Article

Tax and the Canadian constitution

Allison Christians

The H. Heward Stikeman Chair in the Law of Taxation at the McGill University Faculty of Law. Associate member of the International Academy of Comparative Law since July 2021. Named among the International Tax Review's "Global Tax 50" in 2015, 2016 and 2020 for her influence and impact on taxation. Email: allison.christians@mcgill.ca

Kimia Towfigh

Corporate immigration lawyer trained in common and civil law. JD/BCL (2021) McGill University Faculty of Law. Former Editor-In-Chief (2019-2020) of McGill Journal of Sustainable Development Law.

Received 20 June 2022, Accepted 30 July 2022

KEYWORDS:

Taxation, Canada, Constitution, federalism, taxpayer rights, carbon taxes.

ABSTRACT:

This article surveys Canada's constitutional provisions and examines their role in mediating between federal and provincial taxation and related regulatory powers. Part I briefly explains Canada's governance structure and lays out the constitutional provisions concerning taxation and their application to the various levels of government. Part II examines taxpayer rights in connection with the constitutional authority to tax. Part III analyzes the interplay of taxation with other regulatory functions through the lens of recent changes to environmental taxation in Canada, with an emphasis on recent greenhouse gas (GHG) pricing mechanisms imposed by federal Parliament.

PALABRAS CLAVES:

Tributación, Canadá, Constitución, federalismo, derechos de los contribuyentes, impuestos al carbono.

RESUMEN:

Este artículo examina las disposiciones constitucionales de Canadá y examina su papel en la mediación entre los impuestos federales y provinciales y los poderes regulatorios relacionados. La Parte I explica brevemente la estructura de gobierno de Canadá y establece las disposiciones constitucionales relativas a los impuestos y su aplicación a los distintos niveles de gobierno. La Parte II examina los derechos de los contribuyentes en relación con la autoridad constitucional para gravar. La Parte III analiza la interacción de los impuestos con otras funciones regulatorias a través de la lente de los cambios recientes en los impuestos ambientales en Canadá, con énfasis en los recientes mecanismos de fijación de precios de los gases de efecto invernadero (GEI) impuestos por el Parlamento federal.

MOTS CLES :

Fiscalité, Canada, Constitution, fédéralisme, droits des contribuables, taxes sur le carbone.

RESUME :

Cet article passe en revue les dispositions constitutionnelles du Canada et examine leur rôle de médiateur entre la fiscalité fédérale et provinciale et les pouvoirs réglementaires connexes. La partie I explique brièvement la structure de gouvernance du Canada et expose les dispositions constitutionnelles concernant la fiscalité et leur application aux différents paliers de gouvernement. La partie II examine les droits des contribuables en rapport avec le pouvoir constitutionnel d'imposer. La partie III analyse l'interaction de la fiscalité avec d'autres fonctions de réglementation à la lumière des récents changements apportés à la fiscalité environnementale au Canada, en mettant l'accent sur les récents mécanismes de tarification des gaz à effet de serre (GES) imposés par le Parlement fédéral..

CONTENTS:

1 INTRODUCTION

Most countries explicitly claim their authority to tax under formative documents such as constitutions and Canada is no exception: its Constitution authorizes the federal government to impose taxes of any kind, while it authorizes the provinces and territories to impose specified forms of taxation. This article surveys Canada's constitutional provisions and examines their role in mediating between federal and provincial taxation and related regulatory powers. Part I briefly explains Canada's governance structure and lays out the constitutional provisions concerning taxation and their application to the various levels of government. Part II examines taxpayer rights in connection with the constitutional authority to tax. Part III analyzes the interplay of taxation with other regulatory functions through the lens of recent changes to environmental taxation in Canada, with an emphasis on recent greenhouse gas (GHG) pricing mechanisms imposed by federal Parliament.

2 CANADA'S GOVERNMENTS AND THE POWER TO TAX

The primary function of taxation is to raise revenue to meet public needs.(Christians, 2018)[1] Canada raises revenue with a variety of mechanisms, including taxes on income, capital, and consumption. Central to the function of each of these tax regimes is the division of legislative powers. With distinctive elements of provincial autonomy and federal unity, Canada's constitutional landscape reflects a legal recognition of divergent identities and interests that pre-dated its confederation in 1867 and have continued to evolve since then. An overview of Canadian federalism provides a framework to examine constitutional issues that arise from Canada's tax structure.

2.1 THE DIVISION OF LEGISLATIVE POWERS

The *Constitution Act, 1867* divides federal and provincial jurisdiction between enumerated "heads of power."[2] In general, Parliament has jurisdiction over matters of national importance, whereas provincial legislatures have law-making authority regarding matters of a local nature. A law that is beyond the scope of a level of government's jurisdiction is considered *ultra vires* and thereby invalid, though there are some areas of law wherein both the provincial legislature and federal Parliament may legislate.[3]

This constitutional framework was adopted at the time of Confederation to accommodate diversity between provinces and foster cooperation between levels of government.[4] Modern Canadian federalism has evolved from approaching federal and provincial powers as separate, "watertight compartments", to a more flexible, cooperative model, making it possible for federal and provincial legislation to apply concurrently to different aspects of the same regulatory matter.[5] As such, the inevitability of overlap between legislative powers is acknowledged to avoid the creation of legal vacuums and legislative

---

[1] *See Allison Christians, Introduction to Tax Policy Theory, at https://ssrn.com/abstract=3186791.*

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

[3] *See Reference re Securities Act [2011] 3 S.C.R. 837, para. 66, 2011 SCC 66 [hereinafter, Reference re Securities Act]: "Canadian constitutional law has long recognized that the same subject or "matter" may possess both federal and provincial aspects. This means that a federal law may govern a matter from one perspective and a provincial law from another. The federal law pursues an objective that in pith and substance falls within Parliament's jurisdiction, while the provincial law pursues a different objective that falls within provincial jurisdiction. This concept, known as the double aspect doctrine, allows for the concurrent application of both federal and provincial legislation, but it does not create concurrent jurisdiction over a matter (in the way, for example, s. 95 of the Constitution Act, 1867 does for agriculture and immigration)." (internal citations omitted).*

[4] *See Reference re Secession of Quebec [1998] 2 S.C.R. 217, para. 35.*

[5] *See Reference re Securities Act at paras. 54-62, 2011 SCC 66; see also Canadian Western Bank v. Alberta [2007] 2 S.C.R. 3, para. 30, 2007 SCC 22 [hereinafter Canadian Western Bank].*

gaps that may arise from stringent constitutional interpretation and rigid formalism.[6] Constitutional interpretation is generally considered to evolve with the changing realities of Canadian society, as encapsulated by the "living tree" doctrine.[7] Moreover, the constitutional aspects of Canada's taxation structure must be viewed in light of jurisdictional claims of Indigenous peoples. As Professor Dayna Nadine Scott observes, the constitutional recognition of "Aboriginal and treaty rights" in section 35(1) "incorporates into our constitutional framework the affirmation and protection of Indigenous peoples' inherent right to govern themselves and their territories according to certain judicially-defined terms." (Scott, 2017)

2.1.1 Enumerated Powers

The federal legislative authority to tax is found in section 91 of the *Constitution Act, 1867* which states in part:

> "[T]he exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,
>
> …3. The raising of Money by any Mode or System of Taxation."

In contrast, section 92 of the *Constitution Act* provides more limited authority to provincial legislatures as follows:

> "In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,
>
> …2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.
>
> …9. Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes."

The distinction between indirect and direct taxes is central to the division of legislative powers. As section 92 stipulates, provinces are authorized to enact laws regarding matters of direct taxation within their respective borders. Otherwise, a charge with an indirect incidence would be beyond the scope of provincial powers and thereby invalid.[8] According to Justice La Forest, the *Constitution Act, 1987* "appears to contemplate that indirect taxation should be within the sole competence of the federal Parliament."[9] As such, indirect taxes are beyond the scope of provincial law-making authority.

In simplified terms, direct and indirect taxes are distinguished according to the traditional view presented by John Stuart Mill, who explained that a direct tax is collected directly from the person intended to bear it, while an indirect tax is imposed on a party who

---

[6] *Reference re Securities Act at para. 58.*

[7] *Edwards v. Canada (Attorney General) 1929 CanLII 438 (UK JCPC) [1930] AC 124 (PC), 136 ("The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits...their Lordships do not conceive it to be the duty of this Board […] to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation...") See also Reference re Same Sex Marriage 2004 SCC 79 at para 23, whereby the Supreme Court supports a "large and liberal" constitutional interpretation to ensure the continued relevance and legitimacy of Canada's constitution.*

[8] *Lawson v. Interior Tree and Fruit and Vegetables Committee of Direction [1931] S.C.R. 357 at 363-64. For a detailed discussion on the distinction between taxation and regulatory fees, see (Farish & Tedds, 2014)*

[9] *Ontario Home Builders' Association v. York Region Board of Education [1996] 2 S.C.R. 929, para 52.*

is expected to pass the cost on to another.[10] Thus, a wage tax is characterized as a direct tax because it is imposed on a worker (regardless of who collects and remits it), while an excise tax (such as an ad valorem tax on fuel) is characterized as indirect because responsibility for its payment is imposed on a producer who is expected to pass the cost of the tax on to the consumer in the form of a higher price.[11] Taxes imposed on consumers at the point of sale are generally considered direct taxes in Canada.[12]

The combined impact of sections 91 and 92 of the Constitution is to provide provinces with the authority to impose taxes on land, property and income arising within their respective jurisdictions, thereby according a degree of independence and freedom from federal intervention. Additionally, jurisprudential development has limited provincial interference with interprovincial and international trade, as well as the taxation of subjects beyond provincial jurisdiction. (La Forest, 1967)

Within provinces, municipalities in Canada are creatures of provincial statutes and thus only have the taxation powers granted to them by the province within the limited scope of provincial authority. For example, the *City of Toronto Act, 2006* allows the City of Toronto to impose direct taxes by by-law but has extensive limits on what can and cannot be taxed.[13] Among other limitations, the City is forbidden from imposing "A poll tax imposed on an individual by reason only of his or her presence or residence in the City or in part of it" but must impose taxes on "The roadway or right-of-way of a railway company" if it meets certain conditions. Depending on the context, municipalities might also raise revenue through licensing schemes or user fees.[14]

In addition to ten provinces, Canada has three territories: Yukon, Northwest Territories, and Nunavut. A territory does not have either the federal legislative authority or the provincial legislative authority under the *Constitution Act, 1867*. Rather, each territorial legislature has devolved powers granted under a federal statute. For example, the *Yukon Act* allows the territory's legislature to make laws in relation to "direct taxation and licensing in order to raise revenue for territorial, municipal or local purposes" and "the levying of a tax on furs or any portions of fur-bearing animals to be shipped or taken from Yukon to any place outside Yukon".[15]

---

[10] *See also Eurig Estate (Re), [1998] 2 S.C.R. 565 at para 25, citing Mill for the proposition that "a direct tax is one which is demanded from the very persons who, it is intended or desired, should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another."; Canadian Industrial Gas & Oil Ltd. v Government of Saskatchewan et al, [1978] 2 S.C.R. 545 (adopting JS Mill's view to distinguish between federal and provincial powers).*

[11] *Thus, a leading case involving federal-provincial resource disputes struck down a Saskatchewan tax on oil producers, primarily on the ground that it constituted an indirect tax, thus exceeding the authority granted by section 92(2) of the Constitution. Ibid.*

[12] *See e.g. Sorbara v Canada (Attorney General), [2008] 93 O.R. (3d) 241, 2009 O.N.C.A. 506, citing Eurig Estate in finding that the federal general sales tax is a direct tax, even though the direct/indirect distinction is irrelevant for purposes of constitutional analysis at the federal level since only the provinces are limited to direct taxation.*

[13] *City of Toronto Act, 2006, S.O. 2006, c. 11, Sched. A, at section 267. Notably, the Act provides that the by-law must satisfy a number of criteria including, inter alia, stating "the subject of the tax to be imposed … the tax rate or the amount of tax payable [and] the manner in which the tax is to be collected, including the designation of any persons or entities who are authorized to collect the tax as agents for the City and any collection obligations of persons or entities who are required to collect the tax under subsection (5). 2006, c. 11, Sched. A, s. 267 (3); 2017, c. 8, Sched. 4, s. 4 (4)."*

[14] *For discussion, see Carson's Camp Ltd. v. Amabel, 1998 CanLII 14917 (ON SC).*

[15] *Yukon Act S.C. 2002, c.7; for similar provisions see the Nunavut Act, S.C. 1993, c. 28, and the Northwest Territories Act, S.C. 2014, c. 2, s. 2.*

2.2 NOTABLE LIMITATIONS

The Constitution was amended in 1982 to provide for clarity in relation to one specific subject of taxation, namely that related to the regulation of natural resources. A 1982 amendment added section 92A to the Constitution, stating in part that:

> "In each province, the legislature may make laws in relation to the raising of money by any mode or system of taxation in respect of
>
> (a) non-renewable natural resources and forestry resources in the province and the primary production therefrom, and
>
> (b) sites and facilities in the province for the generation of electrical energy and production therefrom, whether or not such production is exported in whole or in part from the province,
>
> but such laws may not authorize or provide for taxation that differentiates between production exported to another part of Canada and production not exported from the province."[16]

Section 125 of the *Constitution Act, 1867* imposes additional limits on taxation powers. The provision states:

> "125. No Lands or Property belonging to Canada or any Province shall be liable to Taxation."

Broadly speaking, this provision provides taxation immunity to federal and provincial Crown lands. In effect, the text precludes one government from taxing another, thereby ensuring a degree of autonomy or independence between levels of government.[17] However, courts have established that this does not prohibit the imposition of user fees or regulatory charges within a government's sphere of jurisdiction.[18]

2.2.1 The Treaty-Making Authority

While all tax laws are legislated by national, provincial, territorial, municipal, or Indigenous governments, Canada has also long been involved in international coordination of its tax regime, mainly via tax treaties with foreign sovereigns. These tax treaties involve the extension and curtailment of taxing powers across sovereign borders, and therefore they also touch upon the constitutional division of powers.

Following the principles of parliamentary supremacy and national sovereignty, Canada's treaty ratification process takes a so-called dualist or transformationist approach: while the negotiation and ratification of international agreements are initiated, carried out, and controlled exclusively by the federal government as its executive prerogative, treaties must be implemented by Parliament in the form of legislation to be given effect and enforceability under domestic law. (Mestral & Fox-Decent, 2008; Saunders & Currie, 2019)[19] Accordingly, implementing international law into Canadian law is not a self-executing process as it is in some other countries, such as the United States, where a treaty entered into by the Executive and consented to by the Senate stands with equal authority to domestic

---

[16] *See Constitution Act, 1867, s. 92A(4).*

[17] *See Keyes and Mekkunnel, supra at 1054. In Reference as to Powers to Levy Rates on Foreign Legations [1943] SCR 208, the Supreme Court stipulated that the City of Ottawa could not impose property taxes on foreign embassies.*

[18] *Westbank First Nation at para. 42.*

[19] *Note that the province of Quebec has entered into a tax treaty with France, but the legal status of provincial agreements with foreign sovereigns is contested. (van Ert, 2001)*

U.S. law.[20] That being said, the federal Parliament has long played a perfunctory role in the implementation of tax treaties as domestic law, with detailed scrutiny of the goals, purposes, or substantive content of such texts a rare event in the tax treatymaking process.(Christians, 2016)

Treatymaking in the context of a federal system like Canada's is complicated by the fact that the federal government cannot enforce compliance of matters beyond its jurisdiction.[21] As Lord Atkins stated in the 1937 *Labour Conventions* reference concerning the distribution of legislative powers, "as a treaty deals with a particular class of subjects, so will the legislative power of performing it be ascertained."[22] In the same judgment, the Privy Council also noted that asserting compliance with international treaties is not a valid justification for encroaching provincial jurisdiction. (van Ert, 2001) Since then, the Supreme Court of Canada has maintained that the domestic implementation of treaty obligations is determined according to the distribution of legislative powers originally established in the *Constitution Act, 1867.*[23] The ultimate implication of these observations is that Canada cannot force the provinces to adhere to its international agenda. Nevertheless, the federal government "has a policy of consulting with the provinces before signing treaties that touch on matters of provincial jurisdiction."(Barnett, 2021, p. 8)

2.3 CONSTITUTIONAL PROCESS REQUIREMENTS IN TAX MATTERS

Beyond the constitutional grant of taxing authority in sections 91 and 92, other provisions of the *Constitution Act, 1867* relate to the powers of taxation in various ways. For instance, section 53 of the *Constitution Act, 1867* reflects the popular mantra "no taxation without representation" by requiring that tax legislation be initiated in an elected legislature. (Magnet, 1974) As the provision stipulates:

> "53. Bills for appropriating any Part of the Public Revenue, or for imposing any Tax or Impost, shall originate in the House of Commons. "

This provision highlights a core principle of representative democracy: that individuals being taxed have the right to have their elected public officials debate about how public money should be both appropriated and spent.[24] Currently, Canada has one unelected legislature: the appointed federal Upper House, that is, the Senate of Canada. All of Canada's provinces and territories have unicameral legislatures but at various times, certain assemblies were bicameral and had unelected upper houses.

Section 53's application is extended by virtue of section 90 of the *Constitution Act, 1867* to provincial legislatures.[25] As result, tax legislation would not be initiated in an unelected provincial upper house.

---

[20] *Generalizing about tax treaty ratification in the United States is complicated by the availability of so-called "executive agreements", which offer an alternative method by which the U.S. executive may bind the nation, including potentially without any action by the legislative branch. For a discussion of the U.S. tax treaty ratification and executive agreement processes and the controversy surrounding their use in distinct circumstances, see (Christians, 2006)*

[21] *See Canada (AG) v. Ontario (AG) [1937] UKPC 6, [1937] A.C. 326.*

[22] *Ibid.*

[23] *See Johannesson v. Municipality of West St Paul, [1952] 1 S.C.R. 292; R. v. Hauser [1979] 1 S.C.R. 984; MacDonald et al. v. Vapor Canada Ltd., [1977] 2 S.C.R. 134.*

[24] *See Westbank First Nation v. British Columbia Hydro and Power Authority [1999] 3 S.C.R. 143, para. 19 [Westbank First Nation].*

[25] *Constitution Act, 1867, s. 90.*

The following Provisions of this Act respecting the Parliament of Canada, namely, — the Provisions relating to Appropriation and Tax Bills, the Recommendation of Money Votes, the Assent to Bills, the Disallowance of Acts, and the Signification of Pleasure on Bills reserved, — shall extend and apply to the Legislatures of the several Provinces as if those Provisions were here

Further, section 54 of the *Constitution Act, 1867* precludes the House of Commons from adopting a spending bill without a recommendation from the Governor General during the session in which the bill is proposed. The section stipulates:

> "54. It shall not be lawful for the House of Commons to adopt or pass any Vote, Resolution, Address, or Bill for the Appropriation of any Part of the Public Revenue, or of any Tax or Impost, to any Purpose that has not been first recommended to that House by Message of the Governor General in the Session in which such Vote, Resolution, Address, or Bill is proposed."

Section 54 is also extended to provincial legislatures by virtue of section 90, with the "Governor General" replaced by the Lieutenant Governor of the province. Some provincial assemblies have also codified this principle in rules, such as that in the Legislative Assembly of Manitoba:

> "66 Any vote, resolution, address or Bill introduced in the House for the appropriation of any part of the public revenue, or of any tax or impost to any purpose whatsoever, or to impose any new or additional charge upon the public revenue or upon the people, or to release or compound any sum of money due to the Crown, or to grant any property of the Crown, or to authorize any loan or any charge upon the credit of Her Majesty in right of the Province, shall be recommended to the House by a message from the Lieutenant Governor before it is considered by the House."(Legislative Assembly of Manitoba, 1980)

Legislation governing the territories also echoes this principle. For example, section 40 of the *Nunavut Act* states:

> "The Assembly may not adopt or pass any vote, resolution, address or bill for the appropriation of any part of the public revenue of Nunavut, or of any tax, for any purpose that has not been first recommended to the Assembly by message of the Commissioner in the session in which the vote, resolution, address or bill is proposed." [26]

Whereas provinces have a Lieutenant Governor, territories each have a Commissioner, appointed by the Governor General acting on the advice of Cabinet. Territorial Commissioners exercise similar functions as their provincial Lieutenant Governor counterparts, but they are not "representatives of Her Majesty." (The Governor General of Canada, 2016)[27]

Section 53 regulates taxation in Canada by ensuring parliamentary control over taxation powers while section 54 acts as a limit on parliamentary authority by requiring certain matters be advanced by the Executive. Case law and academic commentary suggest that these provisions were established with the purpose of ensuring control over the power of the purse, including by preventing the Senate or bodies other than the legislature from imposing tax legislation on their own accord.[28]

---

re-enacted and made applicable in Terms to the respective Provinces and the Legislatures thereof, with the Substitution of the Lieutenant Governor of the Province for the Governor General, of the Governor General for the Queen and for a Secretary of State, of One Year for Two Years, and of the Province for Canada.

[26] *Nunavut Act, S.C. 1993, c. 28.*

[27] *For the list of current Territorial Commissioners, see The Governor General of Canada, Viceregal Representatives, https://www.gg.ca/en/crown/viceregal-representatives.*

[28] *See Eurig Estate (Re), para. 32; (Driedger, 1968). But see (Keyes & Mekkunnel, 2001, pp. 1038, 1045) examining the potential for conflict between courts and parliamentary bodies in making determinations about the validity of legislation on the basis of parliamentary procedure. For a discussion of the legislature's role in the budget process, see (Posner & Park, 2007)*

On this latter point, it is important to consider that initiatives to impose or increase taxation require a "ways and means" motion to be considered by the House of Commons. (Lukyniuk, 2011) Procedurally, such a motion can only be made a Minister of the Crown.[29]

The constitution does not provide for additional formalities with respect to tax legislation before a Canadian legislature. Each legislature therefore may develop its own rules and practices regarding how such legislation is considered. It should be noted that there are sometimes concerns raised about the process of fiscal legislation, particularly in the federal context where measures may be combined into omnibus bills coupled with 'time allocation' or other debate-limiting procedures.[30]

2.4 CONSTITUTIONAL QUESTIONS ON TAX MATTERS

While the division of powers outlined above might give the appearance that it is straightforward to determine the level of government is constitutionally capable of imposing a particular tax, the Canadian reality is far more complex. An imposed tax might raise constitutional questions to the extent that its principal purpose and effect is not to "raise money" but rather to achieve some other policy or regulatory goal. In *Reference re Firearms Act (Can),* the Supreme Court described the issue as one of colourability: "a law may say that it intends to do one thing and actually do something else."[31]

Contesting a federal tax on colourability would be difficult, given that the government routinely uses its taxing power to influence social and economic life in Canada. Otherwise, the government might turn to its power to regulate under the "peace, order and good government" or "POGG" power, which is also outlined in section 91 of the *Constitution Act, 1867*.[32]

In the leading case of *Crown v Zellerbach*, POGG was recognized as a valid authorization of federal legislation aimed at regulating the environment.[33] According to the Court, POGG was appropriately applied because the matter at issue addressed a national concern that had "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."[34] The issue of national concern had to be defined narrowly enough to limit the impact on provincial jurisdiction. [35] POGG powers have evolved to include three branches of power: the emergency branch, the gap or purely residual branch, and the national concern branch. (Monahan et al., 2017)

---

[29] *"The Crown, on the advice of its responsible Ministers, initiates all requests to impose or increase a tax on the public and the House either grants or withholds its consent. A Ways and Means motion may therefore only be moved by a Minister of the Crown." (Marleau & Montpetit, 2000)*

[30] *For discussion, see (Cockram, 2014)*

[31] *Reference re Firearms Act (Can.) [2000] 1 S.C.R. 783 at 18, 2000 SCC 31.*

[32] Constitution Act, 1867, s 91; see Peter W. Hogg, "Constitutional Authority over Greenhouse Gas Emissions," Alberta Law Review 46, no. 2 (2009): 507. *R. v. Crown Zellerbach Canada Ltd., [1988] 1 S.C.R. 401, 1988 CanLII 63 (SCC) para. 34 [Crown Zellerbach]. The other branch of the POGG power is the emergency branch.*

[33] *Ibid., para. 33.*

[34] *Ibid.*

[35] *Ibid., 37, 71.*

Determining the validity of a particular statute may turn on the distinction between a tax and a regulatory charge. Whereas taxation measures are subject to the limitations provided under section 125 of the *Constitution Act, 1867*,[36] regularly charges are not.

To determine if an impugned levy constitutes a charge, courts assess the "pith and substance" of its purpose.[37] A charge is considered a tax if the purpose of the legislation is to raise revenue for general federal purposes.[38] In contrast, a charge is not considered a tax— and by consequence, sections 53 and 125 do not apply— if it is imposed for a specific regulatory purpose.[39] Examples of fees that have been interpreted by courts as regulatory charges include a disposal fee imposed on private waste disposal facilities in Greater Vancouver[40] and a levy on liquor licences for businesses operating in Jasper National Park, Alberta.[41]

In summary, the authority to tax in Canada is laid out in sections 91 and 92, together with the (generally accepted) exclusive authority of the federal government to bind the nation to international agreements, while sections 35, 53, 54, and 125 of the *Constitution Act, 1867* provide for oversight on taxation matters and ensure accountability of public authorities in the exercise of their authority. Overall, the division of powers achieved through the combination of the constitution, constitutionally-sanctioned statutes, historical practice, and jurisprudence reflects a balance between the federal Parliament and provincial legislatures, the three territories, and Canada's Indigenous nations.

Yet even where an authority to tax may be identified —be it federal, provincial, territorial, or Indigenous— no such authority has unfettered power within its legislative competence. Indeed, other provisions of the constitution and even other statutes —such as those of quasi-constitutional status— may bear upon how a taxation authority establishes and administers a taxation regime. Significant legal constraints on government authority of all kinds and at all levels can be found in the *Canadian Charter of Rights and Freedoms* (the *Charter*), which was embedded in Canada's Constitution in 1982. [42] Specific to the taxing power, many of the provisions of the Charter are reflected in a quasi-legal "Taxpayer Bill of Rights" which was developed by Canada's tax authority, the Canada Revenue Agency (CRA), in 2017. These two documents, discussed in the following part, seek a workable balance between the preservation of individual rights and the efficient and effective administration of the tax system at all levels of Canadian government.

---

[36] *For instance, the Supreme Court in Westbank First Nation held that federal levies imposed on a provincial utility company constituted taxation measures. By virtue of section 125 of the Constitution Act, 1867, the company was thus immune from the disputed charges.*

[37] *Canadian Western Bank v. Alberta, 2007 SCC 22.*

[38] *Lawson v. Interior Tree Fruit and Vegetable Committee of Direction, para. 362-63 provides the starting point for characterizing a governmental levy as taxation: (1) enforceability by law; (2) imposition under the authority of the legislature; (3) imposition by a public body; and (4) intention for a public purpose. Eurig Estate added another possible factor to consider, at para. 21: a nexus between the quantum charged and the cost of service provided.*

[39] *The factors considered when identifying a regulatory scheme include: (1) a complete and detailed code of regulation; (2) a specific regulatory purpose which seeks to affect the behaviour of individuals; (3) actual or properly estimated costs of regulation; and (4) a relationship between the regulation and the person being regulated [Westbank at para. 24].*

[40] *Greater Vancouver Sewerage and Draining District v. Ecowaste Industries Ltd., 2008 B.C.C.A. 126.*

[41] *620 Connaught Ltd. v. Canada (Attorney General) [2008] 1 S.C.R. 131, 2008 SCC 7.*

[42] *Canadian Charter of Rights and Freedoms, s 8, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [hereinafter, the Charter]. This bill of rights is entrenched in the Canadian Constitution and guarantees enumerated rights and freedoms that are subject to reasonable limits within a free and democratic society.*

3 INDIVIDUAL RIGHTS AND THE CONSTITUTIONAL AUTHORITY TO TAX

Even when a tax law has been duly enacted according to a relevant jurisdictional head of authority, those subject to such laws retain their individual rights as outlined in the *Constitution Act, 1867.* It is therefore not uncommon for taxpayers to take issue with the constitutionality of Canadian tax laws. For example, in the seminal case of *Symes v Canada*, the taxpayer sought to deduct certain childcare expenses as a business expense, and argued that disallowance of such expenses amounted to a *Charter* violation of her right against discrimination on the basis of sex.[43]

Symes was unsuccessful in her appeal, but the fact remains that the tax laws must remain compatible with Charter rights. These include the principles that "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice," as found in section 7, and that "[e]veryone has the right to be secure against unreasonable search or seizure," as found in section 8. Provincial legal texts echo these sentiments. For example, Quebec's Civil Code opens with a declaration that "Every person is the holder of personality rights, such as the right to life, the right to the inviolability and integrity of his person, and the right to the respect of his name, reputation and privacy."[44]

In 2017, the CRA sought to affirm some of these rights in a non-binding document called the Taxpayer Bill of Rights.(Canada Revenue Agency & Government of Canada, 2017) Like most of its counterparts in other countries, the Taxpayer Bill of Rights is not legislated. Rather, it consists of a set of articulations by the tax authority, each of which may be supported by rights protected in legal texts on a case-by-case basis.(Li, 1997)

3.1 PERSONAL AND ADMINISTRATIVE RIGHTS

The Taxpayer Bill of Rights is a set of 16 rights that "the taxpayer" has in relation to the CRA as the agency with responsibility for carrying out the tax laws in Canada. It reads as follows:

1. You have the right to receive entitlements and to pay no more and no less than what is required by law.
2. You have the right to service in both official languages.
3. You have the right to privacy and confidentiality.
4. You have the right to a formal review and a subsequent appeal.
5. You have the right to be treated professionally, courteously, and fairly.
6. You have the right to complete, accurate, clear, and timely information.
7. You have the right, unless otherwise provided by law, not to pay income tax amounts in dispute before you have had an impartial review.
8. You have the right to have the law applied consistently.
9. You have the right to lodge a service complaint and to be provided with an explanation of our findings.
10. You have the right to have the costs of compliance taken into account when administering tax legislation.
11. You have the right to expect us to be accountable.

---

[43] *Symes v Canada [1993] 4 SCR 695. (at 750). Justice Iacobucci writing for the majority of the Court dismissed the appeal, noting that given a limited deduction for certain child care expenses in section 63 of the Income Tax Act, "It is clear that child care cannot be considered deductible under principles of income tax law applicable to business deductions". For discussion see Lisa Philipps, "The Supreme Court of Canada's Tax Jurisprudence: What's Wrong with the Rule of Law," Canadian Bar Review 79, no. 2 (2000): 120-144.*

[44] *Civil Code of Quebec, art. 3. Note that the doctrine of paramountcy dictates that in cases of conflicting federal and provincial legislation, the former prevails. See Rothmans, Bensons & Hedges Inc. v. Saskatchewan [2005] 1 SCR 188 para. 11, 2005 SCC 13 "…where there is an inconsistency between validly enacted but overlapping provincial and federal legislation, the provincial legislation is inoperative to the extent of the inconsistency."*

12. You have the right to relief from penalties and interest under tax legislation because of extraordinary circumstances.
13. You have the right to expect us to publish our service standards and report annually.
14. You have the right to expect us to warn you about questionable tax schemes in a timely manner.
15. You have the right to be represented by a person of your choice.
16. You have the right to lodge a service complaint and request a formal review without fear of reprisal.

These sixteen enumerated rights express something about the ideal relationship of the taxpayer to the government of Canada. It is notable that the Taxpayer Bill of Rights is general and abstract in nature, so it is not amenable to (and is not intended to elicit) detailed parsing in the same way as a statute. Nevertheless, some of its features raise important threshold questions. For instance, "the taxpayer" is an undefined category. It arguably applies on a global basis to anyone who is touched by the provisions of the *Income Tax Act* by virtue of economic or personal ties to Canada. The scope does not appear to have been tested by litigation.

The first right enumerated by the CRA, that it is the taxpayer's right to arrange their affairs in such a way as to avoid tax, remains a central tenet in Canada (as is elsewhere). However, the statement of this "right" does not capture the nuances and complexities of Canadian jurisprudence surrounding the limits of taxpayers' attempts to strategically plan around specific rules. For instance, Canada's adoption of a "general anti-avoidance rule" (GAAR) in 1987 brings additional principles to play. The GAAR appears in section 245 of the *Income Tax Act* and provides that if a transaction results in a reduction, deferral, or avoidance of tax that does not comply with tax policy objectives, the CRA may deny the tax benefit.

The GAAR currently involves three questions, which, if answered in the affirmative, allow the CRA to recharacterize a taxpayer's tax position, which could include denying deductions, re-assigning income to different taxpayers, or changing the nature of a payment. The three questions are:

1. Is there a tax benefit?
2. Is there an avoidance transaction?
3. Is the avoidance transaction abusive (i.e. is it consistent with the purpose of the ITA)?

This three-part inquiry seems straightforward enough in the abstract, but it falls to the Courts to ultimately decide whether the GAAR should apply to a transaction, and the Courts in Canada have not been consistent. (Li & Hwong, 2013)

The second right expressed in the Taxpayer Bill of Rights refers to service in both languages. The expression of this right accords with the *Official Languages Act*, which has recognized the equal status of English and French throughout the federal administration of Canada since 1969. (Office of the Commissioner of Official Languages & Government of Canada, 2021) As such, taxpayers have the right to receive services from the CRA in the official language of their choice. This type of right is obviously relevant to countries that have more than one official language and appears to be uncontroversial in terms of its rationale.[45]

The third right states that the taxpayer can expect the CRA to protect and manage the confidentiality of their personal and financial information. Confidentiality is a primary issue for every country that seeks to impose a tax on income. Measuring income inevitably requires knowing something about the taxpayer's assets and cash flows, but may also

[45] *For a historical perspective on the Official Languages Act by the Commissioner of Official Languages, see (Fraser, 2020)*

involves personal and family factors. As such, tax information inherently includes the sort of highly personal information for which individuals have a reasonable expectation of privacy,[46] such as family composition,[47] health circumstances,[48] and religious and political preferences.[49] Much of this information is sensitive and many individuals would feel vulnerable to embarrassment or harassment if others could view it, whether in an official capacity or otherwise. (Canada Revenue Agency, 2014)

Confidentiality is further stretched because the *Income Tax Act* imposes various information gathering and reporting obligations on persons other than the taxpayer. These obligations, which include third-party information reporting and tax withholding requirements, are necessary to make the tax system administrable. The CRA's information gathering powers are accordingly broad, including compelling third parties to provide books and records to the tax authority in specific cases. For example, section 231 of the *Income Tax Act* allows the Minister of National Revenue to authorize any person to compel a respective taxpayer to provide them with relevant records, once certain procedural measures are met.

Accordingly, it is no surprise that in the Taxpayer Bill of Rights, the taxpayer's right to privacy and confidentiality is not framed in respect of *the government's* collection and use of information. Rather, it is concerned with the use of taxpayer information by persons *other than* the government, including those tasked with gathering such information for purposes of giving it to the CRA. Thus, the CRA assures taxpayers that government-wide and internal policies are followed, with regular reviews of internal processes to ensure the security of information.[50] Individuals thus have virtually no choice but to share personal information with the government for a specific purpose, namely, the administration of the tax system.

Perhaps because it is practically inescapable, the taxpayer's acquiescence with the obligation to volunteer personal information on a regular basis is widely understood to create a trust relationship between the individual and the government.[51] Yet the level of trust in the relationship between a taxpayer and the government changes as between a standard tax reporting and filing matter, and one that concerns an inquiry into potentially unlawful behaviour by the taxpayer. Canadian jurisprudence has developed doctrines regarding the expectations of privacy and rights to due process when the use of information begins as a matter of tax administration and transforms into investigation of potentially criminal offenses. In the "regulatory sphere" of routine tax administration, taxpayers have a relatively low reasonable expectation of privacy, whereas taxpayers in the "penal sphere" of criminal investigation are provided more rigorous protections by virtue of the *Charter*.

---

[46] *Privacy Act, RSC, 1985, c. P-21 (hereinafter Privacy Act of Canada) (providing inter alia that Canadian government institutions must protect personal information furnished to them by individuals).*

[47] *Family composition is typically required to establish support for various claims, including spousal or childcare tax credits or other credits that depend on family income, such as general sales tax rebates. "Tax information, which includes a taxpayer's income and an individual's personal circumstances (e.g. to support a claim for a disability tax credit), is a particularly sensitive form of personal information, and can be used to build a detailed profile of individual identity, including religious and political beliefs". (Cockfield, 2010, p. 420)*

[48] *This information may be indicated to support a claim for a disability or health-related tax credits.*

[49] *This information may be indicated in connection with claims related to charitable donations.*

[50] *Taxpayer Bill of Rights.*

[51] *Ellis, 29 (the non-tax use of tax information is widely held to be "a breach of trust"); see also R. v. Mckinlay Transport [1990] 1 S.C.R. 627, 648 ("A taxpayer's privacy interest with regard to [records which may be relevant to the filing of an income tax return] vis-à-vis the Minister is relatively low. The Minister has no way of knowing whether certain records are relevant until he has had an opportunity to examine them. At the same time, the taxpayer's privacy interest is protected as much as possible since s. 241 of the Act protects the taxpayer from disclosure of his records or the information contained therein to other persons or agencies.").*

It is a generally accepted principle that "taxpayer information" deserves protection in law and in practice.[52] Moreover, taxpayers routinely assume and believe that government has a duty to protect taxpayer information. At the same time, taxpayer information forms a robust and comprehensive collection of data which is a constant temptation to administrators in a wide variety of regulatory areas. Governments therefore have not strictly protected the confidentiality of taxpayer information, instead routinely using such information for purposes other than the administration of the tax system ("non-tax purposes"), to varying degrees, and for various reasons.

Formative to contemporary thinking was the discovery in 1978, by a Royal Commission, of a secret agreement under which the Canada Revenue Agency (then Revenue Canada) regularly furnished tax information to the RCMP, which the RCMP used to detect and investigate non-tax crimes.[53] These events significantly increased public scrutiny regarding the use of tax information for non-tax purposes, prompted increased official concern for tax confidentiality, and led to the adoption of significant legislative reforms in Canada. That legacy continues to inform contemporary understanding of the importance of tax confidentiality in Canada.[54]

Nevertheless, the temptation to erode privacy in favour of administrative expediency persists, especially as tax information becomes increasingly voluminous and detailed, along with the available technology to collect, sort, use, and share it across agencies and with other countries. For example, in 2015, the Canadian Parliament broadly expanded the use of taxpayer information for investigations into terrorism-related offenses.[55] Further, it was revealed in a subsequent report that despite relaxed controls for the use of data in security-related matters, the Canadian Security Intelligence Service (CSIS) regularly obtained taxpayer information from the CRA without presenting a court-approved warrant as required by statute.[56]

A gradual extension of the use of tax information for non-tax purposes has also occurred in the province of Quebec. Since 2011, a number of new exceptions to taxpayer confidentiality were enacted that allow for the sharing of taxpayer information without judicial intervention to other provincial agencies that are capable of imposing financial penalties and other sanctions on the basis of that information.[57] Prior to these amendments, taxpayer

---

[52] *The universality of this view has been confirmed by two separate multi-country studies in the past two years. (Kristoffersson et al., 2013) (hereinafter, Tax Secrecy Study 2013) 37-country study of tax secrecy and confidentiality rules; (Baker & Pistone, 2015) 41-country survey, national reports, and general report on taxpayer rights, including rights to privacy and confidentiality, and against self-incrimination. (hereinafter, Taxpayer Rights Study 2015)*

[53] *"Testimony before the McDonald Commission of Inquiry into the R.C.M.P. revealed that tax information was released to the R.C.M.P. on the basis of very remote and incidental "tax interests" relating to non-tax prosecutions. Furthermore, the Alberta Royal Commission headed by Mr Justice Laycraft which investigated Royal American Shows Inc., uncovered a secret agreement between Revenue Canada and the R.C.M.P. allowing release of tax information in any investigation of a violation of the Income Tax Act by members of organized crime. Although Mr. Justice Laycraft did not find this agreement to contain any breaches of the secrecy provisions in s. 241 of the Income Tax Act, publicity surrounding the McDonald Commission and the Laycraft Commission has raised questions about the adequacy of existing safeguards. Perhaps the most blatant example of the ineffectiveness of the secrecy provisions was the release of information about Progressive Conservative Leader Joe Clark's tax return to a private investigator who then gave the information to Toronto broadcasters Pierre Berton and Charles Templeton.".(Toope & Young, 1981, p. 479)*

[54] *Philip Baker and Pasquale Pistone, General Report at s. 3.14, in Taxpayer Rights Study 2015 (noting the "critical importance" of preventing use of tax information for political purposes" and concluding therefore that the survey of practices across 41 jurisdictions demonstrates a consensus that broad disclosure of tax information to lawmakers "is not a generally permissible exception" to confidentiality.)(Baker & Pistone, 2015)*

[55] *Anti-terrorism Act, 2015, S.C. 2015, c. 20 (amending section 295 of the Excise Tax Act and subsection 241(9) of the Income Tax Act to expand the list of circumstances under which tax information may be shared among tax and law enforcement agencies).*

Anti-terrorism Act, 2015, S.C. 2015, c. 20 (amending section 295 of the Excise Tax Act and subsection 241(9) of the Income Tax Act to expand the list of circumstances under which tax information may be shared among tax and law enforcement agencies). (Request by CSIS Director), http://www.sirc-csars.gc.ca/anrran/2014-2015/index-eng.html; see Jim Bonskill, "CSIS Obtained taxpayer info from Canada Revenue Agency without warrant," Canadian Press, 28 Jan 2016, http://ipolitics.ca/2016/01/28/csis-obtained-taxpayer-info-from-canada-revenue-agency-without-warrant/.

[57] *TAA s. 69.1(s),(x),(y),(z).*

information could only be shared amongst government agencies without judicial intervention for the purposes of ensuring the proper administration and application of a given act or regulation, without the possibility of punishment to the taxpayer whose confidence was breached.[58]

The erosion of tax confidentiality for purposes involving non-tax matters conflicts with international practice and policy consensus. The use of tax information for non-tax purposes is now widely understood to require special scrutiny and vigilance against misuse. In Canada, the principle was expressed in a 1993 case, in which the majority opined that the legislated uses of tax information:

> "involves a balancing of competing interests: the privacy interest of the taxpayer with respect to his or her financial information, and the interest of the Minister in being allowed to disclose taxpayer information to the extent necessary for the effective administration and enforcement of the Income Tax Act and other federal statutes.... Only in exceptional or prescribed situations does the privacy interest give way to the interest of the state."[59]

The potential for misuse of tax information, and therefore the need for increasing attention to confidentiality, is further intensified in the context of increasing cross-border cooperation on information exchange, which states have used to significantly increased their information gathering powers.[60] Accordingly, lawmakers and jurists in Canada (and peer jurisdictions) have enacted domestic laws and forged international covenants to protect the confidentiality of tax information.

The next six provisions of the Taxpayer Bill of Rights, together with provisions 12 and 13, relate to a taxpayer's interaction with the CRA as an administrative function of the government. Most of these rights seem to flow from basic procedural fairness safeguards, while case law and commentary suggest that this is how they should be read.

Some of these provisions reflect a balance being struck between the taxpayer's procedural rights and the CRA's substantial power and discretion in making and enforcing tax assessments. Canada's courts have jurisdiction to determine the validity of assessments, but commentators suggest that they "have had relatively limited influence regarding the process by which assessments are issued."(Mirandola & Privato, 2015)

Further, despite the promises of consistency in article 8 of the Taxpayer Bill of Rights, the CRA has broad discretion to treat taxpayers inconsistently.[61] Courts have denied taxpayers "legitimate expectations" in these procedural rights, which are conditioned on rights expressed in law.

Accordingly, taxpayer's rights are those that individuals enjoy in Canada under general principles, legal rules and constitutionally entrenched rights; the Taxpayer Bill of Rights reflects but does not substitute for those principles and rules.[62]

---

[58] *TAA s. 69.1(a)-(r),(t)*

[59] *Slattery (Trustee of) v. Slattery, [1993] 3 S.C.R. 430.*

[60] *See Tax Secrecy Study 2013 at 2 (discussing the rise of global tax information sharing networks and stating that "[s]tronger powers for tax authorities must be combined with stronger protection of taxpayer rights, since the taxpayer may not just be the object of mutual assistance on information concerning him but should also receive an effective and timely protection of his/her/its right to confidentiality.").*

[61] *See e.g, Hokhold v. The Queen, 93 DTC 5339 (Federal Court Trial Division) (rejecting taxpayer's appeal in an assessment on grounds other taxpayers had been treated more favourably by the CRA). But see Lee v. The Queen, 92 DTC 6067 (Federal Court-Trial Division) (the choice of two partners to report certain gain on income account was relevant and admissible in the case of a third partner's reporting).*

[62] *As Jinyan Li observes, the Declaration of Taxpayer Rights (predecessor to the Canadian Bill of Rights), "has no legal authority and provides no real protection for taxpayers." (Li, 1997, p. 85)*

3.2 RIGHTS TO ACCOUNTABILITY

Principles 11 and 16 of the Taxpayer Bill of Rights are related in that both speak to the obligations of the CRA as an instrument of government, and the accountability to taxpayers that is consequently required. The eleventh principle distinctly states that the taxpayer has "the right to expect [the CRA] to be accountable". CRA guidance states that this includes being informed of one's rights and obligations with accurate and understandable information.

The eleventh principle is somewhat oddly worded in that it reflects the taxpayers' right to *expect* accountability rather than expressing the taxpayer's right to accountability itself, followed by a statement in guidance to the Taxpayer Bill of Rights that the CRA "is" accountable. It is presumed that the provision is intended to express that the taxpayer has a right to accountability. However, this term is susceptible to wide variation in interpretation. The right expresses one interpretation by focusing on reason-giving in decision-making and reporting. It also repeats prior principles, notably principle 2 on language accessibility.

The sixteenth principle is less explicitly about accountability. It affirms that CRA employees are expected to act in accordance with the CRA Code of Conduct, and that upon formal review of a CRA decision, taxpayers are entitled to impartial treatment by the CRA. The obligations of the agency's employees to follow CRA guidelines during the formal review process are thereby outlined.

3.3 RIGHT TO BE INFORMED

Finally, principles 14 and 15 appear to support a general principle that the taxpayer has a right to know what the law is, and to have assistance in dealing with a complex legal regime that has material financial consequences. While principle 14 affirms that the taxpayer is entitled to timely information about questionable or potentially abusive tax schemes under scrutiny of the CRA, principle 15 stipulates that the taxpayer is entitled to the right to representation by a person of their own choosing.

While a more general right to be informed is not expressly defined in the Taxpayer Bill of Rights, it is the case that taxpayers have various means of participating in the development of tax policy and law in Canada. However, as is typically the case for legal participation, especially in more technical fields, stakeholder participation is proportionate to resources of both time and expertise.(de Londras & Tregidga, 2021) In practice, this is usually conditioned on having well-informed advisers. For example, proposed legal reforms are often released in draft form to the tax community before being tabled in Parliament, which gives tax professionals and interested observers a chance to comment. However, short timeframes and curtailed Parliamentary debate sometimes preclude meaningful participation from the general public. The taxpayer bill of rights does not address these issues and instead focuses on the individual's right to be advised by competent officials and professionals regarding the practical application of tax rules to their particular circumstances.

Overall, Canada's taxation structure entails information collection practices of individual taxpayers, which inherently implicate issues of confidentiality and privacy. Although not legally enforceable, the Taxpayer Bill of Rights provides a framework of administrative standards and statutory rights that taxpayers can expect when dealing with the CRA.

4 TAX AND THE CONSTITUTION IN ACTION: THE FEDERAL CARBON PRICING SCHEME

As part of Canada's pledge to reduce greenhouse gas emissions across all sectors of the economy and eventually achieve net-zero emissions by 2050, (Government of Canada, 2020) Canada's federal government recently introduced a carbon pricing scheme. The context that gave rise to this regime, its unique character as a backstop or minimum tax to any existing or future provincial alternatives, and the constitutional challenges that followed its implementation provide a pertinent case study of the taxing power and the constitution in Canada. Accordingly, this Part introduces the carbon pricing scheme and examines the range of constitutional issues that arose surrounding its adoption.

The scheme emerged in the context of the 2015 federal election in Canada, in which the Liberal Party of Canada under leader Justin Trudeau declared that it would "be putting a price on carbon" with a promise to work with provinces and territories to implement carbon pricing policies of their choice.(Leblanc & Woo, 2015) Having secured a majority government in that election, the Liberal Government released a "Pan-Canadian Framework on Clean Growth and Climate Change" to deliver on this promise and Parliament enacted the *Greenhouse Gas Pollution Pricing Act* (GGPPA) in 2018. The legislation required provinces and territories to implement carbon gas pricing systems by January 1, 2019. In effect, this was a backstop mechanism in which the federal government would impose a tax unless the provinces did so themselves (at the same or a higher level).(Christians et al., 2018; Christians & Jarda, 2015) In this respect, the GGPPA presents a longstanding tension of Canadian federalism: the division of legislative powers necessary to enable federal unity while also protecting provincial autonomy.

Prior to these events, some of Canada's provinces had already been laboratories for carbon tax innovation. For example, British Columbia had adopted a broad-based, revenue-neutral carbon tax in 2008,[63] and Quebec had a cap-and-trade system in effect since 2013, linked to its membership in the Western Climate Initiative.[64] When the federal government decided to step in with a national plan, the question quickly arose whether doing so actually fell within the enacting government's area of legislative competence.

Recently, the characterization of the GGPPA as a tax or a regulation was contested on the basis of division of powers by the provinces of Ontario, Alberta and Saskatchewan in the form of a reference question that was appealed to the Supreme Court. In Canadian law, a reference question is typically a submission from the provincial government to its highest court or from the federal government to the Supreme Court of Canada seeking guidance on a significant issue that does not directly implicate a legal dispute of the parties.[65] These submissions generally concern issues of constitutionality. (Feldman, 2015)

In a 6-3 majority ruling, the Supreme Court of Canada determined that the GGPPA was a constitutionally valid regulatory charge and *not* a tax, despite the popularity of the term "carbon tax" used to describe it and other similar pricing schemes.[66]

The Supreme Court determined that the subject matter of the national pricing scheme is to establish minimum national standards of GHG price stringency in order to

---

[63] *Carbon Tax Act, SBC 2008, c 40.*

[64] *Agreement Between the California Air Resources Board and the Gouvernement du Québec Concerning the Harmonization and Integration of Cap-and-Trade Programs for Reducing Greenhouse Gas Emissions, Quebec and California (27 September 2013).*

[65] *A survey of Canadian jurisprudence demonstrates a long history of provincial legislatures challenging the validity of federal statutes before their provincial courts on a reference. (Feldman, 2017, p. 18)*

[66] *Reference re Greenhouse Gas Pollution Pricing Act, 2021 SCC 11, para. 215 [Reference re GGPPA]. This matter is analyzed in more detail in Part III, infra.*

reduce GHG emissions, which is of sufficient national concern to Canada as a whole. The majority found that the reduction of GHG emissions "is critical to our response to an existential threat to human life in Canada and around the world."[67]

By applying the test articulated in *Crown Zellerbach,* the Court determined that the backstop architecture of the GGPPA encompasses the requisite "singleness, distinctiveness and indivisibility" that is qualitatively different from provincial matters. In particular, the Court found that establishing minimum standards of GHG price stringency relate to a federal role in carbon pricing, thereby reflecting a distinctly national matter.

Provincial inability to deal with the matter was also established in this case: since GHG emissions are extra-provincial and international in their implications, provinces acting alone or together are incapable of establishing minimum GHG emission standards. Failure to reduce GHG emissions would have grave extra-provincial consequences by threatening the existence of human life and the environment, with especially high impacts in the Canadian Arctic, in coastal regions and on Indigenous peoples. As Justice Chief Wagner warns, the effects of climate change have no boundaries and "[pose] a grave threat to humanity's future."[68]

As such, the Court found the federal carbon pricing scheme to be *intra vires* Parliament, that is, within the federal government's constitutionally authorised power on the basis of the national concern doctrine. Overall, this decision presents a significant development of the national concern branch and highlights that GHG emissions not only meet the provincial inability threshold, but also encapsulate the necessary distinctness to be regulated under the peace, order and good government clause of the *Constitution Act, 1867*.

5 CONCLUSION

An analysis of the taxation regime in Canada requires a nuanced understanding of the governance structure that shapes Canada's constitutional landscape. In particular, the division of legislative powers reflects a longstanding tension between levels of government: maintaining federal unity concerning matters of national concern, while also protecting provincial, territorial, and Indigenous peoples' independence and diversity. Canada's constitution, together with its Charter of Rights and Freedoms, mandate a balancing of interests among the various jurisdictions as well as between governments at all levels and the people they purport to regulate through taxation.

6 BIBLIOGRAPHY

Baker, P., & Pistone, P. (Eds.). (2015). The practical protection of taxpayers' fundamental rights: Subject 2 ; [69th Congress of the International Fiscal Association Basel 2015]. Sdu Uitgevers.

Barnett, L. (2021). Canada's approach to the treaty-making process (No. 2008-45-E; p. 19). Library of Parliament Canada. https://lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/HillStudies/2008-45-e.pdf

Canada Revenue Agency & Government of Canada. (2017, June 22). Taxpayer Bill of Rights [Organizational descriptions]. https://www.canada.ca/en/revenue-agency/corporate/about-canada-revenue-agency-cra/taxpayer-bill-rights.html

Christians, A. (2006). Taxing the Global Worker: Three Spheres of International Social Security Coordination. Virginia Tax Review, 26, 81–124.

Christians, A. (2016). While Parliament Sleeps: Tax Treaty Practice in Canada. Journal of Parliamentary and Political Law, 10(15).

[67] *Re GGPPA, para. 171.*

[68] *Re GGPPA, para. 4.*

Christians, A. (2018). Introduction to Tax Policy Theory (SSRN Scholarly Paper No. 3186791). https://doi.org/10.2139/ssrn.3186791

Christians, A., & Jarda, O. (2015). The Constitutional Framework of Environmental Taxation in Canada. In R. R. Salassa Boix (Ed.), La Protección Ambiental a Través del Derecho Fiscal/Environmental Protection Through Tax Law (pp. 283–308). Universidad Nacional de Córdoba.

Christians, A., Jarda, O., & Hewson, S. (2018). The Constitutional Framework of Environmental Taxation in Canada. In R. R. Salassa Boix (Ed.), Aspectos constitucionales de la tributación ambiental/Constitutional Aspects of environmental Taxation (pp. 219–260). Universidad Nacional de Córdoba.

Cockfield, A. J. (2010). Protecting Taxpayer Privacy Rights Under Enhanced Cross-Border Tax Information Exchange: Toward a Multilateral Taxpayer Bill of Rights. University of British Columbia Law Review, 42, 420–471.

Cockram, L. (2014). "Grievance before Supply": Omnibus Budget Implementation Legislation as a Case when Party Discipline Damages Parliamentary Democracy [Thesis, Dalhousie University]. https://DalSpace.library.dal.ca//handle/10222/49097

de Londras, F., & Tregidga, J. (2021). Rights, proportionality, and process in EU counterterrorism lawmaking. International Journal of Constitutional Law, 19(2), 665–693. https://doi.org/10.1093/icon/moab047

Driedger, E. A. (1968). Money Bills and the Senate. Ottawa Law Review, 3(25), 25–46.

Farish, K. I. E., & Tedds, L. M. (2014). User Fee Design by Canadian Municipalities: Considerations Arising from Case Law. Canadian Tax Journal / Revue Fiscale Canadienne, 62(3), 635–670.

Feldman, C. (2015). Parliament and Supreme Court of Canada Reference Cases. Library of Parliament Ottawa (Canada), 2015-44-E, 1–14.

Feldman, C. (2017). Parliamentary Timing and Federal Legislation Referred to Courts: Reconsidering C-14. Canadian Parliamentary Review, 40(2), 18–23.

Fraser, G. (2020). Fifty years later: The legacy of the Royal Commission on Bilingualism and Biculturalism – Notes for an address at a conference at the Université de Moncton. Office of the Commissioner of Official Languages. https://www.clo-ocol.gc.ca/en/news/speeches/2013/2013-06-14

Government of Canada. (2020, November 19). Net-Zero Emissions by 2050. Government of Canada. https://www.canada.ca/en/services/environment/weather/climatechange/climate-plan/net-zero-emissions-2050.html

Keyes, J. M., & Mekkunnel, A. (2001). Traffic Problems at the Intersection of Parliamentary Procedure and Constitutional Law. McGill Law Review, 46(4), 1037–1062.

Kristoffersson, E., Lang, M., Pistone, P., Schuch, J., Staringer, C., & Storck, A. (2013). Tax Secrecy and Transparency—The Relevance of Confidentiality in Tax Law. Lang.

La Forest, G. V. (1967). The allocation of taxing power under the Canadian Constitution (1st ed.). Canadian Tax Foundation.

Leblanc, D., & Woo, A. (2015, June 29). Trudeau vows Liberal environment plan will 'be putting a price on carbon'. The Globe and Mail. https://www.theglobeandmail.com/news/politics/trudeau-unveils-liberal-environment-plan-including-green-bonds/article25176587/

Li, J. (1997). Taxpayers' Rights in Canada. Revenue Law Journal, 7(1), 83–137. https://doi.org/10.53300/001c.6598

Li, J., & Hwong, T. (2013). GAAR in Action: An Empirical Exploration of Tax Court of Canada Cases (1997-2009) and Judicial Decision Making. Comparative Research in Law & Political Economy, Research Paper, 50, 321–366.

Lukyniuk, M. (2011). Tax Bills and the Ways and Means Process. Canadian Parliamentary Review, 34(2), 26–33.

Magnet, J. E. (1974). The Constitutional Distribution of Taxation Powers in Canada. Ottawa Law Review, 10(1), 473–534.

Marleau, R., & Montpetit, C. (Eds.). (2000). Financial Procedures—The Business of Ways and Means. In House of Commons procedure and practice (2000th ed.). House of Commons - Canada. https://www.ourcommons.ca/marleaumontpetit/DocumentViewer.aspx?Sec=Ch18&Seq=5

Mestral, A. C. de, & Fox-Decent, E. (2008). Rethinking the Relationship Between International and Domestic Law. McGill Law Journal, 53(4), 573–648.

Mirandola, S., & Privato, S. (2015). Canada Branch Report. In P. Baker & P. Pistone (Eds.), The practical protection of taxpayers' fundamental rights (pp. 183–206). Sdu Uitgevers.

Monahan, P., Shaw, B., & Ryan, P. (2017). Constitutional law. Irwin Law.

Office of the Commissioner of Official Languages & Government of Canada. (2021). Understanding your language rights. https://www.clo-ocol.gc.ca/en/language_rights/act

Posner, P., & Park, C. (2007). Role of the Legislature in the Budget Process: Recent Trends and Innovations. OECD JOURNAL ON BUDGETING, 7(3).

Saunders, P. M., & Currie, R. J. (Eds.). (2019). Domestic Reception of International Law. In P. Akhavan, J. Brunnée, G. van Ert, T. L. McDorman, F. Mégret, I. Mgbeoji, K. Mickelson, L. C. Reif, & C. P. M. Waters, Kindred's international law, chiefly as interpreted and applied in Canada (9th ed., pp. 153–262). Emond Montgomery Publications.

Scott, D. N. (2017). The Environment, Federalism, and the Charter. In P. Oliver, P. Macklem, & N. Des Rosiers (Eds.), The Oxford Handbook of the Canadian Constitution (1st ed., pp. 493–516). Oxford University Press. https://doi.org/10.1093/law/9780190664817.003.0023

The Governor General of Canada. (2016). Viceregal Representatives [Text]. The Governor General of Canada; Government of Canada. https://www.gg.ca/en/crown/viceregal-representatives

Toope, S. J., & Young, A. L. (1981). The Confidentiality of Tax Returns Under Canadian Law. McGill Law Journal, 27, 479–503.

van Ert, G. (2001). The Legal Character of Provincial Agreements with Foreign Governments. Les Cahiers de Droit, 42(4), 1093–1124. https://doi.org/10.7202/043687ar