The Constitutional Limits on Greenhouse Gas Policy in Canada

by

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Abstract

This thesis examines the constitutional limitations on federal action to reduce greenhouse gas (GHG) emissions to combat climate change. I rely primarily on cases in other areas of economic policy including agricultural supply management, the control of inflation, the regulation of competition, and the regulation of securities to inform a novel analysis both of the real and important limits on federal power and of potential opportunities for federal legislation. When climate change is looked at through an economics lens though, I find that our legal history suggests jurisdictional opportunities under Parliament's trade and commerce power not widely discussed in the existing literature. Once we see the environment as part and parcel of our economy rather than separating the two in a false dichotomy, the federal role to regulate pollution in general and GHG emissions in particular is compelling.

In the introductory chapter of this thesis, I provide a summary of existing GHG policies in Canada and survey the legal scholarship with respect to the constitutional limitations on future federal legislation. To frame this discussion for those not familiar with the classification of laws under the Canadian Constitution, I provide a brief digression on the division of powers.

The main focus of this thesis is Parliament's trade and commerce power. I use the tools of economics to make two central arguments regarding the application of this head of power to climate change policies. In Chapter 2, I argue that the parallels between agricultural supply management policies upheld under the extra-provincial branch of the trade and commerce power and potential federal climate change policies are weaker than suggested by some legal scholars. This is because, despite both relying on similar underlying economic tools, the federal government's ability to backstop such a regime is much more restricted in the case of GHG emissions than in the case of chickens or eggs because emissions aren't traded in a traditional sense. In Chapter 3, I argue that once we view environmental policy in general and climate change policy in particular as economic policy, this framing opens the door to consideration of the general branch of the trade and commerce power as a means to uphold federal regulatory charges on GHGs. Once we think of emissions not as trade but as costly consequences of the incomplete regulation of commerce, then parallels to other areas of federal regulation including competition, trademarks, and securities become clear.

I approach this thesis from an interdisciplinary perspective. While the analysis is primarily constitutional law, it is informed by my background in economics. In my conclusion, I argue that Canadian environmental economics should be more informed than it currently is by the constraints imposed by Canadian constitutional law. Ignoring these constraints will necessarily lead to bad policy advice.

For William and Caroline. May you never stop seeking to learn new things.

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Chapter 1 Climate Change and the Canadian Constitution

1.1. Introduction

Greenhouse gases (GHGs) represent a pressing policy challenge for Canada and for the world. Our global climate has already changed significantly due to anthropogenic emissions of GHGs, and emissions today will affect global climate long into the future. Global average temperatures are today approximately 1°C above pre-industrial levels,[1] and current policy, technology, and demographic trends suggest that we should expect warming of about 3°C above pre-industrial levels by the end of this century.[2] Increased global temperatures mean increased risks: unless measures to substantially reduce and eventually eliminate net GHG emissions are implemented, climate-related risks will continue to grow.[3]

Climate change is not solely an environmental problem; it is among our most pressing economic challenges. Recent work from the Bank of Canada cites a potential reduction of gross output of between 1.5 and 23% due to unmitigated climate change.[4] Combatting climate change will require major economic policies as well. To keep global climate change below 1.5°C, global GHG emissions will have to be reduced by about 40% from 2005 levels by 2030, while limiting climate change to below 2°C would require GHG declines of 22% below 2005 levels by 2030.[5] The rapid and fundamental transformations of global energy and transportation systems that such actions would entail will have significant economic effects.[6] Climate change and the policies to combat it are among the most important economic issues we face today.

This thesis examines the constitutional limitations on federal action to reduce GHGs and combat climate change. The structure of our federation limits the reach of federal legislation in many ways and substantial uncertainty remains with respect to what Parliament can do to reduce emissions.[7]

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[1] Intergovernmental Panel on Climate Change, *Summary for Policymakers. In: Global warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty*, V. Masson-Delmotte, P. Zhai, H. O. Pörtner, D. Roberts, J. Skea, P.R. Shukla, A. Pirani, W. Moufouma-Okia, C. Péan, R. Pidcock, S. Connors, J. B. R. Matthews, Y. Chen, X. & Zhou, M. I. Gomis, E. Lonnoy, T. Maycock, M. Tignor, T. Waterfield, eds. (2018) at 3.
[2] Zeke Hausfather & Glen P Peters, "Emissions – the 'business as usual' story is misleading" (2020) 577:7792 Nature 618.
[3] Intergovernmental Panel on Climate Change, *supra* note 1 at 4.
[4] Miguel Molico, "Researching the Economic Impacts of Climate Change", (November 2019), online: *Bank of Canada* <https://www.bankofcanada.ca/2019/11/researching-economic-impacts-climate-change/>.
[5] Intergovernmental Panel on Climate Change, *supra* note 1 at 12. Calculations were adjusted to reflect implied declines relative to 2005 global emissions levels rather than 2010 levels.
[6] See, for example, Bank of England, *The 2021 biennial exploratory scenario on the financial risks from climate change* (Bank of England Discussion Paper, 2019) at 1. The Bank of England began a process in late 2019 to stress-test financial institutions not only against the physical risks from climate change but also the risks they face from climate change policies. The stress test includes what the Bank refers to as physical risks but also transition risks.
[7] Nathalie J Chalifour, "Jurisdictional Wrangling over Climate Policy in the Canadian Federation: Key Issues in the Provincial Constitutional Challenges to Parliament's Greenhouse Gas Pollution Pricing Act" (2019) 50:2 Ott Law Rev 197; Nathalie J Chalifour, "Canadian Climate Federalism: Parliament's Ample Constitutional Authority to Legislate GHG Emissions through Regulations, a National Cap and Trade Program, or a National Carbon Tax" (2016) 36 Natl J Const Law 331.

The environment is not a subject matter assigned explicitly to either federal or provincial governments in *The Constitution Act, 1867*.[8] Rather, courts have defined the environment an area of shared jurisdiction between both levels of government.[9] Canadian jurisprudence on environmental issues is thin, and provides only limited support for federal policies that would regulate GHGs. Supreme Court decisions in *Hydro-Québec*, *Crown Zellerbach*, and *Oldman River* are most-often cited as the basis for broader federal environmental management authority.[10] These cases, however, tested the federal government's powers with respect to relatively narrow applications of criminal law and regulatory powers, as well as its power to conduct environmental assessments in relation to major projects, and so offer incomplete guidance with respect to the tools to reduce GHGs at the disposal of the federal government.

Federal authority to act on climate change is constrained relative to some other constitutional democracies as a result of judicial interpretation of Parliament's authority to make laws in relation to trade and commerce power and the lack of federal treaty implementation authority.[11] Federal economic regulations are also constrained by exclusive provincial jurisdiction over local matters, the regulation of individual trades and industries, and intra-provincial trade. Jurisprudence in other areas of economic policy including agricultural supply management, the control of inflation, the regulation of competition, and the regulation of securities each suggest that real and important limits exist with respect to federal authority to legislate in ways that impact these areas of provincial jurisdiction.[12] When looked at through an economics lens though, I find that our legal history also suggests jurisdictional opportunities not widely discussed in the existing literature. Once we see the environment as part and parcel of our economy rather than separating the two in a false dichotomy, the federal role to regulate pollution in general and GHG emissions in particular is compelling. Despite historic deference to provincial jurisdiction in many circumstances, I argue that the

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[8] *The Constitution Act, 1867*, 30 31 Vict C 3 UK [*The Constitution Act, 1867*].
[9] *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3 [*Oldman River*] at 63–4.
[10] *R v Hydro-Québec*, [1997] 3 SCR 213 [*Hydro-Québec*]; *R v Crown Zellerbach Canada Ltd*, [1988] 1 SCR 401 [*Crown Zellerbach*]; *Oldman River*, *supra* note 9.
[11] For example, in *Tasmanian Dams*, [1998] HCA 21 (High Court of Australia) [*Tasmanian Dams*], the High Court of Australia ruled that the external affairs power, established in *Commonwealth of Australia Constitution Act*, 1900, 63 64 Vict C 12 UK [*Commonwealth of Australia Constitution Act*], s 51(xxix), allowed the federal government to enact legislation to give effect to treaties, subject to only to other constitutional prohibitions. The United States also has much stronger treaty and trade and commerce power than Canada. United States Supreme Court Chief Justice Marshall wrote in *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 313–14 (1829), "[the US] constitution declares a treaty to be the law of the land." While this only applies to the text of the treaty itself, when combined with the broader interpretation of the power to make laws in relation to trade and commerce, this implies that the federal government is both bound by and able to implement treaties. Article VI of the United States Constitution gives supremacy to treaties in a way that simply does not exist in Canada. It holds that "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." On the other hand, the judicial interpretation of Canada's federal authority to implement treaties as established in *Canada (Attorney General) v Ontario (Attorney General)*, [1937] 1 DLR 673 (PC) [*Labour Conventions*], is narrow and does not allow Parliament to encroach on provincial jurisdiction to implement treaties.
[12] *British Columbia (Attorney General) v Canada (Attorney General) et al, Reference re Natural Products Marketing Act, 1934*, [1937] 1 DLR 691 (PC) [*Re: Natural Products Marketing (PC)*]; *Reference re Agricultural Products Marketing*, [1978] 2 SCR 1198 [*Agricultural Products Marketing*]; *Reference Re Anti-Inflation Act*, [1976] 2 SCR 373 [*Anti-Inflation*]; *Attorney-General For The Province Of Ontario v Attorney-General For The Dominion Of Canada*, [1922] 1 AC 191 (PC) [*Board of Commerce (PC)*]; *Reference re Securities Act*, [2011] 3 SCR 837 [*re Securities Act*]; *Reference re Pan-Canadian Securities Regulation*, [2018] 3 SCR 189 [*re Pan-Canadian Securities*].

courts have upheld federal regulation in relation to many areas which, when viewed through the lens of economics, are similar to climate change.[13]

In this introductory chapter, I provide a summary of existing GHG policies in Canada and survey the legal scholarship with respect to the constitutional limitations on future federal legislation. To frame this discussion for those not familiar with classification of laws under the Canadian Constitution, I provide a brief digression on the division of powers. The main focus of the body of this thesis is Parliament's trade and commerce power. While legal scholars have extensively explored the potential for other federal heads of power to underpin legislation in relation to GHGs, discussion of the trade and commerce power is comparatively thin. Where scholars have explored the trade and commerce power, they have often emphasized parallels with agricultural supply management regimes previously upheld as valid federal legislation in relation to extra-provincial trade and commerce. I use the tools of economic analysis to make two central arguments. In Chapter 2, I argue that the parallels to agricultural policies are weaker than they appear since, despite both relying on similar underlying economic tools, the federal government's ability to backstop such a regime is much more restricted in the case of GHG emissions than in the case of chickens or eggs because emissions aren't traded in a traditional sense. While it is undisputed that the federal government can restrict the physical movement of commodities across borders, there is no comparable authority to restrict emissions to the atmosphere. In Chapter 3, I argue that we should view environmental policy in general and climate change policy in particular as economic policy, and that this framing opens the door to consideration of the general branch of the trade and commerce power as a means to uphold federal regulatory charges on GHGs. Once we think of emissions not as trade but as costly consequences of the incomplete regulation of commerce, then parallels to other areas of federal regulation including competition, trademarks, and securities become clear.

My research draws on recent history of GHG emissions policies in Canada which have, to date, taken four broad forms: 1) regulatory standards; 2) government expenditures intended to reduce emissions; 3) emissions taxes or levies; and 4) environmental assessment standards including those applied to major projects like pipelines and mines. While many tools within each of these categories are potentially available to the federal government, this thesis is principally concerned with market-based policies such as carbon taxes, cap-and-trade systems and hybrids of the two. These policy tools are generally described under the heading of carbon pricing since they either apply a price directly, through a regulatory charge or a tax on

[13] Mollie Lee, "Environmental Economics: A Market Failure Approach to the Commerce Clause" (2006) 116:2 Yale Law J, online: <https://digitalcommons.law.yale.edu/ylj/vol116/iss2/4>, makes a similar argument to mine, but with respect to the commerce clause in the United States.

GHG emissions, or restrict quantities consumed and allow the trading of scarce emissions allowances among potential emitters to establish a market price for the right to emit.[14]

Carbon pricing policies of one form or another have been implemented in many Canadian provinces.[15] The first Canadian carbon pricing policy was Alberta's *Specified Gas Emitters Regulation*, introduced in 2007, and this policy was updated significantly in 2017 and again in 2019.[16] In 2016, Alberta also complemented these industrial emissions pricing regulations with an economy-wide carbon tax which was subsequently repealed in 2019.[17] In 2008, BC introduced a broad-based tax on GHG emissions from fuel combustion, with revenues earmarked to fund reductions in income taxes.[18] Québec has a cap-and-trade regime, and is part of a linked international emissions trading market with California.[19] Ontario had implemented its own system and linked to the same international market, but recently repealed and proposed to replace that regime with a new emissions pricing program focused on large emitters.[20] Nova Scotia has implemented emissions trading.[21] New Brunswick has proposed the development of its own carbon pricing system.[22] Manitoba has proposed multiple means of provincial carbon pricing.[23] Saskatchewan has proposed a system of emissions pricing for large facilities.[24] This is not an exhaustive policy review, but serves to illustrate that legislation in this area exists and has existed for more than a decade in Canadian provinces, and serves to inform the scope of potential policies which might be implemented in the future.

Canadian federal GHG policies have also included price-based instruments, although generally as ancillary elements of regulatory measures rather than as a primary policy tool. In 1997, Canada signed the *Kyoto*

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[14] Joseph E Aldy & Robert N Stavins, "The Promise and Problems of Pricing Carbon: Theory and Experience" (2012) 21:2 J Environ Dev 152. For Canadian analysis, see Canada's Ecofiscal Commission, "Carbon Pricing", online: *Canada's Ecofiscal Commission* <https://perma.cc/L6HL-YRFX>.

[15] Melissa Harris, "Your Cheat Sheet to Carbon Pricing in Canada", (26 October 2018), online: *Delphi Group* <https://perma.cc/5QBP-CDU9>; Kathryn Harrison, "The evolution of carbon pricing in the provinces", online: *Policy Options* <https://perma.cc/29HK-TQB7>.

[16] The original Specified Gas Emitters Regulation, Alta Reg 139-1007 [SGER] was replaced by the *Carbon Competitiveness Incentive Regulation*, 2017, Alta Reg 255-2017 [*CCIR*]. This was, in turn, replaced by the *Technology Innovation and Emissions Reduction Regulation*, 2019, Alta Reg 133-2019 [*TIER*].

[17] The broader carbon pricing regime was introduced via the *Climate Leadership Act*, 2016, SA 2016 C 169 [*Climate Leadership Act*]. That legislation was repealed by *An Act to Repeal the Carbon Tax*, 2019, SA 2019 C 1 [*An Act to Repeal the Carbon Tax*].

[18] *For more details, see British Columbia, British Columbia's Carbon Tax, online: Gov BC <https://perma.cc/8CQ3-G7ZA>.*

[19] *Ibid.*

[20] Ontario's cap-and-trade legislation, *Climate Change Mitigation and Low-carbon Economy Act*, 2016, 2016 C 7 [*Climate Change Mitigation and Low-carbon Economy Act*], was repealed via the *Cap and Trade Cancellation Act*, 2018, 2018 C 13 [*Cap and Trade Cancellation Act*]. As described in Environmental Registry of Ontario, "Making polluters accountable: Industrial Emission Performance Standards", online: *Government of Ontario* <https://perma.cc/9WSM-Y5V4>, Ontario has developed new industrial emitter regulations which are to be implemented subject to an equivalency agreement with the federal government.

[21] Nova Scotia has implemented emissions trading via Section 112Q of the *Environment Act* S.N.S. 1994-95, c. 1. O.I.C. 2018-294 (effective November 13, 2018), N.S. Reg. 194/2018.

[22] Matto Mildenberger, "New Brunswick's timid foray into carbon pricing", (9 July 2019), online: *Policy Options* <https://perma.cc/9GCT-VK2P>.

[23] David McLaughlin, "Manitoba's fickle relationship with carbon pricing", (18 July 2019), online: *Policy Options* <https://perma.cc/BG2J-J5UF>.

[24] Andrea Olive, "Saskatchewan's long history of rejecting carbon pricing", (12 July 2019), online: *Policy Options* <https://perma.cc/9V28-LVRL>.

Protocol, but did not immediately implement specific policies to meet our commitments.[25] A flurry of federal policies were proposed in 2005 through 2008 in response to the looming *Kyoto Protocol* compliance period (2008-2012) including an emissions trading for large emitters, although the large emitters regime was never implemented.[26] There was little change for most of a decade until Canada's commitments to the *Paris Agreement* were made in 2015.[27] Following the negotiation of the *Pan-Canadian Framework on Clean Growth and Climate Change* between the federal government and the provinces,[28] the federal government passed the *Greenhouse Gas Pollution Pricing Act* (*GGPPA*) which allowed the federal government to impose carbon pricing in provinces which did not meet a federal minimum standard of policy stringency.[29] The validity of the *GGPPA* has been challenged in three provincial reference cases, with courts in Ontario and Saskatchewan finding the legislation *intra vires* Parliament, while Alberta's Court of Appeal held the legislation to be *ultra vires*.[30] The Supreme Court heard appeals of all three decisions in September, 2020.[31]

The academic literature on GHG emissions policies has followed the policy evolution discussed above. In the 1990s and early 2000s, scholars considered policies that Canadian government might impose with the objective to meet commitments under the *Kyoto Protocol.*[32] Between 2005 and 2008, legal scholars examined the federal policy initiatives proposed by the governments of Prime Ministers Martin and Harper.[33] After the *Paris Agreement* was signed, scholars speculated on the tools the Trudeau government might use to meet its targets.[34] The federal *GGPPA* and the litigation which has challenged its constitutional validity triggered a new wave of academic commentary on the subject of the federal authority to regulate

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[25] *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 18 December 1997, 2303 UNTS 162 Entered Force 16 Febr 2005" [*Kyoto Protocol*].
[26] See *Notice of Intent to Regulate GHG Emissions by Large Final Emitters* (2005), C. Gaz. (*Canadian Environmental Protection Act*) at 2489-2502 and *Notice of Intent to develop and implement regulations and other measures to reduce air emissions, (2006),* C. Gaz. (*Canadian Environmental Protection Act*) at 3351.
[27] *The Paris Agreement, United Nations Framework Convention on Climate Change*, 2016, CN922016TREATIES-XXVII7d [*Paris Agreement*].
[28] Government of Canada, "Pan-Canadian Framework on Clean Growth and Climate Change", (2016), online: *Environment and Climate Change Canada* <https://perma.cc/3SQK-9TJS>.
[29] *Greenhouse Gas Pollution Pricing Act, SC 2018, c 12, s 186* [*GGPPA*].
[30] *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544 [*Ontario GGPPA Reference*]; *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40 [*Saskatchewan GGPPA Reference*]; *Reference re Greenhouse Gas Pollution Pricing Act*, [2020] ABCA 74 [*Alberta GGPPA Reference*].
[31] The validity of the *GGPPA*, *supra* note 29, will be tested this Fall in the joint hearing of Attorney General for Saskatchewan v. Attorney General of Canada (Docket 38663), Attorney General of Ontario v. Attorney General of Canada (Docket 38781) and Attorney General of British Columbia v. Attorney General of Alberta (Docket 39116) by the Supreme Court of Canada.
[32] *Kyoto Protocol*, *supra* note 25. See, Elisabeth DeMarco, Robert Routliffe & Heather Landymore, "Canadian Challenges in Implementing the Kyoto Protocol: A Cause for Harmonization" (2004) Alta Law Rev 209; Philip Barton, "Economic Instruments and the Kyoto Protocol: Can Parliament Implement Emissions Trading without Provincial Co-operation" (2002) Alta Law Rev 417, Joseph E Castrilli, "Legal Authority for Emissions Trading in Canada" in Elizabeth Atkinson, ed, The Legislative Authority to Implement a Domestic Emissions Trading System (Ottawa: National Roundtable on the Environment and the Economy, 1998), and Chris Rolfe, *Turning Down the Heat: Emissions Trading and Canadian Implementation of the Kyoto Protocol* (Vancouver, Canada: West Coast Environmental Law Research Foundation, 1998).
[33] Stewart Elgie, "Kyoto, the Constitution, and Carbon Trading: Waking a Sleeping BNA Bear (or Two)" (2007) 13:1 Rev Const Stud 67; Alastair R Lucas & Jenette Yearsley, "The Constitutionality of Federal Climate Change Legislation" (2011) 4 Sch Public Policy Publ, online: <https://perma.cc/SFY3-5RJX>; Kai D Sheffield, "The Constitutionality of a Federal Emissions Trading Regime" (2014) 4:1 West J Leg Stud.
[34] Nathalie J Chalifour, "Canadian Climate Federalism: Parliament's Ample Constitutional Authority to Legislate GHG Emissions through Regulations, a National Cap and Trade Program, or a National Carbon Tax" (2016) 36 Natl J Const Law 331.

GHGs.[35] Since the federal government has argued that the *GGPPA* is a valid exercise of federal authority under the national concern branch of POGG under s. 91 of the *Constitution Act, 1867*, most recent writing including work related to this thesis jointly authored with Eric M. Adams has been focused on that head of power.[36]

In this thesis, I use a combination of economic and constitutional analysis to argue that legal scholars have been too quick to dismiss the trade and commerce power as a means to uphold federal legislation in relation to GHGs. In each of the two main chapters of this thesis, I begin by framing the economic policy problem at issue. In Chapter 2, I compare the use of production quotas and trade restrictions to increase the value of agricultural products to emissions quotas to reduce the production of GHGs. In Chapter 3, I compare and contrast policies to correct market failures due to pollution and other sources of market failure. When I complement this economic analysis with an analysis of the constitutionality of federal legislative options to deal with GHGs, two key conclusions emerge. First, in Chapter 2, I argue that while the federal government might use tradeable quota to regulate GHGs, the fact that the Constitution does not divide powers over tools but over subjects means that the use of a similar regulatory regime is immaterial to validity. In the case of agricultural supply management, Parliament's authority over interprovincial trade underpinned federal legislation, and the fact that the quota issued were implemented so as to be tradeable within provinces was not germane to the validity of the federal legislation. The federal government would have no similar means to enforce a GHG emissions quota regime as emissions aren't themselves traded: federal authority over trade can stop chickens from leaving Quebec, but the same head of power cannot stop emissions from leaving a smokestack in Alberta.[37] While most scholars agree that the extra-provincial branch of the trade and commerce power is insufficient to sustain a tradeable emissions quota regime, the reasons for which I reach a similar conclusion are novel in the legal literature. My analysis in Chapter 3 supports a different conclusion than most legal scholars have reached when examining the general trade and commerce power.[38] I argue that the substantial parallels between the economic rationale for other federal policies regulating commerce and contracts under the general branch of the trade and commerce power motivate its application to uphold federal GHG emissions policies. The interpretation of the general trade

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[35] Nathalie J Chalifour, "Jurisdictional Wrangling over Climate Policy in the Canadian Federation: Key Issues in the Provincial Constitutional Challenges to Parliament's Greenhouse Gas Pollution Pricing Act" (2019) 50:2 Ott Law Rev 197.
[36] Andrew Leach & Eric M Adams, "Seeing Double: Peace, Order, and Good Government, and the Impact of Federal Greenhouse Gas Emissions Legislation on Provincial Jurisdiction" (2020) 29:1 Const Forum 1; Nathalie J Chalifour, Peter Oliver & Taylor Wormington, "Clarifying the Matter: Modernizing Peace, Order, and Good Government in the Greenhouse Gas Pollution Pricing Act Appeals" (2020) 40:2 NJCL 53.
[37] This does not preclude actions under other federal heads of power to restrict emissions. For example, precedents in *Hydro-Québec*, *supra* note 10, and *Syncrude Canada Ltd v Canada (Attorney General)*, FC 776, test [*Syncrude Canada Ltd. v. Canada (Attorney General)*], each discussed in the next section, saw federal legislation in relation to toxics emissions upheld under the criminal law power.
[38] My analysis has more in common with some legal scholars' examination of the United States Supreme Court's Commerce Clause jurisprudence, in particular Lee, *supra* note 13, who examines species at risk legislation. Blake Hudson, "Commerce in the Commons: A Unified Theory of Natural Capital Regulation under the Commerce Clause" (2011) 35:2 Harv Environ Law Rev 375, also examines the application of the Commerce Clause to depletable natural resources.

and commerce power allows Parliament to regulate when incomplete markets lead to material economic losses and where those market failures can't be addressed by provincial legislation. While courts and legal scholars have driven a false wedge between environmental and economic policy, I argue that this is a false dichotomy. While scholars have generally concluded that parts of an emissions trading regime might be upheld under the general trade and commerce power, I disagree. I find that a regulatory charge, or regulation of GHGs in the form of what we colloquially view as a carbon tax, is most compatible with the existing interpretation of the general branch of the federal power over trade and commerce.

The remainder of this introductory chapter unfolds as follows. First, I provide a brief introduction to the Canadian constitutional division of powers and judicial review for non-lawyers who may read this thesis. Next, I examine the legal literature commenting on the constitutional validity of carbon taxes enacted under the federal government's taxation power in s. 91(3) of the *Constitution Act, 1867*.[39] I then broaden the discussion to more complex regulatory regimes to address GHG emissions, including price- or quantity-based (cap-and-trade programs) and hybrids of the two. Legal scholars have generally suggested the classification of such policies either as criminal law or under the national concern branch of Parliament's power to make laws for the Peace, Order and Good Government (POGG) of Canada. I examine the limits to classification under each of these heads of power. A smaller number of scholars also consider the trade and commerce power assigned in s. 91(2) of the *Constitution Act, 1867*. The remainder of the thesis provides a more detailed examination of the potential for federal GHG policies to be upheld under the extra-provincial and general branches of the trade and commerce power in Chapter 2 and Chapter 3 respectively.

1.2. A Digression on the Division of Powers for Non-Lawyers

The division of powers between federal and provincial governments in our federation is primarily derived from ss. 91 and 92 of the *Constitution Act, 1867*, with some exceptions.[40] Of particular relevance to environmental policy, the *Constitution Act, 1867* assigns to Parliament the authority to make laws with respect to: the regulation of trade and commerce in s. 91(2), the raising of money by any mode or system of taxation in s 91(3), the criminal law in s. 91(27), as well as a residuary power to, "make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces."[41] The federal government

[39] Here and elsewhere, carbon is used as a stand-in for GHGs. This language is common, for example BC's *Carbon Tax Act*, SBC 2008 C 40 applied a charge to combustion emissions on a per-unit GHG basis.
[40] For example, ss. 93 and 95 of the *Constitution Act, 1867* respectively define the nature of shared jurisdiction between the federal Parliament and provincial legislatures with respect to education and agriculture.
[41] *The Constitution Act, 1867*, *supra* note 8, s 91.

also has authority over works and undertakings crossing provincial or international borders as well as over local works and undertakings declared to be in the national interest.[42]

The provinces are allocated substantial legislative authority over local matters, which provides the most important collar on federal authority over GHGs. The enumerated powers in s. 92 include "Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes," in s. 92(3), the establishment of licensing regimes in s. 92(9), local works and undertakings with the exception of those crossing provincial or international borders and other works declared to be in the national interest in s. 92(10), and the imposition of fines or penalties in relation to matters within their jurisdiction in s 92(15).[43] While these grants of authority provide the basis for some types of regulation of GHGs, the exclusive provincial jurisdiction over property and civil rights in the province in s. 92(13) as well as the residuary authority over "Generally all Matters of a merely local or private Nature in the Province," in s. 92(16) which substantially restrict the reach of the federal government.[44] Section 92A, added via the 1982 amendments to the Constitution, assigns exclusive authority to legislate in relation to natural resource management and electricity generation, as well as shared jurisdiction to legislate in relation to inter-provincial trade and taxation of resources.[45]

The division of powers is not a mechanical exercise, but a complex and evolving task of constitutional interpretation.[46] In Canada, the interpretation of the *Constitution Act, 1867* is a morass of metaphor.[47] John Burrows describes constitutions as verbs, acting to bring us together, to position us in space and time, and also exercising authority over our lives and our governments.[48] This framing reflects Canadian constitutional interpretation well since, rather than an originalist approach, our Constitution has been treated almost as an animate object, guided by the metaphor of the *living tree* rooted in the past but able to grow to "accommodate and address the realities of modern life."[49] The economic policy branch of the *living tree*

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[42] Section 91(29) of *The Constitution Act, 1867*, *supra* note 8, assigns to Parliament the exclusive authority to make laws in relation to "Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces." Sections 92(10)(a) and 92(10)(c) except from provincial jurisdiction "Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province," and "Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces," respectively.
[43] *Ibid*, s 92.
[44] *Ibid*.
[45] *Ibid*, s 92A. With the exception of the authority to levy indirect taxes and legislate in relation to trade in natural resources, it is not clear that much was added to the exclusive legislative authority of the provinces through the resource amendment. The existing authority to legislate in relation to works and undertakings (s. 92[10]) and property and civil rights (s. 92[13]) as well as the residuary power in s. 92(16) would likely underpin any contemplated provincial legislation in relation to natural resources or electricity generation within the province absent the resource amendment. See, for example, the reasons of Chief Justice Laskin in *Central Canada Potash Co Ltd et al v Government of Saskatchewan*, [1979] 1 SCR 42 [*Potash*] at 74, who holds that the management of natural resources would be, ordinarily, within the legislative ambit of the provinces.
[46] Eric M Adams, "Judging the Limits of Cooperative Federalism" (2016) 76:1 SCLR 27 at 31–32.
[47] See *ibid* at 28–30. Adams describes constitutional metaphors as "a compass to assist in reading the map of constitutional text."
[48] John Borrows, "(Ab)Originalism and Canada's Constitution" (2012) 58:1 SCLR 2d 351.
[49] *Reference re Same-Sex Marriage*, [2004] 3 SCR 698 [*Same-Sex Marriage Reference*] at para 22. See also Eric M Adams, "Canadian Constitutional Interpretation" in *The fundamentals of statutory interpretation* (Toronto, Ontario, Canada: LexisNexis Canada Inc, 2018) 129 at 142.

has been shaped and pruned by both political priorities such as prohibition and the regulation of oil and grain trade as well as by events such as the World Wars, the Great Depression, the oil and inflation crises of the 1970s, and the global financial crisis of 2008-09. The analysis which follows in this thesis draws from judicial review of legislation enacted to address each of these events and, through those decisions and the scholarly interpretation of them, I seek to inform the limits on federal GHG policy.

Like all aspects of Canadian constitutional interpretation, the process by which legislation is tested for validity - the characterization and classification of laws – has evolved over Canadian history. The classification of laws in Canada relies on a *pith and substance* analysis which identifies the purpose of the legislation along with its legal and practical effects.[50] The text of the Constitution, in particular its reliance on exclusive authority, posits an allocation of legislative jurisdiction into *watertight compartments*, with no overlap between the powers of federal and provincial governments.[51] On a literal reading of the text of the Constitution, subjects are either exclusively provincial or federal, not both.[52] Early efforts at the classification of laws in the event of overlapping heads of power relied on a determination of which interest, provincial or federal, was more important.[53] Our modern approach is more consistent with overlapping legislative jurisdiction: having identified the impugned legislation's *pith and substance*, the next step is to ask whether it is within the powers of the enacting government.[54] Simply put, we are asking what the legislation does and whether the enacting level of government has the power to do it.[55] If it is determined that statutory provisions are in pith and substance in relation to matters within the legislative ambit of the enacting order of government, it is generally the case that this ends the inquiry.[56] It is not customary to consider whether the legislation fits better under the heads of power of the other level of government.[57]

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[50] *re Securities Act*, *supra* note 12 at paras 63–4.
[51] *Labour Conventions*, *supra* note 11 at 684.
[52] *Ibid* at 109. The watertight compartments view informed decisions to overturn much of Prime Minister R.B. Bennett's "New Deal" legislation. Lord Atkin wrote that, 'while the ship of state now sails on larger ventures and into foreign waters she still retains the watertight compartments which are an essential part of her original structure.' This literal interpretation was not well-received by legal scholars of the era. Writing about these decisions, W P M Kennedy, "The British North America Act: Past and Future" (1937) 15:6 Can Bar Rev at 399, wrote that "in times of sober poverty, sober financial chaos, sober unemployment or sober exploitation, [the federal general power] cannot be used, for these, though in fact national in the totality of their incidents, must not be allowed to leave their legal water-tight provincial compartments; the social lines must not obliterate the legal lines of jurisdiction - at least this is the law, and it killeth."
[53] W R Lederman, "Classification of Laws and the British North America Act" in *Continuing Canadian Constitutional Dilemmas* (Toronto: Butterworths, 1981) 236 at 190–91.
[54] *re Securities Act*, *supra* note 12 at para 65. The Court holds that "if the main thrust of the legislation is properly classified as falling under a head of power assigned to the adopting government, the legislation is intra vires and valid."
[55] Katherine Swinton, *The Supreme Court and Canadian federalism: the Laskin-Dickson years* (Toronto, Ontario: Carswell, 1990) at 26–31.
[56] *Whitbread v Walley*, [1990] 3 SCR 1273 [*Whitbread v. Walley*]. See also Jean Leclair, "The Supreme Court of Canada's Understanding of Federalism: Efficiency at the Expense of Diversity" (2002) 28 Queens Law J 411 at 416–417. The classification analysis in the recently-released decision in *Reference re Genetic Non-Discrimination Act*, 2020 Supreme Court of Canada [*Reference re Genetic Non-Discrimination Act*] at para 66, supports this view. The Court considers only whether the impugned legislation is a valid exercise of criminal law power, not whether it is also legislation that falls into provincial jurisdiction.
[57] This contrasts with earlier jurisprudence which took a "watertight compartments" approach to federalism, where there was seen to be no overlap between the provincial and federal heads of power. See, for example *Reference re Firearms Act (Can)*, [2000] 1 SCR 783 [*Firearms Reference*] at para 146, or *re Securities Act*, *supra* note 12 at para 56.

There are, however, situations in which courts must examine whether legislation encroaches too deeply into the jurisdiction of the other level of government. First, when considering the national concern branch of POGG, the *Crown Zellerbach* test for federal jurisdiction explicitly considers whether the legislation is in relation to a matter distinct from those which would fall into provincial jurisdiction and whether federal legislation would "have a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the [*Constitution Act, 1867*]."[58] This is the appropriate approach given the residuary nature of the POGG power, which is deferential to those matters enumerated as exclusive heads of power in ss. 91 and 92.[59] In Chapter 3 of this thesis, I argue that an analogous approach has been adopted by the courts in considering the reach of the federal trade and commerce power. Courts may also examine whether the impugned legislation constitutes a *colourable* invasion of the jurisdiction of another level of government. In such a case, a law which may appear valid may still be struck down if the courts deem that it involves an attempt to do indirectly what the enacting level of government cannot do directly.[60]

The heads of power enumerated in ss. 91 and 92 allow for significant overlap and many subjects which are important to us today, including the environment and climate change, were omitted entirely from the *Constitution Act, 1867*. Canadian courts have adopted a variety of doctrines and techniques for dealing with both the overlapping and non-exhaustive division of enumerated powers in the Constitution. The three most important of these with respect to understanding the federal authority to regulate in relation to GHGs are the doctrine of *mutual modification*, the *double aspect* doctrine, and federal paramountcy. These are briefly introduced in turn below.

From Canada's earliest division of powers cases, our courts have held that the enumerated powers of the federal and provincial governments must not be read in isolation but with reference to each other via the doctrine of *mutual modification*.[61] In *Parsons*, the Judicial Committee of the Privy Council held that ss. 91 and 92 of the *Constitution Act, 1867* must "be read together, and the language of one interpreted and, where necessary, modified by that of the other, so as to reconcile the respective powers they contain and give effect to all of them."[62] For example, the federal power over trade and commerce in s. 91 (2) cannot be interpreted so as to negate the provincial power over property and civil rights in s. 92 (13).[63] Rather, as

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[58] *Crown Zellerbach*, *supra* note 10 at 432.
[59] Dale Gibson, "Measuring National Dimensions" (1976) 7:1 Manit Law J 15 at 16–17.
[60] Peter W Hogg, *Constitutional Law of Canada*, 2018 student edition ed (Toronto, Ontario: Carswell/Thomson Reuters, 2018) at 15-20-15–21. See, for example, *Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 SCR 297 [*Churchill*], or *R v Morgentaler*, [1993] 3 SCR 463 [*R. v. Morgentaler*]. While the colourability doctrine was not invoked in the latter case, it is discussed at length.
[61] Adams, *supra* note 46 at 31.
[62] *The Citizens Insurance Company v Parsons*, [1881] 7 AC 96 (PC) [*Parsons*] at 96.
[63] Lederman, *supra* note 53 at 192–93.

Adams writes, "interpretations of particular heads of power came to presuppose the continued and essential existence of the other heads of power in order to protect an essential balance of both federal and provincial power."[64] The degree to which federal climate change policies can be enacted while maintaining the balance of federalism is the crux of the issue addressed in this thesis.

No matter how the enumerated powers are constrained through *mutual modification*, they will overlap.[65] There will be legislation which addresses subjects enumerated in both federal and provincial powers: federal legislative authority over banking and bankruptcy, for example, will necessarily overlap with provincial control over property and civil rights in the provinces.[66] Federal and provincial legislation in relation to the same subject matter can be simultaneously valid, but with certain caveats. The *double aspect doctrine* allows "that a federal law may govern a matter from one perspective and a provincial law from another. The federal law pursues an objective that […] falls within Parliament's jurisdiction, while the provincial law pursues a different objective that falls within provincial jurisdiction."[67] A useful environmental policy example of this doctrine is seen in *Spraytech*, in which the Supreme Court allowed that municipal, provincial, and federal laws governing pesticide use, manufacture, and local application were jointly valid because each was a valid exercise of the jurisdiction of the enacting level of government.[68]

There are limits to this collaborative approach. Where joint compliance with federal and provincial laws is not possible, or where provincial laws are deemed to frustrate a federal purpose, federal laws are *paramount* and provincial laws would not be operative to the extent of the conflict.[69] Courts have generally applied a narrow definition of paramountcy in modern-era cases.[70] For example, the Supreme Court decision in *Redwater* clarified that "valid provincial legislation of general application continues to apply in bankruptcy," but that federal bankruptcy legislation which was specifically in conflict with provincial law

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[64] Adams, *supra* note 46 at 31.
[65] Lederman, *supra* note 53 at 193.
[66] The recent case in *Orphan Well Association v Grant Thornton Ltd*, [2019] 5 SCC [*Redwater*] pitted provincial authority over natural resource development, licensing regimes, and property and civil rights against federal bankruptcy provisions.
[67] *re Securities Act*, *supra* note 12 at para 66. See also *Canadian Western Bank v Alberta*, [2007] 2 SCR 3 [*Canadian Western Bank*] at para 30.
[68] *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, [2001] 2 SCR 241 [*Spraytech*].
[69] See *Redwater*, *supra* note 66 at paras 183 and 232. Note that paramountcy does not impact the validity of provincial legislation, only its operation. The majority decision holds at paragraph 64 in the decision that "valid provincial legislation of general application continues to apply in bankruptcy until Parliament legislates pursuant to its exclusive jurisdiction in relation to bankruptcy and insolvency. At that point, the provincial law becomes inoperative to the extent of the conflict." To support this interpretation, Wagner C.J.C. cites *Husky Oil Operations Ltd v Minister of National Revenue*, [1995] 3 SCR 453 [*Husky Oil*] at para 3.
[70] Consider that, in *Grand Trunk Railway Company of Canada v Attorney-General of Canada*, [1907] AC 65 (PC) [*Grand Trunk*] at 68 Lord Dunedin held that "there can be a domain in which provincial and Dominion legislation may overlap, in which case neither legislation will be *ultra vires*, if the field is clear; and, secondly, that if the field is not clear, and in such a domain the two legislations meet, then the Dominion legislation must prevail." In this case, Lord Dunedin was summarizing the findings of the Pricy Council in *Tennant v Union Bank of Canada*, [1894] AC 31 (PC) [*Tennant v Union Bank of Canada*], and *Attorney General for Ontario v Attorney General for the Dominion*, [1896] AC 348 (PC) [*Local Prohibition*]. The modern interpretation of paramountcy arguably dates from *Multiple Access Ltd v McCutcheon*, [1982] 2 RCS 161 [*Multiple Access*] at 191, in which the majority opinion of Dickson J. holds that ", there would seem to be no good reasons to speak of paramountcy and preclusion except where there is actual conflict in operation as where one enactment says 'yes' and the other says 'no'; 'the same citizens are being told to do inconsistent things'; compliance with one is defiance of the other."

would prevail and the provincial law would be inoperative in that instance.[71] The modern definition of paramountcy holds that provincial laws would only be rendered inoperative in the event of either an operational conflict, where compliance with both federal and provincial laws is impossible, or where an otherwise valid provincial law frustrates a federal purpose.[72]

In addition to cases where provincial and federal powers overlap, courts also face the challenge of determining authority where legislation is best characterized as being in relation to a subject not explicitly enumerated in ss. 91 or 92 of the *Constitution Act, 1867*. This is particularly important in the context of this thesis, since neither climate change nor the environment more generally are contemplated in the original text of the Constitution. The division of powers is exhaustive in that subjects not specifically assigned to the federal or provincial governments will necessarily be captured by one of the two residuary clauses.[73] Section 92(16) specifies that provinces may exclusively make laws in relation to "generally all matters of a merely local or private nature in the province."[74] Similarly, the federal government's general POGG power allows the federal government to legislate in relation to subject matters not assigned to the provinces. POGG is not a catch-all for federal legislation, but a residual power available under only very specific circumstances.[75] Constitutional interpretation has defined the federal POGG power to allow temporary legislation in the case of a matter of national emergency and/or where a particular subject matter is not captured in the enumerated powers or in cases where "courts are persuaded that a subject matter of legislation has attained 'national dimensions', even where the same subject has an aspect which is within provincial competence."[76] I provide more substantial discussion of the POGG power in the context of climate change in Section 1.4.2 of this chapter, and in related work with Eric M. Adams.[77]

Finally, it is important to note that more recently, Canadian courts have embraced the idea of *cooperative federalism*.[78] This concept posits that federal and provincial governments might seek "cooperative solutions that meet the needs of the country as a whole as well as its constituent parts."[79] The treatment of cooperative federalism has differed over time but, as Adams argues, in some cases it has been treated as "a substantive constitutional obligation: to hold governments to a constitutional duty to act cooperatively," a

[71] *Redwater*, *supra* note 66 at para 64.
[72] *Ibid* at para 65. The majority opinion of Chief Justice Wagner cites *Multiple Access*, *supra* note 70 at 191, and *Canadian Western Bank*, *supra* note 67 at para 73.
[73] Marshall Rothstein, "Checks and Balances in Constitutional Interpretation Law Review Lecture" (2016) 79:1 Sask Law Rev 1 at 4.
[74] *The Constitution Act, 1867*, *supra* note 8, s 92.
[75] Gibson, *supra* note 59 at 30.
[76] *Ibid*.
[77] Leach & Adams, *supra* note 36.
[78] See, generally, Adams, *supra* note 46.
[79] *re Securities Act*, *supra* note 12 at para 132. Adams, *supra* note 46 at 34–35, argues that cooperative federalism is, itself, a metaphor.

characterization which he argues is misguided.[80] Any federal or provincial regime to reduce GHG emissions will impact the legislative jurisdiction of other levels of government, and so the degree to which courts read into the division of powers an obligation for cooperative federalism could determine the constitutional fate of climate change policies. I would argue, in line with Lederman, that any idea of cooperative federalism must have, as its foundation, a clear division of powers, and that it cannot be a substitute for such a clear division.[81] While a spirit of cooperative federalism might be desirable, as the Supreme Court held in *Re: Securities Act*, this cannot justify overriding the fundamental balance of our federation.[82]

To recap, in characterizing and classifying any proposed legislation for the purpose of determining its validity, the primary test asks whether the legislation, in purpose and effect, can be supported by a head of power specifically assigned to the enacting level of government in ss. 91 or 92 of the *Constitution Act, 1867*. In the case of federal legislation, if it cannot be supported by a head of power enumerated in s. 91 and the legislation is not in relation to a matter specifically assigned to the provinces in s. 92, it may be supported under the POGG power. Valid federal legislation can co-exist with valid provincial legislation, so long as they each have an anchor in their respective jurisdictions, and provincial legislation would only be rendered inoperative, but not invalid, in the event of an explicit conflict. Finally, it is important to emphasize (and occasionally frustrating to economists) that there is no deference to effective policy in determining constitutional validity. As the Court held in the *Firearms Reference*, "efficaciousness is not relevant to the Court's division of powers analysis."[83]

1.3. The Federal Power to Tax GHG Emissions

Carbon taxes are the most straightforward of emissions pricing regimes.[84] The economic premise of a carbon tax is that, as the implied cost of emissions increases, the quantity of emissions will decrease. There is strong evidence, for example from British Columbia's use of a carbon tax, that emissions decrease relative to what would otherwise occur after carbon taxes are implemented.[85]

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[80] Adams, *supra* note 46 at 39. Adams cites the dissent in *Quebec (Attorney General) v Canada (Attorney General)*, [2015] 1 SCR 693 [*Quebec v. Canada (Long-gun Registry)*] at paras 153–54, as one example of this interpretation. He writes that dissent suggests that "a cooperative scheme from which both the federal and provincial governments benefit cannot be dismantled unilaterally by one of the parties without taking the impact of such a decision on its partner's heads of power into account," which he argues is inconsistent with the division of powers in the Constitution.
[81] W R Lederman, "Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation" (1976) Alta Law Rev 34 at 46.
[82] *re Securities Act*, *supra* note 12 at para 62. The decision holds that, "notwithstanding the Court's promotion of cooperative and flexible federalism, the constitutional boundaries that underlie the division of powers must be respected."
[83] *Firearms Reference*, *supra* note 57 at para 18.
[84] Carbon taxes may be direct or indirect. A direct carbon tax applies on the basis of GHG emissions measured through monitoring or via engineering estimates. Indirect carbon prices are charged on fuels with the tax set so that it imposes the desired price per unit of eventual GHG emissions from combustion of the fuel. For the underlying economic analysis of this, see Tom H Tietenberg, "Reflections—Carbon Pricing in Practice" (2013) 7:2 Rev Environ Econ Policy 313 at 314. For an example of fuel charges, see Table 1 of Schedule 2 of the *GGPPA*, *supra* note 29.
[85] Brian Murray & Nicholas Rivers, "British Columbia's revenue-neutral carbon tax: A review of the latest 'grand experiment' in environmental policy" (2015) 86 Energy Policy 674.

Legal scholars generally agree that the federal government has the power to implement a carbon tax under s. 91(3) of the *Constitution Act, 1867*. Peter W. Hogg is perhaps most conclusive, writing that if Parliament chose to reduce emissions through levying a carbon tax either on the production or the consumption of energy, "it would have the power to do so."[86] Other scholars agree that the federal authority to implement a carbon emissions tax is convincing.[87] The main limitation to this authority is that a carbon tax enacted with a primary purpose of reducing GHG emissions likely would not fit within Parliament's taxation power.

As Martin Olszynski writes, "it is well settled that the federal government could pass a straightforward carbon tax pursuant to section 91(3) of [*The Constitution Act, 1867*] so long as the purpose of the scheme was primarily directed at the generation of revenue."[88] The validity of a federal carbon tax would not flow from its form, but from its intended function which would inform how the legal and practical effects of the legislation are characterized by the courts.[89] Nathalie Chalifour allows that a carbon tax could be characterized as a constitutional tax meant to raise revenue, but she is not confident that this would be feasible if the policy were being enacted as a means to reduce GHG emissions.[90] The five-step test in *Westbank* provides a mechanism to differentiate constitutional taxes from levies, user fees, and regulatory charges. The *Westbank* tests asks whether an impugned charge is: (1) compulsory and enforceable by law; (2) imposed under the authority of the legislature; (3) levied by a public body; (4) intended for a public purpose; and (5) unconnected to any form of a regulatory scheme.[91] Chalifour applies the *Westbank* test to carbon taxes and finds that the fifth criterion would be most problematic in that a carbon tax might well be seen as part of a regulatory regime to reduce GHGs.[92]

The *Westbank* decision adds a set of indicia to determine whether a charge is part of a regulatory regime, which should include: (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.[93] Given these indicia, it is likely that

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[86] Peter W Hogg, "Constitutional Authority Over Greenhouse Gas Emissions" (2009) 46 Alta Law Rev 507 at 518.
[87] Chris Rolfe & Linda Nowlan, *Economic Instruments and the Environment: Selected Legal Issues*, Ann Hillyer, ed. (Vancouver: West Coast Environmental Law Research Foundation, 1993), write that "an energy tax or a carbon tax applied either on the retail sale or production and import of fossil fuels almost undoubtedly would be valid federal legislation," subject to caveats that the tax not be an attempt to invade provincial jurisdiction. DeMarco, Routliffe, & Landymore, *supra* note 32 raise the federal power to tax, but only in the context of the potential characterization of an emissions trading regime as a tax. .
[88] Martin Olszynski, "What is the Concern with Recognizing GHGs as a Matter of National Concern?", (13 February 2019), online: *ABLAWG* <https://ablawg.ca/2019/02/13/what-is-the-concern-with-recognizing-ghgs-as-a-matter-of-national-concern/>.
[89] Nathalie J Chalifour, "Making Federalism Work for Climate Change: Canada's Division of Powers Over Carbon Taxes" (2008) 22:2 Natl J Const Law 119 at 149–51.
[90] At least with respect to current litigation with respect to carbon pricing, the extrinsic evidence would strongly cut against any federal claim that GHG pricing was primarily being enacted for the purposes of raising revenue.
[91] *Westbank First Nation v British Columbia Hydro and Power Authority*, [1999] 3 SCR 134 [*Westbank*] at para 21.
[92] Chalifour, "Canadian Climate Federalism", *supra* note 7 at 28.
[93] *Westbank*, *supra* note 91 at para 24.

a federal carbon tax would be determined to be a regulatory charge, not a tax, on the assumption that its intent and legal effects would primarily be to change behavior, despite the fact that it raises revenues.[94]

Shi-Ling Hsu and Robin Elliot agree that the requirement that a tax be primarily focused on raising revenues limits the federal government's powers to enact a carbon tax, and suggest that this might imperil carbon taxes implemented so as to be *revenue neutral*.[95] A *revenue neutral* carbon tax is one which does not increase the total size of government over-and-above that which would otherwise obtain, which implies that revenues from carbon pricing are used to offset other government revenues.[96] I do not see this as a barrier to classification under s. 91(3) per se, since a government could decide that it would prefer to tax GHGs instead of income for the purposes of generating government revenue. In such a case, the carbon tax could still have as its primary purpose the raising of revenue, with ancillary benefits in terms of both the reduction of emissions and overall improvements to the efficiency of the tax system.[97] So, while I agree that a constitutional carbon tax would have to be enacted to raise revenue, this does not imply that an overall increase in the size of government is a necessary condition for a carbon tax to be upheld under s. 91(3) of the Constitution.

Another material concern with respect to carbon taxes enacted under Parliament's taxation power relates to applicability. Parliament's taxation power is restricted by s. 125 of the *Constitution Act,* 1867, which stipulates that Parliament's power to tax does not extend to provincial property. Scholars generally agree that s. 125 would limit the applicability of a carbon tax to emissions from provincial Crown corporations which are prevalent in the electricity sector.[98] This would mean, for example, that a valid federal carbon tax would not apply to emissions from SaskPower or NB Power, which each operate coal and natural gas power plants, but that it would apply to similar merchant power plants in Alberta. In *Re: Exported Natural Gas Tax*, the Supreme Court determined that a federal tax on natural gas did not apply to provincially-owned

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[94] Chalifour, "Canadian Climate Federalism", *supra* note 7 at 29–30. Both Grant Bishop, "Living Tree or Invasive Species? Critical Questions for the Constitutionality of Federal Carbon Pricing", (December 2019), online: *CD Howe Institute* <https://perma.cc/JV7J-NZ7S> at 6, and Sujit Choudhry, "Constitutional Law and the Politics of Carbon Pricing in Canada", (November 2019), online: *IRPP* <https://perma.cc/ZN6M-GT7X> at 12, argue that the federal GGPPA could not be upheld as an exercise of the taxation power because of its obvious regulatory intent.

[95] Shi-Ling Hsu & Robin Elliot, "Regulating Greenhouse Gases in Canada: Constitutional and Policy Dimensions" (2009) 54:3 McGill LJ 463 at 489.

[96] The original *BC Carbon Tax Act,* SBC 2008, c 40 defined a revenue neutral carbon tax as one implemented such that, "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." See online, *Government of British Columbia*: <https://perma.cc/NZ4E-YMCZ>.

[97] The reduction in both pollution and the marginal cost of public funds that may result from revenue-neutral environmental taxes is known as the double dividend. See, for example Lawrence H Goulder, "Environmental taxation and the double dividend: A reader's guide" (1995) 2:2 Int Tax Public Finance 157.

[98] Hogg, "Constitutional Authority", *supra* note 86 at 518. Also see *The Constitution Act, 1867*, *supra* note 8, s 125 which holds that "No Lands or Property belonging to Canada or any Province shall be liable to Taxation." There is also some question as to whether a tax would apply to provincially-owned resources. See, for example, Barton, *supra* note 32 at 444. Barton cites *Re: Exported Natural Gas Tax*, [1982] 1 SCR 1004 [*Re: Exported Natural Gas Tax*], but the contrived fact pattern of that reference case suggests that provincial ownership of resources beyond the well-head would restrict the application of a carbon tax, but this is not generally the case as resources are severed from provincial ownership when they are produced. For more extensive discussion of this point, see Nigel Bankes & Alastair R Lucas, "Kyoto, Constitutional Law and Alberta's Proposals" (2004) Alta Law Rev 355 at 379.

natural gas, although the contrived set of facts in that reference case are such that the precedent is of narrow application.[99] In Re: *Exported Natural Gas*, the challenge applied to gas that remained in provincial ownership after production, and the precedent does not imply that s. 125 would prevent the application of a federal carbon tax to emissions related to provincially-owned natural resources. On the contrary, Nigel Bankes and Alastair Lucas conclude that "any provincial ownership interest in a resource will ordinarily be lost from the moment of severance." Accordingly, s. 125 "will not likely offer protection from a carefully crafted carbon tax that focuses on producers or emitters."[100]

In summary, while carbon taxes are felt by some to be an obvious extension of the federal government's taxation powers, the requirement for a primary connection to the raising of revenue means that a broad-based federal carbon tax grounded in s. 91(3) of the *Constitution Act, 1867* is far from clear. Further, a federal carbon tax underpinned by the taxation power would not apply to a wide range of provincial undertakings, some of which generate significant GHG emissions. This is not quite the end of the story for carbon taxes: scholars generally agree that a regulatory charge on emissions with many of the properties of a prototypical carbon tax could be grounded in the national concern branch of the POGG power, the trade and commerce power in s. 91 (2) or perhaps even the criminal law power in s. 91(27).[101] Since the arguments for federal jurisdiction to enact GHG regulation in the form of taxation apply in general to broader regulatory regimes, they are discussed in that context below.

1.4. The Federal Authority to Implement Emissions Pricing Programs

A broad set of regulatory regimes to reduce GHGs including either carbon budget legislation or cap-and-trade programs can, in many cases, can create similar economic incentives to a carbon tax.[102] Where a carbon tax sets the price of emissions and allows the market to determine the quantity of emissions produced, a cap-and-trade or carbon budget system allocates emissions allowances into the market and, by allowing firms to exchange, bank, and, in some cases, borrow allowances, the market establishes a price for the right to emit over time.[103] While they may result in similar economic incentives, the federal power to enact more complex regimes to reduce emissions is more speculative than that for carbon taxes.[104] While the federal

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[99] *Re: Exported Natural Gas Tax*, *supra* note 98. For a discussion of the contrived set of facts, see Troy Riddell & F L Morton, "Government Use of Strategic Litigation: The Alberta Exported Gas Tax Reference" (2004) 34:3 Am Rev Can Stud 485.
[100] Bankes & Lucas, *supra* note 98 at 382.
[101] The precedent in *Re: Exported Natural Gas Tax*, *supra* note 98, is valuable in this context since the Court was unanimous in the view that, had the impugned charge been imposed with either an intent to change behaviour or as a trade tariff, it would not have been affected by s. 125 of the Constitution.
[102] For recent discussion of carbon budget legislation in the Canadian context, see Andrew Gage et al, "A New Canadian Climate Accountability Act: Building the legal foundation to achieve net-zero emissions by 2050" 44. A more extensive discussion of the economics of such regimes is provided in Chapter 4 of this thesis.
[103] A general treatment of emissions trading programs is available in any environmental economics textbook, for example: Tom Tietenberg & Lynne Lewis, *Natural Resource Economics: The Essentials* (New York: Routledge Taylor & Francis Group, 2019).
[104] Positing a sharp divide between emissions trading programs and carbon taxes makes black and white what, in reality, tends to be shades of grey. Most policies implemented to date are hybrids of the two. See, for example, discussion in Tietenberg, *supra* note 84.

power to enact taxes is enumerated in s. 91(3) of the *Constitution Act, 1867,* there is no explicit federal power to enact legislation with respect to the environment and/or for the purposes of the mitigation of climate change.[105] And, the more regulatory is the approach, the more federal policy may encroach unduly on the domain of the provinces.

Scholars generally see two promising avenues for classification of more complex federal regulatory regimes for GHG emissions: the criminal law power in s. 91(27) of the *Constitution Act, 1867* or the national concern branch of Parliament's general or POGG power. The arguments that the federal government could enact valid legislation to price GHGs under each of these heads of power is considered in turn below. Others have advanced the potential that a complex federal regime could be upheld under the trade and commerce power in s. 91(2) of the *Constitution Act, 1867*, although with significant caveats. The trade and commerce power is considered in greater depth in the remaining two chapters of this thesis.

1.4.1 The Criminal Law Power

Legal opinion on the potential application of Parliament's criminal law power to environmental management is anchored by the Supreme Court's decision to uphold the validity of the *Canadian Environmental Protection Act* (CEPA) in *Hydro-Québec.*[106] In *Hydro-Québec*, a majority of the Supreme Court held that the protection of the environment was a legitimate public purpose and that as *CEPA* combined this purpose with both prohibitions and penalties, it was valid criminal law.[107] Writing for the majority, La Forest J. held that, "the stewardship of the environment is a fundamental value of our society and that Parliament may use its criminal law power to underline that value."[108] While the decision was divided on other aspects of the case, the Court was unanimous in finding that the protection of the environment is a legitimate basis for criminal law.[109] *Hydro-Québec* was decided with respect to prohibitions on toxic pollutant releases, and GHGs were added to the list of toxic substances regulated under *CEPA* in 2005, opening the door to the use of similar prohibitions to combat climate change.[110]

The definition of what constitutes criminal law is broad. In addition to having a public purpose, valid criminal law must create a prohibition, and the prohibition must be backed by a penal sanction.[111] The

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[105] See *Oldman River*, *supra* note 9 at 63, or for more recent interpretation, see the decision of Strathy J.A. in the *Ontario GGPPA Reference*, *supra* note 30 at para 81.
[106] *Canadian Environmental Protection Act*, SC 1999 C 33 [*CEPA*]; *Hydro-Québec*, *supra* note 10.
[107] Legal scholars, in particular Jean Leclair, "Aperçu des Virtualités de la Compétence Fédérale en Droit Criminel dans le Contexte de la Protection de l'Environnement" (1996) 27 Rev Gen Droit 137, argued that the judicial interpretation of the criminal law power should expand to accompdate complex regulatory regimes for environmental damage.
[108] *Hydro-Québec*, *supra* note 10 at 297.
[109] Although they dissented, the reasons of Lamer C.J. and Iacobucci J. in *ibid* at para 43, allow that "the protection of the environment is itself a legitimate basis for criminal legislation."
[110] Hogg, "Constitutional Authority", *supra* note 86 at 513. See also Order in Council SOR/2005-345 November 21, 2005 adding the six *Kyoto Protocol* GHGs to Schedule 1 of *CEPA*, *supra* note 106.
[111] *Reference re Validity of Section 5 (a) Dairy Industry Act*, [1949] SCR 50 [*Margarine Reference*].

Supreme Court has allowed that regulatory means of achieving a targeted prohibition are permissible under the criminal law, even if it is a "circuitous path" to this end.[112] Optimism regarding the use of the criminal law to underpin complex regulatory regimes for GHG emissions increased with the Federal Court of Appeal decision in *Syncrude* in which the Court upheld renewable fuel content standards under *CEPA* as a valid exercise of the criminal law power.[113] *Syncrude* is notable not only because the standards were intended to reduce GHGs, but also because the impugned regulatory regime allowed for trading of compliance credits and did not include individual prohibitions on emissions.[114] While there is no dispute that Parliament can validly enact criminal law to protect the environment, the question of whether a program as broad or as flexible as a national GHG emissions trading regime or a regulatory charge on carbon emissions could be upheld under the federal criminal law power remains a point of disagreement among legal scholars.

The first source of disagreement is that which split the court in *Hydro-Québec*: the distinction between criminal law and regulation.[115] Scholars following Hogg are confident in federal jurisdiction to regulate GHGs via the criminal law power given that "the Court [in *Hydro-Québec*] accepted that a sophisticated administrative scheme could be a criminal law if it is backed by a prohibition and a penalty."[116] Others are less convinced: DeMarco, Routliffe and Landymore, for example, find the decision in *Hydro-Québec* to be insufficient support for an emissions trading regime, arguing that the lack of a clear prohibition militates against such a regime's validity under the criminal law power.[117] Likewise, Hsu and Elliot find that it would be difficult for a court, "as a matter of both logic and principle," to label a cap-and-trade or, in particular, a hybrid or output-based pricing regime as prohibiting an activity.[118] They characterize an emissions-trading regime as one which would permit companies to "buy and sell the right to cause the very environmental harm that the regime aims to control."[119] Sheffield reaches a similar conclusion, finding that "the ability of an emissions trading scheme to achieve its goal will not save it if it does not meet the formalistic requirements of a criminal law."[120]

These concerns are at least partially allayed by the Federal Court of Appeal decision in *Syncrude* which held that so long as an aggregate prohibition was in place, the fact that the law allowed for tradeable

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[112] *RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199 [*RJR-MacDonald*] at para 51.
[113] *Syncrude Canada Ltd v Canada (Attorney General)*, 2016 FCA 160 [*Syncrude*].
[114] Just as the decision in *Syncrude*, *ibid*, reinforced the applicability of criminal law in the context of the environment, more recent decisions in *Reference re Assisted Human Reproduction Act*, [2010] 3 SCR 457 [*Reference re Assisted Human Reproduction Act*], and *Reference re Genetic Non-Discrimination Act*, [2020] SCC 17 [*Re: Genetic Non-Discrimination Act*], have applied broad definitions of a legitimate public purpose under the criminal law.
[115] Castrilli, *supra* note 32 at 13.
[116] Hogg, "Constitutional Authority", *supra* note 86 at 513.
[117] DeMarco, Routliffe, & Landymore, *supra* note 32 at 233.
[118] Hsu & Elliot, *supra* note 95 at 492.
[119] *Ibid*.
[120] Sheffield, *supra* note 33 at 9.

compliance credits was not a barrier to upholding legislation under the criminal law.[121] Chalifour relies on the precedent in *Syncrude* to conclude that a cap-and-trade regime for GHGs could fit within the criminal law power.[122] A prototypical cap-and-trade program would still have an aggregate prohibition (the 'cap'), so Chalifour's insight does not help evaluate whether the criminal authority would extend to hybrid systems like the *GGPPA* or to other price-based systems where no aggregate prohibition is in place.[123] Even with the *Syncrude* judgement in mind, Hogg's expansive view of the potential role for criminal law seems too sweeping. Hsu and Elliot's main contention that the *Hydro-Québec* precedent does not give Parliament a free hand is surely right.[124]

Another factor likely to constrain the reach of the federal government's use of the criminal law to regulate GHG emissions is the degree to which such action would interfere with provincial jurisdiction. In *Hydro-Québec*, the majority opinion of La Forest J. concludes that Parliament may enact prohibitions with respect to what it deems to be toxic substances, but also identified the potential for such prohibitions to be too broadly-aimed at elements of provincial jurisdiction.[125] The dissent also worried that, if environmental protection were swept into the criminal law, there would be little scope remaining for provincial regulatory jurisdiction.[126] Both the majority and the dissent also acknowledge the reasons of La Forest J. in *RJR-MacDonald* which held that "if a given piece of federal legislation contains [a prohibition, a penal sanction and is directed at a legitimate public purpose], and if that legislation is not otherwise a 'colourable' intrusion upon provincial jurisdiction**,** then it is valid as criminal law."[127] There is certainly a plausible scenario in which federal GHG policies with a focus on a major emitting sector such as the oil sands or coal-fired power could tread too deeply into exclusive provincial jurisdiction to manage natural resources and electricity under s. 92A(1) and thus be found invalid.[128]

A related issue which is likely to permeate climate change policy discussion is whether it is tenable for the federal government to argue that regulatory regimes like *CEPA* and/or future GHG policies are valid as

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[121] *Syncrude*, *supra* note 113 at para 77. Rennie J. A. writes that, "[the] argument that the regulation is invalid because it is not a blanket prohibition has no doctrinal support." Under the regulation, firms which over-complied with the regulation (i.e. blended more renewable fuel into their supply than required) could transfer credits to others and individual facilities could also over-comply in part of the year to compensate for under-compliance at other times.
[122] Chalifour, "Canadian Climate Federalism", *supra* note 7 at 26.
[123] The industrial emissions regulations in the *GGPPA*, *supra* note 29, are an example of such a situation. The regulations include emissions trading and other flexible compliance mechanisms, but there is no express or implied aggregate limit on emissions from the sector or from any individual facility.
[124] Hsu & Elliot, *supra* note 95 at 493.
[125] *Hydro-Québec*, *supra* note 10 at para 130.
[126] *Ibid* at 256. The dissenting opinion of Lamer C.J.C. and Iacobucci J. allows that the criminal law finding would not rule out all potential other regulations, but nonetheless wonders how, if everything we do involves polluting the environment in some way, whether any role will be left for the provinces in regulation such pollution.
[127] *RJR-MacDonald*, *supra* note 112 at 246, emphasis added.
[128] Lucas & Yearsley, *supra* note 33 at 27–28 and 33–34. Lucas and Yearsley do not directly invoke the colourability doctrine in examining coal-fired power regulations, preferring to focus on pith and substance, but the potential is explored earlier in their article.

criminal law while also asserting that the same objectives might be accomplished through equivalency agreements with the provinces.[129] This was raised in *Hydro-Québec*, in dissent, as evidence that the regime in *CEPA* was truly regulatory in nature, not criminal.[130] That the provinces cannot enact criminal laws does not prevent them enacting substantially similar regulations in relation to many subjects, and this informed the majority opinion in *Hydro-Québec* in dismissing this concern.[131]

Finally, some scholars argue that the nature of GHGs makes the use of criminal law to restrict emissions less attractive. For example, Hsu and Elliot write that that GHGs "do not have the same *directness* of harm" as the toxic PCBs which were at issue in *Hydro-Québec*.[132] This assertion too is allayed to some degree by the decision in *Syncrude* which upheld as criminal law restrictions intended to reduce GHGs. It is unlikely that a court would embark on parsing the government's definitions of toxic emissions, so long as the process were sufficiently rigorous.[133] The rigor of the process of designating toxic substances was important in La Forest J.'s majority opinion in *Hydro-Québec*, and he held that the process was sufficient to ensure that those substances identified would "result in polluting the environment to a significant degree."[134] The dissent in *Hydro-Québec* worried that the definitions of toxic substances in the impugned legislation were too broad, and took issue with the lack of focus on defining which effects might be sufficiently harmful to warrant prohibition.[135] However, the decision of Gonthier J. in *Canadian Pacific* scotches this concern, as it held that "generally framed pollution prohibitions are desirable from a public policy perspective."[136] I would see the pervasiveness of GHGs in the economy, not their relative lack of toxicity, as the key barrier to applying the *Hydro-Québec* precedent broadly. This concern informed Rolfe's dim view of the prospects for broad-based GHG regulation under *CEPA*, as he argued that such regulation would be too 'all-encompassing' to fit within the standard interpretation of the criminal law.[137] These concerns echo in the majority opinion of LaForest J. who worried about the potential breadth of prohibitions of toxic emissions.[138] The dissenting opinion in *Hydro-Québec* also expressed concern that the definition of toxic substances was overly broad and that "many human activities could involve the use of materials falling within the meaning

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[129] See, for example, Castrilli, *supra* note 32 at 14.
[130] *Hydro-Québec*, *supra* note 10 at 254–55. Lamer C.J.C. and Iacobucci J. wrote that provisions exempting provinces from the application of criminal law if they had equivalent regulations in force would be "a very unusual provision for a criminal law."
[131] *Ibid* at 312–13.
[132] Hsu & Elliot, *supra* note 95 at 492.
[133] Listing decisions would still, of course, be subject to judicial review. See *Canada (Minister of Citizenship and Immigration) v Vavilov*, [2019] SCC 65 [*Vavilov*], or Paul Daly, *The Vavilov Framework and the Future of Canadian Administrative Law*, SSRN Scholarly Paper ID 3519681 (Rochester, NY: Social Science Research Network, 2020).
[134] *Hydro-Québec*, *supra* note 10 at 306.
[135] *Ibid* at 241 and 243.
[136] *Ontario v Canadian Pacific Ltd*, [1995] 2 SCR 1031 [*Canadian Pacific*] at para 52, aff'd *Hydro-Québec*, *supra* note 10 at 301.
[137] Rolfe, *supra* note 32 at 364.
[138] *Hydro-Québec*, *supra* note 10 at 121, emphasis added.

of toxic substances."[139] The unanimous concern of the Court in this regard would surely have been amplified if the listed toxic substances had included GHGs.

Without question, the criminal law power remains available as a means to regulate GHGs. That said, a broad-based cap-and-trade program or similar regulatory tool is unlikely to fit under these auspices, even under the broad definition of a prohibition adopted in *Syncrude*. This contention is supported by the fact that three recent provincial reference cases rejected the criminal law as a means to uphold the validity of the *GGPPA*.[140] In the *Saskatchewan GGPPA Reference,* the majority held that, although jurisprudence has, "extended the reach of s. 91(27) to include laws with a regulatory flavour or dimension," the *GGPPA* was still not within the reach of Parliament's criminal law power.[141] This opinion was endorsed in the *Alberta GGPPA Reference*.[142] Both the majority and the dissent in the *Ontario GGPPA Reference* highlighted that the criminal law power remains available to the federal government as a means to reduce GHGs despite finding that it did not apply in the particular case of the *GGPPA*.[143]

1.4.2 Peace, Order, and Good Government (POGG)

Judicial interpretation has established three branches of the POGG power: the national concern branch, the gap branch, and the emergency branch, although there is little relevant distinction between the gap and national concern branches.[144]

POGG's emergency branch allows the federal government to validly enact legislation in times of crisis.[145] While climate change is often termed an emergency, the emergency branch of the POGG power is poorly-suited to uphold a complex regulatory regime for GHGs.[146] Sweeping economic policies were upheld under the emergency branch in *Anti-Inflation,* but only as a result of the temporary nature of the legislation.[147] Climate change mitigation will require sustained efforts to reduce emissions over decades, which makes it a poor fit for the emergency branch of POGG.[148]

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[139] *Ibid* at 260.
[140] The federal government did not argue that the *GGPPA* was within Parliament's criminal law authority in any of the three *GGPPA* reference cases.
[141] *Saskatchewan GGPPA Reference*, *supra* note 30 at para 191.
[142] The reasons of Richard C.J.S. were adopted by the majority in the *Alberta GGPPA Reference*, *supra* note 30 at para 257.
[143] *Ontario GGPPA Reference*, *supra* note 30, at para 189 in the majority and para 240 in the dissent.
[144] Hogg, "Constitutional Law", *supra* note 60 at 17.5. See Leach & Adams, *supra* note 36, n 37, for discussion of the inconsistency in definitions of national concern vs. gap. The distinction is not material to the classification of laws under Parliament's general power.
[145] Leach & Adams, *supra* note 36 at 5.
[146] Parliament voted to declare a climate emergency in 2019 (House of Commons, Journals, 42nd Parl, 1st Sess, No 435 [June 17, 2019] at p. 5661). See also Jocelyn Stacey, *The Constitution of the Environmental Emergency* (Bloomsbury Publishing, 2018), which frames the law of environmental emergency, but without explicitly addressing the emergency powers under POGG.
[147] *Anti-Inflation*, *supra* note 12. See, in particular, the plurality reasons at page 427 and the concurring reasons at 436-37.
[148] Leach & Adams, *supra* note 36 at 6. For extensive discussion, see Chalifour, "Canadian Climate Federalism", *supra* note 7 at 355–360. Chalifour argues that the emergency branch might be used to uphold "short-term, kickstart legislation" or other more temporary measures to combat the long-term problem of climate change. Note that interveners did argue in favour of upholding the federal GGPPA under the emergency branch of POGG in the reference cases assessing its validity. See, for example, *Alberta GGPPA Reference*, *supra* note 30 (Factum of the David Suzuki Foundation).

Scholars and appellate case authorities have each examined whether POGG can anchor a complex federal regulatory regime for GHGs.[149] While there is near-consensus that the national concern branch of POGG is a better fit for GHG mitigation policies than the emergency branch, neither courts nor scholars are unanimous in the view that federal GHG policies should be upheld under POGG at all. The national concern branch "applies to both new matters which did not exist at Confederation or 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."[150] This matches both the fact that the impact of GHGs on global climate was not contemplated at Confederation, and that our knowledge of the impacts of climate change now allows us to see that GHGs which are the by-products of so many of our activities have impacts far beyond provincial borders.

The key environmental precedent with respect to the national concern branch of POGG is *Crown Zellerbach*, in which a majority of the Supreme Court found that regulations in relation to "the pollution of marine waters by the dumping of substances," were *intra vires* Parliament.[151] The majority opinion in *Crown Zellerbach* holds that to qualify as a matter of national concern, the subject matter 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." Le Dain J. also adds a provincial inability test which asks "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."[152]

In contrast to the criminal law, where the legislative reach of the head of power might not be stretched far enough to uphold a complex regulatory regime for GHGs, the key question with POGG is whether the legislative reach can be appropriately constrained.[153] The potential for POGG to unbalance federalism is grounded in a long judicial history. In cases such as *Board of Commerce* or *Anti-Inflation*, federal policies which sought to regulate individual trades and transactions within the provinces were ruled *ultra vires* Parliament for trenching too deeply into the provincial domain.[154] In *Anti-Inflation*, the proposed measures were eventually upheld under the emergency branch of POGG, but the powerful dissent of Beetz J. in

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[149] See, for example, Chalifour, "Jurisdictional Wrangling", *supra* note 7, Chalifour, Oliver, & Wormington, *supra* note 36, Leach & Adams, *supra* note 36, or Dwight G Newman, "Federalism, Subsidiarity, and Carbon Taxes" (2019) 82:2 Sask Law Rev 187. The federal government argued successfully that the GGPPA should be upheld under the national concern of POGG in the *Ontario GGPPA Reference*, *supra* note 30, and the *Saskatchewan GGPPA Reference*, *supra* note 30, but the legislation was found to be *ultra vires* Parliament in *Alberta GGPPA Reference*, *supra* note 30.
[150] *Crown Zellerbach*, *supra* note 10 at 432.
[151] *Ibid* at 437–8.
[152] *Ibid* at 432, emphasis added.
[153] Leach & Adams, *supra* note 36 at 4.
[154] *Board of Commerce (PC)*, *supra* note 12; *Anti-Inflation*, *supra* note 12.

relation to the national concern doctrine has informed opposition to upholding as broad a subject matter as GHGs as a national concern. Beetz J. writes:

> The "containment and reduction of inflation" does not pass muster as a new subject matter. It is an aggregate of several subjects some of which form a substantial part of provincial jurisdiction. It is totally lacking in specificity. It is so pervasive that it knows no bounds. Its recognition as a federal head of power would render most provincial power nugatory.[155]

Many see an overly powerful federal government as an unacceptable consequence of upholding GHG policies via the national concern branch of POGG.[156] Along with Adams, I agree that the POGG power must not allow federal jurisdiction to encroach upon areas of provincial jurisdiction, but argue that there is a substantial extra-provincial and international aspect to GHG emissions regulation and thus sufficient anchor for federal policy. We cite two competing views of POGG which dominate the legal scholarship and judicial interpretation: 1) *transfer theory*, whereby the national concern branch of POGG shifts jurisdiction over a subject from the provinces to the federal government; and 2) *positive-sum* theory where provincial jurisdiction is preserved while federal legislative competence is added over new matters and aspects of existing subjects.[157]

While we acknowledge that federal legislation in areas like aeronautics or radio and telecommunications has covered the field, we argue that this is not a result of POGG but a consequence of the subject matter having indisputable interprovincial aspects, and few if any purely local ones.[158] On the other hand, we highlight that the federal government covering the field to the exclusion of provincial legislative authority has been the exception, not the norm, and has applied only in cases where federal exclusivity was necessary to properly regulate the subject. More commonly, as evidenced by decisions in *Munro*, *Jones*, *Ontario Hydro*, and even *Crown Zellerbach*, courts have upheld federal legislation under the national concern doctrine while leaving room for provincial legislation of general application.[159] The same would be true in

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[155] *Anti-Inflation*, *supra* note 12 at 458. See also the reasons of Ritchie J. which concurred on this point with Beetz J. thus forming a majority which did not uphold the legislation under the national concern branch of POGG. This passage from the dissent was cited by the majority in *Ontario GGPPA Reference*, *supra* note 30 at para 91, by the majority in *Saskatchewan GGPPA Reference*, *supra* note 30 at para 116, and by the majority in *Alberta GGPPA Reference*, *supra* note 30 at 294, in each case to argue against determining that GHG emissions or a close equivalent to it was a national concern.

[156] See, for example, Newman, *supra* note 149; or Bishop, *supra* note 94.

[157] Leach & Adams, *supra* note 36 at 4–7.

[158] *Ibid* at 7. See also *Reference re the Regulation and Control of Aeronautics in Canada*, [1932] AC 54 (PC) [*re Aeronautics*]; and *Reference re Regulation and Control of Radio Communication in Canada*, [1932] AC 304 (PC) [*re Radio Communication*]. Recall that in *re Aeronautics*, at 77, the decision of Lord Sankey held that only "a small portion of the field" of aeronautics belongs to the federal government under POGG, while "substantially the whole field" fell under specific, enumerated federal powers in s. 91 of the Constitution.

[159] *Munro v National Capital Commission*, [1966] SCR 663 [*Munro*]; *Jones v AG of New Brunswick*, [1974] 2 SCR 182 [*Jones v. NB*]; *Ontario Hydro v Ontario (Labour Relations Board)*, [1993] 3 SCR 327 [*Ontario Hydro*]; *Crown Zellerbach*, *supra* note 10. With respect to Crown Zellerbach, see Choudhry, *supra* note 94 at 230. Choudry argues that "Before the judgment, the operative legal regime for marine pollution in

the case of GHGs which are pervasive in our economy and for which there are myriad legislative anchors for valid provincial legislation.[160]

The same constitutional doctrines which inform the division of powers should also assuage some concerns with respect to a finding that a regulatory regime for GHGs was valid under the national concern branch of POGG.[161] The test in *Crown Zellerbach* is designed to narrow the definition of the subject matter over which federal jurisdiction is conferred under the national concern branch.[162] Even where broad subject matter descriptions apply, judicial interpretation has not held that plenary and exclusive jurisdiction over the field is conferred to the federal government. Rather, as Lamer C.J.C. wrote in *Ontario Hydro*, the POGG power is "subject to federal balancing principles, limiting in this case the POGG jurisdiction to the national concern aspects of atomic energy."[163]

The double aspect doctrine and the more restrained view of paramountcy more common to recent cases also serve to limit the potential incursion into provincial jurisdiction from a finding under the national concern branch of POGG.[164] This view is contrary to some judicial views, in particular the *Saskatchewan GGPPA Reference* and the *Alberta GGPPA Reference*, as well as to the views of some legal scholars.[165] Writing for the majority in Saskatchewan, Richards C.J.S. held that the double aspect doctrine would not prevent provinces "from being frozen out of the field of GHG regulation," if GHG regulation were upheld under POGG.[166] Instead, Richards C.J.S. held that "if GHG emissions are recognized as a matter of exclusive federal jurisdiction, any provincial law would be unconstitutional if, in pith and substance, it was in relation to such emissions."[167] This type of super-exclusivity is not consistent with POGG cases or indeed the more general principles of federalism. For example, in *Ontario Hydro*, Lamer C.J.C. wrote clearly that Parliament's POGG power is not plenary.[168] POGG also does not remove any enumerated powers from s. 92; rather, as Dale Gibson puts it, "the language of ss. 91 and 92 simply does not permit [POGG] to be

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provincial waters was provincial. After the judgment, the status of provincial jurisdiction is unclear. On one reading, Crown Zellerbach vested exclusive jurisdiction over marine pollution with the federal government. If that is true, then the impact on provincial jurisdiction was dramatic. But on another reading, pollution in provincial marine waters is still a provincial subject-matter, such that there is concurrent jurisdiction."

[160] Chalifour, "Canadian Climate Federalism", *supra* note 7 at 19, makes a similar point.

[161] Leach & Adams, *supra* note 36.

[162] *Ibid* at 7–8.

[163] *Ontario Hydro*, *supra* note 159 at para 340. Similarly, in dissent, Sopinka, Cory and Iacobucci JJ. held that, "the extent of what is swept within Parliament's jurisdiction is circumscribed to the national concern aspects of atomic energy" (at 425). Thus, a majority of the Court agreed on this point. The decision of La Forest J. does not explicitly address this point, but he does hold that labour relations are "vital aspects of the management of nuclear facilities," which suggests that the reach of POGG is not plenary in his view either (at 381).

[164] Leach & Adams, *supra* note 36 at 9–10.

[165] Newman, *supra* note 149, for example, states that "something classified within the national concern branch of the POGG power is no longer subject to any provincial aspects but becomes permanently and exclusively within federal jurisdiction." Similarly, Bishop, *supra* note 94 at 7–8, argues that radio and telecom and aeronautics precedents suggest that no double aspect exists for matters found to be of a national concern. See also, generally, Jean Leclair, "The Elusive Quest for the Quintessential 'National Interest'" (2005) 38 UBC Rev 355.

[166] *Saskatchewan GGPPA Reference*, *supra* note 30 at para 129.

[167] *Ibid* at para 129.

[168] Ontario Hydro, supra *note 159 at 340.*

given priority over the enumerated provincial powers in any circumstances."[169] This implies that provincial legislation, so long as it was a valid exercise of provincial jurisdiction under its enumerated or residuary powers in ss. 92 or 92A, would remain valid after a finding that federal legislation validly addressed the national concern aspects of GHGs. Nothing is removed from ss. 92 and 92A by such a finding. Only to the extent that provincial legislation was deemed a colourable invasion of federal jurisdiction would its validity be at issue.

Concerns regarding the interaction of the national concern branch of POGG and federal paramountcy also permeate consideration POGG's use to underpin environmental policy. In *Hydro-Québec,* La Forest J. wrote that determining that a particular subject matter is a matter of national concern "involves the consequence that the matter falls within the exclusive and paramount power of Parliament and has obvious impact on the balance of Canadian federalism."[170] In their factum filed in the appeal of the three provincial *GGPPA* reference cases, Quebec makes this argument strongly and alleges that upholding federal GHG policies under the national concern branch of POGG risks compromising the continued existence of provincial GHG policies.[171] Even if federal and provincial governments enact simultaneous legislation, the possibility of conflicting federal and provincial GHG policies is remote. While it is certainly plausible that the policy of one or the other level of government would be more stringent, that would not trigger paramountcy.[172] Rather, as the Supreme Court held in *Moloney*, only in the case of demonstrated "true incompatibility" would provincial legislation be rendered inoperative.[173] The majority opinion in *Multiple Access* holds that true incompatibility does not extend to cases where firms might be expected to comply with both federal and provincial laws in relation to the same subject, but only to cases "where one enactment says 'yes' and the other says 'no'; 'the same citizens are being told to do inconsistent things'; compliance with one is defiance of the other."[174] In *Bank of Montreal v. Hall*, the Supreme Court extended this definition to include provincial legislation which frustrates a federal purpose.[175] So, more stringent federal legislation in and of itself would not trigger paramountcy. Only insofar as provincial laws implied non-compliance with or explicitly cut against the effectiveness of federal legislation would they be rendered inoperative. In

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[169] *Gibson,* supra *note 59 at 17.*
[170] *Hydro-Québec*, *supra* note 10 at 288.
[171] *Attorney General of Saskatchewan v Attorney General of Canada*, 2020 SCC Docket 38663, Last Modified: 2015-03-17 [*SCC GGPPA Reference*], Factum of the Attorney General for Quebec, at para 13. The factum argues that upholding the decision in *Saskatchewan GGPPA Reference*, *supra* note 30, would imply that the viability of Quebec's extant climate change policies would be compromised.
[172] In the majority reasons in *Multiple Access*, *supra* note 70 at 170, Dickson J. writes that "The doctrine of paramountcy does not necessarily arise because an individual is subject to prohibition and penalty under both statutes at the same time. Unless the duplication of statutory schemes in addition gives rise to incompatibility then the federal statute does not suspend the operation of the provincial statute."
[173] *Alberta (Attorney General) v Moloney*, [2015] 3 SCR 327 [*Moloney*] at paras 27, 63. See also *Redwater*, *supra* note 66.
[174] *Multiple Access*, *supra* note 70 at 191.
[175] *Bank of Montreal v Hall*, [1990] 1 SCR 121 [*Bank of Montreal v. Hall*], aff'd *Rothmans, Benson & Hedges Inc v Saskatchewan*, [2005] 1 SCR 188 [*Rothmans, Benson & Hedges*] at para 12. See also *Spraytech*, *supra* note 68.

Chapter 3 of this thesis, I also discuss the potential that provincial GHG policy would be replaced by federal policy, and find no evidence to support this contention.

The courts in the *Saskatchewan GGPPA Reference* and the *Ontario GGPPA Reference* both found the *GGPPA* to be *intra vires* Parliament under the national concern branch of POGG. In narrowing the matter of federal jurisdiction, the majority in Saskatchewan found that the *GGPPA* was, "about establishing minimum national standards of price stringency for GHG emissions."[176] In Ontario, the majority held that the matter was the adoption of, "minimum national standards to reduce GHG emissions," while the concurring opinion of Hoy A.C.J.O. held that the slightly narrower matter, "establishing minimum national GHG emissions pricing standards to reduce GHG emissions," was appropriate.[177] In the dissents in both cases, the dissenting judges would have held that the matter was more broadly defined.[178] A broader definition of the subject matter of the legislation as "the regulation of GHG emissions," informed the majority in the *Alberta Reference* who found the legislation *ultra vires*.[179] In each case, the more broadly-defined the matter, the more concern there was regarding intrusion into areas of provincial jurisdiction.

Canadian jurisprudence and legal scholarship suggest that the national concern branch of POGG is a suitable anchor for complex regulatory regimes to reduce GHG emissions, whether those include regulatory charges, emissions caps, or hybrids of the two like the *GGPPA*. The degree to which any such regime intrudes into areas of provincial jurisdiction will limit the scope and drafting of potentially valid legislation in this area. However, a finding that any federal legislation in relation to GHG emissions is valid under the national concern branch of POGG should not be viewed as conferring on Parliament the plenary and exclusive jurisdiction over GHG nor as an invitation to cover the legislative field.

While less often discussed than the POGG and criminal law power alternatives, a number of studies have suggested that GHG management legislation including emissions trading systems might instead be based on the *Constitution Act, 1867* s. 91(2) authority to regulate trade and commerce.[180] In the following chapters of this thesis, I discuss the implementation of GHG emissions policies under this head of power, and so omit a lengthy and redundant summary here.

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[176] *Saskatchewan GGPPA Reference*, *supra* note 30 at para 164.
[177] *Ontario GGPPA Reference*, *supra* note 30 at para 70 (majority) and 166 (concurring opinion).
[178] *Saskatchewan GGPPA Reference*, *supra* note 30 at para 454; *Ontario GGPPA Reference*, *supra* note 30 at para 227.
[179] *Alberta GGPPA Reference*, *supra* note 30 at para 211.
[180] See Elgie, *supra* note 33, or Chalifour, "Canadian Climate Federalism", *supra* note 7. For a more contrary view, see Hsu & Elliot, *supra* note 95.

1.5. Conclusion

Climate change presents a daunting challenge to our federal structure, but it is also a necessary policy priority of our time. This introductory chapter has provided a sense of the limitations placed on the federal government in terms of acting to reduce GHG emissions through national policies, in particular carbon pricing. . In Chapter 2, I argue that we have much to learn from the history of the grain trade and agricultural supply management which employed similar policy tools to those now contemplated in the context of climate change. Chapter 3 provides a more hopeful call to arms. I argue that not only are climate change policies important in their own right, but also that they represent some of our most important economic policies. Where the judicial interpretation of the trade and commerce power has to date driven a wedge between the economy and the environment, I argue that such a view is no longer tenable Understanding the limits is crucial to being able to push our courts to move beyond those which prevent action on important issues. The *living tree* that is our Constitution has been shaped and pruned by both political priorities and the need to respond to unexpected events. Climate change provides another such opportunity to adapt our federation to deal with an unprecedented challenge.

While the subject matter of climate change does not lend itself to easy conclusions, this chapter suggests three. First, in any push for federal policy, we must not forget that the provinces have been a consistent source of both policy ambition and innovation in relation to GHGs. We have learned so much from Alberta implementing the first carbon pricing program in North America, from BC's world-renowned carbon tax, and from Quebec's trans-continental cap-and-trade regime with California. Without this provincial ambition and innovation, policies like the federal *GGPPA* would not be possible. Second, economists and other policy-makers would benefit from much more focus on the constitutional limitations facing federal and provincial governments. These limitations have tended to be overlooked when designing so-called optimal policy, but an optimal policy which ignores important constraints will not deliver the promised results. Finally, as I elaborate in the ensuing chapters, our legislative and judicial history provides crucial context as we look forward to our daunting climate policy challenge. Maintaining the crucial balance of federalism while addressing a pressing international policy priority is not a new challenge, but one we have faced many times in the past. The lessons of the past must and will inform our response to this crisis.

Chapter 2 Supply Management for Emissions

2.1. Introduction

Under the *Paris Agreement*, Canada committed to reduce national greenhouse gas (GHG) emissions to 30% below 2005 levels by 2030.[181] Environment and Climate Change Canada (ECCC) projects that, without additional measures, emissions will exceed our target by almost 30%.[182] In the 2019 election, the Liberal Party of Prime Minister Justin Trudeau made three promises to address this shortfall: 1) a commitment to meet or exceed the emissions reduction target for 2030; 2) a commitment to reduce Canada's emissions to net-zero by 2050; and 3) a commitment to set legally-binding, five-year carbon emissions milestones toward the net-zero emissions target.[183] Such legally-binding milestones, generally termed carbon budgets after the approach adopted in the United Kingdom, present both a political and legal challenge for the government.[184] Politically, policies to reduce emissions have been fraught in Canada for decades. The federal government's extant legislative flagship, the *Greenhouse Gas Pollution Pricing Act* (*GGPPA*), remains mired in legal challenges and any new legislation to enforce carbon emissions limits would likely also be challenged.[185] Legal scholars and think-tanks have developed proposals for carbon budget legislation for Canada, adding to an extensive literature on the constitutional authority to implement GHG emissions policies in general.[186] This chapter examines Canadian constitutional jurisprudence, in particular in relation to agricultural supply management and prohibition, to consider the potential constitutionality of carbon budget legislation in Canada.

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[181] See Government of Canada, "Canada's Intended Nationally Determined Contribution (INDC) Submission to the United Nations Framework Convention on Climate Change (UNFCCC)", (2015), online: <https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/Canada%20First/INDC%20-%20Canada%20-%20English.pdf>, which sets Canada's commitments under *Paris Agreement*, *supra* note 27.

[182] Environment and Climate Change Canada, "Canada's Greenhouse Gas Emissions Projections", (November 2019), online: *Open Government Portal* <https://open.canada.ca/data/en/dataset/7ba5acf6-ebae-45b6-bb14-84ab56ad2055> projects Canadian emissions of 673Mt in 2030. Our target level, based on data in the same report, would translate to 511Mt. The units of measure used here are million tonnes (Mt) of carbon dioxide equivalent emissions (CO_2e). This measure is used to compare emissions from various GHGs on a common basis using the global-warming potential (GWP) of each gas and then converting to the amount of CO_2 which would have the equivalent GWP.

[183] Liberal Party of Canada, "Forward: A real plan for the middle class", (2019), online: *perma.cc* <https://perma.cc/QKB2-VMCZ> at 29. These commitments were also spelled out in Office of the Prime Minister of Canada, "Minister of Environment and Climate Change Mandate Letter", (12 December 2019), online: *pm.gc.ca* <https://pm.gc.ca/en/mandate-letters/2019/12/13/minister-environment-and-climate-change-mandate-letter>.

[184] *Climate Change Act*, 2008, C 27 [*UK Climate Change Act*].

[185] Legislation to legally bind Canada to international emissions targets has been attempted once previous in Canada, in the form of the *Kyoto Protocol Implementation Act*, SC 2007 C 30 [*KPIA*]. A legal challenge to force Canada to take stronger action on emissions in *Friends of the Earth v Canada (Governor in Council)*, [2009] 3 FCR 201 (FC) [*Friends of the Earth*] failed. A recent landmark case in the Netherlands, *Urgenda Foundation v State of the Netherlands*, 2019 Supreme Court of the Netherlands 19/00135 [*Urgenda*], concluded that the Government of the Netherlands must seek further, urgent emissions reductions.

[186] Andrew Gage, "A Carbon budget for Canada" 52; Canadian Institute for Climate Choices, "Marking the Way: How Legislating Climate Milestones Clarifies Pathways to Long-Term Goals", (2020), online: *Canadian Institute for Climate Choices* <https://climatechoices.ca/reports/marking-the-way/>; Gage et al, *supra* note 102.

Legal scholars have long looked to agricultural supply management as an analog to inform future restrictions on national GHG emissions, with most suggesting caution in this parallel.[187] Chris Rolfe, for example, argues that supply management has been upheld in the context of protection of local industries or to increase the economic value of exports, but that similar legislation in relation to environmental rather than economic policy may not be constitutionally compatible with the trade and commerce power.[188] More generally, a number of scholars raise concerns regarding the dependence of the supply management precedent on collaboration between the federal government and the provinces.[189] Alistair Lucas and Jenette Yearsley conclude that even if such a federal-provincial agreement were possible, legislation regulating emissions reductions rather than economic output was unlikely to be upheld under the interprovincial trade and commerce power.[190]

In this portion of the thesis, I argue that the Canadian model of agricultural supply management which is reliant on federally-established production quotas managed within each province under provincial legislation, does not provide a viable constitutional pathway for national emissions reductions policy, but for different reasons than other scholars in the field. While I show that the economic underpinnings of supply management and emissions quotas are very similar, I argue that the legal foundation does not support emissions quota policies as readily as it does agricultural supply management because of the lack of a federal regulatory backstop in the case of emissions. In the collaborative approach upheld in *Agricultural Products Marketing* and more recently affirmed in *Pelland*, the federal backstop manifests via the authority to restrict extra-provincial movement of natural products.[191] The federal government can enforce provincial quotas indirectly through restrictions on trade and provinces also need federal collaboration because they cannot unilaterally shield their protected domestic industries from trade.[192] As emissions are not traded in the traditional sense, the federal government cannot prevent emissions from leaving the provinces in the same way they can prevent the movement of milk, chicken or eggs across provincial or national borders. And so, while I agree that federal-provincial collaboration is a necessary condition for our agricultural supply management model, it is unlikely to be sufficient to enable a similar system for GHG emissions

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[187] Castrilli, *supra* note 32 at 15–16; Elgie, *supra* note 33 at 112–114; DeMarco, Routliffe, & Landymore, *supra* note 32 at 236–237; Chalifour, "Canadian Climate Federalism", *supra* note 7 at 371–372.
[188] Rolfe, *supra* note 32 at 366. See also Hsu & Elliot, *supra* note 95, who dismiss the classification of GHG emissions policies under the trade and commerce power altogether.
[189] Barton, *supra* note 32 at 441. Barton quotes from Hogg, "Constitutional Law", *supra* note 60 at 20--7-20–8 [citation updated to newer edition] who writes that the supply management regime may not be a particularly important precedent given the elaborate nature of the intertwined federal and provincial agreements. See also Chalifour, "Canadian Climate Federalism", *supra* note 7 at 371–372, and Rolfe & Nowlan, *supra* note 87 at 26–27.
[190] Lucas & Yearsley, *supra* note 33 at 20. Bryan P Schwartz, *Legal Opinion on the Constitutionality of the Federal Carbon Pricing Benchmark & Backstop Proposals* (Government of Manitoba, 2017) at 40 reaches a similar conclusion.
[191] *Agricultural Products Marketing*, *supra* note 12; *Fédération des producteurs de volailles du Québec v Pelland*, [2005] 1 SCR 292 [*Pelland*].
[192] *Attorney-General for Manitoba v Manitoba Egg and Poultry Association et al*, [1971] 689 SCR [*Manitoba Egg Reference*]; *Re The Farm Products Marketing Act*, [1957] SCR 198 [*Ontario Farm Products Reference*].

reduction. In the absence of provincial collaboration, the federal government is constrained in that it cannot directly regulate production or trade within the provinces such as may be necessary to drive emissions reductions in the economy. With provincial collaboration, a federal equivalent to restrictions on agricultural product trade is not readily available to reinforce the domestic regime, although indirect options such as border carbon adjustment tariffs are available.

The conclusions in this chapter do not imply that federal carbon budget legislation is off the table; the federal government can legislate under various other heads of power. In Chapter 1, I detail how scholars generally see the federal taxation power as enabling GHG mitigation through carbon taxes, although it is not clear that a charge implemented for the purposes of reducing emissions rather than the raising of revenue would be supported under this head of power.[193] The criminal law power, under which GHG mitigation policies were upheld in *Syncrude,* is a broad power which can support various types of GHG mitigation policies.[194] In Chapter 3 of this thesis, I argue that the general branch of the trade and commerce power could underpin federal emissions pricing policies, although this view has not been widely supported by other scholars.[195] I have also argued that the national concern branch of POGG provides a path to valid implementation of certain federal GHG policies including carbon pricing regimes.[196] And, finally, as I discuss briefly later in this chapter, the declaratory power in s. 92(10)(c) of the *Constitutional Act, 1867* – an option Parliament used to regulate the Canadian grain trade – provides a direct though controversial tool in the federal arsenal to reduce emissions.[197]

In the following analysis, I first examine the parallels between the economics of supply management and emissions quotas or potential carbon budget policies. I then examine the constitutional limitations to carbon budget legislation under the extra-provincial branch of the trade and commerce power by looking at the judicial history of supply management. Finally, I highlight two key implementation challenges common to both supply management and carbon budgets: the allocation of quota and the limitations on federal and

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[193] Hogg, "Constitutional Authority", *supra* note 86 at 518, finds that the power to tax carbon emissions would be fettered only by the s. 125 exemption for provincial assets. However, the upshot of decisions such as that in *Westbank*, *supra* note 91 is that the definition of what constitutes a tax is narrowed. In *Re: Exported Natural Gas Tax*, *supra* note 98, both sets of reasons suggested that the charge imposed in that case would not necessarily be seen as a tax had it been levied with the express purpose of reducing natural gas consumption or production.

[194] Hogg, "Constitutional Authority", *supra* note 86 at 511–513. See also Chalifour, "Making Federalism Work for Climate Change", *supra* note 89 at 175–177, or Hsu & Elliot, *supra* note 95 at 491–93.

[195] There are exceptions. The general trade and commerce power is explored in Chalifour, "Making Federalism Work for Climate Change", *supra* note 89, and other scholars have argued it would be potentially available for emissions trading regimes. See, for example, Sheffield, *supra* note 33, and also Elgie, *supra* note 33.

[196] Leach & Adams, *supra* note 36. Others have argued against this including the appelants in the three GGPPA reference cases and several scholars. See, for example, Newman, *supra* note 149. Newman argues that federal authority to legislate in relation to GHG emissions would shift too much power away from provinces to the federal government. Similar arguments in more general contexts have been made by Jean Leclair. See Leclair, *supra* note 165.

[197] For background on the federal takeover of the grain trade, which went beyond the declaratory power, see Bora Laskin, "Tests for the Validity of Legislation: What's the 'Matter'?" (1955) 11:1 Univ Tor Law J 114 at 120. Following the judgement in *The King v Eastern Terminal Elevator Co*, [1925] SCR 434 [*Eastern Terminal Elevator*], the federal government used the s. 92(10)(c) declaratory power to claim jurisdiction over nearly the entire supply chain for the grain trade beyond the farm gate, including elevators and processing plants.

provincial legislation set by the open markets clause in s. 121 of the *Constitution Act*, 1867 as well as by the economic mobility guarantee in s. 6 of the *Constitution Act, 1982* and by internal and international free trade agreements.

2.2. Parallel paths? Chicken and egg quota and carbon budgets

The economic premise of supply management is simple *supply and demand*: if the quantities of production are restricted for a given commodity, the price which producers can command in the marketplace will be higher. Scarcity creates what economists term rents, or higher profits than would obtain in a competitive marketplace, thereby benefitting producers at the expense of consumers.[198] In what follows, a digression into economic theory illustrates the parallels between supply management and emissions reduction policy. With supply management, the goal is to create rents by artificially introducing imperfect competition into the market and to allow those rents to be collected by those who own production quota.[199] In environmental policy, quotas or caps are used to restrict production, indirectly increasing the price that the market will attach to the right to pollute as that right becomes scarce.

To illustrate the role of supply management, consider the basic concept of economic equilibrium in perfect competition – the supply and demand graph that every first-year student learns. Firms supply products until the cost of producing an additional unit, the marginal cost, exceeds the revenue they expect to receive. In a simplified economic model (assuming that per-unit costs of production increase in quantities, that there are no other transactions costs, and everyone has perfect information), the familiar supply curve is a reasonable mathematical proxy for this firm behaviour (see Figure 1). Similarly, consumer preferences lead them to purchase products up to the point at which the incremental value of consumption is equal to the price paid. This generates the familiar demand curve, also shown in Figure 1, so long as the same simplifying assumptions hold. In this model of perfect competition, allocative efficiency is achieved and there is no other set of production and consumption decisions which would improve upon the total welfare generated from consumption and the benefits of production.[200] But, producers under perfect competition earn zero

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[198] The price effects of supply management systems may also generate very different effects across consumers, including potential regressive impacts on some groups. While these effects are not the focus in this work, they should not be generally discounted. In another chapter of this thesis on the general branch of the trade and commerce power, I highlight how imperfect competition (monopoly or oligopolistic collusion) and pollution can each generate aggregate welfare losses and also have potentially important distributional consequences.

[199] Christopher Green, "Agricultural Marketing Boards in Canada: An Economic and Legal Analysis" (1983) 33:4 Univ Tor Law J 407 at 408, summarizes the arguments made in support of supply management. "Three arguments are made for some form of government intervention. First, farm incomes have historically been unstable because of a combination of price-inelastic commodity demand and erratic and unpredictable shifts in supply owing chiefly to weather and other natural conditions. Second, for commodities which are locally processed or consumed, the individual farmer's bargaining power is typically weak relative to those who transport, process, and distribute farm products. The reason is that the individual farmer is one of many selling a perishable commodity to a relatively small number of relatively large buyers. Finally, it is argued that average net farm income is low, with many farmers receiving subnormal returns on their investment in farm land and equipment."

[200] As mentioned when this was first introduced in Chapter X, this result is generally known as the First Fundamental Theorem of Welfare Economics, and relies on consumers and firms acting as *price takers,* i.e. they do not take account of the effect of their decisions on market prices, as well as there being zero transactions costs or other market frictions as well as perfect information. This is otherwise known as a *Walrasian* equilibrium.

economic profits: they are capturing only enough value to compensate for the cost of production and the opportunity costs of labour and capital, and no more.

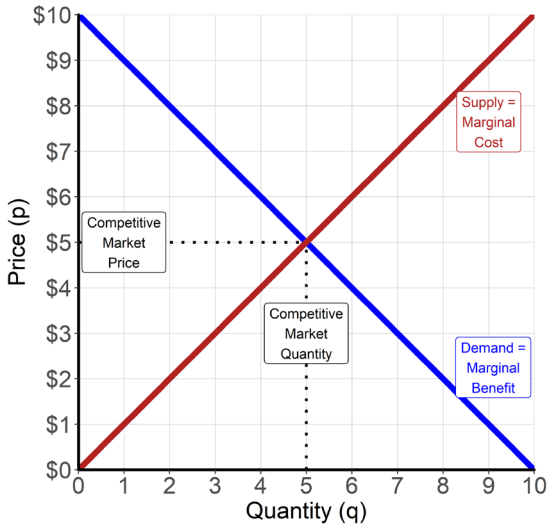

Figure 1 Economic equilibrium in perfect competition.

Supply management policies disrupt this equilibrium through controlled entry and artificial restrictions on production – essentially, governments create market power and distribute the gains from market power to market participants.[201] As shown in Figure 2, with production quotas in place leading to a reduction in the total quantity produced compared to a competitive equilibrium, market prices increase above what they would otherwise be as do producer profits.[202] From a welfare economics perspective, the supply-managed situation is such that some potential gains from trade are unrealized: there are consumers who would be willing to pay more than what it cost to produce additional units of the supply-managed product but, because the quota is in place to preserve scarcity rents, that production does not occur. The overall economic welfare loss, which appears as the grey-shaded triangle in Figure 2, is a measure of the overall detrimental impact to consumers, while producers' gains are illustrated by the blue-shaded rectangle. These higher values purport to alleviate particular market irregularities, although as Green and others note, these market *failures* are speculative.[203] The value of supply management quota is large: by the time the *Agricultural Products*

[201] Canadian governments, both provincial and federal, intervene in agriculture in many other ways. For example, see Green, *supra* note 199 at 409, and discussion of price supports. Other subsidies, such as crop insurance or tax-free "purple gas" are also present in the market. In fact, farm fuels are exempt from federal carbon pricing under the *GGPPA*, *supra* note 29, s 17(2)(a)(iii).
[202] Supreme Court challenges to supply management have not focused on increased consumer costs, although that has been the subject of substantial civil society discussion. The Courts have heard challenges of the individual production constraints in *Pelland*, *supra* note 191, and with respect to the barriers to entry created by quota allocation in *Canadian Egg Marketing Agency v Richardson*, [1998] 3 SCR 157 [*Richardson*].
[203] Green, *supra* note 199 at 408.

Marketing Reference was heard in 1978, the estimated value of supply management quota in Canada was over $2 billion.[204] By the end of 2019, the total value of quota in Canada was over $37.5 billion.[205] With the future value of excess profits capitalized in the value of quota, new entrants do not benefit as much from the system since they must purchase quota to produce.[206]

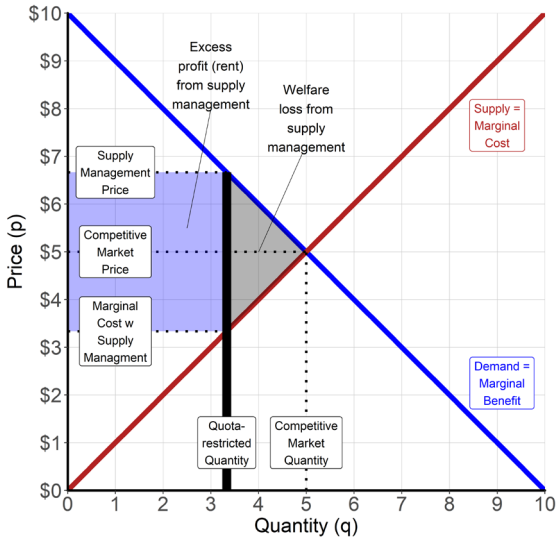

Figure 2 Economic equilibrium under supply management

There are parallels between this outcome, which economists would generally view as negative, and solutions to correct pollution. Economics has long recognized that, in a competitive market in which firms are not responsible for the costs of their polluting activities, they will not reflect those (external) costs in their production decisions and that this leads to over-production which is detrimental to economic well-being.[207] Economics has also long characterized imperfect competition (monopoly and/or oligopoly of the type introduced by supply management) as detrimental to the economy, as discussed in the context of the general trade and commerce power in this thesis. However, when these two results are combined, an interesting result obtains: the propensity of the monopolist or oligopolist to lower production can be beneficial where there are also external costs of production due to pollution.[208] When quotas, or cap-and-trade systems are used to regulate emissions, the induced reduction in production may appear detrimental

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[204] *Ibid* at 415.
[205] *Statistics Canada, "Balance sheet of the agricultural sector as at December 31st", (14 July 2020), online: Table 32-10-0056-01 <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3210005601>. Of the $37.5 billion total value of quota, $10.6 billion was held in Quebec and $13.9 billion in Ontario.*
[206] Green, *supra* note 199 at 417.
[207] Arthur C Pigou, *The Economics of Welfare*, 4th ed (London: Macmillan, 1932) at 107.
[208] See, generally James M Buchanan, "External Diseconomies, Corrective Taxes, and Market Structure" (1969) 59:1 Am Econ Rev 174.

on the surface, but once the analysis considers the true social costs of production, we see net social benefits to the constraint. The barriers to entry from quotas improve social welfare.

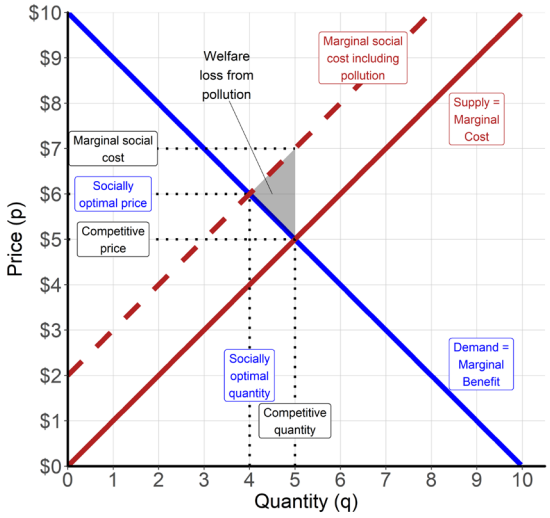

Figure 3 Economic equilibrium with external pollution costs.

A complete analysis of the economics of emissions quotas is beyond the scope of this thesis, but some basic insights can be derived from a simplified economic model shown in Figure 9. Here, the private costs of production borne by the firm (marginal private costs) are less than the true costs of production to society (marginal social costs). Pollution costs are generally in the latter, external, category, since imperfect property rights or limited regulation means that some of the costs of pollution are *uncharged* or *external* to the firm[209]. As shown in Figure 3, economic equilibrium in this case holds that firms will produce more than they otherwise would (q=5 in the textbook example of Figure 3) compared to a competitive equilibrium with costs of production fully internal to the firm (q=4 in Figure 3). Prices are lower than they should be and, since prices do not fully reflect true social costs of production, there is a detrimental aggregate welfare effect indicated by the shaded triangular area in Figure 3.

The economic analysis underlying a system of emissions quotas and their link to production costs is omitted from this analysis due to complexity, but in the stylized example of Figure 3, a reduction in total production from q=5 to q=4 will be of net benefit to the economy since it would prevent the production of output for which total costs exceed total benefits. For illustrative purposes, consider a production quota which restricts

[209] See, generally R H Coase, "The Problem of Social Cost" (1960) 3 J Law Econ 44.

the total quantity produced to 4 units, shown in Figure 4. As it did in the supply management example, the quota creates an artificial scarcity in the market, and so it has value to its owners, which is why quota can be tradeable.[210] Emissions quota systems serve, in economic theory, to reduce the detrimental economic effects of pollution in much the same way as it serves to increase the returns (while creating detrimental economic effects) in the case of supply management.

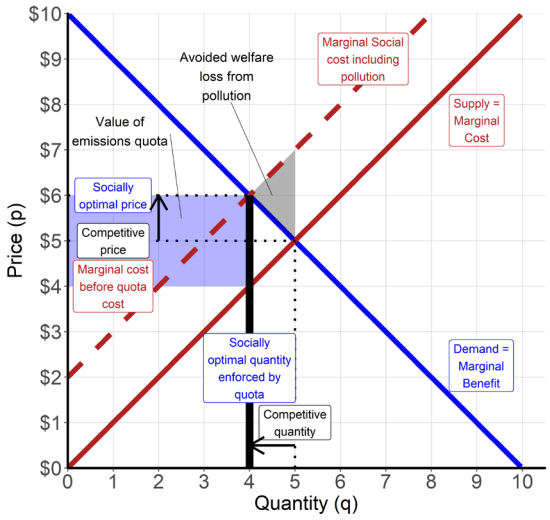

Figure 4 Equilibrium with production quotas and pollution

The economics of trade also plays an important role in underpinning these systems. The combination of the price effects of quota systems and economic mobility mean that supply management must be national. If a supply management system were to be set up in a single province, for example Ontario, to increase the price of eggs received by Ontario farmers, it would be natural for Quebec farmers to look to produce more eggs and to sell them into the now-higher-priced Ontario market.[211] National marketing agencies, combined with a relatively thick Canada-US border, meant that higher prices could be maintained.[212]

This also applies to the use of quota systems to reduce pollution. If, for example, the province of Ontario were to institute strict pollution control policies which increased the cost of production of manufactured products in the province, the reverse effect would take hold. Producers would see their profits reduced because, again due to economic mobility, they would be limited in their ability to pass these costs on to

[210] Green, *supra* note 199 at 414.
[211] Protectionist actions to discourage entry by out-of-province competitors set of the chicken and egg war described in Paul C Weiler, *In the last resort; a critical study of the Supreme Court of Canada* (Toronto : Carswell, Methuen, 1974) at 156, Carissima Mathen, *Courts Without Cases*, 1st ed (Oxford, UK: Hart Publishing, 2019) at 96, and Green, *supra* note 199 at 422.
[212] Green, *supra* note 199 at 423.

consumers. If they tried to do so in the case of a tradeable good, producers in other provinces would still be able to sell more cheaply into Ontario and would likely increase their market share at the expense of the more expensive domestic goods. There would be a risk of emissions leakage, where production relocates to jurisdictions with lower environmental controls, but pollution still occurs.[213] With climate change, the problem of emissions leakage is exacerbated since, even though production leaves a jurisdiction to locate elsewhere, the impacts of GHG emissions through climate change are global, so there is no reduction in pollution to offset the cost of lost economic activity.

Faced with the prospect of emissions leakage, the temptation would exist for provinces to erect barriers to such trade to protect their domestic industries, or to offer subsidies to support domestic production just as they sought to do in agriculture. In the parlance of economists, this would be done either by making imports more expensive through border carbon adjustments or pollution tariffs, or by offering subsidies to output through output-based allocations of emissions quota or tax credits.[214]

To fully understand how the quota systems used in agricultural supply management might be applied to GHG emissions as some have suggested, and the limits to the constitutional foundation that supply management provides, I next work through an abbreviated history of supply management leading up to the *Agricultural Products Marketing Act* reference and consider parallels to GHG emissions.

2.3. Supply management, but for emissions

The economics of supply management are simple, but the law is complicated by the nature of Canadian federalism. Agriculture is, explicitly per s. 95 of the *Constitution Act, 1867*, shared jurisdiction between the provinces and the federal government. The shared jurisdiction relates strictly to production and not to transactions beyond the farm gate.[215] The jurisdiction over farm products beyond the farm gate will generally fall either within the extra-provincial branch of the federal trade and commerce power or under provincial authority to legislate in relation to property and civil rights or matters of a local and private nature in the province and/or the provincial power to institute licensing regimes.[216] In this regard, agriculture and the environment have much in common, with the exception that there is no equivalent of s. 95 for the environment. Despite this lack of constitutionally-explicit shared jurisdiction, Canadian jurisprudence has

[213] See, generally Canada's EcoFiscal Commission, "Provincial Carbon Pricing Competitiveness Pressures", (2015), online: *Canada's EcoFiscal Commission* <https://ecofiscal.ca/reports/provincial-carbon-pricing-competitiveness-pressures/>.
[214] Carolyn Fischer & Alan K Fox, "Comparing policies to combat emissions leakage: Border carbon adjustments versus rebates" (2012) 64:2 J Environ Econ Manag 199.
[215] *Eastern Terminal Elevator*, *supra* note 197 at 457.
[216] See *Carnation Company Limited v Quebec Agricultural Marketing Board et al*, [1968] 238 SCR [*Carnation*], or *Manitoba Egg Reference*, *supra* note 192.

established that shared jurisdiction exists over the environment on very similar terms to that understood to exist in agriculture.[217]

The supply management jurisprudence establishes three tenets of federal and provincial jurisdiction of relevance to potential legislation in relation to GHGs. First, decisions in *Natural Products Marketing Act* and *Agricultural Products Marketing,* as well as several grain marketing cases solidify that the federal government's trade and commerce power does not extend to the regulation of trade in individual commodities or in relation to transactions which occur in the provinces.[218] Second, while it is challenging to develop a bright-line test from decisions such as *Manitoba Egg* and *Carnation*, the tenor of Canadian case law is that provinces have a wide berth to regulate transactions occurring within the province, but cannot regulate with the express intention to affect trade.[219] Finally, Parliament's capacity to legislate in relation to extra-provincial trade, first established in *Parsons*, remains beyond dispute.[220] While beyond dispute, the power to regulate trade is less relevant for GHG policies because, unlike chickens, milk, or eggs, GHGs are not traded across borders in the traditional sense, and so the federal government has less power to underpin a carbon budget than it does for agricultural products quota. Below, I discuss how early cases defined these limits and how the exploration of these limits led eventually to our modern supply management regime.

2.3.1 The limits of federal regulation

Parliament's early attempts to legislate in relation to supply management and the grain trade demonstrate the limits to unilateral federal action. The *Natural Products Marketing Act, 1934*, was wide-reaching policy which sought to regulate "the time and place at which and the agency through which [natural products] shall be marketed and to determine the manner of distribution and the quantity, quality, grade or class of the product that shall be marketed by any person at any time."[221] Agriculture had become a central source of wealth in Canada, and there was substantial willingness to cast aside provincial jurisdiction so that we would have uniform, federal regulation.[222] As we see today with GHGs, some legal scholars of the era

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[217] *Oldman River*, *supra* note 9.
[218] *Reference re legislative jurisdiction of Parliament of Canada to enact the Natural Products Marketing Act*, [1936] SCR 398 [*Re: Natural Products Marketing (SCC)*]; *Re: Natural Products Marketing (PC)*, *supra* note 12; *Agricultural Products Marketing*, *supra* note 12.
[219] The lack of a bright line test clear if one compares the decisions in *Carnation*, *supra* note 216, and *Manitoba Egg Reference*, *supra* note 192.
[220] *Parsons*, *supra* note 62.
[221] *The Natural Products Marketing Act*, 1934, 24-25 George V C 57 [*Natural Products Marketing Act, 1934*]. See *Re: Natural Products Marketing (PC)*, *supra* note 12 at 692.
[222] T G Norris, W C Hopper & R A Mack, "The Natural Products Marketing Act, 1934" (1935) 1:3 Can J Econ Polit Sci Rev Can Econ Sci Polit 465 at 466.

argued that natural products marketing was a matter of national concern and should be regulated under Parliament's general power.[223]

The courts did not agree when the validity of the legislation was tested by reference to the Supreme Court, which unanimously found the legislation *ultra vires* Parliament.[224] Nor did the Privy Council during a subsequent appeal.[225] The Supreme Court decision in *Natural Products Marketing* held that provinces must be able to deal with the marketing of agricultural production, despite the obvious extra-provincial aspects of such trade.[226] The decision demonstrated a judicial deference to provincial rights even where they may affect trade and what Colin McNairn describes as a "manifest judicial reluctance" to allow any federal intrusion into the regulation of intra-provincial activity.[227]

A similar judicial reluctance had earlier led to a defining federal decision in the case of the Canadian grain trade. The grain trade had always had a component of federal oversight, in particular in relation to weights and measures, but the *Manitoba Grain Act* commenced a move toward more heavy-handed federal attempts to control all trade in grain beyond terminals.[228] Further attempts to regulate the behaviour of grain elevators set the stage for the first legal challenge to federal grain policy to reach the Supreme Court, in *Eastern Terminal Elevator.* [229]

In *Eastern Terminal Elevator*, while Duff J. found it undeniable that the impugned federal legislation was intended to protect the external trade in grain, he found a proposed licensing system for grain elevators to be *ultra vires* Parliament. In an exposition with substantial relevance to the regulation of GHG emissions, Duff J. excoriates what he calls a lurking fallacy that "because in large part the grain trade is an export trade, [Parliament] can regulate it locally in order to give effect to [federal] policy in relation to that part of it which is export."[230] Such a principle, Duff J. holds, would presume to grant federal authority over all aspects of any industry so long as some share of product was exported. It is not hard to imagine such a

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[223] See, for example, Norris et al., *ibid*. The authors argue that the Natural Products Marketing Act should be upheld under the national concern branch of POGG.
[224] See *Re: Natural Products Marketing (SCC)*, *supra* note 218, in particular the reasons of Duff C.J.C. at 410. Duff C.J.C. held that the federal trade and commerce power "does embrace the regulation of external trade and the regulation of interprovincial trade and such ancillary legislation as may be necessarily incidental to the exercise of such powers." It did not, however, extend to the regulation of individual transactions within the province.
[225] *Re: Natural Products Marketing (PC)*, *supra* note 12.
[226] Duff C.J.C. also considers whether the impugned federal legislation was valid under POGG. He finds that POGG does not save the legislation, and his opinion in this regard was also endorsed on appeal to the Privy Council. He finds that the legislation is intended to regulate "trade in individual commodities or classes of commodities," and as such was beyond the reach of POGG. In reaching this conclusion, Duff C.J.C. cites *Board of Commerce (PC)*, *supra* note 12, *Toronto Electric Commissioners v Snider*, [1925] AC 396 (PC) [*Snider*], and the POGG emergency power case *Fort Frances Pulp and Paper v Manitoba Free Press*, [1923] AC 695 (PC) [*Fort Frances*]. The Privy Council appeal, *Re: Natural Products Marketing (PC)*, *supra* note 12 at 693, endorses these reasons. The decision holds that, "The judgment of [Duff C.J.] in this case is conclusive against the claim for validity on this ground."
[227] Colin H McNairn, "Transportation, Communication and the Constitution: The Scope of Federal Jurisdiction" (1969) 47:3 Can Bar Rev 355 at 393.
[228] *Manitoba Grain Act,* SC 1900, c 39; *Canada Grain Act, 1912,* 2 Geo V, c 27.
[229] *Eastern Terminal Elevator*, *supra* note 197.
[230] *Ibid* at 447.

dispute today in the context of industries such as the oil sands which contribute substantially to our emissions inventories.[231] Applying the *Eastern Terminal Elevator* decision to GHGs, it is safe to say that the degree to which a particular industry contributes to our emissions inventories is not constitutionally relevant to determining jurisdiction.

In finding the impugned federal legislation *ultra vires* in *Eastern Terminal Elevator*, Duff J. held that there was "one way in which the Dominion may acquire the authority to regulate a local work," and that was via the declaratory power in s. 91(29) and the related exception in s. 92(10)(c).[232] The federal government would follow this direction and use the declaratory power to sweep most of the grain trade beyond the farm gate into federal jurisdiction.[233] However, that was not the extent of the government's actions. As then-Professor Laskin explains, the government also enacted, via the spending power, a program to fix the price of grain by buying surplus from producers when required and it "exercised its compulsory power to prohibit or regulate the interprovincial movement of goods."[234] Although the invocation of the declaratory power set the grain trade on a different overall course from other supply management regimes, these trade restrictions and surplus purchase programs are also present in our modern supply management regime.

The same limits on federal power apply in the regulation of GHGs. Where either provincial works and undertakings or individual trades or transactions are concerned, the federal government cannot regulate directly under the trade and commerce power.[235] As with the grain trade, the federal government could extend its regulatory reach over works and undertakings via the declaratory power, although that seems unlikely due to political constraints. While the declaratory power has not been raised frequently in the context of mitigating climate change, it was widely hypothesized that Parliament might use the declaratory power to exert federal control over oil production in last half of the 20th century.[236] Oil and gas shares much

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[231] Some might argue that we are already seeing such a fight. For example, in *Re: An Act to Enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts, SC 2019, c, 28 and the Physical Activities Regulations, SOR/2019- 285*, ABCA, File Number 1901-0276-AC [*C-69 Reference*], Alberta is challenging the jurisdiction of Parliament to impose environmental assessment on major projects under the *Impact Assessment Act*, SC 2019 C 28 1 [*IAA*].

[232] *Eastern Terminal Elevator*, *supra* note 197 at 447. Anglin C.J.C. also raises the declaratory power at page 443. Leclair, *supra* note 165 at 370 frames this well. He writes that "after rejecting the trade and commerce power as support for federal legislation regulating local grain elevators, [Duff J.] nevertheless indicated [that the declaratory power] could provide the answer [Canada] sought. Ottawa acted accordingly; in so doing, Duff J. forced the government to assume responsibility for its acts."

[233] Parliament's exercise of the declaratory power in the Canada Grain Act, S.C..1925, c.33, and the Canada Grain Act, S.C. 1930, c.5. was upheld in *Murphy v Canadian Pacific Railway Company*, [1958] SCR 626 [*Murphy v CPR*], and also in *R v Klassen*, [1959] 20 DLR (2d) 406 (MB CA) [*Klassen*]. *Klassen* was not appealed to the Supreme Court, but the judgement has been widely cited. For an analysis of the impact of Klassen, see Bora Laskin, "Case Comment: *R v Klassen*" (1959) 37:4 Can Bar Rev 630.

[234] Laskin, *supra* note 197 at 120. The restrictions on transportation are contained in *Canadian Wheat Board Act*, 1935, RSC 1952 C 44 [*Canadian Wheat Board Act, 1935*], s 32.

[235] *Board of Commerce (PC)*, *supra* note 12.

[236] See John B Ballem, "Constitutional Validity of Provincial Oil and Gas Legislation" (1963) 41:2 Can Bar Rev 199 at 230–1 Ballem frames the two possible approaches to federal legislation of oil and gas, by collaboration or fiat, much as I do here for climate change. The use of the declaratory power in relation to oil resources is also addressed in David E Thring, "Alberta, Oil, and the Constitution" (1979) 17:1 Alta Law Rev 69 at 90, Morris C Schumiatcher, "Canada's Constitutional Curmudgeons, or a Tale of Three Cities" (1975) 21:1 McGill Law J 113 at 124, William D Moull, "Section 92A of the *Constitution Act, 1867*" (1983) 61:4 Can Bar Rev, online: <https://cbr.cba.org/index.php/cbr/article/view/3292> at 726, and J Peter Meekison & Roy J Romanow, "Western Advocacy and Section 92A of the *Constitution Act, 1982*" in *Origins and Meaning of Section 92A: The 1982 Constitutional Amendment on Resources* (Montreal, QC: Institute

in common with the grain trade, so it is not hard to see that the shoe might fit. Like the grain trade, oil and gas relies on local gathering systems, central processing facilities, and intra- and extra-provincial transportation infrastructure to realize value. It is in many ways a perfect analog.

The case for the declaratory power as a tool to increase general jurisdiction to regulate in relation to climate change is not often discussed. Nathalie Chalifour suggests the possibility of "provincial motivation to accept a national carbon price and/or other climate regulation increasing in light of the potential for Parliament to use the muscle of the declaratory power," although she allows in later work that political constraints would likely prevent such an action.[237] There is limited modern-era jurisprudence on the limits of the declaratory power, and the precedents do not suggest constitutional limits that would constrain such a declaration.[238] On the contrary, the power is largely unfettered.[239] However, if there were ever to be a test of whether an unfettered declaratory power is compatible with Canadian federalism, a federal declaration of jurisdiction over even the country's largest emitters would surely provide it. The works and undertakings that constitute our largest emitters are widely spread across sectors and provinces.[240] Any declaration of federal jurisdiction over such wide swaths of the provincial sphere is difficult to fathom.

2.3.2 Legislation affecting, but not in relation to, trade

The decisions in *Natural Products Marketing* and *Eastern Terminal Elevator* clarified that the federal government cannot, under the guise of regulating trade, reach into the regulation of local works and undertakings in the provinces. The Supreme Court decision in *Board of Commerce* and the subsequent Privy Council appeal further limited the direct incursion of federal regulation into most transactions

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for Research on Public Policy, 1985) 77 at 15. Doug Richardson & Tim Quigley, "The Resource Industry, Foreign Ownership, and Constitutional Methods of Control" (1974) 39:1 Sask Law Rev 92 took an even more extreme approach, and saw the declaratory power as a tool in a potential wider nationalization of the energy industry.

[237] Chalifour, "Canadian Climate Federalism", *supra* note 7 at 15; In Nathalie J Chalifour, "Drawing Lines in the Sand: Parliament's Jurisdiction to Consider Upstream and Downstream Greenhouse Gas (GHG) Emissions in Interprovincial Pipeline Project Reviews Pipelines and the Constitution" (2018) 1 Rev Const Stud 129, n 210, Chalifour writes that "I have also written about the potential application of the emergency branch of POGG and the declaratory power [in the context of climate change], though I recognize that Parliament would not likely use these powers for political reasons."

[238] See *Pronto Uranium Mines Ltd v Ontario (Labour Relations Board)*, [1956] 5 DLR (2d) 342 (Ontario Supreme Court) [*Pronto*], and *Ontario Hydro*, *supra* note 159, which each resulted from the unclear reach of federal jurisdiction after the declaratory power was used to sweep the nuclear industry into federal jurisdiction. For a complete listing of statutes invoking the declaratory power, see "Statutes Containing an Exercise of the Federal Declaratory Power under Section 92(10)(c) of the *British North America Act 1856-1966* Appendix" (1968) 3:1 Manit Law J 106.

[239] In *Ontario Hydro*, *supra* note 159 at 370, the plurality of LaForest J. held that Canadian courts "have never shown any disposition to limit its operation." Similarly, in *Jorgenson v Attorney General of Canada*, [1971] SCR 725 [*Jorgenson*], a unanimous court held that "Parliament is not limited either as to time or as to occasion in resorting to s. 92(10)(c)," in which the declaratory exception enables federal jurisdiction via s. 91(29). For discussion of the limits to the declaratory power, see Leclair, "The Supreme Court of Canada's Understanding of Federalism", *supra* note 56 at 443, in particular note 131. See also McNairn, *supra* note 227 at 373–388, or generally Kenneth Hanssen, "The Federal Declaratory Power under the *British North America Act*" (1968) 3:1 Manit Law J 87.

[240] For example, in 2018 reporting data, there were fewer than 350 facilities reporting over 100,000 tonnes per year of GHG emissions, and the combined emissions of these large facilities accounted for 257Mt, or about 35% of Canada's total emissions for that year. Environment and Climate Change Canada, "Greenhouse Gas Reporting Program (GHGRP) Facility Greenhouse Gas Data", (30 April 2020), online: *Government of Canada* <https://open.canada.ca/data/en/dataset/a8ba14b7-7f23-462a-bdbb-83b0ef629823>. Annual totals via Government of Canada, "2020 National Inventory Report (NIR) Executive Summary", online: *Environment and Climate Change Canada* <https://perma.cc/V9X9-D3LA>.

occurring in the provinces.[241] The history of supply management also shows that the provinces are, in turn, restricted from legislation in relation to trade although the exact definition of what constitutes regulation in relation to trade is unclear. It is generally accepted that the provinces can regulate GHGs,[242] but the degree to which provincial policies can affect trade or act to protect their domestic economies from external competition while acting on GHGs is important. Consider, for example, Alberta's *TIER* industrial emissions pricing policies which provides output subsidies to large emitters and excludes non-Albertan emissions offsets from its market, two measures which advantage Alberta domestic producers versus import competition.[243]

That provincial regulation can affect traded commodities was established in two early cases, *Shannon* and *Home Oil*.[244] In *Shannon,* a provincial dairy licensing scheme in British Columbia was challenged, and the resulting decision held that provincial jurisdiction extended to "transactions that take place wholly within the province," despite those transactions involving traded products.[245] *Home Oil* provided a similar test of provincial jurisdiction over traded commodities – coal and petroleum products in this case – and further extended the reach of the provinces into matters of trade. In *Home Oil,* the fact that price controls were implemented so as to protect domestic industry from external competition was not deemed material to validity.[246]

The Supreme Court established more substantial and defined limits to the jurisdiction of the provinces in the *Ontario Farm Products Reference*, although the multiple sets of reasons make for a less instructive precedent.[247] Kerwin C.J.C. held that once a statute moves beyond the regulation of transactions within a province and "aims at regulation of trade in matters of inter-provincial concern, it is beyond the competence of a provincial legislature."[248] Rand J. offered a similar conclusion, holding that the provinces had exclusive jurisdiction to regulate particular trades or intra-provincial transactions but that such jurisdiction may be

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[241] See *Re the Board of Commerce Act and the Combines and Fair Prices Act*, [1920] 54 DLR 354 [*Board of Commerce (SCC)*], and *Board of Commerce (PC)*, *supra* note 12.
[242] Hsu & Elliot, *supra* note 95 at 483–489.
[243] *TIER*, *supra* note 16. TIER includes at least two measures designed to improve the competitiveness of domestic production. In the electricity sector, domestic production pays a carbon price but also receives output-based allocations of emissions credits in proportion to electricity generated. Imported power receives no such allocations, nor does it pay the carbon price. The regulation also accepts only Alberta-based offsets for emissions reduction from small sources, such that two farmers on either side of the Alberta-Saskatchewan border undertaking the same practice and certifying their emissions reductions according to the same protocols would not be treated the same way under the policy.
[244] *Shannon v Lower Mainland Dairy Products Board*, [1938] AC 708 [*Shannon*]; *Home Oil Distributors Ltd et al v Attorney-General of British Columbia et al*, [1940] SCR 444 [*Home Oil*].
[245] *Shannon*, *supra* note 244 at 718. The decision also held, at page 720, that so long as the pith and substance of the legislation was the regulation of a "particular business entirely within the province," legislation would be intra vires the province despite incidental effects on trade.
[246] *Home Oil*, *supra* note 244 at 448. Home Oil and *Shannon*, *supra* note 244, both contrast with the Supreme Court's earlier look at protectionist provincial supply management policies in *Lawson v Interior Tree Fruit and Vegetable Committee of Direction*, [1931] SCR 357 [*Lawson*], in which a unanimous court found that legislation restricting the trade of tree fruits via an administrative body was *ultra vires* the province of British Columbia.
[247] See *Ontario Farm Products Reference*, *supra* note 192. The advice in this reference is a morass of 6 sets of reasons on 7 questions from 8 sitting justices.
[248] *Ibid* at 204. Kerwin C.J. cites *Parsons*, *supra* note 62 at 113.

subject to incidental intrusion by federal policies in relation to extra-provincial trade.[249] And, while Rand J. affirmed that extra-provincial trade remained the exclusive legislative jurisdiction of Parliament,[250] he also held that "a producer is entitled to dispose of his products beyond the Province without reference to a provincial marketing agency or price shipping or other trade regulation and an outside purchaser is entitled with equal freedom to purchase and export."[251] The limits of provincial reach with respect to trade led Rand J. to conclude that the only means open to effectively impose agricultural supply management was co-operative action with the federal government.[252]

Additional decisions reinforced provincial claims to wide-ranging powers. In *Carnation,* the Court held that regulations imposed in Quebec which for all intents and purposes allowed price controls on exported products, were *intra vires*.[253] In that case, the regulated transactions all occurred in Quebec and, per Martland J., "the most that can be said of [the impugned Quebec regulations] is that they had some effect upon the cost of doing business in Quebec of company engaged in interprovincial trade and that by itself is not sufficient to make them invalid."[254] A similar decision in the *BC Milk Reference* added some caveats, but still allowed the provinces a wide berth to regulate transactions occurring in the province.[255]

The increasingly bold actions of the provinces to protect their domestic industries launched the 'chicken and egg war' which began a rapid march toward our modern supply management regime.[256] Frustrated with regimes imposed in other provinces, Manitoba, though not a major producer of chickens or eggs, passed its own law in the fashion of Quebec's supply management rules and then questioned its constitutionality through a reference case. When the Manitoba Court of Appeal found the rules to be *ultra vires* the province, Manitoba appealed their *loss* to the Supreme Court. The ensuing advice in the *Manitoba Egg Reference* placed important limits on the reach of provincial policies into the regulation of trade in commodities.[257] Martland J., who wrote for the majority in the *Manitoba Egg Reference* only three years after writing for the unanimous court in *Carnation,* held that the impugned Manitoba legislation "not only affects inter-

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[249] *Ontario Farm Products Reference*, *supra* note 192 at 209 [emphasis added]. Rand J. cites *Re: Natural Products Marketing (SCC)*, *supra* note 218 at 414.
[250] *Ontario Farm Products Reference*, *supra* note 192 at 209 [emphasis added]. Rand J. cites *Re: Natural Products Marketing (SCC)*, *supra* note 218 at 414. This distinction allows Rand J. to distinguish the finding in *Lawson*, *supra* note 246, holding that the impugned legislation in that case sought to regulate trade to directly and was thus outside the provincial ambit.
[251] *Ontario Farm Products Reference*, *supra* note 192 at 210. This distinction would come up in later court challenges, in particular *Pelland*, *supra* note 191, which challenged federal authority to delegate authority in relation to extra-provincial trade to provincial marketing agencies.
[252] *Ontario Farm Products Reference*, *supra* note 192 at 214. This description is a reasonable approximation of the regime later upheld in *Agricultural Products Marketing*, *supra* note 12.
[253] *Carnation*, *supra* note 216.
[254] *Ibid* at 254.
[255] The BC Court of Appeal recommendations in the *Reference Re Milk Industry Act of British Columbia*, [1959] 302 CanLii (BCCA) [*BC Milk Reference*], were appealed to the Supreme Court in *Crawford v Attorney-General for British Columbia*, [1960] SCR 346 [*Crawford*]. In upholding the BC scheme, the Court allows that future orders under the impugned provincial regime could be *ultra vires*, "to the extent that they may trespass upon the powers of Parliament in relation to the regulation of trade and commerce.".
[256] Mathen, *supra* note 211 at 96. See also Weiler, *supra* note 211 at 156.
[257] *Manitoba Egg Reference*, *supra* note 192.

provincial trade in eggs, but that it aims at the regulation of such trade."[258] Laskin J. reconciles the decision in the *Manitoba Egg Reference* with *Carnation* by suggesting that the Manitoba regime was destined to be employed to discriminate against extra-provincial production, thus aligning his reasons with the earlier Supreme Court decision in *Lawson.*[259]

While no clear test emerges from these cases, the overall conclusion is that provinces cannot legislate in relation to interprovincial trade, but that provincial legislation may substantially affect traded goods. This implies that, while provinces have ample constitutional authority to price or otherwise regulate GHG emissions, they may be limited in their capacity to enact measures like border carbon adjustments or other policies to protect provincial competitiveness in the face of trade.[260] When the limits to provincial action implied by these cases are understood along with the limits to federal legislation implied by *Natural Products Marketing* and *Eastern Terminal Elevator*, it is clear that neither provincial nor federal governments acting alone could effectively legislate a supply management regime, at least without Parliament's use of the declaratory power. This understanding set the stage for the collaborative approach which defines our modern supply management regime.[261]

2.3.3 Collaboration Established

The legal saga of supply management reached its practical conclusion in *Agricultural Products Marketing*, which tested the validity of our modern supply management regime.[262] This approach includes production quotas for each province which are established federally by an agency which also backstops the set price by purchasing excess supply in the market.[263] Provincial laws dovetail with federal laws, allocating provincial quota to producers and enforcing constraints on production and sales. The regime is financed by fees paid by producers within the regulated sectors.[264] Those challenging the regulation principally took issue with the fact that all producers were covered by the quota regime regardless of the destination of their product (a challenge which would be again taken up again three decades later in *Pelland*), and that the joint regime was allowing each level of government to effectively exceed their spheres of authority.[265] I use examination of the *Agricultural Products Marketing* decision to complete my consideration of the potential

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[258] *Ibid* at 703 [emphasis added]. Recall that in his decision in *Carnation*, *supra* note 216 at 253, Justice Martland had cited the emphasized word "aimed" from Chief Justice Kerwin's decision in *Ontario Farm Products Reference*, *supra* note 192 at 204.
[259] *Manitoba Egg Reference*, *supra* note 192 at 717.
[260] Recall that border carbon adjustments, discussed in Fischer & Fox, *supra* note 214, are trade tariffs set on an emissions basis instead of an ad valorem or unit basis. See also Canada's EcoFiscal Commission, *supra* note 213, for more discussion of competitiveness concerns.
[261] Patrick J Monahan, *Politics and the Constitution: The Charter, Federalism, and the Supreme Court of Canada* (Toronto, Ontario, Canada: Carswell Methuen, 1987) at 206.
[262] *Agricultural Products Marketing*, *supra* note 12. Three pieces of intertwined legislation, the *Agricultural Products Marketing Act*, RSC 1970, c A-7, the *Farm Products Marketing Agencies Act*, 1972 (Can), c 65, and *The Farm Products Marketing Act*, RSO 1970, c 162 were challenged in the reference, which focussed on the implications of the regulatory regime on intraprovincial, interprovincial, and export trade in eggs.
[263] Monahan, *supra* note 261 at 206.
[264] *Ibid*.
[265] *Ibid* at 206–207. The reference to *Pelland*, *supra* note 191, which was decided long after Monahan's writing, is my own addition.

for a parallel regime to limit GHG emissions, in particular with respect to the necessity of federal-provincial collaboration.[266]

The reference case asked nine questions, but most important for our purposes is the third question which addressed the degree to which Parliament could reach into intra-provincial trade. This was the main source of disagreement between the two sets of reasons, although neither position provides a wide opening for federal intervention.[267] Laskin C.J.C. described the policy problem at play: "I am quite aware of the problem that exists in making a federal marketing scheme effective if the regulatory agency cannot reach back into production."[268] He was prepared to allow that such authority could extend to the purchase and disposal of surpluses so as to effectuate price controls as the federal government has done in the case of the grain trade.[269] Pigeon J.'s majority reasons disagreed in part, holding that the spending power did not allow the federal government to do what it was otherwise not constitutionally entitled to do.[270] Pigeon J. wrote that "federal intrusion into local trade is just as unconstitutional when done by buying and selling, as when done through any other method."[271] The two sets of reasons implicitly agree that the ability to reach back into production is very limited. This is crucial in assessing parallels to GHGs where provincial collaboration is at a premium. The federal government's authority to enforce supply management was grounded in trade and, at least under the extra-provincial branch of the trade and commerce power, it cannot regulate the actions of individuals within the province the further its legislative goals in relation to trade.

The next major issue in the reference was whether the federal government could set quotas and assign them to the provinces. Laskin C.J.C holds that "it was certainly open to the federal authorities to fix the respective provincial shares of Canadian egg production *for the purposes of regulating the movement of eggs in interprovincial or export trade*."[272] The same would perhaps be true of emissions, although even if the federal government could establish such provincial emissions targets, they would be unable to enforce them as they do with supply management. The federal authority to establish quotas in agricultural products is anchored in their jurisdiction to restrict the interprovincial movement and/or export of natural products.[273]

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[266] The decision in *Agricultural Products Marketing*, *supra* note 12 contains expansive reasons from Laskin C.J.C. writing for a minority, with a short set of largely concurring reasons from Pigeon J. forming the majority.
[267] *Ibid* at 1259. Two sets of reasons were provided: the first, a magnum opus by Laskin C.J.C. writing for Spence and Dickson J.J., and a short rejoinder by Justice Pigeon writing for the majority of Martland, Ritchie, Beetz and de Grandpré J.J.
[268] *Ibid* at 1263.
[269] *Ibid* at 1266.
[270] *Ibid* at 1292–1293. Pigeon J. held that "it is not immaterial that surpluses are marketable in local trade and I do not agree that a federal agency may lawfully be authorized to purchase in any market and to dispose of its purchases as an ordinary trader."
[271] *Ibid*. These concerns were not sufficient for Pigeon J. to find that the impugned legislation was invalid.
[272] *Ibid* at 1283 [emphasis added].
[273] This is analogous to what the federal government had validly done with respect to the grain trade. See, for example, Laskin, *supra* note 197 at 120, or the decision of the Supreme Court in *Murphy v CPR*, *supra* note 233.

The federal government almost certainly does not have clear jurisdiction to enforce a particular level of GHG emissions within the provinces under the guise of regulation in relation to inter-provincial trade.[274]

Finally, there was the question of whether the provinces could, through collaboration with the federal government, enforce trade restrictions.[275] Laskin C.J.C struggles with the possibility that reductions in production enabled by provincial law would translate directly to reductions in exports and asks whether a province can be "allowed to accomplish this forbidden end by choking off interprovincial trade at its very source, at the point of production?"[276] In this case, he concludes that, so long as the primary object of provincial legislation is intra-provincial trade, and it is not enacted with a view to limiting export trade, then the law would be valid. This, and similar rationale from Pigeon J. holds that even if provincial restrictions are expressly aligned with the quotas assigned in a federal system which are, in turn, expressly designed with the object of influencing interprovincial or export trade, we can look at the provincial law as though this context does not exist. The interlocking nature of the legislation, in the tradition of the double aspect doctrine, allows it to be the case that the provincial legislation is dealing only with the distribution and enforcement of quota in the province. The federal government is regulating within its domain, restricting trade, and provincial action allocating the quotas is constitutionally separate from federal action. The systems are interdependent, with each level of government legislating within its ambit. This rationale, and the necessity of interdependent legislation, was affirmed in *Pelland*.[277]

Some of the same factors that make collaboration necessary in supply management would apply to regulations to reduce GHGs, namely that provincial governments are limited in their capacity to legislate to protect their domestic economies from competition via trade. In the context of carbon budget legislation, the federal government would be dependent on the provincial capacity to allocate and enforce provincial shares of emissions, but the federal government does not have the same regulatory capacity to enforce the overall system as it does with grain or agricultural products because there is no similar federal authority to limit emissions leaving the province to the atmosphere. With grain, eggs, or chickens, the transportation networks necessary for trade were under federal control, and which meant that it was in provincial interest not to allow domestic over-production as any additional production could not be marketed outside the

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[274] The federal government has broad authority to prohibit pollution under the criminal law power. See, for example, Hogg, "Constitutional Authority", *supra* note 86. It is also plausible that GHGs could be regulated under POGG, although whether the federal government could set and enforce provincial quotas under this power is speculative. Despite the fact that GHG emissions clearly move beyond provincial borders, they could not be regulated in the same way as a commodity via the extra-provincial branch of the trade and commerce power.
[275] *Agricultural Products Marketing*, *supra* note 12 at 1284–1285.
[276] *Ibid* at 1287.
[277] In a test of this finding in *Pelland*, *supra* note 191 at para 37, the reasons of Abella J. held that "the core character of the provincial legislative component of the federal-provincial chicken marketing scheme is not to set quotas or fix prices for exported goods or to attempt to regulate interprovincial or export trade." Rather, Abella J. found in that case that [the provincial] quota system is in relation to "the production and marketing of chicken within [the province]" and the extent of its impact on trade is insofar as it allows [the province] "to fulfill provincial commitments under a cooperative federal-provincial agreement," an impact she deemed incidental.

province. With emissions, that would not be true, at least under the extra-provincial trade and commerce power. If we allow that the federal government could regulate the behaviour of individual emitters under other heads of power to meet national emissions targets, which is almost certainly true, then the tables turn and it is the federal government that no longer needs provincial enforcement of emissions quotas within the province.[278] It is plausible that sub-national carbon budgets could be implemented by the provinces through a voluntary adoption of federal quota allocations, but that seems decidedly unlikely.

Both sets of reasons in *Agricultural Products Marketing* held that the cooperative legislation between the federal government and the provinces had found the right balance.[279] The reasons also highlight the two other key considerations for enforceable carbon budget legislation in the tradition of supply management. First, the allocation of emissions rights will generate significant political as well as potential legal issues. Second, GHG policies imposed in or on the provinces risk contravention of s. 121 of the *Constitution Act, 1867* while national measures offer potential risks tied to Canada's trade agreements. Despite the conclusion that such a system is likely unworkable for emissions, each of these are discussed in turn below for the sake of completeness.

2.4. A national pie-dividing contest: parceling out a carbon budget

A carbon budget regime will have to balance issues of economic integration and regional discrimination.[280] The scarcity induced in a supply management or emissions quota regime means that initial allocations of the right to engage in the regulated economic activity have significant value.[281] For any such regime, there will be equity issues raised with respect to the method (if any) of allocating initial or on-going rights to production or emissions.[282] For this section, I assume that Parliament and the provinces can jointly create an enforceable, national system of emissions allowances to meet its proposed carbon budget. Under such a system, the allocation of federal emissions quota would be largely unfettered.[283] Even so, there remains a risk that a carbon budget regime could run afoul of provisions in s. 6 of the *Constitution Act, 1982* which prevent regional discrimination. While these provisions do not extend to the exercise of certain federal powers (the spending power, for example), they could be in-play with respect to the allocation of sub-

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[278] See Hogg, "Constitutional Authority", *supra* note 86, Hsu & Elliot, *supra* note 95, or Chalifour, "Canadian Climate Federalism", *supra* note 7.
[279] In his reasons in *Agricultural Products Marketing*, *supra* note 12 at 1297, Pigeon J. held that "I fail to see what objection there can be to overall quotas established by a board thus vested with dual [federal and provincial] authority, unless it is said that our constitution precludes any businesslike marketing of products in both local and extra-provincial trade except under a federal assumption of power, something which I think, is directly contrary to the basic principle of the constitution."
[280] See generally Katherine Swinton, "Courting Our Way to Economic Integration: Judicial Review and the Canadian Economic Union Symposium: Recent Developments Affecting the Canadian Economic Union" (1995) 25:2 Can Bus Law J 280 at 295–302, which discusses economic discrimination in the context of a Canadian economic union.
[281] *Recall that per Statistics Canada,* supra *note 205, the total value of quota in Canada was over $37.5 billion at the end of 2019 and that $10.6 billion in quota was held in Quebec and $13.9 billion in quota was held in Ontario.*
[282] Quota could be allocated annually though an auction, for example, with no historic allocations.
[283] *Agricultural Products Marketing*, *supra* note 12 at 1283.

national carbon budgets and/or other emissions regulations depending on the specific legislative approach.[284] The allocation of egg marketing quota was challenged under this section of the Charter in *Richardson* which I use to seed this discussion.

In *Richardson*, the Supreme Court considered whether the Canadian egg marketing scheme violated the appellant's rights under ss. 2(d), 6(2), or 15(1) of the Charter which respectively protect freedom of association, the right to earn a livelihood in any province, and equal treatment before the law. Richardson's claim under the Charter was based on regional discrimination owing to the fact that the Northwest Territories was not allocated any quota for the production of eggs under the supply management system.[285] The majority held that the general purposes of the egg marketing scheme were valid, and the allocation of quota on the basis of historic production was a valid means of doing so.[286]

Before delving further into *Richardson*, it is worth considering what an allocation regime similar to that used for agricultural quota would look like if applied to emissions. Recall that, in the impugned regime in *Agricultural Products Marketing*, the allocation of the total national egg production quota to the provinces was done on the basis of the average market share held by each province in the 5 years preceding implementation.[287] If markets grew, then quota was to be allocated considering "the principle of comparative advantage of production."[288] The eventual allocation of quota across provinces from all of our supply management programs has been anything but equitable, as shown in Figure 5. Rather, the allocation has seen the lion's share of the value of allocations remains in Ontario and Quebec and, as was raised in *Richardson*, Statistics Canada does not show any value from quota for any natural produces held in the territories under the supply management system.

[284] Swinton, "Courting Our Way to Economic Integration", *supra* note 280 at 296, highlights the exclusion of the spending power from s.6 judicial review.
[285] Note that Richardson himself was "a resident of Alberta who produces eggs in the Northwest Territories." *Richardson*, *supra* note 202 at para 95.
[286] *Ibid* at para 102.
[287] *Agricultural Products Marketing*, *supra* note 12 at 1215.
[288] *Ibid*.

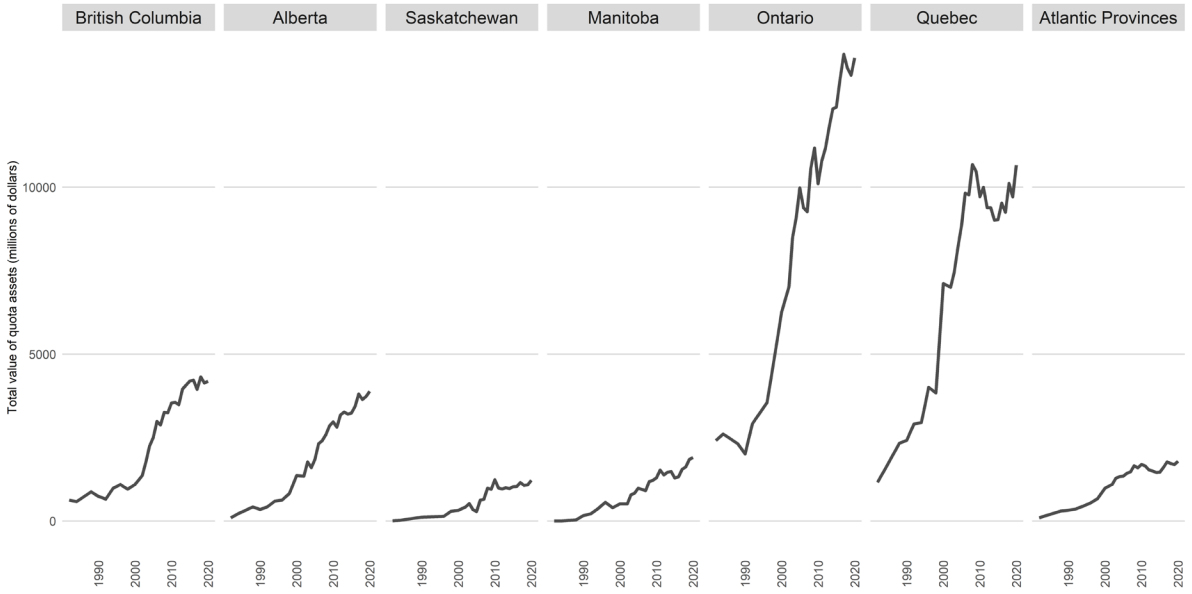

Figure 5 Value of supply management quota at December 31st of each year in Canadian provinces.

When considering a similar system for GHG emissions, the allocation of quota among provinces or sectors would be controversial, largely because of different rates of historic and projected growth in emissions. Consider the emissions by sector and region shown in Figure 6. The figure includes three potential rules by which a national carbon budget in line with our Paris targets might be allocated across provinces or sub-national regions:

1) Each sub-national region allocated a pro-rata share based on 2005 emissions levels;
2) Each sub-national region allocated an equal, per-capita share of the 2030 target of 511 Mt based on current population projections using Statistics Canada's M1 scenario;
3) Each sub-national region allocated a pro-rata share of the 2030 target of 511 Mt based on their share of emissions from 2014-2018 in Canada (the 5-year rule from supply management).

It is clear from Figure 6 that some regions (Alberta in particular, but also Saskatchewan) will face large requirements to reduce emissions under either historical or equal-per-capita allocations, while other provinces would see significant surplus allocations under the equal-per-capita rule, in particular provinces which have substantially reduced emissions in the recent past (Ontario) or provinces reliant on hydro power (Quebec). For some regions, BC or Manitoba for example, the three rules considered produce very similar outcomes. For others, the outcomes vary substantially.

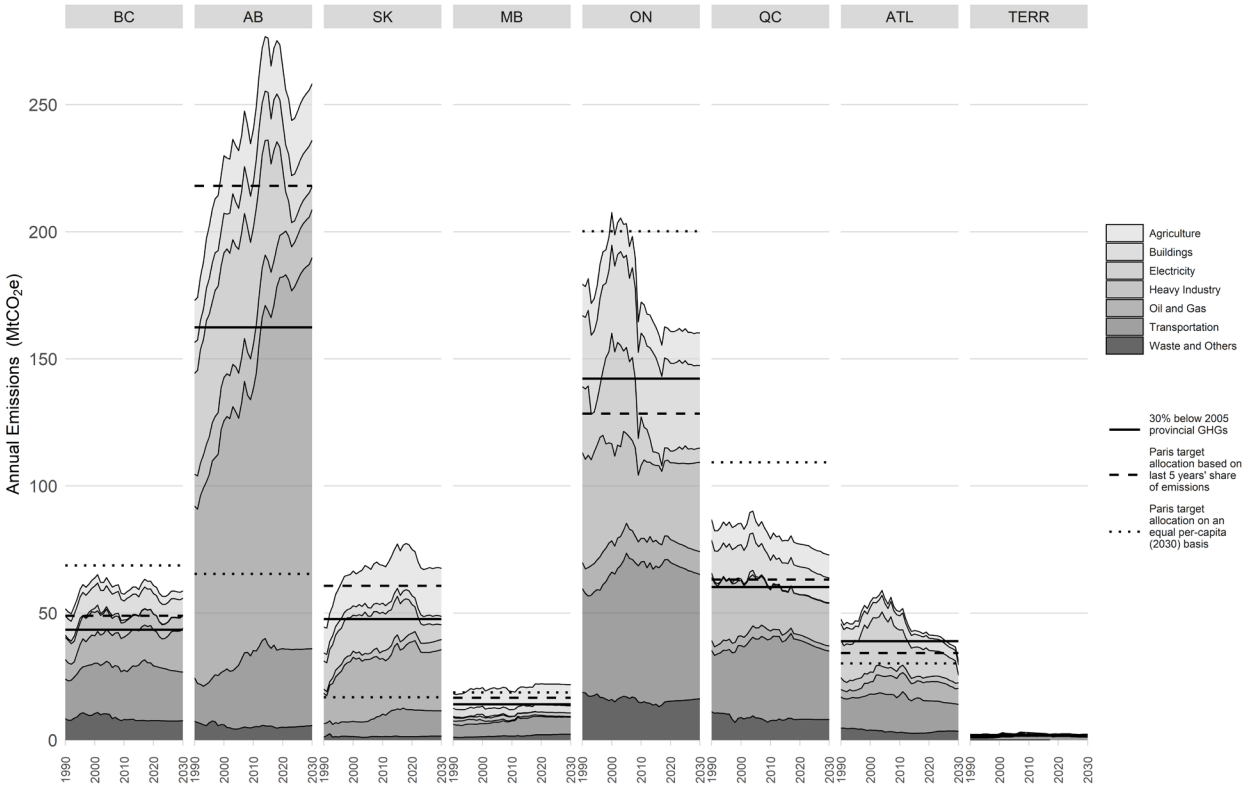

Figure 6 Provincial and territorial emissions and emissions projections along with possible sub-national carbon budget allocation rules.[289]

Depending on the degree of granularity in federal allocation rule and/or the provincial policies to implement any carbon budget regime, it might be that certain sectors or sectors within provinces receive no or very limited allocations. While it is generally assumed that carbon budget allocations would be exchangeable in a national cap-and-trade program, that need not be the case. In fact, sector-level emissions quotas might also be used to supplement or substitute for regulations targeting certain sectors, for example to phase out coal power or to enforce from afar the 100Mt cap on oil sands emissions.[290] Political fireworks notwithstanding, there are two potential legal issues which would be raised by such an action. It is almost assured that federal attempts to manage natural resource industries by proxy via emissions quota would be challenged as an invasion of exclusive provincial authority under s. 92A of the *Constitution Act, 1982*.[291]

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[289] Government of Canada, "2020 National Inventory Data", (20 April 2020), online: *Environment Canada* <http://data.ec.gc.ca/data/substances/monitor/canada-s-official-greenhouse-gas-inventory/>, and Environment and Climate Change Canada, *supra* note 182. Figure uses Reference Case projections including policies and measures that were in place as of September 2019.

[290] The federal government amended regulations to ensure the phase out of coal made under *CEPA*, *supra* note 106, The Reduction of Carbon Dioxide Emissions from Coal-fired Generation of Electricity Regulations (SOR/2012-167) on November 30, 2018. The Alberta government legislated a 100 Mt limit on oil sands emissions via the *Oil Sands Emissions Limit Act*, 2020, SA 2016 C O-75 [*100 Mt Cap*], but regulations or other means to implement the cap have not been enacted.

[291] Lucas & Yearsley, *supra* note 33 discuss the constitutionality of a previous iteration of the coal phase out rules. The majority decision in the *Alberta GGPPA Reference*, *supra* note 30, leans heavily on the premise of a federal invasion of the exclusive provincial authority to manage

But, implicit restrictions on particular classes of economic activity could also open the s. 6 Charter issues raised in *Richardson*.

The majority judgement of Iacobucci and Bastarache J.J. in *Richardson* reminds us that the Charter does not preclude valid regulation of economic activities, and that "the provinces and federal government are authorized by virtue of ss. 91 and 92 of the *Constitution Act, 1867* to regulate all manner of economic activity."[292] However, there is clearly a tension between a person's s. 6(b) rights to pursue a livelihood and the legislative authority of the provinces and the federal government to set regulatory regimes which suit their individual purposes. The majority in *Richardson* recognizes that the necessary upshot of the division of powers is that there will not be equality of opportunity in all areas of Canada, since valid provincial or even federal policies may provide more advantage to the pursuit of a particular vocation in a particular province than would be the case elsewhere. The ratio in *Richardson* is such that, so long as legislation is not enacted with the specific intent to discriminate against residents of one province over another, the legislation may be valid while having an incidental outcome that restricts employment opportunities. The majority opinion is clear that s. 6 rights "should not be interpreted in terms of a right to engage in any specific type of economic activity."[293] Would that still hold if, for example, federal emissions policies precluded or substantially restricted a broader class of economic activity concentrated in a particular region? The oil sands, of course, come to mind.

The dissent of Justice McLachlin (as she was then) in *Richardson* contradicted the view of the majority and should give us pause as to how such challenges might be viewed in the future. For McLachlin J., federal legislation which imposed trade restrictions at the provincial border had always been "suspect", even prior to the enactment of the Charter.[294] She held that, because provinces can only legislate matters within their borders, "discrimination by provinces must necessarily always be concerned with intra-province discrimination." McLachlin J. would have held that so long as provincial laws or government practices treat all people within a province equally, they do not violate s. 6 of the *Charter*.[295] She places a different standard for Canadian laws, however. Federal legislation must "[treat] all people within the country equally," so as to not discriminate.[296] Her opinion, with which Major J. concurred, held that the egg marketing scheme impugned in *Richardson* "denies [the right to market eggs extra-territorially] to producers in two territories,

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natural resources under s.92A (1). This should not be interpreted as an endorsement of that view in the majority opinion. For analysis in this regard, see Martin Olszynski, Nigel Bankes & Andrew Leach, "Breaking Ranks (and Precedent): *Reference re Greenhouse Gas Pollution Pricing Act*, 2020 ABCA 74" (2020) 33:1 J Environ Law Pract 159.

[292] *Richardson*, *supra* note 202 at para 61.

[293] *Ibid* at para 66.

[294] *Ibid* at para 127.

[295] *Ibid* at para 160.

[296] *Ibid* at para 161 [emphasis in original].

and that this constitutes a distinction based on residence that disadvantages egg producers in these territories relative to egg producers in the 10 provinces."[297] Would she have looked the same way upon, for example, federal policy which holds that coal power must be phased out in Alberta by 2030, while granting an exemption to similar facilities in Nova Scotia?[298] It seems likely.

There are significant warnings for GHG policies in *Richardson*, in particular when we consider the potential for a rigid allocation of a carbon budget at the sector or province level. Some parallels to the recent Alberta Court of Appeal decision into the validity of the *GGPPA* also emerge.[299] The majority of the Alberta Court of Appeal clearly saw the *GGPPA* as an attack on Alberta, and one which was targeted to the disadvantage of Alberta workers.[300] That perspective would only be bolstered by the inequities implied in any of the three hypothetical rules for allocation examined in Figure 6 if a future challenge to the validity of federal carbon budget legislation came before the same court.[301]

Hypotheticals which do not consider the finer points of a particular policy and the circumstances under which might be imposed are not always helpful. It seems unlikely that an allocation of a hypothetical carbon budget could rise to the level of regional discrimination as defined in the s. 6 of the Charter, unless federal quota were allocated very specifically to individual industries and allocations were not tradeable.[302] And, having gotten to that stage, the s. 1 consideration might still see the courts find that the overall regime was a reasonable exercise of legislative discretion. After all, it might not be reasonable to expect that a climate change policy would preserve the right to earn a livelihood in emissions-intensive industries anywhere in Canada.

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[297] *Ibid* at para 166. The remainder of McLachlin J.'s dissent holds that the scheme is not saved by s. 6(a) (it discriminates primarily on the basis of residence), nor is it saved by s. 1 (the limitation was not one created by design by rather by accident of historic production, and detracts from the creation of a national supply management system).

[298] See generally Government of Canada, "Canada-Nova Scotia equivalency agreement regarding greenhouse gas emissions from electricity producers, 2020", (2020), online: *Government of Canada* <https://www.canada.ca/en/environment-climate-change/services/canadian-environmental-protection-act-registry/agreements/equivalency/canada-nova-scotia-greenhouse-gas-electricity-producers-2020.html>. The agreement provided for equivalent GHG emissions reductions as would have been achieved through the coal phase out regulation, but allows a different schedule for plant closures than would have otherwise been required.

[299] *Alberta GGPPA Reference*, *supra* note 30.

[300] This tone in the ABCA decision is highlighted in Chalifour, Oliver, & Wormington, *supra* note 36 at 21–22, and in Olszynski, Bankes, & Leach, *supra* note 291 at 10.

[301] Even the most generous of the three allocation rules considered, the 5-year rule as had been used for egg quota, projections from Environment and Climate Change Canada, *supra* note 182, would still set Alberta's emissions 16% above quota levels by 2030 without further action to reduce emissions.

[302] Parallels could be drawn to sector-specific regulations such as the phase out of coal-fired electricity. Given that coal power is today only used in three provinces, Alberta, Saskatchewan, and Nova Scotia, a case similar to that of Richardson could hypothetically be mounted against such regulations, although these approaches are beyond the scope of this paper. The majority opinion that Section 6 rights "should not be interpreted in terms of a right to engage in any specific type of economic activity," would likely preclude such a challenge. *Richardson*, *supra* note 202 at para 66.

2.5. Free trade and the limits to carbon budget policies

The addition of the s. 6 economic mobility rights in the Charter had as one of its objects the assurance of a common economic market in Canada.[303] Section 6, read alongside s.121 of the *Constitution Act, 1867* which stipulates that the output of provincial industries shall "be admitted free into each of the other Provinces," should militate against provincial protectionism.[304] Much like the trade and commerce power enumerated in s. 91(2), judicial interpretation of s.121 has limited its reach, but even the limited interpretation of s. 121 could present impediments to carbon budget legislation.

Conflicts between s. 121 and GHG emissions policies could arise because of provisions which are, and are likely to continue to be, deployed in GHG emissions policies to preserve local competitiveness, including the imposition of duties on carbon-intensive imports and subsidies for carbon-intensive exports.[305] The federal government might also choose, in the context of provincial intransigence, to penalize or otherwise restrict exports or interprovincial movements of emissions-intensive products.[306] Insofar as these policies take the form of trade tariffs, conflicts with s. 121 are possible.

Relatively few cases have considered s. 121, but several are material to our understanding, in particular the recent decision Supreme Court decision in *Comeau*.[307] The judicial interpretation of s. 121 was defined in *Gold Seal* which held that "the real object of the clause is to prohibit the establishment of customs duties affecting interprovincial trade in the products of any province of [Canada]."[308] Rand J., in *Murphy v CPR,* took a broader view of s. 121, holding that it was intended to create "the free flow of commerce across the Dominion as if provincial boundaries did not exist."[309] Rand J. held that "a trade regulation, that in its essence and purpose is related to a provincial boundary," would be forbidden by s. 121.[310] Laskin J. mirrored these positions in both *Manitoba Egg* and in *Agricultural Products Marketing*.[311] Laskin C.J.C. also placed s. 121 in the context of the greater whole, holding that it must not be held to imply that supply management "could not validly take into account patterns of production in the various Provinces in attempting to establish an equitable basis for the flow of trade."

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[303] Swinton, "Courting Our Way to Economic Integration", *supra* note 280 at 280–81.
[304] *The Constitution Act, 1867*, *supra* note 8, s 121.
[305] See discussion of border carbon adjustments in Fischer & Fox, *supra* note 214.
[306] This is probably as close as the federal government could come to the types of trade restrictions imposed for the management of the grain trade. See, for example Laskin, *supra* note 197 at 120.
[307] *R v Comeau*, [2018] 1 SCR 342 [*R. v. Comeau*].
[308] *Gold Seal Ltd v Alberta (Attorney-General)*, [1921] 62 SCR 424 [*Gold Seal*] at 456.
[309] *Murphy v CPR*, *supra* note 233 at 642. Rand J. writes: "I take s. 121 apart from customs duties to be aimed against trade regulation which is designed to place fetters upon, or raise impediments to, or otherwise restrict or limit, the free flow of commerce across the Dominion as if provincial boundaries did not exist."
[310] *Ibid*.
[311] In *Manitoba Egg Reference*, *supra* note 192 at 717–718, Laskin J. held that "the intent of s. 121 was "to form an economic unit of the whole of Canada," although he did not invoke s. 121 in his decision. In *Agricultural Products Marketing*, *supra* note 12, Laskin C.J.C. was more precise, holding that only regulations which were "in essence and purpose related to a provincial boundary," were forbidden.

More recently, the Supreme Court dealt with s.121 in relation to provincial liquor import regulations in *Comeau*.[312] The Court upheld the narrow interpretation of s. 121 from *Gold Seal, Murphy v CPR*, and the *Agricultural Products Marketing* reference, holding that s. 121 is not an absolute free trade provision but rather, "prohibits governments from levying tariffs or tariff- like measures."[313] The Court stipulated that "s. 121 does not prohibit governments from adopting laws and regulatory schemes directed to other goals that have incidental effects on the passage of goods across provincial borders."[314] The *Comeau* decision thus sends mixed messages for certain classes of GHG emissions reduction regimes.

On the one hand, *Comeau* and earlier decisions suggest that provincial GHG policies relying on border carbon adjustments would qualify as tariff or tariff-like measures.[315] On the other hand, if border carbon adjustments served only to impose costs on imports in the same manner as domestic policy imposes on domestic production, the border adjustments might be seen as ancillary measures related to trade necessary to achieve the policy's intended effects. The latter interpretation is reinforced by the Court's holding in *Comeau* that s. 121 should "not be read so expansively that it would impinge on legislative powers under ss. 91 and 92 of the *Constitution Act, 1867*."[316] Given that precedents such as *Shannon* and *Home Oil* upheld as valid provincial law regulations applying to both imported and domestically-produced goods, the same would likely apply to border adjustments so long as they did not seek to unduly penalize imports.[317]

Border adjustments or other measures in carbon pricing regimes may also be subject to challenge in their application to property of other levels of government. For example, consider whether a GHG policy in one province could apply a border carbon adjustment to electricity imported from a neighbouring province's Crown-owned utility? *Johnny Walker* confirms that customs duties or similar measures in relation to trade, for whatever broad purpose they might be enacted including (likely) the reduction of GHGs, may be validly enacted by the federal government and would not be considered constitutional taxes for the purpose of s. 125 of the *Constitution Act, 1867*.[318] *Johnny Walker* is distinguished in *Exported Natural Gas Tax* because, in the latter case, what had been termed an export charge was deemed to be a constitutional tax both because

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[312] *R. v. Comeau*, *supra* note 307.
[313] *Ibid* at para 53.
[314] *Ibid*.
[315] *Ibid* at para 73. The Court holds that s. 121 "should be interpreted as applying to measures that increase the price of goods when they cross a provincial border," which is what a border carbon adjustment would do in the case of emissions-intensive imports.
[316] *Ibid*.
[317] The precedent in *Home Oil*, *supra* note 244, is particularly on-point since the impugned legislation in that case was clearly intended to protect the domestic industry through a regime which increased prices above what would otherwise obtain. See, for example, the reasons of Crocket J. at 448.
[318] *British Columbia (Attorney-General) v Canada (Attorney-General)*, [1924] AC 222 (PC) [*Johnny Walker*]. The facts in the case are simple: a case of Johnny Walker whisky was imported by an authorized agent under BC liquor legislation. The federal government's customs agent refused delivery until taxes and duties were paid. BC argued that the whisky was provincial government property and that the exemption from taxation in s. 125 of the Constitution Act, 1867 applied. Readers with a particular interest may wish to know that the whisky in question Johnny Walker's "Black Label" whisky.

it applied to all gas and had no underlying regulatory purpose. As such, the impugned charge was deemed not to apply to provincially-owned natural gas per s. 125.[319] In a GHG context, this precedent implies that the s. 125 exemption would not apply to any border adjustments levied as part of provincial or federal GHG emissions regimes unless those regimes were upheld under taxation powers of the respective governments, which would not likely be the case for federal carbon budget or other quota legislation.[320] Provincial policies are limited in that provisions may not be enacted directly in relation to trade, but measures implemented as part of an overall regime would still be valid, as was the case for example in *Home Oil*, and so a case where provincial carbon pricing measures are applied on imports from provincial Crown corporations is plausible and also unlikely to run afoul of s. 125 exceptions.

In addition to s. 121, the *Canadian Free Trade Agreement (CFTA)* may also restrict certain policies enacted in support of such a carbon budget regime.[321] While the *CFTA* provides flexibility for parties to advance public policy objectives such as environmental protection, this is unlikely to provide a blanket exemption.[322] As with the s. 121 discussion above, potential issues may arise in the context of policies meant to prevent emissions leakage. For example, the *CFTA* allows measures to guard against relocation of industrial activity, but only where such relocation was "imminent, well known, and under active consideration."[323] The *CFTA* also prohibits incentives which, "sustain, for an extended period of time, an economically non-viable operation whose production adversely affects the competitive position of a facility located in the territory of another Party."[324] Output-based allocations or border carbon adjustments are designed explicitly to combat a situation in which, as a result of carbon pricing, domestic production would be, if not economically unviable, than at least at a competitive disadvantage and at risk of relocation.[325] The *CTFA* is not legally binding on provinces beyond conditions stipulated in implementation legislation enacted by provincial legislatures, and disputes are subject to internal dispute resolution mechanisms rather then

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[319] *Re: Exported Natural Gas Tax*, *supra* note 98 at 1055 where the majority makes clear that export duties and other regulatory mechanisms are exempt from s. 125. The dissent of Laskin J. agrees on this point and also cites Anglin and Mignault J.J. in *Johnny Walker*, *supra* note 318 at 388 and 394 respectively, each holding in separate ways that customs duties are not taxes for the purposes of s. 125 exemptions of provincial property from taxation.

[320] The s.125 issue was also raised in *Saskatchewan GGPPA Reference*, *supra* note 30 at paras 76 and 205–208. Since the case was in relation to the validity, not the applicability, of the carbon price, neither the majority nor the dissent offered an opinion on applicability. This is also mentioned in the majority opinion in *Attorney General for Saskatchewan v Attorney General of Canada*, 2020 [*SCC GGPPA Reference*], n 113. The dissent of Justice Feehan, at paras 1027-1029, addresses this and would have held that the GGPPA was not a tax and so would not be subject to the s. 125 exemption.

[321] The *Canadian Free Trade Agreement*, 2020, Online Httpswwwcfta-Aleccawp-Contentuploads202004CFTA-Consol-Text-Final-EnglishApril-24-2020pdf [*CTFA*], which was implemented nationally under the *Canadian Free Trade Agreement Implementation Act*, 2017, SC 2017 C 33 219 [*CTFA Implementation Act*].

[322] *CTFA*, *supra* note 321, s 102 (2) (b), which allows that "the Parties recognize the need to preserve flexibility in order to achieve public policy objectives, such as public health, safety, social policy, environmental or consumer protection."

[323] *CTFA*, *supra* note 321, Article 320(2).

[324] *Ibid*, Article 321(4).

[325] See, for example, Canada's EcoFiscal Commission, *supra* note 213.

judicial review of legislation, however the agreements still serve as another potential consideration for national carbon budget implementation.[326]

A final limitation to border adjustment policies could come from the World Trade Organization (WTO) and dispute resolution with respect to trade practices generally as well as from the recently-signed *Agreement Between the United States of America, the United Mexican States, and Canada* (*USMCA*) which will replace the *North American Free Trade Agreement* (*NAFTA*).[327] There is an extensive literature on border carbon adjustments and other trade-oriented carbon emissions policies, the details of which lie beyond the scope of this thesis.[328] The general tenor of the literature is that perils lie in the discriminatory application of pricing to out-of-country production. So long as the policies serve to level the playing field between imports and domestic production, and do not unduly subsidize exports beyond compensation for differences in climate policies, national or sub-national policies should be safe from international trade challenge.[329]

2.6. Conclusions

Notwithstanding the fact that the economics of agricultural supply management and carbon budgets are similar, the constitutional foundation on which the Canadian system of supply management was built is not sufficient to underpin carbon budget legislation. The primary reason for this is the lack of a federal regulatory backstop under the trade and commerce power. In agriculture, a cooperative regime emerged because provinces wanted to ensure higher prices than the market would otherwise yield for agricultural products, but could not sustain these prices without legislation in relation to trade that was beyond their reach. Parliament, also interested in promoting higher prices for agricultural products, could establish quotas but could not enforce them to prevent individual economic actors from selling their products. Combined, the two levels of government could both restrict individual actions and restrict trade to derive the desired outcome, and no province would have an individual incentive to over-produce, since the federal government could and did restrict interprovincial movements of natural products. When considering emissions policies, it is this last piece which is lacking from the federal arsenal: the federal government cannot enforce an emissions quota in the same way it can enforce an egg quota.

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[326] Swinton, "Courting Our Way to Economic Integration", *supra* note 280 at 294, discusses the legal standing of similar agreements with respect to economic integration.
[327] "Agreement between the United States of America, the United Mexican States, and Canada", online: *Office of the United States Trade Representative* <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between>.
[328] See, for example, Joel P Trachtman, "WTO Law Constraints on Border Tax Adjustment and Tax Credit Mechanisms to Reduce the Competitive Effects of Carbon Taxes" (2017) 70:2 Natl Tax J 469, Carol McAusland & Nouri Najjar, "The WTO Constitency of Carbon Footprint Taxes" (2014) 46:3 Georget J Int Law 765, or Jennifer Hillman, *Changing Climate for Carbon Taxes: Who's Afraid of the WTO?* (German Marshall Fund of the United States, 2013).
[329] In the US context, Trachtman, *supra* note 328, provides a highly-detailed analysis of the implications of a variety of policies to minimize emissions leakage in the context of the WTO and GATT.

Chapter 3 Environmental policy is economic policy

3.1. Introduction

It is no longer tenable to view environmental policy as separate from economic policy, and the reference case testing the validity of the federal *Greenhouse Gas Pollution Pricing Act* provides an opportunity for the Supreme Court to recognize this evolution and to expand the scope of economic policies which might be upheld under the trade and commerce power.[330] The economic rationale for national policies to mitigate climate change is similar to that for national policies in relation to competition, trademarks and securities. Despite this, in the context of the general branch of the trade and commerce power, both Canadian courts and legal scholars have driven a false wedge between these *economic* issues and environmental policy.[331] The structure of Canada's Constitution enables and encourages such divisions in that it enumerates exclusive subjects of provincial and federal jurisdiction, but economic policy does not always easily conform to these compartments. Environmental policy should not be viewed as distinct from economic policy, but rather as an important class of national economic policy.[332] Climate change and the policies to combat it are rapidly becoming concerns that permeates almost every aspect of trade and commerce in Canada, and the mitigation of climate change is, without doubt, an economic problem of interest to the whole country.

While textually broad, judicial interpretation of Parliament's authority to legislate in relation to trade and commerce as enumerated in s. 91(2) of the *Constitution Act, 1867* has ebbed and flowed through our country's history.[333] The judicial interpretation of the Constitution is crucial since, as Lederman writes, "the power-conferring phrases themselves are given by the [*Constitution Act, 1867*], but the equilibrium points are not to be found there."[334] Historically, what appears to be a broad federal power was, for a time, effectively nullified.[335] The Laskin-Dickson era's more expansive interpretation of the general trade and commerce power, affirmed in recent decisions in two securities reference cases, opens the door to upholding federal legislation in relation to GHG emissions.[336] To support this contention, I use tools from economics

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[330] The validity of the *GGPPA*, *supra* note 29, will be tested this Fall in the joint hearing of Attorney General for Saskatchewan v. Attorney General of Canada (Docket 38663), Attorney General of Ontario v. Attorney General of Canada (Docket 38781) and Attorney General of British Columbia v. Attorney General of Alberta (Docket 39116) by the Supreme Court of Canada.
[331] While this distinction has been made in the case of the general branch of the trade and commerce power, it has not been made in other contexts. In *Oldman River*, *supra* note 9 at 66, for example, the judgement of La Forest J. was clear that weighing environmental and economic considerations simultaneously was the only defensible approach to environmental assessment. A similar argument is made in Lee, *supra* note 13, which argues for a market failure justification for the Commerce Clause in the US Constitution, as well as by Hudson, *supra* note 38, who argues for a similar treatment for commons problems.
[332] In *Syncrude*, *supra* note 113 at para 66, the opinion of Rennie J.A. writing for a unanimous court held that "the environment and economy are intimately connected. Indeed, it is practically impossible to disassociate the two."
[333] *The Constitution Act, 1867*, *supra* note 8, s 91(2).
[334] Lederman, *supra* note 81 at 38.
[335] Patrick J Monahan, "At Doctrine's Twilight: The Structure of Canadian Federalism" (1984) 34:1 Univ Tor Law J 47 at 60–61.
[336] Decisions in *MacDonald et al v Vapor Canada Ltd*, [1977] 2 SCR 134 [*Vapor*], *Multiple Access*, *supra* note 70, *AG (Can) v Can Nat Transportation*, [1983] 2 SCR 206 [*Canadian National*], and *General Motors of Canada Ltd v City National Leasing*, [1989] 1 SCR 641

to demonstrate that substantial parallels exist between the motivation for the regulation of competition, trademarks, and systemic risks in securities markets and the economic motivation for policies to reduce GHGs.

In other constitutional democracies, for example Australia and the United States, the combination of a strong treaty power and clear federal jurisdiction over external affairs mean that the question of whether the federal government can act to reduce emissions is less complicated. In Australia, the *Tasmanian Dams* case clarified that the federal government has jurisdiction to enter into and to implement treaties .[337] Similarly, in the United States, there is also little question that the federal government could act, either directly under treaty power or indirectly via their much stronger authority under the commerce clause in their constitution.[338] In Canada, no modern treaty implementation power exists, and so federal policies must find support within the judicial interpretation of other heads of power in the Constitution, and may not impinge on provincial jurisdiction.[339] While I argue that the door is open to upholding federal GHG policies under the general branch of the trade and commerce power, it is not as wide as some might like. This chapter should not be read as a claim that any and all potential federal GHG legislation could or should be upheld under s. 91(2). On the contrary, decisions in *Re: Securities Act*, the *Reference re: Anti-Inflation Act* and other similar cases inform substantial limits to the reach of valid federal legislation.[340] Federal GHG policies designed to trench deeply into areas of provincial jurisdiction should not and likely will not be upheld under s. 91(2) or other federal heads of power.[341] The correct approach remains that affirmed in the Laskin-Dickson era decisions: a case-by-case assessment of proposed legislation, not a blanket authority.[342]

Contrary to some scholars, I find that regulatory charges are more compatible with the trade and commerce power than cap-and-trade or similar regulatory regimes. While the economics of regulatory charges and

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[*General Motors*] define the Laskin-Dickson era's expansive interpretation of the trade and commerce power. The two securities reference cases are *re Securities Act*, *supra* note 12, and *re Pan-Canadian Securities*, *supra* note 12.

[337] See, for example, Renee Garner, "Regulating a National Emissions Trading System within Australia: Constitutional Limitations" (2006) 3:1 Macquarie J Int Comp Environ Law 83 at 94. Garner explains that *Tasmanian Dams*, *supra* note 11, allows that "may validly enact domestic legislation in relation to 'external affairs' if the subject matter of the legislation is of 'international concern', or if, in an appropriate manner, it implements the purposes of any international treaty or agreement."

[338] Article I, Section 8 of the United States Constitution stipulates that "Congress shall have power ...To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." GHGs and GHG policy would seem to be squarely within this ambit. In fact, some authors have argued this clause implies that GHGs are exclusively federal in nature. See, for example, Joseph Allan MacDougald, "Why Climate Law Must Be Federal: The Clash between Commerce Clause Jurisprudence and State Greenhouse Gas Trading Systems" (2007) 40 Conn Law Rev 1431.

[339] In *Labour Conventions*, *supra* note 11, it was established that treaties do not confer legislative jurisdiction to Parliament to implement the tenets of the treaty if the legislation would otherwise be *ultra vires* Parliament.

[340] The two securities references referred to here are, first, *re Securities Act*, *supra* note 12, and *re Pan-Canadian Securities*, *supra* note 12. See also *Anti-Inflation*, *supra* note 12. *Board of Commerce (SCC)*, *supra* note 241 is certainly among important related cases, as is the appeal in *Board of Commerce (PC)*, *supra* note 12.

[341] For example, the test developed in *Crown Zellerbach*, *supra* note 10, for valid federal legislation under the national concern branch of POGG considers the degree of intrusion into provincial jurisdiction.

[342] Both *Canadian National*, *supra* note 336 at 268, and *General Motors*, *supra* note 336 at 663 cite Parsons in this regard, and Dickson C.J.C. writes in General Motors that the indicia advanced in that decision "merely represent a principled way to begin the task of distinguishing between matters relating to trade and commerce and those of a more local nature."

quantity-based programs like cap-and-trade regimes are similar, the constitutional limitations affecting their implementation are different. While scholars have argued that national cap-and-trade policies might be upheld under the trade and commerce power, I find that this is less likely because of the need to directly enforce emissions levels in specific facilities.[343] Using the *General Motors* test for classification under the general branch of the trade and commerce power, I argue that regulatory charges are more likely to qualify as truly national policy and are more suited to assuring limited federal incursion into provincial jurisdiction.

The analysis in this chapter complements work with Eric M. Adams which explores the reach of the POGG power as well as its necessary limitations in the context of regulating GHG emissions in general and with regard to federal legislation under the *GGPPA* in particular.[344] The common theme through both of these analyses is a case for shared jurisdiction, not a justification of federal primacy or exclusivity. The value of collaborative and/or shared implementation that permeated both recent securities references should guide any test for validity of GHG policies under the trade and commerce power.[345] As Jean Leclair wrote with respect to securities regulation, "the challenge lies in allowing both the central government and the provinces a legitimate and guaranteed space."[346] There are numerous anchors for valid provincial legislation confronting many aspects of the climate change mitigation challenge, and an argument that anchors exist for federal policy does not detract from the continued importance of provincial policies.[347]

In what follows I first present an analysis of the economics of market failure to make the case that there are substantial parallels between the economics of pollution control and the economics of other market failures for which federal regulation has been upheld under the trade and commerce power such as imperfect competition, asymmetric information, and systemic risks in securities markets. I next discuss the economic solutions to climate change and highlight the reasons these solutions raise important division of powers issues. The main body of the chapter characterizes and examines GHG policies in light of the test for validity of legislation under the trade and commerce power established in *General Motors.* Finally, I close with some specific discussion in relation to the recent reference cases testing the validity of the *GGPPA* in Ontario, Saskatchewan, and Alberta.[348]

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[343] See, for example, Elgie, *supra* note 33.
[344] Leach & Adams, *supra* note 36. *GGPPA*, *supra* note 29.
[345] See, generally *Agricultural Products Marketing*, *supra* note 12.
[346] Jean Leclair, "'Please, Draw Me a Field of Jurisdiction': Regulating Securities, Securing Federalism" (2010) 51:1 SCLR, online: <https://digitalcommons.osgoode.yorku.ca/sclr/vol51/iss1/19>.
[347] See Hogg, "Constitutional Authority", *supra* note 86, or Hsu & Elliot, *supra* note 95 for discussion of provincial and federal jurisdiction over greenhouse gas emissions.
[348] *Ontario GGPPA Reference*, *supra* note 30; *Saskatchewan GGPPA Reference*, *supra* note 30; *Alberta GGPPA Reference*, *supra* note 30.

3.2. The law and the economics of market failure

Canadian courts have upheld federal legislation dealing with several classes of subjects under the trade and commerce power including legislation in relation to competition and collusion, intellectual property, and systemic risk in securities markets.[349] Each of these policy problems, viewed through the lens of economics, share a common element: they aim to correct situations in which an unregulated market will lead to an inefficient allocation of resources, and so will be detrimental to our overall economic wellbeing. In this regard, they are of a type with environmental policy.[350]

The economic analysis of climate change shares much with the analysis of imperfect competition (collusion, monopoly, market power) and systemic risk in securities markets, even if it has not been treated as such by the courts.[351] A quick digression into economic theory illustrates the corollary. The basic concept of economic equilibrium in perfect competition – the supply and demand graph that every first-year student learns – occurs as firms supply products to market up to a point where the cost of producing an additional unit, the marginal cost, is equal to the price they receive for the sale of that unit. Assuming that per-unit costs of production increase in quantities, this yields the familiar supply curve (see Figure 7). Similarly, on the demand side, consumers will only be willing to purchase products for which their incremental value, or marginal benefit, exceeds the price they have to pay to acquire them. For most goods, the value of each incremental unit of consumption declines as consumption increases, and this relationship is captured by the familiar demand curve also shown in Figure 7.

The economics of perfect competition are such that, so long as supply reflects the true social costs of production and demand reflects the true social benefits of consumption, then there is no other allocation of goods which can improve upon the market outcome.[352] However, where these assumptions no longer hold, there can be a role for government intervention to improve the overall welfare generated in the market.

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[349] *General Motors*, *supra* note 336; *Vapor*, *supra* note 336; *Kirkbi AG v Ritvik Holdings Inc*, [2005] 3 SCR 302 [*Kirkbi v. Ritvik*]; *re Securities Act*, *supra* note 12; *re Pan-Canadian Securities*, *supra* note 12.

[350] Lee, *supra* note 13 makes a similar argument regarding US Comerce Clause jurisprudence and argues that environmental policy and competition policy each seek to correct market failure. For discussion of the economic underpinings of anti-trust legislation, see also Bruce Johnsen & Moin A Yahya, "The Evolution of Sherman Act Jurisdiction: A Roadmap for Competitive Federalism" (2004) 7 U Pa J Const L 403 at 405–7.

[351] In addition to the seminal work of Pigou, *supra* note 207, both the work of Coase, *supra* note 209, (see "The Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel 1991", online: *NobelPrize.org* <https://www.nobelprize.org/prizes/economic-sciences/1991/summary/>), and the work of William Nordhaus on climate change have been awarded the The Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel (see "The Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel 2018", online: *NobelPrize.org* <https://www.nobelprize.org/prizes/economic-sciences/2018/popular-information/>). The work of Elinor Ostrom on the economic commons, also related to pollution and, in particular climate change, was recognized in 2009 (see "The Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel 2009", online: *NobelPrize.org* <https://www.nobelprize.org/prizes/economic-sciences/2009/summary/>).

[352] This is generally known as the First Fundamental Theorem of Welfare Economics, and relies on consumers and firms acting as *price takers,* i.e. they do not take account of the effect of their decisions on market prices, as well as there being zero transactions costs or other market frictions as well as perfect information. This is otherwise known as a *Walrasian* equilibrium. Importantly, this says nothing about distributional implications of the market equilibrium, and only asks whether the overall net benefits of consumption could be improved through different allocations of resources.

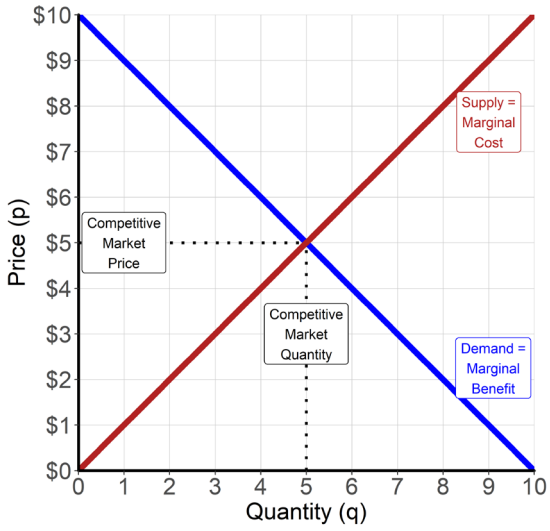

Figure 7 Economic equilibrium in perfect competition.

In the case of imperfect competition, the competitive equilibrium is disrupted because firms with a dominant market position will take account of the impact of their production decisions on market prices and, as a result, will supply fewer units to the market than would otherwise be the case.[353] As shown in Figure 8, with imperfect competition it is optimal for the firm to produce additional quantities when the marginal (or incremental) revenue from selling an additional unit is greater than the cost of production, leading to a reduction in the total quantity produced compared to a competitive equilibrium. The monopoly situation leaves potential gains from trade unrealized: the monopolist could produce additional quantities at a cost less than the benefit to consumers, but it is not in its private, profit-maximizing interest to do so. As a result, the monopolist is made better off than they would be under competition, receiving higher prices and capturing excess profits known as rents and shown as a shaded rectangle on the graph while consumers are made worse off. The overall economic welfare loss, which appears as the shaded triangle in Figure 8, is what has supported federal competition legislation deemed valid by the courts.[354]

[353] Economists generally describe monopoly, oligopoly, collusion (or combines) and other exercises of market power by firms under the general heading of imperfect competition. For more analysis of the rationale for regulation, see W Kip Viscusi, Joseph E Harrington & John M Vernon, *Economics of Regulation and Antitrust*, 2nd ed (Cambridge, Massachusetts, USA: MIT Press, 1995) at 2–3.
[354] For discussion of the history of competition policies in Canada, see *Proprietary Articles Trade Association v Canada (Attorney General)*, [1931] AC 310 (PC) [*P.A.T.A.*] at 317–322, or the comprehensive history in Bruce C McDonald, "Constitutional Aspects of Canadian Anti-Combines Law Enforcement" (1969) 47:2 Can Bar Rev 260 at 172–185.

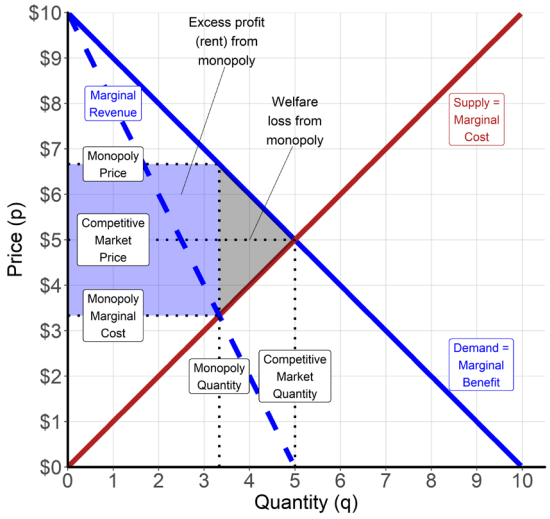

Figure 8 Economic Equilibrium under monopoly

Canadian courts have had no difficulty in seeing imperfect competition as detrimental to the Canadian economy. As with some early environmental protection cases such as *Hydro-Québec*, early legislation in relation to anti-competitive behaviour was upheld under the criminal law power.[355] In *General Motors,* Chief Justice Dickson held that the *Combines Investigation Act* which aimed to reduce anti-competitive activities in the Canadian economy was "a well-integrated scheme of regulation designed to discourage forms of commercial behaviour viewed as detrimental to Canada and the Canadian economy."[356] The decision argues that national policy is essential because of general economic mobility. In the absence of national policies, Dickson C.J.C. writes, provinces might "be forced to resort to protection [of local monopolies] from interprovincial imports and might be tempted to subsidize interprovincial exports."[357] In upholding the impugned legislation under what he termed Parliaments power of "trade and commerce affecting the entire nation," Dickson C.J.C. opened the door to national regulation of what economists term market failure.[358]

[355] Early jurisprudence, for example in *P.A.T.A.*, *supra* note 354 at 323–24, supported Parliament's definition of anti-competitive behaviour as criminal and thus upheld anti-combines legislation as a valid exercise of the federal criminal law power.
[356] *General Motors*, *supra* note 336 at 676. The impugned legislation in this case was the Combines Investigation Act, RSC 1970, c C-23, s 31.1.
[357] *Ibid* at 680. This type of provincial protectionism has many of the same attributes which surface in discussions of GHG policies under the heading of emissions leakage, discussed extensively in Section 5.3
[358] *Ibid* at 693–94.

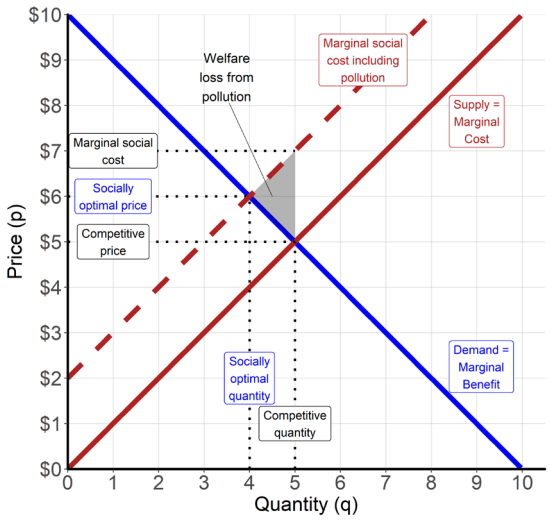

Figure 9 Economic equilibrium with external pollution costs.

Pollution shares a lot with imperfect competition in standard economic analysis.[359] In his classic work, Pigou described smoke from factories as "[inflicting] a heavy uncharged loss on the community," and these uncharged losses are what we generally now term *externalities.*[360] The textbook depiction of this situation, shown in Figure 9, is such that the private costs of production borne by the firm (marginal private costs) are less than the true costs of production to society (marginal social costs) because some of the costs are *uncharged* or *external* to the firm. The firm's (or firms') interests remain the maximization of profits, which they will accomplish by producing only quantities for which the price consumers are willing to pay exceeds their marginal private costs. This quantity (q=5 in Figure 9) is more than would be produced if the firm were responsible for all costs of production (q=4 in Figure 9), prices are lower than they would otherwise be, but the total net benefits to society are lower than would be the case if all costs were internal to the firm. The total detrimental effect to the economy, indicated by the shaded triangular area in Figure 9, depends on the degree to which material costs are external to the producing firms.[361]

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[359] In General Motors, *ibid* at 682 Chief Justice Dickson held that "competition is not a single matter, any more than inflation or pollution." While in this case, Dickson C.J.C. was looking narrowly at the 3rd criterion of the test he established in that case, it motivates further consideration here of whether, in addition to affecting a wide variety of economic activities, pollution and competition policy share other important and relevant attributes.

[360] Pigou, *supra* note 207 at 107.

[361] Ronald Coase's Nobel-winning work on social costs builds a link from the economic insights of Pigou to the common law of torts. In Coase, *supra* note 209 it is shown that so long as property rights (either the right to pollute or the right to unpolluted property) were clearly defined and enforceable, and there were no transactions costs associated with enforcement, the costs of pollution would no longer be external to the firm and an efficient economic equilibrium would exist. However, the costs of recovering damages from polluters are non-trivial and there are often significant barriers to recovery of damages through the common law, and so inefficient economic outcomes persist.

Externalities are no strangers to Canadian jurisprudence, both in environmental law and with respect to other areas traditionally viewed as economic policy. Pollution across borders is a classic example of an externality in cases where domestic firms can pollute without paying the downstream or downwind costs of their actions.[362] In *Interprovincial Cooperatives*, a majority of the Court held that federal jurisdiction was engaged when dealing with pollution across provincial borders,[363] while pollution across international borders was at issue in the Trail Smelter arbitration.[364] Many examples of more localized pollution are present in Canadian tort law.[365]

Financial transactions may also come with external costs, insofar as the collective costs of risk-taking may not be borne by individual decision-makers. Decisions in both *Re: Securities Act* and *Re: Pan-Canadian Securities* recognized the role for the federal government to regulate in relation to systemic risks in financial markets.[366] Systemic risk, as defined in *re: Securities Act*, is a classic economic externality problem: "risks that occasion a 'domino effect' whereby the risk of default by one market participant will impact the ability of others to fulfill their legal obligations, setting off a chain of negative economic consequences that pervade an entire financial system."[367] In the wake of the global financial crisis of 2008-09, the Supreme Court clearly saw how the risks of global financial collapse or contagion was rendered external to those underwriting the complex financial instruments which led to the crisis: their downsides were limited and they did not face the risk of incurring the full cost of their transactions.[368]

As with systemic risks in securities, economic externalities are also at play with respect to trademarks. In *Vapor*, Laskin C.J.C. frames trademark infringement as "taking a free ride on [another firm's reputation] in pretending that one's own goods or services are the plaintiff's or associated with or sponsored by him."[369]

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[362] See, for example Brian Copeland & M Scott Taylor, "North-South Trade and the Environment" (1994) 109:3 Q J Econ 755.
[363] *Interprovincial Co-operatives Ltd et al v R*, [1975] 1 SCR 477 [*Interprovincial Co-operatives*].
[364] Arbitral Trib., 3 U.N. Rep. Int'l Arb. Awards 1905 (1941).
[365] For example, in *Groat v Edmonton (City)*, [1928] CanLII 49 (SCC) [*Groat v. Edmonton (City)*], the judgement of Rinfret J. held that the right of a property owner to drain their land is undoubted, but that such a right may not be exercised in such a ways as to damage downstream landowners. The decision holds that "pollution is always unlawful and, in itself, constitutes a nuisance." In the absence of common law remedies, the costs of damage would not be recovered from those perpetrating it, and economists would view those as external costs. For general discussion of the limits of environmental torts to fully internalize the costs of pollution even where the impacts are local, see William A Tilleman et al, *Environmental Law and Policy*, 4th ed (Toronto, Ontario, Canada: Emond Publishing, 2020), ch 9.
[366] In *re Securities Act*, *supra* note 12 at para 121, the Court held that there was a clear field of national jurisdiction in that "the provinces, acting in concert, lack the constitutional capacity to sustain a viable national scheme aimed at genuine national goals such as management of systemic risk or Canada-wide data collection." The Court found the legislation went too far beyond this scope and thus found it to be invalid. In *re Pan-Canadian Securities*, *supra* note 12 at para 15, the Court held that "the preservation of capital markets and the maintenance of Canada's economic stability are matters that are beyond provincial concern, and therefore fall within Parliament's jurisdiction over trade and commerce."
[367] *re Securities Act*, *supra* note 12 at para 103. The Court cites Michael J Trebilcock, *National Securities Regulator* (2010) at para 26, a report included in Canada's record for the reference case. Recall that the reference case was heard in the wake of the global financial crisis of 2008-09 which was precipitated by the collapse of intricate system of mortgage-backed securities and insurance on the default risk of those same securities.
[368] External costs were also an issue in the recent *Redwater*, *supra* note 66 decision. In that case, the Surpreme Court denied an attempt to avoid environmental costs associated with well reclamation through bankruptcy.
[369] *Vapor*, *supra* note 336 at 147. The majority opinion of Laskin C.J.C. holds that federal jurisdiction in relation to patents and copyrights arises from "specific heads of legislative power," i.e. ss. 91(22) and 91(23) of the Constitution, while federal jurisdiction in relation to "trade marks and trade names" is sustained under the trade and commerce power in s. 91(2).

From an economics perspective, trademarks provide information to consumers with respect to brand quality and thus overcome issues of asymmetric information in the marketplace.[370] Reliable and protected trademarks reduce the costs of search to consumers, and allow firms to accurately signal qualities through branding.[371] Trademarks thus allow firms to capture more of the value of not-easily-observable quality in the marketplace.[372]

Intellectual property protections are a means to ensure that the gains from innovation remain with those who expend the effort and resources to innovate.[373] Canadian jurisprudence in intellectual property cases have upheld the importance of, and federal jurisdiction over, policies to correct economic losses from this externality problem as well. In *Reference re the Dominion Trade and Industry Commission Act*, the federal competency to enact protections of intellectual property was, at least weakly, endorsed.[374] More recently, in *CCH*, the decision of McLachlin C.J.C. holds that copyright laws allow for a balance of "the public interest in promoting the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator."[375] In the absence of copyright protection, others would be free to use works without due compensation to the creators, driving a wedge between the social value of creative product and the private value to creators, and thus a sub-optimal level of creative output.[376]

While the economics of externalities are the same regardless of whether the external costs are due to pollution or financial risk-taking, Canadian courts and some legal scholars have attempted to distinguish between that which is environmental policy and that which is economic policy. Hsu and Elliot are most direct, stating that GHG emissions policies could not be upheld under s. 91(2) because "the trade and commerce power is intended to vest the government with jurisdiction over economic matters."[377] Like Hsu and Elliot, Rolfe argues that where the courts have upheld legislation under the trade and commerce power, it was more likely to be in relation to support for domestic industries or trade-related matters.[378] Barton cites the dissent in *Hydro-Québec* which would have held that *CEPA* could not be upheld under the trade and

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[370] Nicholas Economides, "The Economics of Trademarks" Trademark Rep 523.
[371] William M Landes & Richard A Posner, "Trademark Law: An Economic Perspective" (1987) 30:2 J Law Econ 265 at 270.
[372] See, generally, Landes & Posner, *supra* note 371.
[373] See Viscusi, Harrington, & Vernon, *supra* note 353, chs 23–24.
[374] In *Ontario (Attorney General) v Canada (Attorney General)*, [1937] 1 DLR 702 (PC) [*Re: Dominion Trade and Industry Commission Act*] at 704, the judgement of Lord Atkin held that "no one has challenged the competence of the Dominion to pass [trade marks legislation]. If challenged one obvious source of authority would appear to be the class of subjects enumerated in s. 91(2)."
[375] *CCH Canadian Ltd v Law Society of Upper Canada*, [2004] 1 SCR 339 [*CCH*] at para 23. It is important to note that, while this is an example of correcting for an externality, it is a valid exercise of federal jurisdiction over copyright, not over trade and commerce writ large.
[376] *CCH*, *supra* note 375 is a case of overlapping externalities since it also deals with research which we know to have a significant social value. In the decision in the case, it was held that fair dealing for the purpose of research or private study does not infringe copyright.
[377] Hsu & Elliot, *supra* note 95 at 490. The authors argue that the Court uses the word "economic" repeatedly, and add that, if the trade and commerce power could extend beyond what they view as economic matters, 'there would be little to distinguish [it] from the national concern branch of POGG.' Their reasoning in this regard, and their critique of Elgie, *supra* note 33, was cited in the majority reasons in *Saskatchewan GGPPA Reference*, *supra* note 30 at para 172 in rejecting the application of the trade and commerce power to the GGPPA.
[378] Rolfe, *supra* note 32 at 366. Rolfe writes that the Courts have upheld federal legilation where "the regulation of intra-provincial trade was clearly tied to international trade issues, not protection of the environment."

commerce power and argues that, so long as the purpose of legislation is environmental protection, it should not be upheld as legislation in relation to trade and commerce.[379] Schwartz similarly argues that it is doubtful that federal carbon pricing policies could be supported by the general trade and commerce power since the legislation was aimed at "regulating environmental matters rather than attempting to engage in the regulation of commercial law matters."[380] Choudhry is more deliberate about the specific nature of the climate change externality, drawing parallels to systemic risks, but in the end concludes that such a case has yet to be made with respect to climate policies in Canada.[381] Others, in particular papers by Chalifour and Castrilli, have focused on the mechanism of regulation: if carbon emissions trading were enacted, at least the trading portion of the policy might be upheld under the general branch of the trade and commerce power, because it is *economic* in nature.[382] This last argument seems unlikely to carry the day as the judicial interpretation of the trade and commerce power is not such that it confers federal authority to legislate using economic tools.

The acceptance of this economy vs. environment distinction is not universal. Castrilli argues that "pollution does have an important economic dimension in its impact on trade and commerce."[383] He focusses on the potential for emissions leakage, discussed extensively in Section 3.4.3 below, whereby lower environmental standards imposed in one part of the country draw economic activity away from another.[384] Castrilli also raises the interprovincial externality issue: since one province cannot regulate the polluting activities in other provinces, provinces might "end up living with the other jurisdictions' pollution.[385] While Castrilli finds that emissions trading regimes could well be upheld under the trade and commerce power, like Chalifour and Elgie, he leans on the fact that emissions trading is an economic solution to an environmental problem as well as on the analogy to other quota/marketing programs in agricultural supply management.[386] I examine the analogy to agricultural supply management in Chapter 2 of this thesis, and argue below in Section 3.4.2 that the emissions

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[379] Barton, *supra* note 32 at 440 and 443. Barton cites the dissenting opinion of Chief Justice Lamer and Justice Iacobucci in *Hydro-Québec*, *supra* note 10 at 265. Barton extends his argument to conclude that because what he terms industry is only responsible for a small share of national emissions, the regulation of pollution via a cap-and-trade program cannot be underpinned by the trade and commerce power.
[380] Schwartz, *supra* note 190 at 41.
[381] Choudhry, *supra* note 94 at 23–26.
[382] Chalifour, "Canadian Climate Federalism", *supra* note 7 at 394–398, Chalifour, "Jurisdictional Wrangling", *supra* note 7 at 224–5, and Castrilli, *supra* note 32 at 16–17. Elgie, *supra* note 33 at 115–116, makes a related point that emissions trading regimes have an economic purpose because they reduce the total costs of emissions reduction. Hsu & Elliot, *supra* note 95 at 490, reject this contention holding that the dominant purpose of the legislation would remain environmental, thus in their view excluding the application of the trade and commerce power.
[383] Castrilli, *supra* note 32 at 17.
[384] Recall that a very similar point is made in *General Motors*, *supra* note 336 at 680. Dickson C.J.C. writes that "[A] more competitive structure of industry in one or more provinces would tend to impose competitive conditions on the other provinces. In such circumstances, any provincial authority which was more tolerant of monopoly or combinations than other provincial authorities would be forced to resort to protection against interprovincial imports and might be tempted to subsidize interprovincial exports. By contrast, the point of a federal common market is precisely to allow consumers and producers anywhere in Canada free access to supplies and markets across Canada."
[385] Castrilli, *supra* note 32 at 17. While Castrilli cites objection in Quebec to power plant emissions from Ontario, he might just as easily have cited the fact pattern in *Interprovincial Co-operatives*, *supra* note 363.
[386] Castrilli, *supra* note 32 at 17. I return to Castrilli's assessment of emissions trading under the General Motors indicia which underpins this conclusion in later sections of this paper.

trading crutch fails as an argument for the trade and commerce power. Regulating pollution can stand on its own as economic policy regardless of the tool used to meet that objective.

The distinction between economic and environmental policy should no longer be tenable in Canadian jurisprudence. As I will argue below, there is a significant economic dimension to the challenge of climate change which rises to the level of intellectual property or competition in terms of its importance to our wellbeing. Market failure induced by pollution is, in and of itself, an economic problem and many of the available policy tools being considered or already implemented to address it would best be termed economic policies, although other means of addressing pollution, criminal prohibitions for example, are also available and in use. Many of these solutions also raise important division of powers issues, and these are discussed below.

3.3. Economic solutions to market failure: not just carbon pricing

Policy solutions to correct market failure are wide-ranging, but their nature generally opens the door to constitutional controversy. Fundamentally, solutions to market failures involve regulating who can sell what, how much they can sell and/or at what price a good should be sold, or imposing costs on either producers or consumers which they would not otherwise face. In the case of environmental externalities, students of economics generally study three categories of solutions: regulatory or command-and-control measures which mandate technological solutions or performance benchmarks, pollution pricing, or restrictions on quantities of production or consumption such as quotas.[387] Each of these measures, if enacted by the federal government in relation to climate change, would raise concerns with respect to the intrusion into provincial jurisdiction over property and civil rights, local licensing regimes, or generally matters of a local and private nature in the provinces as well as provincial jurisdiction with respect to the management of natural resources. As Laskin C.J.C noted in the *Agricultural Products Marketing Reference*, there are going to be barriers to the overall effectiveness of any regime to impact production, prices, or sales "if the regulatory agency cannot reach back into production," while recognizing that such regulation of local production may be beyond the federal constitutional sphere.[388]

A quick detour back to economic theory helps to put a fine point on this. The market failure occurs when pollution imposes costs on others which neither the buyer nor the seller is required to pay. As a result, too much is produced and sold at a price which does not reflect the true cost of production. There are three

[387] Emissions quotas, implemented nationally, are also frequently described as carbon budgets. See, for example, Gage et al, *supra* note 102.
[388] *Agricultural Products Marketing*, *supra* note 12 at 1263. Laskin C.J.C. was referring to the establishment of effective agricultural products marketing regimes which, of course, seek to limit quantities and increase prices for agricultural production. Policies to limit greenhouse gas emissions or to restrict other forms of pollution seek to do exactly the same thing, and without reaching back into production in some way will be significantly limited in their effectiveness.

means to alter this: price or quantity regulation, or changes in production technology. Under optimal price-based regulation, a tax or regulatory charge on pollution (or, equivalently, a pro-rata charge on the purchase or sale of a good based on embodied pollution) decreases the net revenue from production such that market prices come to reflect the true social costs of production, so we no longer have a case where social costs of production exceed the benefits of consumption. Importantly, this is not akin to price regulation: governments are not, in the case of a carbon tax or regulatory charge, stipulating the price which must be charged in the market for end products. The policy adds a cost reflecting an estimate of the uncharged damage from emissions, effectively forcing these costs to be accounted for in transactions where they otherwise would not be.[389] Likewise, governments could restrict quantities consumed or produced through a quota or cap-and-trade system. Quantity-based measures arguably involve a heavier government hand since enforcement must involve a prohibition on production without quota rather than the imposition of a regulatory charge. That said, assuming government mandates a level of production consistent with fully-internalized costs of production or pollution, prices in the regulated market will come to reflect social and private costs just as would be the case with an optimally-set tax or regulatory charge. Finally, government policy can mandate the use of particular technologies and regulate emissions-intensity. Quantity- or technology-based policies require more direct enforcement than price-based policies, and thus are likely to raise more substantial division of powers challenges since direct regulation of individual production or technology adoption decisions would reach deeply into what is traditionally provincial jurisdiction.[390]

Economic regulation under the general trade branch of the trade and commerce power has focused on bevaviour (combines and fair prices as well as insider trading) and/or creation of claims for damages (copyright and trademark). While regulatory regimes have been enacted to deal with these issues, none looks much like what we would consider an economic response to a pollution externality. Does that mean there is no room for such a policy to be upheld within the general branch? Below, I examine the evolution of the judicial interpretation of the trade and commerce power and argue that room exists.

3.4. The Laskin-Dickson Test

The judicial interpretation of the trade and commerce power in s. 91(2) would not have accommodated federal policies to restrict GHGs for much of our history. Early interpretation, for example in *Fredericton*, was quite broad as the Supreme Court upheld prohibition legislation under s. 91(2) because of the by-

[389] This is mentioned so as to distinguish carbon taxes or regulatory charges from the types of legislation impugned in *Board of Commerce (SCC)*, *supra* note 241, or *Anti-Inflation*, *supra* note 12, as the legislation at issue in both of these cases sought to directly regulate prices or other transaction-level matters.
[390] For a complete discussion of the tradeoffs between different policy tools to reduce GHG emissions, see Aldy & Stavins, *supra* note 14.

products of the sale of alcohol.[391] The Privy Council, however, subsequently placed significant constraints on federal legislative authority over trade and commerce in *Parsons*, restricting Parliament to legislation in relation to extra-provincial trade and allowing the possibility that the federal reach may also include "general regulation of trade affecting the whole dominion."[392] Patrick Monahan argues that *Parsons* established a need for judicial balancing; courts had to determine the relative importance of the local and national aspects of the matter in question, and then decide whether the national aspects presented a sufficiently compelling case for federal legislation.[393] Initially, there was not much of a balance at all: a series of decisions of the Supreme Court and the Privy Council through the 1920s and 1930s served to effectively nullify the general branch of the trade and commerce power.[394] The general pattern in these cases saw federal legislation found to affect local transactions and market actors and, as a result, the *watertight compartments* rationale of the time implied that legislative authority must lie with the provinces and not with Parliament.[395] Only in the second half of the twentieth century did this begin to change.[396]

A rapid evolution of the judicial interpretation of the general branch of the trade and commerce power began with *Caloil* in which the Supreme Court upheld the validity of regulations which restricted the distribution of imported petroleum products within the provinces of Ontario and Quebec. The majority held that these restrictions on distribution were necessary and incidental to a regulatory regime to limit imports

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[391] *City of Fredericton v The Queen*, [1880] 3 SCR 505 [*Fredericton*] at 533–5. While the decision in Fredericton was not appealed, the validity of the same Canada Temperance Act provisions did come before the Privy Council in *Russell v The Queen*, [1881] 7 AC 829 (PC) [*Russell*] at 842. Although Russell was decided under POGG, the judgement did not repudiate the findings in Fredericton, Rather, Their Lordships were clear that they "must not be understood as intimating any dissent from the opinion of the Chief Justice of the Supreme Court of Canada and the other Judges, who held [in Fredericton] that the [Canada Temperance Act], as a general regulation of the traffic in intoxicating liquors throughout the Dominion, fell within the class of subject, 'the regulation of trade and commerce,' enumerated in [s. 91(2)], and was, on that ground, a valid exercise of the legislative power of the Parliament of Canada."

[392] *Parsons*, *supra* note 62 at 113. Earlier, at page 109, Sir Montague Smith introduces what we now know as the doctrine of mutual modification in holding that "It could not have been the intention [of the legislature in enacting the *Constitution Act, 1867*] that a conflict should exist; and, in order to prevent such a result, the two sections must be read together, and the language of one interpreted, and, where necessary, modified, by that of the other. In this way it may, in most cases, be found possible to arrive at a reasonable and practical construction of the language of the sections, so as to reconcile the respective powers they contain, and give effect to all of them."

[393] Monahan, *supra* note 335 at 59–60.

[394] See, for example, H Carl Goldenberg, "Social and Economic Problems in Canadian Federalism" (1934) 12:7 Can Bar Rev 422 at 425. Goldenberg catalogued a long list of subjects deemed beyond the reach of federal control: insurance, the grain trade, traffic from provincial railways, competition and fair prices, labour and social legislation, and many aspects of prohibition. He wrote that, "the effect has been to restrict the federal jurisdiction to matters which were of national interest in 1867, when Canada's social, economic and political development was in its infancy." In this regard, the courts were quite explicit. For example, in *Board of Commerce (PC)*, *supra* note 12 at 198–9, Viscount Haldane held that, " the trade and commerce power was of no avail because it had no independent content and could be invoked only as ancillary to other federal powers," in finding the head of power to be of no avail to the validity of federal competition policies. For more discussion, see Peter W Hogg & Warren Grover, "The Constitutionality of the Competition Bill" (1976) 1:2 Can Bus Law J 197 at 202–3, or Vincent C MacDonald, "Judicial Interpretation of the Canadian Constitution" (1936) 1:2 UTLJ 260 at 276.

[395] Monahan, *supra* note 335 at 60–61, addresses the contradictory nature of the balancing doctrine applied by the Privy Council. A useful example among many in this regard is the decision of Duff J. in *Board of Commerce (SCC)*, *supra* note 241 at 504. Monahan highlights that once Duff J. had concluded that legislation could not be federal if it affected individuals, then the head of power was effectively nullified since all regulation of trade must by definition affect individuals engaged in trade. In his pre-judicial writing, Bora Laskin was particularly critical of this categorical approach. See, for example, Laskin, *supra* note 197.

[396] Hogg & Grover, *supra* note 394 at 211–12, argue that *P.A.T.A.*, *supra* note 354 at 326, provides an earlier glimmer of broader potential reach for the trade and commerce power. While the legislation in that case was upheld under the criminal law power, their Lordships made it known that they wished to "guard themselves from being supposed to lay down that the present legislation could not be supported," under the trade and commerce power. The P.A.T.A. decision also repudiated what had become the standard interpretation of the decision in *Board of Commerce (PC)*, *supra* note 12 at 198, when it clarified that it was not the intention of the Privy Council to imply that the trade and commerce power could only be employed in furtherance of another federal head of power.

for the protection of the domestic market.[397] *Caloil* relaxed an earlier tradition that even regulation of trade within a province that was necessary to the proper functioning of export regulation was outside the federal ambit.[398] Katherine Swinton argues that Laskin J., in his concurring reasons in *Caloil*, set in motion the modern era of the general trade and commerce power.[399] In avoiding recourse to the necessary and ancillary doctrine, Laskin J. finds that the regulations were valid federal acts in and of themselves, despite their intrusion into transactions occurring within the province, because they advanced the broader, valid, federal objective.[400]

The modern interpretation of the trade and commerce power evolved further through Supreme Court decisions in *Vapor*, *Multiple Access, Canadian National*, and *General Motors*.[401] The last of these, upholding federal competition law under the general branch of the trade and commerce power, completed the transition from a lost head of power to an important economic policy tool.[402] Five indicia identified in *General Motors* – three from Laskin J.'s reasons in *Vapor*, and the latter two from Dickson J.'s reasons in *Canadian National* – form the basis of the test for valid legislation under the general branch of the trade and commerce power. They read as follows:

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.[403]

Chief Justice Dickson noted that these indicia serve only as "preliminary check-list of characteristics, the presence of which in legislation is an indication of validity under the trade and commerce power," and emphasized that the indicia are not exhaustive, nor individually or jointly necessary nor sufficient conditions for validity.[404] Regardless of this caveat, these indicia provide a useful framework for considering

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[397] *Caloil Inc v Attorney General of Canada*, [1971] SCR 543 [*Caloil*] at 548.
[398] Swinton, "The Supreme Court and Canadian federalism", *supra* note 55 at 141. Swinton cites the decision in *Eastern Terminal Elevator*, *supra* note 197, which directly led to the exercise of the federal declaratory power over grain elevators when federal attempts to regulate the operation of those elevators under the trade and commerce power as necessary and ancillary to export regulations was struck down.
[399] Katherine Swinton, "Bora Laskin and Federalism" (1985) 35:4 Univ Tor Law J 353 at 359.
[400] *Ibid*.
[401] *Vapor*, *supra* note 336; *Multiple Access*, *supra* note 70; *Canadian National*, *supra* note 336; *General Motors*, *supra* note 336.
[402] This sequence of decisions is also decribed in Leclair, "Jurisdiction", *supra* note 346 at 568–9, although perhaps with more disdain for the obiter of Chief Justice Laskin in Vapor, which Leclair refers to as "earlier judicial gloss."
[403] *General Motors*, *supra* note 336 at 661–62. See also a summary in *Kirkbi v. Ritvik*, *supra* note 349 at para 17, or equally *re Pan-Canadian Securities*, *supra* note 12 at para 103.
[404] *General Motors*, *supra* note 336 at 661–62.

the possibility for valid federal GHG policies under the trade and commerce power. It is not sufficient to show that a market failure exists to make the case for federal jurisdiction to correct it. It must be the case that the market failure has a federal aspect that can only reasonably be fully corrected by federal legislation.

The modern *General Motors* test effectively consists of three parts: it first asks whether the proposed regulation involves a complex regulatory regime. Next, the test assesses whether the regime applies in general or narrowly to a single commodity, trade, or region. Finally, the *General Motors* test examines provincial inability, to which the Supreme Court's reasons in *re: Securities Act* effectively added a sixth indicium in considering the degree to which any invasion of provincial jurisdiction was appropriately justified.[405] I discuss each of these in turn below.

3.4.1 Easy hurdles: regulations and monitoring

The first and second elements of the *General Motors* test are likely to be satisfied by any comprehensive federal regime to regulate GHG emissions. Any national GHG policy would surely constitute a complex regulatory regime and oversight from Environment and Climate Change Canada, with the addition of Finance Canada and/or the Canada Revenue Agency in the case of regulation in the form of taxation, would surely satisfy the second indicium for any contemplated policy package.

We have no direct precedent for pollution quotas or GHG emissions intensity regulations or related technology standards upheld under the general trade and commerce power, but this claim is supported by scholarly writing albeit with some challenging judicial precedents. In *Hydro-Québec,* a majority of the Supreme Court upheld a portion of the C*EPA* under the criminal law power, with only limited consideration of the trade and commerce power in the dissenting opinion.[406] Since the case was decided on the basis of criminal law, there was no need to for the majority to establish the existence of a complex regulatory regime. However, while the dissent rejected the trade and commerce power as a means to uphold the legislation, the dissent did not dispute that a complex regulatory regime existed in *CEPA*. GHGs were added as a toxic substance under *CEPA* in 2005, and the Federal Court of Appeal upheld renewable fuel content standards including a tradeable quota system under *CEPA* in *Syncrude* in 2016. Again, however, the legislation was

[405] See *re Securities Act*, *supra* note 12 at para 122, where the reach into provincial jurisdiction is considered as part of the Court's classification analysis.
[406] The trade and commerce power was considered in the dissenting opinion in *Hydro-Québec*, *supra* note 10 at 218–19. The dissent would have held that, perhaps, parts of the legislation might be considered to be valid as regulation of extra-provincial trade, but not the regime as a whole. Further, since the legislation was more far-reaching into intra-provincial activities, the dissent would have held that the provincial inability test had not been met and thus that the legislation was invalid.

upheld under the criminal law power, and so establishing the existence of a complex regulatory regime was not part of the analysis.[407]

The impugned regulations in *Syncrude* were part of a larger initiative, dubbed the *Turning the Corner* plan, which was studied extensively and provides some analysis germane to the first two *General Motors* indicia.[408] *Turning the Corner* was a collection of policies and programs which ran the gamut from grants to very specific regulations of energy production, as well as the renewable fuel regulations.[409] Alistair Lucas and Jenette Yearsley had no doubts that the legislation underpinning part of the *Turning the Corner Plan* constituted a complex regulatory scheme: "It is clear that the scheme intended under the [proposed legislation] would be a complex regulatory scheme including required and prohibited conduct, a mechanism to establish an emissions credit "market," investigatory procedures, public regulators, and remedial and punitive provisions."[410]

A regime focused on prices rather than quantities would also likely be seen as a complex regulatory regime. We can glean some insight in this regard from the recent *GGPPA* litigation, because some intervenors argued that the carbon charge imposed in that legislation constituted a constitutional tax, not a regulatory charge.[411] While we tend to think of the standard Pigouvian solution to economic externalities as a carbon tax, whether the charge actually constitutes a tax from a constitutional perspective is important for a variety of reasons, including applicability to provincial assets which would be limited by s.125 of the *Constitution Act, 1867* in the case of a tax. Two relatively recent Supreme Court decisions, *Westbank* and *620 Connaught*, define the tests for distinguishing a regulatory charge from a tax and, in so doing, suggest that a carbon-tax-type regime would satisfy at least the first two hurdles of the *General Motors* test. The *Westbank* decision outlines the distinction between taxes, regulatory charges, and user fees and, to inform this distinction, develops a set of indicia of a regulatory scheme:

> (1) a complete and detailed code of regulation;
>
> (2) a specific regulatory purpose which seeks to affect the behaviour of individuals;

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[407] *Syncrude*, *supra* note 113. See also Order in Council SOR/2005-345 November 21, 2005 adding the six Kyoto Protocol GHGs to Schedule 1 of CEPA.
[408] Government of Canada, "Turning the Corner: Taking Action to Fight Climate Change", (2008), online: *Government of Canada* <https://perma.cc/8P9Z-YTGP> at 2.
[409] Government of Canada, "Turning the Corner", *supra* note 408. For a detailed look at the legislative measures of the era, see Lucas & Yearsley, *supra* note 33 at 6–14.
[410] Lucas & Yearsley, *supra* note 33 at 21. See also Elgie, *supra* note 33 at 116, who writes that "an emissions trading system by its very nature must involve a fairly complex regulatory scheme. It must: set an overall cap for emissions; allocate firm-specific limits within that cap; set the rules for trading; have an oversight body; and have a monitoring, verification, and enforcement regime. A review of the proposed federal emissions trading regime reveals that all those elements (and more) are present." The proposed federal program he refers to is the Turning the Corner plan.
[411] See, for example, *Ontario GGPPA Reference*, *supra* note 30 Factum of the Attorney General of Ontario at paras 102-112.

(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.[412]

The *Westbank* decision stipulates that a regulatory charge "may be the means of advancing a regulatory purpose," which is consistent with a carbon *tax* levied for the purpose of reducing emissions.[413] The decision in *Re: Exported Natural Gas Tax* similarly affirms that federal regulation "in the form of taxation" may be valid under the trade and commerce power, although the unusual hypothetical fact pattern limits the broad applicability of the case.[414] The majority held that, if the purpose of the tax is regulatory (i.e. if the levy in that case had been aimed at the reduction or elimination of exports, per the judgement), it would have been viewed as a regulatory charge, not a tax.[415] The federal *GGPPA*, for example checks all of the boxes established by these precedents for characterizing a complex regulatory regime.[416]

Insofar as the federal government might choose to regulate GHG emissions on a national basis, whatever tool they use, it is almost certain that a court would find it to constitute a regulatory regime with sufficient oversight to meet the first two steps of the *General Motors* test.[417] In fact, national GHG emission policy – whether it involved regulatory charges, quantity restrictions or technology standards – would be all but impossible without both a complex scheme and an oversight body.

3.4.2 Trade as a whole

The third indicium of the *General Motors* test presents a more daunting challenge since what constitutes trade as a whole is not clear from the judicial interpretation before or since the landmark decision. This uncertainty manifests in two ways for GHG policies. First, the precedents in *Board of Commerce* and more recently in *Labatt Breweries* with respect to agglomerations of individual regulations into a single policy seem tailor-made to reject certain recent federal GHG legislation. Second, we must reconcile whether the regulation of GHGs constitutes the regulation of a single commodity, or of activities largely within one sector or region, and there are significant risks that many classes of policies will not satisfy this aspect of the test.

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[412] *Westbank*, *supra* note 91 at para 24.
[413] *Ibid* at 29.
[414] *Re: Exported Natural Gas Tax*, *supra* note 98 at 1068. The majority here cites the judgement in *Johnny Walker*, *supra* note 318, pointing out that the judgement is equivocal on this point. The unusual and contrived fact pattern in this case is discussed at length in another chapter of this thesis as well as in Riddell & Morton, *supra* note 99.
[415] *Re: Exported Natural Gas Tax*, *supra* note 98 at 1072–1073. In this case, the tax applied to all natural gas, so was not purely targeted to exports despite the moniker given the case.
[416] For a longer discussion of this aspect of the on-going GGPPA litigation, see Chalifour, "Jurisdictional Wrangling", *supra* note 7 at 245–250.
[417] Sheffield, *supra* note 33 at 15.

A truly national policy?

It is crucial for the balance of federalism that the courts not permit an agglomeration of otherwise individually *ultra vires* measures to be enacted under the guise of general trade policy, nor can validity come simply from extending the scope of legislation to a wider array of subjects.[418] The reasons of Estey J. in this regard in *Labatt Breweries* read as though they may have been written in response to an impugned national climate plan, in particular when he writes that a regime must not simply be national in the sense that it enacts an individual regulation that applies to multiple industries.[419] Estey J. explains that "even if [the impugned legislation] were to cover a substantial portion of Canadian economic activity, one industry or trade at a time, by a varying array of regulations or trade codes applicable to each individual sector, there would not, in the result, be at law a regulation of trade and commerce in the sweeping general sense contemplated in [*Parsons*]."[420] To qualify as a regulatory regime for the purposes of the general branch of the trade and commerce power, regulation must truly be national in nature, not artificially made to be so by combining multiple individual regulations to cover the entire, national economy.[421]

There is no guarantee that national GHG policies would pass this test. Consider again the *Turning the Corner* plan proposed by the government of Stephen Harper, in which we see examples of very specific regulations of a sort which could, on an individual basis, be beyond the authority of Parliament.[422] The plan, when considered jointly, sounds much like the agglomeration Estey J. is describing in *Labatt Breweries*; the government of the day even described it as "sector-by-sector regulatory approach."[423] Many of the policies in the plan raised significant division of powers concerns. For example, the *Turning the Corner Plan* proposed to effectively require specific technology for carbon capture and sequestration to be installed in all new oil sands facilities built after 2012.[424] Such a regulation, on a stand-alone basis, sits squarely within provincial jurisdiction under the resource amendments in s. 92A, or under s. 92(10) as it relates to local works and undertakings, or as a regulation in relation to property and civil rights and/or matters of a local and private nature in the provinces in ss. 92(13) and 92(16) of the *Constitution Act, 1867*. When

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[418] In *Board of Commerce (SCC)*, *supra* note 241 at 383–4 and 388 respectively, Duff J. wrote that "it is not competent to the Dominion to regulate [the contracts of a particular business or trade] in each Province by legislation applicable to all of the Provinces," and that "if such legislation could not be supported when the subject dealt with is a single commodity, or the trade is a single commodity, or a single group of commodities, how can jurisdiction be acquired so to legislate by extending the scope of the legislation," and covering a larger set of trades or commodities. Similar reasoning from Duff J. appears in *Lawson*, *supra* note 246 at 366. More recently, in *re Securities Act*, *supra* note 12 at para 79, the Court re-iterated that policy deemed national in this regard must not be policies "merely aimed at centralized control over a large number of local economic entities." This phrasing, in turn, is from *General Motors*, *supra* note 336 at 267.

[419] *Labatt Breweries of Canada Ltd v Attorney General of Canada*, [1980] 1 SCR 914 [*Labatt Breweries*] at 941–42.

[420] *Ibid* at 943–44. Estey J. cites Rand J. in *Board of Commerce (SCC)*, *supra* note 241 to buttress his reasoning here.

[421] Monahan, *supra* note 335 at 60–61, discusses the inherent contradictions in what Duff J. demanded of legislation: if regulation of trade and commerce cannot affect individuals, then there can be no regulation under this branch.

[422] Government of Canada, "Turning the Corner", *supra* note 408. For a detailed look at the legislative measures of the era, see Lucas & Yearsley, *supra* note 33 at 6–14.

[423] Canada, House of Commons, Debates Hansard 41st Parl 2nd Sess Vol 147 No 158 9 Dec 2014 1450 Right Hon Stephen Harper.

[424] Government of Canada, "Turning the Corner", *supra* note 408 at 3.

combined and implemented in a broader regulatory regime, individual measures would not be given a gloss of validity simply due to the breadth of the whole package. However, as with competition and trademarks policies, a combination of federal heads of power may jointly uphold the validity of federal legislation.

Consider another part of the *Turning the Corner Plan*: the phase-out of coal-fired electricity.[425] The regulatory phase-out of coal-fired power used the provisions of *CEPA* originally impugned in *Hydro-Québec*, but in this case directed at reductions in GHGs which had been declared a toxic substance in 2005.[426] While these regulations were part of an overall regulatory regime (*CEPA*), they also trenched deeply into the operation and technology choices of provincial works and undertakings or provincial jurisdiction over electricity under s. 92A. At the time, coal-fired electricity represented a significant source of national emissions: 63.3 million tonnes out of a national total of 715 million tonnes.[427] However, by then, coal was being phased-out in Ontario and remained a material source of future electricity supply in only four provinces: Nova Scotia, New Brunswick, Saskatchewan and Alberta.[428] These regulations have, to date, not been subject to judicial review and were, in fact, strengthened under the Trudeau government.[429] However, in the context of the *General Motors* test and, in particular the concerns that an agglomeration of otherwise *ultra vires* regulations would be put forward as constituents of a national regulatory regime, they provide a useful example. While Lucas and Yearsley, for example, argued that these regulations would likely fail if subjected to a constitutional challenge, I would argue they would likely be upheld as valid criminal law per the precedent of *Hydro-Québec*.[430] Given that the protection of the environment is a valid public purpose for criminal law, that GHGs are an identified toxic substance as determined by the same *CEPA* process affirmed in *Hydro-Québec*, and the provisions are backed by punitive sanction, there is no reason to suspect they would not be upheld as valid criminal law. That some aspects of a given regulatory regime might fit better under the criminal law does not detract from the contention that national GHG policies could fit

[425] See Reduction of Carbon Dioxide Emissions from Coal-fired Generation of Electricity, Regulations SOR/2012-167 made under *CEPA*, *supra* note 106, August 30, 2012.
[426] Lucas & Yearsley, *supra* note 33 at 32. Recall that the toxic designation for greenhouse gases was made via Order in Council SOR/2005-345 November 21, 2005 adding the six Kyoto Protocol GHGs to Schedule 1 of *CEPA*, *supra* note 106.
[427] Government of Canada, "2015 National Inventory Report", online: *UNFCCC* <https://unfccc.int/process/transparency-and-reporting/reporting-and-review-under-the-convention/greenhouse-gas-inventories/submissions-of-annual-greenhouse-gas-inventories-for-2017/submissions-of-annual-ghg-inventories-2015>, pt 3, at 72.
[428] *Ibid*, pt 3 at 71–84.
[429] The Reduction of Carbon Dioxide Emissions from Coal-fired Generation of Electricity Regulations (SOR/2012-167) under *CEPA*, *supra* note 106 were last amended on November 30, 2018 to accelerate the phase-out of coal-fired electricity generation in Canada to 2030, with the exception that an equivalency agreement will delay the phase-out in Nova Scotia.
[430] Lucas & Yearsley, *supra* note 33 at 34. That parts of a regulatory package would be upheld under the criminal law, with the balance upheld under trade and commerce would not be novel. The combination of criminal law and valid legislation in relation to trade and commerce has always been a feature of our competition policies. See *General Motors*, *supra* note 336 at 654, or, for historical background, see Hogg & Grover, *supra* note 394 at 200–205.

within the general trade and commerce power. On the contrary, in the case of competition, many provisions of the legislation impugned in *General Motors* had previously been upheld as valid criminal law.[431]

Regulatory charges applied broadly on GHGs across the economy would easily satisfy the third *General Motors* criterion of a truly national policy.[432] For example, the *GGPPA*, where implemented, covers a substantial share of emissions including small and large emitters and, once one accounts for provincial policies in the face of which the *GGPPA* stands down, its geographic scope is also national. Dobson, Winter and Boyd estimated that the federal *GGPPA*, if implemented in all Canadian provinces, would place a regulatory charge on 79% of Canadian emissions.[433] By any measure, a regulatory charge with similar coverage as the *GGPPA* should qualify as a national policy.[434] Such a policy would not be regulation of a single trade or industry, nor would it be an agglomeration of policies affecting multiple industries differently. Just as competition or trademarks policies applies uniform rules across industries and across the country, a national regulatory charge for GHG emissions satisfies the national dimensions criteria for the general trade and commerce power established in *Insurance Act Reference* and *Eastern Terminal Elevator* and later affirmed in *Labatt Breweries*.[435] No economic sector or province in Canada produces close to a majority of our GHG emissions. As shown in Figure 10, there is substantial variation by province in terms of contributions to the total and, while sectors such as oil and gas and transportation contribute substantially to our emissions, emissions are generated as a result of most economic activity. In upholding trademarks protections in *Kirkbi v. Ritvik*, LeBel J. wrote that the impugned legislation "applies across and between industries in different provinces."[436] In *Re: Securities Act,* the Court described a matter of genuine national importance as "a diffuse matter that permeates the economy as a whole."[437] Broad-based GHG policies have no issues meeting this test – the are few more diffuse and pervasive by-products of our national economy than GHGs.

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[431] *General Motors*, *supra* note 336 at 654–5. For an example of such a case, see *P.A.T.A.*, *supra* note 354 at 326.
[432] DeMarco, Routliffe, & Landymore, *supra* note 32 at 237, and Lucas & Yearsley, *supra* note 33 at 31, each question whether policies aimed at only industrial emissions would meet such a test. Data from Environment and Climate Change Canada, *supra* note 240, show that industrial emissions account for roughly 35% of our national total and that regulations of industrial emissions would cover facilities spread widely across sectors and provinces.
[433] Sarah Dobson, Jennifer Winter & Brendan Boyd, "The Greenhouse Gas Emissions Coverage of Carbon Pricing Instruments for Canadian Provinces" (2019) 12 Sch Public Policy Publ, online: <https://journalhosting.ucalgary.ca/index.php/sppp/article/view/53155>.
[434] It is worth noting here that in *Alberta GGPPA Reference*, *supra* note 30, the majority opinion focussed heavily on the impact of the GGPPA on the oil and gas sector. Dobson, Winter, & Boyd, *supra* note 433 estimated that the GGPPA would cover 80% of Alberta's emissions. Per the Government of Canada, *supra* note 240, oil and gas extraction emissions were 33% of Alberta's total emissions in 2018.
[435] *Re Insurance Act, 1910*, [1913] 15 DLR 251 [*Insurance Act Reference*] at 308–9, and *Eastern Terminal Elevator*, *supra* note 197 at 446–7, as aff'd in *Labatt Breweries*, *supra* note 419 at 937–42.
[436] *Kirkbi v. Ritvik*, *supra* note 349 at para 29, and affirmed in *re Securities Act*, *supra* note 12 at para 82.
[437] *re Securities Act*, *supra* note 12 at 87.

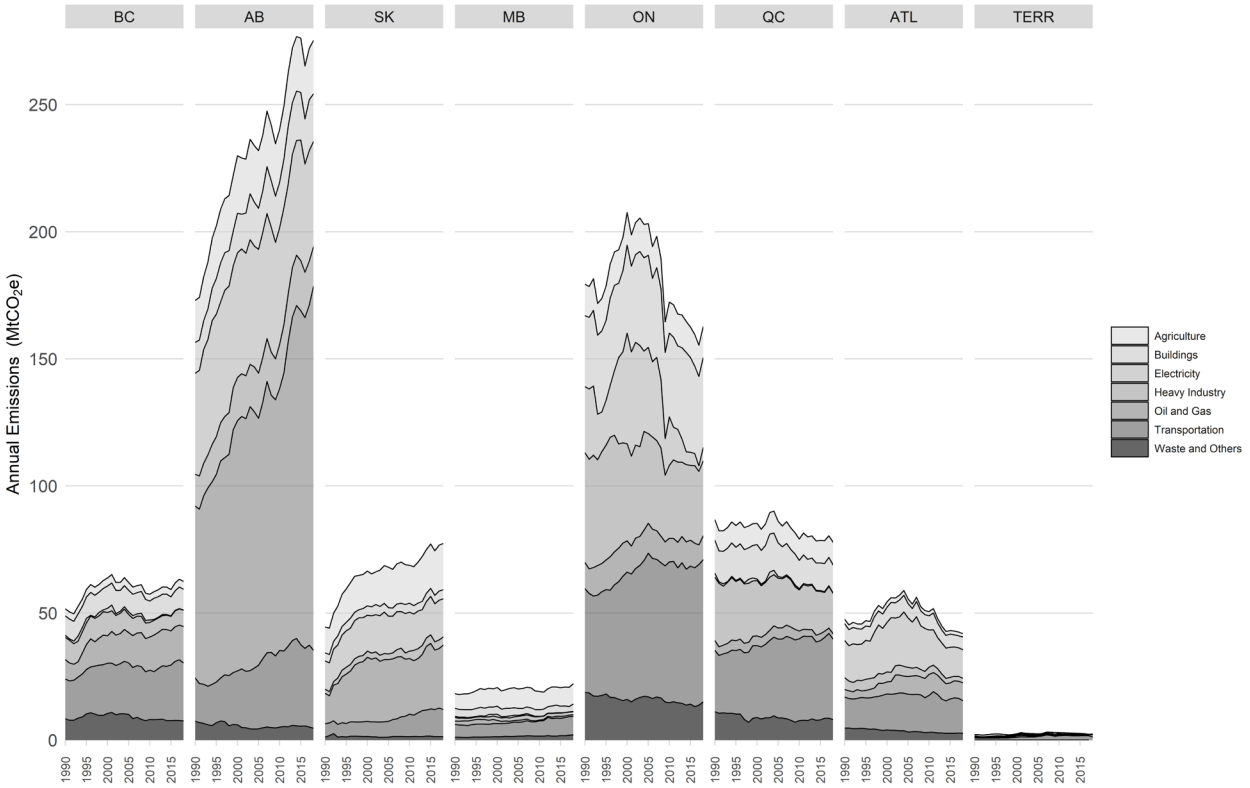

Figure 10 Canada's emissions by sector and province from 1990 through 2018.[438]

Emissions as a commodity

While policies of a type with the *GGPPA* are national in scope and broad in coverage, there is a second question raised in the third *General Motors* criterion: should we think of emissions as a single commodity or as a general by-product of trade and commerce? If we think of GHGs as a single commodity, regulating GHGs cannot also constitute the regulation of trade as a whole.[439]

GHGs are, themselves, an agglomeration of several by-products of goods production and other activities such as agriculture and forestry. For the purposes of emissions trading and/or carbon pricing, the contributions of different GHGs are generally converted to carbon dioxide equivalent units (CO_2e), and so may appear to be a single commodity, but this is akin to reporting energy production in kilojoules or other common units: despite reporting on a common baseline, few would argue that electricity, oil, and natural gas are a single commodity. While carbon dioxide (CO_2) which makes up 80% of our emissions, methane (CH_4) makes up 13%, and

[438] Government of Canada, *supra* note 289.
[439] See Castrilli, *supra* note 32 at 17. Castrilli characterizes the role of GHG pricing regimes as turning emissions and/or emissions reductions into "an article of trade; that is, a commodity that has economic value to industry." While Castrilli offers this in support of his argument that a federal emissions trading regime would satisfy the General Motors test, the fact that the general trade and commerce power does not extend to the regulation of trade in a single commodity has been clearly established since at least the decision of the Supreme Court in *Board of Commerce (SCC)*, *supra* note 241 at 503–4, as aff'd in *Board of Commerce (PC)*, *supra* note 12.

nitrogen oxides make up 5%, with the balance made up of contributions from 10 other GHGs.[440] GHG policy is also not just about regulating the combustion of fossil fuels, as non-combustion sources of GHGs also contribute significantly to our emissions inventory.[441] Carbon sinks also contribute to reducing our emissions, including both natural (e.g. forestry) and anthropogenic (e.g. industrial carbon capture and sequestration) sinks.[442] Simply put, in no way does the regulation of GHG emissions represent the regulation of a single commodity. GHGs introduce the opposite problem: virtually all human activity produces GHGs of one type or another. In *Labatt Breweries*, where the issue was whether federal legislation could dictate the labelling of light (or lite) beer, Estey J. wrote that "what clearly is not of general national concern is the regulation of a single trade or industry."[443] The regulation of GHGs involves the regulation of multiple commodities which are by-products of nearly every trade and industry in the country – there could hardly be a situation more removed from the regulation of a single trade or industry that concerned the majority of the Court in *Labatt Breweries*.

The argument that emissions control policies do not constitute the regulation of a single commodity becomes less convincing when the focus is turned to regulating emissions trading.[444] While emissions are diverse and widely distributed, emissions quotas or credits under a carbon emissions trading regime would be a single commodity – it is the quota being traded, not the emissions themselves. Regulation of the trade of a particular type of property would not be within federal authority under the general branch of the trade and commerce power.[445] So, while the regulation of emissions in general would surely satisfy the third *General Motors* criterion of the regulation of trade as a whole, the regulation of emissions trading in and of itself would not.

3.4.3 The last hurdles: provincial inability and the consequences of intransigence

Jointly, the last two *General Motors* criteria ask whether provinces could, left to their own devices, accomplish the same ends as federal legislation and whether there would be material harm if one or more provinces did not participate. In *Re: Securities Act*, the Court relied on what might be seen as a sixth element

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[440] Government of Canada, *supra* note 240, fig ES-3.
[441] Non-combustion sources accounted for 115Mt CO2e of our 2018 inventory total of 729Mt CO2e, per Government of Canada, *supra* note 240, Table ES-2. Non-combustion emissions include industrial process emissions and emissions from agriculture due to enteric fermentation, farming practices, and land use changes.
[442] For example, in our emissions inventory, *ibid*, Table ES-2 shows sinks in the broad category of land use, land use change, and forestry (LULUCF) accounting for a 13Mt CO2e reduction in our emissions inventory for 2018.
[443] *Labatt Breweries*, *supra* note 419 at 940.
[444] Several authors have argued that emissions trading components of policies could be separately upheld under the trade and commerce power. See, for example, Chalifour, "Canadian Climate Federalism", *supra* note 7 at 396–397, Sheffield, *supra* note 33, or Castrilli, *supra* note 32 at 15–17.
[445] We know from *Saulnier v Royal Bank of Canada*, [2008] 3 SCR 166 [*Saulnier*], that emissions quotas or permits would be considered property for legal purposes. Unless wholesale changes in the ways and means of commerce were contemplated, as was the case in *Reference Re Alberta Statutes*, [1938] SCR 100 [*Re: Alberta Statutes*], it would not necessarily be the general regulation of trade in the nation. As a useful parenthetical, the Re: Alberta Statutes case was in relation to social credit policies and what Duff C.J.C. refers to at page 117 as an act which "provides the machinery for a novel system of credit and contemplates the separation of intra-provincial industry, commerce and trade from the existing system of finance (in which bank credit and legal tender constitute the media of payment) ; and the conduct of industrial, commercial and trading activities by the instrumentality." It would be hard to argue that an emissions trading program would go so far.

added to the test: the degree of intrusion into provincial jurisdiction.[446] The Supreme Court in *Wärtsilä* recently affirmed this caution, holding that "an overly broad interpretation of the federal power over trade and commerce could entirely subsume – and potentially displace through paramountcy – the provinces' legislative authority over property and civil rights and over matters of a purely local nature."[447] In what follows, I treat this as a separate indicium of validity. Combined, these elements of the test are far-and-away the most challenging hurdles for federal GHG policies.

Provincial inability, incapacity, or intransigence

The fourth element of the *General Motors* test – whether the legislation is something the provinces jointly or severally would be constitutionally incapable of enacting – is a substantial challenge for any federal GHG policy. Much of the uncertainty turns on exactly how the indicium should be understood. While the test expressed in *General Motors* refers to constitutional incapability, the indicia applied in *Canadian National* were subtly different, referring to both constitutional and practical incapability.[448] Dickson J. added an additional layer in *Canadian National*, holding that federal legislation must be "qualitatively different" from that which the provinces could practically or constitutionally implement either separately or in combination.[449] In *Pan-Canadian Securities*, the Court again subtly changed the wording applied to this test to provincial incapacity, and added that incapacity may be viewed narrowly as their incapacity to legislate in relation to national aspects of a particular subject.[450] In the context of GHGs, the relevant national context includes consideration of our international commitments and national priorities with respect to emissions reductions, which amounts to a provincial collective-action problem.

Three important elements within the broad suite of potential GHG policies are beyond the legislative reach of the provinces. Most importantly, provinces are not able legislate in relation to activities outside their borders, and so a province cannot enact legislation aimed at reducing emissions elsewhere in the country,[451] nor can they legislate in relation to most aspects of federal infrastructure such as pipelines, rail, or nuclear power.[452] Provinces also cannot legislate in relation to extra-provincial trade, except where such measures

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[446] See *re Securities Act*, *supra* note 12 at para 121. This indicium echoes the test for validity under the national concern doctrine of POGG developed in *Crown Zellerbach*, *supra* note 10 at 432, which asks whether legislation would have "a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power" under the *Constitution Act, 1867*. Choudhry, *supra* note 94 at 20, also discusses the parallels between the decision in *Re: Securities Act* and the *Crown Zellerbach* provincial intrusion test. Elgie, *supra* note 33 at 116, argues that there is no explicit test of impact on provincial jurisdiction in the *General Motors* test, although he was writing before this was read-in or added to the test in *re: Securities Act*.

[447] *Desgagnés Transport Inc v Wärtsilä Canada Inc*, [2019] 58 SCC 1 [*Desgagnés v. Wärtsilä*] at para 57. The Supreme Court here cites *re Securities Act*, *supra* note 12 at para 72, *re Pan-Canadian Securities*, *supra* note 12 at para 100, and *Parsons*, *supra* note 62 at 111–13.

[448] *Canadian National*, *supra* note 336 at 209. Swinton, "The Supreme Court and Canadian federalism", *supra* note 55 at 145 highlights this discrepancy.

[449] *re Securities Act*, *supra* note 12 at para 79, citing *Canadian National*, *supra* note 336 at 267.

[450] *re Pan-Canadian Securities*, *supra* note 12 at paras 113–114.

[451] See, for example, *Interprovincial Co-operatives*, *supra* note 363. See also Castrilli, *supra* note 32 at 19.

[452] This was recently tested in BC in *Reference re Environmental Management Act (British Columbia)*, [2019] BCCA 181 [*Bitumen Reference*].

fall under natural resource management as defined in s. 92A of the *Constitution Act, 1982.* This means that border carbon adjustments or import duties to protect domestic industries from emissions leakage are potentially off the table.[453] Finally, with the exception of policies affecting the primary production from natural resources, the provinces cannot levy indirect taxes.[454] These last two conditions may limit the design of measures within provincial GHG policies designed to prevent emissions leakage. There are other limits on provincial authority, notably that the provinces cannot pass criminal laws, but in so far as environmental regulations are concerned, legislation in relation to local matters can take on many of the characteristics of what would, federally, be criminal law.[455] The limitations on actions beyond provincial borders are the major provincial incapability in the context of GHG policies.

In the context of GHG policies, what is facing the federal government is not a problem of strict provincial inability to legislate to reduce GHGs, but one of provincial intransigence or unwillingness to legislate combined with provincial inability to coordinate collective action. The *GGPPA* is, in form and function, an example of a solution to these combined problems which could only be imposed federally. A quick digression on the structure of the *GGPPA* is useful here. The *GGPPA* imposes a regulatory charge on carbon emissions only in provinces designated in a Schedule to the Act.[456] The Governor in Council may add provinces to the Schedule, but must consider the existing stringency of provincial carbon pricing plans as the primary factor when deciding whether to impose the federal pricing regime in whole or in part in that province. This would, presumably, include consideration of whether more stringent pricing is required in that province to ensure comparable stringency with policies in other provinces and that national objectives are met.[457] The *GGPPA* functions as a backstop policy enabling the federal government to effectively create a minimum national stringency of carbon pricing in Canada, ostensibly at a level of stringency sufficient to meet our national commitments.[458] While the structure of the legislative approach validates the contention

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[453] Writing in *Canadian National*, *supra* note 336 at 278 Dickson J. saw this as the key reason why competition policy must be federal. "Given the free flow of trade across provincial borders guaranteed by s. 121 of the Constitution Act, 1867 Canada is, for economic purposes, a single huge marketplace," which he took to prevent provinces from effectively regulating competition in the absence of an ability to erect trade barriers. This is a logical conclusion of the decades of jurisprudence on supply management as well. *Regulation respecting a cap-and-trade system for greenhouse gas emission allowances*, 2018, Environ Qual Act Chapter Q-2 Ss 461 465 466 468 4616 951 11527 11534 OC 1297-2011 2019-12-01 [*Quebec cap-and-trade*], includes carbon prices applied on imported fuels distributed in the province, but is not targeted directly at imports. As long as they were part of an overall system to reduce emissions in the province, border carbon adjustments would likely survive a constitutional challenge. More complex regulatory policies such as cap-and-trade programs are also not likely to be viewed as taxes for constitutional purposes. Some of these issues are discussed in the interprovincial trade chapter of this thesis.

[454] Peter W Hogg & Wade K Wright, "Canadian Federalism, the Privy Council and the Supreme Court: Reflections on the Debate about Canadian Federalism" (2005) 38:2 Osgoode Hall Law J 329 at 334, argues that the distinction between federal and provincial taxation power is an indication of an intention to form a more centralized federation in 1867. Chalifour, "Canadian Climate Federalism", *supra* note 7 at 385, discusses this distinction in the context of carbon pricing policies.

[455] For example, Alberta's *Environmental Protection and Enhancement Act*, 2000, SA 2000 C E-12 [*EPEA*] contains prohibitions on the release of toxic substances. Similar federal prohibitions were upheld under the criminal law power in *Hydro-Québec*, *supra* note 10.

[456] *GGPPA*, *supra* note 29, s 17(1).

[457] *Ibid*, ss 166 and 189.

[458] There is no explicit link between the stringency of carbon pricing applied and the meeting of Canada's national commitments in the *GGPPA*, *supra* note 29.

that all provinces, acting in a coordinated manner, could achieve federal objectives, guaranteeing such coordination over time is in and of itself beyond the constitutional capabilities of the provinces.

The inability for the provinces to impose and sustain collective action is not unique to GHG policy. The Supreme Court wrestled with this issue in *Re: Securities Act* as the impugned legislative proposal in that case, like the *GGPPA*, was explicit about concurrency with provincial policies, and allowed for provinces to opt in to a federal regime. The Court held that the opt-in provision "weighs against Canada's argument that the success of its proposed legislation requires the participation of all the provinces," although it still found that there were aspects of the overall legislative proposal which satisfied the provincial inability test.[459] Newman raises this issue in the context of the *GGPPA* arguing that federal legislation with provincial opt-out clauses has a logical problem with respect to the provincial inability test, "in that the legislation itself admits that the provinces are in fact constitutionally capable."[460] There is no doubt that provinces are constitutionally capable of pricing GHG emissions and direct regulation of production and consumption activities within the province. Provinces are equally constitutionally capable of legislating in relation to competition, trademarks, or systemic risks in financial markets within their own provinces as well. In these cases, federal jurisdiction was supported by the inability of the provinces to collectively address issues of national concern. For example, in *re: Pan-Canadian Securities* the Court held that, "while provinces have the capacity to legislate in respect of systemic risk in their own capital markets, they do so from a local perspective and therefore in a manner that cannot effectively address national concerns which transcend their own respective concerns."[461] The same rationale applies to a federal government seeking to coordinate provincial action to meet national commitments to reduce GHGs, which would be beyond the constitutional capability of the provinces.

The question of whether federal jurisdiction can be underpinned by provincial intransigence was raised in both the *Saskatchewan GGPPA Reference* and the *Alberta GGPPA Reference,* albeit in the context of the *Crown Zellerbach* test for validity under the national concern branch of POGG. Richards C.J.S. wrote that "Parliament cannot somehow acquire additional authority because of a provincial decision not to act in relation to a particular matter. Parliament either has legislative authority to act or it does not. There is no constitutional magic in the fact a province has failed to move in a particular policy area."[462] This was

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[459] The opt-in provision was viewed by the Court as a false promise which concealed an intention for federal legislation to "duplicate and displace" provincial legislation, effectively forcing provinces to suspend their own regimes. The rationale was that pull on the part of investors would lead to the loss of provincial regimes, leading to exclusive federal control of the field. See *re Securities Act*, *supra* note 12 at paras 99–106, or Leclair, "Jurisdiction", *supra* note 346 generally but in particular at 574. There is no reason to expect that the same would be true of greenhouse gas emissions policies: environmental policies have had competing federal and provincial regimes for as long as such policies have existed in Canada, and no substantial pull on the part of corporations or voters has emerged toward unification under the federal banner.
[460] Newman, *supra* note 149 at 14. Leclair, "Jurisdiction", *supra* note 346 at 572–3, makes a similar point in the context of securities legislation.
[461] *re Pan-Canadian Securities*, *supra* note 12 at para 114.
[462] *Saskatchewan GGPPA Reference*, *supra* note 30 at para 419.

mirrored in the majority and concurring opinions in the *Alberta GGPPA Reference*.[463] In her majority reasons, Fraser C.J.A. wrote that "if the provincial inability test could be met simply by "the risk a province will not act" in accordance with the federal government's preferred scheme, this would not be an indicia of a new head of federal power. It would be a guarantee of it. Policy differences abound throughout this country."[464]

Federal jurisdiction does not come from the intransigence of provinces per se, but is required in some cases because of the risks of it. As Fraser C.J.A. writes in the *Alberta GGPPA Reference*, provincial intransigence flows from diverging federal and provincial aspects of the regulation of GHGs. It is to be expected that individual provinces and the federal government would sometimes have goals that were at odds with one another, and that the interests of all provinces would not align nor would the interests of individual provinces be expected to remain constant over time. This was exactly what was contemplated in *General Motors* when Dickson C.J.C. wrote of monopoly and the differing incentives that individual provinces might have to protect their own, dominant industries.[465] Similarly, in *Re: Securities Act,* the Court held that, for the most part, the provinces could enact legislation identical to that proposed by the federal government, and that they could even go so far as to delegate their regulatory authority to a federal regulator.[466] However, the Court noted that this was limited in that provinces cannot permanently delegate their jurisdiction and so there is no future commitment implied or enforceable.[467] On the contrary, the Court held that "the provinces' inherent prerogative to resile from an interprovincial scheme," limits the provinces' joint or collective ability to achieve truly national goals.[468]

Our recent experience with federal GHG policy in Canada has demonstrated the ability of the provinces to resile from collective action. All provinces but Saskatchewan signed on to the Pan Canadian Framework which presaged the *GGPPA.*[469] Two of those nine provinces subsequently launched constitutional challenges to a framework they had, in principle, supported under previous provincial governments.[470] This

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[463] In the majority opinion in *Alberta GGPPA Reference*, *supra* note 30 at para 311, Fraser C.J.A. wrote that "The provinces have the unchallengeable jurisdiction to reduce GHG emissions. But because the provinces might actually choose to exercise their powers in the way they are constitutionally entitled to do – for example, by not imposing carbon pricing on individual consumers – the federal government claims a right to use the provinces' exercise of their constitutional powers as justification for invoking the national concern doctrine and stripping away those powers. In other words, because the federal government believes a province's failure to act would not ensure the overall efficacy of the federal government's policy choice, the jurisdiction of all the provinces should be overridden. This cannot be…" A similar argument is present in the concurrence of Wakeling J.A. at para 767.
[464] *Alberta GGPPA Reference*, *supra* note 30.
[465] *General Motors*, *supra* note 336 at 680.
[466] *re Securities Act*, *supra* note 12 at 118.
[467] The reasons in *re Securities Act*, *supra* note 12 cite Peter W. Hogg's Constitutional Law (5th ed. Supp). The same reference appears in Hogg, "Constitutional Law", *supra* note 60 at 12–8, which holds that Parliament or a Legislature may, within its jurisdiction, make or repeal any law it chooses at any time.
[468] *re Securities Act*, *supra* note 12 at para 120.
[469] Government of Canada, "Pan-Canadian Framework", *supra* note 28.
[470] Both Alberta and Ontario were signatories to the Pan Canadian Framework under Premiers Notley and Wynne. Susequently, under Premier Kenney, Alberta launched the *Reference re Greenhouse Gas Pollution Pricing Act*, ABCA (Factum of the Attorney General of Alberta) [*Alberta*

emphasizes exactly the risks that were highlighted by the Supreme Court in the securities references. And so, as the Court held in *Re: Securities Act*, so long as federal legislation is aimed at federal concerns in relation to GHGs, such legislation should satisfy the fourth *General Motors* criterion.[471]

Economic efficiency: the fifth GM criterion

The fifth *General Motors* criterion – whether 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 – is almost tailor-made for a climate change discussion.[472] It also offers another opportunity to make the link between climate change policies and policies traditionally seen as *economic* policies by the courts. In describing this indicium as he did, Dickson C.J.C. opens the door to consideration of economic efficiency in a determination of constitutional legislative validity, although more recent decisions have sought to close the door on such discussion.[473] The indicium holds that Parliament must demonstrate that the subject matter being considered is "an aspect of the economy that must be regulated nationally if it is to be successfully regulated at all."[474] Unlike the previous indicium, this fifth aspect of the test contemplates that legislation could fall within Parliament's power over general trade and commerce *even though* the provinces are also competent to legislate in another aspect of the same subject area.[475]

There are three factors which suggest that national GHG policies could satisfy the fifth indicium of the *General Motors* test. First, in the absence of federal coordination, the lack of sufficiently-stringent policies enacted in certain provinces could render it impossible to meet national goals or our commitments under international agreements.[476] Without significant emissions reductions in Alberta, for example, meeting even Canada's 2030 targets is made much more challenging.[477] The same cannot be said of the emissions from

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GGPPA Reference], and Ontario under Premier Ford launched the *Ontario GGPPA Reference*, *supra* note 30. Saskatchewan had resiled from the initial Pan Canadian framework, and also launched its own reference case. New Brunswick and Quebec were both initial signatories as well, but have stood opposed to upholding federal legislation under POGG after changes in governments in both provinces.

[471] See *re Securities Act*, *supra* note 12 at paras 118–122.

[472] *General Motors*, *supra* note 336 at 661–62. See also a summary in *Kirkbi v. Ritvik*, *supra* note 349 at para 17, or equally *re Pan-Canadian Securities*, *supra* note 12 at para 103.

[473] Leclair, "Jurisdiction", *supra* note 346 at 581–582. Leclair asks whether this also opens the door to considering extrinsic evidence in respect to the efficacy of proposed federal legislation to accomplish its stated objectives. The decision in *re Securities Act*, *supra* note 12 at para 90 disavows any role for efficiency, contra the decision in General Motors. In re: Securities Act, efficaciousness must not be considered, nor can what would be best in terms of policy. The Court holds that it is not in their purview to determine which level of government is best placed to legislate on the matter. This is difficult to reconcile with the decision of Dickson C.J.C in General Motors given, for example, his citation of briefing materials which hold that "Competition policy can be used most effectively to support the common market if it is within federal power."

[474] *General Motors*, *supra* note 336 at 682. In applying this test in *re Pan-Canadian Securities*, *supra* note 12 at para 115, the Court held that "effective management of systemic risk requires market-wide regulation."

[475] *General Motors*, *supra* note 336 at 682, as summarized in *re Pan-Canadian Securities*, *supra* note 12 at para 104. On this point, see also Swinton, "Courting Our Way to Economic Integration", *supra* note 280 at 286, Swinton, "The Supreme Court and Canadian federalism", *supra* note 55 at 144–145, and Leclair, "The Supreme Court of Canada's Understanding of Federalism", *supra* note 56 at 419–420 and 426.

[476] Leclair, "The Supreme Court of Canada's Understanding of Federalism", *supra* note 56 at 430, uses discussion of what both he and Swinton call functional tests of legislative validity to raise the possibility of a back door to a treaty implementation power working through either the trade and commerce power or the national concern branch of POGG.

[477] Recall that, under Government of Canada, "Canada's INDC", *supra* note 181, Canada's commitment under the Paris Agreement remains to a 30% reduciton in emissions relative to 2005 levels by 2030. In the majority opinion in the *Alberta GGPPA Reference*, *supra* note 30 at para 313, Fraser C.J.A. shows how sensitive Alberta may be to such realities. Her reasons state that "we must say something about the implicit criticism

PEI. The failure to include certain provinces in a national regime would be detrimental to national climate change objectives.[478] Second, the potential for a regulatory race to the bottom, and/or the potential of significant losses due to emissions leakage support national policies. While provincial policies can account for emissions leakage to some degree, the federal government possesses a broader set of tools which can be implemented via its powers in relation to extra-provincial trade and commerce. Finally, economic evidence tells us that similarly-stringent policies to reduce GHGs across the country will spread the costs of achieving emissions reductions in such a way as to be least detrimental to welfare.[479] The latter two of these are discussed in more detail below.

Climate change damages are a function of global emissions, so if GHG emissions policies serve only to displace emissions to jurisdictions with less stringent policies in place, there is far less gain from the policies than would otherwise be the case.[480] Economists describe a situation where economic activity flows from jurisdictions with high environmental standards to those with lower emissions standards as emissions leakage. The upshot of leakage is that high costs but few actual emissions reductions result from stringent policies in the absence of coordination. Concerns with respect to emissions leakage were endorsed in each of the three recent reference cases testing the validity of the *GGPPA*. In Ontario, Strathy C.J.O. held that "a cooperative national carbon pricing system would be undermined by carbon 'leakage' in jurisdictions that do not adopt appropriately stringent carbon pricing measures."[481] Strathy C.J.O. held GHG emissions pricing to be the quintessential case in which the failure of a province to cooperate would undermine the actions of other provinces."[482] The reasons of Strathy C.J.O. echo those of Dickson C.J.C. in *General Motors* on the need to regulate competition nationally to avoid a race to the bottom.[483] The other two reference cases saw less strident endorsement of leakage concerns. In the *Saskatchewan GGPPA Reference,* Richards C.J.S. allowed that carbon leakage was a "concrete concern for an individual province," although his remarks were qualified by the potential for leakage to affect "only a few sectors."[484] In the *Alberta GGPPA*

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that Alberta is producing a disproportionate share of industrial GHG emissions. This is undeniable – but hardly unexpected. Alberta, because of its oil and gas sector, has been one of the biggest drivers of the Canadian economy for decades."

[478] Writing about a national emissions trading regime, DeMarco, Routliffe, & Landymore, *supra* note 32 at 238, find that "the failure to include one or more of the low-emitting provinces may create politically undesirable impacts, it may not necessarily jeopardize the successful operation of the emissions trading scheme in other parts of the country." Success though must hinge on the participation of larger emitters. Elgie, *supra* note 33 at 199, argues that the exit of provinces from a cap-and-trade program would lead to higher prices to achieve the same aggregate emissions cut and thus put pressure on regulators to backslide on targets. This, of course, presumes that provinces are existing the system because it is too stringent.

[479] This is referred to as the equi-marginal principal and is a basic theoretical result in environmental economics. See, for example, the treatment in Thomas H Tietenberg & Lynne Lewis, *Environmental and Natural Resource Economics*, 10th ed (London New York: Routledge, 2015) at 355.

[480] Canada's EcoFiscal Commission, *supra* note 213 at 2–3.

[481] *Ontario GGPPA Reference*, *supra* note 30 at para 120.

[482] *Ibid*.

[483] In *General Motors*, *supra* note 336 at 680, Dickson C.J.C. held that in the absence of national policies, provinces might "be forced to resort to protection [of local monopolies] from interprovincial imports and might be tempted to subsidize interprovincial exports."

[484] *Saskatchewan GGPPA Reference*, *supra* note 30 at para 155.

Reference, Fraser C.J.A. acknowledged the risks of emissions leakage, but deemed the risk to be more international than domestic.[485] This latter objection, while it might cut against the value of coordination under the *GGPPA*, still implies limits on provincial action to restrict leakage. If, as Fraser C.J.A. holds, the key threat to Alberta's competitiveness comes from abroad, there is risk that mechanisms in Alberta's own carbon pricing policy to preserve competitiveness might be seen as actions in relation to international trade.[486]

Arguing that national policies are required to prevent emissions leakage only takes you so far and may not be sufficient grounds to support a positive answer to the fifth indicium of the *General Motors* test. Consider first that there are two generally-accepted policy solutions to reduce emissions leakage: output-based allocations of emissions credits or tax exemptions and border carbon adjustments.[487] Output-based allocations of emissions credits or tax exemptions reduce the average costs of the policies to firms while maintaining the same financial incentive to reduce emissions as would exits with a pure carbon tax.[488] Border carbon adjustments lead to similar overall financial outcomes by levying tariffs based on embodied carbon emissions from imported goods and crediting exported goods any costs related to domestic policies, thereby avoiding incentives for either domestic firms to outsource or for exporters to relocate their production.[489] Alberta's various carbon pricing policies since 2007 have each included output-based allocations of emissions credits as a means to combat leakage, the same mechanism used in the federal *GGPPA*.[490] It is inconsistent with economic evidence to suggest that provinces are incapable of regulating to prevent emissions leakage.[491] It is true that only the federal government could adopt border carbon adjustments or enforce inter-provincial policies to prevent leakage, but thus far that is not the policy they have adopted. At present, the methods deployed by the federal government to combat emissions leakage are well within the provincial ambit.[492] While the provinces may be able to legislate using the same tools as the federal

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[485] *Alberta GGPPA Reference*, *supra* note 470 at para 331. Wakeling J.A. had similar concerns in his concurring opinion, at para 1024.
[486] Recall that Alberta's *TIER*, *supra* note 16, uses output-based allocations of emissions credits (effectively a domestic output subsidy) to guard against a loss in competitiveness.
[487] Fischer & Fox, *supra* note 214.
[488] See Canada's EcoFiscal Commission, *supra* note 213 at 17, or Fischer & Fox, *supra* note 214, for a more complete economic comparison of output-based allocations versus border adjustments. A very similar explanation of the role of output-based allocations is given in *Alberta GGPPA Reference*, *supra* note 30 (Factum of the Attorney General for Canada) at para 52.
[489] Fischer & Fox, *supra* note 214 at 199–200.
[490] Alberta initially introduced industrial carbon pricing in the province via the *Specified Gas Emitters Regulation*, 2007, Alta Reg 1392007 [*SGER*]. The Climate Leadership Plan modified the rate at which emissions credits were assigned to different facilities, but the system remained otherwise similar when formalized in the *CCIR*, *supra* note 16. The CCIR was, in turn, replaced by *TIER*, *supra* note 16, but the allocation mechanism was changed only slightly. A mechanism very similar to the CCIR/TIER approach is implemented in Part II of the *GGPPA*, *supra* note 29.
[491] Barton, *supra* note 32 at 444, also also addresses competitiveness concerns and related issues : "If trading was justified under trade and commerce (because of the possibilities of pollution havens), then trading could only be justified for the industrial sector. This is because transportation and buildings are not subject to the same competitiveness pressures as industry." This matters with respect to whether policies are seen as national. As shown in Canada's EcoFiscal Commission, *supra* note 213, leakage risks are not evenly distributed across the provinces nor across sectors, and so the more a policy is targeted toward leakage, the less it will be targeted broadly in the economy.
[492] A parallel exists to this in *re Securities Act*, *supra* note 12 at para 116, where the Court pointed out that "the fact that the structure and terms of the proposed Act largely replicate the existing provincial schemes belies the suggestion that the securities market has been wholly transformed

government, this does not imply that they will deploy those tools in the same manner or in relation to the same aspects of the subject matter. Recall again the rationale of the Court in *Pan Canadian Securities* which held that valid federal legislation may address an aspect of the same subject as valid provincial legislation.[493] Parliament doing so using the same methods as the provinces have used does not take preclude such validity.

Beyond simply minimizing emissions leakage, there is an economic case for coordinated stringency across provincial policies which allows for one, last digression to textbook environmental economics. The economic efficiency argument for a national policy is based on a concept known as the *equi-marginal principle* which holds that a policy which leads to equalized marginal costs of emissions reduction across emitting firms or individuals will have the lowest total costs (i.e. is the most *cost effective*) among options to meet a given aggregate level of emissions reductions.[494] The reason this must be true lies in gains from trade. Consider a situation in which government policy requires two firms each to reduce their annual emissions by 50 units. The first firm, which we can call firm A, faces higher costs of emissions mitigation and so must forgo $50 per unit of reduced pollution to reduce the last few units to meet the government's targets.[495] A second firm, Firm B, is able to reduce emissions more cheaply and could, if provided an incentive to do so, reduce emissions by more than 50 units at an incremental cost of less than $50 per unit. This is a situation in which the marginal costs of abatement are not equal across firms and so total costs of emissions abatement are higher than they need to be. An omniscient government could assign more emissions reduction requirements to firm B and relax its requirements for firm A to achieve the same total emissions reductions at lower cost, although with different equity concerns introduced as well. The government could also adopt a more decentralized solution and, for example, issue to each firm tradeable rights to 50 units of emission less than their unregulated level. In such a case, it will be optimal for Firm A to buy some allocations from firm B, and for firm B to reduce emissions further than they otherwise would have to enable it to sell those allowances. At the point where Firm B is no longer willing to sell additional rights to Firm A, it must be the case that the cost of reducing emissions is equalized across firms and there are no longer any gains from trade – the costs of achieving the aggregate 100 unit reduction in pollution will be minimized by the market.[496] More direct emissions pricing regimes such as carbon taxes create this outcome by default: firms will only reduce emissions until such a point where the cost of reducing emissions

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over the years." In this case, the similarities between the federal GGPPA and the Alberta carbon pricing policies should give pause to a broad claim of provincial inability to enact policies such as the GGPPA.

[493] *re Pan-Canadian Securities*, *supra* note 12 at para 114.

[494] This is a standard result in environmental economics, but for one example, see Tietenberg & Lewis, *supra* note 479 at 355.

[495] This is termed the marginal abatement cost, or the incremental cost of reducing emissions by one additional unit.

[496] In the famous work of Coase, *supra* note 209, it is shown that as long as property rights are known, enforceable, and there are no transactions costs, the assignment of either the right to pollute or the right to a clean environment will lead to the efficient outcome as well. Firms can compensate victims to obtain the right to pollute or, vice versa, victims can compensate firms for the costs of reducing pollution. Coase's equilibrium would satisfy the equimarginal principle, although the bargaining gets more fraught with multiple firms.

by one more unit is greater than the cost of just paying the tax or regulatory charge. As a result, emissions taxes, like tradeable permits or omnisciently-set standards at the firm level, lead to cost effective emissions reductions. Since omniscient regulators are in short supply, economists tend to focus on emissions taxes and tradeable permit regimes to deliver these results.

The *equi-marginal principle* is one of arguments advanced by the Government of Canada in support of the *GGPPA* in each of the three recent reference cases.[497] A patchwork of policies with varying levels of stringency across the country leads to welfare losses of a type with those avoided by restrictions on monopoly pricing or by enforcing trademarks. And this cuts to the chase of the legal issue. In *Re: Securities Act*, the Court held that "whether securities should be regulated federally or provincially as a matter of policy are irrelevant to the constitutional validity of the legislation."[498] However, just as Dickson C.J.C. wrote of competition policy, a system of piecemeal provincial policies to address GHGs will be detrimental to our overall economic wellbeing. The choice of the policy tool, in this case, is part and parcel of the test relating to the costs of provincial inaction. Without coordinated policy, there will almost certainly be higher costs, but federal policies are not necessarily going to be coordinated.[499] Whether the cost savings from any given federal policy proposal are large enough to merit a positive answer to the fifth indicium will depend on the specific circumstances, including the nature of extant provincial policies and the degree to which a federal proposal encourages common stringency.[500] In this and other circumstances, the burden of proof continues to fall on the federal government to establish that the patchwork of policies that would or could result from the failure to include one or more provinces would jeopardize the efficient regulation of GHGs in Canada. The *GGPPA* is designed to assure carbon pricing at comparable levels and breadth of coverage across Canada and so is almost certainly an improvement over a patchwork of uncoordinated policies. This need not be the case for any and all GHG policies imposed federally, but at least in the case of the federal *GGPPA* it contributes to a positive answer to the fifth *General Motors* indicium.

Impact on provincial jurisdiction

The general approach to a division of powers analysis is to determine whether the pith and substance of impugned legislation or provisions can be classified within one of the heads of power of the enacting level

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[497] See, for example, *Alberta GGPPA Reference*, *supra* note 30 (Factum of the Attorney General for Canada) at para 42 as well as the Rivers affidavit.
[498] *re Securities Act*, *supra* note 12 at para 127.
[499] The decision in *ibid* at para 90, goes to great lengths to say that the efficaciousness of a particular policy is not a relevant consideration in a division of powers analysis. However, in General Motors, the greater economic costs from provincial regulation of competition are important in the decision. It seems they should be in the case of greenhouse gases as well.
[500] For example, a federal policy which enforced emissions reductions on a pro-rata basis relative to 2005 emissions in each province would likely lead to much wider differences in abatement costs across provinces than exists today. The *GGPPA* attempts to level the stringency of policies across provinces, and so it is likely to reduce economic costs of the emissions reductions it achieves relative to accomplishing the same outcome with a piecemeal approach, but that is a function of the particular policy choice, not a necessary implication of federal policies in general.

of government.[501] If so, "the inquiry is at an end," other than considerations of colourable invasions of the jurisdiction of other levels of government.[502] It is not generally considered whether, for example, subjects over which the provinces have jurisdiction will be affected by valid legislation enacted by Parliament.[503] The Supreme Court has departed from this analysis formally when considering the national concern branch of POGG, where the *Crown Zellerbach* test for federal jurisdiction explicitly considers whether the matter of the impugned legislation is such that federal legislation in relation to it would "have a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the [*Constitution Act, 1867*]."[504] In *Re Securities Act*, the Court's classification analysis went beyond the five *General Motors* indicia in their inquiry into whether the legislation could be classified under the federal trade and commerce power and examined the degree to which it "reaches down into the detailed regulation of all aspects of securities," which eventually led to the rejection of the legislation as *ultra vires.*[505] The *General Motors* test does not directly admit such consideration since it only asks, in the third indicium, whether the impugned statute addresses "a matter of national importance and scope, distinct from provincial concerns," not directly whether addressing such concerns in the way proposed in the legislation would unduly invade provincial jurisdiction.[506] Since concerns about the invasion of provincial jurisdiction have been central to litigation and scholarly writing on federal GHG policies, in what follows I treat the impact on provincial jurisdiction as a sixth indicium added to the *General Motors* test.

In assessing the impugned proposal in *re: Securities Act*, the Court held that the proposed legislation reached too far into provincial jurisdiction and that the day-to-day regulation of securities was beyond the reach of the federal government.[507] This conclusion drew in part from the Court's assessment that a federal securities regulator, once available, would duplicate and displace extant provincial regimes.[508] While that same risk is, at least potentially, present with GHG policies I would argue that it is far less material than was the case with securities, and there is no evidence to date of provincial policies being superseded by the

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[501] Lederman, *supra* note 53. *re Securities Act*, *supra* note 12 at para 65.
[502] *Whitbread v. Walley*, *supra* note 56. See also Leclair, "The Supreme Court of Canada's Understanding of Federalism", *supra* note 56 at 416–417. The classification analysis in the recently-released decision in *Reference re Genetic Non-Discrimination Act*, *supra* note 56 at para 66, supports this view. The Court considers only whether the impugned legislation is a valid exercise of criminal law power, not whether it is also legislation that falls into provincial jurisdiction.
[503] *Whitbread v. Walley*, *supra* note 56. See also Leclair, "The Supreme Court of Canada's Understanding of Federalism", *supra* note 56 at 416–417. The classification analysis in the recently-released decision in *Reference re Genetic Non-Discrimination Act*, *supra* note 56 at para 66, supports this view. The Court considers only whether the impugned legislation is a valid exercise of criminal law power, not whether it is also legislation that falls into provincial jurisdiction. Both the majority and dissenting opinions in *Hydro-Québec*, *supra* note 10, considered the possibility that the impugned environmental protection legislation might encroach on provincial jurisdiction, so this rule is not applied to the exclusion of any such analysis by the Courts.
[504] *Crown Zellerbach*, *supra* note 10 at 432.
[505] *re Securities Act*, *supra* note 12 at para 122. This paragraph follows the Court's consideration of the fourth *General Motors* indicium with respect to provincial inability, hence my choice to add it as an additional consideration in the same way here.
[506] *Ibid* at para 111.
[507] *Ibid* at para 116.
[508] *Ibid* at para 106.

federal *GGPPA*. In fact, the opposite has happened. In several provinces, legislatures enacted new, provincial policies and in some cases were granted equivalency with the *GGPPA* such that it would not apply in those jurisdictions.[509]

In *Re Securities Act*, the Court also held that "the general trade and commerce power cannot be used in a way that denies the provincial legislatures the power to regulate local matters and industries within their boundaries."[510] A federal regulatory charge would not preclude provincial management of the resource industry nor any other emissions-inducing activity. It would only assure that the emissions from those activities are priced, internalizing the external costs of climate damages into business and consumer decisions. The *GGPPA* is similar. There is no sense in which its application leads to any conflict with provincial legislation, and the federal charges are such that they could be applied concurrently with provincial emissions prices or other GHG emissions policies. The *re: Securities Act* decision also holds that "[nor] can the power of the provinces to regulate property and civil rights within the province deprive the federal Parliament of its powers under s. 91(2) to legislate on matters of genuine national importance and scope — matters that transcend the local and concern Canada as a whole."[511] The intention of federal policy must not be to displace provincial legislation, but rather, as the Court wrote in *Pan-Canadian Securities,* to "complement these statutes by addressing economic objectives that are considered to be national in character."[512]

Some recent opposition to federal GHG policies including the *GGPPA* has concentrated on parallels to previous decisions in either *Board of Commerce* or particularly *Anti-Inflation*.[513] For example, in the majority opinion in the *Alberta Reference*, Fraser C.J.A. writes that allowing federal emissions pricing legislation to stand would imply no limits with respect to the products which could be tagged with emissions prices.[514] Fraser C.J.A. is correct insofar as broad-based carbon pricing would imply changes in the costs of many consumer products owing to the emissions embodied in their production and transportation. However, there is nothing in the *GGPPA* that allows the federal government to set prices *for* those goods and services,

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[509] For one example, see Environmental Registry of Ontario, *supra* note 20. In this case, Ontario developed new industrial emitter regulations which were to be implemented if the federal government removes Ontario from Part 2 of Schedule 1 of the GGPPA. In Alberta, *TIER*, *supra* note 16, was granted equivalency and as a result, Alberta is currently listed only in Part 1 of Schedule 1 of the GGPPA (the application of the consumer carbon price), not in Part II. Industrial emitters in Alberta are thus exempt from the federal carbon price and fall only under Alberta's TIER.

[510] *re Securities Act*, *supra* note 12 at para 89.

[511] *Ibid* at para 89.

[512] *re Pan-Canadian Securities*, *supra* note 12 at para 96.

[513] *Board of Commerce (SCC)*, *supra* note 241; *Board of Commerce (PC)*, *supra* note 12; *Anti-Inflation*, *supra* note 12.

[514] In *Alberta GGPPA Reference*, *supra* note 30 at para 333, Fraser C.J.A. writes that "since a price can be attached to anything, price stringency charges could be imposed on an endless list of GHG producing items and things: the purchase of beef; living in a single family home or one exceeding a certain size; ownership of a second residence for personal use; ownership of a vehicle or one that exceeds a certain age; ownership of more than one vehicle per family; taking a holiday by plane, car, cruise ship or bus; the purchase of consumer goods such as TVs, stereos, alarm systems, computers, phones, etc; and the consumption of electricity, to mention a few only."

only to place a regulatory charge on carbon emissions which would influence the cost of their production and transportation. It is the emissions for which federal regulation is setting a price, not the products themselves. I agree that federal legislation which stipulated the prices to be charged for specific items would be outside the federal ambit. Such direct control of prices or other elements of transactions is the exclusive domain of the provinces, per s. 92 of the *Constitution Act, 1867*.[515] But, that's not what the *GGPPA* or other legislation imposing taxes or regulatory charges on emissions does. We would hardly argue that federal payroll taxes act to fix wages, while they do impose costs on firms seeking to hire workers.

In the same way as federal legislation in relation to GHGs should not extend to setting specific prices for goods, we should be wary of federal polices which extend to the direct regulation of production activities. However, as with the distinction between a regulatory charge added to the cost of production versus the direct regulation of prices, concerns in this regard in recent litigation stem largely from a mischaracterization of the federal *GGPPA*. For example, while the output-based allocations in Part II of the *GGPPA* have been characterized as performance standards in the regulatory sense, they do not impose any restrictions on the actual performance of facilities nor, despite being described as doing so, does the legislation impose emissions limits on individual facilities.[516] Legislation of a type with that impugned in *Re: Anti-Inflation* which regulated prices, dividends, wages, and other minutiae of transactions throughout the economy would and should be found *ultra vires* in the absence of a national emergency. However, legislation which imposes regulatory charges and/or allocates emissions credits on the basis of output does not fit this category.

While I have concentrated to this point on regulatory charges, other GHG mitigation policies face a more substantial barrier in their potential invasion of provincial jurisdiction. Policies which enforce emissions quotas, or those which regulate specific technology adoption or emissions-intensity performance are more likely to trench into the provincial sphere. A federal regime more dependent on a command-and-control approach will be less compatible with the general branch of the trade and commerce, in particular if the regulations target different facilities or sectors differently. Rather than applying a uniform charge on emissions, facility-level emissions limits, technology standards, or emissions-intensity requirements would

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[515] *Board of Commerce (PC)*, *supra* note 12 at 198–99 The Privy Council decision did allow that, "It may well be, if the Parliament of Canada had, by reason of an altogether exceptional situation, capacity to interfere, that [the worlds in s. 91, the 'Regulation of Trade and Commerce'] would apply so as to enable that Parliament to oust the exclusive character of the Provincial powers under s. 92."

[516] Consider how the *GGPPA*, *supra* note 29, was characterized in *Saskatchewan GGPPA Reference*, *supra* note 30 at paras 42–43. The majority reasons of Richards C.J.S. explain that "part 2 of the Act establishes output-based performance standards for GHG emissions by large industrial facilities," and that "the annual GHG emissions limits for covered facilities will employ an emissions intensity standard established by regulation." The legislation actual does neither of those things. It allocates emissions credits in proportion to output at a prescribed rate per unit output (the performance standard) and imposes no annual limits on emissions, but would indirectly set a level of emissions per unit output above which the facility would move from being a net seller of emissions allocations to a net buyer. These are not performance standards or emissions limits in any standard sense of the words.

entail the type of deep reach into aspects of property and civil rights in the province which is inconsistent with federal jurisdiction.[517] Such policies could also create more direct conflicts between federal and provincial legislation, in particular if they mandate specific technology adoption or facility-specific performance requirements. Consider, for example, a case where compliance with federal regulations would entail undue reliability risk in electricity markets: a generator could be compelled to run by provincial electricity regulations to ensure reliability, while also compelled not to run by federal emissions regulations. This, again, is not the type of regulation imposed currently by the federal *GGPPA*, but such outcomes are plausible consequences of more command-and-control-oriented regimes.

Testing the degree of incursion into provincial jurisdiction reveals a preference for regulatory charges for emissions, which apply at more distance from individual production decisions. An emissions trading regime based on national emissions targets would resemble early, federal agricultural quota regimes deemed *ultra vires* in *Re*: *Natural Products Marketing Act* in that it would require an emissions quota to allow for production, the regulation of which is the exclusive domain of the provinces.[518] Similarly, in *Eastern Terminal Elevator*, the Court struck down a federal licensing regime for grain elevators on the grounds that the regulation touched on individual transactions and bound the decisions of individuals in the market and was thus within the exclusive domain of the provinces.[519] These precedents are discussed in more detail in Chapter 2 of this thesis.

3.5. Conclusions

The Laskin-Dickson expansion of the general branch of the trade and commerce power, and subsequent litigation of federal securities regulation opens the door to upholding federal climate change policies under that head of power. Climate change mitigation shares many attributes with competition and trademarks policy, as economists consider both to be actions to reduce the welfare costs of market failures. While previous scholars have concentrated on the economic nature of the tools employed to combat climate change, in particular emissions trading, to support a role for the general branch of the trade and commerce power, I have argued that this is the wrong approach and contributes to a tradition of falsely separating economic and environmental policies. Climate change is a compelling economic problem, and the policies to prevent it represent some of our most important economic policies. As a result, I argue that legislation to

[517] These types of sector- or facility-specific regulations would be subject to the critique of Estey J. in *Labatt Breweries*, *supra* note 419, and would thus also be more likely to fail to meet the third indicium of the test in *General Motors*, *supra* note 336 at 661–62.
[518] See the decision of Duff C.J.C. in *Re: Natural Products Marketing (SCC)*, *supra* note 218 at 190–91, or the decision of Lord Atkin in the Privy Council appear in *Re: Natural Products Marketing (PC)*, *supra* note 12 at 692–3.
[519] *Eastern Terminal Elevator*, *supra* note 197.

assure that national priorities with respect to climate change are met could be enacted under the general branch of the trade and commerce power.

I find that regulatory emissions charges are most compatible with the five-step *General Motors* test for validity under the general branch of the trade and commerce power, and this result is strengthened once the degree of invasion of provincial jurisdiction is considered. While I argue that much of the current concern in this regard is due to a mischaracterization of the federal *GGPPA* in recent reference cases and/or to an underestimation of the role for the double aspect doctrine in sustaining overlapping federal and provincial legislation, that is not to say that these concerns are invalid in more general terms. Policies such as emissions-intensity regulations and/or technology standards risk undue invasion of provincial jurisdiction while also being more challenging to enact consistently across provinces and sectors.

Climate change and the policies to combat it are rapidly becoming a concern for almost every aspect of trade and commerce in Canada. It is, without doubt, an economic problem of interest to the whole country.[520] While I argue that the time has come to consider climate change policies as economic policies, this view was not adopted in the three recent reference cases in Saskatchewan, Ontario and Alberta examining the validity of the federal *GGPPA*. Only the majority opinion of Richards C.J.S. in Saskatchewan devotes substantial attention to trade and commerce power, and rejected it for classification of the *GGPPA*.[521] While Richards C.J.S. finds that "the [*GGPPA*] has economic impacts" and that "it attacks the GHG problem by using economic tools," he found climate change mitigation to be an environmental objective, not an economic problem.[522]

A view of the environment as something separate from the economy is at odds with the similar economic motivation for climate change policy and legislation upheld under the general branch of the trade and commerce power. In adjudicating the validity of the *GGPPA*, the Supreme Court should remove this false distinction between environmental and economic policy from the judicial interpretation of the power to legislate in relation to trade and commerce.

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[520] This phrasing is from Swinton, "The Supreme Court and Canadian federalism", *supra* note 55 at 144.
[521] *Saskatchewan GGPPA Reference*, *supra* note 30 at para 171.
[522] *Ibid* at para 172. Richards C.J.S. quotes from Hsu & Elliot, *supra* note 95 at 490. The reference to Professor Elgie in the quoted passage refers to Elgie, *supra* note 33.

Chapter 4 Conclusions

Climate change is one of the more compelling policy challenges of our time. From an economics perspective, climate change combines two classic market failures – externalities and common property problems – and all of the complexities of both international trade and political economy. Climate change and the policies to combat it both present significant economic threats. Canada is, in many ways, a microcosm for global action on climate change. Different provinces and regions will see different impacts from climate change, and some provinces are more exposed to the costs of climate change policies than others. This complicates the political economy of action on climate change in Canada. The climate change policy problem becomes more complicated still when the constitutional constraints which are the focus of this thesis are considered.

This thesis examines the constitutional limitations on federal action to reduce GHGs and combat climate change. The structure of our federation limits the reach of federal legislation and significant uncertainty remains with respect to what Parliament can do to reduce national emissions. While part of this thesis focusses on these limits, I also propose novel arguments about the opportunities presented when we think of environmental policy not as its own, separate domain but as a branch of economic policy. In looking at climate policy in this way, cases in other areas with similar underlying economic policy rationale including agricultural supply management, the control of inflation, the regulation of competition, and the regulation of securities inform both the reach of and the limits to federal power. Using this economics lens, I find that our legal history suggests jurisdictional opportunities not widely discussed in existing legal scholarship including upholding regulatory charges for GHGs under the general branch of the trade and commerce power. Once we see the environment as part and parcel of our economy rather than separating the two in a false dichotomy, the federal role to regulate pollution in general and GHG emissions in particular is compelling. I argue that Canadian courts have upheld federal regulation in relation to many areas which, when viewed as economic policy problems, are similar to climate change.

In the introductory chapter to this thesis, I provide a brief digression on the division of powers aimed at non-lawyers in general but with an economist audience in mind. It is my hope that this helps to inform policy economists about the law and the important constraints imposed on policies by the Canadian Constitution. Economists should not be comforted by thinking ignoring these constraints is simply a matter of focusing on our own subject area: economic theory tells us that ignoring these constraints will lead to incorrect economic analysis.

Many legal scholars will be familiar with Richard G. Lipsey as the author of the economic analysis submitted by the Canadian Labour Congress in *Anti-Inflation*.[523] In economics, Professor Lipsey is likely best known for his General Theory of the Second Best, which contains important lessons related to this thesis.[524] The theory of the second best holds that, where a constraint prevents one element of an optimal economic outcome, it will never be the case that all other elements of that optimal outcome constitute the constrained optimum, or the *second best*.[525] A new, constrained optimum should be calculated and that will mean changes in areas not directly affected by the constraint. To draw an example from this thesis, economics might tell us that a carbon tax is the optimal policy but, once we consider that a carbon tax might not apply to some sectors of the economy because of s. 125 constraints, you can't assume that the other elements of the policy would remain the best choice among the available options.

Constitutional limits necessarily constrain the implementation of policies, and if economists neglect to include these limits in our analysis, our conclusions on optimal policy will be wrong. Lipsey's theory tells us is that we cannot ignore these constraints and assume that policy recommendations based on what would otherwise be optimal will still be valid. They will not be, and we will give bad advice. While I have used the tools of economics to inform constitutional analysis of federal GHG legislation in this thesis, the most important conclusion may be that environmental economics and policy cannot be done well without a thorough understanding of the constraints imposed by the Constitution.

[523] *Anti-Inflation*, *supra* note 12 at 386. See also P W Hogg, "Proof of Facts in Constitutional Cases" (1976) 26:4 Univ Tor Law J 386 at 400.
[524] R G Lipsey & Kelvin Lancaster, "The General Theory of Second Best" (1956) 24:1 Rev Econ Stud 11.
[525] *Ibid* at 11–12.

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