



The Constitutional Context for Federal Climate Policy – Le contexte constitutionnel de la politique climatique fédérale

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Thank you to Taylor Wormington, JD
Candidate, uOttawa for research assistance

Outline

- The Canadian climate policy story – a few key highlights
- Is the *GHGPPA* constitutional?
 - Some relevant heads of power
 - POGG, National Concern and Emergency branches
 - Taxation
 - Criminal law
 - Some key questions for the courts
 - Exclusivity of POGG (NC) in light of double aspect
 - What are temporary measures (POGG Emerg)?
 - Is this taxation or a regulatory charge?
 - Can a price be a criminal prohibition?

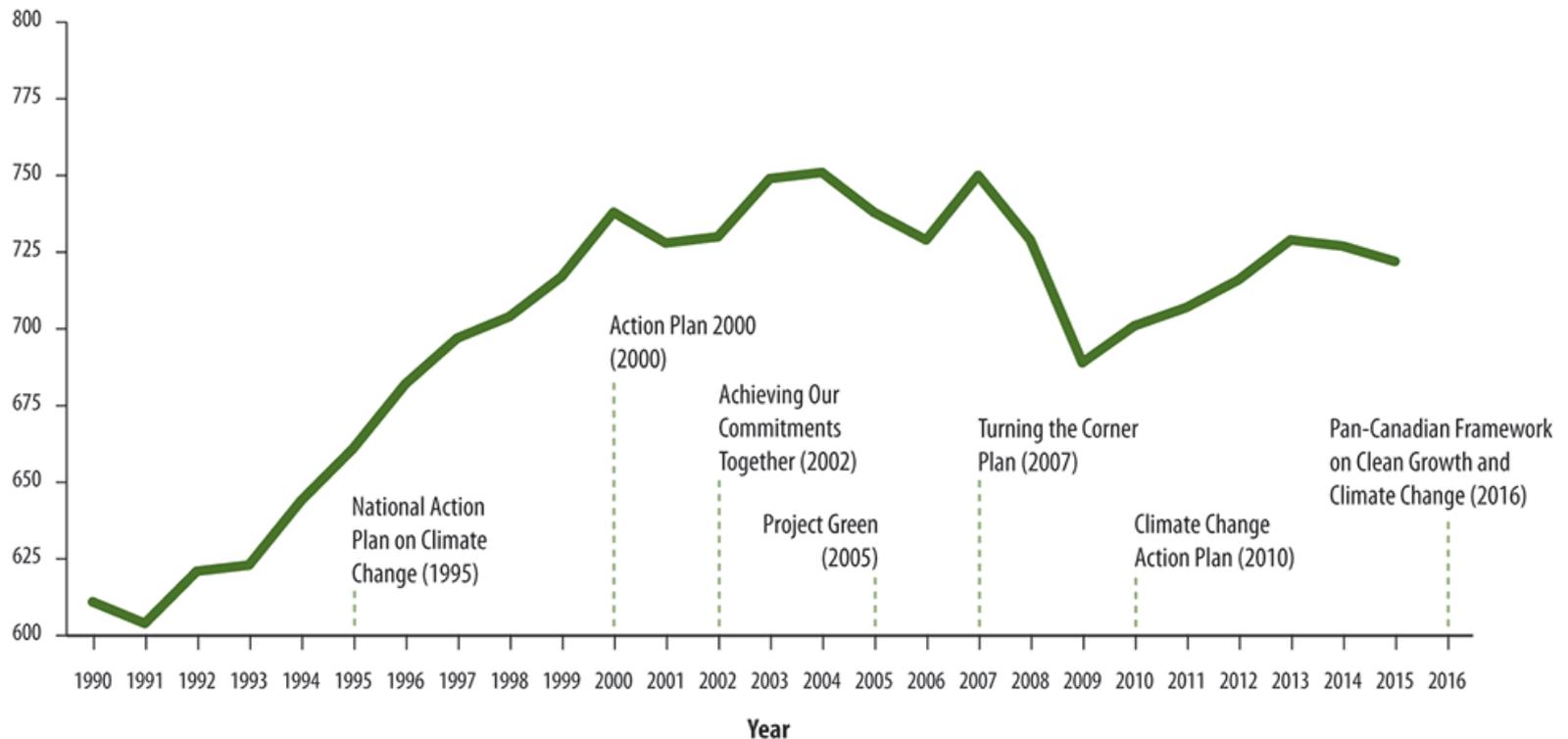
The Canadian Climate Policy Story



The Canadian Climate Policy Story

Federal climate plans 1990 to 2015 (CESD, 2017)

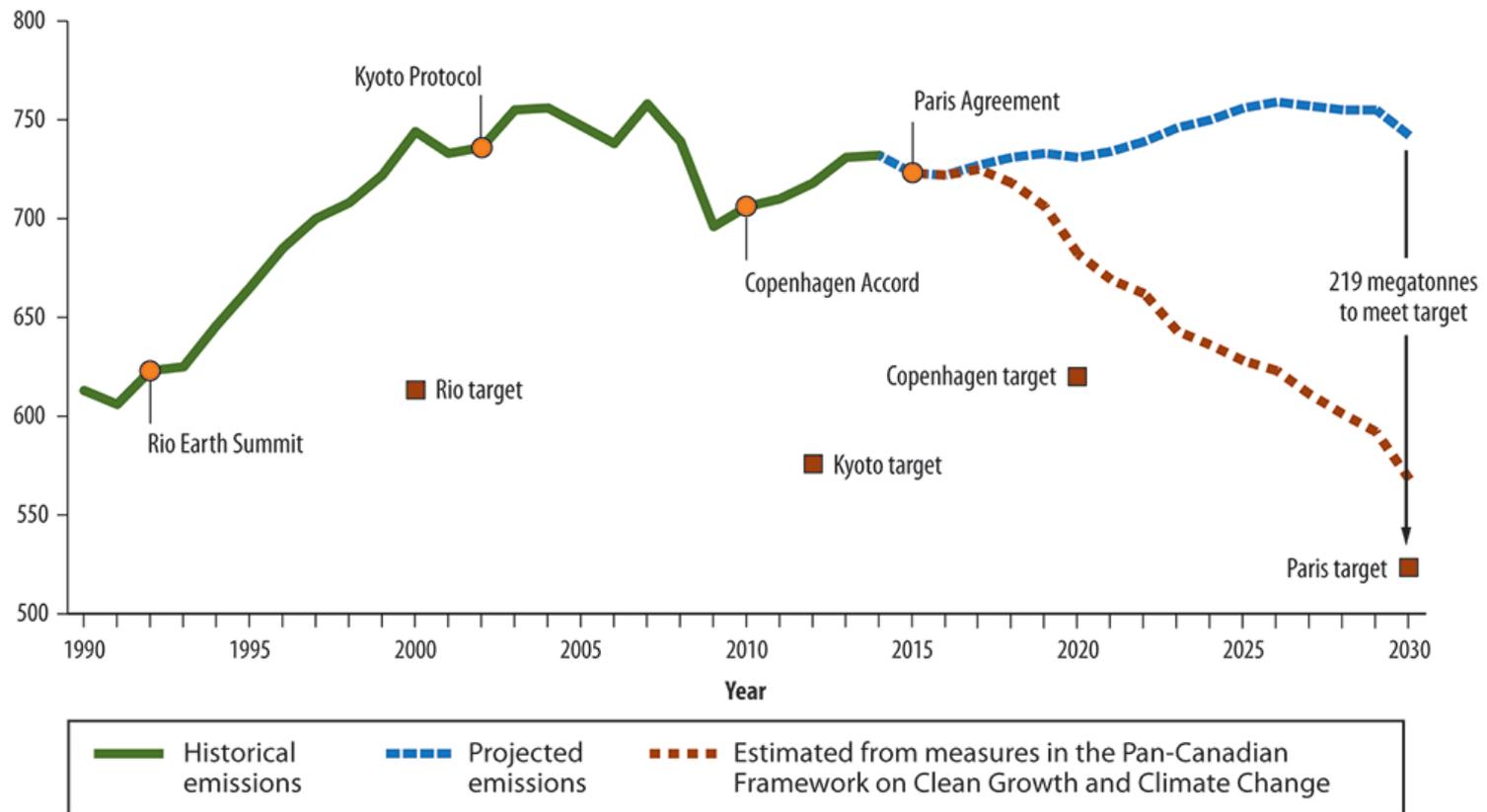
Greenhouse gas emissions
(in megatonnes)



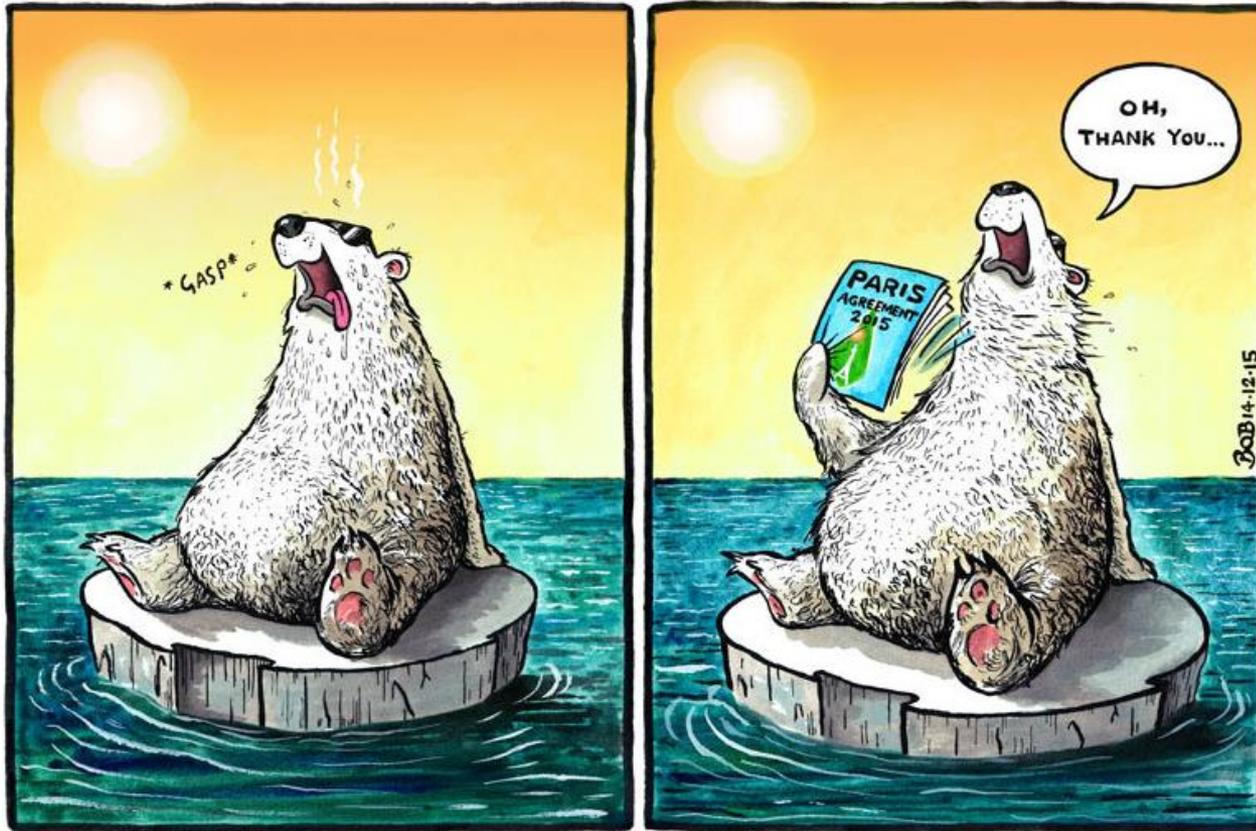
The Canadian Climate Policy Story

GHG emissions and targets 1990-2015 (CESD, 2017)

Greenhouse gas emissions
(in megatonnes)



Paris Agreement, 2015



The Canadian Climate Policy Story

Changing federal priorities on climate action 2015



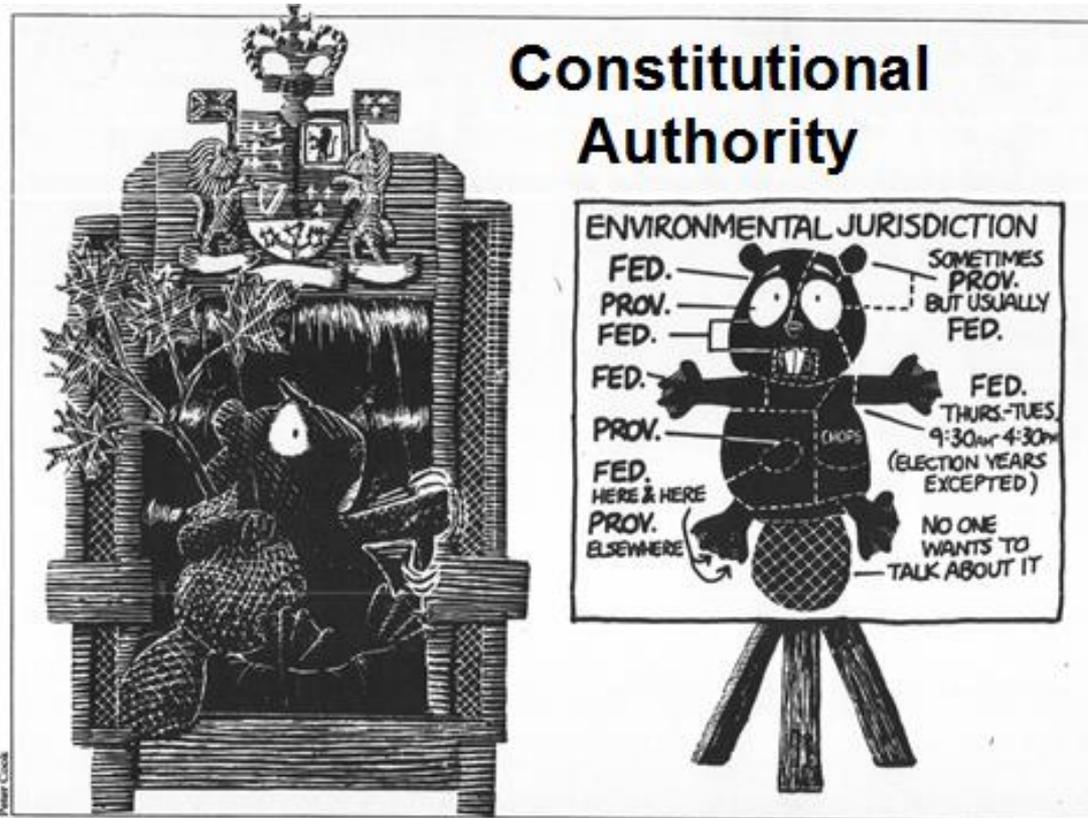
But how do you design an effective national climate plan, including a national carbon price...



...when several provinces have already implemented carbon prices, using different systems?



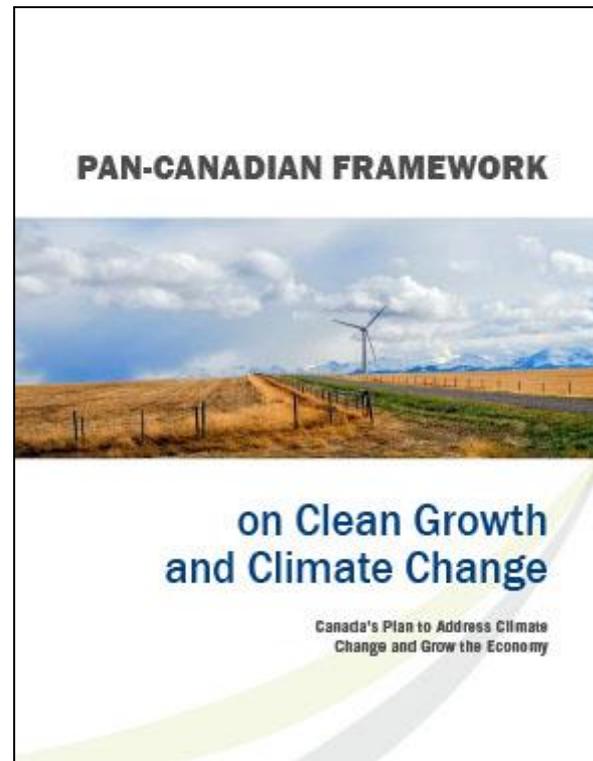
... in the context of shared constitutional jurisdiction?



Vancouver Declaration on Clean Growth and Climate Change (March 2016)



Technical Paper on Backstop (Oct 2016) and Pan Canadian Framework (Dec 2016)



Greenhouse Gas Pollution Pricing Act



CANADA

<p>CONSOLIDATION</p> <p>Greenhouse Gas Pollution Pricing Act</p> <p>S.C. 2018, c. 12, s. 186</p> <div style="border: 1px solid black; padding: 5px; width: fit-content; margin: 10px auto;"> <p>NOTE [Enacted by section 186 of chapter 12 of the Statutes of Canada, 2018, in force on assent June 21, 2018.]</p> </div> <p>Current to October 3, 2018</p> <p>Published by the Minister of Justice at the following address: http://laws-lois.justice.gc.ca</p>	<p>CODIFICATION</p> <p>Loi sur la tarification de la pollution causée par les gaz à effet de serre</p> <p>L.C. 2018, ch. 12, art. 186</p> <div style="border: 1px solid black; padding: 5px; width: fit-content; margin: 10px auto;"> <p>NOTE [Édictée par l'article 186 du chapitre 12 des Lois du Canada (2018), en vigueur à la sanction le 21 juin 2018.]</p> </div> <p>À jour au 3 octobre 2018</p> <p>Publié par le ministre de la Justice à l'adresse suivante : http://lois-laws.justice.gc.ca</p>
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Some provinces are unhappy – threatening lawsuits

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NEW | Brad Wall threatens legal action to block federal carbon tax

"If need be, we will take the federal government to court," said Premier Wall

By Jason Hirsch, CBC News Posted Dec 01, 2018 12:11 PM ET | Last updated Dec 01, 2018 12:28 PM ET

Saskatoon Premier Brad Wall says the Liberal government's carbon price plan will "siphon" \$2.5 billion from the province. (CBC)

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Premier Brad Wall is threatening to take the federal government to court over the national carbon tax plan.

Wall said he instructed Saskatchewan Justice lawyers to look at legal options should the federal government forge ahead on the carbon tax.

• "This is a betrayal": Brad Wall slams Justin Trudeau for carbon pricing deadline

In a recent report to Wall's cabinet, Attorney General Gordon Wyant said provincial lawyers believe there's a strong case.

"We think there are options, and if need be, we will take the federal government to court," Wall told reporters on Thursday in Saskatoon.

• Premier Brad Wall defends "blunt language" on carbon pricing

It's unclear exactly what argument Saskatchewan Justice lawyers would make in court.

Weather

Friday	Saturday	Sunday	Monday	Tuesday
☁️	☀️	☀️	☀️	☁️
4°C	-2°C	4°C	-1°C	-1°C

Latest Saskatoon News Headlines

• Brad Wall threatens legal action to block federal carbon tax

SCRAP THE CARBON TAX

Rally with Premier Doug Ford and United Conservative Party Leader Jason Kenney

WHERE: Palomino Room, BMO Centre (20 Roundup Way SW)

WHEN: October 5, 2018, Doors open at 5:30pm; Rally kicks off at 7:00pm



Some provinces are unhappy – threatening lawsuits

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Edmonton Sun

Published:
 October 6, 2018

Updated:
 October 6, 2018 8:23 PM MDT

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Alberta Premier Rachel Notley speaks at a news conference in Edmonton on Thursday Aug. 30, 2018 after a bombshell court decision threw the Trans Mountain pipeline into doubt. JASON FRANSON / THE CANADIAN PRESS

Prime Minister Justin Trudeau is sticking with his carbon tax even after yet another province – Manitoba – withdrew Wednesday from his national climate plan

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Manitoba may have wiggle room in Feds carbon tax fight: premier

Steve Lambert — Canadian Press | Wednesday, October 11th, 2017

Lots of commentary and analysis about jurisdiction over GHG emissions

Feds have right to impose carbon tax on provinces, says U of M law prof

Legal opinion says Supreme Court would likely uphold federally imposed levy

CBC News | Posted: Oct 11, 2017 3:58 PM CT | Last Updated: Oct 11, 2017 7:26 PM CT

Can Trudeau keep his carbon tax out of court?

iPolitics Insights

A careful reading of the Constitution says 'yes'



Nathalie Chalifour

Saturday, September 24th, 2016

OPINION

Brad Wall's carbon-pricing fight is constitutional hot air

NATHALIE CHALIFOUR AND STEWART ELGIE
CONTRIBUTED TO THE GLOBE AND MAIL
JUNE 14, 2017



uOttawa

Lots of commentary and analysis about jurisdiction over GHG emissions

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A federal carbon price represents far-reaching constitutional territory: No court has yet said Ottawa can regulate GHG emissions

THE GLOBE AND MAIL OPINION

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Saskatchewan, Ontario and the constitutionality of a national carbon price

NATHALIE CHALIFOUR
CONTRIBUTED TO THE GLOBE AND MAIL
PUBLISHED SEPTEMBER 27, 2018

Nathalie Chalifour is an associate professor at the Faculty of Law, University of Ottawa and a member of the Royal Society of Canada's College of New Scholars

Having now each filed in court their arguments against the federal carbon price

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Saskatchewan and Ontario challenge constitutionality of GHGPPA



COURTS *of*
SASKATCHEWAN



Legal grounds of the challenges (not an exhaustive summary)

Saskatchewan

- *GHGPPA* violates UCP of federalism
 - province has autonomy to determine how to deal with GHG emissions
- It's a tax (not regulatory charge) that violates s. 53
- No arguments on POGG

Ontario

- It's a tax (not regulatory charge) that violates s. 53
- It is not justifiable under POGG National Concern
 - GHGs are not a national concern
 - GHGs are ubiquitous so fed regs would be too intrusive

Federal response still to come

Possible sources of federal jurisdiction:

- Peace, Order and Good Government (POGG)
 - National Concern branch
 - Emergency branch
- Taxation - section 91(3)
- Criminal law - section 91(27)

Challenges raise some interesting constitutional law questions

- What is the effect of the language in the **National Concern branch** jurisprudence which refers to exclusive, plenary jurisdiction over the subject matter, in light of the double aspect doctrine and cooperative federalism?
- What are the contours of 'temporary measures' in the context of **POGG's Emergency branch**, given the planetary and geological scale of climate change?
- Will the courts clarify their criteria for distinguishing between regulatory charges and **taxes** to take better account of economic instruments such as carbon pricing for constitutional purposes?

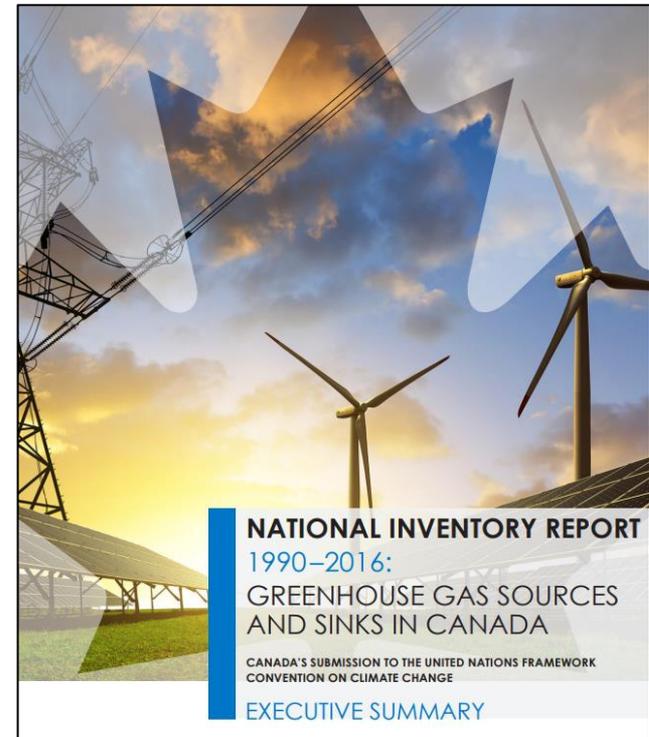
National Concern Branch of POGG

- Single, distinct and indivisible subject matter
- Provincial inability test
- Scale of impact on provinces that is reconciliable with the distribution of powers in the Constitution



National Concern Branch of POGG

- National concern
 - International and extra-provincial implications
- Single, distinct and indivisible
 - GHGs are a known set of gases with radiative impact on atmosphere
 - They are definable and measureable
 - Subject to international agmt



National Concern Branch of POGG

- Is the scale of impact on provincial jurisdiction reconcilable with the fundamental distribution of legislative powers?
 - What is the scope of the subject matter?
 - Would granting jurisdiction to Parliament mean displacing provincial legislation on GHGs?

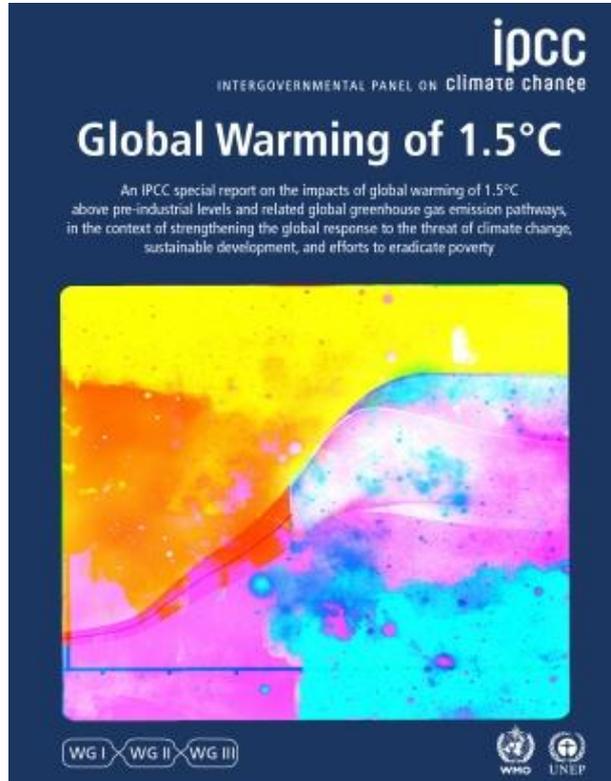
National Concern Branch of POGG

- Reference to «exclusive jurisdiction of a plenary nature» in the jurisprudence (eg. *Crown Zellerbach*, at para 34; *Hydro Québec* dissent, at para 67)
 - But recognition that plenary jurisdiction not needed to deal with legislative problems (*Crown Zellerbach*, at para 35)
 - Dissent's concerns in *Hydro-Québec* were in relation to broadly defined subject matters (eg. environment, pollution)

National Concern Branch of POGG

- Exclusivity runs counter to the « double aspect » and « ancillary powers » doctrines, and spirit of cooperative federalism
- Ample space for federal and provincial GHG regulations
- Design of *GHGPPA* minimizes intrusion

Emergency Branch of POGG



Emergency Branch of POGG

- Is there an emergency?
- What are temporary measures in the context of climate change?



Taxation power

- Parliament has a broad constitutional authority to tax
 - In its factum, the province of Saskatchewan concedes that Parliament has the authority to implement a federal carbon tax
- But... *GHGPPA* not designed as a tax, perhaps because of section 125
- So what *is* the pith and substance of the carbon price?

Taxation power

Is the pith and substance of a given levy:

- to tax, i.e., to raise revenue for general purposes;
- to finance or constitute a regulatory scheme, i.e., to be a regulatory charge or to be ancillary or adhesive to a regulatory scheme; or
- to charge for services directly rendered, i.e., to be a user fee

Westbank First Nation v. B.C. Hydro (1999)

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Fourth criteria needed:

- to impose a price signal intended to change economic behavior, i.e., to internalize an environmental externality

Taxation power

Is the pith and substance of a given levy:

- to tax, i.e., to raise revenue for general purposes;
- to finance or constitute a regulatory scheme, i.e., to be a regulatory charge or to be ancillary or adhesive to a regulatory scheme; or
- ~~to charge for services directly rendered, i.e., to be a user fee~~

→ Is it a tax or a regulatory charge?

Is the levy connected to a regulatory scheme?

Step 1: Is there a relevant regulatory scheme?

- (1) a complete, complex and detailed code of regulation;
- (2) a regulatory purpose which seeks to affect some behaviour;
- (3) the presence of actual or properly estimated costs of the regulation;
- (4) a relationship between the person being regulated and the regulation, where the person being regulated either benefits from, or causes the need for, the regulation.

Is the levy connected to a regulatory scheme?

Step 2: Is there a relationship between revenues generated and regulatory purpose?

- a link between the revenue generated and the costs of the regulatory framework, or
- where the purpose of the regulatory charge is to “proscribe, prohibit or lend preference to certain conduct”

Criminal law power

- Test:
 - Legitimate public purpose
 - A prohibition coupled with a penalty



Syncrude v Canada (2016 FCA)

- CEPA requires minimum content of renewable fuel in diesel (s. 139, 140(1), s. 272(1) of CEPA plus regulation)
- Syncrude argued not a criminal purpose, and percentage requirement was not a prohibition, but rather an economic incentive meant to increase demand for biofuels

Syncrude v Canada (2016 FCA)

- Protecting health & environment by reducing GHG emissions is a legitimate public purpose
 - “[I]t is uncontroverted that GHGs are harmful to both health and the environment and as such, constitute an evil that justifies the exercise of the criminal law power.” (para 62)
- Prohibitions do not need to be complete
- Criminal law is about changing behaviour



Conclusion

- *GHGPPA* likely constitutional
- Design features (eg. backstop, flexibility, returning revenues) minimize intrusiveness
- Interpretive doctrines and principles such as double aspect, ancillary powers, cooperative federalism and living tree are essential to climate federalism



Selected references (available on [SSRN](#) page)

- Chalifour, N. « Parliament's ample constitutional authority to legislate GHG emissions » (2016) 36:2 NJCL 331.
- Nathalie Chalifour, "The Constitutional Authority to Levy Carbon Taxes" in Queen's Policy Studies Series (Institute of Intergovernmental Relations, 2010) 177-196
- Chalifour N., « Canada's division of powers over carbon taxes » (2008) 22 NJCL 119

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