

# The Pandemic and Beyond: Federalism Faces Existential Threats

*Cherie Metcalf\* & Meghan Huskisson-Snider\*\**

*The authors explore how Canadian federalism shapes government responses to the COVID-19 pandemic and other existential threats, such as climate change. The authors assess ways in which the division of power between the federal and provincial governments has been both a potential benefit and hinderance to successfully confronting the COVID-19 pandemic. They first consider ways in which decentralized provincial responses have been a strength, through tailored policy, innovation across provinces, and as a way to avoid centralized mistakes. They then consider how national responses nevertheless play a vital role, addressing aspects of risk that spill over across provinces, national economic risks, and allowing for equitable sharing of the burdens of existential threats like the COVID-19 pandemic. The authors also identify gaps in Canada's federal structure which can undermine Canada's response to existential threats: first, the potential for overlapping authority can lead to a lack of effective action; and second, the incomplete nature of Canadian federalism, can fail to integrate local and Indigenous governments as part of the response. The authors suggest that Canada's response to existential threats ultimately relies on co-operative actions across all governments. While analysis of the response to the COVID-19 pandemic shows that this is possible within our federal structure, it does not always happen effectively. This will be an ongoing challenge as we move beyond the pandemic, but continue to face the threat of climate change.*

---

\* Associate Professor, Queen's University, Faculty of Law. Professor Metcalf gratefully acknowledges support from the Social Science and Humanities Research Council of Canada (Insight Grant No. 435-2020-0891) and from the Canadian Foundation for Legal Research, and thanks Solenn Madevon and Maitree Patel for their helpful research assistance.

\*\* JD candidate 2021 (Queen's).

Copyright © 2021 by Cherie Metcalf & Meghan Huskisson-Snider

## Introduction

### I. How Does Federalism Shape Canada's Response to an Existential Threat?

#### A. *Divide and Conquer?*

- (i) Efficiency, Information, and Subsidiarity
- (ii) Federalism, Experimentation, and Learning
- (iii) Insuring Against Mistakes

#### B. *United We Stand?*

- (i) Spillovers, Public Goods, and Coordination Problems
- (ii) Sharing Burdens Equitably
- (iii) Who Are *We*? Community, Compliance, and Trust

#### C. *Mind the Gap . . .*

- (i) Whose Job is That?
- (ii) Cities and Local Government
- (iii) Indigenous Governments

### II. The Pandemic and Beyond: Questions for Canadian Federalism

#### Conclusion

## Introduction

In 2020 Canada faced an existential threat as the Coronavirus pandemic took hold. The first reported case of COVID-19 in Canada was announced on January 25, 2020.<sup>1</sup> By January 3, 2021, the country had recorded over 600,000 cases, 27,000 hospitalizations, and 15,000 deaths.<sup>2</sup> Previously unimaginable shutdowns needed to slow the pandemic caused widespread economic losses and record levels of unemployment.<sup>3</sup> While perhaps not apparent at first, over time the scale of the health, social, and economic disruptions became clear. The pandemic threatened the integrity of Canadians' collective well-being in a way that went well beyond ordinary policy issues, by undermining the basic stability of the environment we live in and rely on in our daily lives, and that supports

---

1. See Public Health Agency of Canada, *Statement by the Minister of Health on the First Presumptive Confirmed Travel-Related Case of New Coronavirus in Canada* (Ottawa: Public Health Agency of Canada, 25 January 2020), online: <[www.canada.ca/en/public-health/news/2020/01/statement-by-the-minister-of-health-on-the-first-presumptive-confirmed-traveled-related-case-of-new-coronavirus-in-canada.html](http://www.canada.ca/en/public-health/news/2020/01/statement-by-the-minister-of-health-on-the-first-presumptive-confirmed-traveled-related-case-of-new-coronavirus-in-canada.html)>.

2. See Health Canada, *Coronavirus Disease 2019 (COVID-19): Epidemiology Update* (Ottawa: Health Canada, 3 January 2021), online: <[web.archive.org/web/20210104160941/https://health-infobase.canada.ca/covid-19/epidemiological-summary-covid-19-cases.html](http://web.archive.org/web/20210104160941/https://health-infobase.canada.ca/covid-19/epidemiological-summary-covid-19-cases.html)>.

3. See Statistics Canada, *Recent Developments in the Canadian Economy, 2020: COVID-19, Fourth Edition*, by Guy Gellatly & Carter McCormack, in *Economic Insights*, Catalogue No 11-626-X No 128 (Ottawa: Statistics Canada, 28 October 2020), online: <[www150.statcan.gc.ca/n1/pub/11-626-x/11-626-x2020026-eng.htm](http://www150.statcan.gc.ca/n1/pub/11-626-x/11-626-x2020026-eng.htm)> [Statistics Canada, *Recent Developments*].

our society. The scope and severity of the pandemic's impact *necessarily* affected all Canadians. Unfortunately, the pandemic was not the only such threat looming over Canada in 2020. It was also among the hottest years on record,<sup>4</sup> and Canada was hit with severe weather and extreme temperature. In Nunavut, the country's last fully intact ice shelf collapsed into the sea, while other areas of the country suffered a record-setting Atlantic hurricane season, faced severe air quality issues stemming from wildfires, and saw damage from storms and flooding.<sup>5</sup> These impacts, and worse, can be expected as the existential threat of climate change rises.

When Canadians are faced with the serious harms from an existential threat like the pandemic, they naturally look to government to help protect them. The question we consider in this brief essay is: *which* government?

In Canada, the power of government is divided. Our federal structure, adopted at Confederation in 1867, creates a federal government that can address national concerns as well as powerful provincial governments responsive to regional interests. These governments co-exist in Canada and under the Constitution both divide and share power in complex ways. How does this federal structure shape Canada's response to existential threats? Are there constraints in our federal structure that should be addressed to make Canada better prepared to cope with extreme threats like the pandemic in the future? Can we learn anything from our response to the pandemic that may help us address the longer-term threat from climate change?

## I. How Does Federalism Shape Canada's Response to an Existential Threat?

Canada's federal structure both benefits and limits Canada's ability to respond to a threat like the pandemic. Courts have looked to underlying principles, history, the role of federalism in creating and protecting particular communities in Canada, and the ability to achieve important objectives to

---

4. See National Aeronautic and Space Administration, News Release, 21-005, "2020 Tied for Warmest Year on Record, NASA Analysis Shows" (14 January 2021), online: *NASA* <[www.nasa.gov/press-release/2020-tied-for-warmest-year-on-record-nasa-analysis-shows](http://www.nasa.gov/press-release/2020-tied-for-warmest-year-on-record-nasa-analysis-shows)>.

5. See Alex Antoneshyn, "Fort McMurray Flood Caused \$228M in Damage, Says Insurance Bureau", *CTV News* (1 June 2020), online: <[edmonton.ctvnews.ca/fort-mcmurray-flood-caused-228m-in-damage-says-insurance-bureau-1.4963904](http://edmonton.ctvnews.ca/fort-mcmurray-flood-caused-228m-in-damage-says-insurance-bureau-1.4963904)>; Environment and Climate Change Canada, *Canada's Top 10 Weather Stories of 2020* (Ottawa: Environment and Climate Change Canada, 16 December 2020), online: <[www.canada.ca/en/environment-climate-change/services/top-ten-weather-stories/2020.html#toc7](http://www.canada.ca/en/environment-climate-change/services/top-ten-weather-stories/2020.html#toc7)>; National Oceanic Atmospheric Administration, "Canada's Milne Ice Shelf Collapses" (12 August 2020), online: *NOAA NESDIS* <[www.nesdis.noaa.gov/content/canada's-milne-ice-shelf-collapses](http://www.nesdis.noaa.gov/content/canada's-milne-ice-shelf-collapses)>.

interpret federal and provincial powers.<sup>6</sup> When it comes to existential threats, the need for policy to be effective is important in thinking about jurisdictional assignments. Below we review how our existing federal structure has shaped Canada's response to the pandemic in light of this functional concern, using climate change as another example of an extreme risk to test our insights.

### A. *Divide and Conquer?*

Canada's federal system grants substantial authority to the provinces. Provincial governments are the primary decision-makers in important areas like the operation of hospitals, provision of health care services, regulation of specific industries and conditions of work in the provinces, and regulation of property, including provincially owned land and natural resources.<sup>7</sup> Their wide-ranging authority means that provincial governments play an important role in response to threats like the pandemic in Canada. During the pandemic, provinces have managed COVID-19 testing infrastructure, created provincial public health measures, and crafted guidelines for infection and hospitalization rates to trigger tiered restrictions on activity to manage the risks of COVID-19. Provinces were free to design their own responses, weighing their own priorities, needs, and resources. There was no uniform national testing, tracing, risk level, or response framework. Prior to passage of the federal *Greenhouse Gas Pollution Pricing Act*,<sup>8</sup> which sets a mandatory national minimum price on greenhouse gas (GHG) emissions, the same could be said of climate policy in Canada. Provinces largely had the authority to make their own assessments of the threat and determine their own responses. Is the decentralization that comes from provincial jurisdiction a benefit when Canada faces existential threats?

---

6. See e.g. *Canadian Western Bank v Alberta*, 2007 SCC 22 [*Canadian Western Bank*]; *Reference Re Secession of Quebec*, [1998] 2 SCR 217, 161 DLR (4th) 385 [*Secession Reference* cited to SCR].

7. See e.g. *Citizens Insurance Co v Parsons et al*, [1881–85] All ER Rep 1179, 1 Cart BNA 265 [*Citizens Insurance*] (provinces hold jurisdiction to regulate specific industries operating within the province); *R v Morgentaler*, [1993] 3 SCR 463 at 490–491, 107 DLR (4th) 537 (provinces hold jurisdiction over hospitals, the medical profession, the practice of medicine, and health matters within the province generally); *Bell Canada v Québec (Commission de la santé & de la sécurité du travail)*, [1988] 1 SCR 749 at 761, 51 DLR (4th) 16118 (provinces hold jurisdiction in principle over working conditions); *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48 at para 31 (recognizing provincial jurisdiction over provincially-owned land and natural resources).

8. SC 2018, c 12, s 186 [*GHG Pollution Pricing Act*].

(i) Efficiency, Information, and Subsidiarity

While a threat like the pandemic may seem to require a national response, decentralized provincial action can be beneficial. One reason is that effective policy often has to be calibrated to the circumstances. One size does not fit all—and tailoring responses requires information that is often more accurately and readily available at a local level. In principle, authority should be delegated down to the effective level “closest” to those affected by the decisions. In addition to promoting efficiency by matching authority to a government likely to be in possession of the relevant information, this principle of “subsidiarity” can also enhance the legitimacy of regulation.<sup>9</sup> Individuals most affected by regulations also have a direct connection to the government imposing them.

We can see this aspect of federalism in provincial responses to the pandemic. Provinces vary significantly in terms of factors relevant to the risk of the pandemic, such as population density, capacity in health care resources, presence of vulnerable populations, and types of industry or employment to name just a few. Differences in these underlying risk profiles were apparent in the adoption of policies on lockdowns, quarantines, and travel restrictions in response to the pandemic. Provinces like Prince Edward Island and Newfoundland and Labrador initially adopted extremely strict policies, effectively prohibiting travel to their regions for any non-residents—a choice they justified by pointing to their limited hospital and intensive care unit (ICU) capacity.<sup>10</sup> Throughout the pandemic, the maritime provinces have maintained this strict approach, forming their own “bubble” when cases were low, but continuing to require two-week quarantines for anyone permitted to travel there for essential reasons from other regions of Canada.<sup>11</sup> Despite the economic implications of turning visitors away from

---

9. The principle of subsidiarity has been influential in court decisions. See e.g. *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40 at para 3.

10. See CBC News, “Don’t Come From Away: N.L.’s New Rules Aim to Stop Iceberg Tourists”, *CBC News* (29 April 2020), online: <[www.cbc.ca/news/canada/newfoundland-labrador/province-enforcement-tourists-covid-19-1.5548055](http://www.cbc.ca/news/canada/newfoundland-labrador/province-enforcement-tourists-covid-19-1.5548055)>; Terry Davidson, “Newfoundland and Labrador Closes Doors”, *The Lawyer’s Daily* (4 May 2020), online: <[www.thelawyersdaily.ca/articles/18916/newfoundland-and-labrador-closes-doors](http://www.thelawyersdaily.ca/articles/18916/newfoundland-and-labrador-closes-doors)>; Melanie Price, “P.E.I. to Step Up Screening, Turn Non-Essential Travellers From Confederation Bridge”, *CTV News* (1 April 2020), online: <[atlantic.ctvnews.ca/p-e-i-to-step-up-screening-turn-non-essential-travellers-from-confederation-bridge-1.4877657](http://atlantic.ctvnews.ca/p-e-i-to-step-up-screening-turn-non-essential-travellers-from-confederation-bridge-1.4877657)>.

11. See Shane Ross, “Atlantic Provinces Agree to Regional COVID-19 Pandemic Bubble”, *CBC News* (24 June 2020), online: <[www.cbc.ca/news/canada/prince-edward-island/pei-atlantic-bubble-covid19-1.5625133](http://www.cbc.ca/news/canada/prince-edward-island/pei-atlantic-bubble-covid19-1.5625133)>. The “Atlantic bubble” was later suspended as cases rose during the “second wave” in autumn 2020. See Laura Brown & Ryan Van Horne, “N.B. Pulls Out of Atlantic Bubble; Fredericton Region Moving to Orange Phase”, *CTV News*

their popular region, Maritimers have been highly supportive of this strict approach coming from their provincial governments.<sup>12</sup>

In contrast, Quebec and Ontario have declined to adopt general interprovincial travel bans—their large populations and corresponding health care capacity likely made this a less necessary or helpful strategy, while high volumes of interprovincial mobility linked to supply chains for essential goods would have produced significant enforcement costs. In fact, even during the early stages of the pandemic, Ontario welcomed the arrival of temporary foreign workers who provide critical labour for its agricultural industry.<sup>13</sup> However, the conditions under which they lived and worked led to a series of outbreaks and a need for focused regulatory responses.<sup>14</sup> While the federal temporary foreign workers program required quarantine on arrival,<sup>15</sup> regulation of their work environment engaged provincial authority. Ontario developed policy directed at regulating and supporting its agricultural industry and these crucial

---

(26 November 2020), online: <[atlantic.ctvnews.ca/n-b-pulls-out-of-atlantic-bubble-fredericton-region-moving-to-orange-phase-1.5205882](http://atlantic.ctvnews.ca/n-b-pulls-out-of-atlantic-bubble-fredericton-region-moving-to-orange-phase-1.5205882)>.

12. See Bobbi-Jean MacKinnon, “Majority of Atlantic Canadians Oppose Opening Up Bubble in Next Month, Survey Suggests”, *CBC News* (13 August 2020), online: <[www.cbc.ca/news/canada/new-brunswick/atlantic-bubble-open-canada-travel-survey-narrative-research-1.5685365](http://www.cbc.ca/news/canada/new-brunswick/atlantic-bubble-open-canada-travel-survey-narrative-research-1.5685365)>.

13. Temporary foreign workers accounted for 41.6% of agricultural workers in Ontario in 2017. See Statistics Canada, *The Distribution of Temporary Foreign Workers Across Industries in Canada*, by Yuqian Lu, Catalogue No 45-28-001 (Ottawa: Statistics Canada, 3 June 2020), online: <[www150.statcan.gc.ca/n1/pub/45-28-0001/2020001/article/00028-eng.htm](http://www150.statcan.gc.ca/n1/pub/45-28-0001/2020001/article/00028-eng.htm)>; Ontario, Ministry of Health, *Guidance for Temporary Foreign Workers*, Version 1 (Guide) (Toronto: Ministry of Health, 31 March 2020), online (pdf): <[www.health.gov.on.ca/en/pro/programs/publichealth/coronavirus/docs/2019\\_foreign\\_workers\\_guidance.pdf](http://www.health.gov.on.ca/en/pro/programs/publichealth/coronavirus/docs/2019_foreign_workers_guidance.pdf)>.

14. See Brandie Weikle, “COVID Outbreaks on Farms Reveal Crack in System that Migrant Workers Slip Through, Say Health-Care Workers”, *CBC Radio* (20 November 2020), online: <[www.cbc.ca/radio/whitecoat/covid-outbreaks-on-farms-reveal-crack-in-system-that-migrant-workers-slip-through-say-health-care-workers-1.5808489](http://www.cbc.ca/radio/whitecoat/covid-outbreaks-on-farms-reveal-crack-in-system-that-migrant-workers-slip-through-say-health-care-workers-1.5808489)>; Ontario, Ministry of Agriculture, Food and Rural Affairs, *Prevention, Control and Outbreak Support Strategy for COVID-19 in Ontario’s Farm Workers* (Guide) (Toronto: Ministry of Agriculture, Food and Rural Affairs, 23 February 2021), online: <[www.omafr.gov.on.ca/english/about/preventstrat.htm](http://www.omafr.gov.on.ca/english/about/preventstrat.htm)>.

15. For a plain language summary of guidance about quarantine for temporary foreign workers, see Employment and Social Development Canada, *COVID-19: A Guide for Temporary Foreign Workers in Canada* (Ottawa: Employment and Social Development Canada, 9 September 2020), online: <[www.canada.ca/en/employment-social-development/campaigns/foreign-worker-rights/covid19-guide.html](http://www.canada.ca/en/employment-social-development/campaigns/foreign-worker-rights/covid19-guide.html)>.

workers during the pandemic.<sup>16</sup> Migrant workers are important participants in the agricultural industries of Ontario, Quebec, British Columbia, and Nova Scotia.<sup>17</sup> However, the conditions and appropriate responses for these workers were not something common to all Canadian provinces. The provinces' powers to regulate particular industries within their borders, dealing with issues of local concern, created constitutional space for needed variation in pandemic responses.<sup>18</sup>

## (ii) Federalism, Experimentation, and Learning

The variable responses of provinces to similar events can also offer opportunities to learn from both successes and mistakes. Decentralized government can provide a kind of “laboratory” to test the effectiveness of different regulatory strategies.<sup>19</sup> When facing an existential threat, it may seem that we would want to focus on uniformly implementing “best practices”. However, these can be difficult to identify.

Provincial approaches to managing schools during the pandemic provide an example of how decentralization allows diverse approaches. British Columbia reopened its schools in the spring of 2020, before closing them again for summer break. Québec, despite being hard-hit by the first wave of the pandemic, also reopened schools early while provinces like Ontario and Nova Scotia waited until September 2020.<sup>20</sup> Quebec's initial reopening was seen by many as a

---

16. For a plain language summary of Ontario's strategy, see Ontario, *Working with Farm Operators to Stop the Spread of COVID-19 on Farms* (Guide) (Toronto: Ministry of Agriculture, Food and Rural Affairs, 30 November 2020), online: <[www.ontario.ca/page/working-farm-operators-stop-spread-covid-19-farms](http://www.ontario.ca/page/working-farm-operators-stop-spread-covid-19-farms)>. Note that some have questioned the adequacy of the provincial measures.

17. See Statistics Canada, *COVID-19 Disruptions and Agriculture: Temporary Foreign Workers*, Catalogue No 45280001 (Ottawa: Statistics Canada, 17 April 2020), online: <[www150.statcan.gc.ca/n1/pub/45-28-0001/2020001/article/00002-eng.htm](http://www150.statcan.gc.ca/n1/pub/45-28-0001/2020001/article/00002-eng.htm)>.

18. For cases discussing this provincial power in general, see e.g. *Citizens Insurance*, *supra* note 7; *Labatt Breweries v Canada (AG)*, [1980] 1 SCR 914, 110 DLR (3d) 594.

19. See *New State Ice Co v Liebmann*, 285 US 262 at 311, Brandeis J, dissenting; *Canadian Western Bank*, *supra* note 6 at para 24.

20. See British Columbia, Office of the Premier, *K-12 Students to Have Optional In-Class Instruction on June 1* (Victoria: Office of the Premier, 15 May 2020), online: <[news.gov.bc.ca/releases/2020PREM0026-000890](http://news.gov.bc.ca/releases/2020PREM0026-000890)>; Québec, Ministry of Education, *Pandémie de la COVID-19—Les établissements scolaires et les services de garde rouvriront progressivement et de façon non obligatoire à partir du 11 mai* (Québec: Ministry of Education,

success.<sup>21</sup> While all provinces have the goals of protecting children’s health while maintaining the quality of their education, each province has taken its own approach to safety measures like mask-wearing, distancing between desks, and placing students in “cohorts” to minimize contact with other students.<sup>22</sup> Variation in the timing of reopening and implementation of safety measures in schools means that provinces can learn from each other and adopt successful policies.

The idea of learning through decentralized provincial responses is also something we can see in the climate change context. Provinces have pursued a range of policies to reduce GHG emissions. Quebec and (briefly) Ontario implemented cap and trade schemes targeting large emitters, integrating their schemes into the Western Climate Initiative and the New England Governors & Eastern Canadian Premiers regional initiative.<sup>23</sup> Ontario also aggressively targeted its electricity generation sector, phasing out coal fired generation during 2009–2014—one of the single largest GHG mitigation actions in Canada; in 2017, ninety-six per cent of electricity generated in Ontario was GHG-free.<sup>24</sup> British Columbia was the first jurisdiction in North America to

---

27 April 2020), online: <[www.quebec.ca/nouvelles/actualites/details/pandemie-de-la-covid-19-les-etablissements-scolaires-et-les-services-de-garde-rouvriront-progressive](http://www.quebec.ca/nouvelles/actualites/details/pandemie-de-la-covid-19-les-etablissements-scolaires-et-les-services-de-garde-rouvriront-progressive)> (*COVID-19 Pandemic—Educational Establishments and Childcare Services Will Reopen Progressively and in Non-Obligatory Fashion Starting May 11* [translated by author]); Aya Al-Hakim, “Nova Scotia Releases Plan for Students to Return to School in September”, *Global News* (22 July 2020), online: <[globalnews.ca/news/7204455/nova-scotia-back-to-school-plan](http://globalnews.ca/news/7204455/nova-scotia-back-to-school-plan)>.

21. See Sidhartha Banerjee, “Quebec’s Experiment to Open Schools Amid COVID-19 was Successful, Education Experts Say”, *National Post* (21 June 2020), online: <[nationalpost.com/news/as-quebecs-covid-school-restart-ends-better-online-pivot-key-in-case-of-second-wave](http://nationalpost.com/news/as-quebecs-covid-school-restart-ends-better-online-pivot-key-in-case-of-second-wave)>.

22. For a summary of provincial school safety measures, see Nicole Bogart, “Mask Mandates, Class Caps: Back to School Rules by Province”, *CTV News* (29 July 2020), online: <[www.ctvnews.ca/health/coronavirus/mask-mandates-class-caps-back-to-school-rules-by-province-1.5042739](http://www.ctvnews.ca/health/coronavirus/mask-mandates-class-caps-back-to-school-rules-by-province-1.5042739)>.

23. See Bill 42, *An Act to amend the Environment Quality Act and other legislative provisions in relation to climate change*, 1st Sess, 39th Leg, Quebec, 2009 (assented to 19 June 2009), SQ 2009, c 33; *Regulation respecting a cap-and-trade system for greenhouse gas emission allowances*, CQLR c Q-2, r 46.1 (Quebec cap and trade scheme initiation); *Climate Change Mitigation and Low Carbon Economy Act, 2016*, SO 2016, c 7; *The Cap and Trade Program*, O Reg 144/16 (Ontario cap and trade program initiation). The program was cancelled by the incoming Conservative provincial government in 2019, see *Cap and Trade Cancellation Act*, 2018, SO 2018, c 13.

24. See Ontario, Ministry of the Environment, Conservation and Parks, *Preserving and Protecting our Environment for Future Generations: A Made-in-Ontario Environment Plan* (Toronto: Ministry of the Environment, Conservation and Parks, 2018) at 7.

adopt a broad-based carbon tax in 2008 to reduce GHG emissions.<sup>25</sup> Many governments had rejected carbon taxes as too unpopular; British Columbia's innovation was to return revenues from the carbon tax to provincial residents, in a revenue-neutral scheme to limit concerns that the tax would harm the regional economy. British Columbia also included legislated emissions targets and a low carbon fuel standard in its earliest Climate Action Plan.<sup>26</sup> Manitoba was an early adopter of a biofuel mandate.<sup>27</sup> Even this brief and partial review reveals the variety of approaches being tested through decentralized provincial climate policy. The federal government's recent, more aggressive national approach to GHG mitigation draws heavily on this experience. Its minimum national price for GHG emissions implements a backstop approach that closely mirrors British Columbia's innovative and successful revenue neutral carbon tax.<sup>28</sup>

### (iii) Insuring Against Mistakes

At times during the pandemic, commentators have urged a stronger federal presence, to impose a national approach. The crisis experienced by older Canadians living in long-term care (LTC) homes subject to provincial regulation provides an example. Residents of LTC homes have suffered a highly disproportionate share of COVID-19 deaths.<sup>29</sup> The high mortality rate at LTCs brought attention to factors like staffing levels and qualifications, general conditions, and oversight that contributed to residents' vulnerability. Disparity across public and private facilities, as well as across provinces, prompted concern.<sup>30</sup> Calls for minimum national standards to provide a baseline level of

---

25. See *Carbon Tax Act*, SBC 2008, c 40.

26. See British Columbia, *Climate Action Plan* (Victoria: Government of British Columbia, 2008).

27. See *The Biofuels Act*, CCSM c B40; *Ethanol General Regulation*, Man Reg 165/2007; *Biodiesel Mandate For Diesel Fuel Regulation*, Man Reg 147/2009.

28. See *GHG Pollution Pricing Act*, *supra* note 8.

29. See Canadian Institute for Health Information, *Pandemic Experience in the Long-Term Care Sector: How Does Canada Compare with Other Countries* (Ottawa: CIHI, June 2020), online (pdf): <[www.cihi.ca/sites/default/files/document/covid-19-rapid-response-long-term-care-snapshot-en.pdf](http://www.cihi.ca/sites/default/files/document/covid-19-rapid-response-long-term-care-snapshot-en.pdf)>.

30. Disparities between provinces' long-term care homes mortality rates are greater than mortality rates between OECD countries. See *ibid.* For-profit homes were associated with higher rates of outbreaks and deaths. See Nathan M Stall et al, "For-Profit Long-Term Care Homes and the Risk of COVID-19 Outbreaks and Resident Deaths" (2020) 192:33 CMAJ E946, online (pdf): <[www.cmaj.ca/content/cmaj/192/33/E946.full.pdf](http://www.cmaj.ca/content/cmaj/192/33/E946.full.pdf)>.

care for these most vulnerable Canadians led the federal government to promise them in its fall 2020 Throne Speech—potentially using the *Canada Health Act* and the power to restrict federal funding transfers to provinces that do not comply.<sup>31</sup> In some cases, as we will discuss below, there is a need to enforce national coordination if government power is to be exercised effectively.

However, the decentralized authority of the provinces can be an important countermeasure when federal policy turns out *not* to be ideal. Perhaps the clearest example can be found in the United States' pandemic response. Throughout the earlier stages of the pandemic, as the national leader and holder of federal executive authority, then-President Trump continually downplayed the threat of COVID-19, aggressively urged re-opening of the economy and disregard for public health measures like social distancing, masking, and restrictions on public gatherings.<sup>32</sup> The ability for states to pursue alternate strategies likely helped mitigate the negative health impacts of former President Trump's approach. Democratic governors were more willing to impose state-wide pandemic mandates, Democratic constituents were more likely to comply,<sup>33</sup> and by July 2020, the number of new deaths in Republican districts overtook those in Democratic districts.<sup>34</sup>

Closer to home, a similar dynamic has been present in Canada's climate change response. The federal government has *recently* asserted authority to set and enforce national standards to limit Canada's GHG emissions. It has set a minimum national price for emissions that will increase substantially so Canada can meet its *Paris Agreement* GHG reduction targets.<sup>35</sup> Federal legislation mandating emission reduction targets and compliance reporting,

---

31. See Canada, *Speech from the Throne*, 43-2 (23 September 2020) at 17, online: <[www.canada.ca/content/dam/pco-bcp/documents/pm/SFT\\_2020\\_EN\\_WEB.pdf](http://www.canada.ca/content/dam/pco-bcp/documents/pm/SFT_2020_EN_WEB.pdf)>.

32. See e.g. Jeff Tollefson, "How Trump Damaged Science—And Why It Could Take Decades to Recover" (2020) 584 *Nature* 190.

33. See e.g. Anton Gollwitzer et al, "Partisan Differences in Physical Distancing Are Linked to Health Outcomes During the COVID-19 Pandemic" (2020) 4 *Nature Human Behavior* 1186.

34. See Bradley Jones & Jocelyn Kiley, "The Changing Geography of COVID-19 in the US" (8 December 2020), online: *Pew Research Center* <[www.pewresearch.org/politics/2020/12/08/the-changing-geography-of-covid-19-in-the-u-s](http://www.pewresearch.org/politics/2020/12/08/the-changing-geography-of-covid-19-in-the-u-s)>.

35. *Paris Agreement*, 12 December 2015, Can TS 2016 No 9 (entered into force 4 November 2016, accession by Canada 22 April 2016); Environment and Climate Change Canada, *A Healthy Environment and a Healthy Economy* (Ottawa: Environment and Climate Change Canada, 2020), online (pdf): <[www.canada.ca/content/dam/eccc/documents/pdf/climate-change/climate-plan/healthy\\_environment\\_healthy\\_economy\\_plan.pdf](http://www.canada.ca/content/dam/eccc/documents/pdf/climate-change/climate-plan/healthy_environment_healthy_economy_plan.pdf)> [ECCC, *A Healthy Environment*].

and a new clean fuel standard are pending.<sup>36</sup> This is an encouraging response to the existential threat of climate change, but decisive action is a new direction for federal policy. Previous federal initiatives lacked effectiveness, as Canada repeatedly failed to meet its GHG reduction targets and withdrew from its binding international commitment to limit emissions under the Kyoto Protocol.<sup>37</sup> Many of the provincial measures discussed above took place against a backdrop of relatively modest federal climate action.

Federal authority to act cannot necessarily be equated with the federal government taking effective action. An interpretation of federalism that prioritized exclusive federal authority too highly, in hopes of mandated “best case” national responses, may lead to a sub-optimal or no response instead. The room left for provinces to act independently under our federal scheme can hedge against this possibility, even as it complicates getting to a best case national outcome.

### *B. United We Stand?*

The Constitution does reserve significant national powers to the federal government. The federal government has authority to impose prohibitions to combat various public harms,<sup>38</sup> exercise a range of national powers related to economic matters, including a broad power to impose taxes,<sup>39</sup> and also holds a residual power to address matters of national concern that fall outside those specifically allocated under the constitutional division of powers.<sup>40</sup> This residual federal power to legislate on national issues related to “peace, order and good

---

36. See Bill C-12, *An Act respecting transparency and accountability in Canada's efforts to achieve net-zero greenhouse gas emissions by the year 2050*, 2nd Sess, 43rd Parl, 2020 (first reading 19 November 2020); Regulatory Impact Analysis Statement (Department of the Environment), (19 December 2020) C Gaz I, 3868 (*Clean Fuel Regulations*); Environment and Climate Change Canada, *Regulatory Impact Analysis Statement*, Report on proposed Clean Fuel Regulations, Part 1, vol 154, no 51 (Ottawa: Canada Gazette, 19 December 2020), online (pdf): <gazette.gc.ca/rp-pr/p1/2020/2020-12-19/pdf/g1-15451.pdf>.

37. See CBC News, “Canada Pulls Out of Kyoto Protocol”, *CBC News* (12 December 2011), online: <www.cbc.ca/news/politics/canada-pulls-out-of-kyoto-protocol-1.999072>.

38. See e.g. *Reference as to the Validity of Section 5(a) of the Dairy Industry Act*, [1949] SCR 1 at 50, [1949] 1 DLR 433, Rand J (the *Margarine Case*); *Reference Re Firearms Act*, 2000 SCC 31 at para 31.

39. See e.g. *Canadian Western Bank*, *supra* note 6 (federal power over banking); *Guillemette v R*, [1999] 3 CTC 74, [1999] FCJ No 637 (federal taxation power is broad and plenary); *General Motors v City National Leasing*, [1989] 1 SCR 641, 58 DLR (4th) 255 [*General Motors* cited to SCR] (federal power over general trade and commerce).

40. See *R v Crown Zellerbach Canada Ltd*, [1988] 1 SCR 401, [1988] 3 WWR 385 [*Crown Zellerbach*].

government” can be used to support temporary measures for emergencies, as well as permanent regulation of structural national concerns.<sup>41</sup> While constitutional doctrines sometimes permit both the federal and provincial governments to exercise their regulatory powers in ways that overlap in practice, when there is a conflict the federal law prevails.<sup>42</sup> Despite the substantial authority reserved to the provinces, the Constitution leaves a key role for the federal government to regulate nationally in important settings. How does this national power aid Canada in responding to existential threats?

(i) Spillovers, Public Goods, and Coordination Problems

Sometimes problems must be addressed at a national level in order to have an effective response. The law that supports federal authority often hinges on the presence of effects that spill over from one province to others; if a single province is unable or unwilling to take action, its failure could undermine the efforts of others to combat the problem.<sup>43</sup> When coordinated action across provinces is required, relying on decentralized authority can lead to harmful competition or delay and frustration of urgently needed action. Some activities, like generating basic scientific information, have a “public good” aspect.<sup>44</sup> If activities like this are undertaken by a single province in response to a threat, the benefits would extend beyond its borders while it shoulders the costs alone. In cases like these, national action is needed or too little will be done. Both the pandemic and climate change provide examples of the ways federal power fills these critical needs.

Fortunately, widespread access to highly effective vaccines promises to bring the pandemic to an end in Canada.<sup>45</sup> The federal government has played

---

41. See *Reference Re Anti-Inflation Act*, [1976] 2 SCR 373, 68 DLR (3d) 452 (discussing both federal emergency and national concern “POGG” powers).

42. See e.g. *Multiple Access Ltd v McCutcheon*, [1976] 2 SCR 373, 68 DLR (3d) 452 (both federal and provincial laws relating to the same factual circumstances can often be valid under “double aspect” doctrine); *Alberta (AG) v Moloney*, 2015 SCC 51 (provincial law inoperable to the extent of conflict).

43. “Provincial inability” is an indicium in evaluating whether a law was validly enacted under both the federal trade and commerce power and the residual federal power over peace, order, and good government. See *General Motors*, *supra* note 39 at 677; *Crown Zellerbach*, *supra* note 40.

44. A “public good” is one for which the benefits are freely available to anyone, consumption by one person does not reduce the ability of others to consume it too, and the benefit of the good cannot be limited to those who have paid to produce it. A classic example is national defence.

45. Canada has access to more than enough doses for all Canadians of vaccines by

the lead role in procuring vaccines for Canada, approving them for use, and creating a national operations centre to help orchestrate distribution and tracking of the vaccines.<sup>46</sup> National negotiation of vaccine contracts increases Canada's bargaining power and prevents wasteful interprovincial competition to contract separately with manufacturers. With a scarce resource like successful COVID-19 vaccines, races for access between provinces could lead to higher costs, and inefficient shortages or inventories.<sup>47</sup> National review and approval of vaccines by Health Canada provides public information for all Canadians about the safety and efficacy of the vaccines. National coordination of the distribution network ensures that all provinces have infrastructure in place to receive the vaccines safely and securely in a way that preserves their efficacy. Tracking the distribution of the vaccines and making sure that all provinces have access will contribute to a critical public good—eventual “herd immunity” against the disease to end the pandemic.<sup>48</sup> The inability of any single province

---

Pfizer/BioNTech and Moderna, which are approximately ninety-five per cent effective at preventing COVID-19 as approved. See Public Services and Procurement Canada, *Procuring Vaccines for COVID-19* (Ottawa: PSPC, 5 March 2021), online: <[www.canada.ca/en/public-services-procurement/services/procuring-vaccines-covid19.html](http://www.canada.ca/en/public-services-procurement/services/procuring-vaccines-covid19.html)>. See also Health Canada, *Regulatory Decision Summary – Pfizer-BioNTech COVID-19 Vaccine* (Ottawa: Health Canada, 13 November 2020), online: <[covid-vaccine.canada.ca/info/regulatory-decision-summary-detailTwo.html?linkID=RDS00730&cwbdisable=true](http://covid-vaccine.canada.ca/info/regulatory-decision-summary-detailTwo.html?linkID=RDS00730&cwbdisable=true)> (Pfizer-BioNTech vaccine); Health Canada, *Regulatory Decision Summary – Moderna COVID-19 Vaccine* (Ottawa: Health Canada, 13 November 2020), online: <[covid-vaccine.canada.ca/info/regulatory-decision-summary-detailTwo.html?linkID=RDS00736](http://covid-vaccine.canada.ca/info/regulatory-decision-summary-detailTwo.html?linkID=RDS00736)> (Moderna vaccine).

46. For an accessible description of Canada's vaccine strategy and the roles of the federal and provincial governments, see Public Health Agency of Canada, *Canada's COVID-19 Immunization Plan: Saving Lives and Livelihoods* (Ottawa: Public Health Agency of Canada, 18 December 2020), online: <[www.canada.ca/en/public-health/services/diseases/2019-novel-coronavirus-infection/canadas-reponse/canadas-covid-19-immunization-plan.html](http://www.canada.ca/en/public-health/services/diseases/2019-novel-coronavirus-infection/canadas-reponse/canadas-covid-19-immunization-plan.html)>.

47. These negative effects at an international level have been criticized as “vaccine nationalism”, something that Canada's membership in the UN COVAX program for sharing vaccines is intended to help address. See Tedros Adhanom, “WHO Director-General's Opening Remarks at the United Nations General Assembly Special Session” (4 December 2020), online: *World Health Organization* <[www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-united-nations-general-assembly-special-session---4-december-2020](http://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-united-nations-general-assembly-special-session---4-december-2020)>; Global Affairs Canada, News Release, “Canada Announces Additional Support for Equitable Access to COVID-19 Tests, Treatments and Vaccines” (14 December 2020), online: *Government of Canada* <[www.canada.ca/en/global-affairs/news/2020/12/canada-announces-additional-support-for-equitable-access-to-covid-19-tests-treatments-and-vaccines.html](http://www.canada.ca/en/global-affairs/news/2020/12/canada-announces-additional-support-for-equitable-access-to-covid-19-tests-treatments-and-vaccines.html)>.

48. See Alison M Buttenheim & David A Asch, “Making Vaccine Refusal Less of a Free Ride” (2013) 9:12 *Human Vaccines & Immunotherapeutics* 2674.

to acquire or distribute vaccines effectively would create a reservoir for infection with spillover effects for other provinces. In order to really end the health and economic threat of the pandemic, COVID-19 has to be eliminated across the country.

The challenge of limiting GHG emissions also illustrates how federal power can be critical to an effective response. While all provinces have plans to address climate change, when taking action each province faces strategic incentives to prioritize their own costs over benefits that are shared collectively.<sup>49</sup> GHG reductions are a public good—once achieved, they benefit all Canadians, not only residents of the province that achieved them. If only some provinces adopt GHG pricing, they may suffer a competitive disadvantage that reinforces economic incentives to take too little action at a national scale. The failure of a single large emitter to act can potentially undermine the collective mitigation efforts of all the other provinces.<sup>50</sup> These features of the problem work to undercut purely co-operative agreements between the provinces. Despite apparent consensus under the *Pan-Canadian Framework on Clean Growth and Climate Change*,<sup>51</sup> worries over inadequate or inconsistent provincial action led the federal government to introduce the *Greenhouse Gas Pollution Pricing Act*, imposing a mandatory federal backstop GHG price for provinces that do not adopt their own equivalent schemes to limit their emissions.<sup>52</sup> While a price on GHG emissions alone will not eliminate the complex threat of climate change,

---

49. Examples include the “Made-in-Saskatchewan” and “Made-in-Ontario” climate strategies of those provinces, respectively. See Saskatchewan, *Prairie Resilience: A Made-in-Saskatchewan Climate Change Strategy* (Regina: December 2017), online (pdf): <publications.saskatchewan.ca/api/v1/products/88202/formats/104890/download>; Ontario, Ministry of the Environment, Conservation and Parks, *Preserving and Protecting Our Environment for Future Generations: A Made-in-Ontario Environmental Plan*, by Rod Phillips (Toronto: Ministry of the Environment, Conservation and Parks, 29 November 2018), online (pdf): <prod-environmental-registry.s3.amazonaws.com/2018-11/EnvironmentPlan.pdf>.

50. See Environment and Climate Change Canada, *Greenhouse Gas Emission: Canadian Environmental Sustainability Indicators*, Catalogue No En4-144/18-2020E-PDF (Ottawa, Environment and Climate Change Canada, April 2020) at 11, online (pdf): <www.canada.ca/content/dam/eccc/documents/pdf/cesindicators/ghg-emissions/2020/greenhouse-gas-emissions-en.pdf>. The GHG emissions of the five largest emitters accounts for 91% of all emissions (*ibid*).

51. See Environment and Climate Change Canada, *Pan-Canadian Framework on Clean Growth and Climate Change*, Catalogue No En4-294/2016E-PDF (Ottawa: Environment and Climate Change Canada, 2016), online (pdf): <publications.gc.ca/site/eng/9.828774/publication.html>.

52. See *GHG Pollution Pricing Act*, *supra* note 8. The constitutionality of this particular scheme under federal peace, order, and good government authority has yet to be determined by the Supreme Court of Canada. However, the federal government has alternative sources

many experts argue that this is a vital step in meaningful emissions reduction.<sup>53</sup> A dramatically higher price for GHG emissions than the current threshold is required to meet Canada's *Paris Agreement* target.<sup>54</sup> Without the exercise of federal power, an effective national scheme to limit GHG emissions is unlikely.

(ii) Sharing Burdens Equitably

An existential threat like the COVID-19 pandemic impacts all Canadians and economic costs are a major component of the harms. In addition to substantial national economic risks, burdens can potentially vary significantly from one region and individual to another. One of the key roles played by the federal government is to use its authority to create national support measures to mitigate the economic risks of existential threats and address their distributive consequences. Its powers in relation to economic matters, as well as its substantial abilities to raise revenue, position the federal government to respond.<sup>55</sup> The ability to address impacts on the scale of the pandemic, or climate change, goes beyond the power of the provinces to meet on their own.

The pandemic response provides ample opportunity to see the federal government's powers in action. The public health measures necessary to combat the virus have imposed historic economic losses on businesses, especially small businesses in retail and service sectors. Restrictions have prompted drastic increases in both unemployment rates and the precariousness of employment, unevenly distributed across Canadians.<sup>56</sup> Small business owners and self-employed individuals have faced dramatic contractions in their economic

---

of authority it might draw on for a modified federal regime, such as its criminal law power, taxation powers, or trade and commerce powers.

53. See Joseph E Stiglitz et al, *Report of the High-Level Commission on Carbon Prices* (Washington, DC: The World Bank, 2017), online (pdf): <[academiccommons.columbia.edu/doi/10.7916/d8-wdsr-wa14/download](https://academiccommons.columbia.edu/doi/10.7916/d8-wdsr-wa14/download)>; David Klenert et al, "Making Carbon Pricing Work for Citizens" (2018) 8:8 *Nature Climate Change* 669, online: <[www.nature.com/articles/s41558-018-0201-2](https://www.nature.com/articles/s41558-018-0201-2)>.

54. See ECCC, *A Healthy Environment*, *supra* note 35 at 60. Canada says its projected emissions as of December 2019 would leave it on track to only have a nineteen per cent reduction of 2005 levels by 2030—falling short of its thirty per cent target under the *Paris Agreement* (*ibid*).

55. See e.g. *General Motors*, *supra* note 39 (federal general trade and commerce powers). See also *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, ss 91(3) (broad taxation powers), 91(4) (borrowing and public credit), 91(1A) (public debt), 91(2A) (employment insurance), reprinted in RSC 1985, Appendix II, No 5.

56. Individuals who were already more economically vulnerable, including racialized communities, have been disproportionately affected. See e.g. Lemieux et al, "Initial Impacts of the COVID-19 Pandemic on the Canadian Labour Market" (2020) 46:1 *Can Pub Pol'y* S55.

prospects. Even large enterprises were not exempt from the economic risks of the pandemic.<sup>57</sup> In response, the federal government adjusted existing programs and developed a suite of new benefits and programs, including: the Canada Emergency Response Benefit (CERB), the Canada Emergency Student Benefit (CESB), adjustments to Employment Insurance, the Canada Recovery Sickness Benefit (CRSB), the Canada Emergency Wage Subsidy (CEWS), and the Canada Emergency Rent Subsidy (CERS).<sup>58</sup> This suite of economic supports allowed economically vulnerable Canadians and businesses from across the country to access a common support system. The federal government also provided increased transfers to provincial governments to enhance their capacity to react to the pandemic.<sup>59</sup> Through these initiatives, the federal government has helped ensure that there is equitable access to basic economic supports for Canadians across the country during the pandemic, although this has not evened out the full economic impact of the pandemic.

The example of climate change and GHG mitigation offers an important complement to the pandemic in understanding federal power to address economic burdens. Unlike the pandemic, which has caused similar types of economic harms in most regions of Canada, the economic impacts of climate change and attempts to mitigate GHG emissions vary considerably across the country. Due to geographical variation, some provinces are more exposed than others to the risks of climate change. Coastal provinces are vulnerable to rising sea levels and the associated flooding risks, while northern Canada will face disproportionate temperature increases.<sup>60</sup> Differences between the economies of the provinces mean that some provinces are more vulnerable to economic disruptions from efforts to mitigate GHG emissions, largely by pricing and

---

57. See Statistics Canada, *Recent Developments*, *supra* note 3.

58. For accessible descriptions of the various federal economic support programs, see Canada, Department of Finance, “Canada’s COVID-19 Economic Response Plan” (last modified 5 March 2021), online: *Government of Canada* <[www.canada.ca/en/departement-finance/economic-response-plan.html](http://www.canada.ca/en/departement-finance/economic-response-plan.html)> [Department of Finance, “Economic Response Plan”].

59. See Canada, Intergovernmental Affairs, “Safe Restart Agreement” (last modified 16 September 2020), online: *Government of Canada* <[www.canada.ca/en/intergovernmental-affairs/services/safe-restart-agreement.html](http://www.canada.ca/en/intergovernmental-affairs/services/safe-restart-agreement.html)>. Through the Safe Restart Program, the federal government is providing the provinces with funding for key areas affected by the pandemic, such as health care system capacity and testing, contact tracing, and data management (*ibid*).

60. See Natural Resources Canada, *Changes in Canada’s Regions in a National and Global Context*, by Stewart Cohen et al, Chapter 8 in *Canada’s Changing Climate Report* (Ottawa: Natural Resources Canada, 2019), online (pdf): <[www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/energy/Climate-change/pdf/CCCR-Chapter8-ChangesInCanadasRegionInANationalGlobalContext.pdf](http://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/energy/Climate-change/pdf/CCCR-Chapter8-ChangesInCanadasRegionInANationalGlobalContext.pdf)>.

phasing out the use of hydrocarbon fuels. In 2019, mining, quarrying, and oil and gas extraction represented 19.06% of Alberta's GDP, but less than 1% of Ontario's.<sup>61</sup> While climate change requires national action to commit to an effective strategy, the impacts of pursuing it will not be distributed equally across the provinces.

In addition to using its authority to backstop needed restrictions at a national level, the federal government's authority and resources position it to distribute the costs and benefits of climate action more evenly across all Canadians, no matter where they live. For example, under its *Greenhouse Gas Pollution Pricing Act*, the federal government will redistribute the revenues collected.<sup>62</sup> In provinces that voluntarily implement equivalent measures, the revenues raised remain with the province, while in provinces where the federal backstop is applied due to the inadequacy of provincial GHG pricing, the revenue is redistributed through direct payments to individuals in those provinces.<sup>63</sup> More generally, the federal government uses its equalization program to distribute revenues it has raised through its plenary power over taxation between the provinces. The federal government has the ability to address the impacts of structural economic change, such as a transition to a low-carbon economy. It can also provide resources to provinces bearing disproportionate costs from climate change risks. Recently, the federal government announced it would be investing \$3 billion into decarbonization projects.<sup>64</sup> This type of funding can help industries that would otherwise be particularly hard-hit by measures to reduce GHG emissions, thus reducing the burden on provinces whose economies are particularly dependent on GHG emission-intensive industries.

### (iii) Who Are We? Community, Compliance, and Trust

Courts have often associated the federal-provincial division of powers with constitutional space for different communities to exist within Canada. Strong protections for provincial powers allowed Quebec to maintain its distinctive

---

61. See Statistics Canada, *Gross Domestic Product (GDP) at Basic Prices, By Industry, Provinces and Territories, Percentage Share*, Table 36-10-0400-01 (Ottawa: Statistics Canada, 6 March 2021), online: <[www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3610040001](http://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3610040001)>.

62. *Supra* note 8, ss 165, 188.

63. See Environment and Climate Change Canada, *How We're Putting a Price on Carbon Pollution* (Ottawa: ECCC, 28 June 2019), online: <[www.canada.ca/en/environment-climate-change/services/climate-change/pricing-pollution-how-it-will-work/putting-price-on-carbon-pollution.html](http://www.canada.ca/en/environment-climate-change/services/climate-change/pricing-pollution-how-it-will-work/putting-price-on-carbon-pollution.html)>.

64. See ECCC, *A Healthy Environment*, *supra* note 35 at 36; Innovation, Science and Economic Development Canada, *SIF – Net Zero Accelerator (December 11, 2020)* (Ottawa: ISED, 11 December 2020), online: <[www.ic.gc.ca/eic/site/125.nsf/eng/00039.html](http://www.ic.gc.ca/eic/site/125.nsf/eng/00039.html)>.

language, culture, and laws while becoming part of Canada at Confederation.<sup>65</sup> Beyond this historic origin, provinces do have distinctive histories, cultures, and institutions. As people move among different provinces and choose where to live in Canada, regional variation allows them to try and choose communities they prefer. This can contribute to enhanced trust in regional institutions that directly reflect local residents' views. During the pandemic, premiers have taken different positions on issues like imposing public health restrictions, opening economies, and using strict enforcement measures versus appeals to individual choices. These positions reflect differences in the values prioritized by their provincial residents.

At the same time, taking actions at federal level is also seen as a vital way to create a national community. This can be important particularly in areas where we are trying to cultivate national values and shared beliefs in national actions. In the context of the pandemic, federal leadership reinforces the seriousness of the threat across the country—even if the majority of public health measures are instituted at the provincial or local levels. The US example illustrates how a lack of national leadership can contribute to a fractured social response. This is critical in the pandemic context since many measures (e.g., hand-washing guidelines, social distancing rules) are difficult to enforce and highly dependent on voluntary citizen compliance. In a similar way, strong federal action on climate change may help build a sense of national consensus across the country of the seriousness of the threat and the importance of taking action. As with our battle against the pandemic, meeting the challenge of climate change requires the participation of all Canadians.

### *C. Mind the Gap . . .*

The discussion above suggests that Canadian federalism provides a complex, but potentially effective, response to existential threats. Here, we consider two types of gaps that can undermine our ability to address such threats, as revealed by the pandemic. The first is a failure of governments to act and take responsibility because of the complexity from multiple, overlapping sources of authority. The second relates to the incomplete nature of our federal scheme. The Constitution directly recognizes and allocates legislative power between two levels of government within Canada: the provincial and federal government. However, other important governments, formally invisible in our federal division of powers, have played critical roles in implementing responses to the pandemic, and will also be important in our response to climate change. How do these gaps impact Canada's response?

---

65. See *Secession Reference*, *supra* note 6 at para 59.

(i) Whose Job is That?

Courts have been concerned when interpreting the scope of federal or provincial powers to avoid legislative vacuums—gaps in which no government acts to address a problem.<sup>66</sup> Courts usually see this as a result of protecting the exclusivity of one level of government too strongly and finding the other level has no jurisdiction to act. The modern approach to federalism instead generally applies the “double aspect” doctrine to preserve an ability for both levels of government to legislate to respond to a common problem.<sup>67</sup> This has advantages; however, it does come with a downside.

When both levels of government are acting in relation to the same issue, the result can be wasteful overlaps, initiatives that do not fit easily together, or missing pieces in an effective response. We can see several examples during the pandemic. Early in the pandemic, the federal government created the COVID Alert app for Canadians who had tested positive for COVID-19 to anonymously inform close contacts of possible exposure.<sup>68</sup> However, this app remains inaccessible in Alberta, which has separately developed its own contact tracing app.<sup>69</sup> Although the apps do not function identically, their broad purpose is the same. The public conflict between the two levels of government on this issue could discourage users from downloading either app, with potentially devastating effects if case numbers exceed the health care system’s ability to perform traditional contact tracing.<sup>70</sup> Whose fault would that be? When neither level of government has clearly exclusive jurisdiction and both are involved, it becomes difficult to assign responsibility when initiatives fail.<sup>71</sup> A similar problem threatens to plague efforts to create effective systems

---

66. See *Canadian Western Bank*, *supra* note 6 at para 44; *Reference Re Securities Act*, 2011 SCC 66 at para 83.

67. See *Canadian Western Bank*, *supra* note 6; *Reference Re Pan-Canadian Securities Regulation*, 2018 SCC 48.

68. See “Download COVID Alert Today” (last modified 30 October 2020), online: *Government of Canada* <[www.canada.ca/en/public-health/services/diseases/coronavirus-disease-covid-19/covid-alert.html](http://www.canada.ca/en/public-health/services/diseases/coronavirus-disease-covid-19/covid-alert.html)>.

69. See “ABTraceTogether: Overview” (last visited 1 March 2021), online: *Government of Alberta* <[www.alberta.ca/ab-trace-together.aspx](http://www.alberta.ca/ab-trace-together.aspx)>.

70. By one report, only thirty-two cases (out of 113,618 confirmed cases in the province) have been reported through the Alberta app as of January 13, 2021. See Emily Mertz, “Alberta Contact-Tracing App Has Been Used in Just 32 COVID-19 Cases to Date”, *Global News* (14 January 2021), online: <[globalnews.ca/news/7576483/alberta-contact-tracing-app-32-covid-19-trace-together](http://globalnews.ca/news/7576483/alberta-contact-tracing-app-32-covid-19-trace-together)>.

71. This type of federal-provincial blame shifting dynamic has been apparent in challenges to the adequacy of government sick-pay measures in Ontario. See e.g. Nick Boisvert, “Growing

to track Canadians' COVID-19 vaccinations. While the federal government needs information on this "systemic risk" factor as we manage the end of the pandemic, integrating information managed by distinct provincial schemes for tracking vaccines is a challenge.<sup>72</sup> Complex, overlapping roles in regulating the digital infrastructure for COVID-19 vaccination data may leave Canadians without a coherent framework for reliably and securely sharing information about vaccination status.<sup>73</sup> While in many cases having both governments work together is effective, it can lead to coordination failures.

## (ii) Cities and Local Government

The vast majority of Canadians live in urban centres.<sup>74</sup> These are hubs for economic and social activity across the country, giving municipal governments a critical role to play in regulating activity that directly connects to threats like the pandemic. Throughout the pandemic, local governments have taken actions like mandating mask-wearing, restricting recreational activities in public spaces, and regulating restaurants and other meeting spaces.<sup>75</sup> Municipal

---

Chorus Urging Ontario to Include Paid Sick Days in New COVID-19 Restrictions", *CBC News* (12 January 2021), online: <[www.cbc.ca/news/canada/toronto/ontario-paid-sick-days-recommendations-1.5869230](http://www.cbc.ca/news/canada/toronto/ontario-paid-sick-days-recommendations-1.5869230)>.

72. See e.g. Justin Ling, "Provinces are Working with Outdated Vaccine Tracking Systems, Hindering National Data", *The Globe and Mail* (21 February 2021), online: <[www.theglobeandmail.com/canada/article-provinces-working-with-outdated-vaccine-tracking-systems](http://www.theglobeandmail.com/canada/article-provinces-working-with-outdated-vaccine-tracking-systems)>.

73. The Ontario Medical Association has specifically recommended a national vaccine registry. See Katherine Patterson et al, "Shining a Light at the End of the Tunnel" (15 December 2020) at 21–22, online (pdf): *Ontario Medical Association* <[content.oma.org/wp-content/uploads/private/shining-a-light-at-the-end-of-the-tunnel.pdf](http://content.oma.org/wp-content/uploads/private/shining-a-light-at-the-end-of-the-tunnel.pdf)>.

74. See Statistics Canada, *Canada's Population Estimates: Subprovincial Areas, July 1, 2019*, (Ottawa: Statistics Canada, 13 February 2020), online: <[www150.statcan.gc.ca/n1/daily-quotidien/200213/dq200213a-eng.htm](http://www150.statcan.gc.ca/n1/daily-quotidien/200213/dq200213a-eng.htm)>.

75. See e.g. City of Toronto, by-law No 541-2020, *To Impose Temporary Regulations Requiring the Wearing of Masks or Face Coverings Within Enclosed Public Spaces* (30 June 2020), online (pdf): <[www.toronto.ca/legdocs/bylaws/2020/law0541.pdf](http://www.toronto.ca/legdocs/bylaws/2020/law0541.pdf)>; City of Ottawa, *Class Order Made Pursuant to Section 22(5.0.1) of the Health Protection and Promotion Act* (16 February 2021), online (pdf): <[www.ottawapublichealth.ca/en/resources/Corona/Class-S22-Order-Outdoors-FINAL-EN-signed-06Jan2021.pdf](http://www.ottawapublichealth.ca/en/resources/Corona/Class-S22-Order-Outdoors-FINAL-EN-signed-06Jan2021.pdf)>; City of Toronto, *Class Order Made Pursuant to Section 22(5.0.1) of the Health Protection and Promotion Act* (13 November 2020), online (pdf): <[www.toronto.ca/wp-content/uploads/2020/11/9712-Class-Order-Additional-TPH-Measures-Final-11.13.2020.pdf](http://www.toronto.ca/wp-content/uploads/2020/11/9712-Class-Order-Additional-TPH-Measures-Final-11.13.2020.pdf)>.

governments also play a role in mitigating and adapting to climate change. Many cities have developed climate change plans, which can include GHG emissions reductions targets, updates to city infrastructure to prepare for more frequent flooding or other climate-related emergencies, and updates to building and land-use regulations.<sup>76</sup>

Municipal governments extend some of the advantages and limits of divided government down to the local level. Cities can be best placed to make decisions and implement tailored responses. During the pandemic, the ability for municipalities to implement restrictions individually meant that areas that were particularly hard-hit, like Toronto and Montreal, could take the necessary measures to slow the spread of the virus. Their greater knowledge of the local pressures and needs helps these cities identify effective responses. Relatively untouched municipalities, like Kingston, could manage the virus with less restrictive measures. In the climate change context, municipal governments are well placed to make informed decisions about mitigation and adaptation measures related to local infrastructure or transportation investment and land-use planning.

However, a failure on the part of municipal governments to take into account the impact of their decisions on the larger provincial community can have harmful effects. For example, some municipal regions within the Greater Toronto Area resisted stricter COVID-19 measures as infection rates climbed in late November 2020, and the uncoordinated strategy led to significant travel within the region.<sup>77</sup> The rapid rise in cases that followed spread to neighbouring regions, outstripping capacity to respond to the outbreaks, and ultimately necessitating a province-wide lockdown.

Because municipalities derive their power through statute, there may be gaps in authority that fail to reflect the evolving nature of cities' responsibilities in managing threats like the pandemic. For example, Toronto's Medical Officer of Health publicly requested stronger provincial measures within the city, claiming such measures would exceed her authority and potentially render

---

76. See e.g. City of Vancouver, *Climate Emergency Action Plan Summary 2020-2025* (17 November 2020), online (pdf): <[vancouver.ca/files/cov/climate-emergency-action-plan-summary-2020-2025.pdf](http://vancouver.ca/files/cov/climate-emergency-action-plan-summary-2020-2025.pdf)>; City of Calgary, *Climate Resilience Strategy: Mitigation & Adaptation Action Plans* (2018), online: <[www.calgary.ca/content/dam/www/uep/esm/documents/esm-documents/climate-resilience-plan.pdf](http://www.calgary.ca/content/dam/www/uep/esm/documents/esm-documents/climate-resilience-plan.pdf)>; Halifax Regional Municipality, *HalifACT 2050: Acting on Climate Together*, online (pdf): <[www.halifax.ca/sites/default/files/documents/about-the-city/energy-environment/HRM\\_HaliFACT\\_vNew%20Logo\\_.pdf](http://www.halifax.ca/sites/default/files/documents/about-the-city/energy-environment/HRM_HaliFACT_vNew%20Logo_.pdf)>.

77. The province had clear authority to make a coordinated decision, but appeared to defer for a critical period to the varied positions of municipalities within the Greater Toronto Area.

her personally liable.<sup>78</sup> Cities can also be subject to having powers reduced or overridden by the province, which may hamper their ability to plan effectively for future threats.<sup>79</sup> In cases where there is conflict about the seriousness of a threat between provincial and municipal governments, this fragility in cities' authority potentially undercuts their ability to take decisive actions. Conflicts like this do arise. While Alberta has recently cancelled its own carbon tax and challenged the constitutionality of the *Greenhouse Gas Pollution Pricing Act*,<sup>80</sup> Edmonton has declared a climate change emergency and promised to update its energy transition strategies.<sup>81</sup> Even when cities enjoy relatively clear authority, there can be a mismatch between activity needed to respond to a threat and their ability to raise funds, and generally municipalities are limited in their ability to borrow or operate deficits.<sup>82</sup> This limits their ability to be responsive to threats like the pandemic, or climate change, without provincial support. While they are currently outside the formal division of powers in Canadian federalism, a clear, legally protected role for cities, with resources to match, would better support their ability to respond to existential threats.

### (iii) Indigenous Governments

Indigenous communities are among some of the most vulnerable to the pandemic in Canada, as they more commonly experience limited access to health care resources, live in remote communities, in multigenerational, crowded households, and even lack the access to clean water that other Canadians take for granted.<sup>83</sup> Many elders who serve as keepers of laws, knowledge, and

---

78. See "Toronto's Top Doctor Urges Province to Enact Tighter Restrictions as City Sees 323 New COVID-19 Cases", *CBC News* (2 October 2020), online: <[www.cbc.ca/news/canada/toronto/toronto-covid-friday-oct-2-1.5748054](http://www.cbc.ca/news/canada/toronto/toronto-covid-friday-oct-2-1.5748054)>.

79. See *City of Toronto et al v Ontario (AG)*, 2018 ONSC 5151, rev'd 2019 ONCA 732, leave to appeal to SCC granted, 38921 (26 March 2020) (province unilaterally cutting size of City Council during election).

80. See *An Act to Repeal the Carbon Tax*, SA 2019, c 1; *Reference Re Greenhouse Gas Pollution Pricing Act*, 2020 ABCA 74.

81. See City of Edmonton, "Revising the Energy Transition Strategy" (last accessed 1 March 2021), online: *City of Edmonton* <[www.edmonton.ca/city\\_government/city\\_vision\\_and\\_strategic\\_plan/energy-transition-strategy-update.aspx](http://www.edmonton.ca/city_government/city_vision_and_strategic_plan/energy-transition-strategy-update.aspx)>.

82. See Enid Slack & Richard M Bird, "Cities in Canadian Federalism", *Policy Options* (1 December 2007), online: <[policyoptions.irpp.org/magazines/the-mood-of-canada/cities-in-canadian-federalism](http://policyoptions.irpp.org/magazines/the-mood-of-canada/cities-in-canadian-federalism)>.

83. See Kristy Kirkup, "Ottawa Pressed to Make Good on Promise to End All Long-Term Drinking Water Advisories for First Nations", *The Globe and Mail* (1

Indigenous languages have been especially at risk from the pandemic, with age a dominant risk factor for serious disease.<sup>84</sup> Indigenous peoples are also especially vulnerable to climate change. The risks threaten their connections to traditional lands and resources, their traditional ecological knowledge, and food security. These risks are particularly acute in northern regions, where temperatures are rising most quickly.

Indigenous self-government, acknowledged as a constitutional right,<sup>85</sup> should allow Indigenous peoples in Canada to respond to these threats in ways that reflect their unique circumstances. However, these communities may be especially subject to suffering ill effects from decisions made by other governments in Canada. During the pandemic, the particular vulnerabilities of Indigenous communities mean they have often adopted very restrictive policies.<sup>86</sup> However, they can still remain at risk because of actions taken to loosen restrictions in non-Indigenous communities, often for the benefit of larger regional economies, that lead to higher COVID-19 caseloads and community transmission. Similarly, Indigenous governments alone cannot meaningfully affect GHG emissions. While provinces benefit significantly from resource development and industrial production that creates GHGs, Indigenous communities often reap fewer economic benefits but stand to bear significant costs. While the federal government has a relationship and responsibility to Indigenous Canadians, this has been rooted in a history of paternalism and often disregard for the interests of Indigenous peoples themselves.<sup>87</sup>

---

March 2021), online: <[www.theglobeandmail.com/canada/article-ottawa-pressed-to-make-good-on-promise-to-end-all-long-term-drinking](http://www.theglobeandmail.com/canada/article-ottawa-pressed-to-make-good-on-promise-to-end-all-long-term-drinking)>.

84. See Sandra Abma, "Vaccinations Begin for Hundreds of Indigenous Elders", *CBC News* (18 February 2021), online: <[www.cbc.ca/news/canada/ottawa/covid-vaccine-wabano-indigenous-elders-ottawa-1.5917523](http://www.cbc.ca/news/canada/ottawa/covid-vaccine-wabano-indigenous-elders-ottawa-1.5917523)>.

85. See Canada, Ministry of Indian Affairs and Northern Development, *Aboriginal Self-Government: The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government*, by the Honourable Ronald A Irwin & the Honourable Anne McLellan, Catalogue No R32-155/1-1995 (Guide) (Ottawa: Minister of Public Works and Government Services Canada, 1995), online: <[epe.lac-bac.gc.ca/100/200/301/inac-ainc/aboriginal\\_self-e/plcy\\_e.html](http://epe.lac-bac.gc.ca/100/200/301/inac-ainc/aboriginal_self-e/plcy_e.html)>.

86. See e.g. Natasha Kim, "First Nations COVID-19 Travel Bans" (August 2020), online: *Union of British Columbia Indian Chiefs* <[www.ubcic.bc.ca/fn\\_covid\\_19\\_travel\\_bans](http://www.ubcic.bc.ca/fn_covid_19_travel_bans)>.

87. See *Constitution Act, 1867*, *supra* note 55, s 91(24) (source of federal power over Indigenous peoples). For an overview of the federal government's treatment of Indigenous peoples, see Truth and Reconciliation Commission of Canada, *Canada's Residential Schools: The Final Report of the Truth and Reconciliation Commission of Canada*, vol 1, Catalogue No IR4-9/2015E-PDF (Montreal: McGill-Queen's University Press, 2015), online: <[publications.gc.ca/site/eng/9.807830/publication.html](http://publications.gc.ca/site/eng/9.807830/publication.html)>.

The federal government *has* used its authority to create programs to address the needs of Indigenous communities during the pandemic.<sup>88</sup> However, the failure to incorporate Indigenous governments more directly into the structure of Canadian federalism leaves them more dependent on the goodwill of the federal government, and in a less powerful position than the provinces to negotiate and have their views and concerns integrated in the crafting of national responses to extreme threats, like pandemic risks or climate change.

## II. The Pandemic and Beyond: Questions for Canadian Federalism?

The pandemic reveals ways in which federalism shapes Canada's ability to respond to existential threats. These exceptional problems require solutions that are beyond the reach of any single government acting alone. They require combined and coordinated actions by all levels of government to protect Canadians. Our complex federal system of interacting and overlapping authority has some advantages—it can foster innovation and allow for strategies that are tailored and responsive to the needs of citizens. However, there are also disadvantages—multiple systems of government increase the costs of negotiation and coordination, and can result in blame-shifting and a mismatch between responsibilities and resources. The incomplete nature of our federal scheme can also lead to gaps that risk undermining effective responses and fail to account for the particular concerns and vulnerabilities of Indigenous communities when facing existential threats. Even after the pandemic recedes, these features of federalism will be tested as we face the threat of climate change.

Both the pandemic and the looming climate change crisis reveal that there is a crucial role for the federal government to play in confronting national and existential threats. In cases where provinces cannot agree to baseline minimums required to address national threats, the federal government authority to act is a needed backstop. Moreover, federal leadership to coordinate multi-level responses in the shadow of its authority can help Canada position itself to meet the challenges of existential threats, while still engaging the vital capacity of the provincial, local, and Indigenous governments.

Along with the federal power to act to protect Canada from national threats, the pandemic illustrates the responsibility to address the distributive consequences for Canadians who may suffer disproportionately from the needed steps. Where provinces are unable or unwilling to act in concert with national needs because of severe consequences for their region, the federal government should use its plenary revenue-raising powers to address these

---

88. See Department of Finance, "Economic Response Plan", *supra* note 58 (support for Indigenous peoples).

effects. Co-operative federalism is a principle that should be understood not just in terms of shared legislative roles, but also in terms of a fair distributive burden from national policies. Federal leadership can help ensure a baseline level of equity across Canadians in meeting the needs caused by the disruptions of an existential threat. Federal authority should be exercised so Canada can meet existential threats both effectively and fairly.

While the pandemic seems to be stretching on unbearably long, it is a relatively short-term threat compared with climate change. We can reasonably hope for a return to pre-pandemic life over the next few years as vaccine distribution spreads across the globe. In the fight against climate change, the effects of government actions play out over decades. Despite the historic plunge in economic activity due to the pandemic, preliminary estimates suggest annual GHG emissions fell by only 4.2 to 7.5% and *overall* levels of atmospheric CO<sub>2</sub> continued to rise.<sup>89</sup> The complex, sustained response that will be needed to address climate change must be a shared project among all governments in Canada. Our review of the pandemic response suggests that this is possible within the structure of Canadian federalism. However, as with the pandemic, it remains to be seen how well we will succeed.

---

89. World Meteorological Organization, Press Release, 23112020, “Carbon Dioxide Levels Continue at Record Levels, Despite COVID-19 Lockdown” (23 November 2020), online: *WMO* <[public.wmo.int/en/media/press-release/carbon-dioxide-levels-continue-record-levels-despite-covid-19-lockdown](https://public.wmo.int/en/media/press-release/carbon-dioxide-levels-continue-record-levels-despite-covid-19-lockdown)>.

