Federalism, Subsidiarity, and Carbon Taxes

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I. INTRODUCTION

The May 2019 decision of the Saskatchewan Court of Appeal in the *Reference Re Greenhouse Gas Pollution Pricing Act*[1] manifests a deep divide on the legal issues it raises. Such a divide was not supposed to exist according to the carbon tax's academic proponents. Indeed, environmental law professors who commented on the case had relentlessly suggested that Saskatchewan's legal challenge had no legal substance. In September 2018, Nathalie Chalifour called the legal case against the carbon tax "weak" and asserted that it amounted to "a politically motivated, foot-stomping show."[2] Writing together in December 2018, Chalifour and Jason MacLean referred to litigation on the issues as "bicker[ing] and navel-gaz[ing]" before going on to claim that "[t]here's little doubt that the courts will confirm the federal government's jurisdictional authority to regulate GHG [greenhouse gas] emissions. They may even decide that the Constitution obliges the government to take more serious climate action."[3] Writing in February 2019, and citing work by Chalifour in support, MacLean suggested that there was no "genuine legal dispute about whether the federal government has jurisdiction to regulate GHG

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1 2019 SKCA 40 [*Saskatchewan Carbon Tax Reference*].

2 Nathalie Chalifour, "Saskatchewan, Ontario and the Constitutionality of a National Carbon Price", *The Globe and Mail* (27 September 2018) A15.

3 Nathalie Chalifour & Jason MacLean, "Courts Should Not Have to Decide Climate Change Policy", *Policy Options* (21 December 2018), online: <https://policyoptions.irpp.org/magazines/december-2018/courts-not-decide-climate-change-policy>, archived: <https://perma.cc/Y3RX-4EAC>.

emissions."[4]

In a case that these sorts of environmental law academics suggested Saskatchewan was confused even to bring, however, the Saskatchewan Court of Appeal was split by a single vote. In similar litigation in Ontario, in judgments released on the Friday afternoon of the Canada Day long weekend, the Ontario Court of Appeal split into three camps, three-to-one-to-one.[5] One might say that between the two cases, seven appellate justices have now voted to uphold the federal government's carbon tax, and three have voted to hold it unconstitutional. But that summation is complicated by the fact that the seven who would uphold it are split among three different—and not entirely consistent—explanations of the legal basis for federal jurisdiction, meaning that there is as strong a combined vote for the unconstitutionality of the legislation as for any single explanation of its constitutionality.[6] Just by way of adding to the complexity, one might add that the federal government had to abandon its own first legal argument for the legislation's constitutionality midstream and then still faced having its new argument outright condemned by the chief justices of two provinces thus far.[7] For an allegedly simple case, matters

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4 Jason MacLean, "Carbon Tax Case is a Dangerous Political Game", *iPolitics* (12 February 2019), online: <https://ipolitics.ca/2019/02/12/carbon-tax-case-is-a-dangerous-political-game>, archived: <https://perma.cc/EG4L-TW97>.

5 *Reference Re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544, 146 OR (3d) 65 [*Ontario Carbon Tax Reference*].

6 Chief Justice Richards' group of three justices focuses on "establishing minimum national standards of price stringency for GHG emissions" (*Saskatchewan Carbon Tax Reference, supra* note 1 at para 158); Chief Justice Strathy's group of three justices identifies "[e]stablishing minimum national standards to reduce GHG emissions" (*Ontario Carbon Tax Reference, supra* note 5 at para 114); Associate Chief Justice Hoy writes separately to say that the focus must be on "establishing minimum national greenhouse gas emissions pricing standards to reduce greenhouse gas emissions" (*ibid* at para 166). There are differing levels of breadth as between all three of these descriptions, and there are even explicit clashes, such as in Hoy A.C.J.O.'s attack on Strathy C.J.O.'s account as "too broad" (*ibid*). We will return later in the article to consider these distinctions further.

7 In respect of Canada's attempt to recharacterize the law in oral argument as about the cumulative effects of GHG emissions—a change from its original written argument—Richards C.J.S. described the federal characterization as "not well developed" (*Saskatchewan Carbon Tax Reference, supra* note 1 at para 134) and Strathy C.J.O. called the federal argument "too vague and confusing" (*Ontario Carbon Tax Reference, supra* note 5 at para 74).

seem not so simple after all, and we are instead seeing the sort of complex legal showdown that could have been anticipated several years ago.[8]

While climate change policy is an immensely important area for governments, that context does not change the Constitution. Some might wish that it did—for example, Chalifour has published under such titles as "Making Federalism Work for Climate Change."[9] But the very nature of a constitution is that it must endure across various policy challenges of the day and not be bent to particular policy choices. This is not, of course, to undermine the appropriate flexibility that arises in relation to contingent circumstances through the possibility of the Constitution's adaptation in light of its deeper principles.[10] That requires considering those deeper principles and undertaking a holistic analysis.[11] Unfortunately, environmental advocates like Chalifour and MacLean have a tendency to write in overly narrow ways as if their central policy concerns—important though these are—must be the central object of legal planning at the

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8 For an example of such prognostication, see Dwight Newman, *Natural Resource Jurisdiction in Canada* (Toronto: LexisNexis, 2013) at 112-15.

9 Nathalie J Chalifour, "Making Federalism Work for Climate Change: Canada's Division of Powers Over Carbon Taxes" (2008) 22 NJCL 119 [Chalifour, "Making Federalism Work"]. Chalifour has written defences of carbon taxes after what had appeared to be some prior skepticism, with her early view seeming to be that carbon taxes would fail a gender analysis: Nathalie J Chalifour, "A Feminist Perspective on Carbon Taxes" (2010) 21 CJWL 171 at 172. I have not identified in her later work any explanation of why she now exempts the Trudeau government's carbon tax policies from her prior demands for gender analyses. Her more recent focus has simply been to explicitly urge judicial adaptation of the Constitution to ensure the implementation of climate change policies: see Nathalie J Chalifour, "Jurisdictional Wrangling Over Climate Policy in the Canadian Federation: Key Issues in the Provincial Constitutional Challenges to Parliament's *Greenhouse Gas Pollution Pricing Act*" (2019) 50 Ottawa L Rev (forthcoming) currently prepublished as Ottawa Law Review Working Paper Series 2019, No 2, *passim* [Chalifour, "Jurisdictional Wrangling"].

10 *Cf* Roderick A Macdonald, "Kaleidoscopic Federalism" in Jean-Francois Gaudreault-Desbiens & Fabien Gélinas, eds, *The States and Moods of Federalism: Governance, Identity and Methodology* (Montreal: Blais, 2005) 261.

11 *Cf* the opinion of Justice Huscroft in the *Ontario Carbon Tax Reference, supra* note 5 at para 198 (stating that "I appreciate that federalism concerns seem arid when the country is faced with a major challenge like climate change. As long as something gets done, it may seem unimportant which level of government does it. But federalism is no constitutional nicety; it is a defining feature of the Canadian constitutional order that governs the way in which even the most serious problems must be addressed, and it is the court's obligation to keep the balance of power between the levels of government in check").

expense of all other policy considerations, principles, and human values.[12]

My claim in this article is that federalism, properly understood and applied through established legal methodologies,[13] raises profound questions for the sort of carbon tax legislation at issue. I focus on the main claim of the federal government, that upheld by the two Courts of Appeal to consider the matter, which is that the carbon tax legislation may be grounded in those federal powers commonly (if somewhat inaccurately) described as being under the peace, order, and good government ("POGG") clause.[14] Those who have been inclined to mock Saskatchewan's decision to exercise its legal rights to challenge potentially unconstitutional legislation neglect deep underlying values that have shaped the Canadian Constitution and the life of human communities that the Constitution has enabled and that properly guide the Constitution's interpretation today. Understanding the case requires a deeper engagement with the structure of Canadian federalism, and with that deeper engagement, the real challenges with the federal legislation become clear.

In this article, Part II exposits the role of the principles of federalism and of subsidiarity

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12 Thus, authors like MacLean develop arguments in which every institution is corrupt and then the conclusion is that a party of academics must guide all Canadian policy: see Jason MacLean, "Striking at the Root Problem of Canadian Environmental Law: Identifying and Escaping Regulatory Capture" (2016) 29 J Envtl L & Prac 111. That the implication embodies strong-form elitism appears to generate no concern for someone focused entirely on particular policy concerns over others. MacLean, of course, thinks that his approaches are actually quite democratic, in so far as he regards Canada as a "carbon democracy"—a sort of non-tropical form of banana republic—and thinks he offers a different democratic pathway: see Jason MacLean, "Paris *and* Pipelines? Canada's Climate Policy Puzzle" (2018) 32 J Envtl L & Prac 47. But the readiness to condemn all Canadian institutions just manifests a similar refusal to consider working from within the wisdom of long-established institutions and principles.

13 On legal methodologies for applying the division of powers, see generally Dwight Newman, *Mining Law of Canada* (Toronto: LexisNexis, 2018) at 8-14; Guy Régimbald & Dwight Newman, *The Law of the Canadian Constitution*, 2nd ed (Toronto: LexisNexis, 2017) at 173-225.

14 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91, reprinted in RSC 1985, Appendix II, No 5. The clause does not say that Parliament may make laws "in relation to" POGG but says that Parliament may make laws for POGG purposes in areas not within the exclusive jurisdiction of the provinces. For an important discussion of the difference and the need for a narrower reading of the so-called POGG power, see generally K Lysyk, "Constitutional Reform and the Introductory Clause of Section 91: Residual and Emergency Law-Making Authority" (1979) 57 Can Bar Rev 531.

in the development of the Canadian division of powers and in ongoing interpretation of that federal structure. Part III turns directly to how any use of federal POGG powers must show significant respect for those underlying principles, with the carbon tax reference cases manifesting real potential dangers in what the justices upholding the legislation have done. Part IV closes with a brief exhortation on the need to clarify and confine the POGG powers.

II. THE PRINCIPLES OF FEDERALISM AND SUBSIDIARITY IN THE *CONSTITUTION ACT, 1867*

A certain centralizing mythology has sometimes proceeded as if Sir John A. Macdonald uniquely determined the shape of Canada's 1867 constitutional deal and had a singular role in identifying the appropriate interpretation of the text of the *Constitution Act, 1867*.[15] Those taking such a position also tend to reject the case law of the Judicial Committee of the Privy Council which sat as the final appellate court on Canada's division of powers over an eight-decade period. Writing as an Osgoode Hall law professor, Bora Laskin harshly criticized the Privy Council's case law maintaining provincial autonomy as showing a "conscious and deliberate choice of a policy which required, for its advancement, manipulations which can only with difficulty be represented as ordinary judicial techniques."[16]

However, such pat stories overlook the more complex realities of Canadian constitution-making. Macdonald did not own the Constitution, and his vision did not entirely prevail. Indeed, Howard McConnell colourfully put it as follows in his classic text:

> A strongly centralized nation state approximating the legislative [union] form was Sir John A. Macdonald's original preference, but cultural and regional

15 *Supra* note 14.

16 Bora Laskin, "'Peace, Order and Good Government' Re-Examined" (1947) 25 Can Bar Rev 1054 at 1086.

> peculiarities, as stressed especially by the French-Canadian Fathers of Confederation, dictated a federal organism to ward off the "anglican assimilation" desired by Lord Durham.[17]

Intriguingly, broad discussion of politics and principles of political theory in the newspapers of the era actually manifest some varying interpretations of aspects of the final constitutional text in more and less centralist forms,[18] highlighting some of the interpretive task ahead. That task, however, would certainly not be a simple implementation of a centralist vision and would have to take account of federalism-preserving readings of the text.

As the early decision *Citizens Insurance Co. of Canada v. Parsons*[19] made clear, any coherent understanding of the text had to attribute significant powers to the provinces and to recognize their coordinate authority. To make sense of having a federal power over "trade and commerce" and a provincial power over "property and civil rights," it was necessary to read the text in a relatively decentralized form, especially when the same terminology of "property and civil rights" was clearly used elsewhere in the same document to denote virtually the entirety of private law.[20]

So, too, text that provides for the federal 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"[21] must be read alongside text assigning all matters of "local or private Nature in the Province" to the provinces.[22] There is

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17 WH McConnell, *Commentary on the British North America Act* (Toronto: Macmillan of Canada, 1977) at 1.

18 See generally the marvellous analysis in PB Waite, *The Life and Times of Confederation, 1864-1867: Politics, Newspapers, and the Union of British North America* (Toronto: University of Toronto Press, 1962).

19 [1881] UKPC 49, [1881] 7 AC 96 7 [*Citizens Insurance*].

20 *Ibid.*

21 *Constitution Act, 1867*, *supra* note 14, s 91(chapeau).

22 *Ibid*, s 92(16).

a careful balance here, with matters potentially regulated at the federal level already within the enumerated provincial powers or ultimately covered within this last clause on matters of local concern.[23]

Notably, the framers operated within a sense of the appropriateness of local matters being assigned away from the central government. Then-recently published political theory by John Stuart Mill, which we know the framers studied,[24] had developed an account of the proper role of local powers related to matters of local concern,[25] seemingly articulated in line with underlying principles analogous to what later came to be called subsidiarity. Subsidiarity has been recognized by many scholars as properly motivating and shaping a federal structure.[26] Within Canadian law, the principle of subsidiarity has been described by Justice L'Heureux-Dubé in *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*[27] as "the proposition that law-making and implementation are often best achieved at a level of government that is not only effective, but also closest to the citizens affected and thus most responsive to their needs, to

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23 For discussions of this balance, see generally Lysyk, *supra* note 14; Jean Leclair, "The Elusive Quest for the Quintessential 'National Interest'" (2005) 38:2 UBC L Rev 353.

24 See notably Janet Ajzenstat, *The Canadian Founding: John Locke and Parliament* (Montreal & Kingston: McGill-Queen's University Press, 2007) at 7 (stating that in the course of framers' discussions on the constitution, "[t]hey cited John Stuart Mill, especially Mill's *Representative Government*, then recently published (1861)"). The Supreme Court of Canada has relied on John Stuart Mill's work on some issues as expressive of the meaning of terms within the constitutional text: see e.g. *Canadian Industrial Gas & Oil Ltd. v Government of Saskatchewan et al*, [1978] 2 SCR 545 at 582, 1977 CanLII 210 (noting that this traced a long line of prior authority on the point). See also *Cotton v The King* (1913), 15 DLR 283 at 291-92, 1913 CanLII 396 (PC) (Privy Council affirming the role of Mill's discussion of direct taxation in interpreting the text).

25 See generally chapter XV of John Stuart Mill, *Considerations on Representative Government* (London: Parker, Son, and Bourn, 1861).

26 See generally James E Fleming & Jacob T Levy, eds, *Federalism and Subsidiarity* (New York: New York University Press, 2014); Hugo Cyr, "Autonomy, Subsidiarity, Solidarity: Foundations of Cooperative Federalism" (2014) 23:4 Const Forum Const 20. See also Nicholas Aroney, "Federalism and Subsidiarity: Principles and Processes in the Reform of the Australian Federation" (2016) 44:1 Federal L Rev 1 at 1 (stating that "[t]he principle of subsidiarity offers a criterion for the rational allocation of roles within federations between federal and state governments").

27 2001 SCC 40, [2001] 2 SCR 241 [*Spraytech*].

local distinctiveness, and to population diversity."[28]

The Supreme Court of Canada has described how one can read the division of powers contained within the *Constitution Act, 1867* as designed around certain underlying principles, one of which is at least subsidiarity-adjacent. The *Reference re Secession of Quebec*[29] sees the Court making this clear. While the Court states a broad principle that "[f]ederalism was the political mechanism by which diversity could be reconciled with unity," its arrival at this principle is driven by a particular reading of the drafting process in which "[a]t Confederation, political leaders told their respective communities that the Canadian union would be able to reconcile diversity with unity."[30] Indeed, the broad constitutional structure achieved then situates powers in accordance with principles of allocation that may have a familiar sound:

> The principle of federalism recognizes the diversity of the component parts of Confederation, and the autonomy of provincial governments to develop their societies within their respective spheres of jurisdiction. The federal structure of our country also facilitates democratic participation by distributing power to the government thought to be most suited to achieving the particular societal objective having regard to this diversity.[31]

The drafting of a division of powers was not random but sought to recognize provincial autonomy and to allocate powers prudently in light of the particular objectives to which they related. In broad terms, one can see this allocation in the very text of ss. 91 through 95, which set out the allocation of powers between Canada's federal and provincial governments, principally

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28 *Ibid* at para 3.

29 [1998] 2 SCR 217, 1998 CanLII 793 [cited to CanLII].

30 *Ibid* at para 43.

31 *Ibid* at para 58.

in ss. 91 and 92.[32]

Subsidiarity has come to be recognized as a key structural principle within Canadian constitutionalism.[33] The *Spraytech* passage on subsidiarity has been cited with approval in subsequent Supreme Court of Canada case law, including as a reason for or against adapting particular constitutional doctrines. For example, in the *Canadian Western Bank v. Alberta*[34] decision of 2007, which considered modifications to the complex doctrine of interjurisdictional immunity, the joint judgment of Justices Binnie and LeBel, citing *Spraytech*, reasoned that "[t]he asymmetrical effect of interjurisdictional immunity can also be seen as undermining the principles of subsidiarity, i.e. that decisions 'are often best [made] at a level of government that is not only effective, but also closest to the citizens affected.'"[35] Subsequently, the Court has shown some division in later cases over to what degree the principle can be invoked so as to argue directly for a reshaping of the legal rules applying to the division of powers, with two minority camps in the *Reference re Assisted Human Reproduction Act*[36] expressing different views on the point.[37]

One of these groups in *RAHRA*—that behind the judgment of Justices LeBel and Deschamps, who arguably have some claim to speak for the majority of the Court in the case[38]—

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32 *Constitution Act, 1867*, *supra* note 14.

33 *Cf* e.g. Peter W Hogg, "Subsidiarity and the Division of Powers in Canada" (1993) 3:3 NJCL 341; Eugénie Brouillet, "Canadian Federalism and the Principle of Subsidiarity: Should We Open Pandora's Box?" (2011) 54:2 SCLR (2d) 601; Dwight Newman, "Changing Division of Powers Doctrine and the Emergent Principle of Subsidiarity" (2011) 74:1 Sask L Rev 21; Cyr, *supra* note 26.

34 2007 SCC 22, [2007] 2 SCR 3.

35 *Ibid* at para 45, quoting *Spraytech*, *supra* note 27 at para 3.

36 2010 SCC 61, [2010] 3 SCR 457 [*RAHRA*].

37 *Ibid* at paras 72 (Chief Justice McLachlin for four justices objecting to any modification of the division of powers based on subsidiarity), 273 (Justices LeBel and Deschamps JJ. for four justices holding that subsidiarity functions as a vital interpretive principle in understanding the scope of different areas of jurisdiction).

38 Because Justice Cromwell strikes down parts of the legislation in a somewhat unexplained opinion, he must be counted as having sided with LeBel and Deschamps JJ., as McLachlin C.J.C.'s approach would not

affirmed and supplemented an interpretation of Canadian constitutional history expressed by eminent constitutionalist Peter Hogg. LeBel and Deschamps JJ. write the following:

> [T]he powers assigned in the *Constitution Act, 1867* to the provinces on the one hand and the central government on the other are largely consistent with the principle of subsidiarity. According to Professor Hogg, the broad interpretation that the Privy Council and this Court generally gave the provincial jurisdiction over property and civil rights is explained by their acceptance of the principle of subsidiarity.[39]

Because it is an interpretive key to the division of powers, it can be used in interpreting the powers.[40]

The principle of subsidiarity can also be seen as undergirding the Court's ultimate interpretation of the "general regulation of trade" branch of the trade and commerce power first identified in the *Citizens Insurance* case.[41] When this branch came to be interpreted, the Supreme Court of Canada included elements that restricted its scope to situations in which the provinces were constitutionally incapable of action, thus effectively inscribing subsidiarity-based principles into the legal test. As famously articulated in *General Motors of Canada Ltd. v. City National Leasing*,[42] that constitutional incapability of the provinces is one of the key criteria for the application of the general regulation of trade branch. The 2011 *Reference re Securities Act*[43] is an

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lead to striking down any part of the law. Such an analysis was not followed with respect to other parts of *RAHRA* (*ibid*) in the opinion of Justice Rennie in *Syncrude Canada Ltd v Canada (Attorney General)* (2016 FCA 190, 398 DLR (4th) 91), but I respectfully submit that the case was in error in how it treated the precedent emanating from *RAHRA*.

39 *RAHRA, supra* note 36 at para 183 [citation omitted].

40 See also the judgment of Justices Ottenbreit and Caldwell in *Saskatchewan Carbon Tax Reference, supra* note 1 at paras 470-72.

41 *Supra* note 19.

42 [1989] 1 SCR 641, 1989 CanLII 133.

43 2011 SCC 66, [2011] 3 SCR 837.

illustration of the fact that federal legislation that contains an opt-out clause for provinces that pursue their own policies in an area has a logical problem when facing this aspect of the test, given that the legislation itself admits that the provinces are in fact constitutionally capable.[44] The general regulation of trade branch, consistent with the broader subsidiarity-based dimensions of the division of powers, maintains federal power only when the provinces lack constitutional power over a matter. Federalism expressing subsidiarity principles not narrowly defined in terms of economic efficiency does not necessarily always attain the most economically efficient results, but it expresses fundamental values about how diverse communities live together within Canada.

III. SUBSIDIARITY IN POGG ANALYSIS

As Chalifour has candidly admitted, the national concern branch of POGG has been "narrowly construed by the courts"[45] and past uses of it to uphold federal legislation have been exceedingly rare.[46] Indeed, two of the three uses she would class as such are classified differently by other scholars, making the national concern branch potentially such as to have been a singular creation in the context of one particular case where the judges thought they needed it.[47] It certainly has no

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44 *Ibid*. *Cf Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48, 428 DLR (4th) 68 (upholding a cooperatively developed and implemented system based on a combination of federal and provincial legislation).

45 Chalifour, "Jurisdictional Wrangling", *supra* note 9 at 3.

46 See Chalifour, "Making Federalism Work", *supra* note 9 at 179-80 (stating that it has been used only in the three cases of *Johanneson v West St. Paul (Rural Municipality)* (1951), [1952] 1 SCR 292, 1951 CanLII 55 [*Johanneson*], *Munro v Canada (National Capital Commission),* [1966] SCR 663, 1966 CanLII 74 [*Munro*], and *R v Crown Zellerbach Canada Ltd.*, [1988] 1 SCR 401, 1988 CanLII 63 [*Zellerbach* cited to CanLII]).

47 Some scholars would group both *Johanneson* (*supra* note 46) and *Munro* (*supra* note 46) as manifesting the sometimes-asserted "gap branch" of POGG rather than the national concern branch. The Supreme Court of Canada's consideration of the *Saskatchewan Carbon Tax Reference* may end up being an occasion to sort out what branches actually exist on the POGG power. In so far as the "national concern" branch was effectively created out of whole cloth to meet purported needs in a particular case, there are real arguments for considering its legal status suspect, although a full examination of those arguments

broad place in Canadian constitutional law.

Some of the appropriate judicial reluctance to use this national concern branch of POGG in any other cases flows from a concern arising from the resulting displacement of provincial jurisdiction. For reasons that are not wholly discernible, Chalifour has questioned the suggestion that the placement of some matter in the national concern branch of POGG displaces provincial jurisdiction. Her understanding appears to be that the provinces arguing against the carbon tax think that its placement within the national concern branch of POGG would shield it through some particularly strong form of interjurisdictional immunity.[48] But that is not the traditional view of the effect of the POGG power. Rather, the issue is 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. Justice LeDain affirmed this in *Crown Zellerbach*:

> [A] concurrent or overlapping federal jurisdiction…is in conflict with what was emphasized by Beetz J. in the *Anti-Inflation Act* reference--that where a matter falls within the national concern doctrine of the peace, order and good government power, as distinct from the emergency doctrine, Parliament has an exclusive jurisdiction of a plenary nature to legislate in relation to that matter, including its intra-provincial aspects.[49]

Statements of this sort are not arbitrary pronouncements. The exclusive nature of the POGG power flows from its textual basis and is affirmed within the legal test for any matters of national concern. First, the text grounding any purported jurisdiction in this context refers to "Laws for

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would exceed the permitted limits for this article.

48 Chalifour, "Jurisdictional Wrangling", *supra* note 9 at 23.

49 *Zellerbach*, *supra* note 46 at para 34. I thank Jean Leclair for discussion on this point.

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."[50] On this text itself, something that this clause encompasses cannot be within the classes of subjects within s. 92 or other sections enumerating provincial powers. Second, consistent with the subsidiarity principle undergirding the division of powers, the legal test for the national concern branch of POGG indicates that it applies only in contexts where a matter is single, distinctive, and indivisible,[51] with an indivisible matter logically not being subject to divisible aspects. In thinking about whether a matter is single, distinctive, and indivisible, the further *obiter* on the national concern branch suggests that the courts are to consider whether the provinces are constitutionally incapable of regulating the matter,[52] thus generating a close parallel to the application of the general regulation of trade branch discussed above.[53] Consistent with the analysis of that power, then, legislation purportedly grounded in the national concern branch of POGG cannot logically contain opt-out clauses for provinces that regulate the matter at issue. If any matter is to be regulated under the national concern branch of POGG, based on the underlying constitutional text and the cases that have stated the law on the point, the matter must be indivisibly regulated by the federal government and is no longer subject to any provincial aspect.

For anything conceivably to fit the national concern branch of POGG as alleged, there would need to be great clarity on a single, distinctive, and indivisible matter to be placed within this exceptional head of exclusive federal power.[54] Just what is supposed to be the matter that is

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50 *Constitution Act, 1867, supra* note 14, s 91.

51 *Zellerbach, supra* note 46 at para 33.

52 *Ibid* at para 34 (referencing the issue of whether a matter is beyond the powers of a province).

53 See Part II, *above*.

54 Notably, it is the matter at issue as well, as opposed to the means by which the federal government has

single, distinctive, and indivisible in the carbon tax reference cases has been subject to varying assertions. In its Saskatchewan factum, Canada defined the subject matter as "GHG emissions."[55] In its oral argument in Saskatchewan, then repeated in its factum in Ontario, it said it was "the cumulative dimensions of GHG emissions."[56] The Attorney General of British Columbia's intervention in Saskatchewan focused on a minimum price standard for GHG emissions,[57] albeit with their submissions in Ontario seemingly putting the matter more broadly.[58] The Ecofiscal Commission's factum suggested "the control of extra-provincial and international air pollution caused by GHG emissions,"[59] although writing academically rather than in her advocacy role with the Ecofiscal Commission, Chalifour has subsequently referred again to what she sees, essentially on the basis that GHG emissions involve a limited set of known gases, as "a solid case for a finding that GHG emissions are a single, distinct [*sic*], and

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chosen to address the matter. Jean Leclair rightly noted the following:

> The conceptual indivisibility test must be applied using the approach of Justice Beetz in *Anti-Inflation*; that is, to the matter said to be of national interest…and not to the legislative means employed to ensure its regulation…In other words, the conceptual indivisibility of a particular matter should hinge upon whether the totality of legislative means necessary for its overall regulation amounts to an important invasion of provincial spheres of power. Otherwise, the central government could adopt a law said to be confined to a very limited aspect of a particular trade, argue successfully that it was sufficiently indivisible to qualify as a matter of national interest and, after having established its '...exclusive jurisdiction of a plenary nature to legislate in relation to that matter', Parliament could select, this time in all impunity, any other legislative means it would find appropriate to adopt.

Supra note 23 at 363-64 [footnotes omitted].

55 *Saskatchewan Carbon Tax Reference*, *supra* note 1 (Factum of the Attorney General of Canada at para 73).

56 This submission in oral argument was referenced by Richards C.J.S. in *Saskatchewan Carbon Tax Reference*, *supra* note 1 at para 134. See also *Ontario Carbon Tax Reference*, *supra* note 5 (Factum of the Attorney General of Canada at para 53).

57 *Saskatchewan Carbon Tax Reference*, *supra* note 1 (Factum of the Attorney General of British Columbia at para 30).

58 In Ontario, the Attorney General of British Columbia focused on the more general "cumulative dimensions of GHG emissions": see *Ontario Carbon Tax Reference*, *supra* note 5 (Factum of the Attorney General of British Columbia at paras 35, 42). There is a seeming desire to get beyond the Saskatchewan Court of Appeal majority's mistaken embrace of a single policy as stating a matter for POGG purposes. See also the critique of that dimension of the Saskatchewan Court of Appeal decision in the opinion of Huscroft J.A. in the *Ontario Carbon Tax Reference, supra* note 5 at para 234.

59 *Saskatchewan Carbon Tax Reference*, *supra* note 1 (Factum of Ecofiscal Commission at para 6).

indivisible form of pollution,"[60] thus reprising the failed federal argument. Frankly, there does not appear to be any great clarity present here.

Moreover, a number of the expressed characterizations of the allegedly single, distinctive, and indivisible matter at issue have much farther-reaching consequences for federalism than is first apparent. While the courts have already recognized the devastating implications of any far-reaching federal argument concerning "GHG emissions" generally (even if this is now Chalifour's argument once again) and they have recognized the fundamentally confusing nature of characterizations related to "cumulative dimensions" of GHGs, the majority judges have ended up accepting characterizations focused on the setting of a national minimum price. But identifying such an area of federal jurisdiction is to create something out of nothing and to subject every area of provincial jurisdiction to the potential setting of national standards that denude provincial power.[61]

To restate the point, first, on the specific matter of GHG emissions, the purported POGG-based power to set national standards on matters related to GHG emissions is of highly uncertain scope. Justice Huscroft asked the following:

> Can Parliament establish 'minimum national standards' governing such provincial matters as home heating and cooling? Public transit? Road design and use? Fuel efficiency? Manufacturing processes? Farming practices? These are just some of

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60 Chalifour, "Jurisdictional Wrangling", *supra* note 9 at 16.

61 Ottenbreit and Caldwell JJ.A. in their dissent in the *Saskatchewan Carbon Tax Reference* put it as follows:

> There will always be a 'national aspect' of a matter that the Provinces are unable to enact using their Provincial law-making powers. The issue is whether, taking into account federalism and the jurisdictional balance inherent in the Constitution, federal legislation is grounded in a federal head of power, since the matter can be readily classified as an exercise of Provincial power.

Supra note 1 at para 341.

One might also note the characterization by Huscroft J.A. in the *Ontario Carbon Tax Reference* (*supra* note 5 at para 237) of a "vaguely worded federal power to establish 'minimum national standards.'"

> the things that a vaguely worded federal power to establish 'minimum national standards' to reduce GHG emissions may permit – all of which would have a major impact on provincial jurisdiction.[62]

Second, if "national standards" on any matter are within the federal ken, there are effectively no limits on the areas of provincial jurisdiction in which the federal government may intervene on the pretext of establishing "national standards." To parlay on the theme of much American constitutional discussion of a few years ago, if the federal government may set "national standards" on GHG-related matters on the basis that the provinces are constitutionally incapable of creating such "national standards," what prevents the federal government from establishing "national standards" on various aspects of the broccoli industry and forever effectively removing broccoli from provincial jurisdiction?[63]

Once we have reached the broccoli discussion, some might accuse the argument of having departed from the complete seriousness due such a deadly matter as climate change.[64] But the underlying point stands that an approach to POGG that permits the assertion of various "national standards" as automatically within federal jurisdiction is an approach that throws dirt on the Canadian Constitution. The appropriate lines of demarcation between the federal government and the provinces cannot permit the federal government simply to move into previously provincial areas of jurisdiction with a "national standards" flag. Only where there is an entire matter actually not constitutionally susceptible of provincial jurisdiction is there an

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62 *Ontario Carbon Tax Reference, supra* note 5 at para 237.

63 *Cf* James B Stewart, "How Broccoli Landed on Supreme Court Menu", *The New York Times* (14 June 2012).

64 That said, Chalifour gets to make her jokes about living trees:

> Given that trees remove CO2 from the atmosphere, it would be apt for the metaphorical tree to do the same in supporting an interpretation of the *Constitution Act, 1867* that enables a full suite of effective, mutually reinforcing climate policies across the federation. This is what climate federalism requires.

"Jurisdictional Wrangling", *supra* note 9 at 39.

argument for the application of a residual POGG power outside the existing heads of federal jurisdiction. The arguments in the carbon tax case have not identified such a matter, and the federal law must be considered in serious constitutional jeopardy.

IV. CORRECTING THE COURSE OF POGG

In many respects, the Canadian constitutional arrangement has always been a highly decentralized structure. Great provincial diversity is accommodated within the unity of a federation. The enumerated provincial powers were textually significant. In certain specific contexts, there were decisions as to matters that had to be regulated at the national level, and the text reflects those identified areas. While the POGG clause embodies certain residual powers, it applies only in the context of what would otherwise be a gap in the structure. While it may be possible to identify new gaps over time, and such was seemingly done with marine pollution in the POGG context, there should certainly be no rush to do so in the context of areas subject to enumerated and established powers. To override provincial powers in the name of certain policy objectives is to undermine the federation.

On hearing the resulting appeals on the carbon tax legislation, the Supreme Court of Canada will have an opportunity and a responsibility to better articulate the boundaries of the so-called POGG power. Given what is at stake, it is no surprise that more parties are joining the fray and, indeed, that Quebec will enter on the side of Saskatchewan's constitutional argument even if it would prefer different policy choices on climate change. In considering the arguments, the Supreme Court of Canada would do well to adhere to the text that was the subject of agreement, which provides for only a limited residual power balanced against the residual powers of the provinces on matters that can be governed locally. It would do well to respect the subsidiarity

principles interlaced through the structure of Canadian federalism. It would do well to clarify the POGG power—the case law does not support the three-branch description of it often cheerily offered by those who would centralize the federation. Many have fallen into error in suggesting that specific policies can be POGG matters, and the boundaries have become unclear. This will be an important moment to clarify and confine the POGG powers for the sake of the federation and the diversity of human values and policy choices that it was always designed to permit. We must hope that the Court will let the Canadian federation flourish.