CACV 3239

IN THE COURT OF APPEAL FOR SASKATCHEWAN

IN THE MATTER OF THE *GREENHOUSE GAS POLLUTION PRICING ACT*,
BILL C-74, PART 5

AND IN THE MATTER OF A REFERENCE BY THE LIEUTENANT GOVERNOR IN COUNCIL TO THE COURT OF APPEAL FOR SASKATCHEWAN UNDER *THE CONSTITUTIONAL QUESTIONS ACT, 2012*, SS 2012, C c-29.01

FACTUM OF THE INTERVENOR, AGRICULTURAL PRODUCERS ASSOCIATION OF SASKATCHEWAN INC.

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PART I – INTRODUCTION AND OVERVIEW

1. This case raises the issue of how to deal with the pressing concern of climate change in a federalist state where the Constitution allocates separate heads of power to Federal and Provincial legislatures – pursuant to which jurisdiction over environmental concerns arises.

2. The Agricultural Producers Association of Saskatchewan ("APAS") submits that the Constitution permits both levels of Government to take action in their respective domains. The result is the cooperative, constitutional approach to climate change which includes recognition that provincial legislatures are best suited to construct and implement the changes required to their local economies to address climate change.

3. APAS submits that the *Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12 s 186 (the "Act") is *ultra vires* of the legislative competence of Parliament. The pith and substance of the Act is to regulate local businesses and industry – including agriculture – and the behavior of consumers in the local economy, in order to reduce greenhouse gas emissions ("GHGs"). Such regulation of intra-provincial trade and commerce, and local property and civil rights, falls within the domain of provincial legislatures.

4. Further, or in the alternative, the Act does not satisfy the test for being found *intra vires* of Parliament's jurisdiction under the national concern branch of the peace, order and good government ("POGG") power. In particular:

(a) While Canada may enter into international treaties, their implementation – especially of environmental treaties – must defer to the principles of Federalism and cannot be dictated on the terms deemed appropriate by Canada.

(b) The Act's impact on provincial jurisdiction cannot be reconciled with the fundamental distribution of legislative power under the Constitution.

(c) The provincial inability test has not been met. The provinces, including Saskatchewan, are able to and have taken action to address climate

change and GHGs. The test is not satisfied simply because a Province declines to take action in a very specific way dictated by Canada.

PART II – JURISDICTION

5. For the reasons set out in the factum of the Attorney General of Saskatchewan ("Saskatchewan"), APAS agrees that this Court has jurisdiction to provide an advisory opinion on the question posed by Lieutenant Governor in Council – namely, whether the Act is unconstitutional in whole or in part.

PART III – SUMMARY OF FACTS

6. APAS generally agrees with the statement of facts set out in the factum of Saskatchewan. APAS also relies on the following factual themes, which show that:

(a) the pith and substance of the legislation is the regulation of local business, industry and consumer behavior in the provinces; and

(b) the provinces, including Saskatchewan, are acting to address climate change and GHGs.

A. Impact on agriculture in Saskatchewan

7. The carbon tax imposed by the Act will have a significant and negative impact on agriculture in Saskatchewan. Agricultural prices are determined – both in the short and long run – by supply and demand forces beyond the control of individual producers.

8. The vast majority of crops and livestock produced in Canada are exported to world markets. Producers cannot set the price of their commodities at market and are at the mercy of the market when determining the prices of their inputs, such as seed, fertilizer, herbicides, fungicides, insecticides, natural gas, propane and fuel. It is impossible for farmers to pass on increased costs to purchasers of their products. Their profit margins simply shrink or disappear altogether.

9. There are few alternative inputs for use by farmers. All of the aforementioned inputs are necessary for farming operations. In many rural areas there are few suppliers to choose from and even then, the suppliers use the same large distributors.

10. Farmers depend heavily on the transportation industry. Farmers must deliver their product to market and must also transport inputs to their farms. Due to the rural nature of farming, the distances various products must be shipped are often significant.

B. Actions to address climate change taken by local industry and the province

11. Local industry and the Province are taking steps to reduce GHGs.

12. The agriculture industry is deemed to have the greatest near-term (by 2030) GHG mitigation potential among the major economic sectors, through soil carbon sequestration.

13. Agricultural activities in managing soil, water, vegetation and animal life are intrinsically connected to the carbon cycle and to the climate. Producers play a crucial role in the management and stewardship of cultivated lands and grasslands that collectively sequester billions of tonnes of atmospheric carbon annually.

14. Saskatchewan has implemented a plan across the provincial economy to address climate change.[1] Saskatchewan's Climate Change Strategy includes a carbon tax on some large emitters, but recognizes that the "conversation about climate change must be broader than carbon pricing" and highlights Saskatchewan's "strong motivation to seek solutions" due to their experience with "varied and costly climate-related events."[2]

15. The Climate Change Strategy summarizes a broad-based approach across key sectors of the economy. That includes *inter alia*:

(a) Adoption of low-emission and sequestering techniques in agriculture, crop selection techniques, and forestry development.[3]

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[1] Record of the Attorney General of Saskatchewan at Tab 10: Prairie Resilience: A Made-in-Saskatchewan Climate Change Strategy ["*Climate Change Strategy*"].

[2] *Climate Change Strategy* at 2.

[3] Climate Change Strategy at 3-4.

(b) Reduction of emissions resulting from power generation through the use of carbon capture techniques, and increased use of renewable energy resources, in order attain a 40% reduction in GHGs by 2030.[4]

(c) Improved energy efficiency of existing buildings and reduced life cycle costs of new buildings.[5]

(d) Setting performance standards (including carbon intensity thresholds) and requirements to contribute to a technology and innovation fund for large industrial emitters.[6]

(e) Regulating the oil and gas industry to reduce emissions by 40% from 2015 levels.[7]

(f) Implementing a regulatory system for measuring, monitoring and reporting GHGs in order to facilitate further action by the Province.[8]

PART IV – POINTS IN ISSUE

16. APAS raises the following two (2) issues for this Honourable Court's adjudication:

(a) Is the Act in pith and substance a regulation of business, industry and consumer activity within the Province, and thus *ultra vires* of Parliament's legislative competence?

(b) Further, or in the alternative, does the Act satisfy the test for establishing that the Act is *intra vires* of Parliament's POGG power?

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[4] Climate Change Strategy at 5-6.

[5] Climate Change Strategy at 6.

[6] Climate Change Strategy at 8.

[7] Climate Change Strategy at 8-9.

[8] Climate Change Strategy at 10.

PART V – ARGUMENT

A. Canada is improperly regulating industry, business and consumers in Saskatchewan

17. The first step in reviewing the constitutional validity of a law is to determine the matter, or pith and substance, of the statute and thus the heads of power which are implicated. There is no single test for identifying the pith and substance and the approach used must be flexible and technical, rather than formalistic.[9] However, the Supreme Court of Canada maintains that in determining the pith and substance, a court must look to both the purpose of the law as well as its effects.[10]

18. It is clear that both the purpose and the effect of the Act is to regulate local industry, business and consumer activity – in a very specific way chosen by Canada – in order to endeavor to reduce GHGs. Such regulation falls into the provincial power over trade, commerce, property and civil rights in the Province, pursuant to s. 92(13) of the *Constitution Act, 1867*.

19. Prior to examining the pith and substance of the Act, it is useful to review the activity which falls within the provincial power over intra-provincial trade and commerce.

1. Scope of provincial jurisdiction over property and civil rights

20. Parliament's power under POGG and the provincial power to legislate with respect to property and civil rights have often been pitted against each other in division of powers litigation.[11]

21. The scope of a province's ability to legislate with respect to intra-provincial trade and commerce is significant. For example, the federal trade and commerce power will authorize a federal prohibition on the importation of margarine, but not a prohibition of its

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[9] *R v Morgentaler,* [1993] 3 SCR 463 at 481.

[10] *Kitkatla Band v British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] 2 SCR 146 at para 53 ["*Kitkatla Band*"].

[11] Guy Régimbald & Dwight Newman, *The Law of the Canadian Constitution*, 1st ed, Student Edition (Markham: LexisNexis Canada, 2013) at 227-228.

manufacture or sale in the province.[12] Parliament may regulate interprovincial marketing, but provinces have the power to regulate local marketing.

22. Provincial jurisdiction over intra-provincial trade and commerce clearly includes the ability to regulate the prices of all gasoline and fuel oil sold within the province.[13] The Supreme Court of Canada has also upheld a provincial marketing plan for the sale of raw milk by farmers to a specific milk processing company, which resulted in the company paying higher than regular market prices. The bulk of the milk was shipped out of the province by the processor. The Court held that this scheme remained "related to" intra-provincial trade and that it merely "affected" interprovincial trade.[14]

23. These provincial powers are important in a federalist state such as Canada. As noted by Professor Peter Hogg:

> In a country that covers a large area, and includes diverse regions, there may be advantages of efficiency and accountability in dividing the powers of government so that a national government is responsible for matters of national importance and provincial or state governments are responsible for matters of local importance. There would inevitably be diseconomies of scale if all governmental decision-making was centralized in one unwieldy bureaucracy. And a more decentralized form of government can be expected to be able to identify and give effect to different preferences and interests in different parts of the country.[15]

24. The courts have been careful to narrow the scope of doctrines such as interjurisdictional immunity, in order to preserve and protect provincial jurisdiction from federal overreach. For instance, in *Canadian Western Bank v. Alberta,*[16] Justices Binnie and Lebel noted:

> 45 Further, a broad use of the doctrine of interjurisdictional immunity runs the risk of creating an unintentional centralizing tendency in constitutional interpretation… The asymmetrical effect of interjurisdictional immunity can also be seen as undermining the principles of subsidiarity, i.e. that decisions "are often best [made] at a level of government that is not only effective, but also closest to the citizens affected" ….

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[12] *Reference Re Validity of Section 5(a) of the Dairy Industry Act, Canada Federation of Agriculture v Attorney-General of Quebec et al. Margarine Case* (1950), [1951] AC 179, [1950] 4 DLR 689 (PC).

[13] *Home Oil Distributors Ltd. et al. v Attorney-General of British Columbia et al.,* [1940] SCR 444.

[14] *Carnation Company Limited v Quebec Agricultural Marketing Board et al.,* [1968] SCR 238.

[15] Peter Hogg, *Constitutional Law of Canada*, 5th ed. (Thomson Reuters Canada: Toronto, 2018) at §5.2.

[16] *Canadian Western Bank v Alberta*, 2007 SCC 22, [2007] 2 SCR 3.

25. It is settled law that there is no stand-alone jurisdiction over the environment. In the context of environmental concerns arising from and falling within provincial purview pursuant to s. 92(13), the rationale for a federalist structure and the principle of subsidiarity holds considerable force. The provinces are in the best position to implement a broad-based plan, as Saskatchewan has done, to address climate change and GHG emissions from consumer activity, industry and business in Saskatchewan. That may include, for example, and in comparison to other provinces, an imposition of more onerous emission requirements on a particular area of the economy, such as power generation, with less onerous emission requirements on other areas of the economy such as agriculture. That is because the province is best situated to assess how to manage the provincial economy while addressing climate change.

26. In the present case, APAS submits that the pith and substance of the Act is the imposition of regulatory measures on intra-provincial trade and commerce.

2. The pith and substance of the Act is to regulate intra-provincial trade and commerce

27. It is evident that the purpose and particularly the effect of the Act is to regulate fundamental aspects of how industry and business is conducted in the Province.

28. There are two parts to the Act. The first implements a fuel charge while the second provides the framework for the Output-Based Pricing System (“OBPS”) and implements an excess emissions charge for large industrial emitters. The stated purpose of the Act is to effect the behavioral changes necessary to reduce GHG emissions arising from economic activity in the Province.

29. However, the “behavioral change” that the Act seeks to attain is in actuality a fundamental transformation of how business and industry is conducted in Saskatchewan. Indeed, much of Canada’s submission and evidentiary record is focused on establishing how effective it believes a general carbon levy will be in attaining that objective.

30. When determining the effect of a law, the court first looks to see what effect flows directly from the provisions of the law itself. Canada accepts at paragraphs 52, 80 and 102

of its factum that the Act's intended effect is to encourage "companies, investors, and consumers" to change their behavior or reduce their emissions.

31. Secondly, the court will examine what "side" effects flow from the application of the law which are not direct effects of the provisions of the law itself.[17] The side effects become quickly apparent when considering the application of the Act on a local level, particularly in respect of the agricultural and primary-resource industry. The two parts to the Act – the fuel charge and the OBPS – have significant effects that create a *de facto* regulatory scheme for intra-provincial commerce, particularly within the agricultural and primary-resource industry.

32. The producers and/or distributors of inputs, including seed, fertilizer, herbicides, fungicides, insecticides, natural gas, propane and fuel are subject to at least one or both of the fuel charge and the OBPS. As the Act specifically intends to pass this price down to consumers, the implementation of the Act will therefore cause prices of the aforementioned inputs to rise, as accepted by Canada at paragraph 49 of their factum. The simple exemption of farmers from paying the fuel charge[18] is of little consequence as it does not apply to the producers, manufacturers and retailers of these crucial, unavoidable inputs.

33. Similarly, trucking companies and railway companies – including companies operating entirely within the Province – who haul commodities such as grain, livestock and inputs for farmers will not be exempt from the fuel charge under Part I of the Act. Transport costs will correspondingly increase.

34. Despite an attempt by Canada to exempt farmers from the Act's fuel charge, farmers are clearly still going to be paying for the emissions of others by virtue of the fact that farmers are price takers. The cost of GHG emissions, as intended by Parliament, will be passed from high emitters such as fuel distributors and fertilizer manufacturers all the way down to farmers, who have no other option but to take the increased price.

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[17] *Kitkatla Band, supra* note 2 at para 54.

[18] *Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12 s 186 ss 17(2)(a)(iii).

35. It is difficult to imagine incentivizing behavioral changes among farmers by increasing the cost of inputs for which there are no viable alternatives. The Act could create many different results – reduced profit margins, an increase in cultivated acres by farmers in order to make up the financial shortfall or even a decrease in food produced by Canadian farmers due to the added costs associated with every input used on an agricultural operation. Any one of these results would also likely discourage technological innovation by farmers, as fewer financial resources would be available to explore new, but often costly, technologies.

36. Of course, the efficacy of the Act is not for the Court to question. However, the foregoing effects illustrate the profound impact of the Act on the economic activity of a key sector of the provincial economy, as well as why it is the Province which is best situated to implement the changes necessary to address climate change. When these effects are assessed, it becomes clear that the pith and substance of the Act is the regulation of intra-provincial trade.

3. The Act also significantly impacts provincial commerce among individual consumers

37. The fuel charge under Part I of the Act is clearly intended to increase the price of fuel for everyday consumers in every province, as noted by Canada at paragraph 49 of their factum.

38. The theory is that putting a price on emissions will cause Canadians to reduce their emissions by spending less on, or eliminating spending related to, GHG-emitting industries.[19] The anticipated effect is to encourage consumers to buy less fuel, purchase more electric and hybrid vehicles and utilize local mass transit options more often.

39. However, all of these areas, and resulting behavior and underlying objectives, fall squarely within the domain of property and civil rights, over which provinces have exclusive jurisdiction. The purchase and sale of consumer goods, such as fuel and vehicles, as well as spending on mass transit in a large but less densely populated province, clearly falls to Saskatchewan to legislate. Canada is essentially seeking to effect

[19] Factum of the Attorney General of Canada at para 44.

a structural transformation of Saskatchewan's consumer economy, while being ill-placed and ill-positioned to effect such changes.

40. As noted earlier in an excerpt from Professor Hogg's text: "A more decentralized form of government can be expected to be able to identify and give effect to different preferences and interests in different parts of the country." This is exactly why regulation of day-to-day life, including the purchase and sale of most consumer goods, normally falls to the provinces.

B. The Act is not an *intra vires* exercise of Canada's POGG power

41. In order for the Act to be *intra vires* of Parliament's power under the national concern doctrine of the POGG power, the following principles are applicable:[20]

> 1) The national concern doctrine applies to both new matters which did not exist at Confederation and to matters which, although originally matters of a local or private nature in a province, have since, in the absence of national emergency, become matters of national concern;
>
> 2) For a matter to qualify as a matter of national concern in either sense 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;
>
> 3) In determining whether a matter has attained the required degree of singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern it is relevant to consider what would be 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.

42. The last indicator is also known as the "provincial inability test". APAS submits that the second and third requirements are clearly not met by the Act, and that Canada is overreaching in its submissions on the first requirement.

43. With respect to the first requirement, Canada appears to be using the Act as a mechanism to achieve its commitments under a number of international treaties to which it is a signatory. The treaties include the *Kyoto Protocol*, the *Copenhagen Accord* and the *Paris Agreement*. Canada notes that they are not on track to meet their Copenhagen

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[20] *R v Crown Zellerbach*, [1988] 1 SCR 401 at para 33-34.

target[21] and that carbon pricing is "essential but not sufficient" for Canada to meet its *Paris Agreement* targets.[22]

44. Furthermore, several clauses in the preamble to the Act specifically identify international concerns:

> Whereas Canada has ratified the United Nations Framework Convention on Climate Change, done in New York on May 9, 1992, which entered into force in 1994, and the objective of that Convention is the stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system;
>
> Whereas Canada has also ratified the Paris Agreement, done in Paris on December 12, 2015, which entered into force in 2016, and the aims of that Agreement include holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change;
>
> Whereas the Government of Canada is committed to achieving Canada's Nationally Determined Contribution – and increasing it over time – under the Paris Agreement by taking comprehensive action to reduce emissions across all sectors of the economy, accelerate clean economic growth and build resilience to the impacts of climate change;

45. It appears that an important purpose of the Act is to ensure compliance with international treaties. Canada appears to be arguing that they are obliged to abide by international treaties to which they are a signatory. It is established that Canada has the power to enter into multi-lateral agreements. However, the *Labour Conventions*[23] case makes it clear that, in Canada, treaties are not self-executing. If a domestic law must be changed or effected in order to carry out treaty obligations, implementing legislation is required. Whether such legislation will be enacted falls within the purview of the level of government with legislative authority over the subject area of the treaty.

46. All of the aforementioned treaties involve the environment, which is not assigned to either the provincial legislatures or Parliament.[24] The provinces therefore retain jurisdiction

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[21] Factum of the Attorney General of Canada at para 16.

[22] Factum of the Attorney General of Canada at para 33.

[23] *A-G Can v A-G Ont* (Labour Conventions), [1937] AC 326.

[24] *Friends of Oldman River Society v Canada (Minister of Transportation),* [1992] 1 SCR 3.

to legislate on environmental matters and Parliament may also make laws affecting the environment within its own legislative powers.

47. This divided approach to environmental jurisdiction is even reflected in the international treaties to which Canada is a signatory. For example, the *Copenhagen Accord* acknowledges, in Article 10, that the implementation of the agreement must take into account the signatories' "national and, where appropriate, regional programs" as well as their "common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances."

48. Canada cannot rely on international treaties to ignore the jurisdiction of the provinces to legislate in the areas in which they hold power – specifically, the power over property and civil rights, which authorizes the regulation of land use and most aspects of mining, manufacturing and agriculture. This power includes the regulation of emissions that could pollute the environment.[25]

49. With respect to the second requirement, APAS submits that the Act's impact on provincial jurisdiction cannot be reconciled with the fundamental distribution of legislative power under the Constitution, including Saskatchewan's jurisdiction over intra-provincial trade and commerce. APAS relies in this regard on the evidence and argument presented at paragraphs 7-15 and 27-40 above.

50. With respect to the third requirement, APAS submits that the provincial inability test has not been met. The provinces, including Saskatchewan, are capable of – and are in fact – taking action to reduce GHG emissions.

51. As outlined in paragraph 8 above, Saskatchewan's Climate Change Strategy takes a broad and multi-faceted approach to reduce GHGs across key sectors of the economy. The includes carbon sequestering and crop-selection techniques in agriculture and forestry development, as well as carbon capture and the use of renewable resources in power generation. The Climate Change Strategy also includes energy efficiency standards for buildings, carbon pricing for large industrial emitters, and regulation of the oil and gas industry to reduce emissions by 40%.

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[25] *R v Lake Ontario Cement Ltd. et al.,* [1973] 2 OR 247, 35 DLR (3d) 109 (SC).

52. The Climate Change Strategy does not adopt the specific formula which Canada is seeking to impose. However, that is a considered decision of Saskatchewan based on its assessment of the pressure points, flexibility, and opportunities in the provincial economy – precisely what it is authorized to do by the Constitution. In other words, Saskatchewan has and is exercising its jurisdiction to address GHGs resulting from local trade and commerce – albeit in a more varied way than that preferred by Canada.

53. Rather than demonstrating provincial ***inability***, Canada is effectively imposing a test of provincial ***unwillingness*** to deal with GHG emissions in the very specific manner dictated by Canada. Evidently, there are different ways in which provinces can create distinctive regulatory regimes to limit GHG emissions, based on local considerations. That is what Saskatchewan has done. That approach accords with the principles of federalism, which permit each Province to create its own, tailor-made plan to address climate change.

PART VI – RELIEF

54. For all of the reasons outlined above, APAS submits that the Act is unconstitutional and seeks this Court's opinion that the whole of the Act is *ultra vires*.

55. Striking down or reading down the Act will not frustrate the effort to combat climate change in a federalist state. On the contrary, it will allow individual provinces and Canada to implement unique solutions and programs which are tailor-made to their specific jurisdiction and industries, in order to effect behavioral change in respect of climate change.

56. Parliament retains the ability to legislate and implement carbon pricing in areas which fall within their jurisdiction. They could, for instance, use their discretion to regulate GHGs in the areas of shipping, fisheries or airspace. Unfortunately, the Act is not set up in a way that distinguishes legitimate areas of regulation from areas which exceed federal jurisdiction. Accordingly, the entire Act is properly declared *ultra vires*.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of January, 2019.

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PART VII – AUTHORITIES

Statutes

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partial and temporary alteration of the
nent and the Provincial Legislatures".[97] All
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emporary measures.[98]

Regulations, P.C. 9029, [1950] S.C.J. No. 1, [1950]

a), [1976] S.C.J. No. 12, [1976] 2 S.C.R. 373 at 457

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CHAPTER 7

PROPERTY AND CIVIL RIGHTS (SECTION 92(13)) & PROVINCIAL AUTHORITY IN RELATION TO LOCAL AND PRIVATE MATTERS (SECTION 92(16))

1. INTRODUCTION

§7.1 Section 92(13) of the *Constitution Act, 1867*[1] grants the provincial Legislatures the power to make laws in relation to "Property and Civil Rights in the Province". Of all the provincial heads of power enumerated under section 92, section 92(13) is one of the most, if not *the* most, important.[2]

§7.2 Section 92(13) plays an integral role in the broader division of powers tussle between sections 91 and 92, and is often pitted against three of the major heads of federal power. The general trend is for the federal government to argue that a matter concerns the peace, order and good government ("POGG") of

1 *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

2 "'Property and Civil Rights' is one of the most important heads of provincial jurisdiction enumerated in s. 92 of the B.N.A. Act": *R. v. Zelensky*, [1978] S.C.J. No. 48, [1978] 2 S.C.R. 940 at 979 (S.C.C.) (Pigeon J., dissenting in part).

Canada, trade and commerce, or criminal law power, and conversely for the province(s) to argue that a matter more aptly implicates property and civil rights.[3]

§7.3 At the time of Confederation, the phrase "property and civil rights" was understood to mean the whole body of local laws that were not supplanted by the conquest of a foreign power. The phrase was used to describe the system of civil law, which was restored by the *Quebec Act of 1774*.[4] Pursuant to this section, the provincial legislatures are competent to enact laws that govern relationships between individuals and their "property" (real, personal and intangible[5]) as well as individuals and each other, or their proprietary "civil rights", including most of the law of contracts, torts, debtor/creditor situations and the family. This expansive power has the potential to touch every aspect of daily life within a province.

§7.4 Section 92(16) of the *Constitution Act, 1867* grants the provincial Legislatures the power to legislate on "matters of a merely local or private nature in the province". "Local" may mean legislation that is either of significance to a locality in a specific part of a province, or limited to the province as a whole.[6] Despite the breadth of the phrase at first glance, section 92(16) is rarely relied upon as a head of provincial power in its own right. Instead, it is usually mentioned alongside another section, often but not limited to section 92(13), as an alternative reason for finding provincial competence.

§7.5 While section 92(16) has not featured prominently as an independent source of provincial power in the jurisprudence, the provision has nevertheless been the subject of deliberation amongst constitutional scholars for its untapped potential. It may be that the framers of the Constitution intended this section to function as a residuary source of power for the provinces, much like the "peace, order and good government" clause in the opening words of section 91, granting all other remaining local or private matters not specifically enumerated under section 92 to the local Legislatures.[7] Courts have occasionally referred to this subsection as a residuary or supplemental head of power as well,[8] but it has not been widely regarded or accepted as a "POGG for the provinces". However, it is of interest that both camps within the Supreme Court of Canada in its decision in

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3 See, for example, *Reference re Securities Act*, [2011] S.C.J. No. 66, [2011] 3 S.C.R. 837 (S.C.C.).

4 *Quebec Act of 1774*, 14 Geo. III, c. 83.

5 Intangible property would include such things as stocks, bonds and trade-marks. However, ss. 91(22) and 91(23) grant Parliament jurisdiction over patents and copyrights.

6 W.H. McConnell, *Commentary on the British North America Act* (Toronto, ON: Macmillan, 1977) at 286.

7 See, for example, Kenneth Lysyk, "Constitutional Reform and the Introductory Clause of Section 91: Residual and Emergency Law-Making Authority" (1979) 57 Can. Bar Rev. 531; and Albert S. Abel, "What Peace, Order and Good Government?" (1968) 7 West. Ont. L. Rev. 1.

8 *Nova Scotia (Board of Censors) v. McNeil*, [1978] S.C.J. No. 25, [1978] 2 S.C.R. 662 at 700 (S.C.C.); *Reference re Farm Products Marketing Act (Ontario)*, [1957] S.C.J. No. 11, [1957] S.C.R. 198 at 212 (S.C.C.); and *Re Ontario Liquor License Case*, [1896] J.C.J. No. 1, [1896] A.C. 348 (P.C.) [*Local Prohibition Reference*].

5.2 — Reasons for federalism

The genesis of the federal system in Canada was a political compromise between proponents of unity (who would have preferred a legislative union) and proponents of diversity (who were unwilling to submerge the separate identities of their provinces). Probably, a tension of this sort lies at the origin of all federal systems. But it should not be assumed that federalism is just a second-best alternative to a legislative union. The federal form of government has some distinctive advantages.[47]

In a country that covers a large area,[48] and includes diverse regions, there may be advantages of efficiency and accountability in dividing the powers of government so that a national government is responsible for matters of national importance and provincial or state governments are responsible for matters of local importance. There would inevitably be diseconomies of scale if all governmental decision-making was centralized in one unwieldy bureaucracy. And a more decentralized form of government can be expected to be able to identify and give effect to different preferences and interests in different parts of the country.

A related point is that a province or state, being more homogeneous than the nation as a whole, will occasionally adopt policies that are too innovative or radical to be acceptable to the nation as a whole. In this way, a province or state may serve as a "social laboratory" in which new kinds of legislative programmes can be "tested".[49] If a new programme does not work out, the nation as a whole has not been placed at risk. If the programme works well, it will be copied by other provinces or states, and perhaps (if the Constitution permits) by the federal government. One can observe this kind of development in Canada with respect to social credit (which started in Alberta in 1935 and never took hold), medicare (which started in Saskatchewan in 1961 and became a national programme in 1968), family property regimes (which now exist in all provinces) and no-fault automobile insurance (which now exists in several provinces).

An entirely different argument in favour of federalism is that the division of governmental power inherent in a federal system operates to preclude an excessive concentration of power and thus as a check against tyranny.[50] The other side of that argument is that "federal government means weak government", because the dispersal of power makes it hard to enact and implement new public policies, especially radical policies.[51] In the right conditions, however, as we have noticed,[52] change can be initiated by a province or state, and later adopted more widely.

FOOTNOTES

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[47] A well-known account of the political merits of federalism is in J.B. Bryce, *The American Commonwealth* (1897), ch. 29. For modern Canadian discussions, see Smiley, *The Federal Condition in Canada* (1987), 15-22; Smith, *Federalism and the Constitution of Canada* (2010).

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[48] Federalism is also a convenient device for developing a new and large country, allowing the gradual expansion of settlement to be accompanied by local governments that are suitable to the needs of each new region. This is one of the "merits of the federal system" offered in Bryce, previous note, 248.

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[49] *New State Ice Co. v. Liebmann* (1932) 285 U.S. 262, 311 per Brandeis J. ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.") See also Trudeau, *Federalism and the French Canadians* (1968), 124-150.

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[50] See P.-J. Proudhon, *The Principle of Federation* (1863) (trans, by R. Vernon, U. Toronto Press, 1979), who extols federalism as the best possible compromise between liberty and authority; A. Hamilton, J. Madison and J.J. Jay, *The Federalist* papers (1787-1788) (New American Library, New York, 1961), esp. Nos. 10, 51 by Madison, arguing that federalism is a protection for minorities (especially property-owning minorities) against the rule of the majority.

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[51] Dicey, note 5, above, 171; Smiley, note 34, above, 19-22.

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[52] Note 49, above.