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Seeing Double: Peace, Order, and Good Government, and the Impact of Federal Greenhouse Gas Emissions Legislation on Provincial Jurisdiction

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Abstract

Federal regulation of greenhouse gas (GHG) emissions presents a difficult challenge for Canadian constitutional law. The federal government's legislation to implement a national minimum standard of GHG emissions pricing, the *Greenhouse Gas Pollution Pricing Act* (*GGPPA*), and the trio of reference cases launched by Saskatchewan, Ontario, and Alberta questioning its constitutional validity, have brought the law and politics of GHG emissions pricing to the forefront of Canadian federalism. In the two appellate court decisions delivered to date, the legislation has been sustained as a valid exercise of Parliament's power to legislate for the Peace, Order, and Good Government (POGG) of Canada. In each case, however, judges have expressed significant concern with respect to the impact of the legislation on provincial jurisdiction.

We draw on recent and historic jurisprudence to characterize conceptual errors that have bedevilled POGG, specifically in the tendency to overestimate its impact on provincial jurisdiction. We then examine the existing interpretive principles that limit POGG's ability to upend the critical balance inherent in the division of powers. Finally, we discuss how a properly empowered, calibrated, and constrained POGG relates to the *GGPPA*. We argue that the reduction of national GHG emissions constitutes a valid federal subject under the national concern branch of POGG, and that the *GGPPA* is a valid exercise of federal jurisdiction. We see no reason under the double aspect doctrine and cooperative federalism why provinces would lose any existing provincial jurisdiction as a result of the implementation of the *GGPPA*. Rather, a restrained approach to paramountcy, and the mechanics of the *GGPPA* itself suggest that provincial and federal legislation will work concurrently on GHGs. That seems entirely appropriate given the nature of the climate change crisis before us. In the legislative challenge of our time, we believe Canada's Constitution is up to the task.

Résumé

La réglementation fédérale sur les émissions de gaz à effet de serre (GES) soulève de problèmes très difficiles pour le droit constitutionnel canadien. La législation du gouvernement fédéral visant à mettre en œuvre une norme nationale minimale de tarification des émissions de GES, la *Loi sur la tarification de la pollution causée par les gaz à effet de serre*, et les trois cas de référence lancés par la Saskatchewan, l'Ontario et l'Alberta remettant en question sa validité constitutionnelle, ont mis la loi et la politique de tarification des émissions de GES au premier plan du fédéralisme canadien. Dans les deux décisions de la cour d'appel rendues à ce jour, la législation a été maintenue comme un exercice valide du pouvoir du Parlement de légiférer pour la paix, l'ordre et le bon gouvernement (POBG) du Canada. Il importe toutefois dans les deux cas que les juges aient exprimé des préoccupations importantes concernant l'impact de la législation sur la juridiction provinciale.

Nous nous appuyons sur la jurisprudence récente et ancienne pour définir les erreurs conceptuelles qui ont affecté le POBG, notamment la tendance à surestimer son impact sur les compétences provinciales. Ensuite, nous examinons les principes d'interprétation existants qui restreignent la capacité du POBG à bouleverser l'équilibre critique inhérent à la division des pouvoirs. Finalement, nous discutons de la manière dont un POBG correctement habilité, calibré et limité est associé à la *Loi sur la tarification de la pollution causée par les gaz à effet de serre*. Nous considérons que la réduction des émissions nationales de GES doit constituer l'un des sujets fédéraux valables dans le cadre des préoccupations nationales du POBG, et que la *Loi sur la tarification de la pollution causée par les gaz à effet de serre* est un exercice valable de la compétence fédérale. Nous ne voyons aucune raison, en vertu du principe du double aspect et du fédéralisme coopératif, pour laquelle les provinces risqueraient de perdre toute compétence provinciale existante à la suite de la mise en œuvre de la *Loi sur la tarification de la pollution causée par les gaz à effet de serre*. Au contraire, une approche modérée de la primauté, et les mécanismes de la *Loi sur la tarification de la pollution causée par les gaz à effet de serre* elle-même suggèrent que les législations provinciales et fédérales vont travailler en parallèle sur les GES. Cette démarche semble tout à fait appropriée face à la nature de la crise du changement climatique actuelle. Dans le contexte du défi législatif de notre époque, nous jugeons que la Constitution canadienne est à la hauteur de la tâche.

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Introduction

Federal regulation of greenhouse gas (GHG) emissions presents a difficult challenge for Canadian constitutional law. Perhaps the most important policy area of our time, tackling climate change — and the GHGs that produce it — is a political necessity of the twenty-first century. Since neither the environment in general nor GHGs in particular are specifically enumerated subjects in the *Constitution Act, 1867*, constitutional controversies surrounding the nature and extent of jurisdictional authority in relation to them are as inevitable as the policy disagreements concerning the appropriate regulatory approach to limiting their use.[1]

The federal government's legislation to implement a national minimum standard of GHG emissions pricing, the *Greenhouse Gas Pollution Pricing Act* (*GGPPA*), and the trio of reference cases launched by Saskatchewan, Ontario, and Alberta questioning its constitutional validity, have brought the law and politics of GHG emissions pricing to the forefront of Canadian federalism.[2] As with the shared jurisdiction over environmental protection more generally, the authority to regulate GHGs exists within a number of the enumerated heads of power in both Sections 91 and 92 of the *Constitution Act, 1867*, granting scope for valid provincial and federal legislation under existing heads of power.[3] Depending on the nature of the statutory regime, of course, the regulation of GHGs might validly fall within provincial authority over property and civil rights in the province, matters of a local nature, taxation powers, or in relation to local works and undertakings, just as they may reside within the federal power to make laws in relation to trade and commerce, taxation, interprovincial undertakings, or perhaps the criminal law.[4] The *GGPPA* poses a broader question striking at the heart of Canada's constitutional arrangements and fundamental norms: does the *GGPPA* fall under the national concern branch of the peace, order, and good government (POGG) power?

The positive answer to that question, we argue, lies in reconciling the competing demands that have always animated Canadian federalism: enabling necessary federal unity concerning national matters while protecting the provincial autonomy and diversity essential to a federation. As difficult as resolving such tensions appears, doing so is the life story of Canada's federal arrangements. The principles animating that story must guide the constitutional challenge of GHG emissions regulation now before us.

Even though the particular policy problems are new, the challenges posed by POGG are not. POGG and its variously worded antecedents are older than Canada itself. Traced to English statutes in the fifteenth century, the transfer of authority from one law-making body to another enabled the British Crown to extend, but also circumscribe, jurisdictional power to a local entity: a necessary process to govern a diverse realm. In the era of the British Empire, POGG morphed into boilerplate (often worded as the power to make laws concerning "peace, welfare, and good government") by which the Crown empowered executive government in its distant colonies to make law in the Crown's name. Versions of POGG appeared in countless instructions to North America's colonial governors, and most of Canada's early constitutional instruments.[5] POGG's presence in the opening words of Section 91 of the *Constitution Act, 1867* authorizing Parliament to "make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects" assigned to the Provinces would not have been a surprise to Canada's nineteenth-century lawyers, judges, and politicians. Its meanings, most would have assumed, were reasonably well settled by centuries of constitutional use, tradition, and expectation.

But, of course, times change and constitutions along with them. While the Judicial Committee of the Privy Council's decision in *Russell v The Queen* suggested a reasonably generous interpretation of the legislative power conferred by POGG on the federal Parliament, it did not take long for the rulings of the Privy Council to swing in the other direction as the challenges of protecting the law-making authority of provinces captured the attention of the Privy Council.[6] Lord Watson was the first to recognize explicitly that

POGG "ought to be strictly confined" in order to preserve "the autonomy of the provinces."[7] Lord Haldane famously took that task to heart in interpreting POGG as a limited emergency power in a series of cases in the 1920s.[8] POGG, W.P.M. Kennedy lamented as the Great Depression worsened, had vanished "with the winds." [9]

That was not quite true, as Privy Council decisions in the *re Aeronautics* and *re Radio Communication* reference cases revealed,[10] but it was true enough for an influential handful of Canadian constitutional lawyers and scholars such as Frank Scott, Bora Laskin, and Kennedy. They pushed judges to find in POGG's capacious wording greater federal legislative authority, especially in relation to economic matters.[11] The scholarly project to invigorate POGG dominated Canadian constitutional law in the 1930s and 40s, so much so that Laskin worried he was in danger of wearing out the arguments by the time his classic article on POGG appeared in 1947.[12] Perhaps with some fatigue, then, the controversies surrounding POGG's constitutional role quieted in the postwar decades as the Supreme Court of Canada replaced the Privy Council as Canada's highest appellate authority, and courts turned to the more specific heads of federal power to ground federal legislation.

POGG returned briefly to the spotlight in the 1970s in *Anti-Inflation*, enabling Laskin, now as Chief Justice of the Supreme Court, to revive his expansive views on POGG, although without convincing a majority of the Court to endorse his broader conception of the national concern branch.[13] A majority of the Supreme Court upheld federal legislation regulating dumping in provincial marine waters under the national concern branch in *Crown Zellerbach* a decade later, although Justice La Forest's trenchant dissent echoed in the case's aftermath as least as strongly as Justice Le Dain's majority judgment.[14] Certainly, Justice La Forest had convinced himself enough to issue a further warning on POGG in *Hydro-Québec*, noting that the national concern branch "inevitably raises profound issues respecting the federal structure of our Constitution," and should not be used when other heads of federal authority could authorize the legislation at issue.[15] Despite the attention POGG still holds as a constitutional provision of symbolic meaning, the judicial reality of POGG is of a seldom litigated constitutional power defined by a handful of decades-old Supreme Court decisions — until now.

In the reference cases involving the *GGPPA*, majorities in both the Saskatchewan and Ontario Courts of Appeal found the *GGPPA intra vires* Parliament under POGG's national concern branch, with dissenting judges in both courts finding the legislation invalid.[16] In Saskatchewan, Justices Ottenbreit and Caldwell held that the legislation imposed too great an impact on provincial jurisdiction and thus was "not reconcilable with the fundamental distribution of legislative powers under the Constitution."[17] At the Ontario Court of Appeal, Justice Huscroft's dissent equated the finding of the *GGPPA*'s validity under POGG to "a change to the constitutional order" and a distortion of "the POGG power and the limited purpose it is designed to serve."[18]

In this article, we draw inspiration from long-standing efforts in Canadian constitutional history to resolve tensions between unity and diversity in adjudicating the division of powers. We argue that there exist several means by which broadly enumerated jurisdictional powers of the federal government can be given purposive life, while also being necessarily and productively constrained in the name of balanced federalism and provincial autonomy.[19] The principles of mutual modification, subject matter precision, the double aspect doctrine, and cooperative federalism and concurrency provide important conceptual tools to serve the twin purposes of federalism: squaring unity with diversity.[20] The error in many of the cases has been to imagine that POGG, ominous and omnivorous in its capacity to eradicate provincial authority, exists in a realm beyond the existing mechanisms of constraint that work to protect and promote a balanced federalism. We share this concern for provincial jurisdiction if POGG operates on its own rules of federalism. We do not think it does.

We make the case for a POGG embedded in the dynamic web of federalism's constraints in the argument that follows. First, we draw on

recent and historic jurisprudence to characterize the conceptual errors that have bedevilled POGG, specifically in the tendency to overestimate its impact on provincial jurisdiction. We then examine the existing interpretive principles that limit POGG's ability to upend the critical balance inherent in the division of powers. Finally, we discuss how a properly empowered, calibrated, and constrained POGG relates to the *GGPPA*.

2. Competing Views of the National Concern Branch of POGG

POGG's potential to unbalance federalism has led to justified wariness about its use. In *Crown Zellerbach*, Justice La Forest warns that POGG requires "judicial strategies to define its ambit" in order to avoid an approach that will "effectively gut provincial legislative jurisdiction and sacrifice the principles of federalism enshrined in the Constitution."[21] "[T]he challenge for the courts, as in the past," Justice La Forest observes, "will be to allow the federal Parliament sufficient scope to acquit itself of its duties to deal with national and international problems while respecting the scheme of federalism provided by the Constitution."[22] That challenge has been made more difficult by confusion about how POGG impacts provincial jurisdiction.[23]

2.1 Transfer Theory

A persistent error has been to describe POGG as transferring jurisdiction from provincial to federal jurisdiction in a zero-sum exchange. We call this the transfer theory of POGG. The transfer theory posits that a finding of validity under POGG effectively amends the division of powers by transferring jurisdiction from provincial to federal authority resulting in the dramatic and permanent alteration, and unbalancing, of federal arrangements. As we will argue, there is no reason for POGG to work in such a manner given the existing mechanisms and judicial interpretations of the division of powers, nor is there any rationale to burden POGG with such powers precisely because of the importance of the balance of federalism as an animating principle upon which the division of powers rests. Nonetheless, the transfer theory appears to lesser and greater extents in a good deal of writing about POGG. Put most bluntly, in the *Ontario GGPPA Reference*, Associate Chief Justice Hoy suggests that "the national concern branch of the POGG power creates new and permanent federal jurisdiction *by taking powers away from the provinces*."[24] Justice Huscroft agrees that a judicial finding of validity under POGG represents a "transfer of power from provincial legislatures to Parliament."[25] In the *Saskatchewan GGPPA Reference*, Chief Justice Richards explains that "the problem is not only that recognizing federal jurisdiction over something as broad as GHG emissions would give Parliament wide authority in positive terms. It is that, in negative terms, provincial legislatures would be significantly denied the authority to deal with GHG emissions." In dissent, Justices Ottenbreit and Caldwell offer similar concerns, finding that "if GHG emissions are recognized as a matter of exclusive federal jurisdiction […] provincial legislatures would be significantly denied the authority to deal with GHG emissions."[26]

Some academic commentary shares the view that federal jurisdiction under POGG entails an equivalent loss of provincial jurisdiction. Joseph Castrilli characterizes POGG as "by definition … removing the area from the possibility of concurrent provincial legislation."[27] Shi-Ling Hsu and Robin Elliot interpret *Crown Zellerbach* to hold that "if federal legislation is upheld under the national concern branch of POGG the 'matter' of that legislation is foreclosed to the provincial legislatures."[28] In the context of the *GGPPA*, Sujit Choudhury argues that concerns over federal overreach into provincial jurisdiction are amplified by "the Supreme Court's view that federal jurisdiction under the POGG power over matters of national concern is exclusive and would therefore preclude provincial legislation."[29] Dwight Newman similarly maintains that "something classified within the national concern branch of the POGG power is no longer subject to any provincial aspects but becomes permanently and exclusively within federal jurisdiction."[30]

The transfer theory also finds support in a number of POGG cases. In *Johannesson v Muni-*

cipality of West St Paul, the Supreme Court appears to confirm that a finding of national concern leaves no further room for provincial jurisdiction. "[O]nce the decision is made that a matter is of national interest and importance, so as to fall within the peace, order and good government clause," Justice Kellock writes,

> *the provinces cease to have any legislative jurisdiction with regard thereto and the Dominion jurisdiction is exclusive.* If jurisdiction can be said to exist in the Dominion with respect to any matter under such clause, that statement can only be made because of the fact that *such matters no longer come within the classes of subject assigned to the provinces.*[31]

Holdings in the *Reference re Regulation and Control of Radio Communication* at both the Supreme Court and Judicial Committee of the Privy Council also stress the exclusive nature of federal authority under POGG.[32]

POGG's capacity to promote federal domination by expanding Parliament's jurisdiction while shrinking the powers of the provinces equally animates the dissenting judgments in the Supreme Court's most recent trio of POGG cases: *Anti-Inflation*, *Crown Zellerbach*, and *Hydro-Québec*. Justice Beetz's trenchant dissent in *Anti-Inflation* warns of POGG's potential to "render most provincial powers nugatory."[33] For Justices La Forest, Beetz, and Lamer in *Crown Zellerbach*, allocating "environmental control to the federal sphere under its general power would effectively gut provincial legislative jurisdiction and sacrifice the principles of federalism enshrined in the Constitution."[34] In *Hydro-Québec*, Justice La Forest explains that "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 and has obvious impact on the balance of Canadian federalism."[35]

Judges are right to be worried about the balance of federalism and POGG's role within that delicate calculus. By definition, the division of powers requires interpretive techniques that sustain the integrity of both federal and provincial jurisdiction. As one of us has previously argued, "[i]nterpretations of particular heads of power… presuppose the continued and essential existence of the other heads of power in order to protect an essential balance of both federal and provincial power."[36] Perhaps needless to say, mutual respect for the jurisdictional integrity of both levels of government is essential to federalism. A valid concern for balance, however, has sometimes led to overstating how POGG interacts with provincial jurisdiction in practice. As we shall see, addition rather than subtraction better characterizes the role of the national concern branch of POGG in the division of powers.

2.2 Positive Sum Theory

What we are calling the positive sum theory of POGG recognizes that a finding of federal jurisdiction under POGG does not typically involve the *removal* of a subject from provincial jurisdiction, but rather confers federal jurisdiction over new, necessarily national, subjects or aspects of them. In most instances, the development of national dimensions to subjects arises alongside the perseverance of the local and provincial aspects of those subjects. This is true whether dealing with POGG's residual clause concerning the emergence of new subjects, the so-called gap branch, or in situations in which existing subjects develop new national aspects.[37]

POGG's emergency branch probably comes closest to reflecting the temporary transfer of jurisdictional authority from provinces to Parliament but even then falls short of truly transferring jurisdiction. Courts have consistently held that in times of crisis the federal government may validly enact legislation for the peace, order and good government of the nation. To limit the scope of such power, courts have insisted that use of the emergency branch is available only when the government has a rational basis to believe that an emergency or crisis exists, and when the legislation is temporary in nature and operative only so long as the emergency and its significant after-effects remain.[38] While the existence of an emergency is necessary, it is not sufficient in and of itself to validate federal legislation. In *Canada Temperance Federation*, Viscount Simon explains that "an emergency may be the occasion which calls for the legislation, but it is the nature of the legislation itself, and not the existence of emer-

gency, that must determine whether it is valid or not."[39] Even though an emergency may grant federal authority over subjects which would ordinarily fall within provincial authority, it is not the subject which has become suddenly federal, but rather that the emergency creates jurisdictional space for federal legislation.

Emergencies, on this view, add aspects to subjects rather than moving those subjects from provincial to federal authority. We would not imagine, for example, that an emergency which enabled federal jurisdiction over some aspects of municipal affairs would transfer jurisdiction in relation to municipalities entirely to federal authority thus rendering all existing provincial legislation constituting city governments invalid. In any event, the emergency powers have not been applied since *Anti-Inflation,* and were not invoked by the federal government in support of the *GGPPA*. Given that climate change and the solutions to it are likely to require sustained efforts to reduce emissions over decades, it is unlikely the emergency branch of POGG would support federal legislation such as the *GGPPA*.

While scholars disagree on the precise boundaries of POGG's branches (emergency, gap, and national concern), it is generally agreed that, in the absence of emergency, Parliament may legislate under POGG only if such legislation falls outside provincial jurisdiction. Section 91 of the *Constitution Act, 1867* makes clear that, in the event that truly new, distinct subjects arise, absent constitutional amendment, jurisdiction over them falls to the federal Parliament under POGG's residuary capacity. As Guy Régimbald and Dwight Newman note, jurisdiction under POGG follows when "the 'pith and substance' or 'matter' of the impugned statute is not listed or implicit in any enumerated power."[40] In a similar vein, existing subjects may develop new national aspects as the result of significantly altered social conditions. In such cases, the national concern branch of POGG grants federal jurisdiction, but only to the extent of the national aspects of those subjects. As Dale Gibson argues, "'national dimensions' are possessed by only those aspects of legislative problems which are beyond the ability of the provincial legislatures to deal because they involve either federal competence or that of another province."[41] In both cases, either because the subject as a whole did not exist at the division of powers, or because an existing subject came to take on significant and discernable national dimensions, a subject or aspect of a subject is added to federal powers, while leaving the existing jurisdiction of the provinces intact.

By definition, the new national aspects of existing subjects lie beyond the reach of provincial jurisdiction. In *Local Prohibition*, Lord Watson distinguishes between "that which is local and provincial, and therefore within the jurisdiction of the provincial legislatures 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."[42] Accordingly, while federal authority may emerge over time as subject matters of legislation evolve, it is because a subject develops new national aspects that fall within federal authority, rather than the transfer of an entire subject matter from provincial to federal jurisdiction.

The continuation of provincial jurisdiction alongside a finding of federal legislative authority under POGG also flows from the double aspect doctrine, cooperative federalism, and the judicial preference to support "the ordinary operation of statutes enacted by both levels of government."[43] In these respects, earlier jurisprudence from an era more strongly committed to maintaining exclusivity and jurisdictional line drawing should be read with some caution. The modern trend, in which a meaningful role for POGG can comfortably fit, is to favour legislative overlap over jurisdictional displacement. As *Multiple Access* demonstrates, the federal jurisdiction over the incorporation of companies "with other than provincial objects" under POGG can live in parallel with provincial jurisdiction over incorporation of companies with provincial objects, and continuing provincial authority to regulate securities as a matter of property and civil rights.[44] Gibson argues that federal jurisdiction under POGG entails legislative authority for "no more federal legislation than is necessary to fill the gap in provincial powers."[45] For that reason,

the finding of federal jurisdiction under POGG over the national capital region in *Munro* only conveyed federal jurisdiction in relation to the narrow national features of the national capital region, not plenary power over all municipal matters involving Ottawa and its environs.[46] Those issues, of course, continue to fall under provincial authority.[47] And rightly so.

Proponents of the transfer theory point to cases involving aeronautics and broadcasting to claim that federal validity under POGG leaves no room for provincial jurisdiction.[48] One might begin by questioning how much provincial jurisdiction could have existed over such subjects in the first place given the necessarily national and international characteristics of those subjects. POGG, in other words, could not have taken away that which was never there to begin with. In any event, we contend that POGG's scope is always bounded by the nature of the subject itself.

The jurisdictional reach of aeronautics is defined by the nature and particular characteristics of the subject: federal legislative authority exists over all aspects of aeronautics, not because POGG powers are always inherently broad and all encompassing, but because the safe regulation of air travel *requires* a unified national approach over all aspects of the subject of aeronautics. Most subjects which develop national dimensions are not so unified. There is no reason that the national aspects of subjects concerning environmental regulation, language rights, or companies law need to completely subsume or displace the provincial aspects of those same subjects.[49] In POGG, as in all federalism disputes, the task for courts is to ensure continued integrity of the heads of power of both levels of government by defining subject matters with practical precision and due respect for the impact on Parliament and provinces alike. Happily, the same techniques that assist in pursuit of that balance in the interaction of other heads of power, apply to POGG as well.

3. Constraining federal power

Ensuring the productive exercise of federal powers and the meaningful preservation of provincial jurisdiction equally arises in matters falling under other federal powers, especially the trade and commerce power in Section 91(2) of the *Constitution Act, 1867*, but also with respect to criminal law, and shipping and navigation.[50] From the outset, courts have limited the potentially pervasive federal authority of the trade and commerce power of Section 91(2) to avoid what a literal reading of those words might have entailed, by interpreting the scope of federal jurisdiction alongside provincial heads of power (the doctrine of mutual modification), protecting the continuation of provincial jurisdiction over plural subjects (cooperative federalism, concurrency, and the double aspect doctrine), and ensuring the operation of provincial jurisdiction with a restrained approach to the paramountcy doctrine. There is no reason to do differently in cases involving POGG. In fact, much of the case law with respect to POGG shares common elements with trade and commerce cases, at least insofar as POGG has been applied to economic and environmental policy problems.

3.1 Mutual Modification and Narrowing the Subject Matter

It did not take long after Confederation for courts to recognize that the division of powers only made sense when the specifically enumerated powers were read in relation to one another. In *Parsons*, the Judicial Committee of the Privy Council insisted on a definition of the federal power over trade and commerce in Section 91(2), constrained by provincial powers over property and civil rights in Section 92(13) of the *Constitution Act, 1867*.[51] As a result, courts have confined the trade and commerce power to the national aspects of trade; that is, situations in which provinces are constitutionally incapable of action.[52] To determine the necessarily national aspects of the regulation of trade and commerce, the case law has developed tests to determine whether the dominant purpose of the federal legislation at issue relates to interprovincial or international trade, or the general regulation of trade.

Under this more amorphous latter branch, the jurisprudence demands necessarily national economic regulation typified by economic matters that transcend provincial borders *and* require for their resolution national legislative action.[53] In the context of complex legislative schemes, the Supreme Court of Canada in *Re Securities Act* further reminds that "Parliament cannot regulate the whole of the securities system simply because aspects of it have a national dimension."[54]

The constraining features of the national concern branch of POGG work in a similar fashion. Interpretations of the meaning of POGG, like the broad language elsewhere in the division of powers, require mutual modification with the enumerated heads of provincial power. Pointing to Parliament's expansive powers under the declaratory power in Section 92(10)(c) of the *Constitution Act, 1867*, Chief Justice Lamer argues that Parliament's jurisdiction "must be limited so as to respect the powers of the provincial legislatures while remaining consistent with the appropriate recognition of the federal interests involved."[55] The POGG power, he observes, "is similarly subject to balancing federal principles, limiting in this case the POGG jurisdiction to the national concern aspects of atomic energy."[56] As Gibson puts it, "the language of Sections 91 and 92 simply does not permit [POGG] to be given priority over the enumerated provincial powers in any circumstances."[57] And, as in the limits imposed on the boundaries of trade and commerce, what distinguishes federal from provincial jurisdiction are subjects or aspects of them that provinces are constitutionally incapable of effectively dealing with as a result of the nature and characteristics of those subjects.

In applying the gap branch of the POGG power, such precision is synonymous with identifying the extent of the gap. In *Anti-Inflation*, for example, Justice Beetz writes that aeronautics, the national capital region, and radio and telecommunications were all "clear instances of distinct subject matters which do not fall within any of the enumerated heads of Section 92 and which, by nature, are of national concern."[58] The same rationale is present in *Interprovincial Co-operatives* where the Court held that "general legislative authority in respect of all that is not within the provincial field is federal," and thus that jurisdiction over inter-provincial water pollution fell within the federal authority.[59] Highlighting the importance of narrowing the subject with precision in *Interprovincial Co-operatives*, Katherine Swinton notes that "the logical implication of allowing national action [on inter-provincial pollution] would be to fill a legal gap, not to permit regulation of water pollution in general."[60]

If the scope of the head of power under the national concern branch of POGG is limited to truly national subjects, so must the subject matters, or dominant purpose, of any legislation authorized by it. In *Crown Zellerbach*, the Court lays out the test to identify federal subject matters capable of residing under POGG. Justice LeDain, writing for the majority, holds that "[f]or a matter to qualify as a matter of national concern [either for new or existing matters], 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 of legislative power under the [*Constitution Act, 1867*]."[61] Overly broad or imprecise subject matters — environmental protection, health, economic productivity, or innovation, for example — cannot find their validity under POGG because such matters necessarily contain within them important areas of provincial jurisdiction. Accordingly, *Crown Zellerbach* rightly requires that subject matters within POGG satisfy the *provincial inability* test, specifically focusing on "the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the intra-provincial aspects of the matter."[62] Justice Le Dain quotes Gibson in holding that the provincial inability test ensures "a limited or qualified application of federal jurisdiction" and finds it does so by "assisting in the determination of whether a matter has the requisite singleness or indivisibility from a functional as well as a conceptual point of view."[63] Like the factors to determine necessarily national economic regulation under Section 91(2), under POGG the provincial inability test narrows the permissible federal

legislative reach by requiring the presence of not merely national application and aspiration, but *substantive rationale* underpinning the need for a national regulatory approach.[64]

3.2 Cooperative Federalism, Double Aspect, and Paramountcy

Although not a substantive doctrine capable of overriding the text of the Constitution, the modern doctrine of cooperative federalism nonetheless urges courts to adopt constitutional interpretations which "favour, where possible, the ordinary operation of statutes enacted by *both* levels of government."[65] The first step in doing so is recognition, in the famous phrasing of Lord Fitzgerald in *Hodge v The Queen*, that "subjects which in one aspect and for one purpose fall within Section 92, may in another aspect and for another purpose fall within Section 91."[66] Implicit in the double aspect doctrine are two important propositions for federalism. First, as a descriptive matter, subjects are clearly capable of plurality, and as composites of multiple aspects, some of those aspects may fall within federal or provincial jurisdiction. Second is the normative suggestion that courts should allow different levels of government to pursue their policy objectives so long as they are legislating in relation to an aspect of a subject properly rooted within one of their heads of power. Such an approach can often result in the concurrent overlap of legislative regimes, a problem only if one is committed to an unrealistic conception of the indivisibility of subjects and the watertight constitutional divisions between them. Contemporary federalism, Justices Binnie and LeBel note, by contrast, "recognize[s] that overlapping powers are unavoidable."[67] In a diverse federation in which local and national aspects of subjects often coincide, we should think of overlapping legislative powers as more than simply unavoidable; they are the best way to ensure full democratic participation by the different national and provincial constituencies with a stake in the subject matter at issue.[68]

Disagreement remains as to whether the double aspect doctrine applies in cases where federal legislation is sustained under the national concern branch of POGG. Recall that proponents of the transfer theory posit that once a subject falls under the national concern branch, it "is no longer subject to any provincial aspects but becomes permanently and exclusively within federal jurisdiction."[69] As discussed, although some national subjects require a broad scope of legislative unity in order to regulate them effectively such as aeronautics, radio, and telecommunications, a similar breadth of exclusivity is not true of most subjects. The *Crown Zellerbach* test, properly applied, reserves for Parliament only those *aspects* of a subject beyond provincial jurisdiction. More importantly, there is no reason to suspect that the double aspect doctrine disappears under POGG. Once a sufficiently narrow federal subject matter has been identified, the double aspect doctrine continues to preserve the provincial ability to legislate all aspects falling under provincial heads of power. In *Multiple Access*, for example, POGG jurisdiction over the national aspects of the regulation of companies did not impede the ongoing validity of provincial law in relation to provincial aspects of incorporation.[70] Similarly, a finding that the regulation of the interprovincial and international aspects of GHG emissions falls within the national concern branch of POGG has no impact on the scope of provincial jurisdiction or the validity of provincial legislation enacted under Sections 92 or 92A of the *Constitution Act, 1867*.[71]

If overlapping powers are unavoidable, so too will be occasional conflicts between the legislative regimes resulting from them. In this respect, the balance of federalism promoted by mutual modification, cooperative federalism, and the double aspect doctrine has the potential to be undone by interpretations of the paramountcy doctrine that too readily allow federal law to override the operation of valid provincial legislation.[72] Recognizing this risk, the Supreme Court articulates a necessarily restrained approach to paramountcy, one premised on a presumption of concurrency and a high threshold required to demonstrate "true incompatibility".[73] Accordingly, the Supreme Court has sustained the operation of concurrent federal and provincial legislation in cases of overlap and duplication, and where legislative purposes align notwithstanding substan-

tive differences between the valid regimes.[74] The judicial commitment to a restrained approach to paramountcy is especially important in cases where the federal government gains jurisdiction over national aspects of subjects under POGG in order to ensure the continued operation of provincial legislation concerning the provincial aspects of those subjects.

These presumptions will not be sufficient to protect provinces if not also paired with a very restrictive approach to implicit or explicit attempts by federal legislation to cover the field. As William Lederman warns, the doctrine of paramountcy contains the possibility that "federal legislation may carry the express or tacit implication that there shall not be any other legislation on the concurrent subject by a province."[75] Courts must continue to limit the unitary implications of such an approach by presuming, as a matter of the mutual respect owed to each jurisdiction underpinning federalism itself, that federal legislation intends to coexist alongside equally valid provincial laws. Attempts by Parliament to displace that presumption should be strictly construed and narrowly interpreted to allow for the widest operation of provincial law possible in the circumstances. True operational conflicts should remain limited and the exception to the concurrent operation of laws by both levels of government. Here too, POGG presents the same challenges but also the same solutions to preserving the balance of federalism structuring the interaction between the heads of federal and provincial authority.

4. POGG and the *GGPPA*

The looming decision on the constitutionality of the *GGPPA* enables the Supreme Court to return to POGG in a case of unquestioned national attention and importance. The provinces challenging the validity of the law — Saskatchewan, Ontario, and Alberta — express united concern that the use of POGG in this instance imperils provincial jurisdiction over critical aspects of industry, economic development, transportation, utilities, manufacturing, and natural resources.[76] In the *Saskatchewan GGPPA Reference*, Chief Justice Richards was clearly alive to such concerns: in writing that "if GHG emissions are recognized as a matter of exclusive federal jurisdiction, any provincial law would be unconstitutional if, in pith and substance, it was in relation to such emissions."[77] The balance of federalism, so it would seem, hangs in the balance.

The balance of federalism, we contend, remains so long as POGG is interpreted in light of the positive sum theory and the necessary constraints outlined above. To begin, we reject suggestions that a finding of validity for the *GGPPA* under POGG removes any jurisdiction from the provincial heads of power — as in a finding of validity under any other head of federal authority listed in Section 91 of the *Constitution Act, 1867*. POGG simply does not work that way. If the federal government has jurisdiction over aspects of the regulation of GHG emissions it is only because of the emergence of necessarily national aspects of that subject. If so, federal jurisdiction only exists to the extent of those national aspects. Nothing has been transferred to federal power because no jurisdictional authority over those national aspects resided in provincial authority in the first place. The climate change crisis undoubtedly alters the context of GHG emissions in Canada, adding new national and international dimensions to their existence not previously recognized. If federal jurisdiction has emerged in relation to them, provincial jurisdiction has also been maintained. To the extent that the regulation of GHGs touches upon a host of existing provincial heads of power, provincial laws — both existing and future — remain valid in relation to the provincial aspects of GHGs. In these ways, the positive sum theory of POGG aligns with the doctrine of mutual modification and the demand that the jurisdictional scope of the heads of power of both levels of government can only be determined when read in balance with one another.

Against this background, we turn to characterizing the subject matter of the *GGPPA* with the necessary precision required under POGG. In keeping with the preference for concrete particulars in common law reasoning, division of powers analysis does not ask courts to abstractly determine the scope of heads of power for all

purposes and then to inquire about the placement of laws within them. The task, rather, is to determine the dominant purpose of specific laws and then to see if such a purpose can fit within the authority granted by relevant heads of power. A judicial finding of validity in relation to a particular law is always just simply that; it does not purport to define the scope of the head of power in relation to other laws. As Justice Cartwright advised in *Munro* with respect to division of powers cases, the court should "confine itself to the precise question raised in the proceeding which is before it."[78] What is before the courts in the present dispute is federal legislation that prices GHG emissions in order to reduce them, with the potential for prices to differ across provinces, fuels, and facilities.

Part I of the *GGPPA* imposes a fuel charge on the consumption of transportation and heating fuels; Part II contains a separate emissions pricing system for large facilities, including an exemption of these facilities from Part I of the Act where Part II applies.[79] This so-called *output-based* pricing system applies only to facilities with high levels of annual emissions, and allows for such facilities a lower average cost of GHG emissions, while still providing them with a reward for each tonne of emissions reduced.[80] Part I of *GGPPA* applies only in provinces listed in a Schedule to the Act and the decision to list a province is at the directed discretion of the Governor in Council.[81] In making a determination that the federal GHG emissions pricing regime should apply, the Governor in Council must consider, as the primary factor, the stringency of the GHG emissions pricing system in place in the province in question and, implicitly, whether more stringent pricing is required in that province to ensure comparable stringency with policies in other provinces and that national objectives are met.[82] The Governor in Council has similar discretion over Part II of the *GGPPA*: it applies only in provinces listed in a Schedule to the Act and the decision to list a province is at the discretion of the Governor in Council.[83] As with Part I, the Governor in Council must consider, as the primary factor, the stringency of the GHG emissions pricing system in place in the province in question.[84]

In both the *Saskatchewan* and *Ontario GGPPA Reference* cases, judges divided on the dominant purpose of the *GGPPA*'s interlocking parts. In Saskatchewan, the majority held that "the pith and substance of the *GGPPA* is about establishing minimum national standards of price stringency for GHG emissions," while the dissent argued that the purpose of Part I of the *GGPPA* was to enact a tax, Part II was a scheme to regulate GHG emissions.[85] In Ontario, the majority held that the *GGPPA*'s main thrust was "establishing minimum national standards to reduce GHG emissions," while Associate Chief Justice Hoy's concurring opinion described the *GGPPA*, in slightly narrower fashion, as "establishing minimum national GHG emissions pricing standards to reduce GHG emissions."[86] As in Saskatchewan, Justice Huscroft's dissent held that the matter of the *GGPPA* was the broad regulation of GHG emissions.[87]

As always, determining the pith and substance plays a critical role in the outcome and tenor of the constitutional analysis which follows. In these respects, characterizing the main purpose of the Act too broadly — as the dissenting court of appeal judges were inclined to do — runs two risks that can distort the question of its validity and assessments of the nature of POGG. Defining the federal law at high levels of abstraction — the regulation of GHG emissions — ends, in effect, the classification analysis before it begins since POGG could not, and certainly should not, authorize federal jurisdiction over amorphous subjects containing an abundance of provincial aspects of authority. As we have argued, constraining POGG to discernable limits in keeping with the balance of federalism requires ensuring that federal subject matters are not described at a level of generality that are either obviously self-defeating in the classification analysis or would suggest the possibility of federal jurisdiction over a boundless field of provincial activity. The heart of Saskatchewan's concern, Chief Justice Richards notes,

> was that the production of GHGs is so intimately and broadly embedded in every aspect of intra-provincial life that a general authority in relation to GHG emissions would allow Parliament's legislative reach to extend

> very substantially into traditionally provincial affairs. […] Given the absolutely pervasive nature of GHG emissions, *the boundaries of possible regulation in respect of such emissions are limited only by the imagination*.[88]

Avoiding that scenario requires adherence to the classic techniques of the pith and substance analysis: combining purpose *and* legal mechanics in order to realistically capture what the law is truly about. However the *GGPPA* is precisely characterized, it is clear that the purpose and workings of the Act are directed at the national *reduction* of GHG emissions by the imposition of complementary federal GHG emissions prices where provincial policies fall below a required level of stringency.

An important feature of the GGPPA relevant to its narrow characterization is its capacity to exist alongside, rather than to displace, provincial legislation. The legal and practical effects of the interactions between the federal and provincial regimes matter for the purposes of pith and substance and, ultimately, validity as demonstrated in the contrasting fates of the federal legislation considered in *Re Securities Act* and *Pan Canadian Securities*.[89] In *Re Securities Act*, the Court held that legislation which proposed "to regulate, on an exclusive basis, all aspects of securities trading in Canada, including the trades and occupations related to securities in each of the provinces" interfered too deeply into provincial jurisdiction.[90] The *GGPPA* does not entail the "wholesale takeover" of all aspects of the "day-to-day regulation" of long-standing areas of provincial responsibility.[91] The *GGPPA* will most often work in concert with valid and operative provincial regimes. Unlike the impugned legislation in *Re Securities Act*, there is no reasonable expectation that the *GGPPA* would lead to provincial governments abandoning their responsibilities to their local publics in addressing climate change in general, or GHG emissions in particular.

Indeed, the opposite has already occurred. In Alberta, provincial policies in relation to GHG emissions from two successive governments remain operative.[92] So does similarly-aimed provincial legislation in British Columbia and Quebec.[93] The *GGPPA* allows the federal government to impose an incremental regulatory charge on GHG emissions in provinces, or in specific economic sectors within provinces, where existing provincial policies are deemed insufficiently stringent by cabinet.[94] As in the legislation considered in *Pan-Canadian Securities*, the *GGPPA* also effectively serves as a model policy to which provinces can voluntarily subscribe. While the legislation reviewed in *Pan-Canadian Securities* did not include a backstop provision by which the federal government could impose policies in the manner of the *GGPPA*, the *GGPPA* does not impose such policies by default and provinces can still legislate their own GHG policy, with federal prices added to the regime when the situation demands.

Can such legislation fall under the national concern branch of POGG? We argue that it can. Courts have consistently held that federal jurisdiction resides in discrete aspects of subjects when a province is or provinces are incapable of addressing the dimensions of that subject, the matter has material extra-provincial or international aspects, and the ability of provinces to legislate with respect to provincial aspects of the subject matter is preserved. The *GGPPA*, like valid federal legislation respecting the regulation of companies with national objects, marine and freshwater pollution, competition, and systemic risk in the trade of securities, meets these criteria.[95] We agree with the Chief Justice of Ontario that "[w]hile a province can pass laws in relation to GHGs emitted within its own boundaries, its laws cannot affect GHGs emitted by polluters in other provinces — emissions that cause climate change across all provinces and territories."[96] While reductions in emissions in individual provinces may reduce Canada's overall net emissions, no individual province can impose policies that will constrain emissions elsewhere in Canada; nor could provinces acting alone or together ensure the coordination required to meet international targets and obligations.[97]

The lowering of emissions in one province may be more than offset, for example, by the rise of emissions in another. In these respects, the *GGPPA* meaningfully parallels valid federal

competition policies. In *General Motors,* Chief Justice Dickson held that competition "is not an issue of purely local concern but one of crucial importance for the national economy." More importantly, he noted that the *Combines Investigation Act* was a "genre of legislation that could not practically or constitutionally be enacted by a provincial government" since the negative impacts of anti-competitive practices had consequences for the national economy, and required national coordination to regulate them effectively.[98] The Supreme Court found a similar rationale underlying the validity of the national regulation of systemic risk in the trade of securities.[99] So it is with GHGs: lax emissions policies in one province or sector will place a greater burden on other provinces and/or sectors with respect to meeting national emissions reduction commitments.[100]

In addition, GHG emissions have clear extra-provincial and international effects similar to pollution in interprovincial rivers in *Interprovincial Co-operatives*, or the pollution of marine waters by the dumping of substances in *Crown Zellerbach*. "[T]he principal effect of GHG emissions — climate change," Chief Justice of Ontario Strathy points out, "often bears no relationship to the location of the source of the emissions."[101] Rather, because GHGs are so pervasive in all of our economic activities, they are similar to pollution, labour relations or language rights, subjects capable of subdivision into many aspects over which different levels of government may act when anchored to appropriate heads of power.[102]

As we have argued, even with a finding of federal jurisdiction over the necessarily national aspects of regulation to reduce GHG emissions, provincial jurisdiction over the provincial aspects of the subject persist by virtue of the double aspect doctrine and the imperatives of cooperative federalism. Any federal grant of authority under POGG would not, indeed could not, impact the validity of provincial regulation of aspects of GHG emissions falling within the ample provincial jurisdiction provided under property and civil rights, matters of a local and private nature, raising of revenues, or the management of electricity and natural resources. And, given the nature of the *GGPPA*, and the restrained approach to paramountcy, provincial regimes touching upon GHG emissions will most often remain both valid *and* operative. The *GGPPA* contains no explicit or implicit exclusion of provincial legislation, no attempts to cover the field, and ample provision for coordination with provincial policies. There is no reason to think that compliance with the *GGPPA* would be inconsistent with compliance with any existing provincial GHG policies for the purposes of triggering the paramountcy doctrine.[103] Alongside the *GGPPA*, provinces will continue to take action on GHGs in line with local political choices and economic considerations. British Columbia's *Carbon Tax Act*, for example, would remain a valid exercise of provincial jurisdiction to regulate provincial emissions and/or to raise revenue for provincial purposes.[104] Similarly, Alberta's GHG emissions pricing policies would continue to be sustained either as an exercise of provincial powers over property and civil rights, the management of natural resources, or matters of a local and private nature.[105]

The *GGPPA* also leaves discretion to the individual provinces to legislate more stringent policies than would be mandated federally, as is presently the case in British Columbia, or the discretion to voluntarily opt-in to the federal policy.[106] The *GGPPA* does not exclude or invalidate less stringent provincial policies: federal GHG emissions prices supplement less stringent provincial policies, acting solely to *top up* provincial prices or other policies in order to achieve a coordinated level of stringency.[107] The *GGPPA* stipulates explicitly that the Governor in Council must take into account extant provincial policies in setting any federal GHG emissions price.

This is not to say that concerns regarding the addition of federal jurisdictional powers are insignificant, as in any case involving validity under POGG. Even if a valid *GGPPA* under POGG would not remove provincial jurisdiction or render invalid existing provincial legislation, it would allow federal legislation to affect aspects of subjects traditionally in the exclusive domain of provincial governments. The *GGPPA* allows for the federal government to impose GHG

emissions pricing in specific provinces and does not require that the rates charged be uniform either by province, industry, or fuel.[108] Federal GHG emissions pricing applied within one province or to a particular fuel within that province could have significant impacts on the viability of emissions-intensive industries. A high average GHG emissions price applied to the oil sands in Alberta for example, could impact natural resource extraction falling within Section 92A of the *Constitution Act, 1867*.[109]

The potential to impact areas of provincial jurisdiction is not, however, unique to the *GGPPA* or federal jurisdiction over the national aspects of GHG reduction. Federal laws often carry local impacts, and not everyone will agree with the distribution of costs and benefits that constitutionally valid federal policies entail. The federal authority under the *Canadian Environmental Protection Act*, upheld in *Hydro-Québec*, allows the federal government to significantly affect aspects of resource development and electricity production through the regulation of toxic emissions including GHGs.[110] Federal authority over environmental assessment, originally clarified in *Oldman River*, extends to federal assessments over resource development and electricity-generating assets.[111] Federal authority of interprovincial works and undertakings affects oil and gas pipelines and power transmission assets which, in turn, affect provincial economies, populations, and resources falling within provincial jurisdiction.[112] These effects are important, but do not imperil the validity of legislation. Writing in *Munro,* Justice Cartwright clarified that "once it has been determined that the matter in relation to which the Act is passed is one which falls within the power of Parliament it is no objection to its validity that its operation will affect civil rights in the provinces."[113] That case involved the expropriation of property related to enhancing the National Capital Region, but the rationale applies to effects on other aspects of provincial jurisdiction as well. Political questions aside, questions of constitutional validity matter in protecting the balance of federalism essential to Canada's constitutional order and well-being. That is not a reason to wish POGG out of textual existence, or to burden it with extravagant powers it does not possess, but it is a reason to calibrate its capacities deliberately, and to assess legislation purporting to fall within it rigorously and cautiously. The *GGPPA* provides that opportunity.

5. Conclusion

This article encourages us to see past the tendency in Canadian constitutional law to treat POGG as an outlier, a head of power too sweeping in scope and too disruptive of balance to meaningfully integrate into Canadian federalism analysis. Properly and purposively interpreted, POGG is neither. The constraining features of POGG, we argue, are those that have always worked to maintain the balance of Canadian federalism, and the integrity of the jurisdictions of both levels of government. Some heads of power are broad, others are narrow. In both cases, their meaning can only be understood as a matter of mutual modification and respect for the underlying principles of federalism. No interpretation of any head of power can exist in isolation from the others. Since POGG is meant to exist alongside provincial jurisdiction, by definition POGG cannot be interpreted in a manner that would eradicate the authority of provinces. That said, POGG has an important role to play in the division of powers in ensuring that completely new subjects do not fall beyond legislative reach, that the national government can respond to national emergencies, and that the subjects which develop national aspects lying beyond provincial capacity do not fall between jurisdictional cracks. In none of these instances does jurisdiction transfer from provincial to federal authority. New subjects arise and recede, take on or shed new aspects. That is a fact of life. POGG adds, rather than subtracts, these subjects or aspects of subjects to the division of powers and, in so doing, enables limited federal jurisdiction while maintaining ongoing provincial authority.

POGG can only maintain the balance of federalism when constrained by the existing principles of federalism: the double aspect doctrine, cooperative federalism, and a restrained paramountcy. The importance of seeing double in matters of Canadian constitutional law, we con-

tend, entails recognizing the capacity of subjects to contain multiple aspects, some of which will fall within either federal or provincial jurisdiction. In a world in which local issues can take on national and international dimensions, and in which national and international policies play out with different local impacts, there are strong reasons to promote democratic engagement, and capacities to legislate, at both national and provincial levels. There is no reason to imagine that jurisdiction over the national aspects of subjects eradicates the equally important provincial jurisdiction over local aspects of that same subject. So long as courts continue to enable the concurrent application of legislation by both levels of government, POGG takes its appropriate place in a federalism that holds in tension the productive balance between unity and diversity.

We have also claimed that POGG is a power, like other heads of federal and provincial jurisdiction, better deployed in the concrete practice of assessing the validity of specific laws, rather than in an abstract exercise of philosophical constitutional boundary drawing. There is no need to decide, in any particular case, what POGG must mean in all cases. Nonetheless, courts must continue to articulate its characteristics as a head of power and the nature of laws capable of residing within it in order to maintain balance with provincial authority. In this respect, we advocate continuing focus on the provincial inability test as the best way to ensure POGG remains restricted to truly national aspects of subjects residing beyond full provincial capacities. In our view, the *GGPPA* meets that standard. If the reduction of national GHG emissions constitutes a valid federal subject under the national concern branch of POGG, we see no reason under the double aspect doctrine and cooperative federalism why provinces would lose any existing provincial jurisdiction. Further, a restrained approach to paramountcy, and the mechanics of the *GGPPA* itself, suggest that provincial and federal legislation will work concurrently on tackling GHGs with a range of policy approaches. That seems to us entirely appropriate given the nature of the climate change crisis facing all of us. In the legislative challenge of our time, we believe Canada's Constitution is up to the task.

Endnotes

1 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985 [*Constitution Act, 1867*].

2 *Greenhouse Gas Pollution Pricing Act, SC 2018, c 12, s 186* [*GGPPA*]; *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544 [*Ontario GGPPA Reference*]; *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40 [*Saskatchewan GGPPA Reference*]; *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ABCA 349 [*Alberta GGPPA Reference*].

3 As Chief Justice Lamer reminded in *R v Hydro-Québec*, [1997] 3 SCR 213 [*Hydro-Québec*], "the environment is a subject matter of shared jurisdiction, that is, that the Constitution does not assign it exclusively to either the provinces or Parliament" (at 255). Similar conclusions are reached in *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3 [*Oldman River*] at 63.

4 For summaries of federal authority to enact GHG emissions policies see Nathalie J Chalifour, "Canadian Climate Federalism: Parliament's Ample Constitutional Authority to Legislate GHG Emissions through Regulations, a National Cap and Trade Program, or a National Carbon Tax" (2016) 36 NJCL 331; see also Peter W Hogg, "Constitutional Authority Over Greenhouse Gas Emissions" (2009) 46:2 Alta L Rev 507.

5 See Hakeem O Yusuf, *Colonial and Post-Colonial Constitutionalism in the Commonwealth: Peace, Order and Good Government* (Abingdon, UK: Routledge, 2014) at 39-41.

6 *Russell v The Queen*, [1882] 7 AC 829 (PC) [*Russell*].

7 *Attorney General for Ontario v Attorney General for the Dominion*, [1896] AC 348 (PC) at 360-1 [*Local Prohibition*].

8 *Attorney-General of Canada v Attorney-General of Alberta*, [1922] 6 DLR 5423, 1 AC 191 (PC) [*Board of Commerce*]; *Fort Frances Pulp and Paper Co v Manitoba Free Press Co*, [1923] 3 DLR 629, AC 695 (PC) [*Fort Frances*]; *Toronto Electric Commissioners v Snider*, [1925] 2 DLR 5, AC 396 (PC) [*Snider*].

9 Vincent MacDonald, "The British North America Act: Past and Future" (1937) 15:6 Can Bar Rev 393 at 398-9; See generally Richard Risk, "The Scholars and the Constitution: P.O.G.G. and the Privy Council" (1995) 23 Man LJ 496 at 501.

10 *Attorney General of Canada v Attorney General of Ontario*, [1932] 1 DLR 58, AC 54 (PC) [*re Aeronautics*]; *Reference re Regulation and Control*

of Radio Communication in Canada, [1932] 2 DLR 81, AC 304 (PC) [*re Radio Communication*].

11 Risk, *supra* note 9; See Eric M Adams, "Canada's "Newer Constitutional Law" and the Idea of Constitutional Rights" (2006) 51 McGill LJ 435. Other scholars from Quebec worried about maintaining provincial constitutional autonomy in the face of pressures to expand federal jurisdictional power. See Léo Pelland, "Problèmes de droit constitutionnel" (1937-38) 16 R du D 86.

12 Bora Laskin, "'Peace, Order and Good Government' Re-Examined" (1947) 25:10 Can Bar Rev 34.

13 *Reference Re Anti-Inflation Act*, [1976] 2 SCR 373, 68 DLR (3d) 452 [*Anti-Inflation*]. A majority of the Court did, however, uphold wide-ranging federal legislation to combat inflation as a valid use of POGG's emergency branch.

14 *R v Crown Zellerbach Canada Ltd*, [1988] 1 SCR 401, 49 DLR (4th) 161 [*Crown Zellerbach*].

15 *Hydro-Québec*, *supra* note 3 at 285.

16 *Saskatchewan GGPPA Reference*, *supra* note 2; *Ontario GGPPA Reference*, *supra* note 2.

17 *Saskatchewan GGPPA Reference*, *supra* note 2 at para 474.

18 *Ontario GGPPA Reference*, *supra* note 2 at paras 195-7.

19 For the larger argument on constitutional interpretation as a matter of text, purpose, and context see Eric M. Adams, "Canadian Constitutional Interpretation" in Cameron Hutchison, *The Fundamentals of Statutory Interpretation* (Toronto: LexisNexis, 2018).

20 *Reference re Secession of Quebec*, [1998] 2 SCR 217, 161 DLR (4th) 385 at para 43.

21 *Crown Zellerbach*, *supra* note 14 at 447.

22 *Ibid* at 448.

23 Sujit Choudhry, "Recasting Social Canada: A Reconsideration of Federal Jurisdiction over Social Policy" (2002) 52:3 UTLJ 163. Pointing to conflicting interpretations of *Crown Zellerbach*, Choudry writes: "Before the judgment, the operative legal regime for marine pollution in provincial waters was provincial. After the judgment, the status of provincial jurisdiction is unclear. On one reading, *Crown Zellerbach* vested exclusive jurisdiction over marine pollution with the federal government. If that is true, then the impact on provincial jurisdiction was dramatic. But on another reading, pollution in provincial marine waters is still a provincial subject-matter, such that there is concurrent jurisdiction" (at 230).

24 *Ontario GGPPA Reference*, *supra* note 2 at para 178 [emphasis added].

25 *Ibid* at para 203.

26 *Saskatchewan GGPPA Reference*, *supra* note 2 at paras 131-2.

27 Joseph E 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.

28 Shi-Ling Hsu & Robin Elliot, "Regulating Greenhouse Gases in Canada: Constitutional and Policy Dimensions" (2009) 54:3 McGill LJ 463, n 134, citing *Crown Zellerbach, supra* note 14 at 433.

29 Sujit Choudhury, "Constitutional Law and the Politics of Carbon Pricing in Canada" (November 2019), online: *IRPP* <https://perma.cc/ZN6M-GT7X> at 15-6.

30 Dwight Newman, "Federalism, Subsidiarity, and Carbon Taxes" (2019) 82:2 Sask L Rev 187 at 196.

31 *Johannesson v Municipality of West St Paul* (1951), [1952] 1 SCR 292 at 312, 4 DLR 609 [*Johannesson*] [emphasis added]. In a concurring opinion, Justice Estey notes that "[t]he Judicial Committee having decided that legislation in relation to aeronautics is within the exclusive jurisdiction of the Dominion, it follows that the province cannot legislate in relation thereto, whether the precise subject matter of the provincial legislation has, or has not already been covered by the Dominion legislation" (at 318). Justice Locke similarly finds that the "whole subject of aeronautics lies within the field assigned to Parliament as a matter affecting the peace, order and good government of Canada," and that legislation which "clearly trespasses upon that field … must be declared ultra vires the province" (at 328-9).

32 *re Radio Communication*, *supra* note 10; Alone in dissent in *Reference re Regulation and Control of Radio Communication*, [1931] SCR 541, 4 DLR 865 [*re Radio Communication (SCC)*], Justice Rinfret would have held that Parliament did not have plenary and exclusive jurisdiction over all aspects of radio and telecommunications (at 566).

33 *Anti-Inflation*, *supra* note 13 at 458.

34 *Crown Zellerbach*, *supra* note 14 at 455.

35 *Hydro-Québec*, *supra* note 3 at 288.

36 Eric M Adams, "Judging the Limits of Cooperative Federalism" (2016) 76 SCLR 26 at 31.

37 There is no consistent delineation between the so-called gap, residual, and national concern branches of POGG. In his recent commentary on the *GGPPA*, Newman, *supra* note 30, goes so far as to argue that "the 'national concern' branch was effectively created out of whole cloth to meet

purported needs in a particular case, there are real arguments for considering its legal status suspect" (at n 47). Newman also claims that "the case law does not support the three-branch description of it often cheerily offered by those who would centralize the federation" (at n 26).

38 *Anti-Inflation*, *supra* note 13; See also *Crown Zellerbach*, *supra* note 14 at 432; *Fort Frances*, *supra* note 8.

39 *Attorney General of Ontario v Canada Temperance Federation*, [1946] 2 DLR 1, AC 193 (PC) [*Canada Temperance Federation*].

40 Guy Régimbald & Dwight Newman, *The Law of the Canadian Constitution*, 2nd ed (Toronto: LexisNexis Canada, 2017), s 6.13. Régimbald and Newman cite the finding in *R v Hauser*, [1979] 1 SCR 984, that narcotics control represents a genuinely new matter, and thus the *Narcotic Control Act* was properly the domain of Parliament under POGG.

41 Dale Gibson, "Measuring National Dimensions" (1976) 7:1 Man LJ 15 at 34-5, as cited by Justice Le Dain in *Crown Zellerbach, supra* note 14 at 433.

42 *Local Prohibition*, *supra* note 7 at 361.

43 *Canadian Western Bank v Alberta*, 2007 SCC 22 at para 37 [*Canadian Western Bank*].

44 *Multiple Access Ltd v McCutcheon*, [1982] 2 SCR 161 at para 21, 138 DLR (3d) 1 [*Multiple Access*]; See also Lord Simon's recognition in *Canada Temperance Federation*, *supra* note 39, of continuing "room for enactments by a provincial legislature dealing with an aspect of the subject in so far as it specially affects that province," despite the presence of federal jurisdiction under POGG (at 205-6).

45 Gibson, *supra* note 41 at 34.

46 *Munro v National Capital Commission*, [1966] SCR 663, 57 DLR (2d) 753 [*Munro*].

47 See Nathalie J Chalifour, "Jurisdictional Wrangling over Climate Policy in the Canadian Federation: Key Issues in the Provincial Constitutional Challenges to Parliament's Greenhouse Gas Pollution Pricing Act" (2019) 50:2 Ottawa L Rev 197 at 234. Chalifour, *supra* note 4 makes similar points (at 335).

48 *re Aeronautics*, *supra* note 10; *re Radio Communication*, *supra* note 10.

49 See *Multiple Access*, *supra* note 44; See also *Jones v AG of New Brunswick*, [1974] 2 SCR 182, 45 DLR (3d) 583 [*Jones v NB*]; See also *Interprovincial Co-operatives Ltd et al v R* (1975), [1976] 1 SCR 477, 53 DLR (3d) 321 [*Interprovincial Co-operatives*], respectively.

50 *Hydro-Québec*, *supra* note 3; *Desgagnés Transport Inc v Wärtsilä Canada Inc*, 2019 SCC 58 [*Desgagnés v. Wärtsilä*].

51 See *The Citizens Insurance Company v Parsons*, [1880] 4 SCR 215, 7 AC 96 (PC) [*Parsons*]. Mutual modification goes in both directions. As Viscount Haldane points out in *John Deere Plow Company v Wharton* (1914), [1915] 18 DLR 353, AC 330 [*John Deere Plow*], "the expression 'civil rights in the Province' is a very wide one, extending, if interpreted literally, to much … of the field of s. 91. But the expression cannot be so interpreted and it must be regarded as excluding cases expressly dealt with elsewhere … notwithstanding the generality of the words" (at 340).

52 Newman, *supra* note 30 at n 14.

53 *General Motors of Canada Ltd v City National Leasing*, [1989] 1 SCR 641 at 678, 58 DLR (4th) 255 [*General Motors*]; This section is cited in *Reference re Securities Act*, 2011 SCC 66 at para 81 [*re Securities Act*]. Paragraphs 70-85 of this decision provide an overview of the interpretation of the general trade and commerce power.

54 *re Securities Act*, *supra* note 53 at para 7.

55 *Ontario Hydro v Ontario (Labour Relations Board)*, [1993] 3 SCR 327 at para 1, 107 DLR (4th) 457 [*Ontario Hydro*].

56 *Ibid* at para 2. Similarly, in dissent, Justices Sopinka, Cory and Iacobucci held that, "the extent of what is swept within Parliament's jurisdiction is circumscribed to the national concern aspects of atomic energy" (at 425).

57 Gibson, *supra* note 41 at 17.

58 *Anti-Inflation*, *supra* note 13 at 457. This two-step test is similar to that proposed by W R Lederman, "Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation" (1976) 35:1 Alta L Rev 34.

59 *Interprovincial Co-operatives*, *supra* note 49 at 514.

60 Katherine Swinton, "Federalism under Fire: The Role of the Supreme Court of Canada" (1992) 55:1 Law & Contemp Probs 121 at 132.

61 *Crown Zellerbach*, *supra* note 14 at 402 [emphasis added].

62 *Ibid* at 432.

63 *Crown Zellerbach*, *supra* note 14 at 432, 434.

64 As Swinton, *supra* note 60, puts it, the criteria in General Motors, "incorporate concepts of provincial inability," in order to promote "a case-by-case balancing of the interests of federal and provincial governments" (at 121).

65 *Canadian Western Bank*, *supra* note 43 at para 37; See generally Adams, *supra* note 11.

66 *Hodge v The Queen*, [1883] 9 AC 117 at 130 (PC).

67 *Canadian Western Bank*, *supra* note 43 at para 42.

68 See e.g. *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40 [*Spraytech*].

69 Newman, *supra* note 30 at 17.

70 *Multiple Access*, *supra* note 44 citing Peter W Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1977) at 102; Peter W Hogg, *Constitutional Law of Canada*, student ed (Toronto: Carswell/Thomson Reuters, 2018).

71 Provincial jurisdiction persists, despite the presence of federal jurisdiction under POGG, over municipal subjects in *Munro*, *supra* note 46 and official languages in the administration of justice in *Jones v NB*, *supra* note 49. By implication, in *Ontario Hydro*, *supra* note 55, a majority of the Court (Chief Justice Lamer's concurrence as well as the dissent of Justices Sopinka, Cory and Iacobucci) preserves provincial jurisdiction as well by insisting that POGG jurisdiction was "circumscribed to the national concern aspects of atomic energy" (at 425). Also, see generally Chalifour, *supra* note 47 at 234.

72 *Desgagnés v. Wärtsilä*, *supra* note 50 at para 48. Justices Moldaver, Karakatsanis, Gascon, Côté, Rowe and Martin here cite *re Securities Act*, *supra* note 53 at paras 71-2.

73 *Alberta (AG) v Moloney*, 2015 SCC 51 at paras 27, 63.

74 *Multiple Access*, *supra* note 44; *Ontario Hydro*, *supra* note 55 at 420; *Rothmans, Benson & Hedges Inc v Saskatchewan,* 2005 SCC 13.

75 W R Lederman, "The Concurrent Operation of Federal and Provincial Laws in Canada" (1963) 9:3 McGill LJ 185 at 192; Lederman cites Justice Cartwright's dissent in *O'Grady v Sparling*, [1960] SCR 804, 25 DLR (2d) 145 [*O'Grady v Sparling*] but is clear that this view is not the law.

76 *Attorney General for Saskatchewan v Attorney General of Canada*, 2020 [*SCC GGPPA Reference*], (Factum of the Attorney General for Saskatchewan) at para 92; *ibid*, (Factum of the Attorney General of Ontario) at para 87; *Alberta GGPPA Reference*, *supra* note 2 (Factum of the Attorney General of Alberta), at paras 6-7.

77 *GGPPA*, *supra* note 2, ss 129-130.

78 *Munro*, *supra* note 46 at 672.

79 *GGPPA*, *supra* note 2, s 17(2)(ii).

80 For the economic theory underlying the policy, see Carolyn Fischer & Alan K Fox, "Output-Based Allocation of Emissions Permits for Mitigating Tax and Trade Interactions" (2007) 83:4 Land Econ 575. Output-based allocations are designed to mitigate competitiveness issues for trade-exposed industries. The system provides, in effect, credits used against the regulatory charge which are issued per unit output. As such, a firm reducing emissions per unit output will benefit in the amount of the carbon emissions charge, but a firm reducing emissions solely through reducing output will see lower net rewards. Canada's Ecofiscal Commission, "Explaining Output-Based Allocations (OBAs)" (2017), online: *Canada's Ecofiscal Commission* <https://perma.cc/N97L-Z8NP> provides an accessible explanation of the policy tool.

81 *GGPPA*, *supra* note 2, s 17(1) specifies the charge to apply only in provinces appearing in Schedule 1. The decision to list a province in Schedule 1 falls to the Governor in Council under s 166(2).

82 *Ibid*, ss 166(2) and 166(3).

83 See the definition of a covered facility in *ibid*, s 169. s 189(1) specifies that the decision to list a province in Part 2 of Schedule 1 for the purposes of applying the output-based pricing system falls to the Governor in Council, and s 189 (2) specifies the factors which must be considered in making such a decision.

84 *Ibid*, s 189(2).

85 *Saskatchewan GGPPA Reference*, *supra* note 2 at paras 125, 335, 337 respectively.

86 *Ontario GGPPA Reference*, *supra* note 2 at paras 77,166 respectively.

87 *Ibid* at para 213.

88 *Saskatchewan GGPPA Reference*, *supra* note 2 at para 128 [emphasis added].

89 *re Securities Act*, *supra* note 53; *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48 [*re Pan-Canadian Securities*].

90 *re Securities Act*, *supra* note 53 at paras 106,122.

91 *Ibid* at paras 6, 128.

92 Until 2019, provincial emissions from large, industrial facilities were priced under the *Carbon Competitiveness Incentive Regulation*, Alta Reg 255-2017 [*CCIR*] and the output-based pricing system under Part II of the *GGPPA* did not apply in Alberta. From 2020 onward, the *Technology Innovation and Emissions Reduction Regulation*, Alta Reg 133-2019 [*TIER*] will apply to these same facilities in Alberta, and Part II of the *GGPPA* will not apply. This decision was confirmed in Government of Canada, "Integrating Alberta's Carbon Pollution Pricing System for Large Industrial Emitters With the Federal Fuel Charge" (6 December 2019), online: *Department of Finance Canada* <https://perma.cc/5CYK-NG84>.

93 *Carbon Tax Act*, SBC 2008, c 40 [*BC Carbon Tax Act*]; *Environment Quality Act*, CQLR c Q-2 [*Environment Quality Act*].

94 *GGPPA*, *supra* note 2, ss 166, 189.

95 In *re Pan-Canadian Securities*, *supra* note 89, the Supreme Court held that federal legislation which addressed systemic risks in relation to the trade of securities was intra vires Parliament.

96 *Ontario GGPPA Reference*, *supra* note 2 at para 117.

97 Recall that in *Interprovincial Co-operatives*, *supra* note 49, Manitoba was unable to impose restrictions on polluting industries in Ontario via provincial statute.

98 *General Motors*, *supra* note 53 at 678, 683. These passages are cited in *re Securities Act*, *supra* note 53 at para 87.

99 *re Securities Act*, *supra* note 53 at para 90; *re Pan-Canadian Securities*, *supra* note 89 at para 90.

100 In *Ontario GGPPA Reference*, *supra* note 2 at para 119, Chief Justice Strathy writes: "the inability of one province to control the deleterious effects of GHGs emitted in others, or to require other provinces to take steps to do so, means that one province's failure to address the issue would endanger the interests of other provinces". We also consider that Canada's national GHG emissions targets, stated in Government of Canada, "Canada's 2017 Nationally Determined Contribution (NDC) Submission to the United Nations Framework Convention on Climate Change" (2017), online (pdf): *UNFCC* <https://perma.cc/BCZ9-LCQ6>, imply a zero-sum relationship between the actions taken or not taken in one province and the burden implicitly placed on others to meet these targets.

101 *Ibid* at para 17.

102 Lederman, *supra* note 58 at 45.

103 *Ontario GGPPA Reference*, *supra* note 2 at para 4.

104 *BC Carbon Tax Act*, *supra* note 93.

105 *TIER*, *supra* note 92.

106 *Ontario GGPPA Reference*, *supra* note 2 at para 115.

107 *GGPPA*, *supra* note 2, ss 166, 189.

108 *GGPPA*, *supra* note 2, Schedules 1-2.

109 See, for example Branko Bošković & Andrew Leach, "Leave It in the Ground? Oil Sands Development Under Carbon Pricing" (forthcoming) Canadian J Econ, online: <https://papers.ssrn.com/abstract=2920341>. Here, the authors assess the impacts of GHG emissions prices on oil sands viability and show that, where high carbon prices are applied, there is a potential to affect project-level investment decisions such that new projects which would otherwise proceed are not built.

110 Hogg, *supra* note 4 at 513; *Canadian Environmental Protection Act*, SC 1999, c 33.

111 *Oldman River*, *supra* note 3.

112 *Reference re Environmental Management Act (British Columbia)*, 2019 BCCA 181.

113 *Munro*, *supra* note 46 at 671.

Constitutional forum constitutionnel

Charter *Injunctions, Public Interest Presumption, and the Tyranny of the Majority*

Colin Feasby*

Introduction

Quebec's Bill 21, which seeks to restrict employees in its public service from displaying religious symbols at work, has attracted a number of constitutional challenges. In one of those challenges, *Hak v Quebec (Attorney General)*, the plaintiffs sought an injunction suspending the operation of parts of Bill 21 pending a decision on the merits.[1] Both the Quebec Superior Court and the Quebec Court of Appeal declined to issue an injunction. The majority of the Quebec Court of Appeal found that in enacting Bill 21 the legislature must be presumed to have acted in the public interest and, as such, the third part of the injunction test — balance of convenience — could not be satisfied.

The idea that Parliament and provincial legislatures must be presumed to be acting in the public interest — what I will call the public interest presumption — is problematic in *Charter* cases concerning constraints of fundamental rights and the treatment of minorities. Parliament and provincial legislatures are majoritarian institutions; they are the product of elections where the candidates and parties with the most votes win. A core objective of the *Charter* is to protect minorities from being oppressed by the majority. Giving too much weight to a majoritarian conception of the public interest in interlocutory injunction applications concerning minority rights undermines the *Charter* and negates injunctions and stays as effective remedies, particularly where an applicant establishes real harm. To fulfill the *Charter*'s mandate to protect minority rights it must be recognized that the government does not have a monopoly on representing the public interest and that a majoritarian conception of the public interest cannot control the outcome of the balance of convenience test in the face of evidence that other aspects of the public interest are harmed by the impugned legislation. This short article argues for a much weaker public interest presumption: one that may be rebutted by an applicant adducing evidence of harm to an identifiable group.

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1 *Hak c Procureure Générale du Québec*, 2019 QCCA 2145 [*Hak*].

Hak v Quebec (Attorney General)

Hak is a challenge to *An Act respecting the laicity of the State* which is commonly known as Bill 21.[2] Bill 21, amongst other things, prohibits individuals in the Quebec public service, including teachers, from wearing religious symbols when at work. Bill 21 is widely perceived as being targeted at Muslim women who wear a niqab, though it also affects the members of other faiths who wear religious symbols. The Quebec National Assembly recognized that Bill 21 was potentially unconstitutional and pre-emptively invoked the notwithstanding clause. *Hak* challenges the constitutionality of Bill 21 on several grounds, including section 28 of the *Charter* which provides for the equality of women and which is not subject to the notwithstanding clause.[3]

The applicants in *Hak* sought an injunction to prevent the operation of certain parts of Bill 21 pending a full hearing on the merits of the case. The Quebec Superior Court denied the injunction application.[4] On appeal to the Quebec Court of Appeal, the applicants were granted leave to adduce new evidence that showed Muslim women who wore a niqab had been denied employment as teachers by reason of Bill 21. The Quebec Attorney General accepted that there was a serious issue to be tried and two of the three judges of the Court of Appeal accepted that there was evidence of irreparable harm, leaving the appeal to be decided on the question of balance of convenience.

All three judges agreed that at the balance of convenience stage it must be presumed that the government is acting in the public interest. Chief Justice Hensler concluded that despite the public interest presumption, the balance of convenience favoured a temporary suspension of the provision of Bill 21 because it jeopardized the employment of new teachers who wore a niqab. The two other judges disagreed holding that the public interest presumption trumped all other considerations. Belanger JA held that "[e]ven in the absence of an urgent evil to eradicate or a situation affecting a pressing public need …, it is not for the courts to interfere in the legislature's choice to define the public interest as it sees fit."[5] Mainville JA agreed, holding that "…the Court must presume that the public interest is served by keeping these provisions in force."[6]

Presumptions and Constitutional Injunctions

i. Manitoba (AG) v Metropolitan Stores Ltd.

The presumption of constitutional validity was a feature of federalism jurisprudence prior to the advent of the *Charter*.[7] The Supreme Court of Canada confronted the question of whether the presumption of constitutionality applied in the context of the *Charter* in a stay application in *Manitoba (AG) v Metropolitan Stores Ltd.,* a case where a labour board's effort to impose a collective agreement was alleged to have been unconstitutional.[8] Justice Beetz held that a presumption of constitutionality was inappropriate because a court cannot delve deeply into the merits on an interlocutory stay or injunction application as would be required to rebut such a presumption. He further explained, "there is no room for the presumption of constitutional validity … [given that] the innovative and evolutive character of the *Canadian Charter of Rights and Freedoms* conflicts with the idea that a legislative provision can be presumed to be consistent with the

2 *Act respecting the laicity of the State*, CQLR, c L-0.3.

3 *Canadian Charter of Rights and Freedoms,* s 28, Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]. Section 28 provides: "Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons." For a discussion of the argument that Bill 21 is unconstitutional contrary to section 28, see Kerri Froc, "Shouting into the Constitutional Void: Section 28 and Bill 21" (2019) 28 Const Forum Const 19.

4 *Hak c Procureure générale du Québec,* 2019 QCCS 2989 [*Hak*].

5 *Hak, supra* note 1 at para 98.

6 *Ibid* at para 148.

7 Joseph Eliot Magnet, "The Presumption of Constitutionality" (1980) 18:1 Osgoode Hall LJ 87.

8 *Manitoba (AG) v Metropolitan Stores Ltd,* [1987] 1 SCR 110, 38 DLR (4th) 321 [*Metropolitan Stores*].

Charter."[9] Beetz J's point was that a presumption of constitutionality makes no sense in light of the fact that the *Charter* exists to hold the legislature accountable.

After dispensing with the argument that the first part of the injunction/stay test was determined by the presumption of constitutionality, Beetz J focused on the need to consider the public interest in the third part of the injunction/stay test — balance of convenience — in *Charter* cases. He observed that an injunction or stay affecting the operation of legislation goes beyond the private interests of the applicant to engage the public interest. Accordingly, he held that the Court of Appeal had erred in failing to "consider the public interest as well as the interest of the parties."[10] The requirement to consider the public interest in the context of the balance of convenience is a sound principle. A careful reading of *Metropolitan Stores*, however, shows that Beetz J never styled the consideration of the public interest as a presumption in favour of the government.

Beetz J drew the germ of the idea that later becomes the public interest presumption from *Canada (Attorney General) v Fishing Vessel Owners' Assn. of British Columbia*, a federalism case.[11] The Fishing Vessel Owners' Association sought to prevent the implementation of the 1984 Commercial Fishing Guide which the Regional Director of the Department of Fisheries and Oceans published ostensibly pursuant to his authority under the *Fisheries Act* and associated regulations. The Federal Court granted an injunction restraining the Regional Director from implementing the quotas and fishing times set out in the 1984 Commercial Fishing Guide on the basis that he did not have the constitutional authority to do so. The Federal Court of Appeal overturned the injunction on the basis that the lower court failed to take into account public interest considerations in the balance of convenience stage of the test. In particular, the Federal Court of Appeal held, "[w]hen a public authority is prevented from exercising its statutory powers, it can be said, in a case like the present one that the public interest, of which that authority is the guardian, suffers irreparable harm…."[12]

Three observations may be made on the reasoning of public interest in *Fishing Vessel Owners* and the subsequent incorporation of that reasoning in *Metropolitan Stores*. First, while consideration of the public interest may be required at the balance of convenience stage of the injunction test, the inference that the public interest is harmed by enjoining a public body from acting is framed in permissive and tentative terms. The Federal Court of Appeal held that "it can be said, that the public interest, of which that authority is the guardian, suffers irreparable harm…." The Federal Court of Appeal's words suggest that the public interest presumption is not a presumption and is not appropriate in all cases.[13] Second, in *Metropolitan Stores,* Beetz J did not expressly consider whether it was appropriate to import a concept from a federalism case into *Charter* jurisprudence. Perhaps the question of whether the legislature was acting in the public interest would have weighed more heavily on his mind in a case involving minority rights than one involving freedom of association and a collective bargaining agreement. Third, the reasons in *Metropolitan Stores* make it clear that the existence of a public interest in favour of enforcing legislation is not dispositive of the question of balance of convenience. Beetz J concluded that "the public interest [should be] taken into consideration in the balance of convenience and weighted together with the interest of private litigants."[14] The admonition to consider the public interest in *Metropolitan Stores* was not framed as a presumption and, even if it can be described that way in retrospect, it is a weak presumption that can be overcome by evidence to the contrary.

The Court in *Metropolitan Stores* rejected the application of the presumption of constitutional validity in the first stage of the injunction test (merits), but lays the foundation for the public interest presumption to be weighed on the third

9 *Ibid* at para 16.
10 *Ibid* at para 112.
11 *Canada (AG) v Fishing Vessel Owners' Assn. of British Columbia*, [1985] 1 FC 791 (Fed CA).
12 *Ibid* at para 7.
13 *Ibid*.
14 *Ibid* at para 80.

branch of the injunction test (balance of convenience). Professor Cassels saw this as progress, writing that "[t]he decision to jettison the presumption [of constitutionality], and to address concerns for the public interest more directly and openly in the balance of convenience further promotes a more purposive and transparent approach to *Charter* issues."[15] As seen in *Hak*, however, a strong presumption that the government acts in the public interest in the third part of the injunction test often has the same effect as a presumption of constitutionality in the first part of the test; it nullifies interlocutory injunctions and stays as remedies in the *Charter* context.[16]

ii. *RJR-MacDonald Inc. v Canada (Attorney General)*

The Supreme Court of Canada returned to the issue of the appropriate test for a *Charter* injunction in *RJR-MacDonald Inc. v Canada (Attorney General),* a case concerning freedom of expression and limits on cigarette advertising and sales.[17] Sopinka and Cory JJ, writing for the Court, declined to grant an injunction suspending the government's legislation. An important point to keep in mind when considering *RJR-MacDonald* is that the cigarette companies, perhaps understandably, did not adduce evidence of the public interest or contend that their continued advertising and sale of cigarettes without the legislated restrictions was in the public interest.

The *RJR-MacDonald* case was the Supreme Court's first clear articulation of the public interest as a presumption. The presumption, however, is not automatic. It only arises if there is "proof that the [public] authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility."[18] These are, as Sopinka and Cory JJ recognized, "minimal requirements."[19] Once the presumption arises, the applicant cannot deny that an aspect of the public interest will be harmed by issuing an injunction; but, at the same time, the applicant is not prevented from adducing evidence that other aspects of the public interest would be harmed by a failure to grant the injunction. The Court explained that "[i]n order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit."[20]

iii. *Harper v Canada (Attorney General)*

The most recent Supreme Court of Canada decision to consider the presumption that government acts in the public interest is *Harper v Canada (Attorney General)*.[21] Stephen Harper, who was at the time a private citizen, obtained an injunction from the Alberta Courts suspending the limits on third-party advertising expenses on the eve of the 2000 federal election so that his organization, the National Citizens Coalition, could purchase advertising in excess of the limits. The Attorney General sought a stay of the injunction from the Supreme Court of Canada. The Supreme Court of Canada accepted that there was a serious issue to be tried and that there was irreparable harm to Mr. Harper. The case turned on the question of the balance of convenience. Unfortunately, the majority's reasons are brief and conclusory. The majority held that the trial judge had erred in not assuming that the law was "directed to the public good and serves a valid public purpose."[22]

One interpretation of the majority in *Harper* is that the presumption that the government is acting in the public interest is dispositive of the question of public interest and almost invariably

15 Jamie Cassels, "An Inconvenient Balance: The Injunction as a Charter Remedy" in Jeffery Berryman, ed, *Remedies: Issues and Perspectives*, (Toronto: Carswell, 1991) 271 at 296.

16 Robert Sharpe, "Interim Remedies and Constitutional Rights" (2019) 69:1 UTLJ 9 at 26,

17 *RJR-MacDonald Inc v Canada (AG)*, [1994] 1 SCR 311, 111 DLR (4th) 385 [*RJR-MacDonald*].

18 *Ibid* at para 76.

19 *Ibid*.

20 *Ibid* at para 85.

21 *Harper v Canada (AG)*, 2000 SCC 57 [*Harper*].

22 *Ibid* at para 9.

controls the outcome of the balance of convenience test. Supporting this interpretation is the majority's conclusion that "we must take as given at this stage that the legislation imposing spending limits on third parties will serve a valid public purpose."[23] This was the interpretation of *Harper* that guided the majority decisions in *Hak*.

The majority's insistence in *Harper* that it was acting "as *RJR-MacDonald* directs"[24] runs counter to the interpretation that the public interest presumption is dispositive. As such, the majority did not seem to intend to overrule the principles outlined in *RJR-MacDonald*.[25] A better explanation of the outcome in *Harper* is that the third-party election advertising spending limit was one of a number of spending limits and funding provisions that make up the *Canada Elections Act*'s political finance regime. The provisions were facially neutral and did not plausibly single out any minority. Indeed, the Court observed that "the law may be seen not only as limiting free expression but as regulating it in order to permit all voices during an election to be heard fairly."[26] The complexity of the regulatory regime together with Parliament's obvious balancing of expressive interests provides more justification for the majority's deferential approach than the public interest presumption.[27]

The Nature of the Public Interest Presumption

There are several different kinds of presumptions: presumptions of fact and presumptions of law, as well as rebuttable presumptions and conclusive presumptions.[28] What kind of presumption is the public interest presumption? Is the public interest presumption a presumption of fact or law? Is it rebuttable and, if so, by which standard?

A presumption of fact is a conclusion that may be logically inferred or deduced from an already proven fact or set of facts.[29] Presumptions of fact are permissive; they allow a judge to draw an inference, but do not require the inference to be drawn. The public interest presumption set out in *Metropolitan Stores*, if it can be called a presumption at all, is a presumption of fact. The presumption is expressed in terms that indicate that it is discretionary, not mandatory.

A presumption of law is one that a judge is required to make upon proof of a fact or set of facts. Upon proof of one fact, a second fact is presumed. Presumptions of law may be conclusive or rebuttable. In the case of a rebuttable presumption of law, "[o]nce the basic fact is established, the party against whom the presumption operates has either an evidential or a persuasive (legal) burden to satisfy the legal consequence of the presumption."[30] The public interest presumption as described in *RJR-MacDonald* is a presumption of law because it arises upon demonstrating that the "authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility."[31] While the public interest presumption may be dispositive of the question of balance of convenience "in most cases," Sopinka and Cory JJ leave the door open by indicating that either party "may tip the scales of convenience in its favour by demonstrating to the court a compelling public interest in granting or refusal of the relief sought."[32] In establishing the balance of convenience, the public interest presumption as expressed by Sopinka and Cory JJ places the burden on the applicant to overcome the presumption with evidence.[33]

23 *Ibid* at para 11.
24 *Ibid* at para 10.
25 *Ibid*.
26 *Ibid*.
27 Four years later in *Harper v Canada (AG)*, 2004 SCC 34, the majority of the Court held that the third party advertising expenditure limits were constitutional.
28 See generally, Sidney Lederman, Alan Bryant, & Michelle Fuerst, *The Law of Evidence in Canada,* 5ⁱh ed, (Toronto: LexisNexis, 2018) ch 4.
29 *Ibid* at §4.5.
30 *Ibid* at §4.29.
31 *RJR-MacDonald, supra* note 17 at para 76.
32 *Ibid* at para 71.
33 Justice Sharpe considers the public interest presumption to be rebuttable. See. Robert Sharpe, *Injunctions and Specific Performance*, (Toronto:

The public interest presumption expressed in *Harper* appears to be closer to a conclusive presumption of law. The Court in *Harper* held that the lower court had erred in not applying what it considered to be the "principles enunciated in previous decisions…,"[34] indicating that it considered the presumption a question of law. The Court then sent mixed signals as to whether it is a conclusive presumption, saying that it "must take as a given … that the legislation … will serve a valid public purpose"[35] and shortly thereafter weighing the balance of convenience. The best reading of *Harper* is that the public interest presumption is a conclusive presumption of law with respect to the question of public interest, but the question of public interest is not dispositive of the question of balance of convenience.

The Public Interest and Minority Rights

The more robust versions of the public interest presumption sit uncomfortably with the *Charter*'s intended protection of minority rights and the unwritten constitutional principle of protection of minorities.[36] Minority rights — whether they are language rights, equality rights, or other rights — enjoy protection in the *Charter* precisely because majorities cannot be trusted to protect those rights through the legislative process and may succumb to temptation to use legislation to trample upon those rights. Chief Justice Dickson explained this idea in the specific context of freedom of religion in *R v Big M Drug Mart Ltd.*, explaining that "[w]hat may appear good and true to a majoritarian religious group, or to the state acting at their behest, may not, for religious reasons, be imposed upon citizens who take a contrary view. *The* Charter *safeguards religious minorities from the threat of 'the tyranny of the majority.'"*[37]

Some years later, Professor Hogg wrote that "*Charter* rights provide support for vulnerable groups ("discrete and insular minorities") who are not properly represented in the democratic process."[38] Why, then, in the context of legislation that obviously affects minority rights, should courts charged with the responsibility of protecting minorities' *Charter* rights presume the government to be acting in the public interest any more than they should presume the legislation to be constitutional? Isn't this exactly why Beetz J rejected the application of the presumption of constitutionality in *Metropolitan Stores*? Professor Cassels wrote:

> …the assumption that the Attorney General is the exclusive guardian of the public interest is a hangover from ancient rules of standing in public nuisance and criminal law cases. This assumption can no longer be maintained in light of the *Charter*, the very existence of which belies the notion that government authorities have a monopoly over the public interest.[39]

Comments by Sopinka and Cory JJ in *RJR-MacDonald* give some support to the argument that the public interest presumption should be tempered or abandoned in cases involving minority rights.[40] The Court in *RJR-MacDonald* made it clear that the government does not have a monopoly on the public interest and that there

Thomson Reuters, loose-leaf updated to November 2019) at para 3.1330.

34 *Harper, supra* note 21 at para 11.

35 *Ibid.*

36 *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 81, 161 DLR (4th) 385: "…one of the key considerations motivating the enactment of the *Charter,* and the process of constitutional judicial review that it entails, is the protection of minorities. However, it should not be forgotten that the protection of minority rights had a long history before the enactment of the *Charter*….".

37 *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at para 96, 18 DLR (4th) 321 [emphasis added]. See also, *Vriend v Alberta*, [1998] 1 SCR 493 at para 176, 156 DLR (4th) 385: "Where the interests of a minority have been denied consideration, especially where that group has historically been the target of prejudice and discrimination, I believe that judicial intervention is warranted to correct a democratic process that has acted improperly."

38 Peter Hogg, "The *Charter* Revolution: Is it Undemocratic?" (2001/2002) 12:1 Const Forum Const 1 at 5.

39 Cassels, *supra* note 15 at 304.

40 *RJR-MacDonald, supra* note 17 at para 71.

may be differing conceptions of what constitutes the public interest. In particular, the Court held that "'[p]ublic interest' includes both the concerns of society generally and the particular interests of identifiable groups."[41] This statement indicates that the Court understands that the interests of society generally, as represented by majoritarian government, may be at odds with the interests of identifiable groups. Nothing in *RJR-MacDonald* indicates that the majoritarian concept of the public interest should automatically trump the minority concept of the public interest.

The specific mention of "identifiable groups" in *RJR-MacDonald* hints that the Supreme Court may be open to a different approach in the context of minority rights.[42] The leading cases — *Metropolitan Stores*, *RJR-MacDonald*, and *Harper* — concern primarily freedom of association and freedom of expression, not minority rights. This alone might be enough to distinguish those cases and recommend a different approach in the context of minority rights. However, freedom of expression and freedom of association are important and may, in some cases, raise the same concerns of tyranny of the majority as minority rights. Rather than a special exception from the public interest presumption for minority rights, the presumption should be explicitly recognized to be a weak presumption and one that is easily displaced by actual evidence.

The public interest presumption should be explicitly recognized to be a presumption of law that operates only in the absence of evidence to the contrary.[43] When the presumption is met by the applicant with evidence that suspension of the law pending a hearing on the merits is in the public interest, the government cannot rely on the public interest presumption alone. If the applicant adduces evidence of the public interest, the burden shifts to the government, which then must adduce evidence to support its position. This is a reasonable requirement given that, in any *Charter* litigation, the government has the burden to establish that a law addresses a pressing and substantial objective.

Conclusion

Hak is an easy case to decide. The public interest presumption is rebutted because the applicants adduced actual evidence of harm to individuals and an identifiable group — Muslim women who wear a niqab seeking employment as teachers. Recognizing that there may be more than one conception of the public interest and that minority conceptions of the public interest are as valid as the majority conception, the evidence adduced by the applicants supports the view that suspension of certain parts of Bill 21 is in the public interest. The absence of evidence from the Quebec Attorney General leaves the Court with no alternative but to grant the injunction pending a determination of the case on its merits.

A weak public interest presumption is consistent with the role of the courts in checking legislative abuse and, at the same time, it tips the scales ever so slightly in the favour of the legislature prior to a full hearing on the merits. Moreover, the weak public interest presumption still operates as a disincentive to meritless applications, thus keeping the floodgates shut. The weak public interest presumption, however, is not so formidable that applicants challenging a law are doomed to failure.

41 *Ibid*.

42 At least one appellate court has taken this hint. The British Columbia Court of Appeal in *Halalt First Nation v. North Cowichan (District)*, 2011 BCCA 544 at paras 22-3 cited *RJR-MacDonald* for the proposition that the public interest includes the interests of "identifiable groups" in rejecting the submission that a local water authority should be presumed to be acting in the public interest in the face of constitutional claims by a First Nation.

43 Justice Sharpe agrees that the public interest presumption is sometimes too great an obstacle to the granting of injunctions in constitutional cases, but offers a different solution. Justice Sharpe would allow courts to take a deeper look at the merits in the first stage of the injunction test and a "litigant who can show a strong claim should be permitted to demonstrate the likelihood of success and to have the strength of the claim weighed in the balance." See Sharpe, *supra* note 16 at 32.

Operation of laws like Bill 21 that are targeted at minorities and cause harm to those minorities should be enjoined, prior to a trial, on the merits when applicants come forward with evidence that operation of the law harms the public interest. The possibility of success on an injunction application is important because the wheels of justice turn slowly and a hearing on the merits and a decision in a constitutional case may take several years; that is too long for a law that oppresses minorities to operate on the basis of a presumption.[44]

44 Sopinka and Cory JJ recognized this in RJR-MacDonald, observing that "[f]or the courts to insist rigidly that all legislation be enforced to the letter until the moment that it is struck down as unconstitutional might in some instances be to condone the most blatant violation of Charter rights. Such a practice would undermine the spirit and purpose of the *Charter* and might encourage a government to prolong unduly final resolution of the dispute." (*RJR-MacDonald, supra* note 17 at para 44).

Constitutional forum constitutionnel

The Conscientious Objection of Medical Practitioners to the CPSO's "Effective Referral" Requirement.

Richard Moon*

Introduction

The term "conscience" is used in two different ways in discussions about religious freedom. Sometimes, conscience is contrasted with religion. Freedom of conscience, in contrast to freedom of religion, is concerned with the protection of fundamental beliefs or commitments that are not part of a religious or spiritual system.[1] Together, freedom of conscience and freedom of religion protect the individual's most fundamental moral beliefs or commitments.[2]

Other times, though, the term "conscience" refers to a particular kind of accommodation claim. In most religious accommodation cases, an individual or group seeks to be exempted from a law that prevents them from engaging in a religious practice — for example, from wearing religious dress or keeping religious holidays. In conscientious objection cases, however, the individual asks to be exempted from a law that requires them to *perform* an act that they regard as immoral or sinful. In many of these cases the claimant asks to be excused from performing an act that is not itself immoral, but supports or facilitates what they see as the immoral action of others, and so makes them complicit in this immorality. In this comment I will focus on this second use of the term conscience, and more particularly the conscientious

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1 The term "freedom of conscience" was once used interchangeably with freedom of religion to refer to an individual's freedom to hold beliefs that were spiritual or moral in character. At this earlier time the moral beliefs of most individuals were rooted in a religious system. Freedom of conscience, though, is now viewed as an alternative to, or extension of, freedom of religion.

2 However, as I have argued elsewhere, the conscience part of section 2(a) is seldom raised before the courts and may have very little practical content. See Richard Moon, "Conscience in the Image of Religion" in John Adenitire, ed, *Religious Beliefs and Conscientious Exemptions in a Liberal State* (Oxford: Hart, 2019) 73.

objection claim made by some medical practitioners in Ontario to the requirement that they provide an effective referral to another doctor when they are unwilling, for moral or religious reasons, to perform a particular medical procedure.

In the last several years, Canadian courts have dealt with a number of conscientious objection claims. When the definition of civil marriage was changed in Canada to enable same-sex couples to marry, a few civil marriage commissioners objected on religious grounds to performing such marriages.[3] While some provinces agreed to accommodate the commissioners' religious objections and excuse them from performing same-sex civil marriage ceremonies, other provinces were unwilling to do so and instructed the commissioners to perform these marriages or face dismissal. The question of whether a province could require its marriage commissioners to perform same sex civil marriages, despite their religious objections, was addressed by the courts in several cases.[4] In each of these cases, the court or tribunal held that the equality rights of same-sex couples outweighed the religious freedom of marriage commissioners.

There have also been a variety of cases in Canada in which market service providers have objected on religious grounds to providing services to same-sex couples and sought to be exempted from anti-discrimination laws. The claims in these cases have generally been unsuccessful.[5]

More recently, a number of doctors in Ontario challenged the policy of the provincial College of Physicians and Surgeons (CPSO) that required its members to provide a patient with an "effective referral" to another doctor if they were unwilling or unable on moral grounds to offer a particular medical service, such as an abortion or medical assistance in dying (MAiD).[6] The doctors argued that if they were to give an effective referral, they would be complicit in acts that in their view were immoral. The doctors' claim was rejected by the Ontario Court of Appeal, which held that the interests of patients in accessing medical services outweighed the doctors' freedom of religion claim.

I will argue that the significant issue in *Christian Medical and Dental Society of Canada v College of Physicians and Surgeons of Ontario* (*Christian Medical Society*), and other con-

3 I have examined this issue previously in Richard Moon, "Conscientious Objection in Canada: Pragmatic Accommodation and Principled Adjudication" (2018) 7:2 Oxford JL & Religion 274.

4 See e.g. *MJ v Nichols* (2008), 63 CHRR 145 (SKHRT), aff'd *Nichols v MJ*, 2009 SKQB 299 [*Nichols* (QB)]; *Re Marriage Coammissioners Appointed Under The Marriage Act*, 2011 SKCA 3.

5 See e.g. *Eadie & Thomas v Riverbend Bed and Breakfast and Others (no. 2)*, 2012 BCHRT 247 (a bed and breakfast that denied service to a gay couple); *Brockie v Brillinger*, [2002] 222 DLR (4th) 174, 161 OAC 324 (a print shop that refused to provide services to a gay organization).

6 *Christian Medical and Dental Society of Canada v College of Physicians and Surgeons of Ontario*, 2019 ONCA 393 at para 121 [*Christian Medical Society* (CA)] states: "The medical procedures to which the appellants object (an objection shared to varying degrees by the individual appellants and members of the appellant organizations) include: abortion, contraception (including emergency contraception, tubal ligation, and vasectomies), infertility treatment for heterosexual and homosexual patients, prescription of erectile dysfunction medication, gender re-assignment surgery, and MaiD." There is a growing body of literature on this issue, including Bruce Ryder, "Physicians' Rights to Conscientious Objection" in Benjamin L Berger & Richard Moon, eds, *Religion and the Exercise of Public Authority* (Oxford: Hart, 2016) 127; Jacquelyn Shaw & Jocelyn Downie, "Welcome to the Wild, Wild North: Conscientious Objection Policies Governing Canada's Medical, Nursing, Pharmacy, and Dental Professions" (2014) 28:1 Bioethics 33.

scientious objection cases, is not, as the courts have said, the reasonable balance between the individual's religious interests or commitments and the interests or rights of others in the community, but is instead whether the individual's religiously-based objection should be viewed as an expression of personal religious conscience that should be accommodated, provided this can be done without noticeable harm to others, or as a religiously-grounded civic position or action that falls outside the scope of religious freedom and may be subject to legal regulation. The commitment to religious freedom requires that a distinction be made — a line drawn — between civic and spiritual beliefs or actions. An individual's spiritual practices are both excluded and insulated from political decision-making. However, their beliefs concerning civic issues, such as the rights and interests of others and the just arrangement of social relations, even if grounded in a religious system, must be subject to the give-and-take of ordinary politics.

The courts' task is not to trade off or balance specific competing values/interests but is instead to mark out a protected space for religious communities or ways of life -- to define the scope of personal or communal religious practice that can be practically insulated (and excluded) from legal regulation. Religious freedom, as a constitutional right in a democratic political system, must be limited in what it protects to matters that can be viewed as private and outside the scope of politics. The protection of religious freedom then requires the courts to draw a line between the spheres of spiritual and civic life, even if that line often appears to be pragmatic and moveable.[7]

In determining whether a particular (conscientious) objection should be viewed as a personal or spiritual matter or instead as a civic or political position, two factors may be relevant. The first is whether the individual is being required to perform the particular act to which they object only because they hold a special position not held by others, notably some form of public appointment. The other factor is the relative remoteness-proximity of the act that the objector is required to perform from the act that they consider to be inherently immoral. The more remote the legally required action, the more likely we are to regard the refusal to perform it as a position about how others should behave or about the correctness of the law, rather than as an expression of personal conscience.

Accommodation, balancing, and line-drawing

The separation of religion and politics — the exclusion and insulation of religion from politics — rests on the idea that religion is a matter of cultural identity rather than contestable political opinion, and that the restriction of a religious group's practices, and more generally the marginalization of the group, whether intended or not, can be damaging to individual members and undermining of social stability. Religious beliefs and practices are sometimes excluded and insulated from political contest not because they are intrinsically valuable, but instead because they are aspects of an individual's cultural identity or markers of their membership in the collective. Religious belief systems are a source of meaning and value for their adherents. Religious commitment connects the individual to a community of believers and orients them in the world. The ties of religious community can sometimes be as deep and significant to the individual as the ties of family. This is what is meant when religious practices are described as deeply held or rooted.

7 This claim is more fully developed in R. Moon, "Freedom of Religion under the Charter of Rights: The Limits of State Neutrality", 45 UBC Law Review 497-549 (2012)

Judgments about the necessity and extent of accommodation for a particular religious practice do not depend on the balancing of competing religious and civic interests. A court has no way to attach value or weight to a religious belief or practice. From a secular or public perspective, a religious belief or practice has no necessary value; indeed, it is said that a court should take no position concerning its value — that the court should remain neutral on the question of religious truth. The belief or practice is significant, from a civic-secular perspective, because it matters 'deeply' to the group and its members or because it is part of their cultural identity. But there is no way to balance this value against the purpose or value of the restrictive law. The secular concern is not with the belief or practice itself, but rather with its importance and meaning to the group's members and the potential impact of its restriction on the position of the group in the larger society.[8] Religious freedom seeks to prevent or limit the marginalization of a religious group by requiring the state to reasonably accommodate the group's religious practices — by treating these practices as the equivalent of group traits. [9]

The courts have adopted a subjective/sincerity test for determining whether a particular practice or belief falls within religious freedom's protection.[10] The subjective test, which provides that a practice or belief will be protected if the individual has a sincere belief in its spiritual significance, reflects the courts' understandable reluctance to determine the content or significance of an individual's or group's religious beliefs. This test, though, enables the objector in conscientious objection cases to blur the distinction between a religious belief about how one should live one's life, which should sometimes be accommodated, and a religiously-grounded moral or political belief about how others should act or about the public interest, which must remain subject to political debate, and which political decision-makers may either accept or reject.[11]

The objecting doctors may sincerely believe that it is immoral for them to engage in action that supports or facilitates the immoral actions of others. Moreover, they may argue, with some justification that it is not for the courts to decide that this belief lacks weight — that it is not something that matters deeply to them. However, the issue in conscientious objection cases is not what the objector sincerely believes or what is the correct understanding of the religious belief system which they follow. It is instead whether their sincerely-held religious belief should be viewed as an expression of personal morality or spiritual commitment, or rather as a political position — as a religiously-grounded belief about a civic matter.

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8 While a religious group may think that its practices should be protected because they are true and that anything less than full accommodation is wrong, the group must argue before the courts that its practices should be protected because it believes them to be true — adopting a detached perspective.

9 In this way religious freedom is different from rights, such as freedom of expression, which is protected because there is value in the activity of expression — its contribution to democracy, knowledge, individual agency.

10 In Canada this test was established in *Syndicat Northcrest v Amselem*, 2004 SCC 47 [*Amselem*].

11 The Divisional Court of Ontario in *The Christian Medical and Dental Society of Canada v College of Physicians and Surgeons of Ontario*, 2018 ONSC 579 at para 108 [*Christian Medical Society* (SC)] states: "the notion that the Court should determine what constitutes 'complicity' or 'participation' in an act that a physician regards as immoral or sinful is inconsistent with the Court's role in matters involving religious belief." The Court then points to the statement of Iacobucci J in *Amselem*, *ibid* at para 50, that the state is in no position to be "the arbiter of religious dogma."

In the civil marriage commissioner cases, the courts saw the issue as a contest between the religious freedom of the objecting commissioners and the right of same sex couples to receive government services without discrimination that should be resolved through the balancing of these competing interests. Yet nothing of the sort occurred in these cases. The objecting marriage commissioners argued that their religious beliefs could be accommodated without any impact on the ability of same-sex couples to access the services of a civil marriage commissioner, since there were other commissioners willing to perform same-sex marriages. If a commissioner's personal decision not to perform the marriage had no practical impact on the couple, as long as they were able to quickly find someone else to perform the ceremony, then the 'competing' interests of equality and religious freedom did not appear to be in conflict, at least not in any significant way.

Nevertheless, the courts in these cases held that even if a same-sex couple could easily find another commissioner to perform their civil marriage, the initial refusal was objectionable and amounted to a significant breach of the couple's right to equality. The refusal was viewed as an affront to their dignity, even though the refusal was based on the commissioner's sincerely-held religious belief — a belief that the courts formally agreed fell within the scope of section 2(a), freedom of religion protection.[12] When a marriage commissioner tells a same-sex couple that she or he is opposed on religious grounds to their marriage and sends them to another commissioner, she or he is considered to have caused them injury. The courts, in these cases, also attached no significance to the fact that other provinces had decided not to require civil marriage commissioners to perform same-sex marriages and instead had introduced a "single entry system," in which those seeking the services of a commissioner applied to a central office, which then assigned a commissioner to perform the marriage. Under such a system, the couple seeking a commissioner would never know if one of the commissioners on the roster had refused to perform their ceremony, and so would not experience any dignitary harm.

The civil marriage commissioner's religiously-based refusal to perform a same-sex couple's civil marriage was viewed by the courts as an act of state discrimination — as a political or civic act (that should not be insulated from democratic judgment and legal duty) rather than an expression of personal conscience.[13] As a private citizen, the marriage commissioner can refuse to attend and participate in a same-sex wedding. But the commissioner is a public official, who has been granted special rights and powers. If they object to performing their duties because they disapprove of the conduct of others and the law's acceptance or affirmation of that conduct, they can step down from their position. The objecting marriage commissioners said that their refusal to perform same sex marriages was simply an expression of their personal conscience. Yet they wanted to be excused from performing the duties attached to their civic role, because they believed that same-sex marriage is immoral and should not be recognized by the state.[14]

12 *Nichols* (QB), *supra* note 4 at para 57.

13 See e.g. *ibid*.

14 The distinction between a civil servant's personal religious expression and the performance of his/her public role or duty is erased to opposite effect in the Province of Quebec's recently enacted Bill 21, *An Act respecting the laicity of the State*, 1st Sess, 42nd Leg, Quebec, 2019 (assented to 16 June 2019), SQ 2019, c 12, which treats the wearing of religious dress or symbols, such as a hijab or turban, by certain civil servants as a political act — a state act — that is incompatible with the requirement that the state remain neutral in matters of religion.

Authority and remoteness

In many of the conscientious objection cases, an individual is required to perform a particular act only because they hold a position that is not held by others, and that carries certain powers and duties. The civil marriage commissioners who objected to performing same-sex marriages were legally required to facilitate what they saw as the 'immoral' act of another only because they occupied a particular civic position or exercised a form of public power. They held a special power and could escape any 'complicity' simply by giving up this position. In contrast, compulsory military service, by its very nature, is not voluntary, applies to a wide group, and brings no significant benefits or privileges. Compulsory military service is an extraordinary intervention into the individual's life which cannot be avoided by stepping down from a particular role. Other cases may be less clear-cut. If the law were to require all palliative care doctors to provide MAiD or all gynecologists to provide abortion services, might we reasonably expect a conscientious objector to change their specialization?

When the act the objector is required to perform is remote from the act they regard as necessarily immoral, we are more likely to see their objection as a political position rather than an expression of personal religious commitment. The most obvious case of remoteness is the objection to paying taxes on the grounds that some of the government's revenue may go to the military or to support abortion services. The courts have invariably rejected such claims.[15] In contrast, the courts have generally viewed the moral objection to compulsory military service during war as an expression of personal conscience that should be accommodated because such service require the individual to engage directly in acts they regard as immoral, rather than as a political position that may be subject to democratic regulation.[16] The courts have taken this view, even though the objector's reasons are universal in the sense that they believe that it is wrong for anyone to go to war, and even though the exemption may place a greater burden of public service on other members of the community.

The objection of medical practitioners to providing an effective referral

Doctors in Ontario are not required to perform medical procedures to which they object on moral or religious grounds, such as assisted death or pregnancy termination, except in emergency situations. However, the CPSO, which licences and regulates doctors in the province, requires that they provide an "effective referral" to another doctor or health care professional when they are unwilling to perform a particular procedure themselves. The CPSO's policy defines an effective referral as a referral made in good faith "to a non-objecting, available, and accessible physician, other health-care professional, or agency."[17]

15 See e.g. HRC, Optional Protocol to the International Covenant on Civil and Political Rights, *Dr JP v Canada*, 43rd Sess, UN Doc CCPR/C/43/D/446/1991, 7 November 1991.

16 Governments sometimes have their own, more political, reasons for exempting conscientious objectors from military service. They may be concerned, for example, that conscription will result in acts of civil disobedience, which in time of war may be particularly destabilizing.

17 College of Physicians and Surgeons of Ontario, "Professional Obligations and Human Rights" (approved September 2008, updated March 2015), "effective referral," online: *CPSO* <www.cpso.on.ca/Physicians/Policies-Guidance/Policies/Professional-Obligations-and-Human-Rights> [perma.cc/6XDA-8ATZ];

A number of doctors objected to the effective referral requirement, arguing that if they were to provide such a referral they would be complicit in acts they regard as immoral.[18] This requirement, they argued, breached their freedom of conscience and religion under section 2(a) of the *Charter* and could not be justified under section 1. The Divisional Court of Ontario and, on appeal, the Ontario Court of Appeal rejected the doctors' claim. The Court held that while the referral requirement breached the objecting doctors' section 2(a) rights, the restriction of these rights was necessary to protect the interests of patients.

The Court found that in a publicly-funded system "which is structured around patient-centered care … the interests of patients come first, and physicians have a duty not to abandon their patients."[19] The Court described family doctors as "advocates" and "navigators" for their patients in the public health care system.[20] Moreover, because a patient is dependent on their doctor in this way, they may experience shame or humiliation when their doctor makes a religious objection to a procedure they want or require and declines to provide them with a referral to another doctor.[21]

The Court held that doctors in the province had no "right" to practice medicine and that "as members of a regulated and publicly-funded profession, they are subject to requirements that focus on the public interest, rather than their interests."[22] The Court also noted that physicians may adopt "other practice structures that will insulate them from participation in actions to hich they object."[23] In the Court's view, if the doctors are unable to do this, "they will

College of Physicians and Surgeons of Ontario, "Medical Assistance in Dying" (approved June 2016, updated December 2018), "effective referral," online: *CPSO* <www.cpso.on.ca/Physicians/Policies-Guidance/Policies/Medical-Assistance-in-Dying> [perma.cc/29N9-YL4M]. See also the Divisional Court's description of the requirement in *Christian Medical Society* (SC), *supra* note 11 at para 31: "First, the Policies do not require that a referring physician provide a formal letter of referral to, and arrange an appointment for a patient with, another physician. The CPSO says that the intent of the Policies is to ensure only that patients are not left to finding a willing physician on their own without any assistance from the physician from whom they first sought care. Accordingly, the spirit of the requirements is that the physician take 'positive action' to connect a patient with a physician, another health-care professional or an agency. Second, referral may be made to any of a physician, another health-care professional or an agency provided the party to whom a patient is referred provides the requested medical services and is 'non-objecting, available and accessible.' In the case of an agency, a referral may be made to an agency that is charged with facilitating referrals for the health care service."

18 *Christian Medical Society* (CA), *supra* note 6 at para 70: "The appellants' objections that compliance with the Policies would make them complicit in moral wrong is supported by the evidence of expert theologians and ethicists who deposed that the act of referral is a form of direct cooperation in the act which makes the physician complicit. As one, Dr. Daniel Sulmasy, put it, for a religious physician, '[r]eferral is not just a morally neutral get-together.'"

19 *Ibid* at para 167.

20 *Christian Medical Society* (SC), *supra* note 11 at para 159; *ibid* at para 43.

21 *Christian Medical Society* (CA), *supra* note 6 at paras 132, 141.

22 *Ibid* at para 187

23 *Ibid* at para 186. The Court explained at para 50: "For those physicians whose religious objections could not be addressed by the options identified in the Fact Sheet, the physicians could change the nature of their practice to a specialty or sub-specialty that did not engage the same moral and ethical issues. Given the options available to comply with the Policies, the potential for a conflict between a physician's religious beliefs and the Policies, and any resulting psychological concern, results from a conscious choice of the physician to practice in circumstances in which such a conflict could arise. The deleterious effects of the Policies, while not trivial, are less serious than outright exclusion from the practice of medicine."

have to seek out other ways in which to use their skills, training and commitment to patient care," even though this may involve some sacrifice for the doctors.[24] The Court accepted that "the burden of these sacrifices did not outweigh the harm to vulnerable patients that would be caused by any reasonable alternative."[25]

The Court concluded that the interests of patients outweighed the religious freedom rights of the objecting doctors. Yet there are several troubling aspects to the Court's assessment of the competing factors. The first is the expectation that a doctor might alter the nature of their practice or specialization in order to avoid situations in which they might be complicit in acts they consider immoral. A doctor is not a public official, even though they are a member of a regulated profession and paid for their services through a publicly-funded Medicare system. Unlike a marriage commissioner, a doctor is not acting as an agent of the state and is not exercising any special or public powers delegated to them by the state.[26] The second is the Court's emphasis on the "stigma and shame" a patient will experience when told by their doctor the reasons the doctor will not assist them in accessing a particular service. The Court had already found that the doctor's refusal to make an effective referral rested on a sincere religious belief and so was protected under section 2(a). Should the shame experienced by a patient when someone exercises their right to religious freedom be a basis for limiting that freedom? The doctor's refusal to provide an effective referral will cause harm to the patient's dignity only if we think that the refusal amounts to a judgment about the morality of the patient and is not simply an expression of the doctor's personal conscience. Finally, the Court seems to put no burden on the state to establish other processes or channels that would enable a patient to access medical procedures that their doctor is unwilling to provide.

The Court is quick to find a breach of section 2(a) and so must rely on section 1 to reach the conclusion that seems intuitively correct. However, the requirement that a doctor provide an effective referral should not be seen as a breach of section 2(a).[27] The action the objecting doctors are required to perform — a referral — is so remote from the act they regard as inherently immoral that it is better viewed as a civic position rather than an expression of personal conscience. While the doctor's objection is framed as a belief about their personal practices or actions, it is focused on the immorality of the actions of others and on the error of lawmakers in permitting (and even facilitating) these actions.

The doctors in *Christian Medical Society* present their objection as a personal position — as an expression of personal conscience — that should be exempted from the effective referral requirement imposed by the CPSO. The religious belief that MAiD or abortion are immoral, a belief that played a role in the public debate about the legal recognition of these procedures, but was rejected in the democratic and legal processes, now becomes the basis for a rights' claim by

24 *Ibid* at para 186.

25 *Ibid*.

26 I am aware of, but entirely unconvinced by, the argument that doctors are engaging in state action subject to the Charter because they are implementing a specific state policy, see *Eldridge v British Columbia (AG)*, [1997] 3 SCR 624, 151 DLR (4th) 577. Ryder, *supra* note 6 at 129 observes that individual doctors "do not have an obligation to provide all medical services; that obligation is borne by the public health care system as a whole, not by individual doctors."

27 Concerning the remoteness of the requirement, it is worth noting the different views held by objectors as to what is acceptable and what is not. While some of the objectors thought that a requirement that they provide a phone number to a general referral service would be acceptable, other objectors did not.

the objecting service providers — a claim to be exempted from their obligation to refer patients to doctors who can provide the particular medical services. In other words, a religious belief or value that was treated as political — as something that might influence public policy but was rejected by policy makers — is converted into a private or personal practice or belief (a matter of personal religious conscience) that should be protected from political judgment.

The objecting doctors may continue to oppose such laws in the political sphere — although constitutional commitments may limit the scope of legislative action. The state, though, should not 'accommodate' their beliefs about what others should and should not do and their personal opposition to the law that permits these activities.

Constitutional forum constitutionnel

Nothing to Declare: A Response to Grégoire Webber, Eric Mendelsohn, Robert Leckey, and Léonid Sirota on the Effects of the Notwithstanding Clause

Maxime St-Hilaire and Xavier Foccroulle Ménard*

Introduction

In the wake of the legal challenge to Quebec's law on state secularism,[1] Professor Grégoire Webber, lawyer Éric Mendelsohn, and Dean Robert Leckey jointly published a post. In that post, they argue that the invocation of the "notwithstanding clause" in section 33 of the *Canadian Charter of Rights and Freedoms* does not preclude a court from making a declaration of "consistency." By such a declaration, a Court would declare the mere "inconsistency," not the invalidity or inoperability, of legislative provisions for which section 33 had been invoked with the constitutional rights from which they validly derogate.[2] Their arguments ought to be reviewed and assessed, as they constitute creative but ultimately erroneous development in legal thought on section 33 in Canadian law.

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1 *Act Respecting the Laicity of the State*, CQLR c L-0.3.

2 Grégoire Webber, Eric Mendelsohn & Robert Leckey, "The faulty received wisdom around the notwithstanding clause" *Policy Options Politiques* (10 May 2019) online: <policyoptions.irpp.org/magazines/may-2019/faulty-wisdom-notwithstanding-clause/>.

Summary of the Five Arguments to be Assessed

Webber, Mendelsohn and Leckey's first and main argument is textualist, if not literalist. It is based on the wording of subsection 33(2), which states:

> An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

The argument is that, without ever denying the legal effects that validly derogating legislative provisions produce notwithstanding certain sections of the *Charter*, the courts should be authorized to make declarations of inconsistency between the former and the latter.

Their second argument is that, in the leading case on section 33 of the *Charter* — the *Ford*[3] decision — the Supreme Court of Canada "was not asked about, nor did it rule on, the significance of shielding a law's operation."

Their third argument looks to find evidence of the alleged judicial power in the 2010 decision of the Supreme Court of Canada in *Canada v Khadr*.[4] In a 2008 decision,[5] Omar Khadr had previously obtained an order from the Canadian justice system requiring the Canadian government to provide him with transcripts of the interrogations he was subjected to by Canadian officers at Guantanamo Bay who were aware that Khadr had been subjected to a sleep deprivation technique. In 2010, he sought judicial review of the Canadian government's decision to refuse to petition the United States authorities for his return to Canada. For a variety of reasons stemming from evidentiary uncertainty, the limits of its institutional jurisdiction in foreign affairs, and the "need to respect the prerogative powers of the executive,"[6] the Court concluded that it was not appropriate to grant the order sought. Instead, the Court thought best to limit itself to issuing a declaration, including of the fact that Canada has "deprive[d] him of his right to liberty and security of the person guaranteed by [section] 7 of the *Charter*, contrary to the principles of fundamental justice"[7] (which is a condition of section 7 violation). The argument presented is that the *Khadr* decision is evidence that courts can always make declarations rather than grant alternative relief. According to Webber, Mendelsohn and Leckey, the *Khadr* decision demonstrates that judicial declarations of mere "inconsistency" of valid exception-to-rights provisions with the very provisions of the *Charter* from which they so derogate, would be "consistent with what the courts already do."

Their fourth argument is again example-based, yet this time drawn from foreign legal systems, in this case the law of the United Kingdom, New Zealand, and Australia, which "all provide that judges may declare legislation incompatible with human rights, but such declarations do not affect the operation of legislation."[8]

Jumping into the playing field a dozen days after the publication of Professor Webber et al.'s post, Professor Léonid Sirota wrote in support of their arguments and added one of

3 See *Ford v Quebec (AG)*, [1988] 2 SCR 712, 54 DLR (4th) 577 [*Ford*].
4 *Canada (Prime Minister) v Khadr*, 2010 SCC 3 [*Khadr*].
5 *Canada (Justice) v Khadr*, 2008 SCC 28.
6 *Khadr*, *supra* note 4 at para 46.
7 *Ibid* at para 48.
8 Webber, Mendelsohn & Leckey, *supra* note 2.

his own: "One provision that is not subject to section 33 is section 24, the *Charter*'s internal remedial provision."[9] While Professor Sirota had only wanted to advance the claim that the exercise of the power provided for under section 33 would not prevent courts from making "declarations of inconsistency," Dean Leckey used this new fifth argument in a short piece he published soon thereafter to bring forth an even bolder one: the fact that statutory provisions validly derogate from certain rights found in the *Charter* would not preclude the remedy for damages which the case law[10] recognizes — as section 24(1) of the *Charter* reads, "[a]nyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied."[11] He invokes here the distinction accepted in administrative law between what is invalid and what gives rise to civil liability.[12] In his view, because state action that is legally valid may nevertheless give rise to civil liability, it is conceivable that the state may also incur civil liability by enacting legislation that is validly "inconsistent" with rights (from which that legislation is validly excepted).

Assessment of the First Argument on Textual Clarity

How should the strength of these aforementioned arguments be assessed? We can begin by pointing out that mere literal interpretation is fortunately not accepted in our law. Of course, the text of our Constitution as "supreme law" — a more precise term that is properly used in our *Constitution Act, 1982* and which should be used by legal scholars and commentators as well[13] — can never be ignored.[14] That which is absolutely clear must prevail, but we still need to know over what it prevails. In other words, the constitutional interpreter is not allowed to just ignore the scheme of the provisions and structure of the Constitution, which the Supreme Court has referred to as an "architecture"[15] and from which it even allows itself to infer "unwritten principles."[16]

Indeed, the interpretive method of our supreme law remains irreducibly that of the meaning given to it by the purpose (*telos*) of the provisions to be interpreted, a method that the Supreme Court thus calls "purposive."[17] This "purpose" could also be represented as a function, so as to speak of a functionalist method. In any case, the clarity of the text of a constitu-

9 Léonid Sirota, "Concurring Opinion" (23 May 2019), online (blog): *Double Aspect* <doubleaspect.blog/2019/05/23/concurring-opinion/>.

10 See *Vancouver (City) v Ward*, 2010 SCC 27.

11 *Canadian Charter of Rights and Freedoms,* s 24(1), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]; Robert Leckey, "Advocacy Notwithstanding the Notwithstanding Clause" (2019) 28:4 *Const Forum Const* 1.

12 See *Canada (AG) v TeleZone Inc*, 2010 SCC 62.

13 See Maxime St-Hilaire, Patrick F Baud and Elena S Drouin, "The Constitution of Canada as Supreme Law: A New Definition" (2019) 28:1 *Const Forum Const* 7. Unless indicated otherwise, the meaning of the term Constitution herein refers to the supreme law as understood under section 52(1) of the *Charter*.

14 We would oppose any conception of the "living tree" doctrine that would be forgetful of the "natural limits" part the famous analogy made in *Edwards v Canada (Attorney General)*, [1930] AC 124 (PC), at 106-7 (*sub nom Re Section 24 of the BNA Act*) 1 DLR 98, and that would allow itself to simply ignore the text of the supreme law.

15 *Reference re Senate Reform*, 2014 SCC 32 at paras 26-27.

16 *Reference re Secession of Quebec*, [1998] 2 SCR 217, 161 DLR (4th) 385.

17 See *Hunter et al v Southam Inc*, [1984] 2 SCR 145, 11 DLR (4th) 641.

tional provision can only reveal its object, or function. If any doubt as to the function of one or more provisions remains after reading the supreme law, the interpreter is entitled to consider the "extrinsic" evidence of the framers' intent

Taken in isolation, the use of the words "has the effect that it would have except for the provision of the Charter" in subsection 33(2) of the *Charter* cannot, in any sufficient manner, reveal the function of section 33. Only the full text of the provision can give it meaning. This textual excerpt is therefore on its own unclear. Does it become clear in light of the scheme of the section's provisions? The exclusion of any substantive review (confirmed by the Supreme Court in *Ford*[18]), the requirement of an express declaration of intent, and the temporary nature of the exception all support the argument that the function of section 33 is to allow legislators to exempt legislative provisions from any judicial debate on their respect for the constitutional rights from which they derogate.

To believe Professor Dwight Newman, who has thoroughly considered the extrinsic evidence, any doubt on the intent of the framers of the *Constitutional Act, 1982* should be easily dispelled.[19] As a matter of fact, after a rigorous and exhaustive analysis of that evidence,[20] Professor Newman concluded that the intent behind section 33 was that "legislative bodies [would] have the legal authority to substitute their view of a particular rights conflict or rights interpretation for the view at which courts have arrived."[21] Combined with a proper (structural/functional) reading of the *Charter*, the evidence of such intent seems indeed rather overwhelming, enough so that Webber, Mendelsohn, Leckey, and Sirota's arguments cannot be upheld: it could hardly be clearer that section 33 gives legal authority to legislatures in having the last word on certain rights questions, barring the judicial review of those questions entirely.[22]

Assessment of the Second Argument on the *Ford* Decision

The negative argument based on the *Ford* decision is quite puzzling. In this case, the Supreme Court did not contemplate making a declaration about the relationship between section 58 of Quebec's *Charter of the French Language*[23] and section 2(*b*) of the *Charter*, guaranteeing freedom of expression, since that statutory provision was protected by a declaration of exception to sections 2 and 7 to 15 of the *Charter*, a declaration that was valid and still in force. Moreover, in distinguishing the *exception* to rights from the *limitation* of rights under section 1, the Supreme Court in this case confirmed that, unlike the exception, the limitation could not have the effect of totally suspending the right with regard to the limiting measure.[24] Finally, this decision went so far as to admit the possibility of using an "omnibus notwithstanding clause" to state that *all legislation* from the same provincial legislature or Parliament shall continue to operate notwithstanding sections 2 and 7 to 15 of the *Charter*. This all indicates that the Court

18 See *Ford*, *supra* note 3 at para 33.
19 Geoffrey Sigalet, Grégoire Webber & Rosalind Dixon, eds, *Constitutional Dialogue: Rights, Democracy, Institutions* (Cambridge: Cambridge University Press, 2019) at 209.
20 See *ibid* at 214-19.
21 *Ibid* at 227.
22 See also *ibid* at 219-21.
23 *Charter of the French Language,* CQLR c C-11, s 58.
24 *Ford*, *supra* note 3 at paras 65-66.

was very much alive to the "significance" of section 33, that is, of its legal effects: its use suspends, or sets aside, the right in relation to a variable and unlimited number of identified, or identifiable, provisions so that, on the substantive relation between the right and the specific provisions, courts simply have nothing to declare.

Assessment of the Third Argument on the *Khadr* Decision

In our view, the argument from *Khadr* also fails. Courts can obviously declare a violation of rights. So far, nothing new has been said, and certainly nothing to support the claim either. Actually, the question to address is whether courts may, or even logically can, declare the *hypothetical* "infringement" or "denial" of constitutional rights that have been temporarily suspended in respect of particular legislative provisions. Put another way, whether they can declare the "inconsistency" of particular legislative provisions with rights that are validly excepted from . In the *Khadr* case, section 7 had not been derogated from by means of valid applicable statutory provisions. Had this been the case, the Court could not have made its declaration.

Of course, courts can declare that individual rights or state obligations have been violated and, as is within their jurisdiction, they can do so rather than granting the remedy sought. Can they thereby declare the virtual "inconsistency" of exception-to-rights provisions with the very constitutional rights from which they are validly excepted? We do not think so, but one thing is certain; there is no jurisprudence to date on this point.

Therefore, it would be pointless, in objecting to our argument, to rely on decisions such as *Manitoba Metis Federation*[25] — at least so long as the Supreme Court is correct in referring to the principle of the "honour of the Crown" as a genuinely legal principle which "speaks to *how* obligations that attract it must be fulfilled"[26] — or *Ewert v Canada*.[27] In the former case, the Supreme Court issued a declaration of non-fulfillment of constitutional obligations by the federal Crown while personal remedies claims had lapsed.[28] In the latter case, the Court made a declaration of breach of an obligation bestowed on the Correctional Service of Canada by federal statute, where the statutory grievance mechanism provided to the plaintiff had not been effective.[29] In neither case had the correlative legal right or interest been legally inexistent or of no substantive force at the time of the facts. In both, the declaration was made in order to ensure that a right or legal interest was not without any remedy; not in a way as to grant a remedy without a right or legal interest at the time of the events in question.

Assessment of the Fourth Argument on British, Australian, and New Zealand Law

While not convincing, we find the comparative argument by Webber, Mendelsohn and Leckey, to have more weight, and this despite the following clarification. The authors give two exam-

25 *Manitoba Metis Federation Inc v Canada (AG)*, 2013 SCC 14 [*Manitoba Metis Federation*].
26 *Ibid* at para 73.
27 *Ewert v Canada*, 2018 SCC 30 [*Ewert*].
28 See *Manitoba Metis Federation*, *supra* note 25 at paras 6-9, 143-44.
29 See Ewert, *supra* note 27 at paras 7, 27, 83-84.

ples taken from Australian law: the *Human Rights Act 2004* of the Australian Capital Territory and the *Charter of Human Rights and Responsibilities 2006* of the federated unit of Victoria. Section 32 of the former authorizes courts only to make "declarations of incompatibility," while section 36 of the latter provides for "declarations of inconsistency" in a functionally equivalent manner. Nevertheless, as Léonid Sirota pointed out in his otherwise concurring opinion piece, in the *Momcilovic*[30] case involving the charter of the state of Victoria, the High Court of Australia held that the making of mere declarations of inconsistency was not the exercise of a judicial function, and that the law could not therefore constitutionally authorize the courts to make them. This leaves us with the British and New Zealand examples.

Section 4 of the British *Human Rights Act 1998* only allows the courts to make a "declaration of incompatibility," which "does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given." As for the *New Zealand Bill of Rights Act 1990*, it merely provides, at section 4, that the courts may not, under its terms, declare any legislative act ("enactment") "impliedly repealed or revoked, or to be in any way invalid or ineffective," or decline to apply any provision thereof. Therefore, the *Bill of Rights* did not expressly contemplate that courts may make a declaration of inconsistency. It was by a slim three-to-two majority that in 2018, in the *Taylor* case, the Supreme Court of New Zealand upheld such a power.[31]

Does the fact that British and New Zealand courts — by express statutory authority, constructed statutory authority, or somehow their own authority — may make declarations of mere inconsistency of particular statutory provisions with human rights legislation support the view that Canadian courts may make such declarations, where the declared "inconsistency" is that of statutory provisions with constitutional provisions from which they validly derogate, under a power expressly provided for in the supreme law itself? No. These foreign examples have nothing to do with section 33 of the *Charter of Rights and Freedoms*.

Neither New Zealand nor the United Kingdom has a supreme written law in the sense of formally constitutional, supra-legislative provisions. Their constitutional law, despite the wishes of some authors,[32] remains governed by the principle of parliamentary sovereignty, as opposed to constitutionalism, in the formal, supra-legislative sense of the term. In the case of Australia, the latter principle applies because it is a federation, yet the protection of fundamental rights is essentially excluded from it.[33] This already explains why compliance with any human rights act adopted by the legislature or, in the case of the Australian federation,

30 *Momcilovic v The Queen*, [2011] HCA 34 [*Momcilovic*].

31 *Attorney-General v Taylor*, [2018] NZSC 104 [*Taylor*].

32 See e.g. Janet L Hiebert, "The Human Rights Act: Ambiguity about Parliamentary Sovereignty" (2013) 14:12 German LJ 2253; See e.g. Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge: Cambridge University Press, 2013); See e.g. Nicholas W Barber, "The Afterlife of Parliamentary Sovereignty" (2011) 9:1 Intl J Const L 144; See e.g. Peter Oliver, "Sovereignty in the Twenty-First Century" (2003) 14:2 King's LJ 137; See e.g. Mark Elliot, "Parliamentary Sovereignty and the New Constitutional Order: Legislative Freedom, Political Reality and Convention" (2002) 22:3 LS 340.

33 Adrienne Stone accurately summarized in these words: "As is well known, the Australian [legal and supra-legislative] Constitution is principally structural and federal in its scope and contains sparse, if any, rights protection, reflecting a marked preference for political constitutionalism in that domain." See Adrienne Stone, "I-CONnect Symposium on "Constitutional Boundaries" — Proportionality and the Boundaries of Borrowing" (24 April 2018) online (blog): *Blog of the International Journal of Constitutional Law*

by one of its legislative authorities, cannot be a prerequisite for the *validity* of other legislative provisions.[34]

However, the attachment of these legislators to parliamentary sovereignty, at least in matters of fundamental rights, has convinced them to go so far as to rule out the possibility that their legislation on the latter subject might, in the event of a conflict of laws, render other legislative provisions *inoperative*. This is precisely how the possibility for courts in these countries to declare the mere *inconsistency* of given legislative provisions with their human rights legislation was either expressly provided for by their human rights legislation or recognized by the courts themselves: as a means of ensuring that rights recognized in the legislation do not remain absolutely without a remedy against… the legislation. This is clear from the reasoning of the New Zealand Supreme Court decision in *Taylor*.[35]

The legal framework of this judicial practice cannot be compared with that of a Canadian court that would be asked to make a declaration on the relationship of statutory provisions to provisions of the supreme law from which they validly derogate, with express authorization. As Léonid Sirota himself insists, the legal framework and arguments for the protection of rights in countries that do not have what Jeremy Waldron calls "strong judicial review of legislation" [36] are not immediately transposable to the interpretation of Canadian constitutional human rights law, beginning with section 33 of the *Charter*.[37] Section 33 of the *Charter* does not pertain to the law of remedies. Its *use* is only subject to *formal* judicial review, but the *result* thereof is a temporary change in *substantive* law: the bracketing of *Charter* provisions that guarantee rights.

Section 33 is an attributive provision that gives Parliament and legislatures the power to temporarily exempt their provisions from judicial review based on certain substantive provisions of the *Charter*. In other words, with respect to legislative provisions that validly make exception to a right by derogating from the *Charter* sections which guarantee it, a constitutional right is temporarily non-existent — as the Court in *Ford* points out by distinguishing between derogation and limitation[38] — so that, on this particular issue of the relationship between that right and the provisions that are excepted from it, the courts have nothing to declare. Can one imagine for a moment New Zealand courts taking the liberty to declare par-

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<iconnectblog.com/2018/04/i-connect-symposium-on-constitutional-boundaries-proportionality-and-the-boundaries-of-borrowing>.

34 Maxime St-Hilaire, "'Quasi Constitutional' Status as *Not* Implying a Form Requirement" (8 August 2017) online (blog): *Blog of the International Journal of Constitutional Law* <iconnectblog.com/2017/08/quasi-constitutional-status-as-not-implying-a-form-requirement>.

35 See *Taylor*, *supra* note 31 at para 29. Without in any way making our argument dependent on a rebuttal of the merits of this decision, we would like to mention in passing that we share Paul Daly's view that in this case, "to the argument that issuing a declaration would be entirely academic, in a context in which the meaning and effect of the ban on prisoner voting was uncontested, the majority offered a comparatively weak set of ripostes" in Paul Daly, "The Onward March of Declaratory Relief?" (12 November 2018) online (blog): *Administrative Law Matters* <administrativelawmatters.com/blog/2018/11/12/the-onward-march-of-declaratory-relief/>.

36 Jeremy Waldron, "The Core of the Case Against Judicial Review" (2006) 115:6 Yale LJ 1346.

37 See Léonid Sirota, "Chekhov's Gun" (10 May 2017) online (blog): *Double Aspect* <doubleaspect.blog/2017/05/10/chekhovs-gun/>.

38 *Ford*, *supra* note 3 at paras 65-66.

ticular statutory provisions to be inconsistent with provisions of the *New Zealand Bill of Rights Act 1990* when the former enactment would expressly provide that those provisions derogate from those rights? The answer is no.

The origins of judicial declarations are found, not in the common law, but in the continental "civilist" tradition.[39] This transplant required some adaptation. While the Anglo-American legal tradition holds that there is no right without a remedy (*ubi jus ibi remedium*),[40] it is also because it holds that there is no remedy without a corresponding right (or legal "interest"). This seems to be increasingly overlooked. Judges were initially reluctant to make declarations which did not seem to them to constitute genuine remedies.[41] The usefulness of the declaration as remedy has come to be explained in large part by the principle that there can be no enforcement of judgments against the Crown.[42] The American scholar Edwin Borchard, who remains the most ardent and historically important advocate of the introduction of judicial declarations in common law countries, justified their importation by their ability to serve "a useful purpose in clarifying and settling the legal relations at issue."[43]

Today, academics like Webber, Mendelsohn, Leckey, and Sirota are calling on Canadian courts to issue declarations that are not only further deprived of effect, but devoid of a substantive object in the — be it temporary — absence of a legally existing — valid and in force — right. Of course, in Canada, the ability to make declarations on the law in force is part of the constitutionally protected power of those higher courts of review which are the superior courts. Our argument does not directly fall within the realm of the law of procedure and remedies, just as section 33 of the *Charter* does not either.[44] Rather, it goes to the more fundamental idea that — save the (unfortunate) self-indulgence of appellate courts giving their opinion on constitutional conventions in a reference procedure where they are asked to do so by the government[45] — our courts have no jurisdiction to decide matters other than of law that is existing, positive, and in force, and therefore they have no jurisdiction to decide matters, be they substantial or procedural, that are legally hypothetical or otherwise virtual.

In Canadian law, it is only when a right has not been excepted from that it may constitute the basis for an application for a judicial declaration, which will be of invalidity — in the case of a *Charter* right which has not been derogated from under section 33 — or inoperability — in the case of a right protected by one of the (federal or provincial) "quasi-constitutional" human rights statutes but which is expressly set aside in the valid exercise of federally allocated legislative powers.[46] With less rigour, Canadian courts are also open to declaring that rights

39 Edwin Borchard, *Declaratory Judgments*, 2nd ed (Cleveland: Banks-Baldwin Law Publishing, 1941).

40 Albert Venn Dicey, *The Law of the Constitution*, ed by JWF Allison (Oxford: Oxford University Press, 2013) vol 1 at 117.

41 See *Clough v Ratcliffe* (1847), 63 ER 1016 at 1023.

42 See *Dyson v Attorney-General (No. 1)*, [1911] 1 KB 410 at 421.

43 Borchard, *supra* note 39 at 299.

44 *Kourtessis v MNR*, [1993] 2 SCR 53 at 495-98, 102 DLR (4th) 456.

45 *Re: Resolution to amend the Constitution*, [1981] 1 SCR 753, 125 DLR (3d) 1.

46 For a complete list of this allocation, see Maxime St-Hilaire, "150 Years On: Why don't we get clear on where the Canadian federal distribution of legislative powers (legally) comes from?" (24 August 2017) online (blog): *À qui de droit* <blogueaquidedroit.ca/2017/08/24/150-years-on-why-not-get-clear-on-where-the-canadian-federal-distribution-of-legislative-powers-comes-from/>.

have been violated[47] or that the state has failed to meet its obligations.[48] When, on the contrary, a right has been validly excepted from, there is *nothing to declare* by the courts about the relationship between the valid exception provisions and the constitutional or quasi-constitutional provisions from which they are excepted. There can therefore be neither a violation of rights nor a breach of obligation to be decided upon, not even in the form of a simple declaration.

In 2018, the Supreme Court of Canada summarized the conditions under which a judicial declaration can be made in its *Ewert* decision:

> A declaration is a narrow remedy but one that is available without a cause of action and whether or not any consequential relief is available: *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, 2013 SCC 14, [2013] 1 S.C.R. 623, at para. 143; P. W. Hogg, P. J. Monahan and W. K. Wright, *Liability of the Crown* (4th ed. 2011), at p. 37; L. Sarna, *The Law of Declaratory Judgments* (4th ed. 2016), at p. 88; see also *Federal Courts Rules*, SOR/98-106, r. 64. A court may, in its discretion, grant a declaration where it has jurisdiction to hear the issue, where the dispute before the court is real and not theoretical, where the party raising the issue has a genuine interest in its resolution, and where the respondent has an interest in opposing the declaration sought: see *Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, [2016] 1 S.C.R. 99, at para. 11; *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44, at para. 46; *Solosky v. The Queen*, 1979 CanLII 9 (SCC), [1980] 1 S.C.R. 821, at pp. 830-33.[49]

Our argument is quite simply that the courts have no jurisdiction to rule on the relationship between two legal norms, one of which, in this case a constitutional right, has been validly excepted from with respect to the other by virtue of an authorization expressly provided for in the supreme law. Such question is, indeed, theoretical.

At this stage of our argument, one might be tempted to object that it is established practice for our courts to sometimes render declarations with regard to "future infringement of rights." But would it be reasonable to think that the courts do have jurisdiction to rule on the consistency of particular legislative provisions with the *Charter* provisions from which they are validly excepted, in anticipation that, about five years from now, such exception may not be renewed under section 33(4)?[50] We do not think so. Perhaps the imminent expiration of such an exception would make a difference, but we doubt it very much. Furthermore, the question gives us an opportunity to elaborate a little more on the applicable case law. Above all, one should not misunderstand it by failing to distinguish between facts and legal norms. More specifically in our case, it is crucial to differentiate the factual conditions for the violation of a right that have not yet been fulfilled while the right does exist legally from a right that does not yet have legal existence, be it "again," for it has been suspended with regard to the legal norm against which one would like to oppose it.

The Supreme Court has actually never stated that a declaratory judgment could be issued on a future or past violation of rights. The relevant excerpt from the 1980 *Solosky* decision which addresses the granting of a declaration, is as follows:

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47 See *Khadr*, *supra* note 4.

48 See *Manitoba Metis Federation*, *supra* note 25; *Ewert*, *supra* note 27.

49 *Ewert*, *supra* note 27 at para 81.

50 Section 33(4) of the Charter reads as follows: "Parliament or the legislature of a province may re-enact a declaration made under subsection (1)."

> The first factor is directed to the "reality of the dispute". It is clear that a declaration will not normally be granted when the dispute is over and has become academic, or where the dispute has yet to arise and may not arise. As Hudson stresses, however, one must distinguish, on the one hand, between a declaration that concerns "future" rights and "hypothetical" rights, and, on the other hand, a declaration that may be "immediately available" when it determines the rights of the parties at the time of the decision together with the necessary implications and consequences of these rights, known as future rights. (p. 710)[51].

This statement was not contradicted by the *Operation Dismantle* decision in 1985, in which an uncontradicted majority confirmed that "[i]t is clearly illustrated by the rules governing declaratory and injunctive relief that the courts will not take remedial action where the occurrence of future harm is not probable."[52] In other words, it was the future possible facts that were at issue, not the future existence of rights.

Assessment of the Fifth Argument on Section 24 not Being Listed in Section 33 of the *Charter*

The last point we wish to refute is the argument regarding the use of section 24 of the *Charter*. As Maxime St-Hilaire has already explained regarding its relationship to section 28,[53] section 33 allows rights to be excepted from, through the exception to some of the substantive provisions of the *Charter* that are rights-bearing. That is why it does not allow for exception from interpretive provisions such as section 28. This exception of course applies to section 24, the remedies section, which by definition does not contain substantive, rights-bearing provisions. There is therefore nothing surprising, nor is there a mine of hidden arguments, in the fact that no reference to section 24 is included in the provisions of section 33, regarding those sections from which the latter allows Parliament and legislatures to derogate. For the foregoing reasons, there can be no judicial remedy (or judicial declaration, if one wishes to play with words) for the "violation" of a validly suspended right, even if it is only temporarily suspended, and only in respect of provisions against which it is sought to be invoked.

Let us do the "thought experiment" with subsection 24(2). Would the courts have the power to exclude evidence obtained in (non-) "violation" of *Charter* rights from which applicable statutory provisions would validly be excepted? Of course not. Certainly, in administrative law, the mere legality of the state's action does not exclude the possibility that the state may be liable in tort law. Still, there must be a "fault" (in civil law) or some "breach of duty" (in common law). In Canadian law, the possibility of state liability for the enactment of *unconstitutional* legislation is extremely limited and requires proof of negligence, bad faith or wilful blindness, a requirement that the Supreme Court has stated applies to a claim under section 24(1) of the *Charter*.[54] In these circumstances, let us remember that the issue before us concerns provisions that are not unconstitutional, but constitutionally valid. In other words, we are relying on our reader to see the *a fortiori* argument.

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51 *Solosky v The Queen* (1979), [1980] 1 SCR 821 at 832, 105 DLR (3d) 745.

52 *Operation Dismantle v The Queen*, [1985] 1 SCR 441 at para 36, 18 DLR (4th) 481.

53 Maxime St-Hilaire, "L'article 28 de la Charte canadienne des droits et libertés: des dispositions interprétatives sujettes à interprétation" (4 February 2020) online (blog): *Double Aspect* <doubleaspect.blog/2020/02/04/25293/>

54 *Mackin v New Brunswick (Minister of Finance); Rice v New Brunswick*, 2002 SCC 13 at para 79.

Conclusion

Finally, there is hardly an issue which should be more clearly considered non-justiciable,[55] as a purely political issue that does not raise a real question of positive law but rather that of the appropriateness of legislative provisions, than that of the "consistency" of such provisions with provisions of the *Charter* from which they validly derogate.

In conclusion, it is our view that the last thing the rule of law and judicial review of legislation need is judges who allow themselves to make statements about the relationship of legal provisions to constitutional rights from which they are expressly and validly excepted, by virtue of an equally express authorization by the supreme law, whose function here is to allow legislators to shield certain issues from judicial debate altogether. In his short solo article on this issue, Dean Leckey appeals to the moral "responsibility" of jurists in a "tragic" situation.[56] In sum, if we understand correctly, a responsible jurist must agree with him. In this case, we regret to say that, with all due respect, we think exactly the opposite.

55 See Lorne M Sossin, *Boundaries of Judicial Review*, 2nd ed (Toronto: Carswell, 2012) at 185-216, where, in our opinion, should have appeared the thesis defended here.

56 Leckey, *supra* note 11, at 1-2.