The Administrative State after the Carbon Tax References

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This is a case comment on the three aspects of the Supreme Court of Canada's decision in the References re Greenhouse Gas Pollution Pricing Act which are relevant to the administrative state: the constitutional limits on delegation; judicial review of regulations made under the POGG power; and the distinction between a regulatory charge and a tax. Through its analysis of these aspects, the decision in the References sets out high-level principles about the delegation of authority to Canada's administrative state. On two of these aspects — constitutional limits on delegation and judicial review of regulations — there was disagreement between the majority and dissenting judges. These disagreements highlight the importance of the decision to the administrative state and careful consideration of the dissenting judges' observations helps to supplement the majority's analysis. Ultimately, I suggest, the majority got the References right on the aspects relating to the administrative state, but that the dissenting judges' cogent concerns deserve to be taken seriously. When the decision is read alongside recent developments in American public law, its significance becomes even clearer. For some years now, America's administrative state has been under attack, on the basis that it is an unlawful deviation from the constitutional standards created by the founders. It is not fanciful to expect that in the years to come,

Ce texte est un commentaire d'arrêt sur les trois aspects de la décision de la Cour suprême du Canada dans ses Renvois relatifs à la Loi sur la tarification de la pollution causée par les gaz à effet de serre et qui sont pertinents pour l'État administratif : les limites constitutionnelles de la délégation; le contrôle judiciaire des normes prises en vertu du pouvoir de faire des lois pour la paix, l'ordre et le bon gouvernement du Canada; et la distinction entre un prélèvement de nature réglementaire et une taxe. Par son analyse de ces aspects, la décision de la Cour établit des principes de haut niveau sur la délégation de pouvoirs au Canada. Sur deux de ces aspects — les limites constitutionnelles de la délégation et le contrôle judiciaire — il y a eu désaccord entre les juges majoritaires et ceux dissidents. Ces désaccords soulignent l'importance de la décision pour l'État administratif et un examen attentif des observations des juges dissidents permet de compléter l'analyse de la majorité. En fin de compte, je suis d'avis que la majorité a vu juste sur les aspects relatifs à l'État administratif, mais que les préoccupations convaincantes des juges dissidents méritent d'être prises au sérieux. Lorsque la décision est lue en parallèle avec les développements récents du droit public américain, sa pertinence devient encore plus claire. Depuis quelques années déjà, l'État administratif américain fait l'objet d'attaques,

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the Supreme Court of the United States will rein in America's administrative state. Such changes are singularly unlikely in Canada, as the References demonstrate, even though the course of American administrative law has often influenced Canadian developments.

au motif qu'il s'écarte illégalement des normes constitutionnelles créées par les pères fondateurs. Il n'est donc pas fantaisiste de s'attendre à ce que, dans les années à venir, la Cour suprême des États-Unis mette un frein à l'État administratif américain. De tels changements sont singulièrement improbables au Canada, comme le démontrent les Renvois, même si le cours du droit administratif américain a souvent influencé les développements canadiens.

Contents

This is a case comment on the aspects of the Supreme Court of Canada's 2021 decision in the *References re Greenhouse Gas Pollution Pricing Act*[1] that I believe are relevant to the administrative state.

This was a significant decision on Parliament's authority to make legislation for the Peace, Order, and Good Governance ("POGG") of the nation.[2] In the end, the legislation was held to be a valid exercise of the POGG power.

The Court's decision on the constitutionality of the legislation has been the subject of a great deal of commentary.[3] The matter was hard fought, with several provinces objecting to what they perceived to be federal overreach. Because emissions of greenhouse gases originate locally it was argued that this was a subject for provincial legislation.

Nonetheless, emissions cross provincial boundaries and contribute to a national and indeed, international accumulation of emissions, with harmful effects on climate. The difficulty the courts faced — the Courts of Appeal of Alberta, Ontario and Saskatchewan were asked by their respective provincial governments to opine on the validity of the legislation — was in drawing appropriate boundaries between provincial and federal authority in respect of regulating emissions of greenhouse gases. The Court had similar difficulties, with a majority prepared to uphold the *Greenhouse Gas Pollution Pricing Act*[4] under the POGG power, but a minority saw this decision as a destabilizing influence on Canadian federalism.

My focus in this case comment is not on the POGG analysis, but rather three aspects of the *References* which are important to Canada's administrative state: the constitutional limits on delegation in Canada, judicial review of regulations made under POGG, and the distinction between a regulatory charge and a tax for the purposes of Canadian public law.

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1 2021 SCC 11 [*GGPPA Reference*].

2 *Constitution Act, 1867* (UK) 30 & 31 Vict, c 3, 91, reprinted in RSC 1985, Appendix II, No 5.

3 See Richard Haigh & Ryan Ng, "There's Something for Everyone in 400 Pages — A Comment on the Greenhouse Gas Pollution Pricing Act References" (2021) 21 Ann Rev Civil Lit I (WL); Julia Schabas, "A Matter of National Concern: SCC Rules Parliament's *Greenhouse Gas Pollution Pricing Act* is Constitutional" (28 March 2021), online (blog): *The Court.ca* <www.thecourt.ca/a-matter-of-national-concern-scc-rules-parliaments-greenhouse-gas-pollution-pricing-act-is-constitutional/> [perma.cc/Z8EB-BEBA]; Nigel Bankes, Andrew Leach & Martin Olszynski, "Supreme Court of Canada Re-writes the National Concern Test and Upholds Federal Greenhouse Gas Legislation: Part I (The Majority Opinion)" (28 April 2021), online (blog): *ABlawg* <ablawg.ca/2021/04/28/supreme-court-of-canada-re-writes-the-national-concern-test-and-upholds-federal-greenhouse-gas-legislation-part-i-the-majority-opinion/> [perma.cc/KHL9-939Y]; Marie-France Fortin & Alexandre Lillo, "Les Enjeux Juridictionnels de la Future Agence Canadienne de l'Eau" (2021) 51:1 RGD 201.

4 SC 2018, c 12, s 186 [*GGPPA*].

Through its analysis of these aspects, the decision in the *References* sets out high-level principles about the delegation of authority to Canada's administrative state. On two of these aspects — constitutional limits on delegation and judicial review of regulations — there was disagreement between the majority and dissenting judges. These disagreements highlight the importance of the decision to the administrative state. Careful consideration of the dissenting judges' observations helps to supplement the majority's analysis of these three aspects. Therefore, inasmuch as this case comment contains an argument, it is that the majority got the *References* right on the aspects relating to the administrative state, but that the dissenting judges' cogent concerns deserve to be also taken seriously.

Each of these aspects is worthy of analysis in its own right.

First, in regard to the constitutional limits on delegation, the COVID-19 pandemic has exposed the extent to which Parliament and provincial or territorial legislative assemblies can delegate sweeping coercive authority to officials. The Court's decision strongly maintains the *status quo* with respect to such delegations by reducing the scope for any successful challenge to the validity of administrative delegations (for instance, to medical officers of health). However, the decision was accompanied by a powerful, partial dissent, authored by Côté J, which took aim specifically at Henry VIII clauses as a constitutionally repugnant form of delegation. This partial dissent may well be taken up by lower courts in the future. I argue, however, that the majority's analysis of this aspect is persuasive, and that the appropriate means of responding to concern about over-broad delegation is judicial review of action taken under such delegations.

Second, the legislative framework of the *GGPPA* is, if not skeletal, certainly in need of fleshing out in the years to come. The primary mechanism for putting meat on the bones of Parliament's policy for reducing carbon emissions, is to empower the federal cabinet to make regulations. These regulations may, however, be as contentious as the *GGPPA* itself. It would not be surprising then, to see their validity tested in court in the future. In that regard, the framework set out by the Court for assessing the validity of regulations made under the *GGPPA* will be of particular importance to Canada's response to greenhouse gas emissions. Indeed, guidance on judicial review of regulations is important in its own right, as many federal and provincial policies are given life in regulatory form. On this aspect, the minority judges objected that reviewing regulations made by the federal cabinet is especially difficult, as there are barriers to reviewing the output of this 'black box'. I argue, however, that this objection cannot be maintained in light of recent jurisprudence on the

ability of courts to review high-policy decisions made by cabinet. This signals something of a sea change in judicial attitudes to judicial review of regulations. When supplemented by consideration of this recent jurisprudence, the majority's analysis of judicial review of regulations made under the *GGPPA* is sound, in my view.

Third, the Court clarified the distinction between taxes, which are subject to constitutional limitations, and regulatory charges, which are not. While the principle of 'no taxation without representation' — enshrined in the *Bill of Rights* 1689[5] and now in section 53 of the *Constitution Act, 1867*[6] — limits the ability of legislative delegates to impose taxes without statutory authority, no such limits apply to regulatory charges. But what is a regulatory charge? And, in particular, are monies payable under the *GGPPA* still a regulatory charge even if they are not subsequently directed to the reduction of greenhouse gas emissions? The Court was clear — and on this aspect, it was unanimous — that there must be a nexus between monies payable and the purposes of a regulatory scheme. However, it was equally clear that the *GGPPA* imposed a regulatory charge even though the monies thereby collected would not be directed specifically at climate change. This maximizes the flexibility Parliament and provincial or territorial legislatures will have in the future to impose charges ancillary to regulatory schemes.

Ultimately, when the three aspects are considered together, Canada's administrative state emerges strengthened from the *References*. The constitutionality of broad delegations of authority has been reaffirmed in strong terms. Creative uses of regulatory charges by administrative officials who wish to influence the behaviour of Canadians are constitutionally permissible. Those who fear that such powers might be abused can take some comfort in the fact that administrative action is subject to robust judicial review, as officials are required to justify their use, creative or otherwise, of broad delegations of authority. At a moment when delegation of authority to governmental officials is under attack in the United States — a country whose jurisprudential influence on Canada has historically been significant — there is no existential challenge to the administrative state on the other side of the 49th parallel. I will return to this observation in the Conclusion.

I will address the three aspects in more detail, but before doing so, I will lay out the relevant provisions of the *GGPPA*.

5 (UK), 1689 1 Will & Mar, c 2.

6 *Constitution Act, 1867*, *supra* note 2, s 53.

The *GGPPA*

The *GGPPA* is Parliament's primary response to the national and international challenge of climate change. The characterization of the *GGPPA* was a major point of contention in the Supreme Court and the courts below, but ultimately the majority upheld the validity of it under POGG as it was designed to reduce the emission of greenhouse gases in Canada by imposing a minimum national price on carbon. Indeed, several of the recitals in the Preamble to the *GGPPA* state that Parliament's goal was to price greenhouse gas emissions and thereby produce behavioural change leading to greater energy efficiency.[7]

The *GGPPA* contains four parts. Two of these are not constitutionally contentious. Part 3 provides for the application of provincial greenhouse gas emissions standards to federally regulated entities. Part 4 requires the Minister responsible for administering the *GGPPA* to table an annual report in Parliament on the operation of the legislation.

At the core of the *References* were Parts 1 and 2 of the *GGPPA*. Part 1 imposes a general fuel charge for greenhouse-gas-emitting fuels. Part 2 establishes a general scheme for industrial emissions, to which the general fuel charge is not applied. Revenue raised from both is distributed by the Minister.[8] It is important to note that the prices established by the federal government are backstops and, as such, do not apply automatically. Only when the federal cabinet adjudges a province's carbon-pricing regime to be insufficiently stringent does the *GGPPA* come into force in a particular province.[9] Hence, the majority's characterization of the *GGPPA* as being concerned with the establishment of a national minimum price for greenhouse gas emissions.

Part 1's fuel charge is applicable to producers, importers and distributors of products listed in Schedule 1 of the *GGPPA,* 22 different types of fuel that emit greenhouse gases when burned. Although the charge is not directly imposed upon consumers, the expectation is that the price would be passed along to consumers, thereby occasioning behavioural change on the part of all involved in the production and consumption of greenhouse-gas-emitting fuel.[10]

The federal cabinet may make regulations under Part 1. These regulations are evidently expected to be extensive: most of the who, why, what, where, when and how of pricing of carbon emissions is left to the Governor in Council. The

7 *GGPPA*, *supra* note 4, Preamble.
8 *GGPPA*, *supra* note 4, ss 165, 188.
9 *Ibid*, ss 166(3), 189(2).
10 *GGPPA Reference*, *supra* note 1 at para 30, *per* Wagner CJ.

federal cabinet may, by regulations, prescribe persons liable to pay the charge, the circumstances in which the charge will be levied, conditions which must be satisfied for the charge to be imposed, the manner of payment or reimbursement of charges and define "fuel".[11] Indeed, the regulatory powers under Part 1 allow the Governor in Council to vary the application of the fuel charge by modifying the Schedules to the *GGPPA,* expanding or contracting the list of fuels to which the charge applies.[12] Strictly speaking, these are Henry VIII clauses, statutory provisions that empower the executive to modify an Act of Parliament by regulations.[13] There is a further power to make regulations in relation to the fuel charge system generally. These regulations can prevail over the provisions of the *GGPPA* in the event of a conflict.[14] This is a Henry VIII clause, plain and simple.

Under Part 2, the federal cabinet again has extensive regulation-making power. The industrial emissions pricing scheme in Part 2 applies to "covered facilities"; this term is defined in regulations made under the *GGPPA*.[15] Whether a facility is "covered" mostly depends on the activities it is engaged in.[16] Each industry has sector-specified output standards, which are calculated by a formula contained in the regulations.[17] Emissions in excess of the standards attract a cost, which is extracted in either the form of credits gained from good prior performance (i.e. emitting less than the sector-specified output standard), cash, or a combination of both. As with Part 1, the goal is behaviour change; a covered facility has an economic incentive not to exceed the standards. If it reduces its emissions of greenhouse gases, it will reap a financial benefit by avoiding a monetary burden. Again, as with Part 1, the federal cabinet has extensive regulation-making powers.[18] It may modify the greenhouse gases identified in Schedule 3 of the *GGPPA* which applies to Part 2,[19] and can set the charges per tonne of gas emitted.[20] Once more, most of the

11 *GGPPA Reference*, *supra* note 1 at para 228, *per* Côté J, identifying ss 5, 14, 26, 27, 40, 41 and 47 of the *GGPPA*.

12 *GGPPA*, *supra* note 4, ss 166(2), 166(4).

13 "The term 'Henry VIII power' is commonly used to describe a delegated power under which subordinate legislation is enabled to amend primary legislation": Daniel Greenberg, *Craies on Legislation*, 10th ed (London: Sweet and Maxwell, 2015) at para 1.3.9.

14 *GGPPA*, *supra* note 4, s 168(4).

15 *Output-Based Pricing System Regulations*, SOR/2019-266, s 8.

16 *GGPPA*, *supra* note 4, s 169. Note that a facility which does not meet the requirements of a "covered" facility may apply to be so designated: s 172.

17 *Ibid*, s 36.

18 *Ibid*, s 192.

19 *Ibid*, s 190.

20 *Ibid*, s 191.

who, why, what, where, when and how of carbon pricing is left to the federal cabinet, in the exercise of its regulation-making power under the *GGPPA*.

As noted above, the primary question for the Supreme Court in the *References* was whether this legislative and regulatory scheme came within Parliament's POGG power. But the Court also had to address whether the extent of the delegation was permissible, how the courts could ensure that the sweeping powers granted to the federal cabinet would not be misused, and whether the revenue-raising aspect of the scheme was also constitutionally permissible. I will address each of these aspects of the decision in turn.

Constitutional Limits on Delegation

The conventional view is that Parliament and the provincial or territorial legislatures can delegate plenary powers. That is, they are free to empower ministers and other bodies as amply as they desire to achieve their policy objectives.[21]

There are *some* constitutional limits on delegation. First, legislatures may not "abdicate" their powers. However, it is questionable whether this is a meaningful limit, as it is impossible for legislatures to give up their powers entirely.[22] Second, legislatures may not alter the distribution of legislative competence in sections 91-92 of the *Constitution Act, 1867.* [23] However, the scope of this limit is not particularly extensive; the rule against inter-delegation is breached only by a transfer of law-making authority from one level of government to another, so as to effect, in essence, a constitutional amendment.[24] By contrast, delegating administrative authority to another level of government is perfectly permissible.[25] Third, legislatures may not delegate a power to impose taxation.[26]

Within these modest limits, legislatures are free to structure the delegation of regulation-making and discretion as they see fit. As long as Parliament and the provincial legislatures act within the powers accorded to them by sections 91-92 of the *Constitution Act, 1867*, they have legislative authority as extensive as that of the Westminster Parliament. The line of jurisprudence to the effect

21 See e.g. the discussion in Shaun Fluker & Lorian Hardcastle, "Executive Lawmaking and COVID-19 Public Health Orders in Canada" (2021) 25:2 Rev Const Stud 145. There is also a magisterial overview in John Mark Keyes, *Executive Legislation*, 3rd ed (Toronto: LexisNexis, 2021), ch 2.

22 *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48 at paras 68-71.

23 *Constitution Act, 1867*, *supra* note 2, ss 91-92.

24 *Attorney General of Nova Scotia v Attorney General of Canada*, [1951] SCR 31, [1950] 4 DLR 369. See also the obiter in *Re The Initiative and Referendum Act*, [1919] AC 935, 48 DLR 18 (UK JCPC).

25 *PEI Potato Marketing Board v Willis*, [1952] 2 SCR 392, [1952] 4 DLR 146. *Cf* Mark Mancini, "The Non-Abdication Rule in Canadian Constitutional Law" (2020) 83:1 Sask L Rev 45.

26 *Re Eurig Estate (Re)*, [1998] 2 SCR 565, 165 DLR (4th) 1.

is unbroken, running from early Privy Council decisions in the 19th century to, most recently, the Supreme Court of Canada's 2018 decision in the second *Securities Reference*.[27]

It remains unbroken after the *References*. Two parts of the *GGPPA* were considered: Part 1, which sets out a fuel charge, and Part 2, which relates to industrial emissions. As seen above, there are significant regulation-making powers in Part 1 (sections 166(2), 166(4) and 168(4)) and Part 2 (section 192), exercisable by the federal cabinet.[28] Section 168(4) provides, for example:

> If a regulation made under this Part in respect of the fuel charge system states that it applies despite any provision of this Part, in the event of a conflict between the regulation and this Part, the regulation prevails to the extent of the conflict.[29]

For the majority, Wagner CJ drew on the unbroken line of delegation jurisprudence to note that the Supreme Court "has consistently held that delegation such as the one at issue in this case is constitutional" and that courts of appeal have "consistently applied" this expansive understanding of legislatures' authority to delegate.[30] He concluded that Parliament had "instituted a policy" by setting out "minimum national standards of . . . price stringency" and "simply" delegated to the federal cabinet "a power to implement this policy." [31] One might add that delegation is a necessary feature of some complex legislative and regulatory schemes. For instance, there are 22 and 33 fuels listed for Parts 1 and 2 respectively, of the *GGPPA*. Even if modifying those long lists involves the exercise of Henry VIII powers, there are clear efficiency gains to having the executive make the modifications rather than requiring Parliament to legislate each time the list requires variation.

As such, Canada's administrative state emerges strengthened from the *References*, with the conventional views about the legality of expansive delegations of authority prevailing.

However, the powerful partial dissent of Côté J indicates that the debate about the limits of delegation in Canada is far from over and, indeed, is likely to inspire litigation that tests the existing limits and proposes new ones. Ultimately, however, her analysis is unconvincing — a critical review of her argument reveals that the majority's decision rests on solid premises.

27 *Reference re Pan-Canadian Securities Regulation*, *supra* note 22.
28 *GGPPA*, *supra* note 4, ss 166(2), 166(4), 168(4), 192
29 *Ibid*, s 168(4).
30 *GGPPA Reference*, *supra* note 1 at para 85.
31 *Ibid* at para 88.

Côté J's dissent turns on Brown J's characterization of the *GGPPA* in his dissent. As she explains it, "rather than establishing minimum national standards, Part 2 of the *Act* empowers the executive to establish variable and inconsistent standards on an industry-by-industry basis", raising the possibility that "the executive could decide to impose such strict limits on the fossil fuel or potash industries, both heavy emitters of GHG emissions, that the industries would be decimated."[32]

She took particular aim at the Henry VIII clauses in the regulation-making provisions, which provide that regulations may modify provisions in the *GGPPA*.

In Côté J's view, the Canadian position in relation to Henry VIII clauses is unsettled. Of the leading authority, *In Re George Edwin Gray*,[33] she wrote:

> First, the comments of the majority justices in *Re Gray*, particularly with respect to the unlimited powers of the Governor in Council, demonstrate that their findings are not in accord with our contemporary understandings of core constitutional principles. The justices in *Re Gray* were clearly moved by the great emergency of war. In the case before us, Parliament did not pass the impugned legislation under the emergency branch. Second, *Re Gray* is distinguishable from the present case in that all three of the bodies charged under ss. 17 and 91 with the exclusive authority to make legislation agreed with the Order in Council. Although not passed as an Act of Parliament, the joint resolution of the Senate and House of Commons along with the Order in Council may adequately meet the demands of ss. 17 and 91 in the urgent situation of war. There was no consent of the House of Commons or Senate to the regulations promulgated by the Governor in Council under the *GGPPA*. Third, this reading is inconsistent with our most recent pronouncement on delegation of law-making powers.[34]

Emergency or not, however, *Re Gray* states a proposition on which Canadian legislatures and lower courts have consistently relied.[35] Moreover,

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32 *Ibid* at para 238.

33 (1918), 57 SCR 150, 42 DLR 1 [*Re Gray*].

34 *GGPPA Reference*, *supra* note 1 at para 258.

35 See e.g. **Federal**: *Excise Tax Act*, RSC 1985, c E-15, s 277.1(5); *First Nations Fiscal Management Act*, SC 2005, c 9, s 36(4). **Ontario**: *Credit Unions and Caisses Populaires Act, 2020*, SO 2020, c 36, sch 7, s 284(2); *Not-for-Profit Corporations Act, 2010*, SO 2010, c 15, s. 210.2(4); *Ontario Energy Board Act, 1998*, SO 1998, c 15, Sch B, s 127(7); *Education Act,* RSO 1990, c E.2, ss 194(3.2), 257.2.1(4); *Early Childhood Educators Act, 2007*, SO 2007, c 7, Sch 8, s 45(2); *Compensation for Victims of Crime Act*, RSO 1990, c C.24, s 28(2); *Protecting a Sustainable Public Sector for Future Generations Act, 2019*, SO 2019, c 12, s 38(5); *Financial Services Regulatory Authority of Ontario Act, 2016*, SO 2016, c 37, Sch 8, s 21(5); *Corporations Information Act,* RSO 1990, c C.39, s 21.4(5); *Cannabis Licence Act, 2018*, SO 2018, c 12, Sch 2, s 26(2); *Construction Act*, RSO 1990, c C.30, s 88(1.1); *Labour Relations Act, 1995*, SO 1995, c 1, Sch A, ss 125(3), 125(5); *Highway Traffic Act*, RSO 1990, c H.8, ss 4.1(5), 100.1(2);

the fundamental proposition that within their areas of legislative competence, Canadian legislatures enjoy powers as ample as the Westminster Parliament, remains undoubted. And, given that there is no doubt in the United Kingdom that Parliament may enact Henry VIII clauses — whether it should or not being a different question, for political judgment rather than for legal sanction — it is difficult to see why the Canadian position should be any different. As I noted above, the case law limiting inter-delegation relates only to the distribution of powers as between Parliament and the provincial legislatures, not to the scope of the authority a Canadian legislature may delegate. Whatever a Henry VIII clause does, it does not amend the distribution of powers in sections 91-92.[36] Lastly, resolutions passed by legislative assemblies do not have the force of law — and, in any event, the House of Commons and Senate could pass resolutions in relation to regulations made under the *GGPPA* just as they did prior to *Re Gray*.

Be that as it may, settled law must sometimes yield to constitutional first principles. In this regard, Côté J has offered a rich account of why Henry VIII

Employment Standards Act, 2000, SO 2000, c 41, s 141(2.0.4). **New Brunswick**: *An Act to Amend the Collection Agencies Act*, SNB 2017, c 26, s 11(11); *Pension Benefits Act*, SNB 1987, c P-5.1, s 100.3(1); *Climate Change Act*, SNB 2018, c 11, s 10(9); *Apprenticeship and Occupational Certification Act*, RSNB 2012, c 19, s 17(1); *Collection and Debt Settlement Services Act*, RSNB 2011, c 126, s 11(11); *Credit Reporting Services Act*, SNB 2017, c 27, s 56(11); *Financial and Consumer Services Commission Act*, SNB 2013, c 30, s 59(9); *Mortgage Brokers Act*, RSNB 2014, c 41, s 89(11); *Cooperatives Act,* SNB 2019, c 24, s 168(10); *Credit Unions Act*, SNB 2019, c 25, s 283(10); *Local Governance Act*, SNB 2017, c 18, s 36(12). **Alberta**: *Public Health Act*, RSA 2000, c P-37, ss 52.1(2)(a), 52.21(2)(a), 52.21(2)(b) as it appeared on 1 February 2021; *Public Health (Emergency Powers) Amendment Act, 2020*, SA 2020, c 5, ss 3(2)(a), 52.1(2)(b), 52.1(2)(a), 52.21(2)(b); *Pandemic Response Statutes Amendment Act, 2007*, SA 2007, c 23, s 4(6); *Livestock Industry Diversification Act*, RSA 2000, c L-17, s 34(3); *Pharmacy and Drug Act*, SA 1999, c P 7.3, s 45(3); *Electric Utilities Act*, SA 2003, c E-5.1, s 41(2); *Alberta Utilities Commission Act*, SA 2007, c A-37.2, s 80(9) as it appeared on 1 August 2018; *Responsible Energy Development Act*, SA 2012, c R-17.3, s. 83(10); *Adult Guardianship and Trusteeship Act*, SA 2008, c A-4.2, s 117(10); *Chartered Professional Accountants Act*, SA 2014, c C-10.2, s 167(3); *Business Corporations Act*, RSA 2000, c B-9, s 293.4; *Cooperatives Act*, SA 2001, c C-28.1, s 382.4; *Insurance Act*, RSA 2000, c I-3, s 60(c). **British Columbia**: *Cannabis Distribution Act*, SBC 2018, c 28, s 22(3) as it appeared on 26 June 2018; *Cannabis Control and Licensing Act*, SBC 2018, c 29, s 139(3) as it appeared on 28 July 2020; *Forest Act,* RSBC 1996, c 157, s 163(8); *Budget Transparency and Accountability Act*, SBC 2000, c 23, s 24(2.1); *Wildfire Act*, SBC 2004, c 31, s 43(6); *Adoption Act*, RSBC 1996, c 5, s 92(2); *Chartered Professional Accountants Act,* SBC 2015, c 1, s 72(5) as it appeared on 13 April 2016; *Environmental Assessment Act*, SBC 2018, c 51, s 79(3); *Employer Health Tax Act*, SBC 2018, c 42, s 110(3) as it appeared on 21 December 2021; *Oil and Gas Activities Act,* SBC 2008, c 36, s 86(7); *Insurance (Vehicle) Act*, RSBC 1996, c 231, s 183(3) as it appeared on 22 September 2020; *Motor Fuel Tax Act*, RSBC 1996, c 317, s 73(3) as it appeared on 12 June 2011; *Carbon Tax Act*, SBC 2008, c 40, s 85(3) as it appeared on 17 June 2011; *Forest and Range Practices Act*, SBC 2002, c 69, s 87(7); *Societies Act*, SBC 2015, c 18, s 251(3) as it appeared on 30 July 2019; *Motor Vehicle Act*, RSBC 1996, c 318, s 304(5).

36 *GGPPA Reference, supra* note 1 at para 414, Brown J.

clauses might be unconstitutional in Canada — not just, as is almost universally thought, constitutionally objectionable and open to criticism in political forums. Although I agree that Henry VIII clauses are constitutionally problematic, I am ultimately unpersuaded by Côté J that they are constitutionally invalid. Again, I think the majority's analysis — though perhaps not as fulsome as it might have been — rests on solid ground. Nonetheless, it is clear that future Canadian debates on the topic of Henry VIII clauses will take Côté J's thoughtful contribution as their starting point. Accordingly, her argument deserves careful attention.

To begin with, Côté J notes that section 17 of the *Constitution Act, 1867* provides that there is to be one Parliament of Canada, composed of the Queen, the Senate and the House of Commons and that section 91 provides that the "exclusive" authority of Parliament, so composed, extends to the matters coming within the classes of subjects set out in section 91. From this, she concludes that "every exercise of legislative power — every enactment, amendment and repeal of a statute — must have the consent of all three elements of Parliament."[37]

It is not clear, however, that this conclusion follows from the premises upon which it rests. Textually, the fact that Parliament's "exclusive" authority extends to everything covered by section 91 does not necessarily mean that legislative power is exercisable exclusively by Parliament (in contrast, to say, the Irish constitution). There also exists the structural and historical objection that Parliament's powers within its areas of competence are as wide as those of the Westminster Parliament. Indeed, Côté J's textual argument depends on characterizing the exercise of a power conferred by a Henry VIII clause as a legislative act. And, while it is certainly arguable that a Henry VIII clause is legislative in nature, it is equally arguable that the power is not legislative, because, unlike primary law-making authority, the scope of any Henry VIII clause is limited, by reference to the statutory objects which it was created to achieve.

Côté J supported her textual argument by reference to constitutional principles. The first principle she referenced, parliamentary sovereignty, has a positive aspect that allows Parliament to make or unmake any law whatsoever. But it also has a negative aspect: "no institution is competent to override the requirements of an Act of Parliament."[38] Henry VIII clauses "run afoul of" this negative aspect.[39] The difficulty with this line of reasoning, however, is that a

37 *Ibid* at para 247.
38 *Ibid* at para 265.
39 *Ibid* at para 266.

Henry VIII clause specifically makes ministers "competent" to modify legislation. It is true, as Côté J observes, that "logic limits Parliament from achieving two contradictory purposes simultaneously" as in limiting the federal cabinet on the one hand but providing it with law-making power on the other.[40] The solution in such situations, however, is to rely on judicial interpretation to make as much sense of the contradictions as possible.

Second, the rule of law, which is violated by law-making that does not go through the ordinary legislative process,[41] is undermined by modifications to statutes which are found in the *Canada Gazette* rather than in the statute book,[42] and is imperilled by the arbitrary power created by Henry VIII clauses.[43] These are certainly good reasons not to enact Henry VIII clauses and equally good reasons to interpret them narrowly. For Côté J, that meaningful judicial oversight of the exercise of Henry VIII clauses is impossible, implies that they are unconstitutional.[44] But if judicial oversight *is* possible, as I will discuss below much of the force of Côté J's rule of law point dissipates.

Third, the separation of powers "demands that the core function of enacting, amending and repealing statutes be protected from the executive and remain exclusive to the legislature."[45] There is, for Côté J, a meaningful separation of powers in the Canadian Constitution[46] and a suite of doctrines preventing intrusion on executive, judicial and legislative functions[47] — two points with which I wholeheartedly agree. The difference, however, between these doctrines and her proposed new doctrine, is that doctrines such as parliamentary privilege and non-justiciability of the prerogative prohibit unwanted interference by the judicial branch in the affairs of the legislative or executive branches respectively. Even though the borders of the latter doctrine have receded significantly in recent decades. Côté J's proposed new doctrine would prohibit interference *which has already been expressly invited by the legislative branch*. Parliamentary privilege keeps the judicial fox out of the legislative henhouse. But, if Parliament is foolish enough to invite the fox in, it is questionable whether the courts should revoke the invitation.

40 *Ibid* at para 268.
41 *Ibid* at para 272.
42 *Ibid* at para 273.
43 *Ibid* at para 274.
44 *Ibid* at paras 276-278.
45 *Ibid* at para 290.
46 *Ibid* at paras 281-284.
47 *Ibid* at paras 285-289.

It is for these reasons that I am ultimately unpersuaded. Part of the force of Côté J's argument, though, is that it has a laser-like focus on Henry VIII clauses. She therefore avoids some of the problems that would arise out of more ambitious efforts to reform the Canadian approach to delegation.

Alyn James Johnson, for example, has suggested a test in the following terms in his article "The Case for a Canadian Nondelegation Doctrine":

> It is necessary to adopt the perspective of the citizen author/addressee of an exercise of executive law-making. On a nondelegation challenge, the question is whether an underlying policy conflict has been meaningfully resolved such that a citizen, affected or coerced by an executive measure, can be said to recognize and understand the measure and thereby take responsibility as its implied author. A reviewing court will in effect look to see if the enabling provision is thick — that is, if it contains sufficient information to anticipate and control the substance of the resulting executive action. Logical and predictable executive action is consistent with the rule of law, and completes the circular process of legitimate democratic self-government. Legislatures have a responsibility to draft enabling provisions that have content, and not simply pass on difficult conflicts in undigested form to executive decision-makers. Courts have a responsibility to ensure that the requisite content is present.[48]

Johnson's article is a fine piece of scholarly writing, and justly provides the jumping-off point for Côté J.[49] His account of how broad delegations are difficult to reconcile with the unwritten principles of the Canadian Constitution is compelling. In the context of section 1 of the *Charter*, I have argued for a more robust application of a foreseeability requirement, urging that where *Charter* rights are threatened by discretionary decisions, the holders of discretionary powers should be obliged to adopt mechanisms to check, structure and confine their discretion.[50] It is one thing, however, to adopt such a requirement in the *Charter* context, where it is triggered only by a breach of a *Charter* right. It is quite another, to adopt a muscular, across-the-board approach to *judicial* policing of legislative delegation.

Here, the experience from other common-law jurisdictions with non-delegation doctrines is illuminating. In both Ireland and the United States the courts have had great difficulty in developing a meaningful test for the application of the non-delegation doctrine. In the United States, these difficulties

48 (2019) 52:3 UBC L Rev 817 at 888.

49 *GGPPA Reference*, *supra* note 1 at para 237.

50 Paul Daly, "Prescribing Greater Protection for Rights: Administrative Law and Section 1 of the Canadian Charter of Rights and Freedoms" (2014) 65 SCLR (2d) 247.

have led to, in essence, a refusal to apply the doctrine at all to invalidate legislation. The nondelegation doctrine has, per Cass Sunstein's quip, had one good year and 200-odd bad ones. In Ireland, the courts have not given up on the non-delegation doctrine but have been roundly criticized for their inability to apply the test consistently,[51] and judicial arbitrariness is nothing to celebrate.[52]

Hence the attractiveness of second-order solutions. The Americans have taken to interpreting broadly-drawn delegations of power as narrowly as they can.[53] Justice Côté arguably deployed this strategy, incidentally, in her dissent in *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*.[54] In her dissent in the *References*, Justice Côté cited a classic article by Professor David Mullan, which also emphasized second-order solutions to the violence to constitutional principles wrought by broad delegations.[55]

Viewed in this light, Côté J's proposed reform is precisely targeted, and narrowly tailored to root out the specific evil of Henry VIII clauses. Whether one agrees with Côté J or takes the view, as I tend to, that the best remedies for this evil are political in nature, the debate and discussion are worth having.

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51 See generally Gerard Hogan, David Morgan & Paul Daly, *Administrative Law in Ireland*, 5th ed (Dublin: Roundhall, 2019), ch 2. Interestingly, in *Bederev v Ireland*, [2016] IESC 34, [2016] 2 ILRM 340, the Irish Supreme Court upheld the validity of a broad discretionary power to add new products to a list of illicit drugs (of which possession was criminalized) contained in the schedule to the *Misuse of Drugs Act, 1977*. This constitutionally valid delegation was not dissimilar to the powers in the *GGPPA* to modify the Schedules.

52 Timothy AO Endicott, "Arbitrariness" (2014) 27:1 Can JL & Jur 49.

53 Paul Daly, "Tough Times for the Anti-Administrativists" (30 June 2019), online (blog): *Administrative Law Matters* <www.administrativelawmatters.com/blog/2019/06/30/tough-times-for-the-anti-administrativists/> [perma.cc/6LP3-WK8B].

54 2018 SCC 22. See especially para 87.

55 David Mullan, "The Role of the Judiciary in the Review of Administrative Policy Decisions: Issues of Legality" in MJ Mossman & G Otis, eds, *The Judiciary as Third Branch of Government: Manifestations and Challenges to Legitimacy* (Montreal: Canadian Institute for the Administration of Justice, 1999) 313 at 377-378:

> I would also urge the Court to rethink its eschewing of any capacity to probe the motives of multi-member bodies charged with the exercise of broadly-based or open-ended discretions and those conferred on the Governor General and Lieutenant Governors in Council in particular . . . . As well as reflecting the principle of justification, the more vigilant policing of the purposes for which the executive acts also has the merit of also attempting to preserve some integrity for parliamentary processes. In this domain, I would also look for clarification of the Canadian position on justiciability and political questions as threshold concepts in the calling of the executive branch to account. As well, I would take up the suggestion of Archie Campbell J. and, by reference to a new or resurgent anti-delegation principle, condemn the use of Henry VIII clauses and, indeed, in at least some circumstances, the conferral of unstructured, broad discretions unless accompanied by an obligation to engage in broadly-based notice and comment procedures in the development of policy under the terms of such delegations.

Beyond this, the force of her analysis depends in large part on the extent to which judicial review of regulations made by the federal cabinet is sufficiently robust. That is the subject of the next part of this case comment.

Judicial Review of Regulations Made under the POGG Power

It is helpful, at this point, to recall some of the key features of the *GGPPA* and the *References*. The *References* concerned the constitutionality of the *GGPPA*. The legislation establishes a backstop carbon-pricing regime. The provinces are in the driving seat in terms of setting prices for greenhouse gas emissions. But the *GGPPA* provides that if the federal government determines that provincial standards are insufficiently stringent, the pricing mechanisms set out in the *GGPPA* will take effect. Part 1 imposes a charge on prescribed types of fuel, "including gasoline, diesel fuel and natural gas, as well as to combustible waste."[56] Part 2 establishes a pricing system for large industrial emitters, with significant leeway to categorize emitters differently.

The federal government argued, successfully, that it could enact the *GGPPA* under the 'national concern' branch of the federal power to legislate for peace, order and good government. This issue split the Supreme Court and each of the provincial courts of appeal that considered it. My focus, in this part, is on difficult issues which may present themselves for judicial resolution in the future. As the dissenting judges observed, the majority's resolution of the issue may lead to problems, especially when the federal cabinet adopts regulations to implement the *GGPPA*.

The issue of the constitutionality of the *GGPPA* is a difficult one because the POGG power has been treated as residual to the heads of legislative competence set out in sections 91-92 of the *Constitution Act, 1867*.[57] The analysis of whether Parliament or a provincial legislature can enact a statute usually depends on, first, characterizing the "matter" — by identifying the "pith and substance" of the provisions at issue — and, second, assigning the matter to one of the "classes of subjects" listed in section 91-92. But POGG is different. Because it is residual, it has an amorphous quality[58] applicable to "matters of inherent national concern, which transcend the provinces."[59] Just how residual

56 *GGPPA Reference*, *supra* note 1 at para 30.
57 *Constitution Act, 1867*, *supra* note 2, ss 91-92.
58 See e.g. *GGPPA Reference*, *supra* note 1 at para 115.
59 *Ibid* at para 89.

POGG is provoked significant disagreement in the *References*.[60] But there is no doubt that POGG is different to the heads of legislative competence elsewhere set out in sections 91-92.

Sometimes, the POGG power is described broadly (for example, nuclear energy) but sometimes narrowly (as in the control of marine pollution by the dumping of substances). In POGG cases, the characterization of the matter can influence whether a particular statute is within the legislative competence of Parliament.[61] In this case, the pith and substance of the legislation was held to be the establishment of minimum national standards of GHG price stringency to reduce GHG emissions.[62] And this "matter" was held to fall within the POGG power.[63]

But this creates a potential problem for the implementation of the *GGPPA*. The federal cabinet has regulation-making powers under Part 1 and Part 2 of *GGPPA*. Normally, where Parliament or a provincial legislature has legislative competence to enact a statute, regulations made under that statute will also come within that legislative competence. Canadian regulations relating to nuclear energy, for example, can be made by the Canadian Nuclear Safety Commission, a federal commission, under the Canadian *Nuclear Safety and Control Act* — a federal statute.[64] As long as the regulations deal with nuclear energy, they will fall within the POGG power just as their enabling statute does.

It is also possible that nuclear energy regulations could fall, in whole or in part, under another head of federal power, for example, in relation to international trade. That is, even if regulations were not, in pith and substance, regulations relating to nuclear energy, they might nonetheless be valid federal regulations relating to international trade or some other head of power. Executive authority, including the power to make regulations, generally maps onto the distribution of legislative authority in sections 91 and 92. As long as the regulations are: one, within *a* head of federal authority; and two, authorized by the empowering legislation — which, itself, must be valid federal legislation — they will be valid. There must, in other words, be a chain of validity running through the regulations from both the enabling statute and section 91. Of course, if the regulations do not deal with a subject matter of federal

60 See e.g. *ibid* at para 341, Brown J.
61 See e.g. *ibid* at para 116, Wagner CJC for the majority, and paras 369-370, Brown J dissenting.
62 *Ibid* at para 80.
63 *Ibid* at paras 115, 207.
64 *Nuclear Safety and Control Act*, SC 1997, c 9.

legislative authority but veer into provincial jurisdiction, they will be *ultra vires*, because they are unconstitutional and, almost certainly, outside the scope of the enabling statute.

The problem that arises in relation to the *GGPPA*, which is peculiar to the POGG power, is that regulations could be *intra vires* the enabling statute but *ultra vires* on constitutional grounds. This is because the constitutional basis on which the *GGPPA* was upheld is narrow — as it set out to create the national minimum carbon pricing standards — but the powers granted by the *GGPPA* are extremely broad. A regulation might be within the broad powers granted to the federal cabinet by the *GGPPA* but nonetheless would still be without the narrow constitutional basis of establishing a national minimum price for carbon emissions. As Huscroft JA put it in his dissent in the Ontario Court of Appeal, upholding the *GGPPA* under POGG constitutionalizes the particular means used in the *GGPPA,* and this means only (for the moment at least).[65]

Accordingly, if regulations under the *GGPPA* do anything more than establish national minimum carbon pricing standards, they may be constitutionally invalid even if they are *intra vires* the GGPPA. To put the point another way, regulations made under the *GGPPA* will have to be directed, in pith and substance (having regard to their purpose and effect[66]), to the establishment of national minimum pricing standards to be constitutional. Otherwise, they will not be regulations which deal with the matter of inherent national concern as identified by the majority in the *References*. And, given the extent to which the *GGPPA* regulates matters of provincial jurisdiction relating to emissions from private individuals and enterprises — as, indeed, is inherent to any legislative and regulatory scheme based on the POGG power — such regulations are unlikely to have a chain of validity linking them back to section 91 of the *Constitution Act, 1867*.

Problems may therefore arise because of the breadth of the federal cabinet's regulation-making powers. As Brown J put it, Part 2 of the *GGPPA* can be seen as "a deep foray into industrial policy"[67] which allows the federal cabinet "to establish variable and inconsistent standards for an array of different industrial activities."[68] If regulations do so, they could be *intra vires* the *GGPPA* but nonetheless *ultra vires* on constitutional grounds, as Rowe J explained:

65 *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544 at para 224.
66 *Reference re Firearms Act (Can)*, 2000 SCC 31 at para 16.
67 *GGPPA Reference*, *supra* note 1 at para 346.
68 *Ibid* at para 339.

> By design, regulations under Part 2 will have impacts that vary by enterprise, sector and region. These regulations will affect the viability, for example, of natural resource industries that need to generate power at remote locations or heavy industries that require intense heat, like making cement or smelting ore. By contrast, they will have little effect on industries that are either not power-intensive (like finance) or where production is electrified (like manufacturing). While the primary purpose of the legislation is environmental protection, Part 2 is premised on tailoring the impact of emissions reduction by reference, inter alia, to economic considerations (G. Bishop, *Living Tree or Invasive Species? Critical Questions for the Constitutionality of Federal Carbon Pricing* (2019), C.D. Howe Institute Commentary 559). Issues as to whether regulations veer too deeply into industrial policy, thus calling into question the regulations' constitutionality, will inevitably arise.[69]

This very much depends on the ends to which the regulation-making powers are put, of course. But this issue, as well as the observations in Côté J's partial dissent about the constitutionality of Henry VIII clauses, does raise questions about how exactly regulations made under the *GGPPA* are to be reviewed.

On this point, Wagner CJ laid out a familiar set of principles. The federal cabinet's discretion is limited by the purpose of the *GGPPA* and the guidelines therein established for exercising its powers. Any regulations would have to be consistent with the purpose of establishing national, minimum, pricing standards in order to reduce carbon emissions, and the stringency of provincial pricing mechanisms is the primary factor to be taken into account.[70] Ultimately, "although the Governor in Council has considerable discretion with respect to listing, that discretion is limited, as it must be exercised in accordance with the purpose for which it was given."[71] To this I would add the principle that Henry VIII clauses should be narrowly construed and, conceivably, other second-order judicial responses to broad delegations, as noted in the previous section of this case note.[72]

In judicial review of regulations made under the *GGPPA*, the standard of review would be: reasonableness as to the substance of the regulations, and correctness as to their constitutional validity.[73] Under the Supreme Court's re-

69 *Ibid* at para 599.

70 *GGPPA*, *supra* note 4 ss 166(2)-(3), 189(1)-(2).

71 *GGPPA Reference*, *supra* note 1 at para 73. See also *ibid* at paras 75-76 for comments on Parts 1 and 2 respectively.

72 See e.g. *R (Public Law Project) v Lord Chancellor*, [2016] UKSC 39 at para 25; this principle would be one of the legal constraints applicable to an exercise of a regulation-making power reviewed for reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 111 [*Vavilov*].

73 *Cf* the discussion in *Bertrand v Acho Dene Koe First Nation*, 2021 FC 287 at paras 75-76.

formulation of Canadian administrative law in *Vavilov*, reasonableness is the presumptive starting point for any judicial review. Courts of appeal have consistently taken the view, since *Vavilov*, that reasonableness is the applicable standard of review of regulations.[74] Only neat questions of constitutional validity are subject to correctness review.[75]

However, whether correctness or reasonableness applies, challenging regulations made by the federal cabinet may be difficult. Judicial review of cabinet decisions is difficult, because detailed information of cabinet discussions might not be disclosed.[76]

Accordingly, Rowe J raised the concern that, in terms of judicial review, decision-making of the federal cabinet is "very nearly a total black box."[77] The absence of extrinsic evidence about the purpose and effect of a regulation means "a court's ability to effectively adjudicate the boundaries of federal and provincial powers may be made more difficult."[78] Inasmuch as the legal effects and purpose of the regulations depend on evidence of what the federal cabinet intends to achieve, this information could escape judicial oversight.

If Rowe J's proposition were true, it would further underpin Côté J's concern about the inability of courts to robustly review the exercise of regulation-making powers under the *GGPPA,* and under the many other statutes which contain Henry VIII clauses. It would also raise concerns about whether the courts could adequately police the boundaries between provincial and federal authority. While this proposition has been historically true, however, recent developments cast some doubt on it.

To begin with, regulations might not necessarily be challenged by way of an application for judicial review. They might be challenged by way of action, where the applicant can create a detailed evidentiary record.[79] The constitution-

74 See e.g. on municipalities, *1120732 BC Ltd v Whistler (Resort Municipality)*, 2020 BCCA 101; *Restaurants Canada c Ville de Montréal*, 2021 QCCA 1639 at para 25, and on cabinet, *Portnov v Canada (Attorney General)*, 2021 FCA 171 at paras 10-17 [*Portnov*]; *Bricka c Procureur général du Québec*, 2022 QCCA 85 at para 10. There has been some academic debate on this point. See John Evans, "Reviewing Delegated Legislation After Vavilov: Vires or Reasonableness?" (2021) 34:1 Can J Admin L & Prac 1. But the judicial trend is, nonetheless, clear.

75 See e.g. *Merck Canada inc c Procureur général du Canada*, 2022 QCCA 240 at para 132.

76 Indeed, it can be withheld under s 39 of the *Canada Evidence Act*, RSC 1985, c C-5. See generally *Babcock v Canada (Attorney General)*, 2002 SCC 57, [2002] 3 SCR 3. This regime has been forcefully criticized: Yan Campagnolo, *Le secret ministériel: théorie et pratique* (Québec: Presses de l'Université de Laval, 2020).

77 *GGPPA Reference*, *supra* note 1 at para 606.

78 *Ibid* at para 605.

79 See *R v Desautel*, 2021 SCC 17.

ality of regulations might also be raised in enforcement proceedings, where the evidentiary record would be as expansive as required to dispose of the enforcement action. The ultimate decision would then also be subject to judicial review, with any decision on the constitutionality of the regulations being subject to correctness review.

Moreover, even on a plain-vanilla judicial review of regulations, it is possible for applicants to put material relating to purpose and effect before the courts. For one thing, federal regulations are now typically accompanied by regulatory impact statements, from which purpose and effect can be divined.[80]

For another thing, the mechanisms available to develop a comprehensive record might be more robust than previously thought, as is explained in a series of recent Federal Court of Appeal decisions.

First, a court may draw a negative inference from a decision-maker's failure to provide a summary of its decision-making process and reasons, even in circumstances where the underlying information is confidential. If it can be disclosed, either in summary or redacted form, but was not, this calls the substantive reasonableness or correctness of the decision or regulation into question. Second, an applicant can apply under Rule 317 of the *Federal Court Rules,* for disclosure of "material relevant to an application that is in the possession of a tribunal".[81] Such procedural rules should be read with constitutional principle in mind; especially the principle that access to information held by governments would facilitate more accurate judicial review proceedings, thereby enhancing the search for the truth constitutionally protected by section 2(b) of the *Charter of Rights and Freedoms*.[82]

Third, any superior court of record has flexible mechanisms at its disposal to appoint an amicus, conduct an *ex parte* hearing, and so on: "The measures to which a court can resort are limited only by its creativity and the obligation to afford procedural fairness to the highest extent possible."[83]

80 See e.g. *Innovative Medicines Canada v Canada (Attorney General)*, 2020 FC 725 at paras 34-54; *Portnov*, *supra* note 76 at paras 34, 36, 50.

81 *Federal Court Rules*, SOR/98-106, s 317(1).

82 *Ontario (Public Safety and Security) v Criminal Lawyers' Association*, 2010 SCC 23 at paras 36-37; *Canadian Charter of Rights and Freedoms*, s 2(b), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. See further Paul Daly, "*Vavilov* On the Road" (2022) 35 Can J Admin L & Prac 1 at 12-13.

83 *Canada (Citizenship and Immigration) v Canadian Council for Refugees*, 2021 FCA 72 at para 120.

There are, therefore, varied ways of prising open the black box of cabinet regulation-making.

As such, if ever issues were to arise about the lawfulness of regulations under the *GGPPA*, there are mechanisms available to ensure that the reviewing court has ample information about the purpose and effect of the regulations. A reviewing court could, accordingly, carefully review the record to determine whether the regulations are directed, in pith and substance, to establishing a minimum national price for carbon emissions — *intra vires* the POGG power — or to furthering goals of industrial policy, which would be *ultra vires* the POGG power.

More broadly, when a reviewing court is assessing the reasonableness of regulations, it can do so in light of a developed record. If the record reveals a rationale for the regulation, this rationale can be reviewed for its compliance with the legal and factual constraints bearing on the regulation-maker.[84] Even if the record does not reveal a rationale, the reasonableness of the regulation will be reviewed, in regards to those legal and factual constraints.[85] In terms of legal constraints, although the statutory language in the *GGPPA* is broad, there are a variety of legal principles which can tighten the legal constraints on regulation-makers.[86] More importantly, the information in the record also might impose factual constraints on the regulation-maker — for example, the regulation-maker might have to demonstrate responsiveness to concerns raised by a regulatee prior to the regulation being made, account for the harsh consequences of a regulation on a particular regulatee, and/or ensure consistency between similarly situated regulatees. Of course, deference remains *de mise,* especially when expert judgement is being exercised, but *Vavilov* gives more ammunition to applicants.[87]

As a result, regulations under the *GGPPA* can, despite the concerns of the dissenting judges, be subjected to appropriately robust review on constitutional and administrative law grounds. In the first post-*References* challenge to regulations made under the *GGPPA*, Manitoba suffered a resounding defeat, with Mosley J applying a deferential approach to the determination that the province's approach to emissions was insufficiently stringent and having no difficulty in upholding the determination under POGG.[88] However, a key aspect

84 *Vavilov*, *supra* note 74 at para 137.
85 *Ibid* at para 138.
86 *Ibid* at paras 111-113. See the Henry VIII clause principle I noted above.
87 See further *Portnov*, *supra* note 76 at paras 18-28.
88 *Manitoba v Canada (Attorney General)*, 2021 FC 1115.

of the legal and factual context in that determination was that Manitoba had withdrawn its plan for reducing greenhouse gas emissions, which undermined the province's proposition that it had been treated unreasonably or unfairly. In future litigation, a province might provide a sturdier factual basis for the proposition that the *GGPPA* was not applied in uniform fashion, and thus *ultra vires* the POGG power.

Taxes and Charges May Apply[89]

The distinction between a tax and a regulatory charge might seem, at first sight, to be a distinction without difference. In either context, a person, subject to a statutory provision that imposes an obligation to pay money to the government, has to comply as long as there is clear legal authority to impose the obligation. The difference, however, is that special principles apply to taxes. In the common law tradition, no taxation without representation has long been a settled principle, despite what our friends south of the border might say about its being honoured occasionally in the breach rather than the observance.

In Canada, this constitutional fundamental is memorialized in section 53 of the *Constitution Act, 1867*: "Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons."[90]

Section 53 "gives effect to the basic democratic principle that the Crown may levy taxes only with the consent of elected representatives."[91] Indeed, "[t]he provision codifies the principle of no taxation without representation, by requiring any bill that imposes a tax to originate with the legislature."[92] As Professor Driedger observed, in a passage quoted with approval by the Supreme Court of Canada, the country's elected representatives sit in the lower house and "consistently with history and tradition, they may well insist that they alone have the right to decide to the last cent what money is to be granted and what taxes are to be imposed.[93] In a similar vein, Gonthier J commented,

89 See generally John Mark Keyes & Anita Mekkunnel, "Traffic Problems at the Intersection of Parliamentary Procedure and Constitutional Law" (2001) 46:4 McGill LJ 1037; 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; Andrew Leach, "Environmental Policy is Economic Policy: Climate Change Policy and the General Trade and Commerce Power" (2021) 52:2 Ottawa L Rev 97; Mancini, *supra* note 25.

90 *Constitution Act, 1867*, *supra* note 2, s 53.

91 *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40 at para 99.

92 *Re Eurig Estate*, *supra* note 26.

93 Elmer A Driedger, "Money Bills and the Senate" (1968) 3:1 Ottawa L Rev 25 at 41, quoted in *Re Eurig Estate, ibid* at para 32.

for the Court, in *Westbank First Nation v. British Columbia Hydro and Power Authority*, that: "individuals being taxed in a democracy have the right to have their elected representatives debate whether their money should be appropriated, and determine how it should be spent."[94]

Taxation, therefore, is for legislation passed by elected representatives. By contrast, a regulatory charge — a requirement to pay money for purposes connected to a statutory scheme — need not comply with the principles flowing from section 53, and is not subject to the section 125 limitation on the "taxation" of public land. The question, then, is what the test is for distinguishing a tax, which is subject to section 53 and section 125, from a regulatory charge, which is not.

The basic idea is that there must be, first, a regulatory scheme and, second, a nexus between the scheme and the obligation to pay money.[95]

Ontario argued that the required nexus was absent in this case, because the monies collected in respect of carbon emissions would go to the Consolidated Fund, to be distributed — potentially, at least — for general government purposes, and would not go towards reducing or mitigating the effects of climate change. In Ontario's submission, a nexus could only be present if the revenues collected were used to cover the cost of the scheme, or to otherwise be used in connection with the purpose of the scheme.[96] Although behaviour modification is a valid purpose for a regulatory charge, the Supreme Court had previously left open the question of whether the costs of the regulatory scheme impose a ceiling on the funds which might thereby be generated.[97]

Wagner CJ rejected the proposition that the costs of a regulatory scheme imposed a ceiling and also rejected any suggestion that the monies collected under a regulatory scheme must be put to the same purposes for which they were collected. Rather, a regulatory charge can be "set at a level designed to proscribe, prohibit, or lend preference to a behaviour", which is incompatible with the proposition that the charge can only cover the costs of the scheme and, indeed, with the proposition that the revenue from the charge should be used to further the same purpose: "Where, as in the instant case, the charge itself is a regulatory mechanism that promotes compliance with the scheme or furthers

94 [1999] 3 SCR 134, 176 DLR (4th) 276 at para 19. At issue there was a separate constitutional provision, s 125 of the *Constitution Act, 1867*, which prevents the taxation of public lands.

95 See e.g. 620 *Connaught Ltd. v. Canada (Attorney General)*, 2008 SCC 7, [2008] 1 SCR 131.

96 *GGPPA Reference*, *supra* note 1 at para 214.

97 *620 Connaught Ltd v Canada (Attorney General)*, 2008 SCC 7 at para 48.

its objective, the nexus between the scheme and the levy inheres in the charge itself."[98] Accordingly, designers of administrative schemes can impose charges to modify individuals' behaviour, even if those charges exceed the cost of the scheme, and the revenues are ultimately spent on the attainment of some other objective entirely.

What matters for something to be a regulatory charge is its nexus to a regulatory scheme. Where there is no nexus, this will be a colourable attempt to impose taxation and subject to the rigours of section 53 and section 125.[99] In this case, as Wagner CJ held, the required nexus was easily established. The charges on emissions are "regulatory charges whose purpose is to advance the *GGPPA*'s regulatory purpose by altering behaviour."[100]

Of course, the point that there must be clear statutory authority to impose a requirement to pay monies remains fundamental. However, as long as that statutory authority exists — in the context of a regulatory scheme, and the imposition of a requirement to pay monies with a sufficient nexus to that regulatory scheme — the requirement is a regulatory charge, not a tax. As such, the constitutional limitations on taxation do not apply. What constitutes a "sufficient nexus" is an argument for another day. Though one wonders which intrepid plaintiff would pay to litigate the point, now that the Supreme Court has established that behaviour modification, with no relation to the cost of the scheme put in place to achieve the modification, is a valid regulatory purpose, and that revenues raised from the scheme can safely be directed into the Consolidated Fund. There is little left to litigate on regulatory charges in Canada.

Conclusion

The Court's decision in the *References* was a significant contribution to Canadian constitutional law jurisprudence. In this case comment, I have outlined the importance of the *References* to Canada's administrative state.

First, the *status quo* in relation to delegations of authority was maintained. Even though many of the details of much of the who, why, what, where, when and how of carbon pricing in Canada were left by Parliament to the federal cabinet, the majority strongly rejected the proposition that there was any constitutional deficiency due to the breadth of the delegation of authority. By add-

98 *GGPPA Reference*, *supra* note 1 at para 216.
99 *Ibid* at para 218; *Constitution Act, 1867*, *supra* note 2, ss 53, 125.
100 *GGPPA References*, *supra* note 1 at para 219.

ing another link to an unbroken chain of authority for the proposition that Canadian legislatures may delegate plenary powers to administrative officials, the decision in the *References* confirms that there is ample scope for delegation in Canada. Even the *GGPPA*'s Henry VIII clauses, which permit the federal cabinet to modify the *GGPPA*, were constitutionally valid. However, there was a strong partial dissent by Côté J on the constitutionality of Henry VIII clauses. And, while a critical discussion of Côté J's analysis demonstrates the strength of the premises of the majority's decision, her analysis may be influential going forward.

Second, the majority established a framework for reviewing regulations made under the *GGPPA*. Even though the delegation of authority under the *GGPPA* is broad, the federal cabinet does not enjoy unfettered discretion, as every exercise of the authority is constrained by the purposes and language of the *GGPPA*. Some difficulties arise however, because the *GGPPA* contains broad delegations of authority to the federal cabinet, but the *GGPPA* itself rests on the narrow constitutional basis of the POGG power. Accordingly, the federal cabinet could conceivably make regulations which are within the scope of the *GGPPA,* but outside the scope of the POGG power. If so, the regulations would almost certainly lack a chain of constitutional validity. As the dissenters observed, reviewing cabinet decisions is quite difficult, as these are often shrouded in secrecy. I argued that despite the concerns of the dissenters, courts will be able to determine whether these regulations are legally valid; judicial oversight is capable of being robust, especially in view of recent Federal Court of Appeal jurisprudence on judicial review of cabinet decisions. When supplemented by critical analysis of the dissenters' concerns, the majority's decision promises meaningful judicial review of regulations made under the *GGPPA*.

Third, the Court clarified the test for categorizing an obligation to pay monies as being a regulatory charge rather than a tax. It did so in such a way as to facilitate the creation of regulatory schemes by Parliament and the provincial and territorial legislatures. Taxes cannot be imposed by discretion, as this would be contrary to the principle, enshrined in the *Constitution Act, 1867,* that taxes can only be imposed by elected representatives, not by executive fiat. Regulatory charges can be so imposed, however. Accordingly, distinguishing between taxes and regulatory charges becomes significant, with legislatures and officials having much more latitude with the latter than the former. In the *References*, the Court clarified the distinction in a pro-administrative state fashion. A regulatory charge will be valid even if the revenues it raises exceed the costs of the scheme put in place, *and* if the revenues are put to some other purpose entirely, as long as the scheme aims to modify behaviour. However,

it is hard to imagine a revenue-raising scheme which does not aim to modify behaviour. Therefore, the *References* have increased the scope for creative regulatory design by minimizing the risk of administrative schemes being held to be unconstitutional because they impose taxes by discretion rather than by statute.

In both its administrative law and constitutional law aspects, then, the decision in the *References* is a significant contribution to Canadian public law. And when the decision is read alongside recent developments in American public law, its significance becomes even clearer. For some years now America's administrative state has been under attack on the basis that it is an unlawful deviation from the constitutional standards created by the founders.[101] This attack has resonated with the federal and state judiciary.[102] The *Chevron* doctrine — under which deference is accorded to administrative interpretations of law — is on its deathbed, with some of its state law equivalents already in the graveyard. [103] The permissiveness of the non-delegation doctrine is being called into serious question, and deference to administrative agencies' interpretations of their own regulations has been dialed down. It is not fanciful to expect that in the years to come, the Supreme Court of the United States will rein in America's administrative state. As the *References* demonstrate, such changes are singularly unlikely in Canada, even though the course of American administrative law has often influenced developments in the Great White North.[104]

101 See especially Philip Hamburger, *Is Administrative Law Unlawful?* (Chicago: University of Chicago Press, 2014).

102 See generally Cass Sunstein & Adrian Vermeule, *Law and Leviathan: Redeeming the Administrative State* (Cambridge, Mass: Harvard University Press, 2020), describing (and rebutting) the attacks.

103 See further Paul Daly, "Doubts about Deference: *Chevron USA v. Natural Resources Defence Council*" (2019) 32 Can J Admin L & Prac 137.

104 See e.g. Matthew Lewans, *Administrative Law and Judicial Deference* (Oxford: Hart Publishing, 2016).