Dissipating Normative Fog: Revisiting the POGG's National Concern Test

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Quelques jalons pour dissiper le brouillard normatif enveloppant la doctrine des dimensions nationales élaborée sous l'égide du pouvoir de légiférer pour la paix, l'ordre et le bon gouvernement du Canada

Pautas para despejar la niebla normativa que envuelve la doctrina de las dimensiones nacionales desarrollada bajo el auspicio del poder de legislar por la paz, el orden y el buen gobierno de Canadá

Algumas balizas para dissipar a bruma normativa à volta da doutrina das dimensões nacionais sob a égide do poder de legislar pela paz, pela ordem e pela boa governança no Canadá

驱散规范的迷雾：重新审视“和平、秩序和良治”的“国家问题”检验

Résumé

Cet article plaide en faveur d'une révision du test permettant de valider une loi fédérale en se fondant sur la théorie des dimensions nationales élaborée sous l'empire du pouvoir du Parlement de légiférer pour la paix, l'ordre et le bon gouvernement du Canada. Une telle proposition prend toute son actualité à la

Abstract

This article argues that the test used to determine the constitutional validity of a federal statute on the basis of the national concern branch of Parliament's power to legislate for the peace, order and good government of Canada should be revisited. Such a revision appears all the more important in light of federal

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lumière des initiatives fédérales en matière de régulation des gaz à effet de serre, lesquelles sont défendues en invoquant cette théorie. Plus particulièrement, les auteurs y soutiennent que l'exigence jurisprudentielle voulant qu'une matière d'intérêt national doive avoir une unicité, une particularité et une indivisibilité qui la distinguent des matières provinciales devrait être abandonnée. Ils arguent en outre que la théorie des dimensions nationales peut s'appliquer à des matières assujetties à une compétence concurrente, ou visées par la doctrine du double aspect, donc des matières pouvant sous certains aspects relever de la compétence fédérale et sous d'autres de la compétence provinciale. Ils proposent enfin que le critère de l'incapacité provinciale soit subsumé à une analyse mobilisant le principe de subsidiarité. La reformulation proposée du test déterminant l'application de la théorie des dimensions nationales dissiperait la confusion provoquée par le test actuellement employé, en plus de fournir un cadre analytique d'application davantage prévisible, et ce, autant pour le fédéral que pour les provinces.

Resumen

Este artículo aboga en favor de una revisión de la prueba que permite validar una ley federal basándose en la teoría de las dimensiones nacionales elaborada bajo la autoridad del Parlamento para legislar por la paz, el orden y el buen gobierno de Canadá. Tal propuesta adquiere toda su relevancia a la luz de las iniciativas federales en materia de regulación de gases de efecto invernadero, las cuales se justifican invocando esta teoría. Más particularmente, los autores argumentan que la

initiatives pertaining to the regulation of greenhouse gas emissions, which are justified on the basis of that theory. More specifically, the three criteria of distinctiveness, indivisibility and singleness, identified as the proper indicators of federal jurisdiction grounded in the national concern doctrine, should be abandoned. In addition, the doctrine should be recognized as applying to matters subject to the concurrent jurisdiction of Parliament and provinces or that have a double aspect. Last, and most importantly, it argues that the provincial inability test should be incorporated in a broader analysis revolving around the principle of subsidiarity. The proposed reformulation of the national concern doctrine's test would reduce the confusion created by the current test, and would provide a more stable and predictable analytical framework, to the benefit of both Parliament and provinces.

Resumo

Este artigo pleiteia a revisão do teste que permite validar uma lei federal fundando-se sobre a teoria das dimensões nacionais elaborada sob o império do poder do Parlamento para legislar pela paz, a ordem e a boa governança do Canadá. A atualidade desta proposta é confirmada à vista das iniciativas federais em matéria de regulamentação dos gases de efeito estufa, defendidas com base nessa teoria. Mais particularmente, os autores sustentam que deverá ser abandonada a

exigencia jurisprudencial que busca que un asunto de interés nacional deba tener una unidad, una particularidad y una indivisibilidad que la distingan de los asuntos provinciales debe ser abandonada. Sostienen además que la teoría de las dimensiones nacionales puede ser aplicada a materias sujetas a concurrencia de competencias, o sujetas a la doctrina del doble aspecto, es decir, materias que bajo ciertos aspectos puedan considerarse de competencia federal y en otros de competencia provincial. Finalmente, proponen que el criterio de la incapacidad provincial sea sometido a un análisis que movilice el principio de subsidiariedad. La reformulación propuesta de la prueba que determina la aplicación de la teoría de las dimensiones nacionales disiparía la confusión causada por la prueba actualmente empleada, además de proporcionar un marco analítico más previsible en su aplicación, tanto a nivel federal como provincial.

exigência jurisprudencial segundo a qual uma matéria de interesse nacional deva ter uma singularidade, uma particularidade e uma indivisibilidade que a distingue das matérias provinciais. Argumentam que a teoria das dimensões nacionais pode aplicar-se a matérias sujeitas a uma competência concorrente ou alcançadas pela doutrina do duplo aspecto, portanto matérias que, sob certos aspectos, podem ser de competência federal e, por outros, de competência provincial. Propõem, enfim, que o critério de incapacidade provincial seja submetido a uma análise que faça valer o princípio da subsidiariedade. A reformulação proposta do teste que determina a aplicação da teoria das dimensões nacionais dissiparia a confusão por ele provocada atualmente, além de fornecer um quadro analítico de aplicação mais previsível, e isso tanto para o âmbito federal como para as províncias.

摘要

本文主张重新审视基于国家问题（national concern）理论认定联邦法律有效这一检验（Test）。该理论的依据是联邦议会对加拿大的“和平、秩序和良治”问题上享有立法权。本文提出这一主张切合当前联邦政府试图规制温室气体的时事议题，联邦政府正是基于此理论为自己的行为辩护。具体而言，本文认为，有别于省级层面的问题，“国家层面的问题应当具有统一性、特殊性和不可分性”这一被司法判例确认的主张应当予以摒弃。此外，本文指出，国家问题理论可适用于管辖权竞合的领域或“两面性”学说针对的领域，即在某些方面归联邦管辖而另一些方面归省属管辖的领域。最后，本文提出认定省政府无管辖权的标准应归入辅从性原则的分析范围。本文提出的重新拟定国家问题检验有助于厘清目前检验的使用所造成的混淆，同时也为该检验在联邦层面和省级层面更有预见性的适用提供分析框架。

While this article was in its last publication stage, the Court issued its opinion in the *Reference re Greenhouse Gas Pollution Pricing Act,* 2021 SCC 11, in which a majority of the Court (Wagner J., with whom concurred five judges) upheld the constitutional validity of the impugned Act. Justices Côté, Brown and Rowe each signed a separate dissent. There are many converging points between the ideas that our paper advocates and the Court's majority opinion.

The POGG criteria: a new picture in an old frame

The Court recognizes that the triple criteria of "singleness, distinctiveness and indivisibility", are "not easily applicable" (at para. 146). The Court nevertheless holds on to this three-prong test, completed by the provincial inability test and impact analysis. However, the way the majority reframes the triple criteria and the provincial inability test actually involves a transformation of the POGG national dimensions test.

Confirming that the doctrine of double aspect applies to matters of national dimensions (at para. 126), the majority stresses that only those aspects that are distinctly federal, i.e. that address the risk of non-cooperation and extraprovincial prejudice, fall within the newly recognized federal jurisdiction over the establishment of minimum standards of GHG pricing.

In our paper, we suggest that the distinctiveness criterion be discarded because a) the wording of POGG itself does not require it; b) there is no reason to grant an exclusive, plenary jurisdiction over an entire matter to Parliament; and c) recognizing a valid federal aspect is sufficient and better respects the equilibrium of federalism.

Refusing to discard the distinctiveness criterion, while at the same time accepting that the doctrine of double aspect applies to POGG, leads to what Justice Brown in dissent calls a "constitutional impossibility" (at 350). Indeed, it is hard to argue that Parliament can be recognized jurisdiction over an aspect of an otherwise provincial matter under the guise of POGG *and at the same time* that the requirement of a "matter distinct from provincial concern" (at para. 172) ought to be retained.

The fact is that majority of the Court applies distinctiveness to an *aspect* of a matter. It is therefore not the matter that ought to be distinct from matters of provincial concern, but the aspect of that matter.

Indeed, we would find it preferable if the Court had simply recognized that distinctiveness from provincial matters is now an irrelevant criterion. Instead, we now have to fit a proverbial square peg in a round hole. Consider how the Court handles the pith and substance analysis. Initially described as the establishment of "minimum national standards of GHG price stringency to reduce GHC emissions" (at para. 57), the matter becomes, later on, and to accommodate the application of the double aspect doctrine, a more general "GHC pricing of GHC emissions" (at para 199). This mutation is due to the fact that if the matter were described as the setting of national standards, presumably there can be no provincial aspect to it. Yet the provinces remain competent, as the very idea of the backstop presupposes.

Regarding indivisibility, the majority holds that it has nothing to do with whether, physically, one can establish the origin of the problem (at para 193). This is a helpful clarification. However, when it defines what indivisibility *is,* with due respect, the majority makes the prior test even less clear in its application. Indivisibility, in the newly refurbished test, is demonstrated when the risk of extraterritorial prejudice *and* distinctiveness (at para. 159) are found.

Here again, the Court is revamping indivisibility in a way that goes beyond mere clarification. Recall that in *Crown Zellerbach*, indivisibility was explicitly linked to the difficult assessment of the limit between the territorial sea and internal marine waters (at para 38, per LeDain J.). The Wagner C.J. majority does not recognize that indivisibility receives a new meaning: instead, the majority considers that the risk of extraprovincial and international prejudice (which was actually not examined by LeDain J.) "was critical" in Justice LeDain's opinion that the matter at stake be truly indivisible (at para. 148).

In our piece, we also argue that provincial incapacity should become a self-standing criterion, not an "indicium" of the singleness, distinctiveness and indivisibility criteria. The Court goes in this direction as well (at para. 156) and provincial incapacity becomes an indicium on its own. The newly refurbished provincial incapacity test has two elements: the incorporation of the General Motors test 4th and 5th prongs (i.e. the provinces cannot address the matter jointly or severally, because of the probability of non-cooperation), and the idea that the failure by one province to legislate could have grave extraprovincial consequences, not only on the legislative regime but also on residents of other provinces (at para. 154).

The risk of extra-provincial or international prejudice thus becomes the dominant criterion of the national dimensions doctrine. It is a "key factor" of distinctiveness (at para. 148); it is a "requirement" for a finding of provincial incapacity (at para. 159); and it "is a marker of" indivisibility" (at para. 158-159).

Subsidiarity in all but name

Contrary to what we assert in this piece, the Court does not refer to the subsidiarity principle in order to ground this stand-alone provincial incapacity test.

However, the ideas underlying subsidiarity run through the ruling. The fact that it is only to prevent the risk of non-cooperation, and to reduce the impact on other provinces of failure by one province to legislate, that federal jurisdiction is asserted, was determinative of the issue (at para. 177). The requirement that the federal assertion of power be empirically supported and not be grounded in "mere conjectures" is also reflected in the majority opinion. Thus, the Court endorses subsidiarity in principle, but not in name. It is a missed opportunity in our view, given the explicit recognition of the relevance of this principle in constitutional precedents, but perhaps the time has not yet come for this type of "revolution."

Minimum norms – a warning

The Court stresses the fact that the setting of minimum standards, in itself, is not a free pass for national dimensions. We warn about this possibility in Part VI of our paper. The majority points out that in the fields of health and education, most decisions have an impact only within the province (at para. 209). Hence, the recognition of a matter of national dimensions is precluded because there would be no provincial incapacity (and, hence, no risk of extraprovincial harm). The Court might be anticipating Parliament's assertion of jurisdiction over long-term health care facilities in a post-Covid world...

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This paper aims to revisit the national concern branch of the "Peace, order and good government" ("POGG") test for the validity of federal legislation. The relevance of this test has been brought to the fore most recently in the context of the various provincial challenges to the validity of federal legislation regulating greenhouse gas ("CHG") emissions.[1] Three Courts of Appeal[2] and several scholars[3] have reflected upon the application of the national concern doctrine to that question. In this paper, we propose a revamping of the POGG's national concern test, and the abandonment of the three criteria of distinctiveness, indivisibility and singleness, which were identified by Justice Jean Beetz as the proper indicators of federal jurisdiction grounded in the national concern doctrine.[4]

Part I of this paper provides a short description of the test. In Part II, we point to the mistaken view that in order for this branch of the POGG power to enable legislation, the matter must be completely beyond provincial jurisdiction. In Part III, we address the indivisibility criteria, and highlight the fact that it has been applied confusingly. In Part IV, we address the provincial inability test. In Parts V and VI, we propose, while

1 *Greenhouse Gas Pollution Pricing Act,* SC 2018, c 12.

2 Reference re *Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40 (hereinafter, the *Saskatchewan Reference*); Reference re *Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544 (hereinafter, the *Ontario Reference*); Reference re *Greenhouse Gas Pollution Pricing Act*, 2020 ABCA 74 (hereinafter, the *Alberta Reference*).

3 See, for example, Dwight Newman, "Federalism, Subsidiarity and Carbon Taxes" (2019) 82 Sask L Rev 187; Andrew Leach & Eric Adams, "Seeing Double: POGG and the Impact of Greenhouse Emissions Legislation on Provincial Jurisdiction" (2020) 29 Constit. Forum; Peter W Hogg, "Constitutional Authority over Greenhouse Gas Emissions" (2009) 46:2 Alta L Rev 507; Jason Maclean, "Climate Change, Constitutions, and Courts: The Reference re Greenhouse Gas Pollution Pricing Act and Beyond" (2019) 82 Sask L Rev 147; Jean-Maurice Arbour, "L'impossible défi canadien: lutter efficacement contre les changements climatiques, exporter davantage de pétrole, respecter les compétences constitutionnelles des provinces" (2017) HS17 Revue juridique de l'environnement 73; Nathalie Chalifour, "Jurisdictional Wrangling over Climate Policy in the Canadian Federation: Key Issues in the Provincial Constitutional Challenges to Parliament's *Greenhouse Gas Pollution Pricing Act*" (2019) 50 Ottawa L Rev 197; Nathalie Chalifour *et al.*, "Modernizing Peace, Order and Good Government in the *Greenhouse Gas Pollution Pricing Act* Appeals" (2020) 40:2 N.J.C.L. (forthcoming); Nathalie Chalifour, "Making Federalism Work for Climate Change: Canada's Division of Powers over Carbon Taxes" (2008) 22 N.J.C.L. 119.

4 *Reference Re: Anti-Inflation Act*, [1976] 2 SCR 373.

building on our previous analysis of the general commerce power,[5] to formally incorporate the principle of subsidiarity within the "provincial incapacity" test. In doing so, we outline the origins of the principle of subsidiarity and its potential application within Canadian constitutional law. We also suggest a revamped test for the national concern branch of POGG, which we hypothetically apply, in Part VII, to the carbon tax question. Our readers will thus understand that this short piece is, in essence, a *plea* in favour of a redefined "national concern" test, rather than an exhaustive analysis of everything that has been written on that particular question.

I. POGG's national concern test

The Judicial Committee of the Privy Council's (JCPC) interpretation of the introductory words of section 91 has drawn close scrutiny,[6] the JCPC having mostly reduced the POGG power to a mere tool for addressing emergencies and exceptional gaps in the division of powers. The former addressed those situations where a national crisis demanded temporary, urgent legislation[7]; the latter covered those situations where the drafters simply seemed to not have fully contemplated a matter, such as the incorporation of federal companies (the incorporation of provincial companies was provided for in section 92(11) Constitution Act), or the ratification of treaties (the power of the federal executive to fulfill international treaty obligations on behalf of the Crown was provided for in section 132 CA 1867). We shall leave POGG's emergency and gap branches outside of the scope of this short piece, and focus instead on its national concern branch.

Initially expounded by Justice Jean Beetz in his dissenting opinion in the *Reference re Anti-Inflation*,[8] the current test for demonstrating that fed-

5 Noura Karazivan & Jean-François Gaudreault-DesBiens, "On Polyphony and Paradoxes in the Regulation of Securities within the Federation", (2010) 49 Can. Bus. L.J. 1, hereinafter "On Polyphony and Paradoxes".

6 Canada, Parliament, Senate, *Report pursuant to resolution of the Senate to the Honourable the Speaker by the parliamentary counsel: relating to the enactment of the British North America Act, 1867, any lack of consonance between its terms and judicial construction of them and cognate matters* (Ottawa: Canada, 1939). See also Peter Hogg & Wade Wright, "Canadian Federalism, the Privy Council and the Supreme Court: Reflections on the Debate about Canadian Federalism", (2005) 38 UBC L Rev 329.

7 See, for example, *Fort Frances Pulp and Paper Co v Manitoba Free Press Co*, [1923] AC 695 (UK JCPC) and *Re: Anti-Inflation Act*, *supra* note 4.

8 [1976] 2 SCR 373.

eral legislation is valid under the national concern branch of POGG was later endorsed by the Supreme Court of Canada in *R. v. Crown Zellerbach Canada Ltd*.[9]

This test can be summarized as follows. In order to be characterized as "national concern", matters must either be "new" or have started as local concerns, and "have since, in the absence of a national emergency, become matters of national concern."[10] If a matter qualifies as a "national concern", either because of its newness or because it has now become of national interest, the next step is the determination that the matter displays a "singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern."[11]

One way of determining whether these three criteria have been met is for courts to look for evidence of a provincial inability in regulating the matter at issue. This imposes upon them to inquire into the impact of the failure by one province to regulate effectively the intra-provincial aspects of the matter and on this failure's effect on extra-provincial interests.[12] As we will see below, the very definition of "provincial inability" remains contentious.[13]

But there is more. Indeed, for a matter to be of a "national concern," the net result of recognizing federal jurisdiction must not drastically upset the balance of powers in the Canadian federation (presumably because one tangible outcome of the application of the national concern branch is that Parliament is vested with an irreversible and exclusive jurisdiction over the issue at stake).[14] It thus matters that the issue be *narrow and contained* rather than *broad* and *sweeping*. In other words, provincial jurisdictions must not be seriously diminished as a result of the recognition of a POGG power over a matter now deemed of "national concern".

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9 [1988] 1 SCR 401 (*hereinafter, Crown Zellerbach*). The next three paragraphs are strongly inspired by Noura Karazivan & Jean-François Gaudreault-DesBiens, "On Polyphony and Paradoxes", *supra* note 5.

10 *Crown Zellerbach, ibid.* at para 33.

11 *Ibid.*

12 *Ibid*.

13 See discussion below in Part IV.

14 See discussion below in Part VI.

The complex and dual nature of this test has perhaps something to do with the fact that, as two authors claimed in 2007, "the Supreme Court has let POGG slide into disuse and has not ruled decisively upon it in nearly two decades."[15] The same can be said thirteen years later. In practice, judges have repeatedly hesitated to find *vires* on its basis, choosing other strategies instead.[16] As the Alberta Court of Appeal reminded us, in Canada's 153-year history of division of powers, the "judicially-created national concern doctrine" has been relied on by the Supreme Court of Canada or the Privy Council to expand federal powers only 6 times.[17] Even parties are candid in their pleadings about how they perceive POGG as a much less reliable solution than finding vires on the basis of the criminal law power, for example.[18]

Despite the fact that the test may have fallen into disrepute, it is still, as a matter of precedent, binding on courts. Along with others in the past,[19] we find several problems with that test, justifying in our opinion that it needs to be completely overhauled. Because *Crown Zellerbach* is one of the only instances where the test was successfully argued, much of our focus will be on this case.

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15 Amir Attaran & Kumanan Wilson, "A Legal and Epidemiological Justification for Federal Authority in Public Health Emergencies" (2007), 52 McGill L.J. 381, at 412.

16 Jean Leclair, "The Elusive Quest for the Quintessential National Interest" (2005), 38:2 UBC L Rev 353.

17 *Alberta Reference, supra* note 2 at paras 16-17.

18 For example, the Canadian Coalition for Genetic Fairness argued, at para 65-66 of their Factum on appeal, that finding *vires* on the basis of the criminal law power does not threaten the equilibrium of the division of powers in Canada and respects a "balanced approach", quoting Justice Laforest in *R v Hydro-Quebec,* [1997] 3 SCR 213. In that case, Laforest J. held that the national concern branch works by assigning "full subjects" to Parliament, whereas the criminal law power works by "discreet prohibitions", hence the latter is more in harmony with the federal principle than the former. We shall say more on this below, in Part VI.

19 See: Jacques-Yvan Morin & José Woerhling, *Les constitutions du Canada et du Québec du régime français à nos jours,* Tome premier – Études (Montréal: Éditions Thémis, 1994) at 315-322; Henri Brun, Guy Tremblay & Eugénie Brouillet, *Droit constitutionnel*, 6th ed., (Cowansville: Éditions Yvon Blais, 2014) at 590-595. See also Patrick J. Monahan *et al.*, *Constitutional Law,* 5th ed., (Toronto: Irwin Law, 2017), at 280 and ff., proposing a fourth branch to the POGG power to account for "interprovincial impact" cases not otherwise covered by s. 91 enumerated powers.

II. The problem with distinctiveness

According to the majority of the Supreme Court of Canada in *Crown Zellerbach,* "For a matter to qualify as a matter of national concern in either sense it must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern".[20]

But when we read section 91, we find no evidence that the matter should be distinct from "matters of provincial concern". Section 91, Constitution Act, 1867, provides as follows:

> **91.** It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say (...),

According to A.H.F. Lefroy, John A. Macdonald gave the "gift of a general residuary power to the Dominion parliament", by stressing the failings of the American Constitution, devoid of such residuary power, thus causing great "weakness of the American system". If all the powers were divided among the federal and provincial legislatures, the opening words of section 91 "rounded off" the Dominion parliament's powers by "bestowing upon it a general residuary power to make laws for the peace, order and good government of the country *in relation to all non-provincial subjects*" (our emphasis).[21]

Note the leap from the wording of section 91 *in limine*, which makes POGG available to matters not assigned *exclusively* to provinces, to its interpretation by Lefroy as applying only to "non-provincial subjects" The federal residuary power has thus been fraught with an internal contradiction from its inception: the text announces that it could apply to any *non-exclusively* provincial subject. With the passing of time, and the idea that

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20 *Crown Zellerbach, supra* note 9 at para 33.

21 A.H.F. Lefroy, *Canada's Federal System, Being a Treatise on Canadian Constitutional Law Under the British North America Act* (Toronto: Carswell, 1913) at 747.

there might be not one, but *two* residuary clauses in the division of powers,[22] the POGG power was construed as not being available whenever a matter over which provinces could claim jurisdiction was involved. It was thus deemed unavailable not only where subjects that were attributed *exclusively* to the provinces were involved, but also where subjects that were *concurrently* shared or had a double aspect were at stake. This reading has led to the development of the criterion requiring that for the exercise of federal legislation to be valid under POGG, the matter targeted by such legislation must be *distinct from* provincial ones, such as in the *Crown Zellerbach* excerpt identified above. A lot of the confusion surrounding POGG is reducible to this question: can POGG apply to concurrent or double aspect matters, i.e. matters that are, under some aspects, within provincial jurisdiction? If so, how can Courts decide whether a particular exercise of federal power fits under POGG?

In our opinion, the correct answer to the first question is positive. To explain why, we must first dissipate the normative fog surrounding a) the wording of the provision which authorizes the use of POGG for matters not "exclusively" within provincial jurisdiction; b) the repeated incantation that the power cannot validate legislation not distinct enough from matters within provincial jurisdiction; and c) the way the POGG test has been devised by courts, in particular the part where judges recognize that it applies to matters that may have *started* as a local concern but have transitioned into a *national* one.[23]

In *Reference re Anti-Inflation*, Beetz J. writes that in order to satisfy the national concern branch of POGG, the matter legislated upon must have

[22] The idea of two residuary powers has received some judicial endorsement: see *Ontario (A.G.) v Canada (A.G.),* [1896] A.C. 348 (Local Prohibition), per Lord Watson. Both Lefroy and Lysyk believe that s. 92(16) performs a residuary function. According to Lefroy, "[i]n like manner, also they rounded off and completed the power of provincial legislatures over provincial matters by giving them residuary power over 'generally *all* matters of a merely local and private nature in the province'". See also, K. Lysyk, "The Introductory Clause of Section 91" (1979) Can Bar Rev 531 at 534.

[23] *Crown Zellerbach*, *supra* note 9 at para 33 al. 2: "The national concern doctrine applies to both new matters which did not exist at Confederation and to matters which, although originally matters of a local or private nature in a province, have since, in the absence of national emergency, become matters of national concern" (our emphasis). This wording is taken from LeDain's reading of Justice Estey's reasons in *Labbatt Breweries,* at 945.

an "identity which made it distinct from provincial matters".[24] Surely this must be incorrect, as the opening words of section 91 only excludes matters *exclusively* assigned to provinces. A revamped test should make clear that only those matters "exclusively assigned" to provinces are, arguably, outside the scope of POGG. Even if there is a judicial tendency to sway away from exclusivity and towards overlapping jurisdictions, some matters do remain exclusively within federal jurisdiction, and others within provincial jurisdiction. On the other hand, concurrent powers seem plausible candidates for the assertion of contained, limited POGG powers. As the next section will show, subsidiarity is a principle which applies only to concurrent matters, and which may help determine the validity of a specific federal initiative.

In the carbon tax cases, the way in which all three Courts of Appeal handled this part of the test shows great discrepancies. Some judges look at distinctiveness from provincial powers, others look at the distinct character of the matter *per se.* In Alberta, the majority of the Court announced that "[i]n assessing whether the claimed head of power is sufficiently distinct from provincial powers, a court must consider the totality of the legislative means authorized under the impugned legislation." Here, the matter was found to be an aggregate of provincial matters, thus obviously not distinct enough from provincial powers.[25] The majority found that POGG only applied in cases where provinces have *no* jurisdiction:

> [291] The federal government's effort to co-opt the provinces' jurisdiction in pursuit of the federal government's preferred policy choices is fundamentally inconsistent with the national concern doctrine. This doctrine confers federal power over a single and indivisible subject matter when it does not come within any of the classes of powers assigned to the provincial governments, that is when it is beyond the power of the provinces to regulate. That is not this case.[26]

In the *Saskatchewan Reference*, the majority of the Saskatchewan Court of Appeal found no "lack of clarity in how the Act intersects with provincial

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[24] At p. 458. In *Crown Zellerbach*, the dissenting judges (with Beetz) write that the subject, to fall within the national concern branch, "must be marked by a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern." (*Ibid.* at para 72).

[25] *Alberta Reference, supra* note 2 at paras 287-288.

[26] *Ibid.* at para 291, emphasis added.

areas of responsibility. Simply put, this is not a situation of the sort that troubled La Forest J. in *Crown Zellerbach* when he argued against recognizing marine pollution as a matter of national concern because, in his view, there was no clear demarcation between salt and fresh water."[27]

In Ontario, the Court of Appeal did not dispute the submission made by British Columbia's Attorney General that distinctiveness should require "that the matter be one beyond the practical or legal capacity of the provinces because of the constitutional limitation on their jurisdiction to matters 'in the Province'".[28] Although the Ontario Court of Appeal found this characterization helpful, it applied the distinctiveness criteria rather like the Supreme Court did in *Crown Zellerbach,* i.e. by looking into the distinctiveness of the matter *per se*, finding GHG are "a distinct form of pollution,"[29] identified "with precision" in the impugned Act.

There is thus a general endorsement of the criteria of distinctiveness from provincial matters or powers even though the precise application of this criterion varies.[30] This repeated endorsement however is wrong, as it relies on a mistaken reading of s. 91 *in limine*. The fact is that provinces are competent to regulate GHG emissions intraterritorially, just as the provinces are competent to regulate capital markets' systemic risks intraterritorially – we will return to this analogy later in this article. The question is not whether the matter is distinct enough from provincial powers, as it may be not be distinct at all and yet warrant federal legislation – we shall return to this below. In any event, the judicial wording of the test, which targets not only new matters, but also matters which, though local at first, became of national interest, makes it obvious that POGG can apply to matters that are at least to some extent and in some aspects within provincial jurisdiction.

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27 *Saskatchewan Reference, supra* note 2 at para .152

28 *Ontario Reference, supra* note 2 at para 113.

29 *Ibid.* at para 114.

30 The same ambivalence is found in Lysyk's analysis. Lysyk righlty argued that the focus of the national dimensions test should be on the words "'not coming within' the provincial heads of power rather than on the words 'peace, order and good government', but he doesn't always add the word 'exclusively' to his analysis (see "The Introductory Clause of Section 91", *supra* note 22 at 542: "What the introductory clause assigns to Parliament, to repeat, is not authority to make laws in relation to peace, order and good government but authority to make laws in relation to matters 'not coming within' the provincial heads of power."). Nonetheless, he rightly concludes that "neither level of government has a monopoly over matters falling outside the specified classes of subjects." (*ibid* at 572).

Therefore, the criteria set by Beetz J. that POGG matters should be *distinct from provincial matters* should be abandoned.

III. The problem with indivisibility (and singleness)

There is a confusion among and between the other two criteria developed by Beetz J. in the *Reference re Anti-Inflation*. According to Beetz J, inflation did not fall under POGG because it did not follow those other cases, like the national capital or aeronautics or radiocommunications, where the (new)[31] matter "was not an aggregate but had a degree of unity that made it indivisible, an identity which made it distinct from provincial matters and a sufficient consistence to retain the bounds of form."[32]

Thus, the matter must have a sufficient "consistence" (*consistance*, in French, being defined as the "*degré de solidité d'un corps*" – as opposed to a more fragile "aggregate" (*agrégat* in French)) or shape so as to "retain the bounds of form" (in the French version, "*pour retenir les limites d'une forme*", which presupposes a relatively closed and containable entity). In other words, it must be something other than an ever-expanding blob. But the matter must also be indivisible. It must be both indivisible...and retain the bounds of form. For example, land planning on the national capital region retains the bounds of form. But is it indivisible, and if so, from what? Here the indivisibility seems to derive from a prior federal determination of the geographical boundaries of the national capital region rather than from an objective conceptual indivisibility. Radiocommunications across the country is also indivisible, but this time, the conceptual indivisibility is slightly easier to defend. Yet, what is its shape or form; what is its *consistence*?

The problems with these two elements is that they can be contradictory and overlap with distinctiveness. There can also be a confusion between indivisibility and consistence, as is evident when we examine both La Forest and Le Dain JJ.'s motives in *Crown Zellerbach*. For Justice LeDain, writing

[31] We agree with the late Peter Hogg that newness, bringing nothing useful to the discussion, should be discarded as a criterion for POGG's national concern test: Peter W. Hogg, *Constitutional Law of Canada*, 2011 Student edition (Toronto: Carswell, 2011), 17.3(d), at 17-18. See also K. Lysyk, *supra* note at 572 (newness should be "an entirely neutral factor in the process of determining the content of the federal residuary power").

[32] *Reference re Anti-Inflation*, *supra* note 4 at 458.

the majority opinion, marine pollution is a "distinct form" of water pollution; he also finds a "distinction between salt water and fresh water"; yet indivisibility is found because of "the difficulty of ascertaining by visual observation the boundary between the territorial sea and the internal marine waters of a state". He adds that "[i]n many cases the pollution of fresh waters will have a pollutant effect in the marine waters into which they flow".[33] Thus, all things considered, marine pollution (by dumping) is not that indivisible after all. As to marine pollution's ability, as defined, to retain "the bounds of form," we would be tempted to say "res ipsa *non* loquitur"...

Justice La Forest's opinion in *Crown Zellerbach*, to which Beetz J. concurs, is also fraught with contradictions. Relying on a geographic indicator, he finds that there is no singleness or consistence of the matter: "marine waters are not wholly bounded by the coast; in many areas, they extend upstream into rivers for many miles."[34] La Forest J. adds that there is no clear 'demarcation' between salt and fresh water. To quite a few observers, this would seem to show the indivisibility *of the matter*, but the conclusion reached is exactly the opposite: the dissenting judges find that marine pollution fails the indivisibility test. Paradoxically, by seeking to establish that marine pollution knows no borders, that rivers and coastal waters, and salt and fresh waters, are all mixed up, i.e., by seeking to show that the matter was not contained enough, they end up showing that the matter *is* indivisible. One can perhaps reconcile this apparent contradiction by saying that the "indivisibility" test could either refer to a conceptual indivisibility of the means used to combat marine pollution or to a visually-ascertainable natural phenomenon.[35]

We thus conclude that, for all their superficial theoretical appeal, indivisibility, singleness and distinctiveness, fail to produce predictable results. Therefore, all three should be dropped. Indivisibility should not apply to the physical or conceptual matter itself, but to the legislative response to the matter (and be addressed in the provincial incapacity prong). As to singleness or retaining the bounds of form, it really helps little, especially in a world where in many instances the digital progressively replaces the physi-

[33] *Crown Zellerbach, supra* note 9 at paras 37-39.

[34] *Ibid.* at para 72.

[35] Actually, it is not clear if the judge refers to the mechanisms or means used to combat marine pollution, but it is a reasonable hypothesis. We thank our colleague Jean Leclair for this insight.

cal. In any event, the shape of the matter should not be a decisive factor. The critical point is rather that the matter should not be sweeping. It must be narrow, irrespective of its shape or form.

IV. The problem with provincial incapacity

There is also normative fog surrounding the notion of provincial incapacity. It is an "indicia" to ascertain the first three criteria, but, in practice, it also leads to a separate inquiry. Often referred to as a "test," such a characterization remains questionable, as reference to provincial inability seems instead to call for an evidence-based approach to the "singleness/distinctiveness/indivisibility" test. In our opinion, the determining criterion should not turn on the provincial incapacity to *legislate* (provinces are often capable of legislating within their own territory). Indeed, it is only if provinces are *capable* of legislating that we can measure the impact of their unwillingness to do so. In reality, this prong of the test seeks to verify the *capacity* of provinces to, collectively, implement and maintain a normative framework effectively addressing an issue, and force other recalcitrant provinces to play along the same tune.

That issue has to be targeted and not sweeping. Provincial inability signals the need for a single, harmonized approach to a targeted issue, not to a broad one. A similar distinction was made in the first *Securities Reference*, where the Supreme Court contemplated a potential federal jurisdiction over systemic risks, but refused to recognize such jurisdiction over the general aspects of securities regulation, thus finding that the draft law failed the s. 91(2) *General Motors*[36] test. What makes an interesting parallel is that the GM test also has a "provincial inability" component. The Court found that the provinces were, by virtue of their own parliamentary sovereignty,[37] unable to force each other to legislate on the question of systemic risks. They were capable, individually, of legislating on systemic risks within their province, but they were unable to "maintain a viable regime sought to meet the national ends."[38] The Court hinted, in the first *Securities Reference*, that

[36] *General Motors Ltd v City National Leasing,* [1989] 1 SCC 641.

[37] Reference Re *Securities Act*, 2011 SCC 66, [2011] 3 SCR 837 at para 119 (hereinafter, *Securities Reference*).

[38] Noura Karazivan, "Le fédéralisme coopératif entre territorialité et fonctionnalité: le cas des valeurs mobilières", (2016) 46:2 R.G.D. 419 at 456-458. See also, *Securities Reference*, *ibid.* at para 120.

only the federal Parliament could legislate in order to prevent the effects, on the other provinces, of one province's refusal to legislate on systemic risks. When the question was raised the second time around, the Court confirmed the validity of a federal law doing precisely that.[39]

By contrast, in *Crown Zellerbach,* LeDain J.'s majority opinion failed to consider the extra-provincial impact of a failure to legislate. Perhaps he did so while commenting on the complex task provincial legislators have to face, because, allegedly, the " difficulty of ascertaining by visual observation the boundary between the territorial sea and the internal marine waters of a state creates an unacceptable degree of uncertainty for the application of regulatory and penal provisions."[40] However, he did not examine the impact of the absence of legislation. Justice Laforest did, but he was not convinced that the activities regulated by the federal law could be "demonstrated either to pollute or to have a reasonable potential of polluting the ocean."[41] Hence, the effects of the law, not to mention its extra-provincial effects, were hypothetical.

In the *Alberta Reference* on the validity of the GHG emissions legislation, the majority of the Alberta Court of Appeal suggested its own reading of this test. According to these judges, the question is "whether the provinces, acting alone or in concert, have the jurisdictional ability to enact the challenged scheme. If they do and that scheme may still operate successfully in other provinces, even if one province or more does not join in, that test is not met".[42] They found that Alberta had the "jurisdictional and practical ability to reduce GHG emissions", thus, that the province was not incapable of legislating. The Court adds what appears to us a wrong premise:

> But the POGG power can only operate in the absence of provincial jurisdiction and here, the provinces have the constitutional and practical ability to act to reduce GHG emissions individually or together.[43]

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39 *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48, [2018] 3 SCR 189. The Court held the federal *Capital Markets Stability Act* intra vires Parliament.

40 *Crown Zellerbach, supra* note 9 at para 38.

41 *Ibid.* at para 74.

42 *Alberta reference*, *supra* note 2, para 308. This characterization of provincial inability is at odds with the majority of the Court's formulation in *Crown Zellerbach*.

43 *Ibid.* at para 309 (emphasis added). Equally irrelevant is the Court's assertion that the prejudice caused by a province's failure to act is hypothetical, given the fact that Canada produces only 1.8% of the world's GHG emissions (*ibid.* at para 324).

We believe that the "provincial inability" prong of POGG's national concern test should follow the same lines as those traced by the Supreme Court in the first *Securities Reference*[44] regarding the identical prong of the *General Motors* test. It should stress the fact that the inquiry is not so much into the "inability of provinces to regulate" as it is into the probability of cooperation, or lack thereof, and the enforceability of a joint approach. Even if intergovernmental agreements are not always enforceable by courts and legislation can easily throw them out of the window,[45] courts should be reluctant to strike down a full-fledged intergovernmental scheme voluntarily put in place in every province.

For all these reasons, we suggest revamping the POGG test by abandoning the trilogy of "indivisibility, distinctiveness and singleness", and reinstating the provincial inability test within a more predictable analytical framework, which, in our view, should incorporate elements of the principle of subsidiarity, the object of the next section.

V. Subsidiarity[46]

Historically, the principle of subsidiarity has been associated with the Roman Catholic Church's social doctrine. With the rise of industrialization in the 1930s, Pope Pius XI feared the papacy would lose its grip on family and social life. He thought that the Church and other charities would eventually no longer be able to ensure basic social networks, as the state would supersede them. By invoking subsidiarity, the papacy sought to make sure that only if the Church were unable to provide certain services to society should the state take action. Subsidiarity was thus protecting the

44 *Securities Reference*, *supra* note 37 at paras 117-121.

45 See Jean-François Gaudreault-DesBiens & Johanne Poirier, "From Dualism to Cooperative Federalism and Back?: Evolving and Competing Conceptions of Canadian Federalism", in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, eds, *The Oxford Handbook of the Canadian Constitution*, (Oxford: Oxford University Press, 2017) at 391; Noura Karazivan, "Cooperative Federalism vs Parliamentary Sovereignty: Revisiting the Role of Courts, Governments and Parliaments", in Alain-G Gagnon & Johanne Poirier, eds, *Canadian Federalism and its Future,* (Montreal/Kingston: McGill/Queen's University Press, 2020) at 291-335.

46 This part is strongly inspired by our previous work on subsidiarity; see N. Karazivan & J.-F. Gaudreault-DesBiens, "On Polyphony and Paradoxes", *supra* note 5 at 29 and ff.

autonomy and social relevance of non-state actors, therefore indirectly preserving the Church's then shrinking *imperium*.[47]

Since then, some secular legal orders have integrated it to various extent into their *corpus juris*. The most prominent move in that direction was made by the European Union, where subsidiarity is a principle applying to concurrent powers. Article 5(3) of the *Consolidated version of the Treaty on European Union* provides that:

> in areas which do not fall within its exclusive competence, the Union will take action "only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States...[and] can rather, by reason of the scale or effects of the proposed action, be better achieved [by the Union]".[48]

As this wording suggests, the principle of subsidiarity has both a positive limb (the union can achieve better results than Member States) and a negative limb (the Member States are unable to achieve the objectives of the proposed action). According to the preamble of the *Protocol on the Application of the Principles of Subsidiarity and Proportionality*, the high contracting parties wish to "ensure that decisions are taken as closely as possible to the citizens of the Union." Article 5 of the Protocol holds that any draft European legislation should contain "a detailed statement" on the proposal's compliance with the subsidiarity principle. The Protocol goes further: "the reasons for concluding that a Union objective can be better achieved at Union level shall be *substantiated by qualitative and, wherever possible, quantitative indicators*."

Judicial review of subsidiarity has not been widespread in the European context. Even though the principle is justiciable as per article 8 of the Protocol, Courts have tended to avoid enforcing it.[49] Yet, it remains con-

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47 See Thomas O. Hueglin, "The Principle of Subsidiarity: Tradition — Practice — Relevance" in Ian Peach, ed., *Constructing Tomorrow's Federalism* (Winnipeg: University of Manitoba Press, 2007). However, subsidiarity in its general meaning, *i.e.*, that, as far as possible, decisions ought to be taken at the lowest possible level of governance, can be traced back much further. See Michel Thériault, "Définition et origines de la subsidiarité" (1993) 3 N.J.C.L. 311. See also: Julien Barroche, "La subsidiarité. Le principe et l'application", *Études*, 2008, vol. 408, no. 6, p. 777.

48 European Union, *Consolidated version of the Treaty on European Union*, 30 March 2010, [2010] OJ C 83/13

49 The European Court of Justice has indeed tended to adopt a rather deferential approach toward the Community's *own* evaluation of when it can better achieve a given objective,

ceptually useful, and, in any event, we do not suggest mobilizing subsidiarity, in itself, as a principle capable of invalidating legislation or bypassing the division of powers; rather, it is through the interpretation of legislation impugned under the division of powers provisions of the Constitution that we think its potential is most promising. Although Canadian courts have recognized the potential interpretive value of this principle, and in spite of a burgeoning scholarship,[50] its use remains embryonic and

therefore allowing its centralizing potential to express itself. See, *inter alia*, *Philip Morris Brands SARL e.a. v Secretary of State for Health*, C-547/14, C:2016:325, [2016] EUECJ C-547/14 (04 May 2016):

> 218. As regards, in the first place, the judicial review of compliance with the substantive conditions laid down in Article 5(3) TEU, the Court must determine whether the EU legislature was entitled to consider, on the basis of a detailed statement, that the objective of the proposed action could be better achieved at EU level.
> 219. Since the present case concerns an area — the improvement of the functioning of the internal market — which is not among those in respect of which the European Union has exclusive competence, it must be determined whether the objective of Directive 2014/40 could be better achieved at EU level (see, to that effect, judgment in *British American Tobacco (Investments) and Imperial Tobacco*, C-491/01, EU:C:2002:741, paragraphs 179 and 180).
> 220. In this regard, as has been mentioned in paragraph 143 of this judgment, Directive 2014/40 has two objectives in that it seeks to facilitate the smooth functioning of the internal market for tobacco and related products, while ensuring a high level of protection of human health, especially for young people.
> 221. Even if the second of those objectives might be better achieved at the level of Member States, the fact remains that pursuing it at that level would be liable to entrench, if not create, situations in which some Member States permit the placing on the market of tobacco products containing certain characterising flavours, whilst others prohibit it, thus running completely counter to the first objective of Directive 2014/40, namely the improvement of the functioning of the internal market for tobacco and related products.
> 222. The interdependence of the two objectives pursued by the directive means that the EU legislature could legitimately take the view that it had to establish a set of rules for the placing on the EU market of tobacco products with characterising flavours and that, because of that interdependence, those two objectives could best be achieved at EU level (see, by analogy, judgment in *Vodafone and Others*, C-58/08, EU:C:2010:321, paragraph 78, and *Estonia* v *Parliament and Council*, C-508/13, EU:C:2015:403, paragraph 48).

[50] Peter W. Hogg, "Subsidiarity and the Division of Powers in Canada" (1993) 3 N.J.C.L. 341; Robert Howse, "Subsidiarity in All but Name: Evolving Concepts of Federalism in Canadian Constitutional Law" in Patrick Glenn, ed., *Droit Contemporain* (Québec: Yvon Blais, 1994); Dwight Newman, "Federalism, Subsidiarity, and Carbon Taxes" (2019) 82:2 Sask L Rev 187, qualifying subsidiarity as a "key structural principle" within the Canadian constitution; Eugénie Brouillet, "Canadian Federalism and the Principle

its normative consequences, unclear. From *Spraytech*[51] to *Reference re Assisted Human Reproduction Act*,[52] the role assigned to subsidiarity when handling general division of power cases remains modest.

The subsidiarity principle could serve as an interpretive principle, akin to cooperative federalism, or as the lens through which the validity of legislation is examined (both at the pith and substance stage, and at the classification stage), especially when the matter is a concurrent one or one where there is a clear double aspect. At the very least, it could serve, as in the European Union, as a conflict rule that helps determine which level of government bears the burden of proof in a situation that gives rise to its application.[53] It can thus prevent the highest level of government from deciding to exercise, on a purely discretionary basis, a power that local governments may be in a better position to exercise.

We therefore suggest that in order to interpret the national concern branch of the POGG power, courts should use the subsidiarity principle in a way similar to what the European protocol provides, i.e. limited to situations where the objectives of the proposed federal action cannot be sufficiently achieved by the provinces and "can rather, by reason of the scale or effects of the proposed action, be better achieved" by Parliament. In addition, subsidiarity demands *strong indicia* (qualitative, and if possible, quantitative) that federal action is necessary, and it safeguards as much as possible member states' (or provinces', in our case) autonomy by failing to transfer a whole subject within the central government's exclusive jurisdiction.

of Subsidiarity: Should We Open Pandora's Box?" (2011) 54:2 SCLR (2d) 601; Dwight Newman, "Changing Division of Powers Doctrine and the Emergent Principle of Subsidiarity" (2011) 74 Sask L Rev 21; Erika Arban, "La subsidiarité en droit canadien et européen. Une comparaison" (2013) 56(2) Adm. pub. Can. 219.

51 *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40, [2001] 2 SCR 241. In that case, L'Heureux-Dubé J., writing for the majority, displayed a correct reading of the principle of subsidiarity, by finding that law-making and implementation are best achieved by the level of government which is both effective and closer to the population, and by finding that local governments are entitled to 'exceed, but not lower' national norms: at para 3.

52 [2010] 3 SCR 457. Subsidiarity was addressed by Deschamps and LeBel JJ in their concurrent opinion, paras 183 and 273.

53 Vlad Constantinesco, "Le principe de subsidiarité: un passage obligé vers l'Union européenne", in *L'Europe et le droit, Mélanges en hommage à J. Boulouis* (Paris: Dalloz, 1991) at 41, quoted in Valérie Michel, *Recherches sur les compétences de la communauté* (Paris: L'Harmattan, 2003) at 476.

Therefore, subsidiarity should come particularly handy in the Canadian context when judges are assessing the validity of federal legislation under the POGG power.

VI. A new test for POGG's national concern branch

Relying on the above premises, federal jurisdiction over a matter of national concern should be met when:

1) It is demonstrated, on a balance of probabilities and based on qualitative (including comparative) evidence and, where available, quantitative evidence, that action at the federal level would produce tangible benefits compared with action at the provincial levels and, more precisely:
   a) that the problem that the legislation seeks to address has supra-provincial aspects which cannot be satisfactorily and efficiently regulated by provinces acting jointly or severally;
   b) that the objectives sought by the legislation cannot be satisfactorily achieved by the provinces acting jointly or severally and, by reason of the scale or effects of the legislation, can better be achieved by Parliament; and
   c) that the failure to include one or more provinces or localities in the legislative scheme will jeopardize the successful operation of the scheme in other parts of the country.
2) Where appropriate and subject to the need for proper enforcement, the legislation provides provinces with alternative ways to achieve the objectives of its measures or incorporates provincial input in the management and enforcement of the scheme; and
3) The scope of the legislation does not exceed what is necessary to achieve the objectives sought and does not disproportionally upset the balance of power between the federal and provincial governments.[54]

[54] This test is similar to the one we established in relation to the trade and commerce power: see N. Karazivan & J.-F. Gaudreault-DesBiens, "On Polyphony and Paradoxes", *supra* note 5 at 32.

The first part of this test refers to the evidentiary burden which should be met when the POGG's national concern branch is relied upon. As we argued in "On Polyphony and Paradoxes",[55] and as the SCC in the *Securities Reference* took high pains to confirm, judicial recognition of federal power (whether under s 91(2) or under POGG) should not be based on general efficiency considerations, but rather on empirical evidence. Courts must be satisfied that there is evidence, so that the "rational basis" is genuinely rational, and not merely intuitive or driven by purely political objectives.

Sub-parts a-b-c revisit the "provincial inability test." Here, we stress the provincial inability to enforce a collective scheme, and the impact of a failure to legislate on other provinces. Sub-part b stresses the probability of intergovernmental cooperation, which in Canada is not mandatory but attracts judicial benevolence when implemented. This examination was conducted in *Munro,* where the improbability of cooperation led the court to find vires on the basis of the national concern power.[56] Sub-part c addresses the necessity to handle the matter in a collective, or harmonious way. It is not the "matter" which is single, but the legislative response. It does not mean there can be no variation among provincial legislative responses, but it means there cannot be a "no-show" on the part of one or several provinces.

Part 2 of the test goes to the idea, pleaded many times, of the need for "national standards". There is nothing wrong in setting national standards, *provided* federal jurisdiction is established. Hence, the (increasingly popular) proposition that federal legislation setting minimum standards on matters falling exclusively within provincial jurisdiction is valid but may be inapplicable in case of equivalent provincial legislation, should be rejected.[57]

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55 *Supra* note 5.

56 *Munro v National Capital Commission*, [1966] SCR 663 at 667. Justice Cartwright, writing the judgment of the Court, endorsed the trial judge's findings that "it was only after prolonged and unsuccessful efforts to achieve the desired result by such co-operation that Parliament decided to confer upon the National Capital Commission the powers necessary to enable it to carry out the zoning contemplated in the Master Plan.»

57 McLachlin C.J.'s hinted towards that approach in the *Reference re Assisted Reproduction Act*. McLachlin J. held that section 10 of the Act (regulating fertility treatments), read in conjunction with s 68 (equivalence agreements) were an example of "pragmatic" lawmaking, where federal law would cease to apply whenever provincial laws were

In both the upcoming Indigenous Children reference[58] and the *Reference re Assisted Human Reproduction Act*,[59] the validity of federal "minimal norms" is raised. It must be clear that if there is no jurisdiction, there should be no minimal norms depicted as "national standards". However, when there is a jurisdiction based on the POGG power's national concern branch, setting minimum standards while allowing provincial variations actually achieves the objectives of maintaining a fair balance of powers within the federation because provinces are offered the liberty to adapt the federally-imposed minimal norms to their own particular contexts – and thus to ensure not only the effectiveness but the efficiency of these norms – and exceed them if they so wish. Such a scheme integrates into the POGG's equation the protection of diversity, which is one of the federalism's most fundamental goals.

Indeed, Albert Breton and Anthony Scott's three classical rationales for establishing a federal state from the economic point of view are compatible with this test. In their view, the potential of federalism to cope with cultural, linguistic, racial, religious diversities is one rationale for establishing a federation; another rationale is the possibility of exploiting economies of scale. More relevant to our discussion is the third, classic rationale: that federalism increases responsiveness to the preferences of citizens, assuming that lower levels of jurisdiction "are more responsive to the desires and demands of local citizenry" because they "deal with fewer citizens, possibly more homogeneous groups of preferences, and with local issues."[60] In a more contemporary formulation, it could be said that lower levels of jurisdiction are better positioned than higher level ones to grasp contextual factors pertaining to their local political community in such a way that both the legitimacy and the efficiency of the norms enacted will be increased.

deemed equivalent to federal minimum standards (see paras 102 and 139). By accepting Deschamps and LeBel's motives on the validity of section 10 of the Act, Justice Cromwell implicitly rejected McLachlin's analysis.

58 The upcoming reference at the Quebec Court of Appeal on the constitutionality of the *Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c 24 raises the question of the constitutional validity of the federal law which sets minimum standards on the delivery of family and children services.

59 2010 SCC 61.

60 This paragraph is largely taken from "On Polyphony and Paradoxes", *supra* note 5.

Returning to the test, the third prong reinforces this idea of maintaining the general balance of the federal division of powers. The idea underlying it is that sweeping powers should never be justified under POGG: only narrowly tailored, contained jurisdiction should be. In addition, recognizing federal jurisdiction should not imply the irreversible transfer of the whole subject into Parliament's hands, contrary to what is commonly asserted.[61] There is no reason for such a necessary implication. Presumably not all aspects of marine pollution became immune from provincial jurisdiction after *Crown Zellerbach*. In *Ontario Hydro*, it was made clear that recognizing POGG power would not transfer jurisdiction over "all aspects of nuclear power".[62] Obviously, if the matter is characterized as nuclear energy, or water pollution, the jurisdictional transfer could be sweeping. But it is not, and it cannot be. Instead of finding other solutions like resorting to criminal law[63] for fear of completely unsettling the division of pow-

[61] It is alleged that recognizing federal jurisdiction effectively "removes" or "guts" provincial powers in a permanent way (see La Forest's dissenting opinion in *Crown Zellerbach, supra* note 10 at paras 70 and 73). This fear is based on Justice Beetz's warning, in his dissenting opinion in the *Reference re Anti-Inflation Act,* that recognizing a valid exercise of the national concern branch means that provinces can no longer regulate any part of it unless "Parliament saw fit to leave them any room" (*supra* note 4 at 444). However, at paragraph 34 of *Crown Zellerbach*, Le Dain J. notices an apparent contradiction between a POGG-based, exclusive federal jurisdiction, as alluded to by Beetz J., and the approach expounded in a prior, and seminal article by Professor Dale Gibson, which, instead of emphasizing some form of radical exclusiveness, contemplated "a concurrent or overlapping federal jurisdiction." Thus, the author of *Crown Zellerbach*'s majority opinion remains ambiguous about the often-heard conclusion that a jurisdiction based on the POGG power's national branch doctrine is inevitably exclusive.

[62] Lamer C.J. in a concurring opinion recognized that jurisdiction under POGG power had to be "circumscribed", that it was "not plenary" (*Ontario Hydro v Ontario (Labour Relations Board)*, [1993] 3 SCR 327, per Lamer, at 340); on that point he agreed with Iacobucci J who found that the recognition of federal jurisdiction under POGG should not be sweeping; he held that "while there is no dispute that Parliament has jurisdiction over atomic energy under the national concern branch of the p.o.g.g. power, the extent of what is swept within Parliament's jurisdiction is circumscribed to the national concern aspects of atomic energy which would appear to be the same as those aspects of the nuclear electrical generating stations which render them to the general advantage of Canada, namely the fact of nuclear production and its safety concerns." *Ontario Hydro,* at 423-425 (Iacobucci J., dissenting).

[63] See text accompanying and the examples in footnote 18 above. In recent years, many federal initiatives have been validated on the dubious basis of criminal law. For example, a majority of judges in the *Reference re Genetic Non-Discrimination Act,* 2020 SCC 17, found a criminal law purpose in a law that prohibits insurers and employers from

ers balance with using POGG, the national concern branch should indeed be allowed to play a really useful role in the division of powers jurisprudence, but a relatively predictable and contained one. It is crucial that matters recognized under POGG be narrow and not all-encompassing; absent such cautionary principle, POGG could easily serve as a tool of evisceration of provincial areas of jurisdiction. Conversely, the risk flowing from systematically not resorting to POGG's national concern branch lies in stretching criminal law beyond what it is meant to be, or it can reasonably mean, and what it is capable to sustain in the long term.

VII. Applying the test to the carbon tax question

Our goal in writing this article is not to suggest a specific outcome. The GHG emissions case however provides an interesting illustration of how our test could work, hence the following cursory remarks.

Let us assume the pith and substance of the impugned act is indeed the reduction of greenhouse gas emissions.[64] The setting of minimum standards does not appear to us to be part of the pith and substance of the Act[65]: it is, rather, the means chosen to meet the federal law's purpose of adopting a national strategy to reduce GHG emissions.

Let us further assume the factors of indivisibility, distinctiveness and singleness are abandoned given their numerous deficiencies, some of which were addressed earlier on. According to the test we suggest, and based on the evidence submitted by all intervenors, it seems that there is both an inability of provinces to enforce a national scheme to control greenhouse

obtaining genetic tests; in the *Reference re Assisted Human Reproduction Act,* four judges found section 10 of the law, regulating in vitro fertilisation treatments and intra-uterine insemination to be within criminal law; the notion of a "public evil" is fading away in favor of an amorphous view that there is always an evil somewhere which can ground federal jurisdiction. This phenomenon may be more acute because POGG is seen as riddled with problems. Or simply because, as was held in *Hydro-Quebec*, *supra* note 18, the criminal law power is seen as "plenary" outside colorability concerns.

64 This was the conclusion reached by the Alberta Court of Appeal, although it added "at a minimum": see *Alberta Reference, supra* note 2 at para 256.

65 The Ontario and Saskatchewan Courts of Appeal believed it was: *Ontario Reference*, *supra* note 2, para 77; *Saskatchewan Reference*, *supra* note 2 at para 125, qualifying the pith and substance of the law as "the establishment of minimum national standards of price stringency for GHG emissions."

gas emissions, and an added value, or "tangible benefits" to federal framework legislation compared with action at the provincial level. The first prong appears to be met, in that A) the problem has supra-provincial aspects which cannot be satisfactorily and efficiently regulated by provinces acting jointly or severally; B) the objectives of reducing GHG emissions, "by the reason of the scale or effects of the legislation", can be better achieved by Parliament; and C) a no-show by one province could jeopardize the successful operation of the scheme in other parts of the country.

The inability of provinces stems from the fact that they are not *equal to* the federal government when it comes to enforcing national standards of GHG emissions. Just like provinces may be able to regulate systemic risks on their own territory, but unable to uphold a national system, provinces may be able to regulate emissions on their own territory, but unable to uphold a national system or to take action against recalcitrant provinces. The impact of one province refusing to legislate could have ripple effects in other provinces; no province could force another one to take action. More importantly, reducing global emissions across the country, so that Canada can meet its international obligations, cannot be the responsibility of just one or a few provinces willingly collaborating: it has to result from a national strategy; yet, such a strategy must be mindful of the constitutional constraints set forth in the 1937 Labour Conventions case.[66]

By limiting the federal jurisdiction to what is strictly needed, the balance of interests in the federation seems to be preserved. Sufficient diversity is allowed by the fact that provinces are free to maintain or develop their own system, provided the minimum standard of is met and the alternative set up by the province is rigorous enough. The principle of subsidiarity, as expounded by L'Heureux-Dubé J. in *Spraytech,* is met by allowing Parliament to legislate on a matter described as narrowly as possible by both the Alberta and Ontario courts. In fact, the law addresses the stringency of provincial mechanisms,[67] but leaves the provinces with the ability to surpass those minimum standards, and free to choose the way they want to do so. And, in this case, the probability of cooperation has been checked, with the refusal of Saskatchewan to sign the *Pan-Canadian Framework on*

[66] *Canada (AG) v Ontario (AG)*, [1937] AC 326.

[67] *Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12, s 186, ss 166(3).

Growth and Climate Change.[68] It is only when the initial will to arrive at a cooperative scheme binding all provinces was defeated that the federal law came into force.

As provincialist as we may want to be, fighting global climate change is not just a provincial affair, and the Parliament of the federation may have something useful to say about it. Yet, when doing so, it must bear in mind that it precisely is the Parliament of a *federation*.

[68] Environment and Climate Change Canada, *Pan-Canadian Framework on Clean Growth and Climate Change: Canada's Plan to Address Climate Change and Grow the Economy* (Gatineau: Environment and Climate Change Canada, 2016), online: <http://publications.gc.ca/site/eng/9.828774/publication.html>.