⁴⁵

A focus on the "big picture" includes an examination of the overall body of the Supreme Court of Canada's decision-making, and trying to identify "organizing principles".⁴⁶ These are not

⁴⁴ See footnote 28 above.

⁴⁵ This issue is discussed in Part V of this opinion below, "The Proposed Selective Backstop".

⁴⁶ In *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494, the Court framed its recognition of good faith and a duty to perform contracts honestly as an "organizing principle" of the law (at para. 64):

detailed rules; rather, they are high-level principles and values that help the Court define and apply the more specific doctrines it has developed to guide the interpretation of the Constitution. The Court derives these organizing principles by looking at the general structure of the Constitution, distilling guiding principles from its own cases,⁴⁷ and sometimes by reference to other sources, such as its understanding of the “fabric of Canadian society”.⁴⁸ Sometimes these “organizing principles” are clearly stated in the case; sometimes they can be inferred from the overall context of the decision, even if the Court for various reasons (including diplomacy and decorum in helping to manage the federation), chooses not to address the principles directly. A “big picture” approach also involves viewing the Supreme Court of Canada as having a practical side, rather than being wrapped up in technical doctrine to the exclusion of other considerations. The Supreme Court of Canada has an interest in writing decisions that are workable in practice for governments and lower Courts, that will secure a broad measure of public acceptance and that will reduce tensions within the federation.

The “big picture” considerations that might lead the Supreme Court of Canada to decide that a carbon tax/levy can be upheld by the Subsection 91(3) tax power (and that a carbon trading add-on would be permitted as being reasonably ancillary to that carbon tax/levy) include:

- (a) the carbon tax/levy will be understood by the public as a tax. The Court might favour aligning its decision on this controversial matter with common sense understandings about the scheme;
- (b) another factor that is arising recently in the case law on the federal-provincial division of powers is the history of legislation in the area in question.⁴⁹ The fact that many provinces already have a carbon tax/levy might be a factor in a decision by the Supreme Court of Canada to avoid inventing a new head of federal authority along the lines of “greenhouse gas emissions” or “carbon pricing”. The argument that “the provinces already did this” might, however, be a less persuasive factor weighing against the use of Parliament’s Subsection 91(3) tax authority to impose a carbon tax/levy. The Court would not be inventing a new label of authority or stretching one; it would be only giving scope to a broadly-worded authority of Parliament that has been in place since Canada’s origins. Further, there is a long history of Canada and the provinces both

As the Court has recognized, an organizing principle states in general terms a requirement of justice from which more specific legal doctrines may be derived. An organizing principle therefore is not a free-standing rule, but rather a standard that underpins and is manifested in more specific legal doctrines and may be given different weight in different situations.

⁴⁷ See, for example, the reasoning in the *Patriation Reference*.

⁴⁸ In *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 391, 2007 SCC 27 (CanLII), the Court noted in its reasons that “collective bargaining was recognized as a fundamental aspect of Canadian society” (at para. 41).

⁴⁹ In *Reference re Firearms Act (Can.)*, [2000] 1 S.C.R. 783, 2000 SCC 31 (CanLII), the Supreme Court of Canada found the fact that the Government of Canada had a history of controlling firearms through federal legislation supported its conclusion that the legislation before the Court could be upheld under Parliament’s criminal law power. In *Reference re Assisted Human Reproduction Act*, [2010] 3 S.C.R. 457, 2010 SCC 61 (CanLII), one judgment placed heavy emphasis on the fact that the province of Québec already had pertinent laws in place. According to that judgment, this fact supported the conclusion that some of Parliament’s proposed legislation went beyond the federal criminal law authority, and amounted to regulation of matters within provincial jurisdiction.

imposing taxes on the same activity or area. So, the fact that the provinces were the first to impose carbon taxes might be a less persuasive argument against a new federal tax initiative in the same area;

- (c) upholding the legislation as a tax would permit the Court to decide on one particular ground, linked to the actual legislation in question, and leave other challenging questions to be worked out by politicians (or if not, decided by a Court another day);
- (d) in controversial cases, the Supreme Court of Canada often prefers to avoid “winner take all” outcomes. It favours instead the achievement of a balanced, middle ground.⁵⁰ The Subsection 91(3) outcome would give the federal government a general “win”, but it might also provide a degree of counterbalancing comfort to opposing provinces, as they would have a shield (albeit, one that would be very limited) against the full rigour of the tax under Section 125 of the Constitution, which, as noted above, protects provincial Crown property from federal taxation;
- (e) the Supreme Court of Canada would, by upholding the legislation under Subsection 91(3), avoid being seen to be obstructing an important political initiative by a national government that has nearly global support, in principle;
- (f) the Supreme Court of Canada often considers the existence of an international treaty, and the desirability of implementing it, as a *factor* (but not a determinative element) that supports a decision in favour of federal jurisdiction;
- (g) the Supreme Court of Canada generally favours interpreting division of powers issues in a way that permits vigorous government action. For example, it tends to find wide areas of concurrent jurisdiction (known as the “double aspect doctrine”, which applies to areas where both federal and provincial governments can operate from their own bases of jurisdiction).⁵¹ The Court does not oppose, on division of powers grounds, the potential for a citizen to be taxed for the same activity by both levels of government;⁵²

⁵⁰ For example, federal measures to deal with high levels of inflation that were affecting the fabric of Canadian society were at issue in the Anti-Inflation Reference. At that time, standards of living for families could have been seriously affected by the loss of the real value of wages or prices paid under existing contracts. People were losing their houses in the face of rising interest rates. Businesses were dealing with uncertainty that made business decisions, including investment decisions, more difficult. Wage and price levels in one province – and how they were impacted by provincial laws – could affect the inflation situation in other provinces. The Supreme Court of Canada still confined the federal law to the temporary emergency branch of POGG, and opted not to support it under the broader national concern doctrine.

⁵¹ In *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, 1982 CanLII 55 (SCC) at pages 181 and 182, the Court explained that the double aspect doctrine allows concurrent regulation in the same area by both the federal and provincial levels of government, as long as each law is rooted in a valid head of power. An expansive reading of the double aspect doctrine was favoured by the majority of the Court in *Reference re Assisted Human Reproduction Act*.

⁵² See, for example, *Manitoba (Attorney General) v. Forbes* [1937] A.C. 260, [1937] 1 D.L.R. 289 (P.C.), in which the Court upheld a provincial income tax on income which was already subject to a federal income tax.

- (h) the Supreme Court of Canada does not favour using division of powers principles to protect individual citizens from regulatory overlap and duplication;
- (i) the Supreme Court of Canada favours interpreting division of powers issues in a way that enables environmental protection;⁵³
- (j) at the same time, the Supreme Court of Canada is always concerned about upsetting the balance of federalism.⁵⁴ It is clear that respecting the Constitution's express grant of powers to the provinces is a fundamental Canadian value. This principle also supports respect for the diversity among Canada's varied communities, as well as the spirit of democracy itself. A carbon tax/levy – at least, the one outlined by the Government of Canada – would have a serious effect on provinces. At issue is not only the effect within provinces of a federal carbon tax/levy, in its own right, but also its impact on efforts that have been undertaken by the provinces, using their own constitutional authority, to pursue their own economic futures and their own approaches to controlling GHG emissions. In the end, this federal initiative could damage provincial economies to a greater extent than what would be warranted by actual reductions to GHG emissions or the related impact on climate. It might disrupt some or all of the provinces' ability to achieve their own home-grown approaches toward reducing GHG emissions. A federal carbon tax/levy would, however, by nature be limited in some respects. It would not regulate in any detailed way. It would not dictate how carbon reduction is to be achieved, but would instead impose a strong price signal, and leave actors to determine how they can respond to that signal. As such, upholding the measure using the federal tax power could be viewed as a decision which respects the balancing of powers which is inherent in federalism; and
- (k) *if the Supreme Court of Canada wishes to find an avenue for the federal level of government to address GHG emissions, finding that a carbon tax/levy is supported by the federal taxation power provided by Subsection 91(3) may be the choice that best preserves the federal-provincial balance.* The Court would not be creating a new implied head of federal authority, such as “authority over greenhouse gas emissions”, that might lead to further federal intrusions on provincial powers. Such intrusions could take the form of a centralized command-and-control model, involving varied and detailed regulation, which extends to vast areas of provincial jurisdiction (including everything from housing

⁵³ In the opening line of *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, 1992 CanLII 110 (SCC), the Court observed that: "The protection of the environment has become one of the major challenges of our time."

⁵⁴ In the *Obamacare* case, in which the power of the U.S. Congress to pass the *Patient Protection and Affordable Care Act* was upheld by the Court, Chief Justice Roberts cast his deciding vote on the basis that the law's imposition of a legal duty to buy insurance (failing which, a penalty would be levied) fit the definition of tax, but not trade and commerce. His thinking seems to have been that upholding the tax on the interstate trade and commerce power would stretch that head of federal authority too far, and open the way to more drastic intrusions on state authority. His decision also takes pains to observe that there are inherent limitations on the nature of a federal tax (for example, it does not prohibit an activity as such, but rather provides citizens a genuine choice about following a federal mandate or paying a moderate penalty).

codes to speed limits to management of Crown energy corporations). The Subsection 91(3) avenue would also bring Section 125 immunity into play, which would provide limited protection for provincial Crown corporations.

To further elaborate on the last point:

- (i) if the Supreme Court of Canada upholds the legislation as a tax, the Court might indicate that it is not opening an avenue to use the federal taxing authority in an endlessly intrusive manner. It could say, or raise the possibility, that if a federal carbon tax/levy engaged in detailed regulation of behaviour, it would no longer be a tax supported by Subsection 91(3), but in substance regulatory legislation that may be at least in part outside of federal jurisdiction;
- (ii) declaring that the Government of Canada's carbon tax/levy would be unconstitutional because it is revenue neutral, would give rise to a paradox that an even more intrusive federal government intervention might be lawful (i.e., a scheme that raises a large amount of net revenues for the Government of Canada, which it can then devote to other purposes, ranging from national defence to funding green energy initiatives);⁵⁵
- (iii) while it is true that an equivalent amount of money would be returned to the province of origin, the Government of Canada's intervention means that the money taken in by the tax would form a pool that would be distributed in a far different way than how the money would be exacted. Any rebates that might be paid to households would not be exactly the same as what those same households paid, directly or indirectly, as a result of the carbon tax/levy. Some households will be winners, others will be losers. The Government of Canada will acquire revenues and make choices about how to return them to their province of origin – whether by payments to individuals or households, province-specific reductions to the GST and/or federal income tax rates, or whatever constitutionally-available means the Government of Canada might choose; and
- (iv) the Supreme Court of Canada could indicate that it is upholding the carbon tax/levy under Subsection 91(3) because it is essentially “price signal” legislation, rather than an ordinary regulatory scheme, in which exactions are attached to a complex and detailed set of norms that can be stated on their own and in which rebates effectively involve extensive intrusions in matters ordinarily regulated by the provinces.

For the reasons which have been suggested, the Court is more likely to take the view that broad considerations support upholding a federal carbon tax/levy.

Various statements in the case law might be cited in support of the view that the proposed carbon tax/levy should be viewed as essentially regulatory, rather than as a tax, in light of its aim to alter behaviour and its revenue-neutrality.

⁵⁵ While this opinion was being prepared, the Government of British Columbia proposed a change to the carbon tax that would remove its revenue neutrality. The fact remains, however, that the carbon tax was introduced and initially sustained on the basis of it being revenue neutral.

The Supreme Court of Canada would likely be attentive, however, to the specific circumstances in which the Courts evaluated the scope of federal authority in past cases. It would adopt the approach that judicial statements must be viewed in their context.

Whether a measure is a "tax" may be at issue for different reasons.⁵⁶ In some cases, the question is not the federal-provincial division of powers, but whether a regulatory body has been clearly authorized by any legislature to provide the most carefully-considered statements on the scope of the Subsection 91(3) tax authority.

In other cases, the question is not the federal-provincial division of powers, but whether a regulatory body has been clearly authorized by any legislature to impose a particular charge. Judicial statements in these cases may not necessarily be applied, without qualification, to cases involving the division of powers. Similarly, statements in case law about whether Section 125 immunity applies to shield provincial property from a federal tax have to be treated carefully, in the context of deciding whether a measure is within federal authority as a tax in the first place.⁵⁷

Another reason for caution in reading the precedents is that they are often addressed to the facts of "easier cases", and so they do not spell out exactly how a hard case like this would be decided. In some cases, it is clear the tax is exclusively or overwhelmingly related to raising revenues, rather than a case such as this, where the tax does aim to influence conduct (albeit by sending a price signal, rather than by blending tax burdens with other norms). In other cases, federal exactions are part-and-parcel of a detailed regulatory system, and in that context, the "tax" may be much more easily characterized as falling outside government's Subsection 91(3) authority (rather than a carbon tax/levy, which is confined to sending a price signal).

But what if a tax has some regulatory aspect?⁵⁸ Is it automatically excluded from the scope of Subsection 91(3) and will Section 125 never apply? In *Re Exported Natural Gas*, the majority

⁵⁶ For example, in *Re: Exported Natural Gas Tax*, [1982] 1 S.C.R. 1004, 1982 CanLII 189 (SCC), the majority judgment held that part of a federal tax that formed part of the National Energy Program could not apply to exports of natural gas by a provincial Crown corporation, because of Section 125 immunity. The majority held that "the present tax is clearly not a 'regulatory tool' in itself" (at page 1077). In that case, the tax was aimed at raising federal revenue, not at altering conduct.

⁵⁷ Other cases, meanwhile, explore the regulatory scheme vs. tax distinction for other purposes, such as whether an administrative measure is a tax that has been authorized by the Legislative Assembly (see *Eurig Estate (Re)*, [1998] 2 S.C.R. 565, 1998 CanLII 801 (SCC) and *620 Connaught Ltd. v. Canada (Attorney General)*, [2008] 1 S.C.R. 131, 2008 SCC 7 (CanLII)), or whether a measure is an indirect tax (see *Ontario Home Builders' Association v. York Region Board of Education*, [1996] 2 S.C.R. 929, 1996 CanLII 164 (SCC)).

⁵⁸ In *Westbank First Nation*, the Court held that an assessment and taxation by-law passed by a First Nation was in substance a tax, rather than a regulatory charge or something which otherwise formed part of a regulatory regime. The Court referred to four "indicia of taxation", at para. 21: "(1) enforceable by law, (2) imposed under the authority of the legislature, (3) imposed by a public body, and (4) intended for a public purpose." This is to be contrasted with the indicia of a regulatory scheme, referred to at para. 24:

Certain indicia have been present when this Court has found a "regulatory scheme". The factors to consider when identifying a regulatory scheme include the presence of: (1) a complete and detailed code of regulation; (2) a specific regulatory purpose which seeks to affect the behaviour of individuals; (3) actual or properly estimated costs of the regulation; and (4) a relationship between the regulation and the person being regulated, where the person being regulated either causes the need for the regulation, or benefits from it.

notes that a tax may have both revenue raising and regulatory purposes, and that excise taxes are sometimes enacted for the purposes of discouraging conduct.⁵⁹ The majority opinion therefore suggests that if a tax has an "ancillary" regulatory purpose, it may still be considered a Subsection 91(3) tax and Section 125 immunity will still apply.

By contrast, in some of the cases which have found a measure to be regulatory, rather than a tax, the measure was characterized as being part of a complicated regulatory scheme. But the proposed carbon tax/levy would not be attached to a complicated regulatory scheme; *the tax* would in essence be the regulatory scheme. The whole point of the carbon tax/levy is to use market pricing signals to direct behaviour, rather than command-and-control directives which have been issued by government.

On top of everything else, it must again be kept in mind that the Supreme Court of Canada is not bound by any precedents, including its own. It considers itself free to overrule or refine its earlier rulings and pronouncements. A large part of the legal debate in any constitutional case involves parsing the Supreme Court of Canada's previous interpretations of provisions of the Constitution. But all of those earlier pronouncements were themselves innovative at one point. If this case goes to the Supreme Court of Canada, the Court may use the occasion to redefine doctrine in areas such as the test for a Subsection 91(3) tax and the scope of Section 125 immunity. It could generate new doctrine that will guide the future, rather than merely invoking and applying its past judicial statements. It might, for example, decide that if a measure could be justified under a head of federal authority apart from the Subsection 91(3) taxation power, Section 125 immunity still applies, if the measure is equally or more naturally sustained under Subsection 91(3) taxation power.⁶⁰

The view adopted in this opinion, therefore, contrary to the views of some scholars, *is that the Supreme Court of Canada would probably hold that the proposed federal carbon pricing framework – including both the carbon tax/levy and the proposed carbon trading add-on – is sustainable under the Subsection 91(3) taxing power.*

(D) The Carbon Trading Add-On Feature of a Carbon Tax/Levy

Assuming the carbon tax/levy was upheld under Subsection 91(3), what would be the fate of its "carbon trading add-on" feature?

This is again a matter that is far from certain. The "carbon trading add-on" system for large emitters, however, would probably be upheld as a "necessarily ancillary" part of the overall tax scheme. The federal level of government can include "extra" provisions – pieces of a statute

⁵⁹ At page 1075.

⁶⁰ In *The Attorney-General of the Province of British Columbia v. The Attorney-General for Canada* (1922), 64 S.C.R. 377, 1922 CanLII 47 (SCC) (known as the Johnnie Walker case), Section 125 immunity was found to be inapplicable to a federal tax on provincial liquor imports. The Court held that the tax in that case, an import duty, should be viewed as regulation of international commerce. The Johnnie Walker case, however, might be distinguished for, among other reasons, the fact that the activity being taxed involved importing goods across Canada's international boundary (rather than an activity that is essentially intraprovincial, such as consumption of fuel within a province). Another approach might be to say that customs duties are a historically-established category of taxes that constitutional framers would have expected to be under the authority of the federal level of government, whereas the constitutionality of new kinds of federal taxes has to be adjudicated in light of the need to maintain the ongoing federal-provincial balance of powers.

that on their own would be outside federal authority – if they are necessary to make the statute effective as a whole. The test established by the Supreme Court of Canada requires the intrusion on provincial jurisdiction to be balanced against the necessity of including the “extra” provision.⁶¹ The latter must justify the former.

While large emitters would have the option of simply paying the carbon tax/levy, the federal government has expressed concerns that the option might undermine the carbon tax/levy system, as a whole.⁶² Large emitters might relocate to other jurisdictions where the carbon-pricing regime is less demanding or more flexible. Another possibility is that large emitters might become uncompetitive, and competitors in less demanding jurisdictions would gain market share, with the net result that more production would be carried out by relatively less green facilities.

Standing on its own, a carbon trading add-on scheme might be beyond federal authority. As indicated above, this is a challenging question in its own right, with no certain answer. A carbon trading add-on scheme would control the conduct of provincially-regulated industries, and even provincial Crown corporations. It would also impact on natural resource development. If a carbon trading add-on scheme is an option that fits within a broader regime that is first and foremost a carbon consumption tax/levy, then the Supreme Court of Canada would likely uphold it. The carbon trading add-on would potentially limit the extent to which the main features of the carbon tax/levy might otherwise interfere with the effective operations of industries ordinarily regulated or owned by the provinces, and in that context could be viewed as actually *lessening* the extent of federal interference on matters generally regulated by the provinces.

(E) *Provincial Immunity Arising from Section 125 of the Constitution and other Immunity Doctrines*

As noted above, if the Supreme Court of Canada uses the Subsection 91(3) taxation power to uphold the proposed carbon tax/levy, it might find that Section 125 immunity applies to protect

⁶¹ *Reference re Assisted Human Reproduction Act* at para. 127. In *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641, 1989 CanLII 133 (SCC) at pages 671 and 672, the Court phrased the test as follows:

First, the court must determine whether the impugned provision can be viewed as intruding on provincial powers, and if so to what extent ... Second, the court must establish whether the act (or a severable part of it) is valid ... If the scheme is not valid, that is the end of the inquiry. If the scheme of regulation is declared valid, the court must then determine whether the impugned provision is sufficiently integrated with the scheme that it can be upheld by virtue of that relationship. This requires considering the seriousness of the encroachment on provincial powers, in order to decide on the proper standard for such a relationship. If the provision passes this integration test, it is *intra vires* Parliament as an exercise of the [head of power]. If the provision is not sufficiently integrated into the scheme of regulation, it cannot be sustained under the [head of power].

⁶² This is relevant because, as the Court held in *City National Leasing* (at page 671), "As the seriousness of the encroachment on provincial powers varies, so does the test required to ensure that an appropriate constitutional balance is maintained." To the extent that a carbon trading add-on scheme might be characterized as a serious intrusion on provincial powers, arguments that the absence of the scheme would impair the effectiveness of the proposed carbon tax/levy would support upholding the former as being necessarily ancillary to the latter.

provinces from the full force of the tax.⁶³ The Court might hold that the immunity applies where the provincial government (including its Crown corporation agents) is acquiring fuel for its own consumption, through resource extraction or by purchase.

The immunity might not apply where the Crown or its agent is collecting the tax from a party to whom it is selling the fuel, and who will be the ultimate consumer of the fuel.⁶⁴ In addition, Section 125 would not apply to tax levied on fuel which, while extracted from land owned by the provinces or Crown corporations, is owned by private parties.

If the Supreme Court of Canada holds that the Subsection 91(3) taxation power is the only basis on which the federal government can impose the proposed carbon tax/levy, the application of Section 125 follows naturally.⁶⁵ If the proposed carbon tax/levy can be sustained on both the basis of the Subsection 91(3) taxation power *and* another head of federal authority, then the Supreme Court of Canada might find that Section 125 immunity does not apply. Or, it might refine the doctrine on Section 125 immunity (or the doctrine on interjurisdictional immunity more generally), to provide a measure of limited protection to provincial governments and their agents, even when a measure can be justified on the basis of some other head of federal authority, in addition to the taxation power.

In addition to Section 125 immunity, another form of immunity arises specifically in respect of Indigenous peoples. Under the *Indian Act*, the Federal government and the provinces have to respect the immunity from taxation of property of First Nations citizens which is located on reserves.⁶⁶ There may in some cases be not only a statutory right to immunity from taxation, but rights arising under a historic or modern treaty, or as Aboriginal rights.

A third immunity doctrine relates to "interjurisdictional immunity". It might be that some carbon pricing measures are not open to a province because of the interjurisdictional immunity of federal entities like railways, airlines or banks.⁶⁷ The Supreme Court of Canada has recently affirmed that a narrow view should be taken of the interjurisdictional immunity doctrine, which provides that an otherwise valid law will not be valid, to the extent that it targets a core area of the other level of government's jurisdiction. Rather, the division of powers between levels of

⁶³ The immunity only applies to the extent that the Crown corporations are considered by the law to be agents of the Crown. See *Westbank First Nation* at para. 46.

⁶⁴ In *Reference re Goods and Services Tax*, [1992] 2 S.C.R. 445, 1992 CanLII 69 (SCC) (known as the GST Reference), the Court held that Section 125 immunity did not apply to a province's obligation to collect and remit GST on the purchase of taxable supplies, where the province acts as a supplier.

⁶⁵ Conversely, if the Court found the proposed carbon tax/levy was unsupported by the federal taxation power, then Section 125 immunity would not apply. See *Westbank First Nation* at paras. 31 to 33.

⁶⁶ As indicated above, Subsection 87(1) of the *Indian Act* exempts on-reserve property of First Nations citizens from taxation.

⁶⁷ The doctrine of interjurisdictional immunity provides that an otherwise valid law will be invalidated, to the extent that it targets a core area of another level of government's jurisdiction. Historically, the doctrine only applied to limit provincial powers – provincial laws which intruded on core areas of federal jurisdiction would be either struck down in their entirety or selectively read down. In *Canada (Attorney General) v. PHS Community Services Society*, [2011] 3 S.C.R. 134, 2011 SCC 44 (CanLII) at para. 65, however, the Court suggested that interjurisdictional immunity might equally apply to limit federal laws which intrude upon core areas of provincial jurisdiction.

government should generally be construed so that both federal and provincial governments have a robust ability to regulate in the public interest.⁶⁸

4. Peace, Order and Good Government as a Potential Basis for Federal Authority

Another potential basis for upholding the federal carbon tax/levy is the general federal authority over peace, order and good government, or POGG. To date, Courts have recognized several distinct branches of POGG, including: the "national concern" or "implied labels of authority" branch, the "emergency" branch and a residual branch that applies when a matter is outside provincial authority.

(A) The National Concern or Implied Labels Branch of POGG

Parliament has authority over the “peace, order, and good government of Canada”. Since the Anti-Inflation Reference, however, the Supreme Court of Canada has rejected the view that a matter falls within federal jurisdiction merely because it is important to Canada as a whole, or can be characterized as a “national concern”. If all such matters came with the jurisdiction of Parliament, the federal-provincial balance of power would be destroyed. From time to time, the Courts will recognize that a reasonably narrow and distinct subject matter falls under federal authority. In other words, the POGG power is used by the Courts to effectively generate new labels of federal authority, such as:

- (a) radio and television;⁶⁹
- (b) aeronautics;⁷⁰
- (c) uranium mining;⁷¹
- (d) the national capital region;⁷²
- (e) narcotics control;⁷³ and
- (f) marine pollution.⁷⁴

These new implied labels operate the same way as the heads of federal authority which were originally set out in the Constitution – once an implied label of authority is established, it can be used to justify federal legislation in the same manner as an enumerated head of power.

The Supreme Court of Canada will not recognize a new implied head of federal authority if the subject matter is capable of justifying federal measures that would have an undue impact on provincial authority. Accordingly, the Court has not or will not use POGG to recognize new implied labels of federal authority, such as controls over:

⁶⁸ *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, 2007 SCC 22 (CanLII) at paras. 37 to 47.

⁶⁹ *Québec (AG) v. Canada (AG)*, [932] UKPC 7, [1932] AC 304 (P.C.).

⁷⁰ *Johannesson v. West St Paul (Rural Municipality of)*, [1952] 1 S.C.R. 292, 1951 CanLII 55 (SCC).

⁷¹ *Pronto Uranium Mines Ltd. v. Ontario Labour Relations Board*, [1956] O.R. 862, 5 D.L.R. (2d) 342 (S.C.).

⁷² *Munro v. National Capital Commission*, [1966] S.C.R. 663, 1966 CanLII 74 (SCC).

⁷³ *R. v. Hauser*, [1979] 1 S.C.R. 984, 1979 CanLII 13 (SCC).

⁷⁴ *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401, 1988 CanLII 63 (SCC).

- (a) inflation;⁷⁵ and
- (b) the environment.⁷⁶

The factors that the Supreme Court of Canada will take into account in deciding whether to recognize a new implied head of federal authority under POGG's national concern doctrine are:

1. The national concern doctrine is separate and distinct from the national emergency doctrine of the peace, order and good government power, which is chiefly distinguishable by the fact that it provides a constitutional basis for what is necessarily legislation of a temporary nature;
2. The national concern doctrine applies to both new matters which did not exist at Confederation and to matters which, although originally matters of a local or private nature in a province, have since, in the absence of national emergency, become matters of national concern;
3. For a matter to qualify as a matter of national concern in either sense 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;
4. In determining whether a matter has attained the required degree of singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern it is relevant to consider what would be the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the intra-provincial aspects of the matter.⁷⁷

⁷⁵ See, for example, page 437 of the Anti-Inflation Reference.

⁷⁶ In *Crown Zellerbach*, the majority of the Court supported the use of POGG to uphold controls against marine pollution. The dissenting opinion in that case, written by La Forest J., however, would have found that POGG could *not* support the controls (see paras. 70 to 75). Nine years later, La Forest J. wrote the majority opinion in *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213, 1997 CanLII 318 (SCC), in which he repeated his view that POGG could not be used to support environmental regulations. See para. 112:

In considering how the question of the constitutional validity of a legislative enactment relating to the environment should be approached, this Court in *Oldman River*, supra, made it clear that the environment is not, as such, a subject matter of legislation under the *Constitution Act, 1867*. As it was put there, “the *Constitution Act, 1867* has not assigned the matter of ‘environment’ sui generis to either the provinces or Parliament” (p. 63). Rather, it is a diffuse subject that cuts across many different areas of constitutional responsibility, some federal, some provincial (pp. 63-64). Thus Parliament or a provincial legislature can, in advancing the scheme or purpose of a statute, enact provisions minimizing or preventing the detrimental impact that statute may have on the environment, prohibit pollution, and the like. In assessing the constitutional validity of a provision relating to the environment, therefore, what must first be done is to look at the catalogue of legislative powers listed in the *Constitution Act, 1867* to see if the provision falls within one or more of the powers assigned to the body (whether Parliament or a provincial legislature) that enacted the legislation (ibid. at p. 65). If the provision in essence, in pith and substance, falls within the parameters of any such power, then it is constitutionally valid.

⁷⁷ *Crown Zellerbach* at para. 33.

The Supreme Court of Canada could in this case recognize a new implied head of federal authority that has sufficiently well-defined and limited boundaries. But how would that head of authority be characterized?

"The environment" is too broad, as is "global warming". "Greenhouse gas emissions" sounds more modest, but again, the Pan-Canadian Framework illustrates how many regulatory areas would be involved – many of them being within provincial jurisdiction. "Carbon pricing" would be more limited still, but is open to the objection that it would still permit highly intrusive federal regulation into areas of provincial jurisdiction. For example, Parliament might then establish a complicated and varied regime, which includes elements of taxation, a carbon trading add-on and command-and-control edicts that set out maximum prices. Parliament might also establish a federal regulatory agency which could be authorized to manage (or even micromanage) different producers, in different ways.

It might be argued that the Government of Canada should have authority over "carbon pricing" generally, because one province's failure to establish a carbon-pricing regime (either in full or in part) might compromise attempts by other provinces to control GHG emissions. Might industries move to a "carbon tolerant" province, to the detriment of the efficacy of the larger GHG emission control measures? This seems like a theoretical possibility, but the Court might have a hard look at whether this is a *realistic* issue. Have industries actually fled British Columbia for other provinces, because it is a carbon pricing pioneer? What if the evidence is that in practice, all Canadian provinces are addressing GHG emissions in one way or another, and that there is not much moving about of industries within Canada due to different policies?

The particular legal issue which is engaged in these circumstances is referred to as the "provincial inability" test. As indicated in the excerpt above from *Crown Zellerbach*, "it is relevant to consider what would be the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the intra-provincial aspects of the matter". Whether the Court would consider practical economic realities, rather than theoretical possibilities, is not clear from its doctrinal statements on the provincial inability test. In practice, the Supreme Court of Canada might take the actual realities into account.⁷⁸

In addition, the Courts have noted that the placing of an "implied label" on a particular area of the law has the effect of forestalling future legislation, in that area.⁷⁹

⁷⁸ Another matter to be considered is whether the provinces are *unable* to implement GHG emission control legislation, or whether they might fail to do so because of a conscious policy choice (the latter of which may be entitled to some judicial deference).

⁷⁹ See *Crown Zellerbach* at para. 34: "[W]here a matter falls within the national concern doctrine of the peace, order and good government power, as distinct from the emergency doctrine, Parliament has an exclusive jurisdiction of a plenary nature to legislate in relation to that matter, including its intra-provincial aspects." As discussed above, this is contrary to the prevailing judicial sentiment of permitting concurrent legislation by different levels of government in the same areas of the law. This is particularly problematic for laws which purport to regulate the environment, insofar as the Court in *Friends of the Oldman River Society* at pages 63 and 64, and again in *Hydro-Québec*, expressly noted that both the federal and provincial levels of government have power to legislate in that area (see *Hydro-Québec* at para. 116):

The general thrust of [*Friends of the Oldman River Society v. Canada (Minister of Transport)*] is that the Constitution should be so interpreted as to afford both levels of government ample means to protect the environment while maintaining the general structure of the Constitution.

The presence of international treaties appears to be another factor in the "implied labels of federal authority" case law.⁸⁰ An international treaty has been in the background in most of the cases where a new head of federal authority is recognized. Here, there is the Paris Agreement. As noted, however, the Paris Agreement itself affords considerable flexibility to the parties, in terms of the policies and mechanisms they use to meet their targets (and in fact does not even unilaterally dictate defined national targets). Further, it does not punish failure to achieve targets, nor does it require the implementation of either a carbon trading add-on, carbon tax/levy or any other particular mechanism. True, the legal relationship between the international community and Canada is not identical to that of the federal government and the provinces. Still, the Court would likely recognize the inconsistency arising from the use of a highly flexible international treaty as a basis for rebalancing the federal-provincial balance of power, in favour of the federal government.

For these reasons, it is unlikely that the Supreme Court of Canada will recognize a new federal head of authority in the GHG emission or carbon pricing areas. Given the flexibility in the legal doctrine, however, the possibility that the Court might nonetheless recognize such a head of power cannot be ruled out.

(B) The Emergency Branch of POGG

As indicated above, the POGG head of authority has a second branch, in addition to the national concern doctrine. Courts recognize that, in the event of a "national emergency", the federal government has the power to pass temporary legislation for the purpose of maintaining or promoting peace, order and good government. As will be seen, the use of the emergency branch of POGG to uphold federal legislation is exceedingly rare.

The Anti-Inflation Reference was one of the cases in which the emergency branch of POGG was successfully invoked to uphold temporary federal legislation. In that case, the federal government had expressly declared a national emergency. At the Supreme Court of Canada, the federal government did not argue that the legislation should be upheld under the emergency branch of POGG, but rather took the position that POGG includes wide powers to address matters of national concern (which in that case included taking measures to address rampant inflation). The Supreme Court of Canada, however, decided to structure and limit the POGG power, by dividing it into two branches:

- (a) implied new labels of federal authority, which have reasonably well-defined contours. The limiting nature of the "national concern" or "implied labels" branch, as noted above, is that there must be strong reasons to view the legislation as applying to matters within federal authority, and that the label is reasonably specific, rather than a launching board for excessive intrusions on provincial authority;⁸¹ and

This is hardly consistent with an enthusiastic adoption of the "national dimensions" doctrine. That doctrine can, it is true, be adopted where the criteria set forth in *Crown Zellerbach* are met so that the subject can appropriately be separated from areas of provincial competence.

⁸⁰ This issue is discussed in greater detail below.

⁸¹ As indicated above, the Court in *Crown Zellerbach* later expanded on this requirement and held that, in order for legislation to be upheld under the national concern or implied labels branch of POGG, a matter must have "a singleness, distinctiveness and indivisibility that clearly distinguishes it from

- (b) the limiting nature of the "emergency" branch of POGG is that the legislation must be viewed as a response to an emergency (whether there is an express declaration of emergency or not) and that the "emergency" must be a temporary state of affairs. The emergency branch of POGG does not support the permanent rebalancing of the division of powers between the federal and provincial levels of government in favour of centralized authority.

In this case, the basis for the Paris Agreement is that GHG emissions, if not eventually capped, will likely cause global warming to an extent that would cause serious adverse effects. Some participants in the debate are concerned that the continued increase in global temperatures may lead to "runaway global warming", whereby the natural effects of global warming will cause additional global warming, with profoundly negative consequences.⁸²

The Supreme Court of Canada likely would not second-guess a decision by the federal government to either:

- (a) declare a "greenhouse gas emergency"; or
- (b) short of declaring an emergency, to at least make it clear through other public pronouncements that the federal government considers it urgent and important to limit Canada's overall GHG emissions.

Instead, the Court would likely be inclined to consider it sufficient that the elected national government genuinely views the matter in that light. The Supreme Court of Canada would not want to make itself an arbiter of differing scientific or economic views on the issue. Instead, history and experience suggest it would likely defer to the judgment of an elected branch of government concerning the applicable science, economics and the appropriate policy response.

Those opposed to the proposed carbon tax/levy might argue that even if Canada wholly de-industrialized, the global impact on GHG emissions would be small, and the impact on global warming would be even less significant. In response, it might be argued that while Canada's own GHG emissions might not be significant, there is an exigent need for global cooperation to limit the growth of GHG emissions, and Canada can reasonably regard it as a matter of high priority to set a good example and carry its equitable part of the burden.

If the science and economic thinking behind the Paris Agreement is correct, however, GHG emissions present a significant long term challenge. World population is growing. Industrial production in many societies is increasing. To date, there is no reason for confidence that new

matters of provincial concern". The legislation must also have "a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution".

⁸² For example, one such concern has been stated as follows: GHGs cause heat to be trapped; and more heat means the ocean will release additional GHGs, perpetuating the cycle of additional heat. Others argue that life on earth would not be able to thrive, if the natural tendency of climate variation was to proceed in one self-reinforcing direction. If that was the case, global cooling would not only have resulted in ice ages, but temperature decreases that became more severe and widespread until life completely disappeared; hotter periods, on the other hand, would similarly have led to ever greater warming, until life became unsustainable. It is possible that negative feedback might limit a tendency in one direction (for example, global warming might lead to more cloud cover). For the present purposes, the point is simply that as indicated above, the science surrounding climate change is far from settled.

technology will replace the use of carbon-based fuels to an extent that GHGs would no longer be a concern.

Given these factors, this opinion concludes that, while a Court might well be persuaded that the problems posed by GHG are significant (even to the point that the situation might be described as a serious immediate threat), the "temporary" requirement for using the emergency branch of POGG is absent. Regardless of its importance, the problem posed by GHG emissions simply cannot be characterized as something that is transitory in nature. As a result, the Supreme Court of Canada would be unlikely to use the emergency branch of POGG as a basis for upholding the proposed carbon tax/levy.

(C) *The Residual Branch of POGG*

A general argument might be made that the federal government inherently has authority to enact a carbon tax/levy, because some of the GHG emissions released by fuel consumption might eventually cross a provincial boundary, or might have an impact on the global climate. Either way, part of the impact of the taxed or regulated activity would be outside the originating province, and so, the argument would go, that part of the impact of carbon consumption would be inherently *within* federal authority.⁸³ The federal government could address GHG emissions based on its authority over the extraprovincial impact of GHG emissions, even if the provinces could address GHG emissions on the basis of their authority over industries located within their boundaries.

It is entirely possible that this argument could succeed, in the context of the proposed carbon tax/levy.

But it is perhaps more likely that it would not. What the Court would have to evaluate is the constitutionality of a *particular legislative measure*, not whether a matter is conceptually within federal or provincial authority. The particular measure here – the proposed carbon tax/levy – would be aimed directly at consumption, not emissions. It would apply even if the emissions from consumption were captured at their source, or were otherwise captured quickly within the originating province by natural processes.

Moreover, the fact that an activity has some extraprovincial impact may not be sufficient to sustain the federal measure which is directed at that activity, if the measure's impact on provincial jurisdiction is considered excessive. In the *Anti-Inflation* case, for example, the larger purpose of controlling inflation in the national economy was – absent a national emergency – considered to be insufficient to constitutionally justify the application of federal wage and price controls to industries ordinarily regulated by the provinces. The majority decision at the Supreme Court of Canada was concerned about the major intrusion by Canada into matters ordinarily regulated at the provincial level, even though price increases in various goods and services sold within a province might have contributed to the overall loss of the real value of the Canadian dollar throughout the federation.

In *Crown Zellerbach*, only the dissenting members of the Court addressed the POGG argument to uphold the federal law at issue in that case, which concerned authority to legislate in relation

⁸³ In *Interprovincial Co-operatives Ltd. et al. v. R.*, [1976] 1 S.C.R. 477, 1975 CanLII 212 (SCC), the Court struck down a Manitoba law that allowed Manitoba residents to sue for harm caused by pollution which originated outside Manitoba.

to the release of toxic substances into the marine environment. The dissent seems to take into account both the technical concern that the regulatory scheme was not confined to releases of toxins that would have extraprovincial effects, as well as the conceptual concern that jurisdiction over the environment is shared between the provinces and Canada, under the federal-provincial division of powers (and further, that using POGG to uphold the federal regulatory regime would have left insufficient room for provincial authority). If the federal level had regulatory authority over any and all GHG emissions that have some extraprovincial effect, there would be no effective limit to how extensive and intrusive federal regulations might be, from the perspective of provincial jurisdiction. Everything from speed limits on local roads to local building codes to the detailed operation of provincial energy corporations might be regulated in detail. These federal measures might apply, regardless of whether the province had put in place measures to capture almost all of the emissions, or that province had found other means of offsetting the impact of emissions not recognized by the federal proposal, such as having a cap-and-trade system in place or adopting an overall legislative program which offsets some types of emissions by securing reductions in other types of emissions. It is unlikely, therefore, that the Supreme Court of Canada would rely on POGG to uphold the proposed carbon tax/levy and carbon trading add-on.

5. Criminal Law Power as a Potential Basis of Federal Authority

The case law recognizes that, in order for a law to be recognized in pith and substance as a criminal law, it must contain a prohibition, a penalty and a criminal law purpose.

In the *Hydro-Québec* case, the Supreme Court of Canada used the criminal law power to uphold federal legislation which controlled the use and release of certain toxic substances. The law in question authorized the federal government to issue regulations concerning toxic substances. These regulations could involve directions as to the substances' handling and management, rather than requiring an outright prohibition against their release. The three-point test noted above was held to be satisfied, insofar as the law at issue:

- (a) prohibited the release of certain toxic substances into the environment (even though the prohibition arose from a detailed regulatory scheme and a determination as to which substances were targeted was delegated by Parliament to a government agency);⁸⁴
- (b) enforced the prohibition by a penal sanction; and
- (c) was aimed at protecting the environment, which the Courts now recognize is a valid criminal law purpose.

Hydro-Québec is often cited as authority for the principle that the federal government can use its criminal law power to address GHG emissions. In 2005, Parliament added GHGs to the list of substances that could be regulated under the *Canadian Environmental Protection Act, 1999*

⁸⁴ In *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, 1995 CanLII 64 (SCC), the Court accepted that a law which controlled or reduced the effect of the subject matter of the law – but stopped short of an outright prohibition – could nevertheless be upheld under the criminal law power. In that case, the Court upheld a ban on tobacco advertising on the basis that it would reduce the detrimental health effects of tobacco consumption, even though the actual sale of tobacco would still be permitted.

("CEPA").⁸⁵ In *Syncrude Canada Ltd. v. Canada (Attorney General)*,⁸⁶ the Federal Court of Appeal held that the criminal law power supported CEPA regulations which require that all diesel fuel produced, imported or sold in Canada must contain at least two percent renewable fuel.

The reasoning in the *Hydro-Québec* case, however, is not an open-ended mandate – a "carte verte", so to speak – for the federal government to enact any and all laws involving GHG emissions. The case was itself narrowly decided (by a four-three split of judges). Further, the majority judgment takes pains to emphasize the relative narrowness of the prohibitions:

These listed substances, *toxic in the ordinary sense*, are those whose use in a manner contrary to the regulations the Act ultimately prohibits. This is a limited prohibition applicable to a restricted number of substances.⁸⁷ [Emphasis added.]

GHGs such as carbon dioxide and water vapour are not toxic "in the ordinary sense." Their detrimental effects are based on a theory of their long-term interaction with the rest of the environment, and the impact that interaction might have on human life. The limits on GHG emissions are targeted to a few substances, but those substances are routinely used by Canadian families, as well as business operations. The regulation of GHGs may involve considerably more complicated measures than the regulation of other toxic substances, have a much more extensive impact on the routine lives of Canadians and have a much larger impact on matters exclusively within provincial jurisdiction.

The theory of the Paris Agreement is that there is a compelling global need to limit emissions of carbon-based GHGs in order to limit global warming. The Supreme Court of Canada would likely accept the underlying theory as correct, or at least as a theory upon which the federal level of government can reasonably proceed to legislate. The Supreme Court of Canada has already ruled that protecting the environment can be a valid criminal law purpose. As in its interpretation of all federal powers, the Supreme Court of Canada tries to keep in mind the importance of maintaining the federal-provincial balance of power. But again, that factor in and of itself may not be sufficient to uphold a proposed carbon tax-levy with the criminal law power.

As and when the Supreme Court of Canada rules on the use of the criminal law power to support controls on GHG emissions, there are a variety of factors that it might take into account:

- (a) to what extent does the legislation include prohibitions and penalties? A valid criminal law may include licensing or registration requirements, but the Courts will consider the extent to which the legislation follows the core criminal law formula of prohibited conduct plus a penalty. This is a significant issue, insofar as the proposed carbon tax/levy and carbon trading add-on would control – but not prohibit – the release of GHG emissions;

⁸⁵ S.C. 1999, c. 33. GHG have been added as Nos. 74 to 79 to CEPA's Schedule I, "List of Toxic Substances".

⁸⁶ 2016 FCA 160 (CanLII).

⁸⁷ At para. 146.

- (b) what is the scale of the legislation's intrusion on matters within provincial jurisdiction? Does the federal legislation disrupt provincial regulation in the area?;⁸⁸
- (c) is the legislation in its main purpose and effect an attempt to legislate in the area of a subject matter that is ordinarily within exclusive provincial authority?;⁸⁹ and
- (d) what are the historic roles of the federal and provincial levels of government in this area, including recent history? A federal law that operates in an area where the Government of Canada has long acted may be more likely to be upheld.⁹⁰ Conversely, federal law that would operate in an area where at least one province has established its own regime might be more problematic.⁹¹

In view of these considerations, it is unlikely that the proposed carbon tax/levy would be upheld under the federal government's criminal law power. A variety of other initiatives might for constitutional purposes be a "criminal law measure", but the overriding reality is that a tax measure (whether or not intended to shape conduct or raise revenue) generally cannot be characterized as a "criminal law measure". The carbon tax/levy would raise the price of certain activities, but it would not ban them. The conduct in question is being influenced, but not dictated by command-and-control orders.

In a highly-contested area of constitutional law, it is doubtful that the Supreme Court of Canada would want to adopt reasoning that is far removed from the understanding of ordinary Canadians. From the common sense point of view which is likely to be held by most Canadians, the carbon tax/levy looks like a tax. Some might accept the nuance that it is more of a "levy", than a tax. But how many would say that it is a "criminal law measure"?⁹²

Some scholars have argued that a carbon trading add-on regime could be justified under the federal criminal law power. It is possible that the Supreme Court of Canada would agree. The "cap" part could be seen as sufficiently embodying the "criminal law" idea of prohibiting something; with carbon trading add-on systems, the prohibition would be on collective emissions of GHG, beyond a stipulated level. The "trade" part could be seen as a constitutionally permissible part of an overall scheme whose foundation is the cap.

On the other hand, a carbon trading add-on system would involve creating a system of tradeable rights, similar to property, which would impact significantly on private and public enterprises that are ordinarily within exclusive provincial authority.

⁸⁸ *Reference re Firearms Act (Can.)* at para. 48.

⁸⁹ *Reference re Assisted Human Reproduction Act* at para. 266. Note that in this case, the Supreme Court of Canada split three ways over which parts of a proposed federal law were valid criminal legislation. The judgments differ, however, both in terms of their general understanding of the constitutional law in this area as well as their application to the facts of that particular case.

⁹⁰ *Reference re Assisted Human Reproduction Act* at para. 136.

⁹¹ *Reference re Assisted Human Reproduction Act* at paras. 222 to 225

⁹² Again, cases such as the Anti-Inflation Reference demonstrate that how government chooses to characterize the applicable head of power is not necessarily determinative of what a Court might decide.

The outcome of litigation at the Supreme Court of Canada of a carbon trading add-on scheme, in its own right, is entirely unclear. To some extent, that outcome would depend on the details of the particular legislative proposal.

The view expressed in this opinion, as previously stated, is that the carbon trading add-on to the proposed federal carbon/tax levy probably could not be sustained as "criminal law". The carbon trading add-on feature would be viewed in the context of an overall scheme that is in substance a tax, rather than a criminal law prohibition. As stated above, the carbon trading add-on would probably be sustained on a different basis – being necessarily ancillary to an overall scheme that is sustainable on the basis of the federal taxation power under Subsection 91(3).

6. Trade and Commerce as a Potential Basis of Federal Authority

Under Subsection 91(2) of the Constitution, the federal government has authority over the "Regulation of Trade and Commerce." The Courts have historically given this power a highly restrictive interpretation, on the basis of the need to preserve the federal-provincial balance of powers, including provincial authority over "property and civil rights" and the regulation of "intraprovincial" trade and commerce.

As such, the Supreme Court of Canada has tended to continue the judicial line of thinking that the Subsection 91(2) regulation of trade and commerce power applies narrowly to interprovincial and international trade and commerce, as well as to "general trade and commerce".

In *General Motors of Canada Ltd. v. City National Leasing*, the Supreme Court of Canada established a set of factors to be considered in determining whether the "general trade and commerce" branch of the Subsection 91(2) power to regulate trade and commerce can uphold a federal law:

- (1) the impugned legislation must be part of a general regulatory scheme;
- (2) the scheme must be monitored by the continuing oversight of a regulatory agency;
- (3) the legislation must be concerned with trade as a whole rather than with a particular industry;
- (4) the legislation should be of a nature that the provinces jointly or severally would be constitutionally incapable of enacting; and
- (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.

To date, the federal trade and commerce power has been used to uphold the following kinds of federal statutes:

- (a) competition laws;⁹³
- (b) trade-mark laws;⁹⁴ and

⁹³ In *City National Leasing*, the predecessor statute to the current federal *Competition Act* was upheld.

(c) laws which involve aspects of interprovincial or international trade.⁹⁵

The Supreme Court of Canada recently held that the federal government could not use its Subsection 91(2) power to establish a national securities regulator.⁹⁶ The proposed law would have only applied in provinces in which the provincial government had opted into the regime. Still, the Court said, the proposed federal regulator would have had authority in matters that involved core provincial authority, including the regulation of ordinary retail transactions, in these "opted-in" provinces. It should be noted that the provinces which raised constitutional objections to the legislation included Alberta and Québec (which have in this case already adopted their own provincial carbon pricing laws).

The trade and commerce power can be used to set standards legislation, which permits a national agency to define technical product standards (e.g., "Canada Grade A" apples) and to restrict the use of the standard to compliant products. Any standards which unduly intrude into areas of provincial jurisdiction are, however, subject to being constitutionally challenged. In an older case,⁹⁷ the Supreme Court of Canada struck down a federal law which engaged in detailed regulation of a particular industry (in that case, beer production). The Court noted that requiring compliance with a federal standard was indicative of an unwarranted intrusion on provincial authority, in part because the "light beer" description at issue was already commonly in use.⁹⁸

Could the proposed carbon tax/levy be supported by the Subsection 92(1) power over trade and commerce?

The regime would apply to material that is produced and consumed within a single province. It might be argued that there is an interprovincial or international dimension to carbon use, as GHG gases can affect the overall global climate. That consideration is likely to be insufficient, however, to turn the carbon tax/levy into a measure that regulates interprovincial or international trade and commerce. The substance and focus of the legislation might be difficult to characterize as something that is essentially about international "trade and commerce". GHG emissions may travel outside a province, but what is being taxed is the consumption of fuel – even if that fuel is produced and consumed in a single province.⁹⁹ Enterprises are not buying or selling the actual GHG emissions.

⁹⁴ See *MacDonald et al. v. Vapor Canada Ltd.*, [1977] 2 S.C.R. 134, 1976 CanLII 181 (SCC) and *Kirkbi AG v. Ritvik Holdings Inc.*, [2005] 3 S.C.R. 302, 2005 SCC 65 (CanLII).

⁹⁵ See, for example, *Caloil Inc. v. Attorney General of Canada*, [1971] S.C.R. 543, 1970 CanLII 194 (SCC) (regulating the import of oil into Canada) and *Reference re Agricultural Products Marketing*, [1978] 2 S.C.R. 1198, 1978 CanLII 10 (SCC) (regulating egg marketing).

⁹⁶ *Reference re Securities Act*, [2011] 3 S.C.R. 837, 2011 SCC 66 (CanLII) at para. 6 (also known as the Securities Reference).

⁹⁷ *Labatt Breweries of Canada Ltd. v. Attorney General of Canada*, [1980] 1 S.C.R. 914, 1979 CanLII 190 (SCC).

⁹⁸ *Labatt Breweries* at pages 958 and 959.

⁹⁹ While it is probably not a major consideration in the constitutional analysis, the proposed carbon tax/levy would apply regardless of whether the fuel consumed actually results in emissions being released into the environment, rather than being captured.

Similarly, it is doubtful that the Supreme Court of Canada would consider the proposed carbon tax/levy to be supported by the regulation of "general trade and commerce" branch of Subsection 91(2), since it would be aimed at:

- (a) one particular (albeit major) kind of business (i.e., fuel sales and consumption); and
- (b) regulating environmental matters, rather than attempting to engage in the regulation of commercial law matters (such as establishing and protecting property rights and standards, misleading or fraudulent commercial conduct or the establishment of marketplace domination).

Given the careful approach the Courts have taken toward limiting the scope of the trade and commerce power, it is unlikely that the Supreme Court of Canada would use Subsection 91(2) to uphold the proposed carbon tax/levy and carbon trading add-on.

There might be situations in which the federal government could become involved in the emissions-trading market. For example, issues involving honesty and transparency in the marketplace might arise (and these issues could include interprovincial and international transactions), in which the federal government would have a constitutionally valid role. But rather than speculating on hypothetical schemes, this opinion is focused on the proposed carbon tax/levy that is outlined in the Technical Paper. That proposed carbon/tax levy does have a carbon trading add-on, as an option which is available to mitigate the potential harshness or counterproductive effects of the tax, on some heavy consumers. But it is doubtful that the Supreme Court of Canada would invoke the federal trade and commerce power, with all of its judicially-established limitations, to uphold that add-on feature. Rather, as noted above, the carbon trading add-on would probably be upheld as "necessarily ancillary" to a valid federal taxation scheme.

7. *Treaty Implementation Power as a Potential Basis of Federal Authority*

In theory, there is no standalone federal "treaty implementation" power that authorizes federal intrusions on provincial jurisdiction.

The authority to enter into international law treaties is vested in the federal executive. But treaties do not automatically change the internal law of Canada. Rather, the pre-existing respective spheres of authority of the federal and provincial levels of government remain in place. Some parts of a treaty might be implemented in Canada by an Act of Parliament that changes the laws of Canada. Other parts of the treaty might have to be implemented by the provinces, whose legislatures would change provincial laws. But if the provinces do not act, Canada might be noncompliant with its obligations in the eyes of international law.

Nevertheless, there are powerful reasons why the Courts have not recognized a distinct treaty-implementation power. If such a power existed, provincial authority could be drastically undercut by the federal government's international treaty-making activities. Present-day treaties exist on a vast array of topics – not only war and peace and trade, but also in substantive areas such as labour standards, social programs, human rights, culture and a broad variety of other subjects which are largely regulated by the provinces.

Moreover, treaties vary drastically in their form and content. A treaty that represents a global consensus, or something close to it, might be seen as more morally compelling (and inherently

less disruptive of provincial authority) than a treaty between Canada and one or a few other signatories. A treaty that spells out clear, specific, technical norms (for example, concerning civil aviation) might be less threatening to the federal-provincial balance of power than a treaty that allows enormous discretion in its interpretation and implementation. A treaty that is followed in practice by most or all of its parties might similarly be considered as carrying more weight, in the Canadian constitutional context, than one that is widely ignored. Some treaties provide for adjudication in case of disagreements, together with a framework for consequences for breaches of their terms. Many treaties do not allow other parties to "take them to Court", and there are no sanctions set out for non-compliance. As such, using a treaty that has flexible norms and relaxed enforcement mechanisms as a basis for changing the way the Constitution is interpreted and applied could be viewed as unduly extending the power of the federal government at the expense of the provincial order.

In the United States, there is a distinct federal treaty-implementation power. But the treaty must be entered into through a special process, which requires a two-thirds affirmative vote by the Senate (in which each state has equal representation). The American system therefore contemplates a check-and-balance mechanism to reconcile the competing values of the desirability of having internal American laws conform to international commitments, versus the desirability of preserving the balance of powers between the federal and state governments. No such check-and-balance system currently exists in Canadian law.

The Supreme Court of Canada has not, however, been indifferent to Canada's international treaty commitments. The Court has said, for example, that consistency with Canada's international treaty commitments can be a *factor* in favour of construing the *Canadian Charter of Rights and Freedoms*¹⁰⁰ in one way, rather than another.¹⁰¹ In practice, the existence of an international treaty is often a background factor when the Supreme Court of Canada interprets ordinary heads of federal authority, such as the criminal law power, or when the Court recognizes a new implied head of federal authority, such as aeronautics or radio and television. In other words, absent a special check-and-balance mechanism as exists in the U.S. constitution, the Supreme Court of Canada has made treaty obligations one factor among many to be considered in a long-term course of adjudication aimed at preserving the overall federal-provincial balance of powers.

The Paris Agreement is a near-global treaty and it addresses a subject that is generally considered to be of great importance. On the other hand, it leaves a great deal of discretion to individual states about how they wish to define their GHG emission objectives, and what mechanism they will choose to attempt to achieve those objectives. The Supreme Court of Canada would likely consider the Paris Agreement as being an important factor in a decision about whether the proposed carbon tax/levy can be reconciled with the federal-provincial division of powers. The treaty's existence, however, would probably not cause the Court to lose sight of its long-standing approach of trying to preserve the federal-provincial balance of power.¹⁰²

¹⁰⁰ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11.

¹⁰¹ See, for example, *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, 1987 CanLII 88 (SCC) at para. 57.

¹⁰² *Canada (A.G.) v. Ontario (AG.)*, [1937] A.C. 326 (P.C.), 1 D.L.R. 673, 1 W.W.R. 299 (known as the Labour Conventions case) continues to be applied by Courts on this point.

V. THE PROPOSED SELECTIVE BACKSTOP

This opinion has expressed the view that the federal government probably can enact the proposed carbon tax/levy, apart from its "selective application/backstop" features. What remains to be discussed is whether those selective backstop features are themselves enforceable, or otherwise affect the integrity of the proposed carbon tax/levy.

To recap, the selective backstop feature of the proposed federal carbon tax/levy would provide that the law would apply in any province that has not put in place measures that satisfy federal benchmarks. In other words, provinces can effectively "opt out" of the federal legislation, but only by enacting compliant legislation of their own.¹⁰³ The tightly constrained flexibility (or lack thereof) given to the provinces likely does not enhance the case that the subject matter of the law is within federal jurisdiction. If the Supreme Court of Canada decides the proposed carbon tax/levy would ordinarily be outside of federal authority, its selective backstop feature will almost certainly not rescue it.

In the Securities Reference, the Supreme Court of Canada struck down a proposed federal scheme to create a national securities regulator. That federal scheme involved an "opt in" feature – the scheme would have operated only in provinces whose governments affirmatively chose to accept its operation. But this "opt in" feature did not, in the Supreme Court of Canada's view, excuse the enactment of legislation that otherwise intruded into provincial jurisdiction.¹⁰⁴ By contrast, the proposed federal legislation which is being examined in this case, the carbon tax/levy and carbon trading add-on, provides far less consideration to provincial government preferences.

Having considered whether the backstop feature would validate otherwise invalid federal legislation (it would not), the opposite question must now be asked: if the proposed carbon tax/levy and carbon trading add-on would ordinarily be within federal authority, would its selective backstop feature render it invalid?

The answer is essentially no. The mere fact that federal legislation will be inactive in compliant provinces would not by itself make the law unconstitutional. It seems consistent with the theme of "cooperative federalism", as stated by the Supreme Court of Canada,¹⁰⁵ that innovative means of coordinating federal and provincial authority are welcomed, from a legal perspective.

A precedent for the selective backstop feature of proposed carbon tax/levy is the *Personal Information Protection and Electronic Documents Act*,¹⁰⁶ the federal private sector privacy law. It only applies to the provincially-regulated private sector in provinces that have not enacted their own laws which are "substantially similar" to PIPEDA.¹⁰⁷ In an article commenting upon the Securities Reference, however, former Supreme Court of Canada Justice Michel Bastarache questioned whether the federal government is in fact constitutionally competent to

¹⁰³ Technical Paper at page 5.

¹⁰⁴ At para. 123.

¹⁰⁵ See *Canadian Western Bank* at para. 37: "In the absence of conflicting enactments of the other level of government, the Court should avoid blocking the application of measures which are taken to be enacted in furtherance of the public interest."

¹⁰⁶ S.C. 2000, c. 5 (PIPEDA).

¹⁰⁷ At para. 26(2)(b).

impose PIPEDA upon the provinces by way of a selective backstop measure.¹⁰⁸ According to former Justice Bastarache, the federal government's stated justification for the law – its power over trade and commerce arising from Subsection 91(2) of the Constitution – may be inapplicable, following the Court's comments in the Securities Reference.¹⁰⁹

As indicated above, the federal government probably could enact the proposed carbon tax/levy, separate and apart from its selective backstop feature (again, if the Supreme Court of Canada was to decide that the carbon tax/levy would ordinarily be outside of federal authority, its selective backstop feature would almost certainly not rescue it – the core elements of the law must be grounded in a head of federal authority as a prerequisite to any possibility that a selective backstop element might apply).

Assuming, then, that the carbon tax/levy *is* within the federal government's authority to implement, is there a reason why a selective backstop feature would invalidate what was an otherwise valid law? This opinion now examines two untested (with respect to Canadian federalism) arguments that might be used to argue that a selective backstop feature might place the carbon tax/levy outside government's authority.

1. Federal Power Cannot be Exercised "Coercively"?

The Supreme Court of Canada might eventually develop a doctrine whereby “coerciveness” with respect to the provinces provides a basis for striking down certain federal legislation.

According to the Supreme Court of the United States, the use of the federal spending power in that country must not go beyond attaching incentives for the states to access federal money, thereby in practice reaching the point of being coercive. In the so-called "Obamacare case",¹¹⁰ Chief Justice Roberts – with the concurrence of two of the more liberal members of the Court – found that Congress could not strip states of their existing Medicaid funding, merely because the states did not participate in a program to expand Medicaid. The Court concluded that to strip the states of their funds would have been coercive; essentially, forcing the states onto one particular policy path that had been chosen by the federal government.

The Supreme Court of Canada has not to date developed any comparable doctrine with respect to the use of the federal spending power. In practice, the Government of Canada has reduced the extent to which it attaches conditions to federal transfers to the provinces. The Meech Lake Accord and Charlottetown Accord (in a manner consistent with Québec's five demands for approving the 1982 amendments to the Constitution) would have placed restrictions on new federal cost-shared programs. Under these restrictions, provinces could opt out of such cost-

¹⁰⁸ Michel Bastarache, "The Constitutionality of PIPEDA: A Re-consideration in the Wake of the Supreme Court of Canada's Reference re Securities Act" (June 2012), accessed at: <http://accessprivacy.s3.amazonaws.com/M-Bastarache-June-2012-Constitutionality-PIPEDA-Paper-2.pdf>.

¹⁰⁹ The author concludes, at page 20:

There is a very strong possibility that, in light of the Supreme Court's decision in the Securities Reference, PIPEDA's model of cooperative federalism may need to be revised. In particular, it may be necessary to formally recognize provincial legislative jurisdiction over purely intraprovincial aspects of private sector privacy regulation, which extend beyond the national interest in providing minimum standards.

¹¹⁰ *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012), 183 L. Ed. 2d 450, 132 S.Ct. 2566.

shared programs, yet still receive the same funding as participating provinces, as long as the opting out provinces created programs that were compatible with the federal programs. In the 2007 federal budget, the federal government promised to honour the same principle.¹¹¹

To be clear, the Supreme Court of Canada has *not yet* recognized any anti-coercive limits on the federal spending power.¹¹² If such limits are recognized, they will likely operate notwithstanding that the federal spending power is otherwise unlimited, and because the Court is instead looking for an avenue to provide structure and moderation to broadly-stated federal powers that might otherwise upset the federal-provincial balance of power in the particular case before the Court.

There does not appear to be any realistic possibility that the Supreme Court of Canada would use this carbon/tax levy case – which does not involve questions about the federal government's spending power – to suddenly create an anti-coercion doctrine with respect to the use of federal authority, in general. In this case, the heads of authority upon which the federal government would likely rely already have structure and limits imposed by established doctrine. The Supreme Court of Canada might clarify or revise these doctrines, but it is unlikely that it would suddenly insert an anti-coercion principle into them. It will be a challenge to define the nature of an anti-coercion principle, and in any event, it would likely not be necessary to do so in order to achieve a result that the Supreme Court of Canada views as being consistent with the federal-provincial balance of powers. On these facts, it is far from self-evident that the selective backstop feature actually is coercive. If the federal government could enact a carbon tax/levy in any event, then leaving space for substantially compliant provinces can instead be viewed as an exercise in cooperative federalism.

2. Exercises of Federal Power and Equality among the Provinces

There is another argument against the selective backstop feature of the carbon tax/levy – again, without any Canadian judicial precedent – that might be nonetheless be considered as being credible, and which would have at least a chance of being accepted by the Supreme Court of Canada. This argument would concern the selective application of federal law to some provinces, but not others, which, depending on the facts, could be framed as a denial of the legal equality of the provinces.

This other untested argument might proceed as follows:

“The federal government in its backstop legislation has arbitrarily accommodated some provides, but not others. The federal benchmarks accommodate Alberta and British Columbia, which already have carbon taxes/levies, and Québec and Ontario, which have cap-and-trade schemes.

The federal government has, however, arbitrarily refused to accommodate a few provinces that have created their own paths to carbon reduction, the opportunities for success of which are substantially equal to the schemes in other

¹¹¹ Library of Parliament, "The Federal Spending Power" (November 13, 2007), accessed at: <https://lop.parl.ca/content/lop/ResearchPublications/prb0736-e.pdf>.

¹¹² In *YMHA Jewish Community Centre of Winnipeg Inc. v. Brown*, [1989] 1 S.C.R. 1532, 1989 CanLII 53 (SCC) at page 1549, the Court noted the federal government has broad discretion to exercise its spending powers, even in areas which are under provincial authority.

provinces which have been favoured by the federal government. In Manitoba's case, some combination of carbon pricing, reform of agricultural practices, and reliance on further investment in its hydroelectric generation system is and will be used to meet these objections.

This discriminatory treatment is arbitrary. It has no basis in the Government of Canada's own targets. The Paris Agreement itself places a heavy emphasis on flexibility, different approaches to achieving targets, acknowledging the vulnerability of some economies, and addressing the concerns of Indigenous peoples.

Manitoba is a "have-not" province. Its citizens are already paying heavily for the provincial investment in hydroelectric power generation. They will likely be required to absorb rate increases for electricity in excess of inflation for decades to come. Manitoba has significant agricultural and Indigenous communities that cannot cope with increased fuel prices as well as can dwellers in urban centres. They may not have comparable access to alternative energy sources. They may not have the same flexibility to reduce their fuel consumption, since agricultural consumption can be energy-intensive and remote Indigenous communities are located in places that have longer winters than Southern Manitoba.

Accordingly, the Manitoba Legislature is not being allowed the same flexibility to craft its own solution as are other sovereign legislatures. Without casting any aspersions on federal intent, the practical reality is that provinces with larger populations, more robust economies and more voting power are being accommodated to a greater extent than Manitoba.

The principle of equality among the provinces – in the sense of their equal power to legislate – is therefore effectively being breached, by the selective backstop feature of the carbon tax/levy.

Provinces are not equal economically or politically. But it is a bedrock principle of federalism that they all have the same power to legislate. Constitutional adjudication looks at reality, not just legal form. The proposed carbon tax/levy, with its selective backstop feature, appears neutral on its face – it does not single out any particular provinces for favours or burdens. But the practical reality is that Manitoba's elected government and Legislative Assembly would be overborne by the federal government – effectively being told how to exercise their taxing and regulatory authority – in a way most provinces are not.

The Constitution does not treat all provinces identically, but to a great extent grants the same catalogue of powers to all the provinces. New provinces have been admitted, with various special adaptations, but again with the same basic catalogue of powers. One major area of discrimination – lack of ownership of natural resources by provincial governments in Western Canada – was remedied almost a century ago.¹¹³

¹¹³ As part of its 1982 amendments, Subsection 92A of the Constitution was added to give provinces express power over non-renewable natural resources inside their borders.

Throughout the debates over the Patriation Package (in 1982), the Meech Lake Accord (in 1987) and the Charlottetown Accord (in 1992), the principle of the juridical equality of the provinces was a constant theme. The rest of Canada did not accept that one province, Québec, would obtain legislative powers that others were denied. Instead, Québec's aspirations would be addressed by enhancing recognition of provincial authority for *all* provinces. Québec's distinctive linguistic and civil law heritage would be recognized for some purposes (for example, they might be a factor to be taken into account in interpreting the Constitution in some respects, such as balancing the protection of Québec's cultural distinctiveness in the face of individual rights claims under the *Charter*), but there would be no constitutional entrenchment of asymmetrical federalism.

The Charlottetown Accord placed equality of the provinces among the fundamental characteristics of Canada. It had the support of all federal and provincial governments. While the Charlottetown Accord was defeated in a referendum, there is little or no evidence that voters took issue with the principle of the equality of the provinces itself.

The principle of the juridical equality of the states in the United States has been recognized by its Supreme Court as an implied but fundamental principle of that country's system of federalism. In *Shelby County v. Holder*,¹¹⁴ a majority of the Supreme Court of the United States held that the federal government could not selectively police voting legislation in some states, but not others. The original reason for the differential treatment was that some states had egregious histories of racial discrimination. Federal intervention had been warranted, and had in fact produced tremendous positive change. The Court found it arbitrary, however, to diminish the sovereignty of some states due to *past conditions*, rather than current conditions.

While the decision in the *Shelby County* case is controversial within the United States, some of that disagreement may relate to how the legal principle of juridical equality *was applied*, rather than disputing the principle itself. Earlier American cases that had been decided with broader majorities had adopted the principle of the "juridical equality of the states" argument which might be applied to the provinces in this case.

It is true that there are dozens of examples of federal legislation that has treated the provinces differently. One such example is the *Canadian Wheat Board Act*¹¹⁵ regime, which applied only in the three Prairie provinces and part of British Columbia, but not elsewhere in Canada. The federal government might often have good policy reasons for making federal laws applicable in some provinces, but not others. These might include different practical conditions in some provinces or differences in provincial laws and the desirability of coordinating federal laws with those different provincially-chosen regimes. In the case of the backstop feature of the proposed federal carbon pricing regime, it is not

¹¹⁴ 570 U.S. 2 (2013).

¹¹⁵ R.S.C., 1985, c. C-24

differential treatment in and of itself which is problematic – rather, the issue arises because the differential treatment is arbitrary.”

The selective application of federal laws has been tested from the point of the individual right to non-discrimination under the *Charter*. The Supreme Court of Canada has held that federal legislation that discriminates on the basis of provincial residence cannot be the basis for an equality claim under the *Charter*.¹¹⁶ The *Charter* is concerned with protecting individuals against discrimination based on hostility and stereotyping, on grounds such as ethnicity or gender. The claim here would be based on the juridical equality of provinces within the federation, which is a fundamentally different matter than the grounds which have to date been recognized in *Charter* equality claims.

The strength of this "juridical equality" argument would depend on the extent to which Manitoba could show that its made-in-Manitoba plan would accomplish federal objectives at least as well as the proposed carbon tax/levy and carbon trading add-on. The more likely it is that Manitoba's measures would provide a carbon reduction outcome which would be similar to the proposed federal regime, the easier it would be to argue that the proposed carbon tax/levy and carbon trading add-on constitute arbitrary discrimination which unduly denies Manitoba's ability to pursue its own course.

The argument set out above is credible, despite its lack of precedent. Provided there is a strong factual foundation (i.e., that the outcomes of a made-in-Manitoba plan would in substance comply with federal benchmarks), the argument that Manitoba has simply adopted another method of achieving the federal government's own objectives would have at least some chance of success.

This argument would require the Supreme Court of Canada to recognize a fundamental principle it has not adopted before, and to apply this new principle in the context of a case that is both legally and politically controversial. There can be no assurance that it would do so, even if Manitoba *could* demonstrate a strong factual foundation for its case of arbitrary discrimination.

It is an argument, however, that would likely be considered by the Court as being worthy of serious contemplation. The argument should not be expected to fail merely because it would only be advanced by one or two smaller provinces. Instead, the Supreme Court of Canada might be expected to give this argument fair consideration and deliberation, even though those who may support it would not have anywhere near the political or economic clout within the federation as the four largest provinces.

In summary, then, if the Supreme Court of Canada found that the federal government had authority to implement the proposed carbon tax/levy and carbon trading add-on, the inclusion of a backstop feature would probably not in and of itself render the law unconstitutional. If the backstop feature effectively discriminates against some provinces, however, there is a credible but untested argument to be made that the federal law would be inconsistent with the binding legal principle that the equal legislative authority of the provinces must be respected.

¹¹⁶ In *R. v. Turpin*, [1989] 1 S.C.R. 1296, 1989 CanLII 98 (SCC), the Court found the requirement under the *Criminal Code* that, outside Alberta, murder trials would proceed with a judge and jury, did not violate Section 15 of the *Charter*. The Court held that "persons living outside Alberta" was not a "disadvantaged group", for the purposes of an equality rights claim.

In these circumstances, the model for “equivalency” or “substitution” agreements (which has been previously adopted by federal and provincial laws concerning environmental protection) may present a solution which accommodates all parties' interests.

In an equivalency agreement, federal and provincial governments may agree that one level will use the other's environmental assessment process as the basis for its own decision about whether a project may proceed, or that the other level will both assess and decide upon the project.¹¹⁷

Laws which provide for equivalency agreements sometimes stipulate conditions that must be met when a government accepts the other level's processes or decisions. These laws also in some cases appear to leave room for the exercise of discretion, by the other level of government.

As noted in this opinion, the proposed federal carbon tax/levy would appear to limit the range of acceptable provincial carbon pricing measures – these provincial measures must conform to the federal benchmarks for either a carbon tax/levy or a cap-and-trade regime – if not, the federal carbon tax/levy will directly apply in the province.

Following the example of equivalency and substitution arrangements that have been reached in other contexts, one option for the federal government might be to legislate further flexibility in this area. For example, a carbon pricing law might provide for a third, more general category, whereby the federal carbon tax/levy would not apply where a province has established a series of measures that are reasonably comparable in expected GHG emission reduction to a provincial carbon tax/levy or cap-and-trade system that would otherwise satisfy the federal benchmarks.

This third category might be framed so as to permit some flexibility. Recognition might be given, for example, to a province's measures to reduce GHG emissions that have been taken over time (e.g., Manitoba's investment to date in development of its hydroelectric capacity), rather than only new steps that are taken to reduce GHG emissions. Some allowance might also be made, in the spirit of the Paris Agreement, for circumstances such as differences in impacts and resources among provinces, and the particular vulnerability of some communities or sectors within a province.

¹¹⁷ See Sections 32 to 37 of the *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19, s. 52, Section 10 of CEPA and Sections 27 and 28 of the *Environmental Assessment Act*, S.B.C. 2002, c. 43 (British Columbia).

**THIS IS APPENDIX "A" TO A LEGAL OPINION ON THE CONSTITUTIONALITY OF THE
FEDERAL CARBON PRICING BENCHMARK & BACKSTOP PROPOSALS DATED OCTOBER 6, 2017**

FEDERAL HEADS OF POWER

Author	Summary	Taxation	Peace, Order and Good Government	Criminal Law	Trade and Commerce	Declaratory/Federal W&U	Spending
<p>Chalifour, <i>Canadian Climate Federalism Parliaments Ample Constitutional Authority to Legislate GHG Emissions through Regulations, a National Cap and Trade Program, or a National Carbon Tax</i> (2016)</p>	<p>Article looks at GHG regime either as a national carbon tax or a national emissions trading scheme. Considers five federal heads of power (POGG, criminal law, taxation, trade and commerce, and the declaratory power) plus spending power. Concludes there is room for the feds to pass legislation in a way that won't displace "appropriately scoped" provincial plans. Environment is not an enumerated head of power in the Constitution. It is shared between the feds and the provinces - depends on the dominant purpose of the particular law. GHG regulation would "quite likely" be upheld under the CEPA on the basis of Hydro-Québec. But also strong arguments for POGG national concern and taxation and T&C (depending on how the regime is set up, she notes that different aspects of the regime might be supported by different heads of power, e.g., T&C supporting an emissions trading aspect of a larger regime which might ultimately be supported by the criminal law power and/or POGG).</p>	<p>The provinces also have a tax power, at 92(2), but that is limited to being direct and limited within the province (but 1982 amendments to the Constitution - 92(A) - gave the provinces direct and indirect taxing powers over natural resources). Could support a GHG regime, but "it would need to be distinguished from a regulatory charge and the "pith and substance" or dominant purpose of the measure would need to be to raise money." This is a problem because the purpose of the regime is viewed as reducing pollution rather than raising revenue. "The question will ultimately come down to the measure's design (is it designed as a revenue raising initiative for funding climate policy or a behaviour-modifying measure?) and how flexible the courts would be in accepting revenue raising as one of two key purposes for a federal carbon tax, rather than its sole purpose." Westbank First Nation can be used to determine if it is a tax or a regulatory charge or fee. "Unless carefully designed and framed, a federal carbon levy is more likely to resemble a regulatory measure rather than a true tax in the constitutional sense. If the dominant purpose of a carbon levy is really about shifting price signals in order to transition the economy to one that is less reliant upon fossil fuels, and the measure is brought in as part of a broader regulatory framework", then it's probably not a tax. Also subject to s. 125 immunity: "Section 125 of the Constitution states that "[n]o lands or property belonging to Canada or any province shall be liable to taxation". This provision serves to exempt each level of government from land or property taxes imposed by the other level." So this would exempt the provinces from any tax that applies to their lands and property. She is not sure whether s. 125 would apply to crown corporations, since among other things, would GHG emissions be considered part of provincial land or property? "The answer depends, among other things, on whether the corporation is truly an agent of the Crown, acting for the Crown's benefit". Reference Re Proposed Federal Tax on Exported Natural Gas is the leading s. 125 case. Court found a federal tax applied to natural gas extracted from provincial lands would be ultra vires the feds. But if it is a regulatory charge, then s. 125 won't apply. In Westbank First Nation, the Court "struck down two native by-laws imposing taxes on a provincial hydro authority operating on reserve lands on the basis that the by-laws contravened s. 125". Also keep in mind that not all</p>	<p>Emergency branch of POGG (as distinct from national concern doctrine) is rarely used because applies to an emergency only and it allows the feds to intrude on provincial jurisdiction. More of a "bargaining chip", here. She thinks that climate change is both an economic and an environmental emergency. But would be weak on the temporary aspect.</p> <p>On POGG national concern: in Crown Zellerbach, the Court held the law requires 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." In other words, need to root it in federal power. Look at the inability of the provinces to do something - if so, this suggests the national concern doctrine of POGG may be appropriate. She thinks both the majority and minority judgments in Crown Zellerbach support federal controls on pollution under this head of power (the minority found the legislation was overbroad because it wasn't sufficiently tied to pollution). "The Court in Crown Zellerbach was unanimous in holding that Parliament has jurisdiction over extra-provincial pollution." Need to deal with the fact GHG regulation impacts on traditional provincial heads of power: property and civil rights (s. 92(13)), natural resources (s. 92A), local works and undertakings (92(10)) and matters of a local or private nature (s. 92(16)). Overlapping jurisdiction is now "the norm" but the feds can't unduly intrude into areas of provincial concern. "For justification under POGG, the key question would be whether such regulations have the singleness, distinctiveness and indivisibility that clearly distinguishes them 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." Meeting the Paris accords would be a national concern. Also, a failure of one province to address the problem could injure other provinces. "No single province or territory is able to deal effectively with reducing GHG emissions because of the significant sources of emissions in several provinces." Would need to focus on GHG generally rather than regulating particular sectors. Law doesn't need to apply uniformly to each province. Focus on the dominant purpose, so could be upheld under POGG national</p>	<p>Has been interpreted expansively and applied to the environment before (CEPA in Hydro-Québec). "To qualify as federal criminal law, a law must have a valid criminal purpose and create a prohibition coupled with a penalty." Environmental protection can be a valid criminal purpose. Re Assisted Human Reproduction Act is a more recent case on the criminal law head of power. Harming the environment should easily be found to constitute a real or apprehended evil, per Syncrude. "The need to find a prohibition combined with a penalty has similarly been interpreted expansively to include complex legislative schemes coupled with administrative discretion, though once again there has been some debate. The Court in Hydro-Québec was divided on the question of whether the regulation of toxic substances constituted a prohibition coupled with a penalty." So the minority in Hydro-Québec suggests that regulation rather than a ban is not a criminal law purpose. Minority in Re Assisted Human Reproduction Act defined criminal law power more narrowly, but majority held that a mix of absolute and conditional prohibitions, as well as a complex regulatory scheme, doesn't preclude the criminal law power. Many of the health-related arguments which justified controls on advertising in RJR-Macdonald could apply to a GHG regime. RJR-Macdonald is another broad criminal law power case. Not too significant intrusion into provincial powers - another example of a field in which the feds and provinces can work together: Hydro-Québec. Reason to believe the criminal law power would work to support a GHG scheme in the form of regulations to CEPA, since there is existing precedent for this: "Current GHG regulations under CEPA are justified under the criminal law power, as per the reasoning in Hydro-Québec, and nothing in the recent jurisprudence suggests it would be decided differently today." Recent decision in Syncrude upholding CEPA regulations as a valid exercise of criminal law power "sends a strong signal that GHG regulations are entirely appropriate criminal law measures". Argument that the criminal law power was inapplicable because the regulations did not contain an absolute ban (only required 2% non-renewable fossil fuels to be used, and included exceptions) was rejected. Reducing GHG emissions is a valid criminal purpose: "[p]rotection of the environment is, unequivocally, a legitimate use of the criminal law purpose." Not an</p>	<p>Since T&C is an intrusion into provincial power over property and civil rights, it has been construed narrowly. Applies to interprovincial or international trade and commerce or the general regulation of trade and commerce. But intrusion which is incidental to an inter-provincial matter is acceptable. See Reference re Agricultural Products Marketing Act. Five-point test from National Leasing, applied more recently in Securities Reference: "(1) the law must be part of a general regulatory scheme; (2) the scheme should be under the oversight of a regulatory agency; (3) the legislation should be concerned with trade as a whole and not a particular industry; (4) the legislation should be of a nature that the provinces, jointly or severally, would be constitutionally incapable of enacting; and (5) failure to include one or more provinces in the regulatory scheme would jeopardize its successful operation." So the general T&C power has been tightly constrained, and Hogg thinks the list is pretty much limited to competition law and trade-marks. She disagrees and thinks T&C could justify a national cap and trade scheme. While POGG and criminal law could justify other aspects of a GHG regime, the T&C power would be the best fit for the cap and trade aspects of such a regime (food and drug control is an example of something that is justified under different heads of power).</p>	<p>Might be a possible fit, but would require an expansive reading of what is a "work" for the general advantage of Canada. Not likely, though like the emergency branch of POGG, something to be leveraged at the bargaining table. Both the emergency branch of POGG and the declaratory power allow the feds to intervene in provincial matters. The remaining heads of power require the pith and substance of the law to fall under federal power.</p>	<p>On spending, feds can spend however they want, even on matters outside their jurisdiction, as long as they don't seek to regulate provincial powers. YHMA: infer this power from levying taxes (91(3)), legislating in relation to public property (91(1A)) and appropriating public funds (106). You can attach conditions to funding, as long as you don't directly regulate the provincial activity: Winterhaven Stables, and withdrawing funding isn't regulation, either: Reference Re Canada Assistance Plan (BC). See also national norms imposed through health care funding.</p>

Author	Summary	Taxation	Peace, Order and Good Government	Criminal Law	Trade and Commerce	Declaratory/Federal W&U	Spending
		provinces have publicly-owned utilities, so inequity as to the application of the tax could result.	concern, even if it's called a tax.	intrusion into provinces' power over natural resources since the regulations target all consumers of fuel, not just producers. A cap and trade system could also be supported by the criminal law power, but: "It would be important that the cap be: associated with a penalty, targeted GHG emissions and did not single out one sector within provincial competence." While a trading system might be a better fit for the T&C power, the criminal law power leaves room for ancillary activities which in this case could include a trading system. Weaker argument to be made that criminal power would support a carbon tax. Syncrude suggests that economic regulation will not necessarily render an otherwise valid criminal law purpose colourable. There is a lot of leeway there. But POGG and taxation are the better fits for a carbon tax.			
Bishop and Dachis, <i>The National Energy Board's Limits in Assessing Upstream Greenhouse Gas Emissions</i> (2016)	Generally less sanguine on federal powers than many other commentators. Nothing in the Constitution expressly addresses the environment. "If emissions are already subject to provincial regulation, requiring the NEB to scrutinize emissions from upstream industrial activities looks suspiciously like an intrusion into provincial jurisdiction for industrial regulation and control over natural resources." Cites Prairie Acid Rain Coalition: "an environmental assessment did not authorize a Responsible Authority to environmentally assess aspects of a project unrelated to those heads of federal jurisdiction called into play by the project in question." You need to link it to a federal head of power.	Feds likely have authority on basis of tax power, but "it would seem difficult to demonstrate, for example, that a scheme for capping and trading permits represents a criminal prohibition, rather than general industrial regulation."	Unlikely that GHG emissions could "be a national concern of the federal government's regulatory jurisdiction".			Federal authority over "interprovincial works and undertakings" does not necessarily authorize environmental measures.	
Powell, <i>Climate Change Legal Roadmap</i> (2016)	Constitution doesn't expressly address the environment. Both the provinces and the feds have overlapping jurisdiction (both from the perspective of law making and ownership and control of natural resources). Concludes that both sides have jurisdiction to regulate climate control (though provincial jurisdiction is limited to intra-provincial matters): "The result is that climate change is a matter of overlapping and concurrent legislative authority meaning both the federal and provincial government can make climate change laws."	Could also rely on taxing power, but feds can't tax lands and property belonging to the provinces (including natural resources). There is no prohibition against taxing resources which are owned by private producers and extracted from provincial lands, however.	Cites Hogg for the principle that the feds have jurisdiction arising from residual power of POGG.	Cites Hogg for the principle that the feds also have jurisdiction arising from the criminal law power. A complicated administrative regime can still be criminal in nature, as long as it's backed up by a prohibition and penalties. Federal Court looked at federal authority to regulate climate control in Syncrude, on the basis that the provisions were criminal in nature (involved CEPA). Re: criminal purpose, the Court held: "The evil of global climate change and the apprehension of harm resulting from the enabling of climate change through the combustion of fossil fuels has been widely discussed and debated by leaders on the international stage." So, an express finding that GHG regulation is aimed at a criminal purpose.			
Taylor, <i>The Coming National Carbon Tax Gap</i> (2016)	Article provides a practical review of a proposed federal GHG regime - "\$10 a tonne tax applied to carbon emissions starting in 2018, rising by \$10 per year until it hits \$50/t in 2022. This will be imposed on all provinces that are not already pricing carbon at an equivalent rate." Cap and trade provinces may also be exempt, if they meet certain conditions. Provincial disparity could result, if some provinces have a carbon tax imposed on them, while others use a cap and trade system (under						

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	<p>the Western Climate Initiative), since the carbon tax might result in substantially higher amounts being paid by those provinces. "So the cost of a tonne of carbon emissions in carbon tax provinces will be more than 50 percent higher than the price paid in Québec and Ontario after just three years. And this gap is likely to grow. According to projections by CaliforniaCarbon.Info, an online carbon market research firm, by the time the national carbon tax hits \$50 in 2022, the WCI permit price is estimated at just \$23." There are questions about whether the equivalency requirements for cap and trade can be torqued in a way that allows those provinces to escape the price they'd pay under a carbon tax system.</p>						
<p>Sheffield, <i>The Constitutionality of a Federal Emissions Trading Regime</i> (2014)</p>	<p>Focuses on three bases for justifying an emissions trading regime: criminal law, T&C and POGG (national concern). General agreement among scholars that these three bases are the most likely way you could uphold such a regime. But no clear consensus on which head of power is the best fit. Ultimately concludes trade and commerce is the most likely head of power. Market-based aspects make it a bad fit for criminal law. Relevance of US developments makes T&C a better fit. POGG a bad fit because the provinces would completely lose their power in this area.</p>	<p>Notes in passing that a tax is politically unlikely because of the criticism Dion faced in the 2008 election.</p>	<p>Use national concern, as was done in Crown Zellerbach. But keep in mind that Crown Zellerbach was read down in Oldman River. Two-point national concern test from Crown Zellerbach: "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." Also must "satisfy the "provincial inability test," an inquiry into "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." Thinks a treaty is a relevant factor, as it was in Crown Zellerbach (not determinative, but relevant). But he thinks POGG won't work because once the feds get the power in this area, the provinces will be boxed out, and the Court won't want that. See Crown Zellerbach: feds would get "an exclusive jurisdiction of a plenary nature to legislate in relation to that matter." Would invalidate provincial efforts, such as in Alberta. Believes Oldman River and Hydro-Québec signal a weaker national concern doctrine in the area of the environment.</p>	<p>Easier to justify an emissions cap rather than a cap and trading system, under the criminal law power: "The federal government's authority to impose a simple cap on emissions, without an accompanying emissions trading scheme, is clear in light of the Supreme Court's decision in R. v. Hydro-Québec." Criminal law power is broad and flexible and can include complex administrative regulatory schemes. Rather than calling it a "toxic substance" (which is dependent on an executive decision), think about GHG as "air pollution", which is a clearer concept in the CEPA. Firearms Reference: just because it's a complex regulatory scheme doesn't preclude it being criminal law in pith and substance. But keep in mind Hydro-Québec is about a cap, only. Not trading emissions: "Such a regime would go beyond merely imposing permissible levels of conduct for each emitter. Rather, an emissions trading regime would, at a basic level, set out an economy-wide cap on GHG emissions, allocate entitlements to create GHG emissions, and then permit these entitlements to be traded amongst emitters". This is different than Hydro-Québec, in which: "The regime was ultimately analogous to traditional, "self-applicable" criminal laws like the prohibition on murder because the administrative process, however elaborate, ultimately culminated in a concrete prohibition." Doesn't accept Hogg's view that a Court would be OK with reductions on GHG, rather than a ban, as an exercise of the criminal law power. Plus a more significant intrusion on 92(13) than Hydro-Québec (e.g., emissions permit is a piece of property). Weak on second step of the criminal law test, "public purpose backed by a prohibition". RJR MacDonald doesn't support criminal law power because it permits alternative targets of governmental regulation but not alternative means of compliance. In other words, you can eliminate advertising because smoking is bad (rather than banning smoking itself), but the ban on advertising remains. Here, we are saying that we are reducing GHG</p>	<p>On T&C, use the five-point National Leasing test, as applied in the Securities Reference (but note the five indicia aren't set in stone). Weakness with T&C lies in previous federal approach, on an industry-by-industry basis. Setting up the law on an opt-in basis for each province could also be a problem. Both things run afoul of the fifth point of the T&C test. More confident in T&C than criminal power, though: "given that an emissions trading regime seems capable of satisfying all five branches of General Motors, and that the branches of General Motors are merely indicia in a flexible overall approach to trade and commerce, an emissions trading regime seems justifiable under the trade and commerce power".</p>		

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				unless you buy credits. So the prohibition isn't being enforced, and it's different than RJR MacDonald. Could bypass the pith and substance analysis like La Forest did in Hydro-Québec. In the Securities Reference, the Court downplayed pith and substance, too.			
Becklumb, <i>Federal and Provincial Jurisdiction to Regulate Environmental Powers</i> (2013)	Nothing in 91 or 92 of the Constitution specifically addresses the environment. But it is tangentially caught by other matters which are addressed in those sections. Both the provinces and the feds could find jurisdiction, as an environmental assessment. Generally, there are a number of potential federal heads of power which could justify a GHG scheme.	If you are limiting greenhouse gas emissions from a particular industry, then that falls under a provincial head of power. But if you are adopting a broader strategy, that might be federal in nature, as well as provincial - characterize it as tax.	A cap and trade system could be justified under property and civil rights or under POGG, as a national concern.	While provinces ordinarily have power over property and civil rights, if the emissions are toxic, then the feds have power to regulate per Hydro-Québec, under criminal law.	Heavy-duty vehicle and engine emissions brought in under T&C power in 2013.		
Lucas and Yearsley, <i>The Constitutionality of Federal Climate Change Legislation</i> (2012)	Analyze the proposed 2006 amendment to CEPA which would have included GHG emissions regulations. Potential sources of federal jurisdiction include: taxation power, criminal law, T&C, national concern aspect of POGG and emergency aspect of POGG. On pith and substance, the purpose of the bill is "greenhouse gas emission reduction ... accomplished through a complex regulatory scheme". But you need to go further and look at the law's effects. Specific sectors, as well as natural resources, are targeted. These are classic provincial heads of power. So while on its face the bill involves GHG emissions reduction, "a different conclusion is very plausible for the provisions to establish a system for emission credit creation and trading. The pith and substance of the latter provisions would be regulation of industrial operations in particular sectors". The three most likely heads of power to be applicable are the criminal law, POGG and T&C.		On POGG: Both Crown Zellerbach and Hydro-Québec read the national concern doctrine narrowly. The authors give a broad reading to the idea that federal jurisdiction precludes provincial activity in the field: "the problem is that assigning a matter to POGG essentially closes out provincial jurisdiction over that matter. Such determinations will impact the balance of power between the provinces and the federal government. Consequently, potential classification to potentially appropriate enumerated heads of power should be tested before resort is had to POGG." Given the potentially sweeping nature of POGG and shared jurisdiction over the environment, "it is rarely a clear and simple matter to validate legislation under POGG." Not single, indivisible or distinct, since the list of pollutants can be added and it clearly involves and envisions provincial involvement.	On criminal law: while Hydro-Québec suggests environment writ large can support a criminal purpose, the authors suggest a more nuanced view of that passage. In this case, there is a possibility that GHG may not really be classified as "toxins" under CEPA. Plus, the contemplation of a trading scheme suggests regulation, not prohibition. The prohibition only kicks in if you can't buy enough credits: "The prohibition is not directed against specified acts of emission, but against emissions that cannot, in effect, be paid for by tendering the required quantity of emission credits." In the end, we're left with a complex regulatory scheme that is not well suited to criminal law. In the Firearms Reference, the Court phrased colourability in terms of not being able to use criminal law to intrude into new areas of provincial jurisdiction. This seems analogous to the balance of power concern which is addressed in POGG national doctrine cases. The federal intrusion into provincial heads of power is significant: local works and undertakings, non-renewable resources, public lands, property and civil rights and matters of a local or private nature. There could be significant regulation on a sector by sector, on the ground basis. "[T]he broader objectives underlying the Amended Clean Air Bill, namely the idea of economic transformation to achieve a less carbon-intensive economy, and the economic impact on the largest industrial and energy producers, makes undue intrusion in provincial powers at least a much more plausible argument than it was in either Hydro-Québec or the Firearms Reference."	On T&C: a poor fit. In Parsons, T&C was limited in scope, but as Canada's national economy developed, the ambit of T&C increased somewhat. On interprovincial trade, "Simply creating a trading mechanism for air emissions is not likely to be enough to uphold the legislation under the first branch. Significantly, the "goods" in trade concerned are constructs created under specific environmental legislation that are instrumental in a scheme of greenhouse gas emission reduction." On general commerce and the City National Leasing factors, uncertainty as to whether "small jurisdiction climate change legislation, particularly emissions trading schemes limited to provinces, can be successful", as well as "whether failure of one or several provinces to act would jeopardize the efforts of the remaining provinces." There is also a concern about whether the intrusion on provincial rights can be characterized as something more than incidental.		
Krupa, <i>The Legal Framework for Carbon Capture and Storage in Canada</i> (2011)	Generally bullish on provincial, rather than federal powers. Feds need to point to a head of power to justify their activity, though their power can be exercised in connection with the provinces (such as when an inter-provincial pipeline runs through a particular province).						
Hogg, <i>Constitutional Authority over Greenhouse Gas Emissions</i> (2009)	Constitutional authority over the reduction of greenhouse gas emissions is not explicitly addressed in the Constitution. Both feds and provinces have authority. May be supported under POGG but criminal law more likely. Since it is such a	91(3) of the Constitution Act, 1867 gives the feds the power to levy "any mode or system of taxation." "If Parliament chose to reduce greenhouse gas emissions by levying a "carbon tax" on the production or consumption of energy, it would have the	"There is no doubt that a federal environmental protection law could be enacted under the "national concern" branch of the POGG power." Crown Zellerbach - "marine pollution was a matter of national concern that was distinct from	"[I]ts complex administrative procedure ultimately culminates in the requisite prohibition and penalty and has a valid criminal purpose." Criminal law power a more likely fit than POGG, given expansion of doctrine and upholding CEPA 1999 in			Could also justify as a spending measure: "It is clear that Parliament has the authority to authorize the expenditure of public money for any purpose it chooses, including purposes that it could not directly accomplish by regulation. However,

Author	Summary	Taxation	Peace, Order and Good Government	Criminal Law	Trade and Commerce	Declaratory/Federal W&U	Spending
	complicated regime with overlapping authority, the key will be all sides agreeing on some sort of cooperative framework.	power to do so." But this would butt up against s. 125 immunity: " The only serious limitation on the federal power is that it cannot tax "lands or property belonging to ... any province," which would protect resources extracted by a province (but not by private producers) from provincial Crown lands", citing Re: Exported Natural Gas Tax.	matters of provincial jurisdiction and that was beyond the capacity of the provinces to control." Apply that reasoning here. Didn't look at this in Hydro-Québec because protecting the environment had since been recognized as a valid criminal law purpose.	Hydro-Québec - will likely take the form of amendments to that regulation. Three elements to Criminal Law: (1) a prohibition; (2) a penalty; and (3) a typically criminal purpose. La Forest majority in Hydro-Québec: because the administrative process culminated in a prohibition enforced by a penalty, the scheme was sufficiently prohibitory to count as criminal law. Fact that regime could be displaced by equivalent provincial regime not fatal. "[A] sophisticated administrative scheme could be a criminal law if it is backed by a prohibition and a penalty. All nine judges agreed that the protection of the environment counted as a sufficient purpose for a criminal law." Since criminal law includes protection of the environment and since CO2 can be characterized as toxic and bad for the environment, a plan to reduce greenhouse gas emissions could have a criminal purpose. "The only question is whether the three additional means of compliance (emissions credits, offset credits, and contributions to a climate change technology fund) can also be upheld as exercises of the criminal law power." OK to have a criminal law which lessens the effect of, but doesn't outright prohibit something: RJR-MacDonald.			spending measures have not arrested the upward trend of Canada's greenhouse gas emissions in the past and are not likely to do so in the future."
Hsu and Elliot, <i>Regulating Greenhouse Gases in Canada - Constitutional and Policy Dimensions</i> (2009)	Ultimately conclude the Constitution doesn't preclude concurrent provincial and federal GHG schemes, and that policy considerations support using two mechanisms to federally regulate GHG: a carbon tax and using the Canadian Environmental Assessment Act to review projects that may increase GHG. Constitutionality will ultimately depend on the form the regime takes. "[I]t is possible, given the extent and nature of the global climate change problem, that Parliament could regulate all industrial emitters using the national emergency branch of POGG. While some have argued that Parliament could regulate greenhouse gas emissions under the criminal law power, we have our doubts about this line of argument. Finally, it is open to the federal government to use the provisions of the CEA Act to assist in its efforts to control climate change." Given the flexibility of the case law in interpreting the heads of power, the decision may ultimately turn on policy considerations. Tax is to be preferred to a cap and trade because it is easier to uphold constitutionally and allows the feds and provinces to retain authority in areas of their core jurisdiction. Little reason to doubt the feds couldn't use 91(3) to impose a carbon tax. The case law provides considerable leeway for the Courts to decide upon the issue (both in terms of interpreting the applicable head of power as well as the pith and substance of the law). There are also individual leanings of judges on federalism and policy choices re: the environment to take into account. "The fact that the validity of	On federal tax power: very broad, only limits are that it be taxation and raise money. Do not believe it could be successfully challenged on the basis that it was purportedly revenue neutral. So 91(3) could be used to uphold a federal carbon tax. Little doubt a federal cap and trade system which targeted federally regulated industries, only, would be upheld. The bigger question is whether that system could target provincially regulated industries (such as the oil and gas sector).	On POGG national concern: authors indicate POGG has three branches: emergency, national concern, and gap doctrine. The gap doctrine is seldom used and wouldn't involve the environment (presumably because it can be slotted into other enumerated heads of power). Local Prohibition Reference requires national concern matters to be "unquestionably of Canadian interest and importance", otherwise, provincial autonomy should not be invaded. See the "singleness, distinctiveness and indivisibility" comments in Crown Zellerbach on that point - here, the matter appears to have federal and provincial elements (i.e., some federally and some provincially regulated industries). Also requires a provincial failure, causing harm, before the feds can step in. There is a concern about the provinces being forced out of the area, as well, per LeDain in Crown Zellerbach: "where a matter falls within the national concern doctrine ... as distinct from the emergency doctrine, Parliament has an exclusive jurisdiction of a plenary nature to legislate in relation to that matter, including its intra-provincial aspects". The law would also have a serious impact on provincial interests. On the other hand, existence of international commitments could be used to demonstrate the extra-provincial character of the issue. Re: the emergency branch, following Russell, the Courts have interpreted this aspect of POGG very narrowly. You need "exceptional" circumstances which "imperil" the Dominion. This position was pulled back from in Temperance Federation, but it is	On criminal law power, the Courts typically found that a valid exercise of the power required prohibition, not regulation: Board of Commerce Reference and Snider. But that has lessened post-Hydro-Québec. But Hydro-Québec may be distinguishable - unlike the toxins in that case, GHG doesn't pose the same immediate harm (not "truly toxic"). Plus, it is a regulatory regime, not a prohibitory regime - since provincial power is regulatory, the Court would need to find provincial GHG regimes regulatory, yet a similar federal regime prohibitory. You would have unlimited federal jurisdiction over the environment, as well. However, a "command-and-control" regime which sets specific limits on GHG - without the ability to trade permits - would be more likely to meet the criminal purpose requirement because it would be more prohibitory in nature.	On trade and commerce, the authors believe that head of power would be inapplicable to a cap and trade program because such a program is not in substance an "economic" program. "If City National Leasing were not limited to economic cases, there would be little to distinguish the trade and commerce power from the national concern branch of the POGG provision ... there is no denying that both cap-and-trade programs and emissions-intensity programs have an environmental objective as their core purpose."		

Author	Summary	Taxation	Peace, Order and Good Government	Criminal Law	Trade and Commerce	Declaratory/Federal W&U	Spending
	legislation depends on so many factors means that confident predictions are difficult to make. While we make a number of predictions in this article about the likelihood of certain kinds of legislative initiatives being open to the two orders of government in this paper, we do not wish to be taken as having committed ourselves unreservedly to those views." Oldman River indicates that neither the provinces nor the feds have exclusive jurisdiction over the environment.		still a valid consideration. Following Anti-Inflation, the following principles are relevant: the feds can respond to and prevent emergencies; economic conditions can create emergencies; government's decision there is an emergency is entitled to deference; the legislation must be temporary in nature; the legislation should expressly indicate it has been enacted for the purpose of dealing with a "serious national condition"; the provinces are not precluded from passing their own laws in the area, as long as there is an applicable provincial head of power. The authors believe a cap and trade regime could be upheld on the emergency power because climate change is a serious and imminent emergency. Appropriate drafting can be used to indicate the law is temporary in nature and the Courts will be open to maintaining the ability for provinces to operate in this area. Also, the law could indicate it will only apply if provinces were unable to meet prescribed targets.				
Farber, <i>Climate Change, Federalism, and the Constitution</i> (2008)	Article explores US federalism approach toward regulating GHG. In the US, most laws have been passed at the state and local levels - not at the federal level. The feds can use pre-emption to box out states, but this needs to be done with clarity and that's not always the case. In the face of a silent or ambiguous statute, the states then need to figure out how much room is left for them to act. "In general, the Article supports a strong presumption of validity for state climate change regulation. The presumption can be overcome if a state law discriminates against interstate commerce, Congress expressly requires pre-emption or a clear conflict exists between federal and state law ... The bottom line is that state regulation has a good chance of surviving challenge if it avoids the most obvious constitutional pitfalls such as discriminating against interstate commerce, banning or burdening behavior explicitly authorized by federal law, taking steps with foreign countries that directly contradict presidential or congressional initiatives, or attaching penalties to transactions that occur wholly outside state borders."						
Elgie, <i>Kyoto, the Constitution and Carbon Trading - Waking a Sleeping BNA Bear (or Two)</i> (2007)	Focuses on federal authority to control GHG emissions, primarily through an emissions trading scheme. POGG, treaties and a combination of T&C and the criminal law power could support such a scheme (criminal law for prohibition aspects, T&C for trading regime). While these powers provide "a reasonable basis" for upholding federal laws to control GHG emissions, the author believes Courts will have to "extend federal powers somewhat further than in previous cases". Key question is how federalism is reconciled with international treaty obligations. Revisit Labour Conventions and find a treaty implementation federal head of power. POGG and criminal law have		On POGG: not an emergency, but may be supported by national concern/gap. In Crown Zellerbach, anti-dumping laws were upheld because they protected against marine pollution rather than pollution, generally. The four-point test from Crown Zellerbach has been applied to environment issues in Oldman River and Hydro-Québec (by the dissent). In this case, climate change is a national concern, GHGs provide a single, indivisible and distinct aspect of pollution and provincial inaction could frustrate the scheme. On the impact on provincial interests, GHG regulation would be a serious intrusion, but the author argues the level of permissible intrusion is not static and given the	On criminal law: the limit imposed by Courts is the breadth of the measure - it can apply broadly, but the measure must be prohibitory rather than regulatory. GHGs have been listed as toxic substances under CEPA, and since protection of the environment was recognized as a criminal purpose in Hydro-Québec, the author believes the criminal purpose requirement would be met. As to a distinction between CO2 and things which are inherently toxic, the author says GHG still meets the test, since in Hydro-Québec, "the Court made it clear that direct impact on humans is not a prerequisite for the Criminal power; the protection of the environment per se is a	On T&C: there is precedent for upholding different parts of a law under different heads of power, such as the FDA, which is largely criminal in nature, but which includes marketing controls which can be upheld via T&C. T&C is hard to pin down and has never before been used to uphold environmental regulation. Could characterize the statute as regulating interprovincial and international trade in emissions credits. The fact that the scheme would create rather than simply regulate a trading market would suggest it is not intruding on provincial jurisdiction - without the federal scheme there would be nothing for the provinces to regulate. The general T&C power requires "that the		

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	<p>typically been used to support broad environmental laws which go beyond a single industry. Limits have been imposed, to respect the balance of powers between the feds and provinces: "Therefore, to date, the Supreme Court has used both vertical and horizontal limits to delineate federal environmental powers. Put another way, it has limited the breadth of matters that may be addressed, through the POGG power, and the depth of the tools that may be used, under the Criminal power". For POGG, the issue must be single, distinct and indivisible. For criminal law, the tools are limited to prohibitory powers. Both Crown Zellerbach and Hydro-Québec were one vote majority decisions. "[T]here appears to be a fairly strong argument for upholding the KPIA under the national concern power. The main issue would be the scale of impact on provincial jurisdiction. However ... the Court is likely to find that the KPIA's provincial impact, though significant, is acceptable in light of the global importance of the subject, its distinctive and indivisible nature, and the serious consequences of provincial inaction."</p>		<p>importance of the issue, a higher degree of intrusion should be tolerated. "Simply put, an important and far-reaching subject like climate change may justify a greater degree of provincial impact than a less weighty or far-reaching subject." On the exclusion of provincial interests under POGG, the author argues the double aspect doctrine will continue to permit the provinces to pass environmental regulations in their own areas of jurisdiction. What the Court held in Crown Zellerbach and Hydro-Québec was simply that what is defined as being of national concern should be viewed narrowly - don't say the national concern is "pollution", generally, it's control of extraprovincial marine pollution. The provinces still have power to legislate in the areas of pollution inside their borders (even water pollution). "If a court wanted to remove any doubt on this score, it could define the subject matter of national concern to be "international air pollution," rather than control of GHG emissions, to clarify that provinces are able to legislate over provincial aspects of the problem." While provincial law which conflicts with federal law would be struck down, it is unlikely that federal laws will be drafted in a way which makes compliance with both impossible.</p>	<p>valid object. More importantly, the fact that CO2 is only harmful in excessive quantities is also irrelevant. The same is true of countless other substances (too much fluoride, for example, is very harmful, yet we use it daily in toothpaste) ... It seems far-fetched to argue that the release of a substance that threatens the planet's climatic stability, with the accompanying consequences for humankind, does not pose a sufficient environmental threat for Parliament to use its Criminal Law power". The prohibition requirement - accomplishing the law's purpose through prohibitions and penalties rather than regulation - is the bigger hurdle for this law. In Hydro-Québec, the Court accepted that prohibitions can be enacted by regulation, rather than in the statute itself. Permits and exemptions are also acceptable within a criminal law: Firearms Reference. While the idea of an emissions trading regime is heretofore foreign to a criminal law, this is a different sort of problem which requires a different sort of approach. But if you focus on the fact that we care about total GHG rather than who is emitting how much, then a trading regime makes sense: "Because a tonne of GHG emissions has the same atmospheric impact regardless of where it is emitted and by whom, the only thing that really matters is the overall limit on emissions. Trading is simply a means of allocating emissions within an overall cap ... While such trading would be inconsistent with the goal of most criminal statutes, it is quite consistent with the goal of limiting overall impacts on a resource or ecosystem, such as the atmosphere." This new approach might be difficult to contemplate, but the Court in RJR-Macdonald said the criminal law may need to be innovative to respond to challenges. The regime would be administrative in nature, but not unduly complex in nature. In the end, the Court could always sever the emissions trading aspect and uphold that part under a different head of power, such as T&C.</p>	<p>scheme of regulation is national in scope and that local regulation would be inadequate". Unlike the national concern doctrine of POGG, there is no consideration of the impact on the balance of powers. Even if the purpose of the scheme as a whole is environmental, the T&C aspect would focus only on whether the trading regime itself was economic, which the author argues it is. Emissions trading redistributes rather than reduces emissions and this is economic in nature (which does suggest it could not be upheld under the criminal law). A de minimus exemption for small emitters wouldn't make it any less concerned with trade as a whole. A provincial regime would be constitutionally incapable of dealing with national (not provincial) GHG emissions. He concludes, "the essence of the Court's decision in GM Leasing was that "competition cannot be effectively regulated unless it is regulated nationally" - and the same can be said of trade in GHG emission reduction units".</p>		
<p>Bankes and Lucas, <i>Kyoto, Constitutional Law and Alberta's Proposals</i> (2004)</p>	<p>Ample authority to support provincial regime to reduce GHG emissions inside the province, through targets and emissions trading. Primarily property and civil rights, but also local works and undertakings and the residual matters of local and private nature head of power.</p> <p>While analysis of the constitutionality of federal GHG reduction schemes is premature until there is an actual bill on the table, criminal law, POGG's national concern doctrine and T&C might be a fit. Any tax would also be supported by 91(3), with the caveat that provincially owned property would be subject to s. 125 immunity.</p>	<p>On tax: other than immunity for provincially owned-property, 91(3) provides broad authority.</p> <p>S. 125 immunity is limited - the property must be owned by the province and the measure must be a tax measure rather than a licence fee or other form of general regulation. There is no general immunity from a federal regulatory scheme and given that the province's ownership interest will be lost once the resource is extracted, "the section will not likely offer protection from a carefully crafted carbon tax that focuses on producers or emitters ... the provincial government may claim that its property is immune from federal taxation but this immunity expires once the ownership of provincial resources passes to private parties."</p>	<p>On POGG: a national initiative to reduce GHG seems like something which is of national concern, but the law would be a significant intrusion into provincial rights, and therefore have issues with the requirement that it not be inconsistent with the division of powers under our model of federalism. Provincial inability is a possibility, but the Court in Hydro-Québec signalled that provincial inability isn't a critical part of the test.</p>	<p>On criminal law: while the majority upheld CEPA amendments in Hydro-Québec, the four-judge minority argued strongly that there was no criminal law purpose because the law was regulatory in nature. "The majority acknowledged that a prohibition may be 'so broad or all-encompassing' that it cannot be characterized as a matter of criminal law ... The key question is whether these prohibitions are likely to be characterized as compliance elements of regulatory and covenant-based requirements of an offsets trading system, and not as fundamentally criminal prohibitions." Permits could fall under the idea of regulatory exceptions, which the Court accepted in Hydro-Québec. But the fact that a number of GHG emitters would escape regulation because of a de minimus standard would</p>	<p>On T&C, the regime would likely stumble because it would be hard to characterize as something which is commercial, in substance. The emission rights and permits could have commercial value, but the overall scheme would be to reduce GHG (which is an environmental, not a commercial, objective).</p>		

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DeMarco et al., <i>Canadian Challenges in Implementing the Kyoto Protocol - A Cause for Harmonization</i> (2004)	Provides an analysis of a proposed domestic emission trading system, arising from the Climate Change Plan for Canada. There are six different ways by which the regime could be characterized: treaty implementation; provincial non-renewable natural resources; development, conservation and management of electricity generation sites; taxation; environmental protection and interprovincial and international trade. "It is the authors' opinion that the two most likely characterizations for GHG emissions reductions and trading systems are in relation to environmental protection and interprovincial and/or international trade ... the most likely basis for upholding environmental legislation implementing a federal emissions trading system would be as a matter of national concern ... Certainly from the authors' perspective there does not appear to be an unassailable class of subject or source of environmental jurisdiction that the federal government could rely upon to regulate and implement a GHG emissions reduction and trading system without inevitably encroaching upon provincial areas of competence ... the authors conclude that the shared federal and provincial constitutional jurisdiction over both environmental protection and trade and commerce provides strong support for the implementation of a single, coordinated Canadian GHG emissions trading system that is jointly developed and implemented by the federal and provincial governments."	On taxation: while the feds ordinarily have broad tax powers, the proposed system as it existed at the time of the article was not framed as "an upstream carbon tax on energy production".	The Court upheld an anti-pollution scheme on the basis of POGG in <i>Crown Zellerbach</i> . The key was that the regime was single, indivisible and distinct from a provincial head of power and that it would not upset federalism to give this power to the feds. Authors think POGG would support an emissions trading regime: international dimensions of Kyoto Protocol (now Paris); extraprovincial nature of air pollution; international action to address global warming; global atmospheric chemistry of effects of GHG emissions; interrelatedness of intraprovincial and extraprovincial aspects of GHG emission trading systems. Also consider the fact that provinces are unable to do this on their own. Could read down federal legislation in areas which are clearly subject to provincial control (e.g., forestry sector) - the federal legislation would only fill the gaps of what the provinces were unable to do. POGG was read down somewhat in <i>Hydro-Québec</i> , in which the regime was upheld on the basis of the criminal law (despite express wording in the statute to the effect that it was intended to address a national concern).	be problematic. The use of sectoral covenants as a basis for an emission trading regime would likely cause the law to fail the prohibition and penalty aspect of the criminal law power.	On regulation of trade: "the jurisprudence provides only limited direction on the question of how any trade and commerce jurisdiction over emissions trading may be divided between the federal and provincial governments". Regulation of a particular industry inside a province, by a province, would likely be upheld under property and civil rights. But the effectiveness of such a regime would be limited. Targeting a single industry is ultra vires the feds: <i>Labatt Brewing</i> . But the provinces cannot regulate extraprovincial trade, as in <i>Interprovincial Co-operatives</i> , where legislation affecting pollution across provincial borders was struck down. A coordinated federal and provincial effort was upheld in <i>Re: Agricultural Products Marketing Act</i> . "It is our view that this case provides the best support for a principled and effective emissions trading system that involves both the federal and provincial governments within their respective extra-provincial and intra-provincial spheres of trade competence." Authors do not agree with <i>Castrilli</i> that general T&C power would support a federal emissions scheme: "In forming this opinion, the authors believe that <i>Castrilli</i> was both optimistic and without the benefit of any of the details of the proposed federal emissions trading system". The scheme is supposed to use market forces rather than an administratively burdensome regulatory system, not concerned with trade as a whole - rather, nine specific sectors are targeted, US experience supports provincial emissions trading, and since a small number of provinces produce the most emissions, there is a small risk of pollution havens being created.		
Barton, <i>Economic Instruments and the Kyoto Protocol: Can Parliament Implement Emissions Trading without Provincial Co-operation?</i> (2002)	Article focuses on the federal government's ability to create a cap-and-trade GHG regime. POGG is the strongest ground (though there are difficulties every federal head of power which he thinks might be applicable: POGG, the criminal law power and the T&C power). However, the federal government would be on much stronger footing, were it to implement a carbon tax regime pursuant to its taxation powers. If there is a trading regime, POGG national concern is the best fit: "As long as legislation is carefully designed with balanced federalism and ascertainable limits in mind, there is a good possibility that the national concern doctrine of the POGG power could provide the constitutional basis for implementing trading. It will be important from the perspective of the constitutionality of trading legislation that trading only sets the emissions cap. Trading does not dictate the specific measures to be undertaken."	On tax: the federal government's power is very broad. Citing <i>Hogg on Reference re Proposed Federal Tax on Exported Natural Gas</i> , "federal taxes could not apply to natural gas that the province had extracted from its own Crown lands. This limitation does not help private producers." The certainty of a tax regime provides one reason why it might be attractive. A carbon tax regime could be safely supported by the federal government's taxation power.	On POGG: there are three branches (emergency, national concern and gap) - only the national concern branch is relevant to a GHG regime. The leading national concern case is <i>Crown Zellerbach</i> , in which the SCC upheld a federal regime to control marine pollution. "These cases have demonstrated that extraprovincial and international implications can justify the federal government's POGG power - the matter has ceased to be just a local or provincial concern. The logical question is, therefore, what is a sufficient national concern that will invoke federal authority?" Singleness, distinctiveness and indivisibility, balancing federalism and provincial inability are all relevant to a GHG regime. Giving that the environment is such a broad area of the law, a Court would be wary of upsetting the balance of federalism by granting the feds jurisdiction on the basis of the national concern doctrine. <i>La Forest</i> was part of the dissent in <i>Crown Zellerbach</i> that raised the alarm about the overbreadth of POGG over the environment, he said the same thing as the majority in <i>Hydro-Québec</i> . The majority in	On criminal law power: look to <i>Margarine Reference</i> for seminal definition of criminal law. Three prerequisites: a valid criminal law purpose, a prohibition, and a penalty. <i>Hydro-Québec</i> recognized that the protection of the environment could be a valid criminal law purpose. In <i>RJR-Macdonald</i> , the Court recognized that protection of human health could be a valid criminal law purpose. Court rejected an argument the law was not criminal because it targeted advertising rather than smoking itself, and also that it involved a regulatory scheme (you can have exemptions to the prohibitions in that scheme, too). The majority in <i>Hydro-Québec</i> recognized that environmental protection necessarily involves a broad, regulatory scheme, and that doesn't make the law any less criminal. In <i>Firearms Reference</i> , a gun control scheme was upheld through the criminal law power (in that case, protecting public safety). Again, arguments that the regime was not criminal because it was a complex regulatory scheme and didn't result in an absolute prohibition were rejected. The feds may	On T&C: Following <i>Parsons</i> , T&C has needed to either relate to interprovincial and international T&C, or general T&C that affects the whole country. Construed narrowly. There is disagreement among academics about whether or not the <i>Egg Reference</i> is analogous to GHG regulation, and whether or not that case will apply to support T&C in this case. In <i>City National Leasing</i> , competition law was upheld under the modern five-point T&C test. As with the provincial inability test applied to POGG national concern cases, there is a concern that provinces could undercut each other to create more economically friendly conditions for polluters. Therefore, a single federal regime is necessary. At the end of the day, T&C will be a tough sell because "the dominant purpose of trading is one of environmental protection. Reducing GHG emissions is a response to the concern of global climate change - thus GHG control is an environmental protection initiative." As to the provincial inability aspect, keep in mind that only about a third of GHGs are generated by industrial emitters. Other emitters are not		

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			<p>Crown Zellerbach held the law needed reasonable limits. In the minority decision in Hydro-Québec, the national concern doctrine was rejected because the prohibition against toxic substances involved "an all-encompassing definition with no clear limits". The author notes, "The essence of Principle 3 [of the national concern doctrine] is that, because invoking the national concern doctrine results in restrictions on provincial powers, these matters must have clear distinctions that establish ascertainable boundaries. Broad federal matters that could overwhelm balanced federalism will likely not be upheld." In addition to Crown Zellerbach, the provincial inability test was also considered in Ontario Hydro (nuclear power) and the Hydro-Québec dissent. Rejected by the dissent because the definition of "toxic substances" went beyond PCBs.</p> <p>You could apply sectoral limits to a cap regime, in order to preserve provincial involvement, but if that was the case and the provinces could regulate, how could it be a matter of national concern? A regional approach with different levels for different provinces would be easier to justify. A cap and trade system would also help satisfy POGG because it would respect provincial authority over property and civil rights. Limiting the system to GHGs would help with the SID part of the test because you could make a provincial inability argument. You could argue that the number of sectors to be regulated would represent a severe intrusion into provincial property rights, but the answer to that is that the feds can set limits and leave it to the provinces to legislate as to how those limits are to be reached. "In summary, the POGG power presents a strong possibility for federal legislative authority to implement a GHG-trading system. As long as legislation is carefully designed with balanced federalism and "ascertainable" limits in mind, there is a good possibility that the national concern doctrine of POGG could provide the constitutional basis for instituting mandatory emission targets."</p>	<p>use "indirect means to achieve its end ... [and that] direct and total prohibition is not required." These cases suggest that provincial arguments which attack a GHG regime supported on the basis of the criminal law will not likely be effective. There are a number of parallels between banning tobacco advertising and installing a GHG regime. The restrictions don't actually have to be effective, in order to be upheld. In terms of exclusive federal jurisdiction forcing out the provinces, the Court carved out regulation of toxic substances in Hydro-Québec and banning tobacco advertising in RJR-Macdonald, even though the environment and health are both shared responsibilities. So while there is some uncertainty because GHG would involve a regulatory system, the author believes it could be upheld with the criminal law power.</p>	<p>subject to the same competitive pressures, so there is no concern emitters will go to a different province for better economic treatment (e.g., agriculture, municipal government, etc.).</p>		
Castrilli, <i>Legal Authority for Emissions Trading in Canada</i> (1998)	Older article, focuses on emissions trading regimes, following then-recent amendments to U.S. Clean Air Act (though note those amendments targeted sulphur dioxide, rather than GHG, which may be relevant to criminal law arguments insofar as sulphur dioxide is arguably more inherently toxic than GHG). Emphasis on Hydro-Québec case, which was at that time a recent decision, and its application of the criminal law power to the environment. Courts have generally tried to allow both levels of government authority to regulate over the environment. Much depends on the nature of the program and also the pollutants it seeks to		On POGG: national concern has two aspects (gap and also matters which were at one point under provincial heads of power but which have become a national concern), must meet the "single, indivisible and distinctiveness" requirement. This requirement is supposed to maintain the balance of federalism, though provincial inability to deal with the problem is relevant. The finding that something is a national concern has the effect of forcing the provinces out of the field, "Therefore, deciding that federal legislation may be upheld under the national concern doctrine of POGG means that the area involved is not a concurrent area of jurisdiction and	On criminal law power: Two requirements - criminal law object or purpose, enforced by a prohibition backed by penal sanctions. In Hydro-Québec, the Court was satisfied that protecting the environment was a criminal law purpose. The issue was with respect to the prohibition requirement. If the regime looks like regulation, then it will fail on this leg of the test (which is what the minority in Hydro-Québec found). The minority's views were that: (1) the long list of authorities for regulating substances suggested regulation; (2) the sections did not contain an absolute prohibition; (3) an administrative agency decided what was criminal; (4) the feds could exempt	On T&C: historically interpreted narrowly though broadened by the SCC somewhat in more recent times. Not as of the article's writing been used to support environmental laws. T&C could be a fit: "Emissions trading, by introducing economic and market approaches to environmental protection, may represent the first realistic opportunity to test the scope of the trade and commerce power in relation to environmental law" under both the interprovincial and general commerce approaches to T&C. The upholding of wheat and oil T&C legislation bears some similarities to an emissions trading regime, "particularly with respect to the setting of		

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	<p>control. Suggests three heads of power may support a trading regime: POGG, T&C and the criminal law power. T&C is the most likely fit: "The most appropriate constitutional authority for federal emissions trading law is the trade and commerce power. This power has none of the drawbacks of reliance on POGG, which would result in the exclusion of provincial law. The trade and commerce power also is preferable for the federal government to rely on than the criminal law power, which would restrict federal law to a comparatively narrow prohibition and penalty-type regime. The trade and commerce power would permit a broad and flexible federal approach, and would allow concurrent and compatible provincial legislation relating to intraprovincial aspects of emissions trading."</p>		<p>there is no constitutional authority for provincial legislation in connection with the same subject matter." Concern about "radically alter[ing] the division of legislative power in Canada", as expressed in Hydro-Québec. As a result, "Therefore, the Court will be unlikely to "enthusiastically adopt" the national concern doctrine as a basis for upholding federal legislation, because by definition the Court would be removing the area from the possibility of concurrent provincial legislation." Author concludes POGG is not likely to support a trading regime.</p>	<p>equivalent provinces from the regime, but provinces can't enact criminal laws; (5) the regime contemplated complete control over the release of toxic substances, leaving nothing left for the provinces to regulate. Author concludes criminal law is unlikely to support an emissions trading regime: "The federal government has expressed interest in emissions trading. Given the elaborate administrative characteristics of an effective emissions trading regime" and the likely need to trade emissions of "non-toxic substances," it would be very difficult to justify such a program under the traditionally narrow ambit of the criminal law power; that is, a prohibition and penalty type regime."</p>	<p>national quotas of production for a particular commodity for each province". City National Leasing upheld competition law provisions using the general commerce power. If you come under the general commerce power, then regulation of intraprovincial trade is not fatal. Author submits the dissent's observations on T&C in Hydro-Québec are incorrect: control of pollution has an economic dimension (don't want to allow polluters to flee to a lax province); and while traditional environmental regulation isn't motivated by economic concerns, emissions trading turns quotas into articles of trade and therefore does in substance involve commerce. Author submits the five-point test from City National Leasing would be met: general regulatory scheme required to implement scheme; would require continued oversight and monitoring; trading credits or allowances rather than regulating a particular industry; provinces constitutionally incapable of implementing the regime and failure to include one or more provinces would jeopardize the successful operation of the regime. T&C would also allow concurrent provincial authority.</p>		

PROVINCIAL HEADS OF POWER AND OTHER ISSUES

Author	Provincial Heads of Power	Interjurisdictional Immunity	Double Aspect	Paramountcy	Ancillary Powers	Treaties/International Commitments	Other
Chalifour, <i>Canadian Climate Federalism: Parliaments Ample Constitutional Authority to Legislate GHG Emissions through Regulations, a National Cap and Trade Program, or a National Carbon Tax</i> (2016)	Not analyzing provincial authority to regulate GHG.	Exclusive jurisdiction of one government cannot be impaired by another government. You would either read down the law or declare it inoperable, though the doctrine's importance has diminished with the concept of increased cooperative federalism: "The doctrine is now essentially limited to situations already covered by precedent, such as federal people, works or undertakings most notably in matters such as aviation, interprovincial transport and communication undertakings, navigation and shipping, aboriginal land and peoples, banks, federally incorporated companies and labour matters touching federal things." In PHS Community Services Society, McLachlin said it can apply to exercises of provincial power, too. Provinces could argue that having expended resources to enter the field, they should be given exclusive jurisdiction. "However, they would stand little chance of success. The jurisprudence requires that courts attempt to resolve potential conflicts any other way before they would consider applying interjurisdictional immunity to a new subject area". She thinks in that case, paramountcy would apply and the federal law would prevail.	As long as the laws don't conflict and both are grounded in valid heads of power, they can co-exist. McLachlin has favoured a flexible application of the double aspect doctrine and the interests of a pan-Canadian approach would likely support it, here.	On paramountcy: would require a conflict between federal and provincial GHG laws, which can arise because you can't comply with both, or if the effect of the provincial law frustrates the purpose of the federal law. See recent trilogy: Moloney, 407 ETR Concession and Lemare Lake Logging. But there is an emphasis on avoiding the application of paramountcy (done by saying there is no inconsistency between the laws).	The more necessary the provision is to the operation of the law in an area of valid jurisdiction, the more overflow into the other government's area of power will be tolerated (Re Assisted Human Reproduction).		On colourability: "If the federal government simply wanted to manage provincial economic matters, and used climate policy as a way of disguising this intention, the provinces could argue that the policy in question was colourable and thus invalid". But Syncrude says this is a high standard.
Bishop and Dachis, <i>The National Energy Board's Limits in Assessing Upstream Greenhouse Gas Emissions</i> (2016)	Provinces have jurisdiction over natural resources and industrial regulations within the province. But if works cross provincial boundaries, then it's an interprovincial and international work and undertaking which the feds can regulate.						If feds do an environmental assessment, it must be connected to a valid federal head of power: Oldman River. Referring to Oldman River: "The Supreme Court has emphasized that federal environmental assessment should not be a "Trojan horse" for the federal government to inject itself into general industrial regulation, which is a provincial responsibility.
Powell, <i>Climate Change Legal Roadmap</i> (2016)	Provinces generally have "good authority" to deal with environmental matters within the province, because of broad powers of resource ownership. Exceptions for fisheries, navigation and inter-provincial pollution. Cites Bankes and Lucas and Hsu and Elliot articles for proposition that provinces have jurisdiction over climate control matters. "Provincial authority to act on climate change derives from its constitutional jurisdiction over property and civil rights in the province, local works and undertakings, and all matters of a merely local or private nature in the province."						
Taylor, <i>The Coming National Carbon Tax Gap</i> (2016)							
Sheffield, <i>The Constitutionality of a Federal Emissions Trading Regime</i> (2014)			Supports upholding a federal regime under criminal or T&C powers, since the provinces would be allowed to have overlapping/concurrent regimes (whereas POGG would close the door to provincial involvement).				
Becklumb, <i>Federal and Provincial Jurisdiction to Regulate Environmental Powers</i> (2013)	Possible provincial heads of power: property and civil rights (92(13)), management of provincial crown lands (natural resources) (92(5)), municipal institutions, including environmental						Other possible federal heads of power: federally owned property (91(1)(a)), sea coast and inland fisheries (91(12)), navigation and sea shipping (91(10)), Indians and lands reserved for Indians

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	matters such as waste management (92(8)), matters of local or private nature (92(16)). Provinces have power over industrial emissions because they control industries which create them like manufacturing (if you control the industry then you can control emissions created by the industry).						(91(24)). Plus boundary waters and migratory birds (132). Feds generally have power over water-related environmental matters except for provincial powers over drinking water and wastewater.
Lucas and Yearsley, <i>The Constitutionality of Federal Climate Change Legislation</i> (2012)					On the ancillary powers doctrine: "The analytical approach requires the court to determine whether (1) there is potential overflow into provincial powers, (2) the Act (or a severable part) is valid and if so, (3) the impugned provision (or provisions) is sufficiently integrated with the overall scheme of the Act. The more serious the overflow, the higher the threshold -- reaching that of necessity -- for upholding the provisions." So, the emissions limits are backed by prohibitions and penalties, which may be supported by the criminal law, but the trading system cuts at the core of provincial powers and as such is beyond something that can be supported by the criminal law.		
Krupa, <i>The Legal Framework for Carbon Capture and Storage in Canada</i> (2011)	Provinces have a "substantial amount of authority" to govern carbon capture and storage (CCS) activities within their borders, as a function of local works and undertakings, property and civil rights and control over non-renewable resources heads of power.		Dual-aspect doctrine allows concurrent laws in the same sphere, as long as the pith and substance of each law is rooted in a provincial or federal head of power: McCutcheon.				
Hogg, <i>Constitutional Authority over Greenhouse Gas Emissions</i> (2009)	Provinces can justify under property and civil rights: "There is no doubt that each province has the power to control the emission of greenhouse gases by industrial firms operating within the province." "The provinces have the authority to regulate greenhouse gas emissions by firms operating within their borders under the property and civil rights power. They also have the power to institute a cap-and-trade system."			Paramountcy addressed by fact that feds intend to have provincially equivalent law prevail, like PIPEDA. In addition, applied very narrowly by Courts.		Note the targets in the Kyoto Protocol. In 2007, Kyoto Protocol Implementation Act passed to require government to meet targets by passing/repealing "necessary regulations". But a treaty doesn't give you powers you don't otherwise have: "Canada's accession to the treaty did not confer on Parliament any additional legislative power to implement the treaty. That was decided in the Labour Conventions case, which struck down federal laws that attempted to enact national labour standards (minimum wage, maximum hours, and the like) in order to implement obligations undertaken by Canada in a multilateral treaty sponsored by the International Labour Organization."	
Hsu and Elliot, <i>Regulating Greenhouse Gases in Canada - Constitutional and Policy Dimensions</i> (2009)	Provinces have a number of bases to regulate pollution: regulating industry through 92(13), crown lands and inland waterways through 92(5), 92(13) and 92(16). So there will frequently be "considerable overlap", as was held in Oldman River. Provinces have power of taxation pursuant to 92(2): the legislation must (1) impose a tax, which must (2) be direct, (3) be imposed within the province, and (4) raise a provincial revenue. If the tax was revenue neutral, this would pose a problem for step 4 (see also cases which have found that the power to raise revenue through licences per 92(9), which have interpreted that section this way). But in the end, the authors feel the tax would be upheld because it would be difficult to determine whether or not it was revenue		Court has demonstrated a desire to allow the feds to regulate the environment, as shown by the expansion of POGG (in Crown Zellerbach) and the criminal law power (in Hydro-Québec). Hydro-Québec also demonstrates a judicial preference to permit overlapping regulation. This is a reason to favour criminal law over POGG (which would restrict the provinces' ability to legislate in this area). Oldman River indicates that neither the provinces nor the feds have exclusive jurisdiction in the environment.	The provincial law would only be struck or read down if it conflicted with the federal law, but paramountcy is now applied narrowly by the Courts.	A provincial cap and trade regime would likely be upheld if it targeted industries that were otherwise under provincial jurisdiction. If the regime applied to federally regulated industries, you would need to consider the ancillary powers doctrine. See City National Leasing: "To what extent does the impugned part of the statute—here, the inclusion in the list of industries to which the cap-and-trade regime applies of the federally regulated industry in question—encroach on the legislative jurisdiction of the federal order of government when that part is viewed in isolation? Is the rest of the statute valid? Given the answer to the first question, is the impugned part sufficiently integrated into the rest of the statute to profit from that overall validity and thus be considered valid itself?" The authors think that the	International treaty obligations aren't determinative on their own (Labour Conventions case), but they can be used to demonstrate a matter is something that involves a national concern: Crown Zellerbach.	Could also use Canadian Environmental Assessment Act to require an assessment of GHG as part of the federal environmental approval process. Based on Oldman River, this would likely be upheld. Note the authors criticize the former Manitoba government's public position on its own GHG reduction efforts: "Manitoba, which has also joined the Western Climate Initiative, announced that it intends to legislate a commitment to meeting its share of Canada's Kyoto targets: a 6 per cent reduction in greenhouse gases below 1990 levels. Unfortunately, Manitoba's plan seems predicated on the same creative accounting employed by the last two federal governments. It measures emissions reduction in terms of its

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	neutral and other cases have upheld provincial taxation on a variety of matters (Hodge, Local Prohibition Reference).				encroachment on federal power would be so severe that the law would be struck down. But a multi-provincial, regional character to the scheme would not be fatal.		divergence from a business-as-usual baseline. For example, Manitoba credits itself with 1.1 megatonnes of greenhouse gas reduction for construction of the Wuskwatom Hydro Generation Project, which will generate electricity for export out of the province. While this hydro project may be a laudable way to meet increasing electricity demands, it is a bit self-serving to call the construction of a dam an emissions 'reduction'."
Farber, <i>Climate Change, Federalism, and the Constitution</i> (2008)							Once the feds take action to regulate GHG, two issues will be raised: what is the extent of federal power; and what powers are left for the states? There are broad federal commerce powers which might support GHG regulation though those powers have been narrowed over time. Once the feds act, the states might give up, or the federal laws might expressly invoke pre-emption. But otherwise, the role of the states will remain to be determined. In the end, he thinks Courts should give state forays into the field discretion, since there is utility to controlling GHG and if Congress wants to box out the states, then it can do so by statute: "Given that the political system is likely to undersupply climate regulation, courts should provide a friendly reception to any and all climate regulation, rather than subjecting it to skeptical scrutiny."
Elgie, <i>Kyoto, the Constitution and Carbon Trading - Waking a Sleeping BNA Bear (or Two)</i> (2007)			On double aspect: many environmental issues can be effectively addressed by both levels of government.	The laws will stand unless there is conflict between the two of them, which is interpreted very narrowly (compliance is impossible or frustrates the purpose of the other statute). Much of the analysis depends on how the law is characterized. You could go from narrow (controlling GHG emissions) to broader (protecting the environment) to broadest (meeting Canada's obligations under an international treaty).		On treaty power: "The existence and nature of a federal power to implement treaties is one of the greatest unanswered questions in Canadian constitutional law". A novel point of view given that Labour Conventions and Crown Zellerbach would tell you the issue is settled. Argues the earlier Radio Reference case concluded the feds did have the authority to implement treaties, and that Labour Conventions represented an unwarranted about face which incorrectly distinguished Radio Reference as having been decided on the basis of POGG. "The issue of a federal treaty-implementing power has never squarely arisen before the Supreme Court in the subsequent seventy years ... On the whole, almost all scholars agree that Labour Conventions was badly decided, and the large majority support a departure from its precedent - although not all suggest going so far as to allocate treaty-implementing power to the federal government alone." Also argues: it is illogical that the feds can implement treaties signed by the U.K., but not in its own right; in other countries such as the U.S. and Australia, the federal level of government does have the power to implement treaties; Labour Conventions has limited Canada's ability to play a full role in international affairs. On the other hand, the author acknowledges arguments which support the Labour Relations view: the BNA provisions giving the feds the power to implement treaties signed by the U.K. were not expressly carried into the	

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						Constitution; this would allow the feds to do an end around on federalism; it would allow the feds to encroach into provincial jurisdiction; the lack of treaty-making power hasn't impeded Canada's ability to conduct international affairs. He concludes in favour of overturning Labour Relations: "recognition of a federal treaty-implementing power is long overdue. Such a power could come from an extended reading of section 132, or (more likely) from the POGG power, as filling a gap in the Constitution - with reference to section 132 as an indication that treaty-implementing power was meant to rest with Parliament." In any event, the Courts have found that an international treaty provides evidence that a particular matter is of national concern: Crown Zellerbach, Johannesson. The author reviews a number of "half-way houses" and concludes that a treaty-making power should be recognized, though as a principle of interpretation, the federal government's powers should be read narrowly when outside an enumerated head of power. Jurisdiction should be granted only to do what is necessary to implement the treaty.	
Banks and Lucas, <i>Kyoto, Constitutional Law and Alberta's Proposals</i> (2004)	<p>Alberta's climate change initiatives would likely be constitutionally valid under the provincial subject matter of property and civil rights, and possibly local undertakings and ownership of provincial public lands.</p> <p>Applicable provincial heads of power include: property and civil rights, local works and undertakings, management and sale of public lands belonging to a province and timber thereon, matters of a local or private nature, enactment of regulatory offences for matters in provincial jurisdiction, natural resources.</p>	<p>On interjurisdictional immunity: an otherwise valid law won't be valid to the extent it targets a core area of the other level of government's jurisdiction. See <i>Ordon Estate</i>: "each head of federal power possesses an essential core which the provinces are not permitted to regulate indirectly". Cites Hogg for the position that interjurisdictional immunity likely does not apply to protect provincial powers from federal incursion: "Probably, therefore, a federal law in relation to a federal matter may validly extend to the status or essential powers of a provincially-incorporated company, or to the vital part of a provincially regulated undertaking." NB: there is a later SCC case which suggests the doctrine may be reciprocal - <i>PHS Community Services Society</i>.</p>		Paramountcy not likely because it will be hard to show that compliance with two sets of laws is impossible, or that complying with a provincial statute will frustrate the purpose of the federal statute.		<p>On treaties: "It is trite law in Canada that treaties are not self-implementing and thus the Kyoto Protocol does not become part of domestic law by the act of ratification; it only becomes part of domestic law (to the extent that it requires a change in domestic law) when incorporated by the relevant jurisdictional authority (such as Parliament or provincial legislatures and their delegates)." See <i>Labour Conventions</i>.</p>	A law can be authorized by a number of heads of power and different heads of power may authorize different parts of the law.
DeMarco et al., <i>Canadian Challenges in Implementing the Kyoto Protocol - A Cause for Harmonization</i> (2004)	<p>On provincial heads of power: "A provincial emissions trading system may be upheld on the basis of a number of provincial heads of power, including: public lands, including timber and wood thereon (s. 92(5)); municipal institutions (s. 92(8)); local works and undertakings (s. 92(10)); property and civil rights in the province (s. 92(13)); matters of a local or private nature (s. 92(16)); and natural resources (s. 92A)." However, the Court struck down provincial legislation which attempted to control extraprovincial pollution in <i>Interprovincial Co-Operatives</i>.</p> <p>On natural resources: a regime which is found to directly regulate natural resources will be ultra vires the feds. On development of electrical power, the Constitution similarly grants that power to the provinces. So you cannot target this</p>		<p>On environmental powers: "a dominant feature of the system appears to be to protect the environment and address global climate change through the control of GHG emissions to the atmosphere". Since the Courts have found the environment is not an enumerated power and both levels of government have jurisdiction, you need to point to a specific head of power under ss. 91 and 92.</p>			<p>On treaty power, <i>Labour Conventions</i> is clear that a treaty doesn't provide power to regulate in provincial areas of jurisdiction: "it is unlikely that the federal government has the legislative authority to implement such a system on the sole basis of its powers to enter into and implement treaties".</p>	

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Barton, <i>Economic Instruments and the Kyoto Protocol: Can Parliament Implement Emissions Trading without Provincial Co-operation?</i> (2002)	Historically, provincial power to regulate the environment comes from property and civil rights and natural resources. Interestingly, Chretien said in 2002 that the feds did not have the ability to implement a GHG scheme and instead required provincial cooperation.		In Hydro-Québec, the Court held that jurisdiction over the environment is shared.			On treaties, the majority in Crown Zellerbach understood and applied Labour Conventions.	
Castrilli, <i>Legal Authority for Emissions Trading in Canada</i> (1998)	On provincial heads of power: property and civil rights, matters of a local or private nature, municipal institutions, control over local trade.		Courts have generally tried to allow both levels of government authority to regulate over the environment.				