

**Federalism in the Patch:
Canada's energy industry and the constitutional division of powers**

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I. Introduction

The story of Canadian federalism is that of a constitutional tug-of-war that pulls and stretches at the logic of the division of powers allocated between Canada's federal and provincial governments. As this struggle evolves to answer novel constitutional questions and allocate new legislative matters to the appropriate legislative body, the potential consequences facing the provinces increase substantially. Due to their complexity, many of these questions cannot be resolved by simply looking to existing federal and provincial powers and determining that one or the other best captures a particular matter. Frequently, courts rely on flexible constitutionalism and the doctrine of cooperative federalism to hold that jurisdiction over a particularly complex or broad subject is shared between our two orders of government. While this approach has some benefits, it also increases the probability of jurisdictional conflict, which has a tendency to erode provincial autonomy in favour of federal authority and undermine the diversity that the division of powers seeks to establish.

In many ways, the constitutional tug-of-war is by design: the *Constitution Act, 1867*'s¹ textual emphasis on jurisdictional exclusivity has, together with the implicit overlap of certain broad legislative subjects, created a competitive dynamic between the provinces and federal government.² Competition is, therefore, a feature of federalism, encouraging Canadian governments to develop creative ways to expand their legislative jurisdiction, which in turn leads to new approaches in governance and public policy. Harnessed properly, this dynamic advances our constitutional order to accommodate evolving social norms. If left unchecked, however,

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¹ *Constitution Act, 1867* (UK), 30 & 31 Victoria, c 3, reprinted in RSC 1985, Appendix II, No 5, ss 91 and 92 [*Constitution Act, 1867*].

² Herman Bakvis & Grace Skogstad, "Canadian Federalism: Performance, Effectiveness, and Legitimacy" in Herman Bakvis & Grace Skogstad, eds, *Canadian Federalism: Performance, Effectiveness, and Legitimacy* (Oxford University Press: Canada, 2001) at 7-8.

competition can be a bug, leading to conflict and constitutional uncertainty that undermines the purpose and effectiveness of federalism.³

Historically, the Privy Council favoured an exclusivist approach to resolving jurisdictional questions, resisting overlap and preserving provincial autonomy wherever possible.⁴ But Canadian courts, supreme since 1949, have softened these divisions, creating interpretive tools that actively promote constitutional flexibility and legislative overlap.⁵ The competitive dynamic came to a head in the 1970s and 1980s when regional economic disparity, global oil market shocks, and the western provinces' desire for autonomy over the development of their natural resources (primarily oil and natural gas) clashed with the "unilateral nation-building initiatives" and energy policy of the federal government.⁶ While an uneasy *détente* emerged after the patriation of *Constitution Act, 1867* and the subsequent oil price crash in the mid-1980s, it was not to last. 35 years later, federalism and energy policy once again dominate the national discussion. This time, however, the emergence of the environment as a constitutional subject of "superordinate importance"⁷ has complicated the debate, asking questions of the *Constitution Act, 1867* that contemporary Canadian federalism jurisprudence may not be able to adequately answer.

Five recent cases emerge at the vanguard of this trend: *Reference re Greenhouse Gas Pollution Pricing Act* (the "**Saskatchewan GHG Reference**"),⁸ *Reference re Greenhouse Gas Pollution Pricing Act* (the "**Ontario GHG Reference**"),⁹ *Reference re Greenhouse Gas Pollution Pricing Act* (the "**Alberta GHG Reference**"),¹⁰ *Reference*

³ Bakvis & Skogstad, *supra* note 2 at 5.

⁴ See, for example, Lord Atkin's comments in *Canada (AG) v Ontario (AG)*, [1937] UKPC 6, [1937] AC 326 [*Canada v Ontario*].

⁵ Bakvis & Skogstad, *supra* note 2 at 7.

⁶ Bakvis & Skogstad, *supra* note 2 at 8.

⁷ *R v Hydro-Quebec*, [1997] 3 SCR 213 at para 85 [*Hydro-Quebec*].

⁸ *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40 [*Saskatchewan GHG Reference*].

⁹ *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544 [*Ontario GHG Reference*].

¹⁰ *Reference re Greenhouse Gas Pollution Pricing Act*, 2020 ABCA 74 [*Alberta GHG Reference*].

re Environmental Management Act (the "**Pipeline Reference**"),¹¹ and *British Columbia (Attorney General) v Alberta (Attorney General)* ("**BC v Alberta**").¹²

In this paper we consider whether the interpretive tools that our constitutional toolbox provides are capable of answering the questions raised in these cases while preserving the logic and purpose of the balance between federal and provincial powers. Due to the unique way that environmental matters cut across both sides of the division of powers and the conflicting policy priorities of the federal and provincial governments, the answer appears to be no. Absent changes to the division of powers analysis, such as a recognition of provincial interjurisdictional immunity or a recalibration of the federal government's residual and paramount legislative power, it is likely that the judiciary's continued use of the interpretive tools available to it is already shifting the balance of federalism toward expanded federal power at the expense of meaningful provincial autonomy. This is particularly true where federal and provincial policy goals do not align and, more recently, where provincial policies diverge. While exclusivism is not the solution to this trend, the increasing frequency of jurisdictional conflicts concerning the environment and the flexible approach that courts have historically used to resolve these conflicts are leading us to a constitutional impasse that cannot preserve the coordinate autonomy originally promised to the provinces.¹³

II. I've seen this movie before: a brief history of federalism and the debate over energy policy

To run a state—whether federal or provincial—a government needs revenue. To generate revenue, that government needs a commercial base. In a country like Canada, one of the primary drivers of commercial activity is and has historically been the development of natural resources. To that end, the division of property was central to the structure of the *Constitution Act, 1867* and the dominant feature of that division was the provinces'

¹¹ *Reference re Environmental Management Act*, 2019 BCCA 181 [**Pipeline Reference**], aff'd *British Columbia (Attorney General) v Canada (Attorney General)*, 2020 SCC 1.

¹² *British Columbia (Attorney General) v Alberta (Attorney General)*, 2019 ABQB 550 [**BC v Alberta**]. This case was ultimately continued in the Federal Court: *British Columbia (Attorney General) v Alberta (Attorney General)*, 2019 FC 1195 [**BC v Alberta FC**].

¹³ See: *Hydro-Quebec*, *supra* note 7 at para 86; and the dissenting reasons of Lamer CJC and Iacobucci J at para 60.

ownership of their natural resources.¹⁴ This right of ownership represented a jurisdictional enclave generally free from federal interference and provided space for the original provinces to sustain themselves and support economic growth. But as Canada expanded westward, the new provinces were not granted the same ownership rights over their natural resources. This changed in 1930 when the western provinces and the federal government passed the *Natural Resources Acts*, vesting title to most of these federal lands and minerals in the Crown in right of each province.¹⁵ Yet this formal transfer of ownership did not end the struggle for control over natural resource development.

Though the regulation of natural gas development in Alberta's Turner Valley led to some jurisdictional conflict in the 1930s, it was not until Leduc No. 1 struck oil in 1947 that the government of Alberta and the federal government began concerted efforts to assert regulatory authority over the development of Alberta's non-renewable natural resources.¹⁶ The federal government made the first move, enacting the *Pipelines Act* to control the interprovincial and international movement of oil and gas reserves.¹⁷ Alberta responded with the *Gas Resources Preservation Act*,¹⁸ which imposed a permitting requirement on all gas exported from Alberta. Alberta then created a province-wide natural gas gathering system within its legislative control—the Alberta Gas Trunk Line.¹⁹

While Alberta's actions were largely motivated by a desire to prevent the federal government from unfairly interfering in its ability to leverage its resources into local economic development,²⁰ not all federal involvement

¹⁴ William Lahey, "Justice Gerard V La Forest and the Uncertain Greening of Canadian Public Law" (2013) 54 Can Bus LJ 223 at 228, citing Gerard V La Forest, *Natural Resources and Public Property under the Constitution* (Toronto: University of Toronto Press, 1969) at 12.

¹⁵ *An Act respecting the transfer of the Natural Resources of Alberta*, SC 1930, c 3; *An Act respecting the transfer of the Railway Belt and the Peace River Block*, SC 1930, c 37; *An Act respecting the transfer of the Natural Resources of Manitoba*, SC 1930, c 29; *An Act respecting the transfer of the Natural Resources of Saskatchewan*, SC 1930, c 41; *Constitution Act, 1930*, 20 & 21 George V, c 26 (UK).

¹⁶ Susan Blackman, Janet Keeping, Monique Ross & J Owen Saunders, "The Evolution of Federal/Provincial Relations in Natural Resources Management" (1994) 32:3 Alta L Rev 511 at 513. See also: Richard Cullen, "The Encounter between Natural Resources and Federalism in Canada and Australia" (1990) 24:2 U Brit Colum L Rev 275 at 286.

¹⁷ Blackman et al, *supra* note 16 at 513; RSC 1952, 211.

¹⁸ Blackman et al, *supra* note 16 at 514; SA 1949, 2nd Sess, c 2.

¹⁹ Blackman et al, *supra* note 16 at 514.

²⁰ Blackman et al, *supra* note 16 at 513, citing GB Doern & G Toner, *The Politics of Energy: The Development and Implementation of the NEP* (Toronto: Metheun, 1985) at 66.

was unwelcome. Following the recommendations of the 1957 Borden Royal Commission on Energy, the federal government created the National Energy Board (the "NEB") in 1959 to regulate energy-related matters within federal jurisdiction (including the construction and operation of interprovincial and international pipelines) and adopted the National Oil Policy in 1961.²¹ Under the National Oil Policy, Ottawa created a domestic market for western Canadian oil, a move that helped attract investment and ushered in a short-lived period of relative harmony in Canadian energy policy.²²

In 1973, the Organization of Petroleum Exporting Countries ("OPEC") initiated an oil embargo that increased the price of oil and altered world supply, both of which had severe repercussions for the Canadian oil and gas industry. In the face of these market shocks, the federal government took steps to preserve the supply and availability of Canadian oil and to keep consumer prices down.²³ In doing so, it faced the impossible task of balancing the interests of the industrialized and more densely populated region of central Canada against those of the still developing producer provinces in the west.²⁴

To the industrial centre of Canada, oil was a crucial input and low prices were important to maintaining economic competitiveness. The producing provinces, however, viewed their resources as valuable but depleting economic assets that, if leveraged properly, could lead to prosperity.²⁵ These differing economic needs of the Canadian provinces drove the internal fracturing of the early period of collaborative energy policy under the National Oil Policy. To the extent that it was able to act, economic considerations unsurprisingly dominated Ottawa's response to the OPEC embargo, prioritizing the interests of the more heavily populated industrial regions of eastern Canada in Canada at the expense of the western producing provinces.²⁶ In response, Alberta pursued various

²¹ Blackman et al, *supra* note 16 at 515; Robert D Cairns, Marsha A Chandler & William D Moull, "The Resource Amendment (Section 92A) and the Political Economy of Canadian Federalism" (1985) 23:2 Osgoode Hall LJ 254 at 256.

²² Cairns et al, *supra* note 21 at 256. See also: Monica Gattinger, "A National Energy Strategy for Canada: Golden Age or Golden Cage of Energy Federalism?" in Loleen Berdahl André Juneau & Carolyn Hughes Tuohy, eds, *Canada: The State of the Federation, 2012: Regions, Resources, and Resiliency* (McGill-Queen's University Press, 2015) at [50], in which the author refers to this period as a period of "expansionist collaborative energy federalism".

²³ Cairns et al, *supra* note 21 at 257.

²⁴ Cairns et al, *supra* note 21 at 257.

²⁵ Cairns et al, *supra* note 21 at 258.

²⁶ Cairns et al, *supra* note 21 at 258.

strategies to increase its control over the marketing of its petroleum resources, including the creation of the Alberta Petroleum Marketing Commission.²⁷ The federal government neutralized these efforts with the *Petroleum Administration Act*,²⁸ granting itself authority to unilaterally set domestic oil prices in the absence of an agreement with any of the producing provinces.²⁹

From the perspective of the producing provinces, the federal government's strategy to control domestic supply and shelter eastern customers from high energy prices³⁰ usurped provincial jurisdiction. Two important cases before the Supreme Court of Canada crystallized this concern,³¹ and limited the ability of the provinces to tax oil production and control the marketing of natural resources if they were ultimately bound for export. Further inflaming tensions, the federal government responded to significant increases in the price of oil between 1979 and 1980 by implementing the National Energy Program. Through the National Energy Program, the federal government put a ceiling on oil and gas prices, imposed a wellhead tax on natural gas, and established a production tax on oil and gas revenues.³² In response, Alberta cut production, withheld project approvals, and—successfully—challenged the federal government in court.³³ But as oil prices collapsed in 1985, the rationale for the National Energy Program disappeared, and it was finally cancelled in 1986 under the Progressive Conservative government of Brian Mulroney.

Despite the divergent regional and economic interests that motivated much of the conflict in the period leading up to the cancellation of the National Energy Program, the provinces were not always at odds with each other. In fact, they were aligned in many important respects. This is partly due to the fact that much of the dispute played out along federal-provincial lines,³⁴ but also because the pending patriation and reform of the Canadian

²⁷ Blackman et al, *supra* note 16 at 517; Cullen, *supra* note 16 at 287.

²⁸ SC 1974-75-76, c 47.

²⁹ Blackman et al, *supra* note 21 at 517.

³⁰ Blackman et al, *supra* note 21 at 517, citing P Tyerman, "Pricing of Alberta's Oil" (1976) 14 Alta L Rev 427 at 428.

³¹ *Canadian Industrial Gas and Oil Ltd v Saskatchewan*, [1978] 2 SCR 545, 80 DLR (3d) 449 [*CIGOL*]; *Central Canada Potash Co Ltd v Government of Saskatchewan*, [1979] 1 SCR 42, 88 DLR (3d) 609 [*Central Canada Potash*]. See: Cairns et al at 262.

³² Blackman et al at 519.

³³ Cairns et al at 261; *Reference re Proposed Federal Tax on Exported Natural Gas*, [1982] 1 SCR 1004, 136 DLR (3d) 385.

³⁴ Cairns et al, *supra* note 21 at 259 citing Doern, *supra* note 21.

constitution in 1982 presented an opportunity for the provinces to collectively push for greater autonomy, including over natural resource development.³⁵

Of course, differences existed within this general alignment. Alberta and Saskatchewan desired sovereignty and enhanced recognition of provincial ownership of natural resources and concurrency in regulatory matters and resource taxation; British Columbia wanted to preserve some space for federal authority over fisheries and ensure that any amendments related to natural resources included its resource base; Newfoundland wanted to expand the scope of section 109 of the *Constitution Act, 1867*, which provides the basis for provincial ownership of lands, mines, and minerals, to include offshore resources; Ontario, as a beneficiary of the federal government's energy policy following the end of the National Oil Policy, agreed with the push for constitutional amendment but did not want to derogate Parliament's pre-existing powers; and Quebec, consistent with its growing independence politics, also wanted to strengthen provincial powers.³⁶

This general confluence of interests ultimately resulted in two constitutional changes to the division of powers as part of patriation: (i) the introduction of an amending formula allowing the provinces to sidestep the effect of a constitutional amendment if it detracts from its legislative or proprietary powers;³⁷ and (ii) the introduction of section 92A to the division of powers. According to section 92A, the provinces have:

- *exclusive* authority over the development, conservation and management of their non-renewable natural and forestry resources and the generation of electricity;³⁸
 - *concurrent* authority over domestic exports of the primary production of non-renewable natural and forestry resources from the province (subject to the qualification that such laws not be discriminatory);³⁹
- and

³⁵ Cairns et al, *supra* note 21 at 259.

³⁶ Cairns et al, *supra* note 21 at 263-64.

³⁷ *Constitution Act, 1982*, *supra* note 1, s 38.

³⁸ *Constitution Act, 1982*, *supra* note 1, s 92A(1).

³⁹ *Constitution Act, 1982*, *supra* note 1, s 92A(2).

- *concurrent* authority over the taxation of non-renewable natural and forestry resources and the generation of electricity.⁴⁰

On first impression, and viewed as the culmination of the western provinces' historical struggle for resource sovereignty, the express acknowledgment of exclusive jurisdiction over the development of non-renewable natural resources was a victory, as was the affirmation of the provinces' right to tax production and exercise some control over the export of their non-renewable natural resources.⁴¹ But despite these paper advances, almost 40 years later, there is little consensus as to whether section 92A changed very much at all.⁴² Provincial suspicion of federal regulation of natural resource development never fully dissipated and remains a driving force of constitutional litigation in Canada. Indeed, there is a sense in which the competitive federalism that dominated this period was primarily driven by the provinces' fear of federal dominance.⁴³ Merely affirming pre-existing constitutional rights could not allay these fears and, in many ways, the "determination of where provincial interests leave off and national interests prevail remains the persistent question to be resolved"⁴⁴, particularly in the context of natural resource development.⁴⁵

III. Federalism and the constitutional division of powers

A. Canadian federalism: What is it?

Identifying the point at which provincial authority ends and federal authority begins in circumstances where the two appear to exist side-by-side and on top of each other (such as environmental matters) is not easy and will

⁴⁰ *Constitution Act, 1982*, *supra* note 1, s 92A(4).

⁴¹ William D Moull, "Natural Resources: Provincial Proprietary Rights, the Supreme Court of Canada, and the Resource Amendment to the Constitution" (1983) 21:3 *Alta L Rev* 472 at 487.

⁴² For example, see the conflicting comments of Blackman et al, *supra* note 16 at 533 and Cairns et al, *supra* note 21 at 270. See also: Moull, *supra* note 41 at 472.

⁴³ K Norrie, R Simeon & M Krasnick, *Federalism and the Economic Union* (Toronto: University of Toronto Press, 1986) at pp 49-59, reproduced in Joel Bakan et al, eds, *Canadian Constitutional Law*, 3rd ed (Toronto: Emond Montgomery Publications Limited, 2003) at 195.

⁴⁴ Cairns et al, *supra* note 21 at 272.

⁴⁵ Cairns et al, *supra* note 21 at 272. See also: William R Mackay, "Canadian Federalism and the Environment: The Literature" (2004) 17 *Geo Int'l Env'tl L Rev* 25 at 34, citing Grace Skogstad, "Intergovernmental Relations and the Politics of Environmental Protection in Canada", in Kenneth M Holland, FL Morton & Brian Galligan eds, *Federalism and the Environment* (Westport, Conn: Greenwood Press, 1996) 103 at 108.

likely require a recalibration of the federalism principle. To understand why, we must first understand what federalism is and how it has informed Canadian constitutional interpretation. To begin, federalism is one of the organizing principles of the *Constitution Act, 1867*; an unwritten constitutional principle that informs our interpretation, understanding, and application of the [constitutional] text",⁴⁶ thereby fixing the parameters around permissible governance.

At a high level, federalism binds confederation by allocating constitutional spheres of authority to each province while reserving unifying powers to the national government. But this conception lacks the normative force necessary to give any real insight into the meaning or purpose of the structure that it engenders. One of the classic articulations of federalism tells us that it is "the method of dividing powers so that the general and regional governments are each, within a sphere, co-ordinate and independent."⁴⁷ To the extent that it implies a degree of harmony and exclusivity among the various levels of government within a federation, this definition is a good starting point.

If we look at the structure of the *Constitution Act, 1867*, we see complementary spheres of jurisdiction allocated among a central government and decentralized regional governments. Early attempts to interpret this allocation were largely consistent with the classic definition, relying on its emphasis on exclusivity to "elevate the provinces to coordinate status with the Dominion."⁴⁸ Others have tried to push our understanding of federalism beyond this rigid view and blur the hard jurisdictional lines drawn by the Privy Council.⁴⁹ Picking up where these more progressive definitions left off, the Supreme Court of Canada has recently expressed an understanding of federalism that is almost entirely defined by its objectives: "...to reconcile unity with diversity, promote democratic participation by reserving meaningful powers to the local or regional level and to foster co-operation

⁴⁶ *Reference re Senate Reform*, 2014 SCC 32 at para 26.

⁴⁷ KC Wheare, *Federal Government*, 4th ed (Oxford: Oxford University Press, 1963) at 10, cited in Peter Hogg, ed, *Constitutional Law of Canada*, 5th ed, vol 1 (Scarborough, Ont: Thomson Reuters/Carswell, 2019) at 5.3(a).

⁴⁸ Hogg, *supra* note 47 at 5.3(c), citing: *Hodge v The Queen* (1883) 9 App Cas 117 [**Hodge**]; *Liquidators of the Maritime Bank v Receiver General of NB*, [1892] AC 437.

⁴⁹ Hogg, *supra* note 47 at 5.1(a) ref'g variously to: MJC Vile, *The Structure of American Federalism* (Oxford: Oxford University Press, 1961) at 198-199; William S Livingston, *Federalism and Constitutional Change* (London: Oxford University Press, 1954) at 4; CJ Friedrich, *Man and His Government* (New York: McGraw-Hill, 1963) at 594-95; PT King, *Federalism and Federation* (Baltimore: Johns Hopkins University Press, 1982) at 77; N Aroney, "Formation, Representation and Amendment in Federal Constitutions" (2006) 54 Am J Comp Law 277 at 316.

among governments and legislatures for the common good."⁵⁰ As our courts now conceive of Canadian federalism, the division of powers establishes the logical architecture that enables this mode of democratic governance, prescribing which matters (or kinds of matters) are best achieved at a national level, which are best achieved at a local level, and providing a blueprint for the continued evolution of constitutional norms.

Over time, the issues to which Canadian governments must respond have grown increasingly diverse and interconnected. As a result, it has become difficult to discern which order of government should have authority over certain matters. Faced with the difficulties of answering these jurisdictional questions, courts have developed a flexible federalism that is overlapping and concurrent.⁵¹ Contemporary Canadian federalism should therefore be seen as an adaptive process or model that allows the provinces the freedom to pursue policies that respond to their particular needs while maintaining a structure that ensures the disparate policy experiments of the provinces are carried out in broad alignment with the interests of the union as a whole.⁵² It is this latter aim that, if left unchecked, risks eroding provincial autonomy.

B. The interpretive tools of constitutional flexibility

One of the more important projects for Canadian federalism then, at least from the perspective of the courts, is to reconcile provincial policy experiments when they diverge from the broader interests of the country as a whole. In fact, there is an extent to which the courts themselves have been primarily responsible for giving meaning to the framework set out in sections 91 and 92.⁵³ Since the *Constitution Act, 1867* became a subject of judicial consideration, courts have developed and progressively refined a number of interpretive tools to facilitate this exercise.

⁵⁰ *Canadian Western Bank v Alberta*, 2007 SCC 22 at para 22 [*Canadian Western Bank*]. See also *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 58, 161 DLR (4th) 385 [*Secession Reference*].

⁵¹ Bakvis & Skogstad, *supra* note 2 at 7; *Quebec (Attorney General) v Canadian Owners and Pilots Association*, 2010 SCC 39 at para 45 [*COPA*]; *OPSEU v Ontario (Attorney General)*, [1987] 2 SCR 2 at 18, 41 DLR (4th) 1 [*OPSEU*].

⁵² *Reference re Anti-Inflation Act*, [1976] 2 SCR 373 at 412 [*Anti-Inflation Reference*].

⁵³ Patrick J Monahan & Byron Shaw, *Constitutional Law*, 4th ed (Toronto: Irwin Law Inc, 2013) at 241.

While the flexibility of federalism allows the courts to shape jurisdictional outcomes, this exercise cannot be unbridled.⁵⁴ To guard against jurisdictional creep and ensure the constitutional division of powers retains its logical foundation, the Supreme Court of Canada has directed that the starting point of any interpretive exercise is "the framers' description of the power in order to identify its essential components".⁵⁵ But in reading these descriptions, "the meaning of the words used may be adapted to modern-day realities, in a manner consistent with the separation of powers of the executive, legislative and judicial branches."⁵⁶ In principle, this exercise should be primarily interpretive. In practice, however, it is as political as it is legal.⁵⁷ Not only does this shift away from objective interpretation require courts to make policy choices—something they are ill-suited to do—it has also led to an interpretive approach that lacks certainty and predictability, two critical components in any effective system of law.

There are a number of tools that courts use to adapt the wording of the constitutional text to reflect the realities of contemporary society or, in some cases, to avoid the contradictions that this approach may lead to. Perhaps the most pervasive—and pernicious—tool is cooperative federalism, a principle that allows Canadian governments (and courts) to adapt the formal division of powers to accommodate shared ends⁵⁸ and preserve "the ordinary operation of statutes enacted by *both* levels of government."⁵⁹ The underlying assumption here, valid or not, seems to be that the two levels of government will have to cooperate with each other more and more as their respective jurisdictions increasingly overlap. From this, three interrelated interpretive doctrines have developed: (i) pith and substance; (ii) ancillary powers; and (iii) double aspect.⁶⁰

i. Pith and substance

⁵⁴ *Caron v Alberta*, 2015 SCC 56 at para 36 [**Caron**]; *Reference re Securities Act*, 2011 SCC 66 at para 62. See also: *Rogers Communications Inc v Chateauguay (City)*, 2016 SCC 23 at para 39 [**Rogers Communications**].

⁵⁵ *Reference re Employment Insurance Act*, 2005 SCC 56 at para 10 [**Employment Insurance Reference**]; *Quebec (Attorney General) v Canada (Attorney General)*, 2015 SCC 14 at para 18 [**Quebec v Canada**]; *Caron*, *supra* note 54 at para 37.

⁵⁶ *Employment Insurance Reference*, *supra* note 55 at para 10.

⁵⁷ Warren J Newman, "The Promise and Limits of Cooperative Federalism as a Constitutional Principle" (2016) 76 SCLR (2d) 67 at para 6.

⁵⁸ Warren J Newman, *supra* note 57 at para 10.

⁵⁹ *Canadian Western Bank*, *supra* note 50 at para 37.

⁶⁰ *Quebec v Canada*, *supra* note 55 at paras 147-148, cited in Newman, *supra* note 57 at para 29.

Determining the pith and substance of a law is usually the starting point of any federalism analysis and the doctrine provides that, when a law's true character (as disclosed by its legislative purpose and operational effects) falls within the jurisdiction of the enacting legislative body, it will generally be considered valid, notwithstanding that it may have extrajurisdictional effects.⁶¹

Though necessary, this exercise naturally introduces a degree of unpredictability to the division of powers, particularly in areas where there is overlapping jurisdiction and divergent legislative priorities. This is because the characterization of a law and its reduction to a precise description is an imprecise science. Given that the identification of a law's pith and substance often forms the first step of any constitutional inquiry, it will generally indicate whether the law is properly within the authority of the enacting legislative body. Even if we agree on the proper tests to use, reasonable people can differ in the way that they choose to describe the pith and substance of a law, which of its features are most important, and the appropriate degree of generality or specificity to apply.⁶² Moreover, while a law's purpose and effects are supposed to be considered, it is not always clear how the two ought to be weighed. Thus, the words that a judge uses to describe a law—and there will be many different permutations—or the perspective they adopt in considering its true nature can be determinative of the constitutional question. As this can vary from judge to judge, the constitutionality of a law will depend on the court considering it.

ii. *Ancillary powers*

An extension of the pith and substance doctrine is the ancillary powers doctrine, which provides that a law may validly intrude into the jurisdiction of another level of government if the intruding portion of the law is "necessarily incidental" and tightly integrated into a broader scheme that is itself, in pith and substance, valid.⁶³

⁶¹ Hogg, *supra* note 49 at 15.5(a).

⁶² WR Lederman, "Classification of Laws and the British North America Act" in WR Lederman, *Continuing Canadian Constitutional Dilemmas* (Toronto: Butterworths, 1981) at 236-43, reproduced in Bakan et al, *supra* note 43 at 211. See: K Swinton, *The Supreme Court and Canadian Federalism: The Laskin-Dickson Years* (Scarborough, ON: Carswell, 1990) at 24-30, reproduced in Bakan at 206. And see: the concerns of LeBel and Deschamps JJ in *Reference re Assisted Human Reproduction Act*, 2010 SCC 61 at para 190 (dissenting) [**AHRA Reference**].

⁶³ *Canada (AG) v Quebec (AG)*, [1946] UKPC 43, [1947] AC 33 at 43.

In other words, if a legislative body is generally acting within its scope of authority, laws that it enacts may extend into the jurisdiction of the other if required for the operation of the overall scheme.

This was originally a strict test, requiring that the impugned part of a law be necessary to the proper function of the overall scheme and merely incidental in its extrajurisdictional effects—the law itself cannot directly or deliberately target a matter beyond the enacting government’s jurisdiction as that would upend the pith and substance doctrine. But in the course of promoting greater constitutional flexibility, the Supreme Court of Canada has more recently softened this requirement, establishing a test that relies on the subjective determination of the seriousness or degree of intrusion. As explained in *General Motors*, legislatures now have more room to manoeuvre under the doctrine because the conditions required to preserve a law will vary with its characterization and the degree of its extrajurisdictional effects. If the intrusion is serious, the law may still be valid if it is necessarily incidental to the operation of the overall scheme. If, however, the intrusion is less severe, it may still be justified if the offending provision has a rational and functional connection to the scheme.⁶⁴ However, the manner in which a court is to measure the degree of the intrusion is unclear; multi-member judicial panels have not even agreed among themselves whether a particular intrusion is serious or merely incidental.⁶⁵

iii. Double aspect

Finally, the double aspect doctrine recognizes that certain laws may have more than one aspect to them: "subjects which in one aspect and for one purpose fall within s. 92, may in another aspect and for another purpose fall within s. 91."⁶⁶ This is because most significant legislative matters cannot be reduced to one discrete subject. If one considers the division of powers in sections 91 and 92, it is clear that many of the issues Canadian governments must address can fall within any number of heads of power. A classic example are highway traffic laws, which provincial governments may regulate under their authority over property and civil rights and the federal government may regulate under its criminal law power or in relation to interprovincial transportation

⁶⁴ *General Motors of Canada Ltd v City National Leasing*, [1989] 1 SCR 641 at 671-72 [*General Motors*]. See also: *AHRA Reference*, *supra* note 62 at paras 188-99.

⁶⁵ See, for example, *AHRA Reference*, *supra* note 62.

⁶⁶ *Hodge*, *supra* note 48 at 130, cited in *Hogg*, *supra* note 48 at 5.3(c).

undertakings. Another example is environmental regulation. Consistent with the aims of cooperative federalism, the double aspect doctrine recognizes that within their respective spheres of authority both levels of government may validly act to achieve certain ends regarding the same subject matter.⁶⁷

iv. The problems with flexibility

It is not difficult to see how cooperative federalism and its interaction with the other interpretive tools outlined above can be dangerous. While the application of legal tests necessarily invites some discretion, the language that courts use to describe cooperative federalism cloaks the degree of discretion it affords judges to substitute the constitutional division of powers with their own views of federalism.⁶⁸ While there is substantial benefit to a constitution that is capable of growth, it is arguable that these principles have evolved to provide courts too broad a discretion in either answering questions according to their preferred policy outcomes or kicking the can down the road to be determined at a later date. The uncertainty this creates incentivizes governments to capitalize on the lack of clear constitutional rules to expand the scope of their jurisdiction. To push back against this manifestation of the competitive dynamic, however, courts have developed two further interpretive tools to resolve jurisdictional disputes: paramouncy and interjurisdictional immunity.

v. Paramouncy and interjurisdictional immunity

Regardless of how flexible we may want our Constitution to be, there will be instances in which two laws cannot occupy the same space without contradicting each other or undermining the logic and purpose of the division of powers. In these circumstances, courts can use the doctrines of federal paramouncy and interjurisdictional immunity to resolve the conflict. Federal paramouncy tells us that where constitutional flexibility cannot reconcile an operational inconsistency or conflict between valid federal and provincial laws, the federal law

⁶⁷ Swinton, *supra* note 62 in Bakan et al, *supra* note 43 at 207.

⁶⁸ As Newman, *supra* note 57, warns at para 34, "The challenge is to avoid taking the further, facile steps of abandoning the discipline of empirical analysis and conflating an interpretive rule or legal technique with an idealized constitutional principle of cooperative federalism, and then applying that broad principle normatively, without much discernment, to practical situations and dynamics perhaps better classified as something other than cooperative in character, and thereby altering the original form and function of the "principle" (as well as, perhaps, the constitutional division of powers itself)."

prevails.⁶⁹ Under the exclusivist approach favoured in the early Privy Council jurisprudence, such conflicts would be rare; the subject matter allocated to each level of government is notionally independent of the other. But through practical necessity and the expansion of overlapping authority championed by Canadian courts, the potential for such conflict has increased.

That said, courts have historically been reluctant to rely on paramountcy,⁷⁰ electing to invalidate provincial laws only where compliance with both a federal and provincial law is impossible or the provincial law frustrates the purpose of the federal law.

Interjurisdictional immunity can achieve similar results to paramountcy without invalidating the entirety of an offending provincial law. When it is applied, interjurisdictional immunity operates to immunize "certain entities...from the *application* of laws" that remain, in all other respects, valid.⁷¹ In other words, there is a "core or a basic, minimum and unassailable content of legislative powers"⁷² that cannot be impaired by the laws of another level of government and will be preserved by reading down the offending law.⁷³

To the extent that it preserves exclusive jurisdiction over essential components of a particular matter, the language of interjurisdictional immunity lends itself well to a strict division of powers analysis and is thematically consistent with the "watertight compartments"⁷⁴ view of the division of powers. It is perhaps not surprising, then, that some courts have sought to limit its application because it is inconsistent with a more flexible and cooperative federalism.⁷⁵ That said, the doctrine is not irrelevant,⁷⁶ though its application has been circumscribed to instances where a core component of one level of government's constitutional authority is *impaired* by a law of the other.

⁶⁹ Hogg, *supra* note 47 at 16.1; *Canadian Western*, *supra* note 50 at para 32.

⁷⁰ Hogg, *supra* note 47 at 16.2.

⁷¹ Patrick J Monahan & Byron Shaw, *supra* note 53 at 130.

⁷² Monaghan & Shaw at 130, *supra* note 53, citing *Bell Canada v Quebec*, [1988] 1 SCR 749 at 839, 51 DLR (4th) 161.

⁷³ *Canadian Western Bank*, *supra* note 50 at paras 35 and 48.

⁷⁴ *Canada v Ontario*, *supra* note 4.

⁷⁵ See: *Canadian Western Bank*, *supra* note 50 at paras 42-43, 47. In the *Pipeline Reference*, Ontario argued that the Court should take the opportunity to put the doctrine to rest.

⁷⁶ *Desgagnés Transport Inc v Wärtsilä Canada Inc*, 2019 SCC 58; *Quebec v IMTT-Quebec inc*, 2019 QCCA 1598.

Both paramountcy and interjurisdictional immunity are generally used to preserve federal authority, although some courts have stated that both doctrines may operate in favour of provincial laws.⁷⁷ While the idea of provincial paramountcy suffers from several conceptual challenges, there is nothing in the *Constitution Act, 1867* or the doctrine of interjurisdictional immunity itself to suggest that it cannot protect narrow cores of provincial competency from federal impairment. In fact, there are a number of cases where courts have implicitly relied on the logic of interjurisdictional immunity to read down a federal law.⁷⁸

To the extent that courts caution against the use of both of these doctrines, there is some reason to believe that the logic of both motivates judicial reasoning even where they are not expressly acknowledged. For example, the idea that federal laws should supersede the operation of valid provincial laws if the two conflict, or that provincial laws cannot apply to essential elements of federal competence, can affect the classification of a law under the pith and substance test. In the *Pipeline Reference*, for example, the British Columbia Court of Appeal did not expressly go beyond the pith and substance test when it determined the laws the Government of British Columbia proposed were unconstitutional, but much of its analysis clearly concerned the preservation of federal power in the face of jurisdictional conflict.

With respect to each of the interpretive tools described above (cooperative federalism, pith and substance, ancillary powers, and double aspect), it is not unreasonable to conclude that the discretion of the judiciary conditions their application. When the stakes are low, this is tolerable, if not ideal, and can be justified by the fact that flexibility has an important role to play in our constitutional order. But no amount of flexibility can achieve a coherent jurisdictional balance where the aims of federal and provincial laws are diametrically opposed. In these circumstances, the interpretive tools of federalism, as they are currently applied, favour preserving the federal law and, more broadly, centralizing ultimate legislative authority where policies diverge.⁷⁹

⁷⁷ *Quebec (Attorney General) v Canada (Attorney General)*, 2008 QCCA 1167 at para 89; *Canadian Western Bank* at para 35; *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 at para 65.

⁷⁸ *R v Dominion Stores Ltd* (1979), [1980] 1 SCR 844 at paras 30 and 35, 106 DLR (3d) 581; *Labatt Breweries v Canada* (1979), [1980] 1 SCR 914 at paras 37-38, 110 DLR (3d) 594; *PSAC v R*, 2006 SCC 29; *Singbeil v Hansen* (1985), 19 DLR (4th) 48 (BCCA) at para 35, 63 BCLR 332 [one of three concurring judgments].

⁷⁹ Eugénie Brouillet, "Canadian Federalism and the Principle of Subsidiarity: Should We Open Pandora's Box?" (2011) 54 SCLR (2d) 601 at 602.

As we will see, this tendency becomes problematic in areas of shared jurisdiction that stitch together overlapping matters of exclusive authority, like the environment, because the potential for conflict is greater. The effect of always preserving federal power in these circumstances is to sterilize the ability of the provinces to act independently within their exclusive jurisdiction.

C. The division of powers, natural resources, and the environment

Starting with the text of the *Constitution Act, 1867*, section 91 lists 28 specific items that the federal government is responsible for, together with all matters expressly excluded from provincial jurisdiction. In addition to the enumerated heads of federal power, the preamble to section 91 creates a residual power that allows Parliament and the Senate to legislate for the "Peace, Order, and Good Governance of Canada" (the "POGG" power). This means that, as new matters arise from time to time or provincial matters transform into matters of national concern, the federal government's jurisdiction will expand.

Regarding natural resources and the environment specifically, the following federal heads of power are relevant: trade and commerce;⁸⁰ taxation;⁸¹ navigation and shipping (including navigable waters);⁸² inland fisheries;⁸³ Indigenous peoples;⁸⁴ the criminal law;⁸⁵ transboundary matters; and, in conjunction with section 92(10), interprovincial or international works and undertakings, such as railways and pipelines.⁸⁶ In light of the POGG power, this list is not closed, and federal authority over environmental matters may yet expand.

Regarding the provinces' control over their natural resources and the local environment, sections 92 and 92A provide that each provincial legislature "may exclusively make Laws in relation to" certain enumerated matters, including direct taxation within the province;⁸⁷ the management and sale of public lands belonging to the

⁸⁰ *Constitution Act, 1867*, *supra* note 1, s 91(2).

⁸¹ *Constitution Act, 1867*, *supra* note 1, s 91(3).

⁸² *Constitution Act, 1867*, *supra* note 1, s 91(10).

⁸³ *Constitution Act, 1867*, *supra* note 1, s 91(12).

⁸⁴ *Constitution Act, 1867*, *supra* note 1, s 91(24).

⁸⁵ *Constitution Act, 1867*, *supra* note 1, s 91(27).

⁸⁶ *Constitution Act, 1867*, *supra* note 1, s 91(29).

⁸⁷ *Constitution Act, 1867*, *supra* note 1, s 92(2).

provincial Crown;⁸⁸ local works and undertakings;⁸⁹ property and civil rights in the province;⁹⁰ all matters of a private or local nature in the province;⁹¹ and various matters related to the development of non-renewable resources and the generation of electricity in the province.⁹²

While the heads of power supporting provincial jurisdiction over natural resources and the environment appear broader than those given to the federal government,⁹³ the flexibility of contemporary federalism inevitably engages the federal government in any major resource development project, frequently for environmental reasons and, increasingly, due to the federal Crown's role in the process of consultation and Indigenous reconciliation.⁹⁴ This is primarily because the *Constitution Act, 1867* does not expressly address the environment; rather, both levels of government share jurisdiction. As La Forest J. accepted in *Oldman River*,⁹⁵

"environmental management" does not, under the existing situation, constitute a homogeneous constitutional unit. Instead, it cuts across many different areas of constitutional responsibility, some federal and some provincial. And it is no less obvious that "environmental management" could never be treated as a constitutional unit under one order of government in any constitution that claimed to be federal, because no system in which one government was so powerful would be federal.⁹⁶

Moreover, it is trite that the development of natural resources will affect the environment. To the extent that those effects touch on matters that fall under federal jurisdiction, natural resource development, even if local in its footprint or minimally impactful, will engage federal interests.

Given that paramountcy and interjurisdictional immunity have historically favoured the federal government, the shared nature of environmental jurisdiction, and the federal government's increasingly assertive role in that respect,⁹⁷ continued policy conflicts between the federal and provincial governments over resource development

⁸⁸ *Constitution Act, 1867*, *supra* note 1, s 92(5).

⁸⁹ *Constitution Act, 1867*, *supra* note 1, s 92(10).

⁹⁰ *Constitution Act, 1867*, *supra* note 1, s 92(13).

⁹¹ *Constitution Act, 1867*, *supra* note 1, s 92(16).

⁹² *Constitution Act, 1867*, *supra* note 1, s 92A.

⁹³ Hogg, *supra* note 47 at 30.7(b).

⁹⁴ Monahan & Shaw, *supra* note 53 at 257.

⁹⁵ *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3, 88 DLR (4th) 1 [*Oldman River*]

⁹⁶ *Oldman River*, *supra* note 95 citing Dale Gibson, "Constitutional Jurisdiction over Environmental Management in Canada" (1973) 23 Univ of Toronto LJ 54 at 85.

⁹⁷ MacKay, *supra* note 45 at 30, citing Gibson at 85.

and environmental policy will, if courts are not careful, lead to the expansion of federal authority into matters that properly belong to the provinces, often on the strength of minimal federal impact.⁹⁸ And therein is the rub. Environmental protection is critically important, but federal policy has the potential to be a constitutional "Trojan horse"⁹⁹ that shifts the balance of federalism:

On the one hand, there is an obvious policy rationale for national approaches in a field of policy where the problems are by their nature borderless [or engage matters that truly lie within federal jurisdiction]. On the other hand, environmental regulation in Canada overwhelmingly means regulation of the development of natural resources, which is largely a provincial jurisdiction that is central to provincial economic development.¹⁰⁰

These clashes have significant repercussions for federalism in all its forms and Alberta implicitly raised this concern in *Oldman River* when it argued, on jurisdictional grounds, against the need for a federal review of a "provincial project' or undertaking 'primarily subject to provincial regulation'".¹⁰¹ Though aware of the concern that federal environmental policy can shift the constitutional balance, La Forest J. rejected this argument, holding that it "posits an erroneous principle that seems to hold that there exists a general doctrine of interjurisdictional immunity to shield provincial works or undertakings from otherwise valid federal legislation."¹⁰² La Forest J. found support for this statement in *Alberta Government Telephones*:

It should be remembered that one aspect of the pith and substance doctrine is that a law in relation to a matter within the competence of one level of government may validly affect a matter within the competence of the other. Canadian federalism has evolved in a way which tolerates overlapping federal and provincial legislation in many respects, and in my view a constitutional immunity doctrine is neither desirable nor necessary to accommodate valid provincial objectives.¹⁰³

These comments seem to suggest that provincial interests may be accorded less protection from infringements by the federal government. However, the precedential value of that statement seems limited, given that subsequent Supreme Court judgments have since affirmed the validity of provincial interjurisdictional

⁹⁸ *Hydro-Quebec*, *supra* note 7 at para 86.

⁹⁹ *Oldman River*, *supra* note 95 at para 104.

¹⁰⁰ Lahey, *supra* note 14 at 227.

¹⁰¹ *Oldman River*, *supra* note 95 at para 99.

¹⁰² *Oldman River*, *supra* note 95 at para 99.

¹⁰³ *Oldman River*, *supra* note 95 at para 99, citing *Alberta Government Telephones v Canada*, [1989] 2 SCR 225 at 275.

immunity. As such, there is reason to believe that La Forest J.'s refusal to consider the interaction between shared federal authority and exclusive provincial authority is no longer good law. At the very least, however, given the central place *Oldman River* holds in jurisprudence concerning the division of powers over the environment, this is an issue that the Supreme Court needs to revisit to ensure certainty and balance moving forward.

As highlighted in Part II, above, the federalism debate of the 1970s and 80s was drawn on jurisdictional lines located with reference to economic concerns and the provinces' shared desire to minimize federal interference. Today, a similar debate is taking place, but the emergence of the environment as a dominant factor in the federalism equation has fractured the unified front the provinces previously relied on to negotiate constitutional change and has complicated the questions before the courts. In answering these questions, courts largely have recourse only to the existing tools of flexible federalism to reconcile the incompatible interests advocated by the federal and provincial governments, including: (i) the need to balance conflicting regional (and voter) interests, such as economic development and environmental stewardship; (ii) the differential, local, and transboundary environmental effects of industrial activity across Canada; (iii) the relative importance of diversity and unity in our constitutional order; and (iv) the appropriate allocation of legislative competence over matters that, to varying degrees, implicate the interests of both. As we will see in the discussions that follow, the tools that the courts have developed to deal with these issues—including the POGG power, cooperative federalism, pith and substance, ancillary powers, and double aspect—are often not easily applied in the context of disputes over how to regulate the environment.

IV. Canadian federalism enters the 21st century

A. The *GHG References* and the expansion of federal jurisdiction under POGG

On June 21, 2018, the *Greenhouse Gas Pollution Pricing Act*¹⁰⁴ came into force, implementing two different emissions pricing schemes as part of the federal government's strategy to meet its Paris Agreement emissions

¹⁰⁴ *Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12, s 186 [*GGPPA*].

targets. The *GGPPA* targets 33 different greenhouse gases—the most prevalent of which is carbon dioxide—and seeks to encourage their reduction by: (i) imposing a fuel charge on 22 identified fuels (Part 1); and (ii) implementing output-based performance standards for large industrial emitters (Part 2). In both cases, the point is to increase the cost of emitting greenhouse gasses to incentivize their reduction. Importantly, Parts 1 and 2 only apply in provinces that have not enacted their own equivalent emissions pricing regimes:¹⁰⁵ the *GGPPA* is a "federal backstop".

Following the commencement of the *GGPPA*, Saskatchewan and Ontario challenged its constitutional validity, arguing that the legislation violates the federalism principle and infringes their jurisdiction over matters that are of a primarily local nature. Following a change in government, Alberta advanced its own challenge. As Saskatchewan was the first to submit its reference question, the Saskatchewan Court of Appeal was the first to weigh in, holding in a 3-2 judgment that the *GGPPA* is a valid exercise of federal jurisdiction under the national concern branch of POGG. A 3-1-1 majority of the Ontario Court of Appeal also affirmed the validity of the *GGPPA* under the national concern branch of POGG, although the majority and concurring opinions did so on the basis of slightly different characterizations of the law. The Alberta Court of Appeal concluded differently, deciding in a 3-1-1 decision that the *GGPPA* lies beyond Parliament's jurisdiction. Given the flexibility and discretion that contemporary Canadian federalism affords judges, it is no surprise that on the basis of substantially similar legal arguments:

- eight appellate judges ruled in favour of the law; seven ruled against it;
- the pith and substance of the *GGPPA* was articulated nine different ways;¹⁰⁶ and
- four different opinions upheld the constitutional validity of the *GGPPA* and four different opinions concluded it is unconstitutional.

¹⁰⁵ *GGPPA*, *supra* note 104, ss 166(3) and 189(2).

¹⁰⁶ *Saskatchewan GHG Reference*, *supra* note 8 at paras 125, 245, 335, and 337; *Ontario GHG Reference*, *supra* note 9 at paras 77, 166, and 213; *Alberta GHG Reference*, *supra* note 10 at paras 211, 256, 784, 836, and 943. We note that there is some overlap in these pinpoints.

What is perhaps most concerning about this lack of consistency is the fact that it arises from the same general question: is the matter that the *GGPPA* addresses one of sufficient national concern such that its validity is preserved under the POGG power? It is our view that the fact the same question can lead to so many conflicting judicial responses is the natural result of a federalism that lacks the tools necessary to both satisfactorily answer the increasingly complex questions that arise from overlapping environmental jurisdiction and resolve the divergent regional interests that have begun to emerge. In particular, the discretion afforded under the pith and substance doctrine and the unclear parameters of the POGG power have conspired to allow our appellate courts to reason their way to their preferred policy outcomes, notwithstanding the consequences of such an approach on provincial autonomy.

i. The POGG power: What is it?

There are three branches of the POGG power: the gap branch, the emergency branch, and the national concern branch. Each of these branches is rooted in the introductory language to section 91 of the *Constitution Act, 1867* and has been interpreted to grant the federal government the power to: (i) legislate in respect of matters not otherwise allocated to the exclusive jurisdiction of the provinces (the gap branch); (ii) intrude on provincial jurisdiction to deal with an emergency (the emergency branch); and (iii) assume jurisdiction over matters that were once local in nature but have since been transformed into matters of national concern (the national concern branch). As Peter Hogg explains:

the framers of the Constitution could not foresee every kind of law which has subsequently been enacted; nor could they foresee social, economic and technological developments which have required novel forms of regulation. But they did make provision for new or unforeseen kinds of laws. [...] [A]ny matter which does not come within any of the specific classes of subjects will be provincial if it is merely local or private...and will be federal if it has a national dimension (s. 91 [by virtue of the] opening words).¹⁰⁷

In one sense, the existence of the POGG power in all of its guises *could* be confirmation of a general federal legislative power; in another, more commonly accepted sense, it is a narrowly defined residuary power, catching

¹⁰⁷ Hogg, *supra* note 47 at 15.9(e).

matters that are not expressly enumerated in section 92.¹⁰⁸ But however narrowly we define it, there is little doubt that the POGG power constitutionalizes the expansion of federal power at the expense of the provinces, especially under the national concern branch. As federal authority expands to capture new environmental matters that are of a national concern, the potential for jurisdictional conflict increases with the result that, absent some interpretive shift, provincial laws will continue to give way to federal laws. It is for this reason that the ultimate result of these cases—and the Court's use of the POGG power—is of significant importance to Canadian federalism and the ongoing balance of legislative authority.

Fixing the limits of POGG has always been difficult: When is a gap truly a gap, and when can (or should) the existing enumerated heads of power be extended (or not) to capture a new matter? When is a matter of sufficient national concern such that it ceases to be within the competence of the provinces, and how do we define it so that we continue to respect the constitutional balance? This final question is particularly relevant to the preservation of provincial autonomy, and, as evidenced by the divergence of opinion in the *GHG References*, it is not easy to answer.

ii. *The national concern branch*

An early articulation of the national concern branch of the POGG power is found in the Privy Council's decision in the *Local Prohibition Case*, where Lord Watson commented that:

...some matters, in their origin local and provincial, might attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interest of the Dominion. But great caution must be observed in distinguishing between that which is local or provincial and that which has ceased to be merely local or provincial, and has become a matter of national concern, in such sense as to bring it within the jurisdiction of the Parliament of Canada.¹⁰⁹

Viscount Simon added to this description when he wrote that, to determine whether a federal law is valid because it concerns a matter of national concern:

¹⁰⁸ Hogg, *supra* note 47 at 17.1. See also: K Lysyk, "Constitutional Reform and the Introductory Clause of s 91" (1979) 57:3 Can Bar Rev 531 at 543.

¹⁰⁹ *Attorney General (Ontario) v Attorney General (Canada)*, [1896] AC 348.

...the true test must be found in the real subject matter of the legislation, **if it is such that it goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole...**, then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order and good government of Canada, although it may in another aspect touch on matters specially reserved to the provincial legislatures.¹¹⁰

In other words, when a matter that could fall within provincial jurisdiction—whether directly or under section 92(16)—attains a sufficiently national dimension, it may fall within the jurisdiction of the federal government. Further, though there is some debate,¹¹¹ it is likely that on being deemed a matter of national concern under the POGG power, the matter becomes subject to the exclusive and plenary jurisdiction of the federal government, similar to any other matter set out in section 91.¹¹² The logic of the division of powers suggest that this is the case. Even if the provinces retain some authority over the new matter, to the extent that there is overlap with section 92, the doctrines of paramountcy and interjurisdictional immunity will generally protect federal regulatory authority from conflict or impairment in many important respects.¹¹³

On the few occasions where it has addressed the national concern branch, the Supreme Court has recognized the risk that it poses to provincial autonomy and has sought to limit its availability. As the majority wrote in *Crown Zellerbach*, it is not enough for a matter to establish itself as one of concern to the country as a whole: it must have a "singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution

¹¹⁰ *Reference re Canada Temperance Act*, [1946] AC 193 at para 11.

¹¹¹ 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 Const F 1.

¹¹² See, for example, La Forest J's comments in *Hydro-Quebec* at para 44: "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."

¹¹³ For further support for this view, see the sources cited in Leach & Adams, *supra* note 111 at 4: *Saskatchewan GHG Reference*, *supra* note 8 at paras 131-32; *Ontario GHG Reference*, *supra* note 9 at paras 178 and 203; Joseph Castrilli, "Legal Authority for Emissions Trading in Canada" in Elizabeth Atkinson, ed, *The Legislative Authority to Implement a Domestic Emissions Trading System* (Ottawa: National roundtable on the Environment and the Economy, 1999) at 11; Shi-Ling Hsu & Robin Elliot, "Regulating Greenhouse Gases in Canada: Constitutional and Policy Dimensions" (2009) 54:3 McGill LJ 463, n 134, citing *R v Crown Zellerbach Canada Ltd*, [1988] 1 SCR 401 at 433. [**Crown Zellerbach**]; Sujit Choudhury, "Constitutional Law and the Politics of Carbon Pricing in Canada" (November 2019), online: <<http://perma.cc/ZN6MGT7X>> at 15-6; (29); Dwight Newman, "Federalism, Subsidiarity, and Carbon Taxes" (2019) 82:2 Sask L Rev 187 at 196; *Johannesson v Municipality of West St Paul* (1951), 1 SCR 292 at 312; *Reference re Regulation and Control of Radio Communication*, [1931] SCR 541 at 566.

power under the Constitution."¹¹⁴ As Professor Hogg notes, the test is intended to allay the concern that "the national concern branch...would tend to absorb the entire catalogue of provincial powers if subject matters as broad as inflation and pollution were within federal authority."¹¹⁵

This observation clearly applies to environmental matters (such as the deleterious effects of greenhouse gas emissions), which are naturally broad and sit uncomfortably at the nexus of federal and provincial power. But does the *Crown Zellerbach* test actually address these concerns? In some ways, the *Crown Zellerbach* test simply combines elements of the pith and substance, ancillary powers, and double aspect doctrines: the federal law must, in pith and substance, relate to a single and distinct matter of national concern that does not intrude too deeply into provincial jurisdiction, is enacted for a valid "national" purpose, and has a character that necessarily extends beyond the competence of the individual provinces. It is therefore questionable whether the implicit application of tests that already countenance discretionary reasoning in favour of expanded federal jurisdiction will truly protect provincial autonomy.

iii. Greenhouse gas emissions, federal control, and the violation of federalism as a standalone principle

Before discussing the substance of the Courts' reasons in the *GHG References*, we will first briefly address an argument that Saskatchewan raised in the *Saskatchewan GHG Reference*, which was premised on the idea that "federalism is an 'overarching limit' on Parliament's powers"¹¹⁶ and the *GGPPA* is unconstitutional because it conditions its application on how provinces have chosen to act within their own jurisdiction.¹¹⁷ Though the Supreme Court recognized in the *Secession Reference* that federalism is an unwritten constitutional principle that organizes our constitutional order and conditions any division of powers analysis, it has not yet been elevated

¹¹⁴ *Crown Zellerbach* at 432. See Beetz J's comments (in dissent) in the *Antia-Inflation Reference*, *supra* note 52 at 457-458 that inflation is far too broad and diffuse a matter to be removed from the jurisdiction of the provinces as it would affect and impair too many provincial heads of power in a profound manner. To qualify as a matter, within the national concern branch of POGG, the matter must have "a degree of unity that makes it indivisible, an identity which makes it distinct from provincial matters and a sufficient consistence to retain the bounds of form."

¹¹⁵ Hogg, *supra* note 47 at 17.1(c).

¹¹⁶ *Saskatchewan GHG Reference*, *supra* note 8 at para 59.

¹¹⁷ *Saskatchewan GHG Reference*, *supra* note 8 at para 59.

to the status of an independent constitutional principle capable of independently dictating the outcome of a jurisdictional question.

While the majority accepted that federalism "requires a court interpreting constitutional texts to consider how different interpretations impact the balance between federal and provincial interests" (tacitly acknowledging that the *logic* of federalism should condition any jurisdictional inquiry),¹¹⁸ it ultimately concluded that Parliament's authority—whether under the POGG power or an enumerated matter—does not depend on how or whether a province has exercised its jurisdiction over a certain matter.¹¹⁹

However, it may be that Saskatchewan's main point was not that federalism should independently strike down the *GGPPA*, but that the operation of the *GGPPA* shifts the balance of federalism because it coerces provinces to act within their jurisdiction in a certain way, stripping them of their freedom to legislate. Cast this way, the argument would be that the *GGPPA* offends the principle of federalism because it indirectly allows the federal government to supplant provincial policy aims with its own over matters that are provincial in nature and that, to the extent that the court's interpretive tools permit it to reason to this outcome, there is a fundamental problem with that approach. While cooperative federalism might ordinarily allow the federal government to encourage provincial action through the use of targeted funding and intergovernmental agreements,¹²⁰ it has not yet extended so far as to allow the federal government to, through legislation, enforce certain standards over local activities that are not within its jurisdiction.

iv. The Saskatchewan and Ontario GHG References: The GGPPA is constitutional

In any division of powers analysis, the first step is to identify the pith and substance of the challenged law. In the Saskatchewan and Ontario *GHG References*, the parties' characterization of the *GGPPA* and the new matter of national concern evolved throughout the hearings. Canada's initial position was that it should be recognized

¹¹⁸ *Saskatchewan GHG Reference*, *supra* note 8 at para 63, citing *R v Comeau*, 2018 SCC 15 at para 78.

¹¹⁹ *Saskatchewan GHG Reference*, *supra* note 8 at para 67.

¹²⁰ Hogg, *supra* note 47 at 5.8.

as having jurisdiction over "GHG emissions" as a matter of national concern.¹²¹ Responding to concerns that this definition was too broad to be a discrete subject of national concern under the POGG power, Canada moderated its position by arguing that the new subject matter should be the "cumulative dimensions of GHG emissions."¹²²

Neither Court accepted Canada's position. In the *Saskatchewan GHG Reference*, British Columbia advanced an alternative description of the new matter of national concern ("the establishment of minimum national standards of price stringency for GHG emissions"¹²³) that the majority took up.¹²⁴ Given that the majority had previously concluded in its analysis that the pith and substance of the *GGPPA* "is best seen as being the establishment of minimum national standards of price stringency for GHG emissions",¹²⁵ it was self-evident that the Act fell within the scope of the newly identified matter—the two were the same thing.

The majority of the Ontario Court of Appeal arrived at similar conclusions to the Saskatchewan Court of Appeal, determining that both the pith and substance of the Act and the new matter of national concern can be described as establishing minimum national standards to reduce GHG emissions.¹²⁶ In her concurring opinion, Hoy A.C.J.O. agreed in the result but concluded that the majority's findings regarding the pith and substance of the *GGPPA* were overly broad, preferring instead to describe it as "establishing minimum national greenhouse gas emissions pricing standards to reduce greenhouse gas emissions",¹²⁷ further limiting what those "minimum national standards" could relate to.

In both *GHG References*, the ease with which the two majorities were able to recalibrate the character of the *GGPPA* and the asserted matter of national concern into something more "constitutionally palatable"¹²⁸ is interesting and highlights the concerns expressed above regarding the malleability of the pith and substance

¹²¹ *Saskatchewan GHG Reference*, *supra* note 8 at para 127.

¹²² *Saskatchewan GHG Reference*, *supra* note 8 at paras 10 and 134.

¹²³ *Saskatchewan GHG Reference*, *supra* note 8 at para 139.

¹²⁴ *Saskatchewan GHG Reference*, *supra* note 8 at paras 139 and 164.

¹²⁵ *Saskatchewan GHG Reference*, *supra* note 8 at para 125.

¹²⁶ *Ontario GHG Reference*, *supra* note 9 at paras 77 and 124.

¹²⁷ *Ontario GHG Reference*, *supra* note 9 at para 166.

¹²⁸ Brouillet, *supra* note 79 at 602.

doctrine.¹²⁹ While such changes must be supportable on the record, this is an example of the flexibility that the pith and substance doctrine gives judges to reason their way to a preferred outcome. In a POGG analysis, this flexibility raises heightened concerns. Unlike a traditional division of powers analysis in which the pith and substance inquiry must confront memorialized heads of power given to us in the *Constitution Act, 1867*, the pith and substance analysis in the national concern branch is not as restrained because it frequently relates to new matters. It is easy to see how the malleability of this process could effectively lead to essentially pre-determined outcomes based on policy preferences.

Granted, Parliament (and the deciding court) must still navigate the *Crown Zellerbach* test and affirmatively answer the following questions:

- (i) that the matter has a "singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern"; and
- (ii) that the scale of the impact of the new matter and law on existing provincial jurisdiction can be reconciled with the constitutional distribution of legislative power.¹³⁰

But the test is more easily satisfied if its inputs can be redefined or read down to sidestep any jurisdictional concerns. Again, this is not surprising given that the test is a recasting of the pith and substance, ancillary powers, and double aspect doctrines, both of which invite discretionary and values-based reasoning. It is perhaps this issue that motivated Huscroft J.A.'s dissent in the *Ontario GHG Reference*, where he criticized the approaches taken by those Justices in Ontario and Saskatchewan that upheld the validity of the law:

In Saskatchewan, Richards C.J.S. characterizes the Act in a manner that dictates the outcome of the POGG analysis. He proffers a highly specific characterization of the law, concluding that its pith and substance "is best seen as being the establishment of minimum national standards of price stringency for GHG emissions:" para. 125. To a similar effect, the Associate Chief Justice in this case concludes that the Act's pith and substance is "establishing minimum national greenhouse gas emissions pricing standards to reduce greenhouse gas emissions." These are both descriptions of the means or technique Parliament has chosen to give effect to the Act's ultimate purpose, rather than a characterization of the Act's dominant feature.

The Chief Justice's decision in this case avoids this problem but introduces a different one. With respect, to say that the essential character of the Act is to establish "minimum national

¹²⁹ *Alberta GHG Reference*, *supra* note 10 at paras 200 and 826.

¹³⁰ *Crown Zellerbach*, *supra* note 113 at para 33; *Saskatchewan GHG Reference*, *supra* note 8 at para 117; *Ontario GHG Reference*, *supra* note 9 at para 102.

standards to reduce greenhouse gas emissions" is to leave unanswered the key question for classification purposes: minimum standards of what? This characterization leaves "standards" free-floating. What is it, exactly, that the Act regulates? The problem is all the more acute given that we are concerned not with whether the law fits under one of the existing federal powers enumerated in s. 91, but, instead, the more normative question of whether it fits under a new federal subject matter that ought to be recognized for purposes of the POGG power.

...

The majority of the Court of Appeal for Saskatchewan addresses this problem by, in essence, constitutionalizing the Act as the matter of national concern under the POGG power. By definition, the POGG matter the court recognized is contained; it goes no further than the Act itself, and so the impact on provincial jurisdiction is ascertainable and limited. But the POGG power is not designed to constitutionalize particular legislation; it is designed to afford Parliament the authority to legislate in regard to a matter of national concern. On the Court of Appeal for Saskatchewan's approach, Parliament's ability to legislate under the POGG power begins and ends with the carbon pricing scheme the current legislation supports.¹³¹

The concern is evident: if the POGG analysis asks judges to identify the pith and substance of a law and thereby create a new head of federal power, there will be very few "new" laws under the national concern branch of the POGG power that cannot be upheld by progressively or creatively refining the matter to something that is coextensive with what the law does. Such an approach conflates the two steps of the pith and substance test¹³² and would justify federal action not because the matter has become a national concern, but because the provinces are unable to enact legislation that achieves the same purpose in a similar "national" manner.¹³³ Though consistent in some ways with the Supreme Court's interpretation of Parliament's trade and commerce power in the *Pan-Canadian Securities Reference*,¹³⁴ this approach effectively reduces the *Crown Zellerbach* test to an unstated measure of provincial inability. On that basis, the federal government can, for example, regulate almost anything subject to provincial jurisdiction if the legislative means is crafted to establish common national standards. While the *Crown Zellerbach* test has drifted in this direction,¹³⁵ it cannot be consistent with federalism or the purpose of POGG power to give the federal government this much regulatory authority over matters of

¹³¹ *Ontario GHG Reference*, *supra* note 9 at paras 211-12, 234.

¹³² *Ontario GHG Reference*, *supra* note 9 at paras 224-225.

¹³³ See, for example, the dissenting opinion in the *Saskatchewan GHG Reference*, *supra* note 8 at para 341: "There will always be a 'national aspect' of a matter that the Provinces are unable to enact using their Provincial law-making powers." See also: Jean Leclair, "The Elusive Quest for the Quintessential 'National Interest'" (2005) 38:2 UBC L Rev 353 at 363, in which the author comments on the meaning of "indivisibility" in the *Crown Zellerbach* test: 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...."

¹³⁴ See: *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48 at para 101.

¹³⁵ Peter W Hogg, "Subsidiarity and the Division of Powers in Canada" (1993) 3 NJCL 341 at 349.

exclusive provincial jurisdiction. In fact, when legislation is characterized under the national concern branch in the manner that the Ontario and Saskatchewan majorities accepted, the risks to provincial jurisdiction are at least as acute as they would be if the matter itself had been described in overly broad terms.

Viewed this way, Saskatchewan's federalism argument takes on new meaning: federalism should not let Parliament intrude on provincial jurisdiction over broad swathes of local life¹³⁶ by simply pointing to provincial inability, defining a new matter to be the means by which Parliament (and Parliament alone) has chosen to address this inability, and declaring it to therefore be a national concern. When those concerns exist on a field as broad and pervasive as the environment, the ability of Parliament to gradually alter the balance of powers is particularly concerning because its ability to act increases as the scope of the underlying subject broadens.

In her concurring opinion, Hoy A.C.J.O. attempted to pre-empt Huscroft J.A.'s concerns with a doctrinal justification, observing that, while the "Supreme Court has cautioned that when determining the pith and substance of a law for the purpose of determining which order of government can legislate, care should be taken not to confuse the purpose of a law with the means chosen to achieve it",¹³⁷ there is nothing in these cases that says determining the pith and substance of a law cannot include any reference to its means.¹³⁸ But this does not actually address the risk to the division of powers posed by the Saskatchewan and Ontario majority approaches.

v. ***The Alberta GHG Reference: The GGPPA is unconstitutional***

The Alberta Court of Appeal heard the *Alberta GHG Reference* in December 2020, nearly six months after Ontario delivered its opinion affirming the validity of the *GGPPA*. However, Canada's success in Saskatchewan

¹³⁶ *Saskatchewan GHG Reference*, *supra* note 8 at para 128. See also: *Alberta GHG Reference*, *supra* note 10 at paras 831-32.

¹³⁷ *Ontario GHG Reference*, *supra* note 9 at para 178, citing *Ward v Canada (Attorney General)*, 2002 SCC 17 at para 25; *Quebec (Attorney General) v Canada (Attorney General)*, 2015 SCC 14 at para 29; *Goodwin v British Columbia*, 2015 SCC 46 at para 24.

¹³⁸ *Ontario GHG Reference*, *supra* note 9 at para 179.

and Ontario did not stop it from further refining its descriptions of the pith and substance of the *GGPPA* and the matter of national concern.¹³⁹

Regarding the pith and substance of the legislation, Canada argued that the pith and substance of the *GGPPA* is "the establishment of minimum national standards of stringency for GHG emissions pricing to reduce Canada's nationwide GHG emissions."¹⁴⁰ As for the matter of national concern, this had changed to "establishing minimum national standards that are integral to reducing Canada's nationwide GHG emissions."¹⁴¹ Though the two are similar, the slight difference appears intended to give Parliament room under a broader head of power to pursue different strategies for future emissions reduction action beyond establishing minimum pricing standards.

At the outset of its analysis, the majority of the Alberta Court of Appeal emphasized that in a standard division of powers analysis, it is important to maintain a separation between the characterization of the law and its classification under a head of power. The pith and substance of a law must be determined "without regard to the head(s) of legislative competence, which are to be looked at only once the 'pith and substance' of the impugned law is determined. Unless the two steps are kept distinct there is a danger that whole exercise will become blurred and overly oriented towards results."¹⁴² This position is uncontroversial when dealing with the allocation of powers under 91 and 92, but when the exercise is carried out as part of a POGG analysis, the majority held that the two steps collapse into one: the matter of the law necessarily becomes the matter of national concern; the two are coextensive.¹⁴³

The majority doesn't cite any authority for this proposition, nor does it explain its reasons, stating only that "there is no justification for classifying the "matter" said to be of national concern differently than the "matter" of the

¹³⁹ *Alberta GHG Reference*, *supra* note 10 at paras 822-25.

¹⁴⁰ *Alberta GHG Reference*, *supra* note 10 at para 27.

¹⁴¹ *Alberta GHG Reference*, *supra* note 10 at para 27.

¹⁴² *Alberta GHG Reference*, *supra* note 10 at para 152, citing *Ontario (Attorney General) v Chatterjee*, 2009 SCC 19 at para 16.

¹⁴³ *Alberta GHG Reference*, *supra* note 10 at para 156.

legislation."¹⁴⁴ Though it breaks with Supreme Court precedent in some respects,¹⁴⁵ this view has some practical benefits: it limits the scope of new matters recognized to be of national concern to what is actually presented to the court; the inquiry into effects on provincial jurisdiction will therefore not be hypothetical, but focused and specific. Importantly, while this approach at first appears to compound Huscroft J.A.'s concerns with means-based classification and the conflation of the two steps of the pith and substance inquiry, the majority also determined (in contrast to Hoy A.C.J.O.) that it is inappropriate to define the pith and substance of a law as the means Parliament has chosen to give effect to its purpose.¹⁴⁶

Because the pith and substance of a law is coextensive with its associated matter of national concern and neither can be the particular legislative means that Parliament has chosen to achieve its desired end, none of the matters that the Saskatchewan majority, the Ontario majority, or the Ontario concurrence identified can be correct. Indeed, it is likely that, if a court cannot define a matter to be the uniquely federal means of the associated legislation, the only appropriate characterization of the *GGPPA* will be broader than that identified in either majority opinion. More generally, narrowing the universe of possible matters in this way will make it more difficult for federal legislation to fall under the national concern branch of the POGG power. Rather than being a law that simply *operates* in a manner that exceeds provincial ability, the law must truly be in relation to a *subject* that was but is no longer local in nature. In addition, Wakeling J. suggests in his concurring opinion that defining a matter of national concern as a particular legislative means can hide the fact that the "new" matter is, in fact, an amalgamation of a number of heads of power—some of which may be provincial—that lacks the necessary "singleness, distinctiveness, and indivisibility" that is required under POGG.¹⁴⁷

¹⁴⁴ *Alberta GHG Reference*, *supra* note 10 at para 157.

¹⁴⁵ For example: *Munro v Canada (National Capital Commission)*, [1966] SCR 663, 57 DLR (2d) 753.

¹⁴⁶ *Alberta GHG Reference*, *supra* note 10 at para 204, citing the same cases that Hoy ACJO relied upon in her concurring reasons, *supra* note 137. See also: *Alberta GHG Reference* at para 208: "In deciding division of powers disputes, it is not the courts' role to try to find a way to wedge federal legislation into the national concern doctrine."

¹⁴⁷ *Alberta GHG Reference*, *supra* note 10 at paras 390 and 831. See also: WR Lederman, "Continuing Constitutional Dilemmas: The Supreme Court and the Federal Anti-Inflation Act of 1975" (1977), 84 Queen's Q 90 at 96 reprinted in W Lederman, *Continuing Canadian Constitutional Dilemmas* 311 (1981), cited in *Alberta GHG Reference*, *supra* note 10 at para 843.

The majority then moved on to evaluate the national concern branch itself and the circumstances in which it is appropriate to recognize a new head of federal power, whether because it is new or because it has transformed from a matter of local concern to one of national concern. According to the majority, Beetz J's dissenting comments in the *Anti-Inflation Reference* are instructive in this regard:

In my view, the incorporation of companies for objects other than provincial, the regulation and control of aeronautics and of radio, the development, conservation and improvement of the National Capital Region are clear instances of **distinct subject matters which do not fall within any of the enumerated heads of s. 92 and which, by nature, are of national concern**.¹⁴⁸

The majority interpreted this statement to distinguish between the provinces' specific enumerated powers (sections 92(2) – 92(15), 92A and 109¹⁴⁹) and their residual power under section 92(16): the only matters that can be transformed to fall under the national concern branch of POGG are those that would only ever have been brought into provincial jurisdiction under the provincial residuary power.¹⁵⁰ For all other matters outlined in section 92, they should remain exclusive to the provinces.

Beyond the apparent distinction drawn in the *Anti-Inflation Reference*, what else could have motivated this novel approach to the national concern branch of POGG? Though not mentioned expressly in the majority's reasons, one of the implications of Lord Watson's judgment in the *Local Prohibition Reference* is that neither the pith and substance nor the double aspect doctrine may support legislation under POGG: "...federal laws enacted under POGG [cannot] 'encroach upon' or 'incidentally affect' matters under section 92."¹⁵¹ The majority's reasons, perhaps unintentionally, partially track this line of thinking and, to the extent that those same doctrines appear implicitly in the *Crown Zellerbach* test, it may, in their view, be a flawed test. Relatedly—and while we can only speculate—it may be the majority's view that giving the federal government exclusive authority over matters under POGG that the provinces also have exclusive authority over increases the potential for jurisdictional conflict, chipping away at provincial power in a manner that is inconsistent with the balance of

¹⁴⁸ *Alberta GHG Reference*, *supra* note 10 at para 174, citing *Anti-Inflation Reference*, *supra* note 52 at 457.

¹⁴⁹ *Alberta GHG Reference*, *supra* note 10 at para 187.

¹⁵⁰ *Alberta GHG Reference*, *supra* note 10 at paras 175, 178 and 186.

¹⁵¹ Monahan & Shaw, *supra* note 53 at 249.

federalism. Restricting the national concern branch to matters that fall within the provinces' general residuary power is therefore a compromise of sorts.

In many ways, the concerns that underlie this approach are similar to those that La Forest J. acknowledged in *Oldman River*, as well as those that were expressed by Saskatchewan in the *Saskatchewan GHG Reference* and those that were reflected in Wakeling J's concurring opinion, where he wrote that "[t]he magnitude of the federal expansion and provincial contraction of lawmaking authority upsets the balance between the lawmaking authority of Parliament and the provincial legislatures to such a degree that it is irreconcilable with the fundamental federalism principle embedded in the *Constitution Act, 1867*."¹⁵² Moreover, permitting the federal government to legislate in this way under POGG gives it the freedom to pass legislation that effectively controls core elements of exclusive provincial jurisdiction. At a much more abstract level, this tension highlights the inability of contemporary Canadian federalism to satisfactorily accommodate the emergence of the environment in the division of powers debate.

Notwithstanding the above, it is clear from the majority's reasoning that, however you approach the test for national concern under POGG, the carefully tailored descriptions of the *GGPPA*'s pith and substance in the Saskatchewan and Ontario *GHG References* are improper and do not accurately reflect the actual matter of the *GGPPA*, which, the majority concludes, is "at a minimum, the "regulation of GHG emissions."¹⁵³ A matter this broad cuts across a number of provincial heads of exclusive power and cannot, on the majority's reading of the national concern branch, transform into a new matter of national concern. However, it is not clear why the majority sought to change the national concern test. Its pith and substance analysis would have likely helped it arrive at the same conclusion on an ordinary application of the *Crown Zellerbach* test:¹⁵⁴ the true nature of the *GGPPA* is overly broad, intrudes too deeply into provincial jurisdiction, and does not necessarily lie beyond the

¹⁵² *Alberta GHG Reference*, *supra* note 10 at paras 831-832.

¹⁵³ *Alberta GHG Reference*, *supra* note 10 at paras 211 and 256.

¹⁵⁴ *Alberta GHG Reference*, *supra* note 10 at paras 287-337.

ability of the provinces. Indeed, no Court was ready to accept that Parliament could have jurisdiction over as broad a matter as "GHG emissions" or their cumulative effects.¹⁵⁵

vi. Conclusions

It seems fairly clear that the POGG power and, in particular, the flexibility that the national concern branch appears to provide, will generally tend to consolidate legislative and regulatory power with the federal government. While POGG serves an important role in the constitutional order, we should be careful that our preference for flexibility and cooperative federalism does not open a back door to expanded federal jurisdiction on the basis of national concern. Whether the apparent power of the national concern doctrine is consistent with federalism or is something that must be restrained through a recalibration of the *Crown Zellerbach* test is a question that will need to be answered by the Supreme Court of Canada. In our view, however, there is a strong argument that Canadian federalism and the application of the POGG power, as currently understood, are incapable of preserving the degree of provincial autonomy originally promised in the *Constitution Act, 1867*.

B. Much Ado about a Pipeline: The *Pipeline Reference* and *BC v Alberta*

To better understand the place that the *Pipeline Reference* and *BC v Alberta* occupy in the federalism debate, it is important to appreciate the social and political context that led to their appearance before the courts. Just as the federal-provincial disputes of the 1970s and 80s were shaped by divergent federal and provincial interests, these cases were as well, with the added wrinkle that much of the conflict stemmed from disagreements that existed at a provincial level concerning the expansion of the Trans Mountain Pipeline (the "**TMX Project**"). This is a departure from the historical federalism debate. No longer is the jurisdictional balance informed by competing federal and provincial interests; divergent provincial interests—primarily concerning the environment—are now driving some of the discourse.

¹⁵⁵ *Saskatchewan GHG Reference*, *supra* note 8 at paras 128 – 131, 136, 138; *Ontario GHG Reference*, *supra* note 9 at para 74.

On December 16, 2013, Trans Mountain Pipeline ULC ("**Trans Mountain**"), a subsidiary of Kinder Morgan Cochin ULC ("**Kinder Morgan**"), applied to the NEB for permission to build and operate the TMX Project, an interprovincial pipeline system designed to transport heavy oil from Alberta to port facilities in British Columbia for export. As described, the TMX Project will increase the overall capacity of the Trans Mountain Pipeline System from 300,000 barrels per day to 890,000 barrels per day. When Trans Mountain initially applied to the NEB, the expansion was justified on the basis of market support and projected production growth in the Western Canadian Sedimentary Basin. Since then, however, its importance to Canada's oil industry has only increased, with the oil price collapse of 2015 being exacerbated by the dynamics of the North American crude oil market and the growing insufficiency of pipeline capacity. In fact, by late 2018, Alberta produced more crude oil than it could export by existing rail or pipeline. This lack of take-away capacity lowered Canadian oil prices, especially heavy crude prices, below world prices, leading to losses both for Canadian producers and the Alberta government, which holds royalty rights over the bulk of the province's mineral rights.¹⁵⁶ The additional capacity the TMX Project promised was seen as an important step in the industry's—and Alberta's—economic recovery.

On May 19, 2016, the NEB recommended that the federal Governor in Council (the "**GIC**") approve the TMX Project. On November 29, 2016, the GIC approved the application and directed the NEB to issue a Certificate of Public Convenience and Necessity.¹⁵⁷ The GIC's approval of the TMX Project sparked significant opposition in British Columbia, primarily due to the environmental risks and its impact on local Indigenous groups. Nine intervenors applied to the Federal Court of Appeal for leave to appeal the GIC's decision (the "**Judicial Review**"). With a provincial election five months away, the provincial New Democratic Party and the provincial

¹⁵⁶ Geoffrey Morgan, "Ready and prepared to turn off the taps': Notley issues stark warning to BC as pipeline fight escalates" *Financial Post* (16 May 2018), online: <<https://business.financialpost.com/news/ready-and-prepared-to-turn-off-the-taps-notley-issues-stark-warning-to-b-c-as-pipeline-fight-escalates>>.

¹⁵⁷ *To Trans Mountain Pipeline ULC for the Trans Mountain Expansion Project: (i) Order — Certificate of Public Convenience and Necessity OC-001-064; (ii) Amending Order in Council AO-002-OC-49; and (iii) Amending Order in Council AO-003-OC-2*, PC 2016-1069 (2016) C Gaz I vol 150, n 50 (10 December 2016).

Green Party sought to capitalize on this opposition, with the NDP declaring that, if elected, it would "use every tool in [the] toolbox to stop the project from going ahead."¹⁵⁸

After the election, the NDP, with the support of the Green Party, formed an NDP minority government and committed to "[i]mmediately employ every tool available to the new government to stop the expansion of the [TMX Project]...and the transportation of raw bitumen through [British Columbia]."¹⁵⁹ In January 2018, the government proposed to enact legislation (ultimately, the "**Proposed Amendments**") that would restrict the transportation of any additional diluted bitumen through British Columbia.¹⁶⁰ Alberta responded with a short-lived boycott of British Columbian wines.¹⁶¹

On April 8, 2018, in response to British Columbia's public opposition to the TMX Project and the legal uncertainty it created, Kinder Morgan announced that it was suspending all non-essential activities and related spending on the TMX Project.¹⁶² Eight days later, the Government of Alberta introduced Bill 12: *Preserving Canada's Economic Prosperity Act*¹⁶³ ("**Bill 12**"). The news release that accompanied the introduction of Bill 12 specifically pointed to "[r]oadblocks put in place by the British Columbia government" as one of the reasons for the Bill.¹⁶⁴

On April 26, 2018, the Government of British Columbia initiated the *Pipeline Reference* to determine whether it had the constitutional authority to enact the Proposed Amendments and thereby "control substances coming

¹⁵⁸ British Columbia New Democratic Party, "Working for You: Our Commitment to Build a Better BC", online: <<https://action.bcndp.ca/page/-/bcndp/docs/BC-NDP-Platform-2017.pdf>> at 62.

¹⁵⁹ Richard Zussman & Karin Larsen, "NDP-Green alliance to focus on electoral reform, stopping Kinder Morgan and banning big money" *CBC* (3 May 2017), online: <<https://www.cbc.ca/news/canada/british-columbia/ndp-green-alliance-to-focus-on-electoral-reform-stopping-kinder-morgan-and-banning-big-money-1.4138290>>.

¹⁶⁰ "BC creates more uncertainty for Trans Mountain with bitumen restriction" *CBC* (30 January 2018), online: <<https://www.cbc.ca/news/canada/british-columbia/b-c-creates-uncertainty-for-transmountain-with-bitumen-restriction-1.4510839>>.

¹⁶¹ Justin McElroy, "Alberta ends B.C. wine boycott after BC premier announces court action on pipeline standoff" *CBC* (22 February 2018), online: <<https://www.cbc.ca/news/canada/british-columbia/wine-boycott-ends-1.4547754>>.

¹⁶² TransMountain, "Kinder Morgan Canada Limited Suspends Non-Essential Spending on Trans Mountain Expansion Project" (8 April 2018), online: <<https://www.transmountain.com/news/2018/kinder-morgan-canada-limited-suspends-non-essential-spending-on-trans-mountain-expansion-project>>.

¹⁶³ *Preserving Canada's Economic Prosperity Act*, SA, P.21.5 [**Bill 12**].

¹⁶⁴ Government of Alberta, "Preserving Canada's economic prosperity", online: <<https://www.alberta.ca/release.cfm?xID=5577521DB8331-DC67-2CA2-BA443B43F804E3A4>>.

into the province"¹⁶⁵ despite the fact that the Proposed Amendments would affect a federally regulated transportation undertaking. Shortly after, Kinder Morgan agreed to sell the existing Trans Mountain pipeline system and the Certificate approving the TMX Project to the federal government.

On August 30, 2018, the Federal Court of Appeal quashed the Order in Council approving the TMX Project.¹⁶⁶ The Court then directed the GIC to reconsider the TMX Project to address the shortcomings it identified in its reasons. In response, the GIC directed the NEB to reconsider its environmental assessment of the TMX Project and provide an updated report and recommendation, which it did, conducting an expedited hearing on the impact of TMX Project-related marine shipping on the environment. After considering the NEB's recommendation and completing its own consultation process, the GIC approved the TMX Project for a second time.

The saga of the TMX Project has been prolonged and acrimonious. Ordinarily it would be non-controversial that, the *Constitution Act, 1867* places the decision as to whether an interprovincial pipeline project should go ahead or not solely with the federal government. However, the entrenched opposition to the TMX Project and British Columbia's strategy of enacting legislation that would allow it to control the carriage within the province of certain substances on environmental grounds exposed the frailty of the division of powers and the consequences of the legal uncertainty that flexible federalism has introduced to the constitutional order. What is the use of federalism if provinces and other actors can sow enough legal and regulatory uncertainty to make a major project, already approved by the federal government acting within its authority, untenable? And what is the value of confederation if the actions of one province can have such profound consequences for the economies of others and the country as a whole?

i. The Pipeline Reference

As alluded to above, in the *Pipeline Reference*, the Government of British Columbia asked its Court of Appeal to provide an opinion on whether it could enact certain Proposed Amendments to the *Environmental*

¹⁶⁵ Lauren Boothby, "BC government takes pipeline question to court" *VancouverCourier* (26 April 2018), online: <<https://www.vancourier.com/news/b-c-government-takes-pipeline-question-to-court-1.23282150>>.

¹⁶⁶ *Tsleil-Waututh v Canada (Attorney General)*, 2018 FCA 153 at para 774.

Management Act (the "**EMA**") that would limit the ability of persons to transport hazardous substances identified in a schedule without a permit.¹⁶⁷ Importantly, the only substance listed in the schedule was heavy oil (defined as crude petroleum products or product blends that are only produced in Alberta and Saskatchewan) and would only apply to increased volumes of heavy oil coming into British Columbia via interprovincial railways or pipelines.¹⁶⁸ As part of the permitting scheme, directors would have the discretion to impose conditions on, cancel, or suspend such permits.¹⁶⁹

Regarding the constitutionality of the Proposed Amendments, British Columbia asked its Court of Appeal three questions:

1. Is it within the legislative authority of the Legislature of British Columbia to enact legislation substantially in the form [contemplated in the Proposed Amendments]? (the "**Validity Question**")
2. If the answer to question 1 is yes, would the [Proposed Amendments] be applicable to hazardous substances brought into British Columbia by means of interprovincial undertakings? (the "**Applicability Question**")
3. If the answers to questions 1 and 2 are yes, would existing federal legislation render all or part of the [Proposed Amendments] inoperative? (the "**Operability Question**")

The Validity Question primarily engaged considerations related to the pith and substance doctrine, the Applicability Doctrine focused on interjurisdictional immunity, and the Operability Question was concerned with federal paramountcy. In the result, the Court of Appeal only had to deal with the Validity Question.

a. The British Columbia Court of Appeal's reasons

The British Columbia Court of Appeal heard the *Pipeline Reference* in March 2019. In its submissions, British Columbia asked the Court to uphold the Proposed Amendments and grant both levels of government "ample

¹⁶⁷ OIC, *supra* note 157.

¹⁶⁸ *Pipeline Reference*, *supra* note 11, Schedule I, s 22.3(2).

¹⁶⁹ *Pipeline Reference*, *supra* note 11, Schedule I, s 22.5.

means" to protect environmental values central to the health and livelihood of local communities. Canada, on the other hand, asked the Court to find that the Proposed Amendments were unconstitutional, as their pith and substance was the regulation of the interprovincial transportation of oil, an area reserved exclusively to the federal government.

On the Validity Question, British Columbia took the position that the Proposed Amendments were valid under section 92(13) (property and civil rights in the province) because they were, in pith and substance, intended to protect the environment. For similar reasons, British Columbia also argued that there was a double aspect to the accidental release of harmful substances from federal transportation undertakings. In the alternative, British Columbia argued that if the Proposed Amendments were *ultra vires*, they were rationally and functionally related to the *EMA* and should therefore be upheld under the ancillary powers doctrine: the *EMA* already contained a permitting requirement for the *intentional* release of deleterious substances into the environment; the Proposed Amendments would simply add a permitting process for the *accidental* release of hazardous substances within the province. Canada took the position that the Proposed Amendments were unconstitutional because they attempted to do indirectly what British Columbia could not do directly, that is, frustrate the construction and operation of the TMX Project.

While the ultimate disposition appears obvious in retrospect, none of the arguments that British Columbia advanced in support of the Proposed Amendments were objectively unreasonable. In fact, given the evolution of constitutional flexibility, the role of subsidiarity—a doctrine that allocates legislative competence to the level of government closest to a particular matter¹⁷⁰—in guiding a court's reasoning, the importance of the environment, the possibility of gaps in any given regulatory scheme, and the way that some courts have recently applied the doctrine of cooperative federalism,¹⁷¹ the constitutional interpretation that informed these arguments was certainly arguable.

¹⁷⁰ *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40 at para 3.

¹⁷¹ *Coastal First Nations v British Columbia*, 2016 BCSC 34.

On May 24, 2019, the British Columbia Court of Appeal unanimously concluded that the Proposed Amendments were unconstitutional because they were, in pith and substance, aimed at the regulation of a federal undertaking intended to carry heavy oil from Alberta to tidewater. Because the Court disposed of the *Pipeline Reference* on the Validity Question, it was unnecessary to answer the Applicability and Operability Questions.

The British Columbia Court of Appeal largely sidestepped the doctrinal questions associated with the role of the environment in the division of powers, ring-fencing the scope of its judgment to a purely jurisdictional question: "This reference is not about whether [the TMX Project] should be regulated to minimize the risks it poses to the environment – that is a given. Rather, this reference asks which level or levels of government may do so".¹⁷² While the Court's reasons clarify that our current constitutional toolbox will not go so far as to restructure the division of powers in the name of environmental protection, they declined to draw any useful bright lines and their decision to not address the Applicability and Operability Questions leaves some concerning gaps.

In the course of its reasons, the Court discussed the existing legislative framework that regulates the interprovincial transportation of petroleum in Canada. From its review, it is clear that a robust regulatory framework was in place to mitigate the concerns that British Columbia argued the Proposed Amendments were intended to address.

The Agreed Statement of Facts described the NEB's (now the Canada Energy Regulator (the "**CER**")) ability to protect the environment and public safety respecting pipelines. For example, all interprovincial transmission pipelines operating in Canada are required to have an emergency management program, which mandates plans for the anticipation, prevention, management, and mitigation of emergencies. To this end, NEB Orders MO-006-2016 and MO-002-2017 require that CER-regulated companies are also required to develop and post emergency management plans and program materials on their websites.¹⁷³

¹⁷² *Pipeline Reference*, *supra* note 11 at para 1.

¹⁷³ National Energy Board, Order MO-006-2016 and Order MO-002-2017.

In June 2016, the *Pipeline Safety Act*¹⁷⁴ amended the *National Energy Board Act*¹⁷⁵ to require that pipeline companies maintain a minimum level of "readily available" financial resources to cover the costs of unintended or uncontrolled releases. These requirements are reflected in the new *Canada Energy Regulator Act*.¹⁷⁶ Further, in the event of a spill or after the retirement of infrastructure, the CER Remediation Process Guide¹⁷⁷ requires operators to comply with a strict regulatory process designed to ensure effective clean-up and remediation. If necessary, the NEB (and now the CER) has the authority to take control of incident response and clean-up and order companies to reimburse governments, third parties and or individuals for clean-up costs.

Other regulations promulgated under the *NEBA* and continued under the *CERA*, such as the *Onshore Pipeline Regulations*,¹⁷⁸ require that companies design safety management, environmental protection, emergency management, third-party crossing, public awareness, and integrity management programs, which are subject to review and oversight by the regulatory authority.

In light of the above, the permitting requirement that British Columbia sought to introduce with the Proposed Amendments was largely superfluous to the existing regulatory scheme and it was unlikely that, short of preventing the unpermitted carriage of incremental volumes of heavy oil into British Columbia, the Proposed Amendments would have provided any additional protection to the environment. What they would have done, however, was create a provincial veto right over the operation of the TMX Project, impairing the ability of the federal government to act within its jurisdiction.

Applying the pith and substance doctrine, the Court held that although the Proposed Amendments were framed as a law of general application, their "sole *effect* is, to set conditions for, and if necessary prohibit, the possession and control of increased volumes of heavy oil in the Province."¹⁷⁹ Rightly or wrongly, the Court of Appeal was

¹⁷⁴ *Pipeline Safety Act*, SC 2015, c 21 [*PSA*].

¹⁷⁵ *National Energy Board Act*, RSC 1985, c N-7 (repealed) [*NEBA*].

¹⁷⁶ *Canada Energy Regulator Act*, SC 2019, c 28, s 10 [*CERA*].

¹⁷⁷ Canada Energy Regulator, "Remediation Process Guide", online: <<https://www.cer-rec.gc.ca/sftnvrnmnt/nvrnmnt/rmdtnprcssgd/index-eng.html>>.

¹⁷⁸ *Onshore Pipeline Regulations*, SOR/99-294.

¹⁷⁹ *Pipeline Reference*, *supra* note 11 at para 94.

careful not to focus on the Government of British Columbia's motives. While the Court was reluctant to characterize the Proposed Amendments as "colourable", it found that "[t]he 'default' position of the law is to prohibit the possession of all heavy oil in the Province above the Substance Threshold – an immediate and existential threat to a federal undertaking."¹⁸⁰

In considering the question of when valid provincial environmental legislation crosses the line to impermissibly regulate a federal undertaking, the Court relied on the 1998 Supreme Court of Canada *Bell Canada* trilogy¹⁸¹—a series of cases that considered interjurisdictional immunity—and determined that the Proposed Amendments threatened to usurp the role of the NEB and thereby impair an exclusive competence of the federal government. As a result, the Proposed Amendments were not, in pith and substance, concerned with local matters within the jurisdiction of the province, but with Parliament's exclusive jurisdiction in respect of federal undertakings.¹⁸²

Given the Court's reliance on the language of both pith and substance and interjurisdictional immunity, it is difficult to identify the interpretive approach it found the most compelling. However, it is interesting to consider whether the Court's treatment of the Proposed Amendments would have been any different had the federal framework not been as robust as it was. Would it have so readily recognized that the regulation and operation of interprovincial undertakings was intrinsic to its jurisdiction?¹⁸³ In such circumstances, it is arguable that the principles giving rise to double aspect or ancillary powers could have pushed the analysis in a different direction. In fact, on the basis of cooperative federalism, it was not unreasonable for British Columbia to argue that the Proposed Amendments supplemented the federal government's efforts to protect the environment and any conflicts could have been resolved between the two levels of government.

b. Appeal to the Supreme Court

¹⁸⁰ *Pipeline Reference*, *supra* note 11 at para 97.

¹⁸¹ *Pipeline Reference*, *supra* note 11 at para 101.

¹⁸² *Pipeline Reference*, *supra* note 11 at para 105.

¹⁸³ *Pipeline Reference*, *supra* note 11 at para 100.

British Columbia appealed the Court of Appeal's unanimous rejection of the Proposed Amendments to the Supreme Court of Canada. In addition to British Columbia and Canada, 20 parties intervened in the proceedings, including the attorneys general of Ontario, Quebec, Saskatchewan, Alberta, industry participants, environmental groups, Indigenous groups and municipalities.

British Columbia argued that the Court of Appeal did not address the constitutional doctrines used to coordinate between federal and provincial jurisdiction, which, if properly applied, would have revealed that there is nothing about the Proposed Amendments that would impair the core of federal jurisdiction or that causes a constitutional conflict with existing federal law. Canada responded by reiterating the arguments it raised before the Court of Appeal, supplemented by that Court's reasons. The intervenors raised various constitutional arguments, including paramouncy, interjurisdictional immunity, cooperative federalism, and subsidiarity. Ecojustice argued that environmental protection is a quasi-constitutional matter that should be elevated to an unwritten constitutional principle that would inform our understanding of the division of powers. This argument appeared to have no traction with the Court.

Both the Haida Nation and Little Shushwap Lake Indian Band submitted that the questions British Columbia asked in the *Pipeline Reference* ignored the existence of other jurisdictional actors; namely, the Indigenous Nations within Canada, which represent independent jurisdictions and under which Indigenous laws respecting the use of Indigenous territories can be implemented and enforced. These parties noted that while this would not be the appropriate case to determine these issues, the Court should explicitly reserve those questions regarding Indigenous lawmaking. The authors note that the question of how Indigenous self-government interacts with federalism is one that the courts will eventually need to grapple with. Absent clear judicial guidance, a new competitive dynamic of federalism will start to shape the constitutional discourse: Indigenous federalism. In fact, it probably already has.

Despite British Columbia's arguments, the Court's questions at the hearing focused primarily on the pith and substance of the Proposed Amendments, with little discussion of paramouncy or interjurisdictional immunity.

Thirty minutes after the hearing ended, the Court returned to dismiss the appeal for the reasons of the British Columbia Court of Appeal. While extraordinary, the promptness with which the Court issued its judgment was consistent with comments from several of the Justices that the mere existence of unresolved (and, ultimately, improper) jurisdictional questions posed sufficient regulatory risk to kill the TMX Project and others like it. The willingness of the Court to address this risk by dismissing the reference from the Bench may be a message that we're nearing the limits of cooperative federalism and that there is not much flexibility for the provinces to take on matters allocated to the federal government. While the creep of cooperative federalism and subsidiarity has blurred many jurisdictional lines and injected significant uncertainty into issues that were historically more clear-cut, the Court refused British Columbia and Ecojustice's invitations to chip away at the seemingly well-established federal jurisdiction over inter-provincial undertakings.

ii. British Columbia v Alberta

a. Round 1: The first lawsuit

Bill 12 received royal assent on May 18, 2018; however, Bill 12 remained unproclaimed—it had no legal effect. Bill 12 legislated a licensing requirement on the export from Alberta of any quantity of natural gas, crude oil or refined fuels.¹⁸⁴ The Minister of Energy could issue a licence only if it was in the public interest of Alberta to do so having regard to a list of factors, including whether sufficient pipeline capacity existed to maximize the return on crude oil and diluted bitumen produced in Alberta, whether adequate supplies and reserves of natural gas, crude oil and refined fuels will be available for Alberta's present and future needs, and any other relevant considerations.¹⁸⁵ Bill 12 was only authorizing legislation. Its licensing scheme only applied "where the Minister by order requires a person or class of persons to obtain a license."¹⁸⁶ In making that order, the Minister was to consider the same factors set out above in deciding whether to grant a licence.¹⁸⁷

¹⁸⁴ Bill 12, *supra* note 163, s 2.

¹⁸⁵ Bill 12, *supra* note 163, ss 2(3), 4(1).

¹⁸⁶ Bill 12, *supra* note 163, s 2(2).

¹⁸⁷ Bill 12, *supra* note 163, s 2(3).

While the Minister never issued an order requiring any exporter to obtain a licence, one of the consequences of Bill 12 was that it would allow Alberta to reduce the export of refined fuels and other petroleum feedstocks to other parts of the country, including British Columbia. Any action taken in this regard would have potentially impacted British Columbia's fuel supply. Responding to this risk, British Columbia sued the Attorney General of Alberta in the Court of Queen's Bench of Alberta, arguing that Bill 12 was contrary to sections 92A(2) and 121 of the *Constitution Act, 1867*.¹⁸⁸

Section 92A(2) grants the provinces concurrent jurisdiction over the export of the primary production from non-renewable natural resources from the province to another part of Canada. There are, however, three caveats to this power. First, it only applies to "primary production from non-renewable natural resources", defined to *exclude* "a product resulting from refining crude oil [or] refining upgraded heavy crude oil",¹⁸⁹ such that Alberta may not have jurisdiction over the interprovincial export of refined fuels or upgraded petroleum products. Second, s. 92A(2) expressly states that in exercising its authority, a province may not "authorize or provide for discrimination in prices or in supplies exported to another part of Canada." Third, s. 92A(3) qualifies that the Province's jurisdiction under s. 92A(2) does not derogate from Parliament's jurisdiction over the same subject and that Parliament's law prevails in the case of a conflict. Section 121 provides for free trade among the provinces.

On February 22, 2019, Hall J. struck British Columbia's lawsuit because Bill 12 was not yet a law in force in Alberta. He specifically held that the claim was premature but "should the Alberta Government proclaim the *Act* in force, the [Attorney General of British Columbia] may recommence a claim."¹⁹⁰

b. Round 2: Bill 12 proclaimed into force and a return to court

¹⁸⁸ *BC v Alberta*, *supra* note 12 at para 2.

¹⁸⁹ *Constitution Act, 1867*, *supra* note 1, s 92A(2), Sixth Schedule.

¹⁹⁰ *British Columbia (Attorney General) v Alberta (Attorney General)*, 2019 ABQB 121 at para 23.

On April 30, 2019, following the Alberta election of the UCP Government, Bill 12 was proclaimed into force.¹⁹¹ It was expressly made the government's "first order of business" as part of "standing up for Alberta, protecting the value of energy exports and getting a fair deal for Albertans."¹⁹² Proclaiming Bill 12 was not without its detractors. Former Premier Rachel Notley publicly questioned the appropriateness of doing so, advocating instead to leave it immune from judicial review. Professor Bankes called it "reckless to continue down this... path."¹⁹³ The day after it was proclaimed, British Columbia once again sued Alberta, and also applied for an injunction pending the hearing on the merits of Bill 12's constitutionality.¹⁹⁴

Alberta applied to strike this second lawsuit on the ground of prematurity, but also because the Alberta Court of Queen's Bench did not have jurisdiction to issue a declaration of invalidity at the insistence of another province.¹⁹⁵ The Alberta *Judicature Act* (like analogous statutes in other provinces) expressly grants the Court jurisdiction to entertain an action at the instance of "either" the Attorney General of Canada "or" the Minister of Justice of Alberta for a declaration as to the invalidity of an enactment of the Legislature even if no further relief is requested,¹⁹⁶ it is silent whether the Court has the jurisdiction to entertain such an action at the instance of the British Columbia Attorney General.¹⁹⁷ In response to this argument, British Columbia filed a mirror lawsuit in the Federal Court on June 14, 2019.¹⁹⁸

Justice Hall also heard Alberta's strike application in British Columbia's second lawsuit, initially treating the issue as one of standing. He agreed with Alberta that section 25 of the *Judicature Act's* "failure to mention other attorneys general... is a deliberate choice"¹⁹⁹ and British Columbia could pursue its claim in the Federal Court.²⁰⁰

¹⁹¹ *Attorney General of British Columbia v Attorney General of Alberta*, 2019 FC 1195 at para 11.

¹⁹² Government of Alberta, "Defending Alberta's economy, resources and people", online: <<https://www.alberta.ca/release.cfm?xID=63826888E0559-0542-D660-938C03BE09B445CA>>.

¹⁹³ Nigel Bankes, "Bill 12: a reprise" *ABlawg* (2 May 2019), online: <http://ablawg.ca/wp-content/uploads/2019/05/Blog_NB_BILL12_May1.docx.pdf>.

¹⁹⁴ *BC v Alberta*, *supra* note 12 at para 4.

¹⁹⁵ *BC v Alberta*, *supra* note 12 at para 5.

¹⁹⁶ *Judicature Act*, RSA 2000, c. J-2, s 25.

¹⁹⁷ *BC v Alberta*, *supra* note 12 at para 18.

¹⁹⁸ *BC v Alberta*, *supra* note 12 at para 7.

¹⁹⁹ *BC v Alberta*, *supra* note 12 at paras 20, 25

²⁰⁰ See: *Judicature Act*, s 27; *Federal Courts Jurisdiction Act*, RSBC 1996, c 135, s 1(1)(b). See also: *Federal Courts Act*, RSC 1985, c F-17, s 19.

He then appeared to treat the issue as one of forum under a conflict of laws analysis, holding that legislative provisions such as sections 25 and 27 "suggest that the Federal Court is the proper forum for this particular interprovincial dispute."²⁰¹ From this, he pivoted to consider the issue as one of jurisdiction: "this Court's jurisdiction to hear the action is restricted by section 25 of the *Judicature Act*."²⁰² Despite this finding, he ultimately concluded that notwithstanding the Court's lack of jurisdiction, it still had the power to grant public interest standing to "prevent the possibility that legislation will be immunized from judicial scrutiny."²⁰³ Since it was, in his view, "more practical to bring the matter before the Federal Court, in which the [British Columbia] has standing as of right",²⁰⁴ he stayed the lawsuit, but permitted British Columbia to return if the Federal Court declined jurisdiction or standing.

Hall J's decision received mostly negative academic commentary.²⁰⁵ Professor Bankes criticized the judgment for "punting this hot potato in the direction of the Federal Court",²⁰⁶ thereby "privileging the Federal Court".²⁰⁷ He also criticized the decision for conflating jurisdiction, standing and forum. He pointed out the legal oddity of denying "the [British Columbia] standing on the basis that there is a preferred forum [especially when] constitutionally the federal court is not a preferred forum since this is the historic role of the provincial superior court."²⁰⁸ Bankes also agreed with British Columbia's argument that provincial attorneys general have direct standing to challenge purportedly unconstitutional laws under their role as *parens patriae*, but he failed to address: (i) that in Canada such standing applies solely within the attorney general's province; (ii) the uniquely American nature of that doctrine permitting one state attorney general to bring an action against another state; or (iii) any limits that should apply. As for these limits, if a provincial attorney general has *parens patriae*

²⁰¹ *BC v Alberta*, *supra* note 12 at paras 33, 44, 55.

²⁰² *BC v Alberta*, *supra* note 12 at para 42.

²⁰³ *BC v Alberta*, *supra* note 12 at para 52.

²⁰⁴ *BC v Alberta*, *supra* note 12 at para 54.

²⁰⁵ Nigel Bankes, "The Bill 12 "Turn off the Taps" Litigation: Justice Hall Orders a Stay in BC's Action" *ABlawg* (23 July 2019), online: <http://ablawg.ca/wp-content/uploads/2019/07/Blog_NB_Bill12.pdf>.

²⁰⁶ Bankes, *supra* note 205.

²⁰⁷ Bankes, *supra* note 205.

²⁰⁸ Bankes, *supra* note 205.

standing in another province, why shouldn't a US state attorney general have such standing to challenge the constitutionality of a law in a Canadian province?

c. Round 3: The Federal Court

After Hall J. stayed the Alberta lawsuit, British Columbia continued its mirror lawsuit in the Federal Court.²⁰⁹ Alberta cross-applied, arguing again that the lawsuit was premature and that the Federal Court lacked jurisdiction as there was no "controversy" between the provinces within the meaning of the provincial *Judicature Acts* or the *Federal Court Act*. Grammond J. dismissed Alberta's application and granted BC's injunction.

Grammond J. held that the Federal Court had "optional jurisdiction over interprovincial disputes" as the two provinces had opted into that jurisdiction²¹⁰ under the *Federal Courts Act* and their respective provincial statutes. He appears to have presumed that the Federal Court had jurisdiction and required that Alberta prove otherwise, rather than require British Columbia to prove that the Federal Court had jurisdiction,²¹¹ as one would expect in a court with limited statutory jurisdiction. For example, his reasons assume a "controversy" within the meaning of the *Federal Courts Act*, stating "there is obviously a 'controversy' [...] between British Columbia and Alberta regarding the constitutional validity of the Act"²¹² and "[i]t would have been obvious to the members of Parliament [who enacted the *Federal Court Act*] that such disputes would include issues regarding the compliance of legislation with the constitutional division of powers."²¹³ What this argument misses, however, is that where one province asserts that another has exceeded its authority, it is Parliament whose jurisdiction has been trespassed upon, not the moving province. To illustrate, allowing provinces to bring declaratory actions in another province in the absence of any harm is similar to allowing an individual to bring a claim for battery because their friend was punched.

²⁰⁹ *BC v Alberta FC*, *supra* note 12 at para 5.

²¹⁰ *BC v Alberta FC*, *supra* note 12 at para 6.

²¹¹ *BC v Alberta FC*, *supra* note 12 at para 22.

²¹² *BC v Alberta FC*, *supra* note 12 at para 29.

²¹³ *BC v Alberta FC*, *supra* note 12 at para 47.

None of Grammond J's reasoning was as obvious as he appears to have assumed. As Professor Bankes notes, the provisions relied upon in the *Federal Court Act* were intended to "deal with a different problem than that at issue,"²¹⁴ such as a contractual dispute. Bankes also called it "a stretch to characterize an application for a declaration of invalidity as a controversy *between* parties."²¹⁵ Grammond J. also ignored *obiter* from the Supreme Court of Canada,²¹⁶ that the Federal Court does not have jurisdiction under s. 101 of the Constitution to declare a provincial statute invalid. Instead, he found that this fundamental constitutional limit, which is the Federal government's power to create the Federal Court, somehow does not apply to its jurisdiction granted under s. 19 of the *Federal Courts Act*.²¹⁷

In the result, Grammond J. granted the interlocutory injunction, finding that British Columbia had established a serious issue to be tried that Bill 12 was outside Alberta's power under s. 92A(2) of the *Constitution Act, 1867*. What is remarkable about the analytical framework that allowed Grammond J. to reach this conclusion is it treated section 92A(2) as an exception to the federal trade and commerce power under s. 91(2), rather than a stand-alone provincial head of power.²¹⁸ So when he found that Bill 12's pith and substance is the regulation of oil exports,²¹⁹ he held that this fell within s. 91(2) and was "not saved"²²⁰ by the exception in section 92A(2) because Bill 12 also applies to "refined fuels" and, at least in Grammond J's view, permitted the Minister to discriminate against British Columbia. Such an approach has the effect of narrowly interpreting a provincial head of power, is inconsistent with how other provincial powers under section 92 are interpreted, and limits the usefulness of section 92A(2) in favour of privileging federal laws.

Alberta argued that it could, of necessity, regulate the export of refined fuels as ancillary to its powers under section 92A(2) because it is reasonable that Alberta would inevitably need to regulate one as part of regulating

²¹⁴ Bankes, *supra* note 205.

²¹⁵ Bankes, *supra* note 205.

²¹⁶ *Windsor v Canadian Transit Co*, 2016 SCC 54 at para 61, citing *Communications Workers of Canada v Northern Telecom Canada Ltd*, [1983] 1 SCR 733 at 745, 147 DLR (3d) 1.

²¹⁷ *BC v Alberta FC*, *supra* note 12 at para 58.

²¹⁸ *BC v Alberta FC*, *supra* note 12 at paras 107-108, 115.

²¹⁹ *BC v Alberta FC*, *supra* note 12 at para 113.

²²⁰ *BC v Alberta FC*, *supra* note 12 at para 2, 113.

the other. Grammond J. did not accept this argument, which was unsurprising as academics had widely argued that the inclusion of refined fuels in Bill 12 rendered it unconstitutional.²²¹ While Grammond J. stated that it had not been shown to him that it would be necessary for Alberta to regulate the export of refined fuels to successfully regulate the export of crude oil,²²² it is arguable that the limited export capacity available to producers in Alberta may have made such action necessary, particularly regarding pipelines—such as the Trans Mountain Pipeline—that transport petroleum products in batches. For example, Alberta may need to favour the transport of crude oil over refined fuels, even if that incidentally disadvantages the domestic export of refined fuels in certain pipelines.

In all of Confederation, the attorney general of one province had never challenged the validity of another province's law in the way that British Columbia did.²²³ The cases themselves and the accompanying academic commentary failed to address a key question of the litigation: when can provinces sue each other to have provincial laws declared unconstitutional in the absence of any other relief? There is certainly some desire for a measure of restraint against permitting provincial attorneys general roaming the country in search of legislation that may affront the Constitution that no one else, including the federal attorney general, have cared to challenge. And if it is seen as a desirable development, where does the court draw the line? Nor is it obviously desirable to have the Federal Court, a statutory court appointed by the federal government, weigh in on disputes over provincial constitutional authority. If this is held to be the case, provinces may choose to rescind or amend their statutes to limit the jurisdiction conferred on the Federal Court. While the statutory provisions granting jurisdiction to the Federal Court to resolve certain provincial disputes is seen as a great example of cooperative

²²¹ See, for example, Nigel Bankes, "A Bill to Restrict the Interprovincial Movement of Hydrocarbons: aka Preserving Canada's Economic Prosperity [Act]" *ABlawg* (18 April 2018), online: <<https://ablawg.ca/2018/04/18/a-bill-to-restrict-the-interprovincial-movement-of-hydrocarbons-a-k-a-preserving-canadas-economic-prosperity-act/>>

²²² *BC v Alberta FC*, *supra* note 12 at para 117.

²²³ *BC v Alberta*, *supra* note 12 at paras 5, 24; see also: *BC v Alberta FC*, *supra* note 12 at paras 77-80. In fact, in the *Manitoba Egg Reference*, [1971] SCR 689, 19 DLR (3d) 169, Manitoba sought to challenge the constitutionality of provincial marketing schemes in Ontario and Quebec. Rather than entering their superior courts and seeking a declaration of invalidity without request for further relief, the government instead referred substantially similar legislation to its provincial court of appeal.

federalism,²²⁴ the decisions in *BC v Alberta* may have the opposite effect. Provinces seeking greater autonomy and independence may look to limit the jurisdiction of the Federal Court.

At a more fundamental level, the *BC v Alberta* dispute signals an evolution in Canadian federalism: no longer is the division of powers a matter to be determined by balancing federal and provincial interests. While British Columbia built its case on an alleged breach of federal jurisdiction, its real motivating concern was the possibility that Alberta would favour the export of its crude oil production over the export of refined fuels. And diving even deeper into the interprovincial dynamics that led to this dispute, it is arguable that British Columbia's opposition to the TMX Project and its attempts to restrict the flow of heavy oil from Alberta into British Columbia due to primarily local environmental concerns was, at least in part, one of the factors that led to the introduction of Bill 12. Unlike the previous energy disputes of the 1970s and 80s, this fracturing of interests represents a serious risk to the preservation of provincial jurisdiction in the face of expanding federal authority over environmental matters. Where disputes of this nature arise and the interests of the provinces diverge from each other and, to varying degrees, diverge from those of the federal government, it will become more and more difficult for Canadian federalism to resolve these conflicts in a manner that adequately preserves the balance of power. Either the interests of the federal government will supersede the concerns of the province (the *Pipeline Reference*), or the positive interests of one province may, without federal involvement, be circumscribed by the negative interests of the other, or vice versa (*BC v Alberta*).

V. CONCLUSION

Canada is a large country with varied and often conflicting regional interests. The structure of Canadian federalism addresses this by promoting regional and policy diversity while seeking to maintain national unity. The framework of this arrangement is clearly expressed in the *Constitution Act, 1867*: 46 exclusive heads of power are divided between two levels of government. For the most part, this division reflects the idea that the

²²⁴ See, for example: *BC v Alberta*, *supra* note 12 at paras 41, 54, quoting *Alberta v. Canada*, 2018 FCA 83 at para 30; *BC v Alberta* FC, *supra* note 12 at para 30.

federal government should have authority over matters that affect the union, while the provincial governments are best positioned to regulate local matters.²²⁵

Recently, the environment has emerged as a matter of significant public concern and increasing legislative interest. While this is a welcome—and necessary—development in many respects, it nonetheless poses a significant threat to the autonomy of the provinces. This is because the "environment" is not addressed in the division of powers. Instead, it pervades all aspects of local and national life and, as a result, cuts across both sides of the division of powers to a substantial degree. This means that Canada's federal and provincial governments share responsibility for its management and preservation. Due to the amount of overlap that arises from shared jurisdiction, the emergence of the environment as an important legislative subject also demands flexible constitutional interpretation as new problems and questions arise. If the respective interests of the federal and provincial governments are aligned, these questions are relatively straightforward to resolve and do not pose a significant threat to the balance that the division of powers creates. But where the policy priorities of the federal and provincial governments do not align, as may arise in the context of natural resource development, the interpretive tools that we rely on to maintain constitutional flexibility do not provide the predictability needed to minimize legal and regulatory uncertainty, nor do they appear capable of resolving the conflict in a manner that respects the balance achieved by the division of powers. Spurred by their political mandates, this uncertainty has and will continue to incentivize governments to take strong unilateral action that may or may not be constitutional. In addition, and unlike in past constitutional debates concerning natural resources, the interests and priorities of the provinces concerning development and environmental management are no longer as clearly in alignment. This new competitive dynamic will, we contend, ultimately result in courts resolving jurisdictional conflicts in favour of the federal government.

The cases that we examined in this paper illustrate these trends and suggest that the emergence of the environment as an important legislative matter is starting to shift the balance of federalism and limit the scope of provincial autonomy. In the *GHG References*, three provincial courts of appeal produced a dizzying and

²²⁵ Hogg, *supra* note 135 at 346.

contradictory set of reasons that, in the aggregate, narrowly upheld federal power over a new matter of national concern: the establishment of national minimum standards for the pricing of greenhouse gas emissions. In doing so, the majorities of the Saskatchewan and Ontario Courts of Appeal may have applied the tools of flexibility and the POGG power in a manner that leaves the door open to continued federal expansion into provincial jurisdiction. In the *Pipeline Reference*, inter-provincial political disagreement over the TMX Project created a damaging climate of commercial uncertainty. Though the legalities underlying the positions of the parties to this dispute should have been obvious, flexible and cooperative federalism had evolved to the point that British Columbia's position was not unreasonable. And while British Columbia's proposed interpretation of federalism in this case provoked a strong statement from the courts that local environmental concerns do not supersede the federal government's consideration of those same concerns, this case highlighted the fact that the *Constitution Act, 1867* is no longer working as intended. Finally, in *BC v Alberta*, divergent provincial interests also related to the TMX Project and the regulation of the export of non-renewable natural resources from Alberta led British Columbia to challenge the constitutionality of an Alberta law, not because it trespassed upon British Columbia's jurisdiction, but because it trespassed upon federal jurisdiction. Though different in some respects than the other cases we discussed, the events surrounding *BC v Alberta* hint at a new dynamic in Canadian constitutional law: no longer will jurisdictional disputes play out solely between the federal and provincial governments. Instead, provinces may now challenge the validity of the legislative acts of other provinces.

At the time of writing, the *GHG References* and *BC v Alberta* remain before the courts. In addition, the Government of Alberta has initiated a reference that questions the constitutionality of the federal government's *Impact Assessment Act*,²²⁶ environmental legislation that subjects an open-ended class of "designated projects" to federal decision-making.

It is not difficult to see the challenges that the interaction of federalism and the environment present to our constitutional order—courts have acknowledged them for decades. What is difficult, however, is addressing them in a way that accommodates evolving social and political attitudes, preserves provincial autonomy, and

²²⁶ *Impact Assessment Act*, SC 2019, c 28, s 1.

maintains the balance of federalism. One possible way to achieve this is by reinvigorating the doctrine of provincial interjurisdictional immunity. Contrary to the concerns of the Court in *Canadian Western Bank*, reciprocal interjurisdictional immunity has the potential to locate and protect the most essential elements of the exclusive heads of federal and provincial power in a manner that is consistent with the emerging principle of subsidiarity and will ensure democratic accountability.

While the ultimate resolution of this chapter in the federalism debate remains in the hands of the courts, it is undeniable that the issues raised in these cases have revealed the cracks that are starting to form in our constitutional order.