

Carbon Pricing and the Constitution



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Starting Points

- Federalism provides one of the written and unwritten foundations of Canadian Constitutional Law
 - Federalism requires the preservation of, and balance between, the jurisdictional authority of both levels of government
 - Maintaining a balanced federalism is an important consideration in judicial interpretation of the division of powers and assessments of the constitutional validity of legislation
 - Federal authority under POGG, properly constrained by the principles of federalism, has a meaningful role to play in the division of powers
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Peace, Order, and Good Government

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

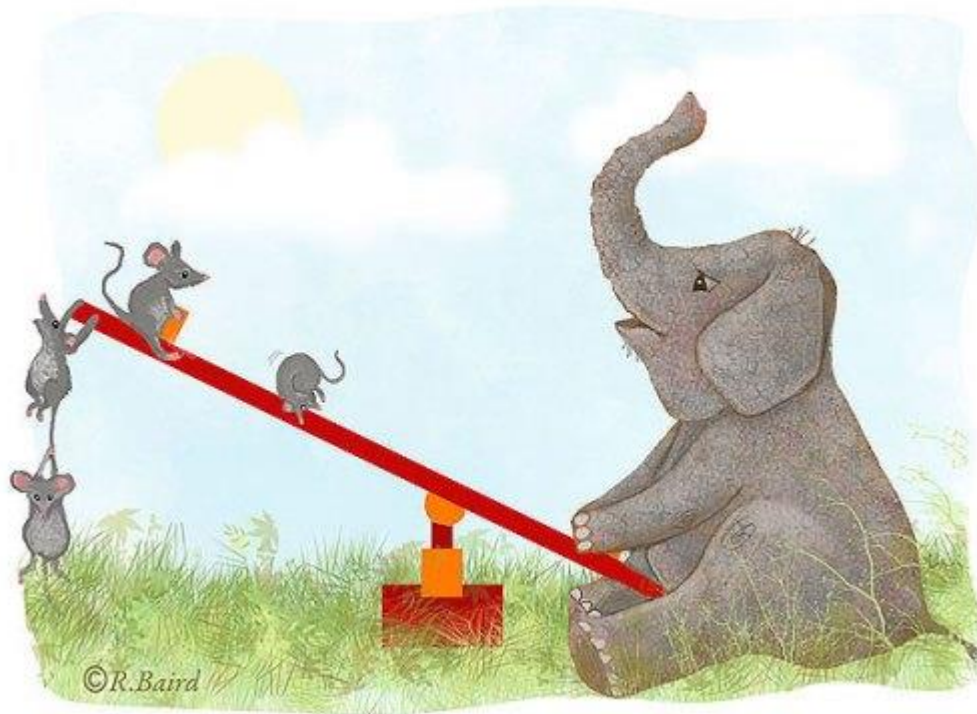
Peace, Order, and Good Government

1. But how does POGG work and what types of federal laws does it authorize?
2. 3 branches? No branches? 2 branches?
 1. Emergency
 2. Gap
 3. National Concern
3. Displacing or overlapping jurisdiction?
4. Relationship with provincial jurisdiction?
5. What is provincial inability?
6. The balance of federalism?

The POGG Solution



The POGG Problem



Constraining POGG

- The Dominant Tide of Federalism
 - Positive Sum Theory
 - Pith and Substance Matters
 - Mutual Modification
 - Double Aspect Doctrine
 - Restrained Paramountcy
 - Cooperative Federalism: presumptions of concurrency
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Transfer or Zero Sum Theory

- Insistence on the *exclusive* and *plenary* nature of federal authority under POGG
 - Subjects under POGG no longer capable of provincial regulation in any respect. Existing provincial regulation now invalid.
 - No room for double-aspect or mutual modification
 - *Radio Reference* (1932)
 - *Johannesson v Municipality of West St Paul* (1952)
 - *Ref Re Anti-Inflation Act* (1976)
 - *R. v. Hydro-Quebec* (1997)
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Positive Sum Theory

- Acceptance of concurrency and overlap
- Subjects under POGG are necessarily beyond the reach of any one province to begin with and deal with the *national* aspects of those subjects
- Double-aspect and mutual modification apply
- No loss of provincial powers enumerated in s. 92
 - *In Re Companies*, (1913)
 - *John-Deere Plow*, (1915)
 - *Canada Temperance Federation*, (1946)
 - *Munro v National Capital Commission*, (1966)
 - *Jones v AG of New Brunswick*, (1974)
 - *Interprovincial Co-operatives*, (1976)
 - *Multiple Access Ltd v McCutcheon*, (1982)
 - *Ontario Hydro v Ontario (Labour Relations Board)*, (1993)

POGG and the *GGPPA*

- POGG can be constrained to the federal aspects of greenhouse gas emissions
 - POGG GHG power would not impair the *validity* of provincial laws acting for provincial purposes
 - Provincial environmental standards
 - Natural resource management
 - Revenue generation
 - Residual power over activities within the province
 - Conflicts handled by restrained paramountcy
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The ABCA disagrees

- When POGG can apply:
 - [172] We have concluded that only when the “matter” would originally have fallen within the provinces’ residuary power under s 92(16) does the national concern doctrine have any potential application. [...]
 - [284] The provinces’ jurisdiction over the regulation of GHG emissions or any variation on this theme does not rest on s 92(16). Thus, there is simply no scope for the national concern doctrine to apply.
- Transfer Zero Sum theory:
 - [149] ...[O]nce a matter is assigned to the federal government under this doctrine, that new head of power is not only permanent, it is also an exclusive power of a plenary nature. That effectively means the provinces have no power to legislate in a “matter” allocated to the federal government under the national concern doctrine.
- Provincial inability:
 - [314] [...] The fact one or more provinces produce disproportionately higher GHG emissions, and thus more potential for a negative impact on other provinces on this front, does not permit the federal government to deprive the provinces of their incontrovertible jurisdiction over their natural resources or other provincial powers. [...]

What say you?

