

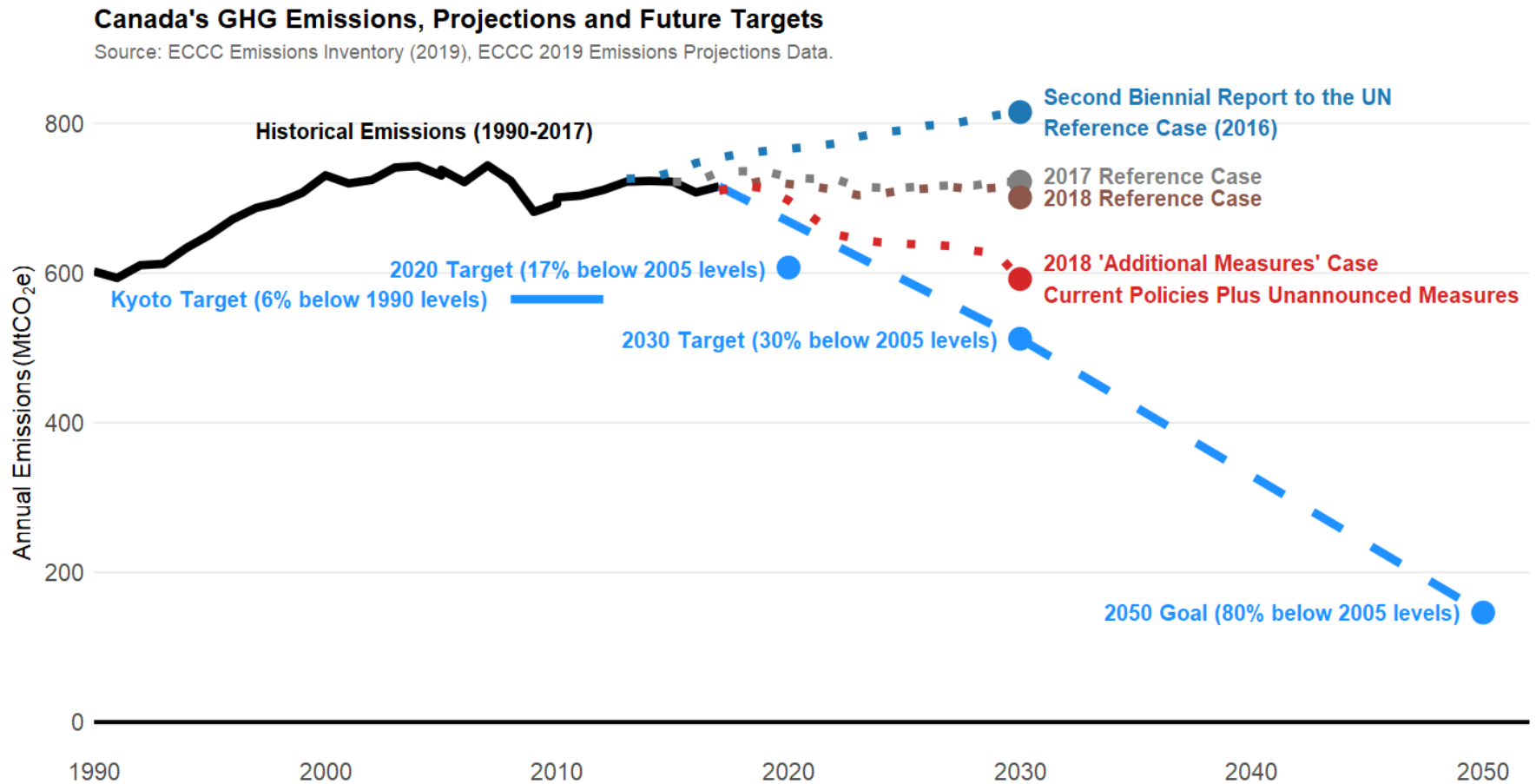
ENERGY & THE ENVIRONMENT

AT THE ALBERTA SCHOOL OF BUSINESS

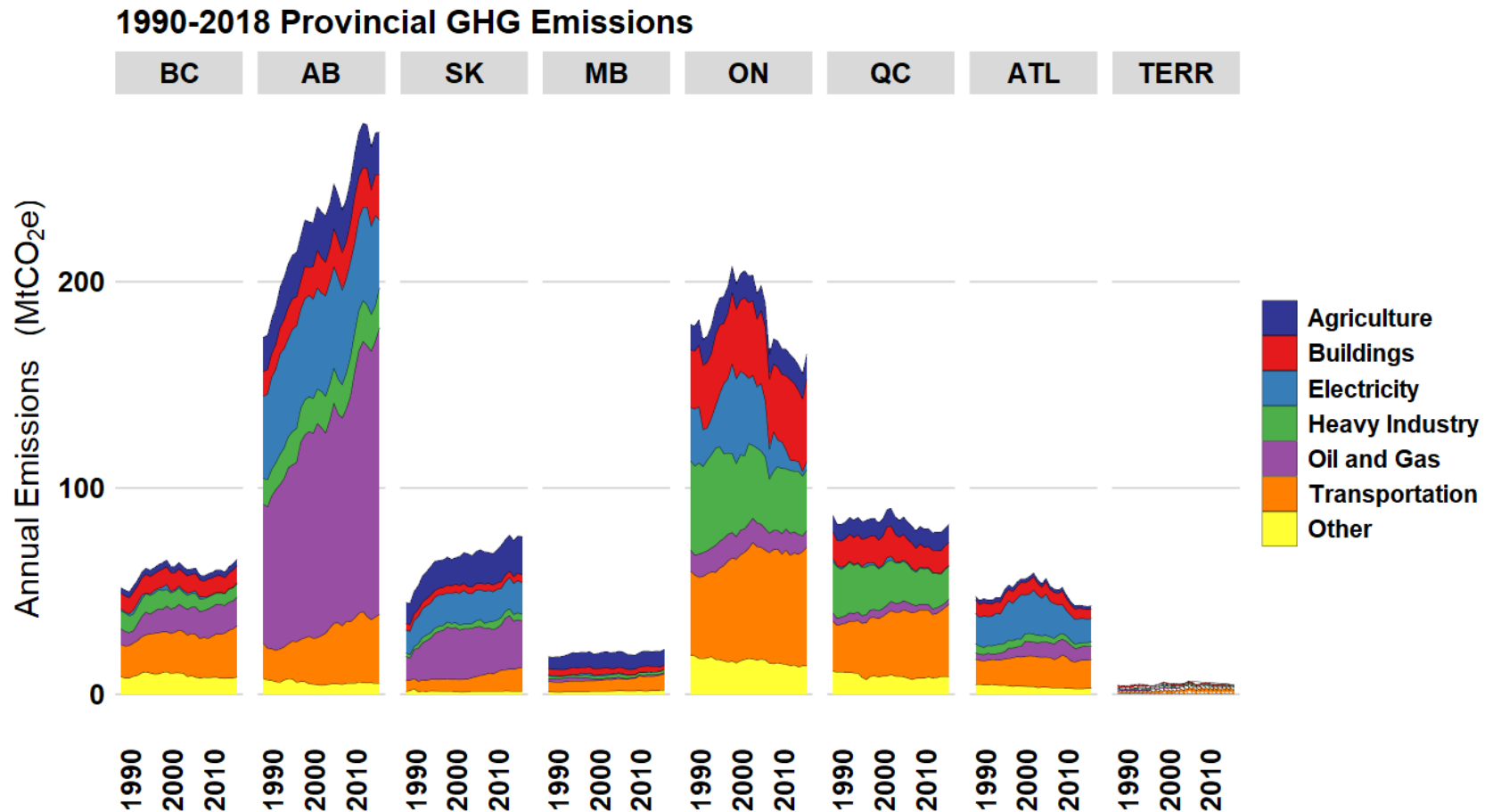
FEDERALISM AND CARBON PRICING

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Canada's emissions targets

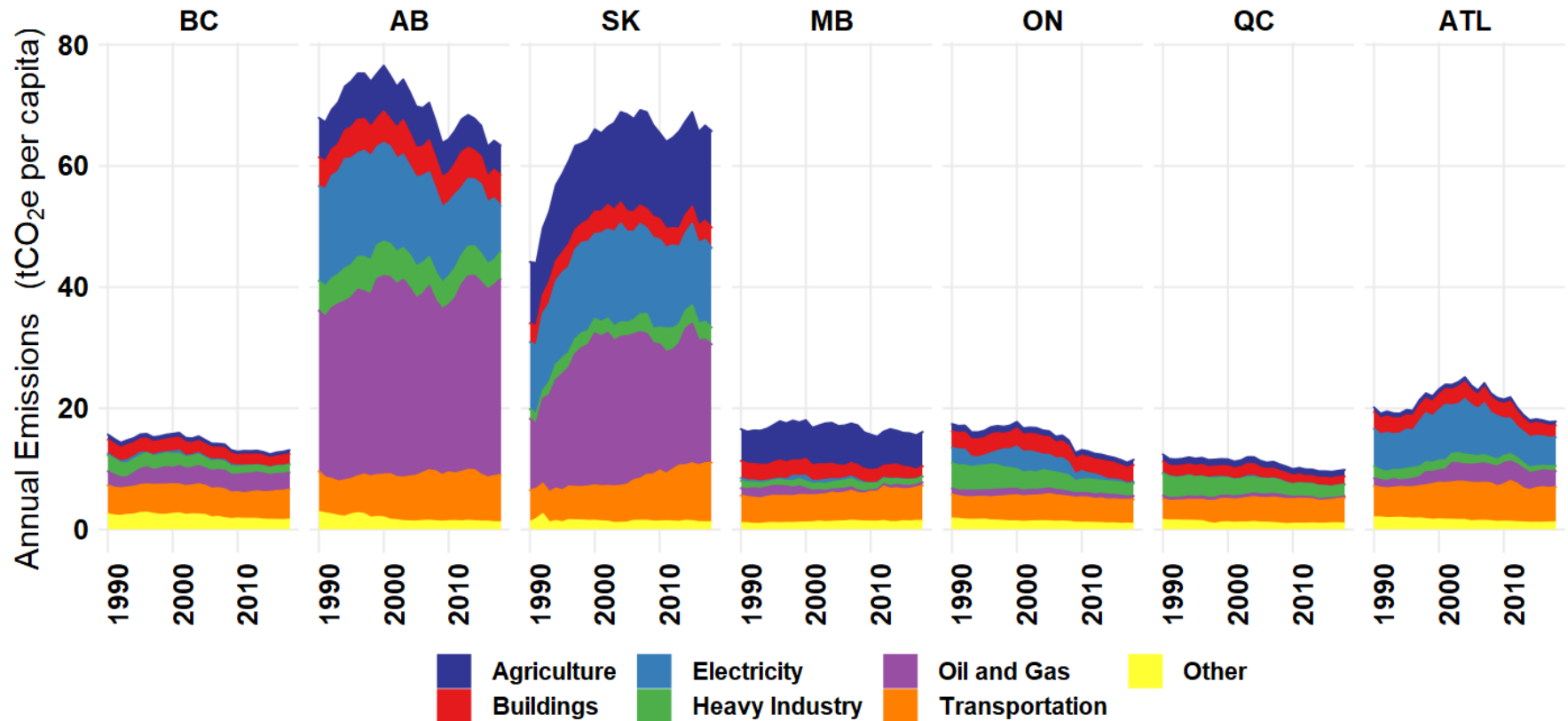


Canada faces a significant emissions challenge



The federalism challenges leap off the page

1990-2018 Provincial Per Capita GHG Emissions

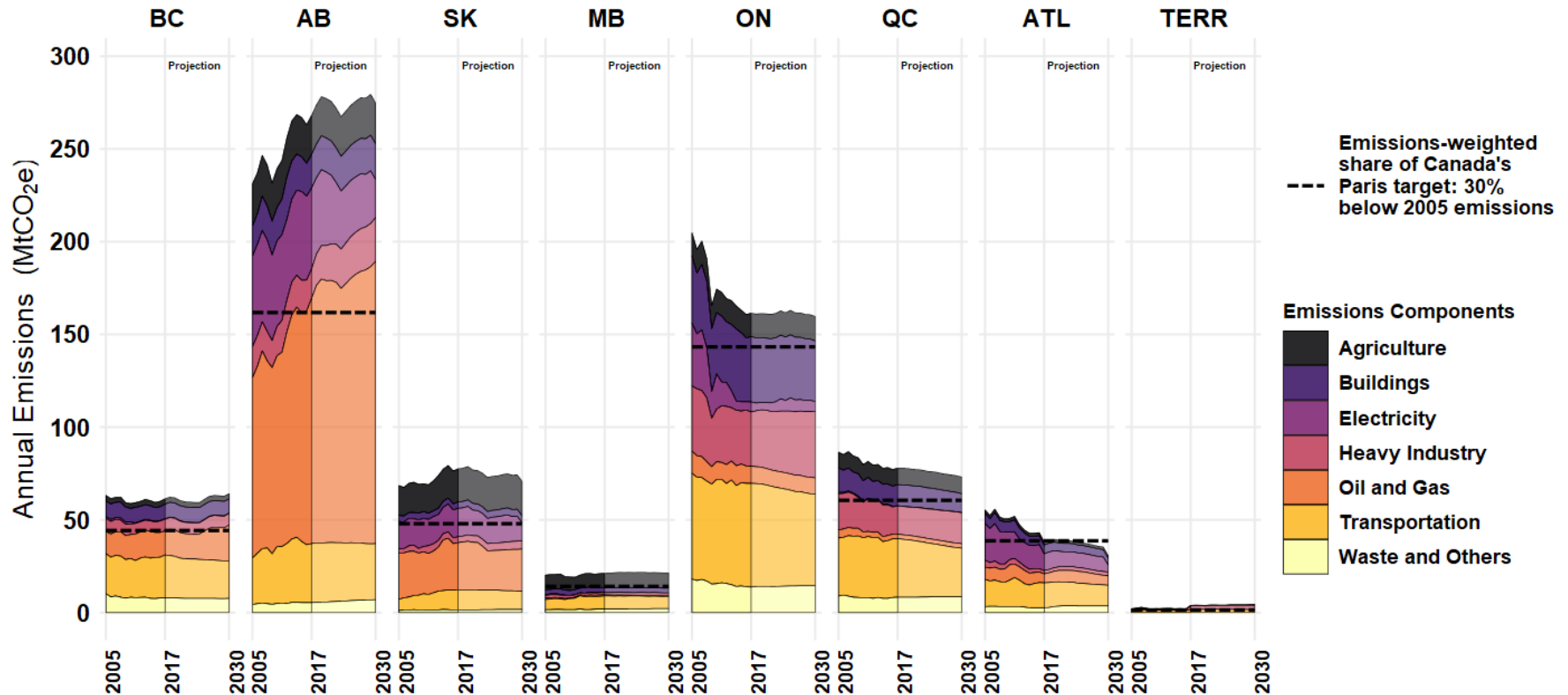


Source: Environment Canada National Inventory Data, graph by @andrew_leach

Can we enact policies to bend these curves?

Canada's GHG Emissions and Projections, 2005-2030

National Inventory emissions (2005-2017) and Environment and Climate Change Canada (ECCC) projections (2018-2030) including impacts of policies and measures in place as of September 2018.



Data from ECCC Greenhouse Gas Emissions Projections (<https://open.canada.ca/data/en/dataset/7ba5acf6-ebae-45b6-bb14-84ab56ad2055>), graph by @andrew_leach.

The roadmap: the pan-Canadian Framework

- Carbon pricing should be a **central component** of the Pan-Canadian Framework.
- The approach should be **flexible and recognize carbon pricing policies already implemented or in development by provinces and territories.**
- Carbon pricing should be **applied to a broad set of emission sources across the economy.**
- Carbon pricing policies should be **introduced in a timely manner to minimize investment into assets that could become stranded** and maximize cumulative emission reductions.
- Carbon price **increases should occur in a predictable and gradual way...**
- Carbon pricing policies should **minimize competitiveness impacts** and carbon leakage, **particularly for emissions-intensive, trade-exposed sectors.**
- **Carbon pricing policies should include revenue recycling to avoid a disproportionate burden on vulnerable groups and Indigenous Peoples.**

Policy from which level of government?

- Provinces will want to impose policies which work best for their local economies (subsidiarity)
 - Choices will include different tools and different levels of stringency
- Economists' reaction is "But, the equi-marginal principle says..."
 - Federal government is responsible for national emissions
 - National policies are more likely to be cost-effective
 - Pricing, imposed nationally, is likely to reduction emissions at the lowest costs per tonne
- Cost-effectiveness or efficacy does not confer legislative authority
 - whether a subject should or would best be regulated federally or provincially as a matter of optimal policy is irrelevant to the constitutional validity of the legislation.

See *Re: Securities Act* at para 90, *Re: Firearms Act* at para 18, *R v. Morgentaler* at 487-88, and *re Anti-Inflation Act* at 468.

So, this week these 9 individuals...



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...get to decide on whether the federal government can do this:



CANADA

CONSOLIDATION

CODIFICATION

Greenhouse Gas Pollution
Pricing Act

Loi sur la tarification de la
pollution causée par les gaz à
effet de serre

S.C. 2018, c. 12, s. 186

L.C. 2018, ch. 12, art. 186

What exactly does the GGPPA do?

- Two main sections of the legislation
 - Part I imposes a fuel charge in provinces listed in a Schedule to the Act at rates calculated based on the emissions content of fuels
 - Part II establishes a separate regulatory framework for *large* emitters, or those with annual emissions greater than 10,000 tonnes per year
 - Same carbon price schedule as Part I
 - Facilities receive an output-based allocation of emissions credits which some foolishly characterize as a performance standard
- What is not in the legislation?
 - The legislation does not invalidate, over-ride, or in any material way interfere with provincial legislation any more than federal income taxes interfere with provincial income taxes
 - The legislation does not set *performance standards* or otherwise regulate technology, production, or individual activities or behaviour

How have appellate courts characterized the GGPPA? (1/2)

- SK: Richards C.J.S. “establishing **minimum national standards of price stringency for GHG emissions**”
- SK: Ottenbreit and Caldwell J.J. “the fuel levy is, in pith and substance, a tax and the OBPS levy is a regulatory charge.”
- ON: Strathy C.J.O. “establishing minimum national standards to reduce greenhouse gas emissions”
- ON: Hoy A.C.J.O. “**establishing minimum national greenhouse gas emissions pricing standards** to reduce greenhouse gas emissions”
- ON: Huscroft J.A.: “(the *GGPPA*) regulates GHG emissions”

How have appellate courts characterized the GGPPA? (1/2)

- AB: Fraser C.J.A.: “regulation of GHG emissions”
- AB: Wakeling J.A.: “environment” or “climate change”
- AB: Feehan J.A.: “To effect behavioral change throughout Canada leading to increased energy efficiencies by the use of minimum national standards necessary and integral to the stringent pricing of greenhouse gas emissions.”

The federal role is subjective

- The *GGPPA* is applied nowhere by default
- The application to provinces is subjective
- This is counter to our usual approach in policy, which is to apply broadly and grant exceptions or equivalency
- It would be ironic if this subjectivity, by its nature more deferential to provinces, led to the striking down of the *GGPPA*

Conclusions

- Canada's emissions challenge is significant and requires more stringent policies
- The federal government has the capacity to implement GHG emissions policies, and has already done so in other ways
- The *GGPPA* is unique legislation without many parallels in our legal history
 - Collaborative, but not cooperative? Cooperative to a point?
- Greenhouse gases are a quintessential national concern but that doesn't make the Court's decision easier
 - Extra-provincial and international aspects of greenhouse gas emissions are clear, as is provincial inability to act at a national scale
 - Potential opportunities for intrusion into areas of provincial jurisdiction are myriad
 - The environmental imperative does not confer constitutional authority

CONTACT INFORMATION

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