


12-2020

## POGG and Treaties: The Role of International Agreements in National Concern Analysis

Gib van Ert

Follow this and additional works at: <https://digitalcommons.schulichlaw.dal.ca/dlj>

 Part of the [Common Law Commons](#), [International Law Commons](#), and the [Public Law and Legal Theory Commons](#)



This work is licensed under a [Creative Commons Attribution 4.0 License](#).

---

### Recommended Citation

Gib van Ert, "POGG and Treaties: The Role of International Agreements in National Concern Analysis" (2020) 43:2 Dal LJ 901.

This Article is brought to you for free and open access by the Journals at Schulich Law Scholars. It has been accepted for inclusion in Dalhousie Law Journal by an authorized editor of Schulich Law Scholars. For more information, please contact [hannah.steeves@dal.ca](mailto:hannah.steeves@dal.ca).

*Canada's international treaty obligations have featured prominently in Privy Council and Supreme Court of Canada jurisprudence on Parliament's power to make laws for the peace, order and good government of Canada (POGG). How treaties ought properly to be used in determining Parliament's POGG jurisdiction is a constitutionally fraught question. The federal executive cannot be permitted to extend Parliament's legislative jurisdiction by making promises to foreign states. Yet the existence of treaty obligations is undoubtedly relevant to the question of whether a given subject has become a matter of national concern. In the upcoming Greenhouse Gas Pollution Pricing Act references, the Supreme Court of Canada will confront this problem again. This article seeks to explain how courts may properly use international agreements in POGG cases.*

*Les obligations du Canada en vertu des traités internationaux ont occupé une place importante dans la jurisprudence du Conseil privé et de la Cour suprême du Canada concernant le pouvoir du Parlement d'adopter des lois pour la paix, l'ordre et le bon gouvernement du Canada. La question de savoir comment les traités doivent être utilisés pour déterminer la compétence du Parlement en ces matières est une question d'ordre constitutionnel. L'exécutif fédéral ne peut être autorisé à étendre la compétence législative du Parlement en faisant des promesses à des États étrangers. Pourtant, l'existence d'obligations conventionnelles est sans aucun doute pertinente pour déterminer si un sujet donné est devenu un sujet d'intérêt national. La Cour suprême du Canada sera à nouveau confrontée à ce problème lors des prochains renvois relatifs à la Loi sur la tarification de la pollution causée par les gaz à effet de serre. Le présent article cherche à expliquer comment les tribunaux peuvent utiliser correctement les accords internationaux dans les affaires relatives aux lois pour la paix, l'ordre et le bon gouvernement.*

---

\* Gib van Ert practices public law and civil litigation in Ottawa and Vancouver.

*Introduction*

- I. *The three references*
- II. *Privy Council case law on treaties and POGG*
  1. Re Aeronautics
  2. Re Radio
  3. Re Labour Conventions
- III. *Supreme Court of Canada case law on treaties and national concern*
  1. Johannesson
  2. Anti-Inflation and Vapor Canada
  3. Hauser
  4. Schneider
  5. Crown Zellerbach
  6. Ontario Hydro
- IV. *Treaties and POGG: some conclusions*
  1. *Treaty obligations are relevant to, but not determinative of, Parliament's POGG jurisdiction*
  2. *For POGG purposes, treaties are judicially noticeable facts*
  3. *Treaties may demonstrate the advent of a new matter*
  4. *Treaties are relevant to the issue of extra-provincial dimensions*
  5. *Treaties are relevant to the singleness/provincial inability analysis*
  6. *Resort to treaties is seemingly permitted at all stages of POGG analysis*
- V. *Treaties and POGG in the Greenhouse Gas references*
  1. *Saskatchewan*
  2. *Ontario*
  3. *Alberta*

*Conclusion*

*Introduction*

Three references arising from Parliament's *Greenhouse Gas Pollution Pricing Act* will soon be heard by the Supreme Court of Canada. In each case, Canada is defending the legislation as valid under the national concern branch of Parliament's peace, order and good government (POGG)

power. And in each case Canada is invoking the state's obligations under international climate change agreements. International agreements have played a central, if somewhat uncertain, role in POGG cases going back to the days of the Privy Council. How treaties ought properly to be used in determining Parliament's POGG jurisdiction is a constitutionally fraught question. I explain the issue, and attempt to distill some conclusions from the case law, here.

The constitutional problem is this: how can courts reconcile the undoubted relevance of Canada's international treaty obligations to the national concern analysis with the clear risk to federalism posed by an expanded federal legislative reach justified by unilateral federal treaty-making?

### I. *The three references*

The governments of Saskatchewan, Ontario and Alberta have each challenged the federal *Greenhouse Gas Pollution Pricing Act*<sup>1</sup> as *ultra vires* Parliament in references to their respective courts of appeal. All three courts sat in five-judge divisions to consider the issue, and all three courts split. In Saskatchewan the Act was upheld three to two.<sup>2</sup> In Ontario the result was four to one in favour.<sup>3</sup> The only court to strike down the Act was Alberta, four to one.<sup>4</sup>

In each proceeding, Canada conceded that the Act could not be supported under an enumerated head of federal power. Instead, Canada resorted to POGG. More specifically, Canada's case rested on POGG's national concern branch. According to this doctrine, Parliament may enact laws concerning both new matters that did not exist at Confederation (when the distribution of legislative powers between Parliament and the provincial legislatures was enacted in the *Constitution Act, 1867*) and matters that, although originally of a local or private nature in a province, have become matters of national concern.

Canada's argument, and the judgments of the three courts of appeal, rely extensively on the international legal regime governing climate change. The main instruments referred to are treaties to which Canada is—or, in the case of the *Kyoto Protocol*, once was—a party. They are the *United Nations Framework Convention on Climate Change 1992* (UNFCCC),<sup>5</sup> the *Kyoto Protocol to the United Nations Framework*

---

1. SC 2018, c 12.

2. *Reference re: Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40 [*Saskatchewan Reference*].

3. *Reference re: Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544 [*Ontario Reference*].

4. *Reference re: Greenhouse Gas Pollution Pricing Act*, 2020 ABCA 74 [*Alberta Reference*].

5. 1994, Can TS No 7.

*Convention on Climate Change 1997*,<sup>6</sup> and the *Paris Agreement 2015*.<sup>7</sup> Also relied on is a non-binding international instrument, the *Copenhagen Accord*.<sup>8</sup>

Before looking more closely at the three references, we need to situate them in the case law. Courts and governments have been turning to international agreements in POGG cases since the 1930s. Whether and how the state's treaty obligations affect Parliament's legislative jurisdiction has been controversial. A review of the cases shows why.

## II. *Privy Council case law on treaties and POGG*

### 1. *Re Aeronautics*

In *Re Aeronautics*, the question was Parliament's competence to legislate in the field of aeronautics.<sup>9</sup> The Supreme Court of Canada had gone against the Dominion, holding that while Parliament had considerable section 91 jurisdiction in the area, the provinces also had jurisdiction for some aspects. The Privy Council rejected this approach, conferring aeronautics as a whole on Parliament chiefly—but not wholly—on the basis of the Empire treaties provision (section 132) of the *Constitution Act, 1867*:

The Parliament and Government of Canada shall have all Powers necessary or proper for performing the Obligations of Canada or of any Province thereof, as Part of the British Empire, towards Foreign Countries, arising under Treaties between the Empire and such Foreign Countries.<sup>10</sup>

Largely forgotten today, this provision clearly granted Parliament legislative jurisdiction to perform British Empire treaty obligations, i.e., to implement them in domestic law. The treaty relied upon in this case was the *Convention for the Regulation of Aerial Navigation 1919*,<sup>11</sup> an agreement ratified by His Majesty on behalf of the British Empire in 1922.

Lord Chancellor Sankey for the Board found that Parliament's aeronautics legislation was, for the most part, in performance of Canada's obligations under the Convention and therefore *intra vires* Parliament under section 132. Yet Parliament's enactment included military aircraft,

6. 1998, 37 ILM 32, 2303 UNTS 1 (entered into force on 16 February 2005, Canada withdrew effective 15 December 2012).

7. 2016, Can TS No 9 [*Paris Agreement*].

8. UNFCCC, 15th Sess, UN Doc FCCC/CP/2009/L.7 (18 December 2009).

9. *Reference re: Regulation and Control of Aeronautics in Canada*, [1932] 1 DLR 58 (PC), [1932] 3 WWR 625 [*Re Aeronautics*].

10. *Constitution Act, 1867* (UK), 20 & 31 Vict, c 3, s 132, reprinted in RSC 1985, Appendix II. No 5 [*Constitution Act, 1867*].

11. 1919, UKTS 002, Cmd 1609 (entered into force on 29 March 1922).

a matter not under the Convention at all. That jurisdiction might readily have been found under section 91(7) (“Militia, Military and Naval Service, and Defence”), but the Board did not rely on that head of power. Rather, it invoked Parliament’s POGG power as set out in *Re Fisheries Act, 1914*<sup>12</sup> and earlier Privy Council authorities, saying:

There may be a small portion of the field which is not by virtue of specific words in the B.N.A. Act vested in the Dominion ; but neither is it vested by specific words in the Provinces. As to such small portion it appears to the Board that it must necessarily belong to the Dominion under its power to make laws for the peace, order and good government of Canada. Further their Lordships are influenced by the facts that the subject of aerial navigation and the fulfilment of Canadian obligations under s. 132 are matters of national interest and importance; and that aerial navigation is a class of subject which has attained such dimensions as to affect the body politic of the Dominion.<sup>13</sup>

This is far from a clear explanation of the relevance of treaty obligations to the national concern branch of POGG. But the suggestion is that the fact that Canada has international obligations to perform in domestic law may support the validity of an Act of Parliament the subject matter of which does not fall within an enumerated head of either federal or provincial power. The existence of a treaty, it seems, may be indicative that the matter of the legislation under scrutiny is of national concern under Parliament’s residual power.

## 2. *Re Radio*

The issue came back before the Privy Council almost immediately, this time with a Canadian rather than an Empire treaty. In *Re Radio*, the question was legislative jurisdiction over the regulation and control of radio communication.<sup>14</sup> The treaty in issue was the *International Radiotelegraph Convention 1927*,<sup>15</sup> an agreement negotiated, signed and ratified by Canada independent from the UK. The Convention not being an Empire treaty, section 132 did not apply. Yet Viscount Dunedin for the Board concluded that “it comes to the same thing” because, being “quite unthought-of in 1867” and “not mentioned explicitly in either s. 91 or s. 92,” legislation to give domestic effect to a Canadian treaty obligation falls within POGG.<sup>16</sup> The learned judge explained:

12. [1930] WWR 449, [1930] 1 DLR 194 (PC).

13. *Re Aeronautics*, *supra* note 9 at 70.

14. *Reference re: Regulation and Control of Radio Communication in Canada*, [1932] 2 DLR 81 (PC), [1932] 1 WWR 563 [*Re Radio*].

15. 1929, Can TS No 1.

16. *Re Radio*, *supra* note 14 at 83-84.

It is Canada as a whole which is amenable to the other powers for the proper carrying out of the Convention : and to prevent individuals in Canada infringing the stipulations of the Convention it is necessary that the Dominion should pass legislation which should apply to all the dwellers in Canada.<sup>17</sup>

This was not the Board's sole rationale for conferring radio on Parliament. It also relied on section 92(10)(a)'s exception to provincial jurisdiction for telegraphs and other works and undertakings connecting the provinces or extending beyond provincial limits. Nevertheless, the treaty is clearly doing significant work here in expanding Parliament's jurisdiction.

Bringing aeronautics and radio within Parliament's power as matters of national concern was undoubtedly convenient. But Parliament's POGG jurisdiction was granted before the attainment of full Canadian statehood, and appears not to have contemplated a federal (as opposed to imperial) treaty-making power. The result in *Re Radio* seemed to allow the Government of Canada to expand Parliament's legislative competence, and correspondingly reduce that of the provincial legislatures, by concluding legal agreements with foreign states. In a striking course correction, the Privy Council adopted a very different approach in *Attorney-General for Canada v Attorney-General for Ontario* (better known as the *Labour Conventions* case).<sup>18</sup>

### 3. Re Labour Conventions

Like *Re Aeronautics* and *Re Radio*, *Re Labour Conventions* was a reference to determine the validity of federal legislation. In a sweeping invasion of what was admittedly provincial jurisdiction, Parliament enacted a series of laws aimed at pulling Canada's economy out of the Great Depression with a Roosevelt-style New Deal. Canada admitted the legislation was within the provinces' legislative jurisdiction under section 92(13) unless some federal head of power could be made out. That was to be found, Canada contended, in the labour part of the *Treaty of Versailles 1919*,<sup>19</sup> which contemplated subsequent treaties for the improvement of labour conditions worldwide. To this end, conventions were adopted through the International Labour Organization in 1919, 1921 and 1928. They limited industrial work hours, established weekly rest, and provided for minimum wages.<sup>20</sup> Canada belatedly ratified the three conventions in

17. *Ibid* at 84.

18. [1937] AC 326, [1937] 1 WWR 299 [*Labour Conventions*].

19. 1919, Can TS No 4.

20. See *The Weekly Rest in Industrial Undertakings Act*, SC 1935, c 14; *The Minimum Wages Act*, SC 1935, c 44; *The Limitation of Hours of Work Act*, SC 1935, c 63.

quick succession in March and April 1935. Parliament then enacted the impugned laws in implementation of the three conventions, using the new powers *Re Radio* had seemed to grant.

*Labour Conventions* is best known today for Lord Atkin's momentous conclusion that:

For the purposes of ss. 91 and 92, i.e., the distribution of legislative powers between the Dominion and the Provinces, there is no such thing as treaty legislation as such. The distribution is based on classes of subjects; and as a treaty deals with a particular class of subjects so will the legislative power of performing it be ascertained.<sup>21</sup>

In other words, Parliament cannot necessarily implement treaties made by the Federal Government. Whether it can do so or not is determined according to the ordinary division of powers. This was effectively the conclusion Justice Duff for the Supreme Court of Canada had reached in 1925 in a reference concerning one of the same three treaties at issue in *Labour Conventions*.<sup>22</sup> Yet Lord Atkin's decision came as a stunning surprise because *Re Radio* had seemed to establish the opposite rule, i.e., that treaty legislation was a matter of national concern falling within Parliament's residual POGG power. Lord Atkin rejected that conclusion, observing that the legislation now before the Board could not be brought within section 91, and was in fact "expressly excluded from the general powers given by the first words of the section."<sup>23</sup> He is referring here to the limitation on Parliament's POGG jurisdiction to "Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces."<sup>24</sup>

As for *Re Radio*, Lord Atkin distinguished it from *Re Labour Conventions* based on the subject matters of the treaties at issue in the two cases. The radiotelegraph convention dealt with classes of matters not falling within either section 91 or 92. The labour conventions, meanwhile, each came within section 92. By this reasoning, Lord Atkin left open the possibility that Canadian treaty obligations might support a claim to POGG jurisdiction in cases where the treaty's subject matter does not fall within section 92, while largely closing the loophole *Re Radio* introduced that permitted federal governments to expand Parliament's jurisdiction at the expense of the provinces by "making promises to foreign countries."<sup>25</sup>

---

21. *Labour Conventions*, *supra* note 18 at 351.

22. *Re Legislative Jurisdiction over Hours of Labour*, [1925] SCR 505, [1925] 3 DLR 1114.

23. *Labour Conventions*, *supra* note 18 at 350.

24. *Constitution Act, 1867*, *supra* note 10, s 91.

25. *Labour Conventions*, *supra* note 18 at 352.



Elsewhere I have told the story of how infuriated English Canadian commentators were by *Re Labour Conventions*.<sup>26</sup> The decision was an important nail in the coffin then under construction for the Privy Council's appellate jurisdiction over Canada. But the Supreme Court of Canada has nevertheless maintained (with some wobbles, as we will see) the rule that the implementation of treaty obligations in domestic law is determined according to the distribution of powers provided for by the *Constitution Act 1867*.

### III. *Supreme Court of Canada case law on treaties and national concern*

#### 1. Johannesson

The question of treaties and POGG in the field of aeronautics came back before the courts—this time with the Supreme Court of Canada serving as the final court of appeal—in *Johannesson v Municipality of West St. Paul*.<sup>27</sup> Mr. Johannesson had been operating a civil aviation business since the late 1920s. He acquired land outside Winnipeg for an airport. The local municipality objected to the noise and adopted bylaws effectively prohibiting his intended use of the land. All seven judges of the Supreme Court of Canada found the bylaws, and their authorizing provincial statute, *ultra vires* because aeronautics was within the exclusive jurisdiction of Parliament. Despite there being five sets of reasons, the underlying reasoning in each is largely consistent on the key point, namely that aeronautics was a matter of national concern under POGG and that the presence of relevant treaty obligations supported that conclusion.

A notable aspect of *Johannesson* was that the underlying treaty was no longer an Empire treaty. Recall that in *Re Aeronautics*, the Privy Council relied chiefly on Parliament's jurisdiction under section 132, and additionally on Parliament's residual jurisdiction in respect of matters not assigned to the provinces and that had become matters of national concern. While Lord Atkin described this latter part of the reasoning in *Re Aeronautics* as *obiter*, the wisdom of it became clear in *Johannesson*. To leave an Empire treaty as the sole juridical foundation for federal jurisdiction less than a year after the enactment of the *Statute of Westminster*<sup>28</sup> risked a disruptive loss of that jurisdiction in the event that Canada ever withdrew from the treaty. As indeed it did. By means of an executive certificate from the Under-Secretary of State for Foreign

26. Gib van Ert, *Using International Law in Canadian Courts*, 2nd ed (Toronto: Irwin Law, 2008) at 259-263.

27. [1952] 1 SCR 292, [1951] 4 DLR 609 [*Johannesson*].

28. 1931 c 4.

Affairs, counsel for the Attorney General of Canada informed the Supreme Court that Canada had denounced the Convention of 1919 in the course of ratifying the new *Chicago Convention on International Civil Aviation*<sup>29</sup> in 1947. The latter treaty was, of course, made by Canada independent from the British Empire, and therefore section 132 did not apply. As Justice Kerwin observed, that provision “therefore ceased to have any efficacy to permit Parliament to legislate upon the subject of aeronautics.”<sup>30</sup>

*Johannesson* is, in a sense, the first modern consideration of the place of international agreements in POGG analysis—shorn of the potentially clouding influence of section 132 and finally decided by the Supreme Court of Canada. What role did the court assign to the *Chicago Convention* in its POGG analysis? Perhaps the clearest statement is from Justice Kerwin:

Now, even at the date of the *Aeronautics* case, the Judicial Committee was influenced (i.e. in the determination of the main point) by the fact that in their opinion the subject of air navigation was a matter of national interest and importance and had attained such dimensions. That that is so at the present time is shown by the terms of the Chicago Convention of 1944 and the provisions of the Dominion Aeronautics Act and the regulations thereunder referred to above. The affidavit of the appellant Johannesson, from which the statement of facts was culled, also shows the importance that the subject of air navigation has attained in Canada. To all of which may be added those matters of everyday knowledge of which the Court must be taken to be aware.<sup>31</sup>

In this passage, the learned judge assimilates the *Chicago Convention* with the federal *Aeronautics Act* and its regulations, the affidavit of Mr. Johannesson, and notorious facts (“those matters of everyday knowledge of which the Court must be taken to be aware”), all of which show aeronautics to be a matter of national concern. In short, the treaty (including, one presumes, the fact of its existence and its content) is evidence in favour of the legal conclusion that the matter of aeronautics is within POGG as a matter of national concern. It is somewhat odd to treat a legal instrument—the *Chicago Convention*—as evidence. It is perhaps odder still to treat the *Aeronautics Act* and its regulations as such. Clearly that is not how courts approach statutes, regulations and international instruments for most purposes. But it makes sense for POGG purposes. The court must determine whether the subject matter of a contested enactment goes beyond local or provincial concern or interests to attain

---

29. 7 December 1944, UNTS No 102.

30. *Johannesson*, *supra* note 27 at 307.

31. *Ibid* at 308.

national dimensions. For the purpose of that inquiry, the existence and content of a treaty obligation may be relevant in an evidentiary way.

## 2. Anti-Inflation and Vapor Canada

The next Supreme Court decision squarely concerning POGG and treaties was *The Queen v Hauser*.<sup>32</sup> Two POGG cases were decided in between, however: *Munro v National Capital Commission*<sup>33</sup> and *Re Anti-Inflation Act*.<sup>34</sup> Neither of those involved an international agreement. But the plurality in *Re Anti-Inflation* did have cause to refer to international treaty-making and its internal consequences. The legislative scheme under consideration involved an Act of Parliament (the *Anti-Inflation Act*)<sup>35</sup> and an agreement between the governments of Canada and Ontario concerning the application of the Act (and regulatory guidelines made thereunder) to the Ontario public sector. Chief Justice Laskin (for himself and three others) upheld the Act under POGG's emergency doctrine but found that the Canada-Ontario agreement did not render the Act and guidelines applicable to the provincial public sector. The chief justice explained that there is "no principle in this country, as there is not in Great Britain, that the Crown may legislate by proclamation or order in council to bind citizens where it so acts without the support of a statute of the Legislature" and that "even if the agreement is binding upon the Government of Ontario as such, on the analogy of treaties which may bind the contracting parties but yet be without domestic force, that would not make the agreement part of the law of Ontario binding upon persons purportedly affected by it."<sup>36</sup> In short, intergovernmental agreements, like international agreements, require legislative implementation to take effect in domestic law.<sup>37</sup>

32. [1979] 1 SCR 984, 46 CCC (2d) 481 [*Hauser*].

33. [1966] SCR 663, 57 DLR (2d) 753.

34. [1976] 2 SCR 373, 68 DLR (3d) 452 [*Re Anti-Inflation*].

35. SC 1974-1976, c 75.

36. *Re Anti-Inflation*, *supra* note 32 at 433.

37. This principle is qualified, in respect of international agreements, by the interpretive presumption of conformity with international law. While treaties cannot take direct legal effect without legislative implementation, courts have recognized that the presumption of conformity confers indirect legal effect on treaties whether implemented or not. See: *Australian Competition and Consumer Commission v PT Garuda Indonesia (No 9)*, [2013] FCA 323 (Fed Ct Australia) at para 43: "when... a court construes a statute to comply with a treaty obligation... international law then exerts a discernible influence on the content of local law"; *R (Miller) v Secretary of State for Exiting the European Union*, [2016] EWHC 2768 (Admin) at para 33: "treaties can have certain indirect interpretive effects in relation to domestic law"; *Higgs v Minister of National Security and Others (Bahamas)*, [1999] UKPC 55 at para 12: treaties have "no effect upon the rights and duties of citizens in common or statute law" but "may have an indirect effect upon the construction of statutes"; *Bhajan v Bhajan*, 2010 ONCA 714 at para 14: "Although the Convention has not been specifically incorporated into domestic law and its provisions therefore have no direct application in Canadian law, the values reflected in the Convention can help to inform the contextual approach to statutory interpretation and judicial review."

One other case needs mention before coming to *Hauser*. In *MacDonald v Vapor Canada Ltd*,<sup>38</sup> the Supreme Court of Canada flirted with the notion of overruling the central holding of *Labour Conventions*, namely that there is no power in Parliament to implement Canadian treaty obligations where the subject matter of the treaty would otherwise come within provincial legislative jurisdiction. This was in response to the appellants' contention (supported by the Attorney General of Canada) that the provision under scrutiny could be supported under POGG. In an extensive *obiter dictum*, Chief Justice Laskin quoted approvingly from Lord Dunedin in *Re Radio*, including the observation that treaty-implementing legislation, being not contemplated in 1867 and not explicitly mentioned in either section 91 or 92, falls within POGG. Having walked right to the edge of this precipice, Chief Justice Laskin declined to jump. He concluded that Parliament had not expressly stated that the provision at issue was in implementation of a treaty, and that:

assuming Parliament has power to pass legislation implementing a treaty or convention in relation to matters covered by the treaty or convention which would otherwise be for provincial legislation alone, the exercise of that power must be manifested in the implementing legislation and not be left to inference.<sup>39</sup>

In concurring reasons, Justice de Grandpré observed that he was initially attracted to the submission that the court was faced with "legislation enacted by Parliament under the Treaty making power of Canada," but he concluded that the treaty had no application here.<sup>40</sup> Thus all judges of the Supreme Court of Canada endorsed, if only in *obiter*, the notion that Parliament might have a power under POGG to implement treaty obligations incurred by the federal government.

The constitutional implications of what was contemplated here are enormous. To reverse *Labour Conventions* and bestow upon the federal government a unilateral power to expand Parliament's jurisdiction through international treaty-making would radically reshape the Canadian division of powers. Parliament's powers would increase dramatically, and the provinces' powers would diminish to the same extent.

It seems clear that the *Vapor* court lacked a proper appreciation of how many treaties Canada concludes each year, how many of those involve domestic legal issues, and how many of those domestic legal issues touch provincial jurisdiction. In 1977 there was no easy way of knowing these

---

38. [1977] 2 SCR 134, 66 DLR (3d) 1.

39. *Ibid* at 171.

40. *Ibid* at 176.

things. Incredibly, the same is true in 2020. Canada's practices in the conclusion and domestic performance of treaties remain scandalously opaque. There is no easy way to discover what treaties are in contemplation, what treaties are concluded, what existing federal and provincial laws are relied upon to perform them, or even, in many cases, what new laws are adopted in implementation of them. Even when answers to some of these questions are in the public record, it is in such an obscure and inaccessible way as to not constitute publication at all.<sup>41</sup> The result of this sorry state of affairs is that courts and litigants frequently go about their business in ignorance of the international aspects and implications of their work.

### 3. Hauser

Much of the Supreme Court of Canada's judgment in *The Queen v Hauser* concerned jurisdiction over the preference of indictments and conduct of proceedings under the *Narcotic Control Act*.<sup>42</sup> But the Court also had to characterize that Act for division of powers purposes. The majority held that the Act was not made in exercise of Parliament's criminal law power, for its character was the control, rather than prohibition, of narcotics. Instead, Parliament's jurisdiction was found in POGG's national concern branch. The control of narcotics was, according to the majority, a genuinely new problem that did not exist at the time of Confederation and could not be classified as a matter of a merely local or private nature.<sup>43</sup>

In coming to this conclusion, Justice Pigeon for the majority relied significantly on Canadian treaty obligations.<sup>44</sup> He reviewed the history of federal legislation on narcotics, noting contemporaneous international agreements on the subject, starting with a 1912 Empire treaty<sup>45</sup> and continuing with Canadian treaties of 1925,<sup>46</sup> 1931<sup>47</sup> and 1961.<sup>48</sup> In support of his view that the impugned Act's character was for the control and not

---

41. For instance, since 2008 the federal government's Policy on Tabling of Treaties in Parliament has required the Minister of Foreign Affairs to table treaties in the House of Commons accompanied by an explanatory memorandum covering such key issues as the treaty's main obligations, its implications for the provinces and territories, and its implementation in domestic law. This information would be extremely valuable for courts and litigants. Yet these explanatory memoranda are not published on Global Affairs Canada's web site, nor on Parliament's web site, nor (to my knowledge) anywhere else.

42. *Hauser*, *supra* note 30.

43. *Constitution Act, 1867*, *supra* note 10, s 92(16).

44. *Hauser*, *supra* note 30 at 998-999.

45. *International Opium Convention*, 1912, [1921] UKTS No 17. This treaty is not expressly cited by Justice Pigeon, but his reference to a 1912 international convention for the suppression of opium and other drugs must surely be a reference to it (*Hauser*, *supra* note 30 at 998).

46. *International Convention relating to Dangerous Drugs*, 1925 [1928] Can TS No 4.

47. *International Convention for Limiting the Manufacture and Regulating the Distribution of Narcotics Drugs*, 1931 [1932] Can TS No 7.

48. *Single Convention on Narcotic Drugs*, 1961 [1964] Can TS No 30.

the prohibition of narcotics, Justice Pigeon quoted from the preamble of the 1961 treaty, pointing to the medical use of narcotic drugs and the need for measures to prevent their abuse.<sup>49</sup> Like radio and aeronautics, the subject-matter of narcotics control was (he held) a new development since Confederation that fell within Parliament's residual power. While Justice Pigeon does not expressly say that the treaties themselves have not expanded Parliament's jurisdiction, his reasoning is entirely consistent with that conclusion. Like Justice Kerwin in *Johannesson*, Justice Pigeon seems to regard the treaty obligations as evidence of the advent of a matter that is new (in the sense of postdating Confederation) and national or international in dimension (rather than merely local or private).

Mr. Justice Dickson (as he then was) dissented, approving Justice Beetz's approach to POGG in *Re Anti-Inflation* whereby the national concern doctrine would be restricted to new matters not falling within section 92 and being by their nature of national concern. He would have characterized the *Narcotic Control Act* as falling within Parliament's criminal law power, as would have Justice Spence. Nearly 25 years later, in *R v Malmo-Levine*, the majority of the Supreme Court of Canada agreed, holding that the *Narcotic Control Act* was a valid exercise of Parliament's criminal law power and expressly disagreed with Justice Pigeon's view that the Act came within Parliament's POGG power in respect of new matters.<sup>50</sup> The majority left open, however, the possibility that the Act might be justifiable under POGG's national concern branch. Justice Pigeon's use of treaties in the course of POGG analysis was not considered.

#### 4. Schneider

Narcotics and POGG came before the Supreme Court of Canada again in *Schneider v The Queen*.<sup>51</sup> The question was the constitutionality of British Columbia's *Heroin Treatment Act*.<sup>52</sup> The trial judge, Chief Justice McEachern, understandably concluded from *Hauser* that Parliament had exclusive jurisdiction over narcotics. The Court of Appeal reversed, finding BC's law to be a matter of health care and not in conflict with the federal enactment.

The Supreme Court of Canada dismissed the appeal. The majority reasons were by Justice Dickson, the same judge who dissented from *Hauser*'s conclusion that the *Narcotic Control Act* was valid federal law under POGG. The learned judge acknowledged he was bound by *Hauser*

---

49. *Hauser*, *supra* note 30 at para 43.

50. 2003 SCC 74 at paras 70-72.

51. [1982] 2 SCR 112, 139 DLR (3d) 417 [*Schneider*].

52. RSBC 1979, c 166.

but found that BC's law was not in relation to the control of narcotic drugs (which *Hauser* had made a matter of federal POGG jurisdiction) but "deals, rather, with the consequences of narcotic use from a provincial aspect."<sup>53</sup> He characterized heroin addiction as a largely local or provincial problem ("it was not disputed that, historically, between 60 and 70 per cent of all known heroin addicts in Canada have resided in the Province of British Columbia"<sup>54</sup>) and not one that has become a matter of national concern so as to come within POGG.

The appellant ran the *Vapor Canada* argument, contending that Parliament has jurisdiction to enact laws in relation to Canadian treaty obligations, and that even if federal implementation of treaties "touches upon a provincial subject matter, it is competent for Parliament to do so in relation to a treaty as a matter of national concern."<sup>55</sup> Justice Dickson described the point as "left open" in *Vapor*, while noting it was "questionable" in the face of *Re Labour Conventions*. He then added that the Court in *Vapor* had "held that even assuming Parliament has power to pass legislation implementing a treaty...the exercise of the power must be manifested in the implementing legislation and not be left to inference,"<sup>56</sup> and that nothing in the *Narcotic Control Act* indicates it was enacted in implementation of Canada's treaty obligations. This reasoning is suspect in two ways. First, I question the term "held" here; Chief Justice Laskin's comments in *Vapor* were *obiter* of the highest order, and expressly not a holding. Second, it is wilful blindness to pretend that the *Narcotic Control Act* was not enacted in at least partial implementation of Canadian treaty obligations.

In a trenchant case note to *Schneider*, Professor de Mestral concluded:

With the *obiter dicta* in *Vapor Canada* and *Schneider* concerning the treaty-implementing power, the Supreme Court of Canada has taken itself very far out on a limb. If the court is not careful the branch will soon break and the court and the country will be the worse for it. There is still time to climb down.<sup>57</sup>

One cannot point to an express climb-down in any decision of the Court since de Mestral's plea. But his plea does seem to have been heeded, for the supposed general power of Parliament to implement treaties under POGG

53. *Schneider*, *supra* note 49 at 130.

54. *Ibid* at 131.

55. *Ibid* at 135.

56. *Ibid*.

57. Armand de Mestral et al, "Note of Cases" (1983) 61:4 Canadian Bar Review 856 at 865.



has not returned, and indeed was pointedly neglected by the Supreme Court of Canada in its next major POGG pronouncement.

### 5. Crown Zellerbach

The leading POGG case today is *R v Crown Zellerbach*, in which Justice Le Dain for a bare (four to three) majority of the court synthesized the authorities into something like a test for whether an impugned provision can be supported under Parliament's residual power.<sup>58</sup> Once again, an international agreement was at the heart of the case.

Section 4(1) of the federal *Ocean Dumping Control Act* prohibited the dumping of any substance at sea except according to the terms and conditions of a permit.<sup>59</sup> The sea was defined as including internal waters of Canada other than fresh waters. Thus the Act prohibited dumping in provincial marine waters. The respondent logging company, charged with unlawful dumping, got the charges dismissed on the ground that section 4(1) was *ultra vires* Parliament. The Court of Appeal for British Columbia agreed.

Mr. Justice Le Dain's analysis begins with the *Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter 1972*.<sup>60</sup> His very first observation on the treaty signals a departure from *Vapor Canada* and *Schneider*. In place of those cases' strict requirement that Parliament expressly state that its Act implements a treaty, Justice Le Dain observes: "[t]he Act would appear to have been enacted in fulfillment of Canada's obligations under the *Convention*... That is not expressly stated in the Act, but" there are several textual and legislative-historical reasons to draw that conclusion.<sup>61</sup> This is a superior approach for the simple reason that it accords with how Parliament actually performs treaty obligations in domestic law. While Parliament sometimes expressly enacts laws to implement treaties, it frequently also enacts new laws, or amends existing laws, for that same purpose without expressly saying so.<sup>62</sup>

Justice Le Dain continues to distance himself from *Vapor Canada* and *Schneider* in the rest of his reasons. This is no doubt due in part to the position taken by the Attorney General of Canada. At trial and on appeal, the Crown had argued unsuccessfully that section 4(1) was enacted under the treaty-making power hypothesized in *Vapor Canada*. But on further

58. [1988] 1 SCR 401, 49 DLR (4th) 161 [*Crown Zellerbach*].

59. SC 1974-1976, c 55.

60. 1979, Can TS No 36.

61. *Crown Zellerbach*, *supra* note 56 at 408.

62. See the discussion and examples in Phillip Saunders & Robert Currie, *Kindred's International Law: Chiefly as Interpreted and Applied in Canada*, 9th ed (Toronto: Emond, 2019) at 212-216.



appeal to the Supreme Court of Canada, the Crown's position changed. The Attorney General now explicitly declined to rely on a POGG treaty power. Instead:

His contention was that the control of dumping in provincial marine waters was an integral part of a single matter of national concern...He referred to the Convention and its Annexes as indicating the mischief to which the Act is directed and as supporting his characterization of the matter in relation to which the Act was enacted.<sup>63</sup>

This is a return to the use of treaties in POGG cases employed by Justice Kerwin in *Johannesson* and Justice Pigeon in *Hauser*, both of which are consistent with Lord Atkin's dictum in *Labour Conventions* that "the Dominion cannot merely by making promises to foreign countries clothe itself with legislative authority inconsistent with the constitution which gave it birth."<sup>64</sup> The existence of a treaty obligation is not itself a juridical basis for Parliament's legislative jurisdiction. But the treaty's terms may support Parliament's claim to jurisdiction under POGG.

Justice Le Dain's definitive departure from *Vapor Canada* (and *Schneider* to the extent that it approved the former) is revealed in his account of POGG jurisprudence. His reasons contain an extensive review of the Canadian cases, starting with *Johannesson* and including *Munro*, *Re Anti-Inflation*, *Hauser* and others. *Vapor Canada* is left out entirely. *Schneider* is not omitted, but that part of it concerning the treaty power hypothesized in *Vapor Canada* is. "From this survey," explains Justice Le Dain, four conclusions about the national concern doctrine can be drawn:

1. The national concern doctrine is separate and distinct from the national emergency doctrine of the peace, order and good government power, which is chiefly distinguishable by the fact that it provides a constitutional basis for what is necessarily legislation of a temporary nature;
2. 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;
3. 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;

63. *Crown Zellerbach*, *supra* note 56 at 419.

64. *Labour Conventions*, *supra* note 18 at 352.

4. 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.<sup>65</sup>

Completely missing from this account of POGG is Chief Justice Laskin's notion, in *Vapor Canada*, that Parliament may have power under POGG to pass legislation implementing a treaty in areas which would otherwise fall within provincial jurisdiction, so long as Parliament signals its use of that power by express language indicating its implementing purpose.

Justice Le Dain's return to the *Labour Conventions* orthodoxy on this point is further illustrated by his consideration of the *Marine Pollution Convention*.<sup>66</sup> He begins with the statement, "Marine pollution, because of its predominantly extra-provincial as well as international character and implications, is clearly a matter of concern to Canada as a whole."<sup>67</sup> Crucially, it is not the fact that Canada has contracted treaty obligations about marine pollution that renders it a matter of national concern. Rather, it is the issue's cross-boundary and transnational character. That character is distinct from (though obviously related to) the fact that Canada has incurred international legal obligations on the topic. Justice Le Dain notes the Act's distinction between pollution of salt water and pollution of fresh water, and asks whether that distinction "is sufficient to make the control of marine pollution by the dumping of substances a single, indivisible matter falling within the national concern doctrine."<sup>68</sup> In answering that question, he notes that the Convention treats pollution by dumping as "a distinct and separate form of water pollution having its own characteristics and scientific considerations."<sup>69</sup> He finds reinforcement for this impression in a UN report that was placed before the Court in argument. Reference to this report, alongside the Convention, serves to underscore that international legal obligations are not driving the analysis here, for clearly Canada has no obligations arising from the report. As in *Johanesson* and *Hauser*, these sources are examined not as legal instruments (though the treaty undoubtedly is that), but as potentially supporting or refuting the contention that the Act's subject matter is one of national concern.

---

65. *Crown Zellerbach*, *supra* note 56 at 431-432.

66. *Ibid* at 436.

67. *Ibid* at 435.

68. *Ibid*.

69. *Ibid* at 436.

Justice Le Dain notes a key difference between the Act and the Convention: the latter does not require regulation of dumping in states' internal marine waters. To the contrary, the Convention expressly excludes internal waters from its definition of the sea. But this fact does not weaken Canada's POGG claim, in Justice Le Dain's view. The Convention has limited states' obligations in this way "presumably for reasons of state policy," but the UN report nevertheless emphasizes the "obviously close relationship...between pollution in coastal waters, including the internal marine waters of a state, and pollution in the territorial sea."<sup>70</sup> Furthermore, Justice Le Dain accepts Canada's contention that the "difficulty of ascertaining by visual observation the boundary between the territorial sea and the internal marine waters of a state creates an unacceptable degree of uncertainty for the application of regulatory and penal provisions"—a point he says "constitutes the essential indivisibility of the matter of marine pollution by the dumping of substances."<sup>71</sup> The learned judge concludes that section 4(1) is valid as legislation falling within the national concern branch of POGG.

Justice Le Dain's reasons in *Crown Zellerbach* are so widely cited now that we tend to overlook the compelling dissent of Justice La Forest (Justices Beetz and Lamer concurring). He cannot see any basis under POGG for section 4(1)'s blanket prohibition against depositing any substance into provincial waters with no regard to whether it harms the ocean or not. ("The prohibition in fact would apply to the moving of rock from one area of provincial property to another.")<sup>72</sup> On the question of treaties and POGG, however, Justice La Forest says only that the appellant was right not to take up the *Vapor Canada* argument here given that the Convention, unlike the Act, does not address the dumping of waste into internal water and therefore cannot justify the impugned provision.<sup>73</sup>

## 6. Ontario Hydro

The issue in *Ontario Hydro v Ontario (Labour Relations Board)* was whether labour relations at Ontario Hydro's nuclear generating stations were governed by federal or provincial labour laws.<sup>74</sup> Section 18 of the federal *Atomic Energy Control Act*<sup>75</sup> declared atomic energy works and undertakings to be for the general advantage of Canada pursuant to section

---

70. *Ibid* at 436.

71. *Ibid* at 436-437.

72. *Ibid* at 459.

73. *Ibid* at 443.

74. [1993] 3 SCR 327, 107 DLR (4th) 457 [*Ontario Hydro*].

75. RSC 1985, c A-16.

92(10)(c) of the *Constitution Act 1867*. Canada relied on that provision, and also on POGG, to assert that the Canada Labour Code applied.

Here again, an international legal regime lurked behind the debate, though it did not figure as prominently as in the other POGG decisions considered above. As Chief Justice Lamer observed, “Many of the security provisions affecting employees in the [Act’s] regulations..., and the licences under which nuclear facilities operate, can be traced to Canada’s international obligations in the field of nuclear energy,”<sup>76</sup> under the *Treaty on the Non-Proliferation of Nuclear Weapons*<sup>77</sup> and the treaties and agreements of the International Atomic Energy Agency (IAEA). The chief justice’s reasons made the most extensive references to this legal regime, focussing more on IAEA reports and articles than on specific treaty provisions. He concluded from these that, “[o]n the international level...there is a consistent recognition that supervising employment on or in connection with facilities for the production of nuclear energy is an integral part of assuring safety of nuclear facilities and materials.”<sup>78</sup>

Chief Justice Lamer wrote for himself only. Justice La Forest (Justices L’Heureux-Dubé and Gonthier concurring) agreed with his analysis but added reasons of his own. Justice Iacobucci (Justices Sopinka and Cory concurring) dissented. He would have held that provincial labour laws applied. Neither of these sets of reasons considered the international aspects of the issue.

#### IV. *Treaties and POGG: some conclusions*

Having reviewed the case law, we are now able to reach some conclusions about how courts may properly use international agreements in POGG analysis.

##### 1. *Treaty obligations are relevant to, but not determinative of, Parliament’s POGG jurisdiction*

The decision in *Re Labour Conventions* was that Parliament does not enjoy a general power under POGG to implement Canadian treaty obligations in domestic law. The implementation of treaties in Canada takes place according to the distribution of powers in the *Constitution Act, 1867*. But the POGG power is itself part of that distribution. If an implementing law can be shown to fall within POGG, Parliament’s jurisdiction is established. The rule in *Re Labour Conventions* is not that Parliament can never avail itself of POGG to implement a treaty. Rather, the rule is that the existence

---

76. *Ontario Hydro*, *supra* note 72 at 346.

77. 1970, Can TS No 1.

78. *Ontario Hydro*, *supra* note 72 at 347.

of the treaty obligation is not, without more, grounds for characterizing its implementation as a matter of national concern. In other words, in considering whether an Act of Parliament is a matter of national concern, the fact that the Act purports to implement a treaty is not determinative of the question—either in favour of Parliament’s jurisdiction or against it.

Relatedly, we can now conclude that Parliament enjoys no freestanding treaty implementation power, whether under POGG or otherwise, despite the passages in *Vapor Canada* and *Schneider* suggesting differently.

2. *For POGG purposes, treaties are judicially noticeable facts*

In POGG cases, unlike the rest of Canadian law, courts look to Canadian treaty obligations in a largely evidentiary way. Without denying or ignoring that treaties represent legal obligations the Canadian state is responsible to perform under international law, courts engaged in POGG analysis look to treaties as evidence that the impugned Act’s subject matter falls within Parliament’s residual power. The obligatoriness of the treaty as a matter of international law is rightly set aside, for the purpose of POGG analysis, because whether or not Canada can perform the obligation is not the question; the question is whether Canada can perform the obligation by a single Act of Parliament, or whether it must instead perform the obligation by enactments of the ten provinces.

The judicial treatment of international agreements more as factual than legal considerations in POGG cases is illustrated by the use made of non-binding international sources in such cases as *Crown Zellerbach* and *Ontario Hydro*. The courts in those cases showed as much interest in the reports, recommendations and bureaucratic regimes supporting or relating to the treaties as they did the treaties themselves. In other areas of Canadian reception law, it would be an error to equate binding and non-binding instruments like this. Here it is defensible because, as noted, the question before the court in a POGG case is not “will we conform to or breach our international obligation?” but “does the Constitution require performance through the provincial legislatures, or may Parliament act alone under POGG?”

The judicial approach to treaties in POGG cases is not purely evidentiary, however. There is no suggestion in any of the cases that a treaty relied on by the federal government, or considered by the reviewing court, must be proved in evidence. In POGG cases, as in all other areas, the Supreme Court of Canada takes judicial notice of the treaty’s existence and determines its meaning for itself as a question of law. Express Supreme Court authority for the proposition that it take judicial notice of the state’s

treaty obligations is regrettably lacking.<sup>79</sup> But the Court recently affirmed that Canadian courts take judicial notice of established rules of customary international law,<sup>80</sup> and it would be strange for the rule to be otherwise in respect of treaties. More importantly, the entire reception law edifice described in the Supreme Court's jurisprudence, particularly in the last 40 years, rests on courts' ability to have regard to relevant treaties whether they are put into evidence by parties or not. One cannot treat international law as "part of the context in which Canadian laws are enacted"<sup>81</sup> without permitting courts to look to treaties, whether in the record or not.

3. *Treaties may demonstrate the advent of a new matter*

A treaty may serve to demonstrate the advent of a new matter that did not exist at Confederation. The decisions in *Re Aeronautics*, *Re Radio* and *Hauser* all rely on post-Confederation treaties in support of their conclusion that their subject matters were unanticipated—and thus undistributed—at Confederation. What is significant is not the newness of the treaty itself or the newness of the obligations the treaty imposes on Canada. It is the newness of the subject matter that both the impugned legislation and the treaty address.

4. *Treaties are relevant to the issue of extra-provincial dimensions*

Where the federal government contends that a matter, originally of a local or private nature in the province, has taken on extra-provincial dimensions and thus become a matter of national concern, a treaty may support (or, one assumes, negate) that argument. *Re Radio*, *Re Aeronautics*, *Johannesson* and *Crown Zellerbach* are all cases in which treaties were invoked to show that a matter had attained national dimensions.

5. *Treaties are relevant to the singleness/provincial inability analysis*

Treaties may tend to support (or seemingly negate) claims that the Act's matter possesses the "singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern."<sup>82</sup> Justice Le Dain used the *Marine Convention* in this way in *Crown Zellerbach*, as did Chief Justice Lamer in *Ontario Hydro*. Similar reasoning occurs in *Re Radio*, where Viscount Dunedin observed that, "keeping in view the duties

---

79. But see *Turp v Canada (Foreign Affairs)*, 2018 FCA 133 at paras 82-88, Justice Nadon affirmed that courts take judicial notice of international law and do not require expert evidence on it; See also *Canadian Planning v Libya*, 2015 ONSC 1638 at para 34. In English law, see *Trendtex Trading Corp v Central Bank of Nigeria*, [1977] 1 QB 529 (Eng CA) at 569. In Australia, see *Australian Competition and Consumer Commission v PT Garuda Indonesia (No 9)*, 2013 FCA 323 (Fed Ct Aust) at para 32.

80. *Nevsun Resources Ltd v Araya*, 2020 SCC 5 at paras 97-98.

81. *B010 v Canada (Citizenship and Immigration)*, 2015 SCC 58 at para 47.

82. *Crown Zellerbach*, *supra* note 56 at 432.

under the Convention,” the broadcasting system “cannot be divided into two parts [i.e., transmitter and receiver], each independent of the other.”<sup>83</sup>

#### 6. *Resort to treaties is seemingly permitted at all stages of POGG analysis*

I have identified examples from decided cases of where treaties have proved relevant to the POGG analysis at its various stages. In doing so I do not mean to suggest a closed list. So long as the foundational rule in *Re Labour Conventions* is respected, there seems no grounds for prohibiting judicial resort to treaties at any stage of the POGG analysis, whether under its national concern branch or its emergency branch.

#### V. *Treaties and POGG in the Greenhouse Gas references*

As I noted at the outset, the three references arising from the federal *Greenhouse Gas Pollution Pricing Act* engage with the international legal regime governing climate change. I now briefly review how the Saskatchewan, Ontario and Alberta courts of appeal have used the relevant international agreements in their POGG analyses.

##### 1. *Saskatchewan*

The first court to rule on the constitutionality of the Act was the Court of Appeal for Saskatchewan. Chief Justice Richards (Justices Jackson and Schwann concurring) upheld the law under POGG. Justices Ottenbreit and Caldwell found it invalid.

The POGG reasoning in both the majority and dissenting reasons suffers from a basic confusion—attributable ultimately to the Attorney General of Canada—about the Act’s pith and substance. For the Act to be valid under POGG, it must have some identifiable matter that can be said to fall within POGG, and particularly under its national concern branch.<sup>84</sup> Canada’s first position was that the Act’s matter was greenhouse gas (GHG) emissions. This was met with the objection that “almost every kind of human action generates GHG emissions” and “a general authority in relation to GHG emissions would allow Parliament’s

83. *Re Radio*, *supra* note 14 at 86.

84. In Saskatchewan, as in Ontario and Alberta, the Government of Canada declined to advance the emergency branch of POGG, presumably because the Act is not temporary in its application. If the Supreme Court of Canada finds the Act to be unconstitutional—a distinct possibility, in my view—the federal government may wish to reintroduce it on a time-limited basis, even if that limit is many years in duration. As I write, the country and much of the world are living through a long-lasting emergency of a different nature: the COVID-19 pandemic. The notion that an emergency can last for years is perhaps less surprising to parliamentarians and judges today than it was even a year ago. There is no shortage of evidence that climate change is regarded internationally as an emergency. To take but one example, the preamble to the *Paris Agreement*, *supra* note 7, describes climate change as “an urgent and potentially irreversible threat to human societies and the planet.”



legislative reach to extend very substantially into traditionally provincial affairs.”<sup>85</sup> The answer to this objection, one might have thought, is that the Act is obviously not addressed at safe levels of GHG emissions, but only at dangerously excessive emissions causing global climate change. While there is nothing new about GHGs *per se*, the phenomenon of GHG emissions being so significant as to threaten life on Earth is obviously a new one not contemplated by the *Constitution Act, 1867*.

This may be what Canada intended by its revised formulation of the Act’s matter as “the cumulative dimensions of GHG emissions,” but Chief Justice Richards rejected that rather uncertain characterization of the Act, adopting instead (at the suggestion of British Columbia) the following statement of the Act’s pith and substance for POGG purposes: “the establishment of minimum national standards of price stringency for GHG emissions.”<sup>86</sup> Chief Justice Richards acknowledged that “framing federal jurisdiction in this way could appear, at first blush, to involve a rather tight or narrow formulation of the matter in question,” but defended the formulation with reference to sections 91 and 92 of the *Constitution Act 1867* (parts of which define federal and provincial heads of power as the establishment of various things) and decided POGG cases.<sup>87</sup>

The chief justice then considered whether “the idea of minimum national standards of price stringency for GHG emissions” is a matter of national concern. He observed that the “factual record before the Court indicates that GHG pricing is not just part and parcel of an effective response to climate change...[but] an *essential* aspect or element of the global effort to limit GHG emissions.”<sup>88</sup> He found support for that conclusion in an affidavit of a federal assistant deputy minister with Environment and Climate Change Canada, a World Bank report, and the affidavit of an otherwise unidentified Dr. Rivers.<sup>89</sup> Notably, the chief justice did not cite any of the international agreements on this point. That is because those agreements do not require states to adopt carbon pricing schemes. This fact forces one to question Chief Justice Richards’ conclusion that GHG pricing is essential to the international climate change project. If the international community really did regard carbon pricing as essential to fighting climate change, one might expect states to say so in treaty obligations. In saying this I express no doubt about the efficacy of carbon pricing as a policy. My point is simply that carbon pricing has not yet been adopted by states as a

85. *Saskatchewan Reference*, *supra* note 2 at paras 127-128.

86. *Ibid* at para 140.

87. *Ibid* at paras 140-144.

88. *Ibid* at para 147.

89. *Ibid* at paras 147-148.



legal obligation, and therefore claims of international consensus must be regarded with some skepticism.

The chief justice returned to Canada's treaty commitments at the "singleness, distinctiveness and indivisibility" stage of his analysis. He observed that GHG emissions do not respect provincial boundaries. Like marine pollution in *Crown Zellerbach*, the failure of one province to take action will impact other provinces. Every province is vulnerable to the failure of another "to adequately price such emissions."<sup>90</sup> Furthermore, climate change is a global problem calling for a global response, and "[s]uch a response can only be effectively developed internationally by way of state-to-state negotiation and agreement."<sup>91</sup> The chief justice continued:

In participating in these international processes, Canada is expected to make national commitments with respect to GHG reduction or mitigation targets. Those commitments are self-evidently difficult for Canada, as a country, to meet if not all provincial jurisdictions are prepared to implement GHG emissions pricing regimes—regimes that, on the basis of the record before the Court, are an essential aspect of successful GHG mitigation plans. This is not to suggest Parliament must somehow enjoy a comprehensive treaty implementation power in relation to the GHG issue. But, it is to say that the international nature of the climate change problem necessarily colours and informs an assessment of the effects of a provincial failure to deal with GHG pricing.<sup>92</sup>

Some care must be taken here on the question of treaty implementation. None of the treaties before the court require GHG pricing schemes; the Act is not in implementation of any such obligation. Instead, GHG pricing is a method Parliament has chosen to perform its more general obligation under climate change agreements to reduce emissions. In that looser sense, one can describe the Act as adopted in implementation of Canada's obligations. But despite the chief justice's disclaimer of a comprehensive treaty implementation power, his reasoning comes perilously close to disregarding the rule in *Re Labour Conventions*. The political fact underlying this litigation is that not all provinces care to adopt the federal government's preferred means of combatting climate change. If that fact is invoked, together with the need to ensure performance of Canadian treaty obligations, as grounds for according jurisdiction to Parliament under POGG, the rule in *Re Labour Conventions* is broken, or at least very badly bent.

90. *Ibid* at paras 154-155.

91. *Ibid* at para 156.

92. *Ibid*.

Two interveners before the Saskatchewan Court of Appeal contended that Parliament enjoyed legislative jurisdiction over the Act under a freestanding treaty implementation power. Chief Justice Richards rejected the submission as inconsistent with *Re Labour Conventions*. Notably, he made no reference to *Vapor Canada* and *Schneider*. The reasons do not indicate whether the interveners relied on those authorities. The chief justice rightly concluded that “there is no federal treaty implementation power.”<sup>93</sup>

Remarkably, the dissenting reasons ignore Canada’s treaty obligations almost entirely. To the limited extent that they do engage with them, they minimize their significance in POGG cases in a way that is difficult to reconcile with the jurisprudence reviewed at length above.<sup>94</sup>

## 2. Ontario

The Court of Appeal for Ontario divided four to one in the result, with Chief Justice Strathy upholding the Act under POGG with the concurrence of Justices MacPherson and Sharpe. Associate Chief Justice Hoy wrote separately, also upholding the Act but characterizing its subject matter more narrowly. Justice Huscroft dissented, finding the Act *ultra vires* Parliament.

The chief justice’s reasons began with the observation that there is “no dispute that global climate change is taking place and that human activities are the primary cause.”<sup>95</sup> He reviewed the “uncontested evidence” before the court of the harms climate change caused or exacerbated, noting recent wildfires and floods in the provinces, the particular impact on Indigenous communities, and the economic costs.<sup>96</sup> He observed that provinces and territories with very low emissions “often experience impacts of climate change that are grossly disproportionate to their individual contributions to Canada’s total GHG emissions,” and that there is nothing these provinces and territories can do about it. “Without a collective national response, all they can do is prepare for the worst.”<sup>97</sup>

Observing that the “international community has recognized that the solution to climate change is not within the capacity of any one country,” the chief justice reviewed the leading international climate change agreements.<sup>98</sup> Notably, he drew no great distinction between legally

---

93. *Ibid* at paras 174-177.

94. See *ibid* at paras 427, 430.

95. *Ontario Reference*, *supra* note 3 at para 7.

96. *Ibid* at paras 11-15.

97. *Ibid* at paras 17-20.

98. *Ibid* at para 21.

binding agreements (the *UNFCCC* and the *Paris Agreement*) and those to which Canada is no longer bound or never was (the *Kyoto Protocol* and the *Copenhagen Accord*, respectively).<sup>99</sup>

Rejecting the characterizations of the Act proffered by both Canada and Ontario, the chief justice observed that its purpose, “as reflected in its Preamble and in Canada’s international commitments and domestic initiatives... is to reduce GHG emissions on a nation-wide basis,” and that its effect is to put a price on carbon pollution.<sup>100</sup> The Act’s purpose and effects revealed its pith and substance, in Chief Justice Strathy’s view, as “establishing minimum national standards to reduce greenhouse gas emissions.”<sup>101</sup>

The chief justice went on to conclude that the Act is within Parliament’s power under the national concern doctrine of POGG. On the role of Canada’s international agreements in this analysis, he observed that in considering whether the Act’s matter is both national and a concern “in the constitutional sense,” the court may appropriately look, as a contextual factor, to the fact that “the *Act* was enacted, as its Preamble demonstrates, to give effect to Canada’s international obligations.”<sup>102</sup> The phrase “contextual factor” is elastic, sometimes to a fault. But deployed here it is apt to capture the ambiguous position Canada’s treaty obligations occupy in POGG cases, being at once binding legal obligations yet largely evidentiary considerations for the purpose of the national concern analysis. As for the chief justice’s description of the Act as giving effect to Canada’s international obligations, I repeat that this must be read to refer to climate change obligations generally, there being no specific commitment to enact a carbon pricing scheme.

Succinctly summarizing *Re Labour Conventions* and *Crown Zellerbach*, the chief justice observed, “[w]hile it has been held that Parliament cannot implement treaties or international agreements that fall outside its constitutional powers... the fact that a challenged law is related to Canada’s international obligations is pertinent to its importance to Canada as a whole,” and the “existence of a treaty or international agreement in relation to the matter also speaks to its singularity and distinctiveness.”<sup>103</sup>

99. *Ibid* at paras 22-25.

100. *Ibid* at para 76.

101. *Ibid* at para 77.

102. *Ibid* at para 106.

103. *Ibid*; see also *ibid* at para 116.

### 3. *Alberta*

The Court of Appeal of Alberta decided against Canada by a margin of four to one. The majority opinion was co-written by Chief Justice Fraser and Justices Watson and Hughes. Justice Wakeling gave concurring reasons, and Justice Feehan dissented.

The majority characterized the Act's matter as the regulation of GHG emissions, and held that POGG can only transform matters falling within the provinces' residual legislative jurisdiction (section 92(16)) into matters of national concern.<sup>104</sup> As the regulation of GHG emissions came within provincial jurisdiction under other heads of power (including natural resources, property and civil rights, local works and undertakings and direct taxation), POGG had no application.<sup>105</sup> In the alternative, the majority held that the regulation of GHG emissions lacked the necessary singleness, distinctiveness and indivisibility to be recognized as a new head of federal power.

The majority took note of international efforts to address climate change, but the instruments themselves did not figure prominently in their reasoning. They agreed with Chief Justice Richards that there is no standalone treaty implementation power, again without reference to *Vapor Canada* or *Schneider*.<sup>106</sup> And they expressed (somewhat cryptically) agreement with the observations of Justice Wakeling "on the differences between treaties with compulsory targets, treaties with less compulsory guidelines and international agreements of different sorts."<sup>107</sup>

This latter comment appears to be directed at a discussion in Justice Wakeling's lengthy concurring reasons. That judge reviewed the relevant international agreements extensively, including commentary on "divergent opinions" as to whether certain articles of the *UNFCCC* and the *Paris Agreement* contain legal obligations or only nonbinding aspirational goals.<sup>108</sup> It is an interesting issue, but unimportant for POGG purposes. As we have seen, the relevance of international instruments in the national concern analysis does not depend on their binding or non-binding character in international law.

In dissent, Justice Feehan noted that Canada, British Columbia and certain interveners submitted that "weight should be accorded to application of the national concern doctrine as a result of Canada's international

---

104. *Alberta Reference*, *supra* note 4.

105. *Ibid* at paras 283-284.

106. *Ibid* at para 259.

107. *Ibid* at para 74.

108. *Ibid* at paras 401-418; *Ibid*, n 267.

agreements and commitments.”<sup>109</sup> The learned judge referred briefly to the use of such considerations in *Crown Zellerbach* and *Ontario Hydro*, concluding that “Canada’s international agreements and commitments favour, although do not determine, application of the national concern doctrine for federal jurisdiction.”<sup>110</sup> This dictum risks putting the matter at too high a level of generality. The Privy Council and Supreme Court of Canada precedents show those courts looking to relevant international instruments in specific, purposeful ways. They are not simply factors to be included in some ill-defined balancing exercise.

### *Conclusion*

The constitutionality of the *Greenhouse Gas Pollution Pricing Act* will be finally determined by the Supreme Court of Canada very soon. The hearings, originally set for April but postponed due to the COVID-19 outbreak, were heard on 22 to 23 September 2020.

The Supreme Court has not heard a POGG case involving Canada’s international obligations since 1993. Like every Supreme Court appeal, these three references are an opportunity for the court to apply, tweak or abandon its precedents. The role of Canada’s international obligations in the determination of Parliament’s residual jurisdiction under the national concern doctrine of POGG is theoretically somewhat complex, and its application can be subtle. But the principles are intelligible, settled and consistent with Canadian federalism. There is no need for judicial reform—whether undertaken deliberately or by inadvertence. The approach to treaties represented by *Johannesson* and *Crown Zellerbach*, informed by *Re Labour Conventions* and rejecting *Vapor Canada*, has served us well. It is not broken. I hope the court does not fix it.

---

109. *Ibid* at para 1037.

110. *Ibid* at paras 1037-1041.