



# Carbon Pricing on Trial

# The issue, and Constitutional Law 101

- **Issue:** Is the fed Greenhouse Gas Pollution Pricing Act unconstitutional?
- The GGPPA:
  - Puts a price on GHG emissions: \$20/T now, rising to \$50/T in 2022
  - Industry emitters must pay price for emissions over a 'benchmark'
  - Applies in any province that does not have equivalent price (NB, ON, MB, SK)
  - Carbon pricing is the lowest cost way to reduce emissions
- Approach to constitutional questions
  1. What is the 'pith & substance' (subject matter) of the law
  2. Does it fall within a federal head of power (s. 91)
  3. If there is 'conflict' with prov'l head of power / law, how to resolve?
    - Overlap is ok; if 'direct conflict' fed law prevails

# Possible Fed. Heads of Power

1. Peace, Order & Good Gov't (POGG) – 'National Concern' branch
2. POGG – Emergency Power
3. POGG – Treaty-implementing power
4. Criminal Law Power
5. Taxation Power
6. Trade & Commerce power (weak)

# POGG – National Concern Test

1. The 'subject' is either 'new' (since 1867) or has become a matter of national / international concern
2. Law scoped as narrowly as feasible to address it ("single, distinct, indivisible")
3. \*Failure of one prov to act would have extra-provincial impacts ('prov inability')
4. \*Fed law would have scale impact on provs that is reconcilable with division of powers (i.e. not disrupt federalism)

\* = The key issues in this case

# What is the 'matter' (pith & substance)

Feds (originally):

- To address **the cumulative dimensions of GHG emissions ...** and ensure GHG emissions pricing applies throughout Canada to **create incentives for the behavioural changes necessary to reduce emissions**

SKCA: Set **minimum standards** of stringency for GHG pricing (from BC)

ONCA: Set **minimum standards** of stringency for GHG regulation

ABCA: Regulation of GHG emissions.

Ecofiscal: The control of **extraprovincial and international pollution** from GHG emissions.

# Putting boundaries on the fed. power

	(Just National	Min. Pricing Stds)	<u>All types of GHG regulation</u> (The “Means”)
	Set National	Minimum Stds	
<u>Intra-prov effects of GHG emissions</u>		<u>Extra-prov effects of GHG emissions</u>	
All aspects of GHG <u>emissions</u> (The “Problem” or “Purpose”)			

# Treaty Implementing (non) Power

- 1867 Const says Feds have power to implement Canada's treaties (all signed by UK)
- In 1926, Canada gained the power to sign its own treaties.
- In 1937, UK Privy Council decided that the feds do not have power to implement treaties; it rests with whichever government has power over a particular subject under the Constitution (*Labour Conventions*)
- Widely criticized, but never (yet) revisited
- One stated purpose of the GGPPA is to to implement Canada's obligations under international climate change treaties