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Constitutional Authority over Greenhouse Gas Emissions

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CONSTITUTIONAL AUTHORITY OVER GREENHOUSE GAS EMISSIONS

PETER W. HOGG*

As awareness and concern about global warming increases, Canada's federal and provincial governments have responded with policies and programs designed to curb greenhouse gas emissions. However, the Constitution of Canada does not specify which level of government has the requisite power to enact the statutes and regulations needed to effectively deal with this pervasive issue. This article explores the constitutionality of a federal program aimed at lowering emissions across the country and concludes that such a program is within the power of the federal government, notwithstanding the fact that it is also within the power of the provincial governments.

The author reasons that the emissions reduction program currently being proposed by the federal government is within its legislative power because its complex administrative procedure ultimately culminates in the requisite prohibition and penalty and has a valid criminal purpose. The article concludes by canvassing other possible heads of power under which the federal government could enact such legislation and by exhorting the federal and provincial governments to co-operate in order to stave off a potentially confusing patchwork of overlapping regulations.

Nous sommes de plus en plus sensibilisés au réchauffement climatique et nous nous en préoccupons davantage, aussi les gouvernements fédéral et provinciaux du Canada réagissent avec des politiques et des programmes visant à réduire les émissions de gaz à effet de serre. Cependant, la Constitution du Canada ne précise pas le niveau de gouvernement qui a le pouvoir nécessaire pour promulguer les lois et règlements requis pour aborder efficacement cette question pénétrante. Cet article examine la validité, sur le plan constitutionnel, du programme fédéral qui vise à réduire les émissions à travers le pays. L'auteur conclut qu'un tel programme relève du ressort du gouvernement fédéral même s'il relève aussi du ressort des gouvernements provinciaux.

L'auteur soutient que le programme de réduction des émissions que le gouvernement propose relève du pouvoir législatif parce que la procédure administrative complexe aboutit en définitive à l'autorité en matière de prohibition et de pénalité et qu'elle a une raison d'être criminelle valable. L'article se termine en prospectant d'autres rubriques de compétence en vertu desquelles le gouvernement pourrait promulguer de telles lois, et en exhortant les gouvernements fédéral et provinciaux de collaborer, afin d'écartier l'existence d'un ensemble éventuellement déroulant de mesures disparates de cumul de règlements.

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I. PURPOSE OF ARTICLE

The purpose of this article¹ is to examine the constitutional authority to regulate greenhouse gas emissions in Canada. The emphasis is on the control of industrial air emissions, which is the emphasis of the Government of Canada's recent policy paper, *Regulatory Framework for Air Emissions*.² Since Alberta is the only jurisdiction in Canada that has actually enacted controls on greenhouse gas emissions (although the other provinces have announced plans to do so), this article will also briefly discuss the powers of the provinces and urge the development of federal-provincial agreements to minimize the conflicts and complications that will arise if industries are subject to two layers of regulation.

II. CONTROLLING GREENHOUSE GAS EMISSIONS

Greenhouse gases consist of six main gases, namely: (1) carbon dioxide (CO₂) (the most important one, accounting for 60 percent of emissions); (2) methane; (3) nitrous oxide; (4) hydrofluorocarbons; (5) perfluorocarbons; and (6) sulfur hexafluoride. These six gases are identified in the *Kyoto Protocol to the United Nations Framework Convention on Climate Change*³ as the gases that accumulate in the Earth's atmosphere and cause the global warming that has been experienced in recent decades.⁴ Global warming has some benign effects, especially for a cold country like Canada, but its effects are mainly harmful. These effects include more frequent extreme storms, prolonged droughts, expanded deserts, melting glaciers, reduced polar ice, rising sea levels, and profound changes to the habitats of many species.

¹ The article is a revised version of "Constitutional Authority Over Greenhouse Gas Emissions" (Paper presented to the Canadian Petroleum Law Foundation Research Seminar, Jasper, 28 June 2008) [unpublished]. That paper was a heavily revised version of "Criminal Law and the Control of Greenhouse Gas Emissions" (Paper presented to the C.D. Howe Institute The Economics of Greenhouse Gas Emissions Control in Canada Conference, Toronto, 7 December 2007) [unpublished]; a revised version of that paper is Peter W. Hogg, "A Question of Parliamentary Power: Criminal Law and the Control of Greenhouse Gas Emissions" *C.D. Howe Institute Backgrounder* 114 (August 2008).

² Environment Canada, *Regulatory Framework for Air Emissions* (Ottawa: Minister of the Environment, 2007), online: Environment Canada <http://www.ec.gc.ca/doc/media/m_124/report_eng.pdf> [*Regulatory Framework*]. See also Environment Canada, News Release, "Government Delivers Details of Greenhouse Gas Regulatory Framework" (10 March 2008). Draft regulations based on the *Regulatory Framework* are due to be published in the fall of 2008 and to become binding on 1 January 2010.

³ 11 December 1997, UN Doc. FCCC/CP/1997/7/Add.1, 37 I.L.M. 22 (entered into force 16 February 2005) [*Kyoto Protocol*].

⁴ The same six gases have been listed as "toxic" in the *Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33, Schedule 1, items 74-79 [*CEPA 1999*].

The bulk of greenhouse gas emissions come from the combustion of fossil fuels (oil, natural gas, and coal) for heating, cooling, energy, manufacturing, and transportation.⁵ The burning of oil, natural gas, and coal releases carbon that has been stored in the fuel sources for millions of years into the atmosphere. The United States and Canada are the highest per capita emitters of greenhouse gases due to high levels of industrialization, high standards of living, and a prevalent suburban lifestyle, which includes heavy reliance on automobiles and the heating and air conditioning of detached private homes. Unfortunately, without regulatory action by governments, increases in the size of the economy and the population lead inevitably to increases in the consumption of fossil fuels, which causes increases in the emission of greenhouse gases. In both countries, emissions have been rising steadily. Without government intervention that has the effect of imposing costs on the emission of greenhouse gases, there is no sufficient incentive for industries and individuals to reduce their carbon footprint. A generalized concern about the environment and about global warming, although widely held, is very unlikely to lead to the radical changes in behaviour that would reverse the trend of rising energy use and rising greenhouse gas emissions.

What the federal *Regulatory Framework* proposes, among other things, is to impose limits on emissions by large industrial emitters.⁶ The limits will vary from sector to sector and will be imposed by regulation. Each regulated firm can comply with the limits by reducing their emissions to the level prescribed by regulation for their sector. The *Regulatory Framework* also proposes a cap-and-trade system. A regulated firm will be able to purchase “emissions credits” from other regulated firms that have gone beyond the regulated level of reduction and “offset credits,” which result from reductions in emissions in unregulated sectors of the economy.⁷ The *Regulatory Framework* also proposes that regulated firms will be able to purchase credits through contributions to a “climate change technology fund,” which will be established by the federal government.⁸

III. PROVINCIAL INITIATIVES

All provinces have announced plans for the control of greenhouse gas emissions,⁹ but all but one province have gone no further, perhaps waiting for the federal regime to become law. The one exception is Alberta.

In 2007, Alberta became the first jurisdiction in Canada to enact and implement controls on greenhouse gas emissions.¹⁰ The *Specified Gas Emitters Regulation* regulates those

⁵ Electricity contributes to greenhouse gases if it is generated by the burning of fossil fuels, which is widespread in North America, as opposed to hydro or nuclear generation.

⁶ See John C. Goetz *et al.*, “Development of Carbon Emission Trading in Canada” (2008) 46 *Alta. L. Rev.* 377 at 404-408.

⁷ *Ibid.* at 14-15.

⁸ *Ibid.* at 12-13.

⁹ Ontario and Quebec have announced a joint cap-and-trade system with more stringent controls than those proposed by the federal government. See Karen Howlett, “Ontario, Quebec go it alone on climate” *The Globe and Mail* (2 June 2008) A1.

¹⁰ *Specified Gas Emitters Regulation*, *Alta. Reg.* 139/2007 [*SGER*] enacted under the *Climate Change and Emissions Management Act*, S.A. 2003, c. C-16.7. See Nigel D. Banks & Alastair R. Lucas, “Kyoto, Constitutional Law and Alberta’s Proposals” (2004) *Alta. L. Rev.* 355; Goetz *et al.*, *supra* note 6 at 390-403.

industrial emitters in the province that produce over 100,000 tonnes of greenhouse gas emissions annually,¹¹ requiring them to reduce their emissions intensity by 12 percent per annum.¹² The required reductions can be achieved by in-house reductions in emissions, by the purchase of “emission performance credits” that have been earned by regulated firms that have exceeded their required reduction,¹³ by the purchase of “emission offsets” that have been earned by emissions reductions in unregulated activities,¹⁴ and by contributions to a “technology fund” which will use the contributed money to invest in energy-efficient technologies, alternative energy sources, conservation, and other such projects.¹⁵ This is a cap-and-trade system, supplemented by a technology fund, that looks very much like the one that the federal government is proposing.

IV. PROVINCIAL POWER TO REGULATE GREENHOUSE GAS EMISSIONS

The *Constitution Act, 1867*, by s. 92(13), confers on the provincial legislatures the power to make laws in relation to “Property and Civil Rights in the Province.”¹⁶ This power extends to the regulation of most aspects of mining, manufacturing, and other business activities in the province, including the regulation of emissions that could pollute the environment.¹⁷ There is no doubt that each province has the power to control the emission of greenhouse gases by industrial firms operating within the province. This power would extend to all the details of a cap-and-trade system, including the creation of a technology fund. The constitutional validity of Alberta’s *Specified Gas Emitters Regulation* is not in doubt.

V. PARALLEL FEDERAL AND PROVINCIAL REGULATION

When the federal regulation finally comes into effect, firms in Alberta (and any other provinces that have enacted greenhouse gas controls) will be subject to a double layer of regulation: federal and provincial regulations will both apply. In the case of any conflict between the federal and provincial laws, the rule of federal paramountcy will cause the provincial law to yield to the federal law. However, the Supreme Court of Canada has defined conflict for the purpose of the paramountcy rule very narrowly as encompassing only two cases: (1) where one law expressly contradicts the other in the sense that it is impossible to comply with both laws; and (2) where the provincial law would frustrate the purpose of the federal law.¹⁸ The first case, express contradiction, rarely occurs. In particular, if the federal and provincial regulations prescribed different levels of emissions reductions for a particular firm, that would not count as an express contradiction; the firm could comply with

¹¹ *Ibid.*, s. 2. New facilities are exempt for the first three years of operation and are subject to lower targets.

¹² The “intensity” approach means that the percentage is applied to each unit of production, and not to absolute totals of emissions. If production increases, the intensity approach accommodates to the increase, and depending on the amount of the increase in production, total emissions may not come down. The same intensity approach is proposed by the *Regulatory Framework*, *supra* note 2 at 9-10, for federal regulation as well.

¹³ *SGER*, *supra* note 10, s. 9.

¹⁴ *Ibid.*, s. 7.

¹⁵ *Ibid.*, s. 8.

¹⁶ *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 92(13), reprinted in R.S.C. 1985, App. II, No. 5.

¹⁷ *R. v. Lake Ontario Cement Ltd.*, [1973] 2 O.R. 247 (H. Ct. J.); see Bankes & Lucas, *supra* note 10; Goetz, *supra* note 6; Peter W. Hogg, *Constitutional Law of Canada*, looseleaf, 5th ed. supplemented (Scarborough: Thomson Carswell, 2007) at para. 30.7(c): Provincial Power [Hogg, *Constitutional*].

¹⁸ Hogg, *Constitutional*, *ibid.* at paras. 16.1-16.6: Paramountcy.

both laws by meeting the more stringent standard, whether that standard was the federal one or the provincial one. The second case, frustration of the federal purpose, also rarely occurs. It is possible that a court would hold that a provincial cap-and-trade system would frustrate the purpose of a similar federal system, but since the purpose of the two laws are basically the same (to reduce greenhouse gas emissions), this is unlikely. In any event, the *Regulatory Framework* contemplates a continuing role for the provinces in the control of greenhouse gas emissions, and if this is reflected in the new legislation and regulations, it would be inconsistent with a total displacement of provincial law.¹⁹

All this being said, it would be intolerably complicated to have both a federal and provincial cap-and-trade system operating together in a single province. Not only would the reduction targets likely differ, but the definitions of the emission and offset credits are bound to differ from each other, and two separate administrative structures would oversee the recognition, banking, sale, and purchase of the federal and the provincial credits. Two different technology funds, one federal and one provincial, would provide access to the federal and provincial contribution credits. No doubt, there would be other complications as well.²⁰ The *Regulatory Framework* contemplates that the federal government will enter into equivalency agreements with provinces, and that any federal regulation would be suspended in those provinces with equivalency agreements.²¹ It is of the utmost importance for federal-provincial agreements to be negotiated to harmonize as far as possible the dual regulatory requirements. This should preferably be done before the provinces actually have cap-and-trade systems in operation — as Alberta already does.

VI. FEDERAL CRIMINAL LAW POWER

The principal heads of power that are available to the Parliament of Canada to control the industrial emission of greenhouse gases²² are, in order of importance: (1) the criminal law power; and (2) the peace, order, and good government (POGG) power. It may seem odd to place the criminal law power first in importance, but the Supreme Court of Canada has in recent years made clear that the criminal law power confers on Parliament a more flexible regulatory authority than might be assumed by the name “criminal law.” The Court has upheld the predecessor of the current federal *CEPA 1999* under the criminal law power,²³ and federal action to regulate greenhouse gas emissions will likely take the form of amendments to the *CEPA 1999* and to the regulations made under that *Act*. Accordingly, this article addresses the criminal law power first.

¹⁹ *Regulatory Framework*, *supra* note 2 at 8-9.

²⁰ Goetz *et al.*, *supra* note 6 at 408-409.

²¹ *Regulatory Framework*, *supra* note 2 at 8-9.

²² See Stewart Elgie, “Kyoto, The Constitution, and Carbon Trading: Waking A Sleeping *BNA* Bear (Or Two)” (2007) 13:1 *Rev. Const. Stud.* 67 for an excellent discussion of the control of greenhouse gas emissions and the constitutional power of Parliament to enact controls.

²³ *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213 [*Hydro-Québec*].

The *Constitution Act, 1867*, by s. 91(27), confers on the Parliament of Canada the power to make laws in relation to “the criminal law.”²⁴ The courts have defined “criminal law” for constitutional purposes as a law that has three elements: (1) a prohibition; (2) a penalty; and (3) a typically criminal purpose.²⁵

In *Hydro-Québec*,²⁶ the Supreme Court of Canada upheld the *Canadian Environmental Protection Act*²⁷ under the criminal law power. The issue was whether Hydro-Québec could validly be prosecuted for violating an “interim order” made by the federal Minister of Environment restricting the emission of perfluorocarbons (PCBs) by the corporation. The power to make the order came from the *CEPA 1988*, which Hydro-Québec argued was unconstitutional.²⁸ The *CEPA 1988* established an elaborate regulatory process that involved a review by government of the effects of any substance. This could lead to a finding that the substance was harmful to the environment or human health, in which case, the Ministers of Environment and Health could recommend to the Governor in Council that the substance be classified as “toxic.” Once the Governor in Council had made that classification, the *CEPA 1988* authorized the Governor in Council to make regulations governing the release of the substance into the environment as well as the manner in which and conditions under which it could be manufactured, imported, processed, transported, stored, sold, used, and discarded.²⁹ Where a substance had not yet been classified as toxic, but either of the two Ministers believed that immediate action was called for with respect to the substance, that Minister was empowered to make an “interim order” before the full process of classification was complete.³⁰ The interim order was temporary, but could include any regulation that could be imposed on a substance that had been classified as toxic. A breach of an interim order, like a breach of a regulation, was an offence punishable by fine or imprisonment.

The legislative scheme of the *CEPA 1988* looked nothing like a standard criminal law prohibition (of theft or assault, for example), which could be self-applied. In the *CEPA 1988*, there was no prohibition until the elaborate administrative process to assess the toxicity of a substance (or make an interim order) had been completed. For four of the judges on the Supreme Court of Canada that was fatal to the classification of the law as criminal: “[i]t would be an odd crime whose definition was made entirely dependent on the discretion of the Executive.”³¹ The same four were also troubled by a provision in the *Act* that suspended the application of a *CEPA 1988* regulation in a province if the province had an equivalent law of its own in place. They pointed out that such an exemption “would be a very unusual provision for a criminal law.”³² However, five of the judges, forming the majority of the bench of nine, upheld the *Act* as a criminal law. Justice La Forest, who wrote for the majority, held that because the administrative process culminated in a prohibition enforced by a penalty, the scheme was sufficiently prohibitory to count as criminal law. Nor did he

²⁴ *Supra* note 16, s. 91(27).

²⁵ See Hogg, *Constitutional*, *supra* note 17 at paras. 18.1-18.13: Criminal Law.

²⁶ *Supra* note 23.

²⁷ R.S.C. 1985 (4th Supp.), c. 16 [*CEPA 1988*].

²⁸ *Supra* note 23 at para. 4.

²⁹ *Ibid.* at para. 19; *CEPA 1988*, *supra* note 27, s. 34.

³⁰ *Hydro-Québec*, *ibid.* at para. 20; *CEPA 1988*, *ibid.*, s. 35.

³¹ *Hydro-Québec*, *ibid.* at para. 55, Lamer C.J.C. and Iacobucci J. for the four dissenting judges.

³² *Ibid.* at para. 57.

object to the suspension of regulations in provinces that had equivalent laws because he took the view that this simply recognized the reality that much of the field of environmental protection is subject to concurrent provincial and federal powers. In the result, the majority view prevailed and the *Act* was upheld as criminal law.³³

Despite the narrow 5-4 majority, *Hydro-Québec* settles the constitutionality of federal environmental law on the model of the *CEPA 1988*. The Court accepted that a sophisticated administrative scheme could be a criminal law if it is backed by a prohibition and a penalty. All nine judges agreed that the protection of the environment counted as a sufficient purpose for a criminal law. Therefore, the *CEPA 1988* had all three elements constitutionally required for a criminal law: a prohibition, a penalty, and a typically criminal purpose.

VII. FEDERAL PROPOSALS FOR THE REGULATION OF GREENHOUSE GAS EMISSIONS

The *CEPA 1999* framework authorizes controls on greenhouse gas emissions. In fact, in 2005, greenhouse gases were assessed under the *CEPA 1999* process and they were classified as toxic and added to Schedule 1 of the *Act*,³⁴ so that the regulatory powers of the *CEPA 1999* now apply to them. While the main greenhouse gas, CO₂, is not toxic in the ordinary sense of the word (because it occurs naturally in the air and is benign in its direct effect on life on earth), the *CEPA 1999* defines “toxic” in broad terms that include “an immediate or long-term harmful effect on the environment.”³⁵ The premise of the *Kyoto Protocol* and of the efforts to limit the emission of greenhouse gases is that the discharge into the atmosphere of CO₂ causes global warming with a long-term harmful effect on the environment. That would be enough for the statutory definition, and the statutory definition would not overstep the criminal law power of Parliament, now that *Hydro-Québec* has established that the criminal law power extends beyond the protection of life and health to the protection of the environment. However, if the *CEPA 1999* is to be the vehicle of control, the classification of these greenhouse gas emissions as toxic is only the first step toward regulation. Standards still have to be set, sector by sector, for the limits on emissions that will be required, and those standards then have to be imposed on industrial emitters by regulation. When that is done, the prohibition and penalty provided by the *CEPA 1999* will apply to greenhouse gas emissions.

The primary means of compliance for a regulated firm will be the adoption of abatement measures that will reduce the firm’s emissions to the regulated standard. However, as well as the in-house abatement of greenhouse gas emissions, the *Regulatory Framework* proposes three additional means of compliance with the regulatory standard, each of which has the effect of softening the prohibition on excessive emissions.³⁶

³³ Justice La Forest did not decide whether the POGG power would also authorize the law (*ibid.* at para. 161), although he implied that his answer would be no (*ibid.* at paras. 115-16). The dissenting judges rejected POGG as authority for the *Act* (*ibid.* at para. 79), as well as the criminal law power.

³⁴ *Supra* note 4.

³⁵ *Ibid.*, s. 64(a).

³⁶ *Regulatory Framework*, *supra* note 2 at 12-15.

The first additional means of compliance is by the use of “emissions credits.”³⁷ Emissions credits will be issued to firms that have reduced their emissions more than required by law. These credits could be “banked” to reduce a future compliance obligation or could be immediately sold to firms that have not achieved the required reduction in their emissions. It is contemplated that a private market for emissions credits will develop and that they will be traded. The creation of emissions credits that can be traded recognizes that different firms in the same sector will experience different costs of emissions abatement. Those firms that do better than their regulated targets will be rewarded with credits that can be sold or banked for future use. Those firms that are not able to reach their regulated targets will be able to purchase credits in lieu of in-house abatement. The trading scheme will provide some breathing space for firms that would incur excessive costs to meet their regulated target, and will create incentives for firms to go beyond their regulated targets. The idea is to lower the overall costs of compliance and stimulate the development of abatement technology.

The second additional means of compliance proposed by the *Regulatory Framework* is by the use of “offset credits.”³⁸ Offset credits will be issued to firms that achieve reductions in greenhouse gas emissions through approved projects outside the domain of regulated activity. These credits could be used to meet the obligations of regulated firms, or they could be traded in the same way as emissions credits.

The third additional means of compliance proposed by the *Regulatory Framework* is by contributing to a “climate change technology fund.”³⁹ This proposed fund, which would be administered by an entity independent of government, would be invested in projects that would be likely to yield reductions in greenhouse gas emissions. The *Regulatory Framework* says that the primary focus of the fund would be on “technology deployment and related infrastructure projects,”⁴⁰ such as the development of infrastructure for carbon capture and storage. Unlike the purchase of emissions credits and offset credits, firms would not be able to satisfy their regulatory obligations solely by contributions to the technology fund. A firm could use contributions to the fund to satisfy 70 percent of its obligation in 2010, 65 percent of its obligation in 2011, and decreasing percentages thereafter, reaching zero in 2018.

VIII. CONSTITUTIONAL VALIDITY OF FEDERAL PROPOSALS AS CRIMINAL LAW

There is no doubt that mandatory reduction in greenhouse gas emissions would be upheld as an exercise of the criminal law power of Parliament. That is clear from *Hydro-Québec*. The only question is whether the three additional means of compliance (emissions credits, offset credits, and contributions to a climate change technology fund) can also be upheld as exercises of the criminal law power. Each enables a regulated firm to meet its obligations without actually reducing its greenhouse gas emissions by the required amount. The rationale for including these alternate means of compliance in all three cases is the difficulty that some firms will have in achieving their required emissions reductions through in-house abatement.

³⁷ *Ibid.* at 13-14.

³⁸ *Ibid.* at 14-15.

³⁹ *Ibid.* at 12-13.

⁴⁰ *Ibid.* at 12.

The effect in all three cases is a reduction in emissions, albeit not one that is made directly by the firm taking advantage of the additional means of compliance. The premise here, unusual in a criminal law, is that it is the *overall* reduction of emissions that is the main purpose of the law. A reduction anywhere is equally beneficial and serves the purpose of the law.

There is no doubt that the criminal law power will extend to some alternative means of compliance, even when those means soften the prohibition that is an essential element of a criminal law. An analogy exists in *RJR-MacDonald v. Canada (A.G.)*,⁴¹ where the Supreme Court of Canada held that the federal prohibition on tobacco advertising was a valid exercise of Parliament's criminal law power.⁴² In the case of tobacco, the harm is caused by the product, not by the advertising, and yet the challenged law banned advertising of the product and not the product itself. The majority of the Court upheld the law as a criminal law, recognizing that it was not practical to ban the product in view of the large number of Canadians who smoke. The majority of the Court recognized that the ban on advertising was intended to pursue the same public purpose; namely, the protection of the public from a dangerous product. The Court also held that the fact that Parliament chose a "circuitous path"⁴³ to its destination did not deny to the law the criminal law classification.

Applying the Court's reasoning in *RJR-MacDonald* to the regulation of greenhouse gas emissions, it seems to me that a court is likely to agree that not all firms will be capable of achieving the required reductions in emissions on the schedule called for by the regulations. Therefore, alternative means of compliance that pursue the same public purpose, namely the reduction in overall greenhouse gas emissions, are likely to be upheld as a valid part of the legislative scheme. In the case of the transferable emissions credits and offset credits, that conclusion seems clear, since they provide incentives for and then recognize equivalent reductions in emissions to those that the regulated firm is bound to achieve. The constitutionality of a climate change technology fund is less clear, since the reduction of emissions caused by the funded projects will be delayed, and when realized, may not be equivalent to the credits issued to the firms that contributed the money to the fund. However, this fund is also likely to be upheld as a valid part of the scheme, especially since it will be available only for a transitional period, and will provide credit for only part of a regulated firm's obligations.⁴⁴

My conclusion is that the proposals for the regulation of greenhouse gas emissions contained in the *Regulatory Framework*, including the three additional means of compliance, would be constitutional exercises of the federal criminal law power.

⁴¹ [1995] 3 S.C.R. 199 [*RJR-MacDonald*].

⁴² *Ibid.*: *Tobacco Products Control Act*, S.C. 1988, c. 20 was struck down under the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*], because of the impact of the ban on advertising on freedom of expression. However, a revised version of the *Act* was later upheld under s. 1 of the *Charter* as a reasonable limit on expression in *Canada (A.G.) v. JTI-Macdonald Corp.*, [2007] 2 S.C.R. 610, and the Court reaffirmed Parliament's power to enact the ban under the criminal law power.

⁴³ *Supra* note 41 at para. 51.

⁴⁴ Alberta's technology fund contains no similar restrictions on access: *SGER*, *supra* note 10.

IX. REGULATION OF GREENHOUSE GAS EMISSIONS UNDER OTHER FEDERAL POWERS

A. PEACE, ORDER, AND GOOD GOVERNMENT POWER

The assumption of this article is that the *Regulatory Framework* proposals will be enacted under the criminal law power, likely as amendments to the *CEPA 1999* and its regulations. Its predecessor, the *CEPA 1988*, was upheld by the Supreme Court of Canada as a criminal law in *Hydro-Québec*.⁴⁵ Before that decision, the general assumption of constitutional lawyers was that a nationwide environmental protection law would have to be enacted under the POGG power contained in the opening words of s. 91 of the *Constitution Act, 1867*.⁴⁶

There is no doubt that a federal environmental protection law could be enacted under the “national concern” branch of the POGG power. In *R. v. Crown Zellerbach Canada Ltd.*,⁴⁷ a majority of the Supreme Court of Canada upheld a federal law that prohibited dumping at sea. This was put on the basis that marine pollution was a matter of national concern that was distinct from matters of provincial jurisdiction and that was beyond the capacity of the provinces to control. A similar argument can be made regarding the control of greenhouse gases. A law enacted under the POGG power need not have the characteristics of a criminal law (a prohibition, a penalty, and a typically criminal purpose). The law in issue in *Crown Zellerbach* did in fact have those characteristics, but the majority of the Court upheld the law under the POGG power and did not even consider whether it could also be upheld under the criminal law power. The probable reason for that omission was that the case was decided in 1988, and it was not until 1997 that it became clear (from the decision in *Hydro-Québec*) that the protection of the environment (as opposed to the protection of human health and safety) could serve as a legitimate purpose of a criminal law.⁴⁸

B. TREATY POWER (OR NON-POWER)

Canada signed the *Kyoto Protocol*⁴⁹ in 1997. The *Kyoto Protocol* is a multilateral treaty in which each state signatory agreed to make reductions in its greenhouse gas emissions by 2012. Each state signatory chose its own target, and Canada agreed to bring its emissions down to 6 percent below 1990 levels by the year 2012. That target was probably unattainable even at the time of signing because in 1997, Canada’s emissions had already risen to a level

⁴⁵ *Supra* note 23.

⁴⁶ *Supra* note 16, s. 91.

⁴⁷ [1988] 1 S.C.R. 401 [*Crown Zellerbach*].

⁴⁸ The point was addressed in the dissenting opinion of La Forest J., *ibid.* at 442. He rejected the criminal law power as a basis for the anti-dumping provision on the assumption that only the protection of human health would qualify as a legitimate purpose of a criminal law.

⁴⁹ *Supra* note 3. Canada ratified the *Kyoto Protocol* on 17 December 2002, following approval by the House of Commons and the Senate. The *Kyoto Protocol* was preceded by the *United Nations Framework Convention on Climate Change*, 9 May 1992, 1771 U.N.T.S. 107, 31 I.L.M. 849 (entered into force 21 March 1994) [*Framework Convention*], in which signatory states including Canada undertook to reduce emissions, but without stipulated targets. The *Kyoto Protocol* amends the *Framework Convention* by adding targets. Canada’s international obligation to reduce emissions really dates from 1992.

13 percent above the 1990 level.⁵⁰ To move from 13 percent above 1990 levels to 6 percent below against a strong trend in the opposite direction would have required government regulation of the most draconian kind. No such action was taken, and the growth of Canada's population and economy has carried emissions ever upward, making the *Kyoto Protocol* target completely impossible. The *Regulatory Framework* does not say where Canada's emissions are now relative to 1990, but the fact is that in 2006, Canada's emissions were 33 percent above 1990 levels.

Unlike its Liberal predecessor, the present Conservative government does not claim that Canada's *Kyoto Protocol* obligation can be fulfilled. The *Regulatory Framework* says that "[t]he government is committed to reducing Canada's total emissions of greenhouse gases, relative to 2006 levels, by 20% by 2020 and by 60% to 70% by 2050."⁵¹ Note that the benchmark date is now 2006 not 1990, and the target date is now 2020 not 2012, and the target for 2020 (20 percent below 2006 levels) is about 19 percent higher than the *Kyoto Protocol* target for 2012 (6 percent below 1990 levels).

The *Regulatory Framework* was issued in April 2007 and its acknowledgment that Canada's *Kyoto Protocol* obligation would not be met led to the passage of the *Kyoto Protocol Implementation Act*.⁵² This was a Liberal bill (technically a private member's bill) that was supported by the New Democratic and the Bloc Québécois parties. It was opposed by the minority Conservative government, which, however, was unable to stop it from passing both the House of Commons and the Senate. The Bill received royal assent and became law on 22 June 2007. Section 7(1) of the *Act* contains the remarkable, perhaps unprecedented, provision that "the Governor in Council *shall ensure* that Canada fully meets its obligations under ... the *Kyoto Protocol* by making, amending or repealing *the necessary regulations* under this or any other *Act*."⁵³ One can only speculate (because the *Act* does not enlighten us) as to what would be the "necessary regulations" that, after so many years of government inaction,⁵⁴ would suddenly "ensure" the reduction of Canada's greenhouse gas emissions to 6 percent below 1990 levels. When the Conservative government reiterated that it could not meet this target,⁵⁵ environmental advocates brought proceedings against the government in the Federal Court for breach of its statutory duty under the *Kyoto Protocol Implementation Act*. In *Friends of the Earth v. Canada (Governor in Council)*⁵⁶ the Court held that the government's obligation under the *Act* was non-justiciable and dismissed the proceedings.

⁵⁰ Environment Canada (EC), *National Inventory Report 1990-2005: Greenhouse Gas Sources and Sinks in Canada: The Canadian Government's Submission to the UN Framework Convention on Climate Change* (Gatineau: Environment Canada, 2007), online: EC <http://www.ec.gc.ca/pdb/ghg/inventory_report/2005_report/2005_report_e.pdf>.

⁵¹ *Regulatory Framework*, *supra* note 2 at 4.

⁵² S.C. 2007, c. 30.

⁵³ *Ibid.*, s. 7(1) [emphasis added].

⁵⁴ Ten or 15, depending on whether you count from the *Kyoto Protocol* of 1997 or the *Framework Convention* of 1992: *supra* note 49. The federal government was Liberal from 1993 to 2006, then Conservative from 2006 to the present day.

⁵⁵ Environment Canada, *A Climate Change Plan for the Purposes of the Kyoto Protocol Implementation Act — 2007* (Gatineau: Environment Canada, 2007).

⁵⁶ 2008 FC 1183, (2008) 299 D.L.R. (4th) 583.

Although it is clear that the *Kyoto Protocol* will not be complied with by Canada, it has not been formally repudiated and is binding on Canada as a matter of international law. For present purposes, its relevance is simply to note that Canada's accession to the treaty did not confer on Parliament any additional legislative power to implement the treaty. That was decided in the *Labour Conventions* case,⁵⁷ which struck down federal laws that attempted to enact national labour standards (minimum wage, maximum hours, and the like) in order to implement obligations undertaken by Canada in a multilateral treaty sponsored by the International Labour Organization. The Privy Council (then Canada's highest court) held that, since labour laws were a provincial responsibility under the division of powers in the *Constitution Act, 1867*, they remained a provincial responsibility even after Canada signed a treaty agreeing to change its labour laws. Only the provinces could enact the required implementing legislation. In the context of the *Kyoto Protocol*, what this means is that Parliament could not use the treaty as the constitutional basis for a law controlling greenhouse gas emissions, even if the true purpose of the law was to implement the treaty. In any case, the Government of Canada has indicated that it is not going to implement the treaty.⁵⁸ That takes us back to the criminal law power and the POGG power — the powers that exist regardless of the treaty.

C. TAXATION POWER

Parliament has the power to levy "any mode or system of taxation."⁵⁹ If Parliament chose to reduce greenhouse gas emissions by levying a "carbon tax" on the production or consumption of energy, it would have the power to do so. The only serious limitation on the federal power is that it cannot tax "lands or property belonging to ... any province,"⁶⁰ which would protect resources extracted by a province (but not by private producers) from provincial Crown lands.⁶¹ However, taxes play no part in the *Regulatory Framework* proposals and were never proposed by previous federal governments. This is something of a puzzle since there is broad agreement among economists that deep reductions in greenhouse gas emissions are unlikely to be achieved without a carbon tax as a central part of government measures.⁶² Moreover, a tax is relatively easy to administer in comparison with regulatory measures.⁶³ There is no constitutional problem in the enactment of a tax,⁶⁴

⁵⁷ *Canada (A.G.) v. Ontario (A.G.)*, [1937] A.C. 326 (P.C.) [*Labour Conventions*]; for discussion, see Hogg, *Constitutional*, *supra* note 17 at para. 11.5.

⁵⁸ The implementation of the *Kyoto Protocol* is the purpose of the *Kyoto Protocol Implementation Act*, *supra* note 52, but it is clear that the federal government will not be relying on that *Act* for its regulatory authority. If the federal government were relying on that *Act*, the question would arise whether the *Labour Conventions* case, *ibid.*, might be reversed or modified by the Supreme Court of Canada. For a criticism of the decision, see Elgie, *supra* note 22 at 90-103; Hogg, *Constitutional*, *ibid.*

⁵⁹ *Constitution Act, 1867*, *supra* note 16, s. 91(3): "the raising of Money by any Mode or System of Taxation."

⁶⁰ *Ibid.*, s. 125.

⁶¹ *Reference Re Proposed Federal Tax on exported Natural Gas*, [1982] 1 S.C.R. 1004.

⁶² This point emerged again and again — it seemed to be a consensus — in the discussions that took place in the C.D. Howe Conference referred to in *supra* note 1.

⁶³ This is one reason why economists like the carbon tax. Once the tax is levied, the market takes over, and firms and individuals change their behaviour in response to the new prices caused by the new tax. The proceeds of the tax can also be used to contribute new resources to greenhouse gas reduction, such as the improvement of railway infrastructure for high-speed trains between urban centres and the extension and improvement of public transit systems within urban areas. Of course, if a carbon tax were revenue-neutral, then there would be no extra money for such initiatives, but governments (in my opinion) should

and popular resistance to the enactment of a new tax would be diminished if a carbon tax were imposed in combination with reductions in other taxes so that it was (and was seen to be) revenue-neutral. A revenue-neutral carbon tax has in fact been proposed by the present federal opposition Liberal Party.⁶⁵

The climate change technology fund, which is part of the *Regulatory Framework* proposals, involves contributions by regulated firms in exchange for emissions credits. It is not described as a taxation measure, and the assumption of this article is that the fund would need to be justified as an exercise of Parliament's criminal law power. However, the fund could be set up under Parliament's taxation power. The contributions could be levied as a tax (from which emissions-compliant firms would be exempt) and the tax could be dedicated to a climate change technology fund. If the portion of the legislation establishing the fund were designed and enacted as a tax measure, then the link to the criminal law power would no longer be necessary to the validity of the fund.

D. SPENDING POWER

Ever since Canada signed the *Kyoto Protocol*, one thing that the various federal governments have done to reduce greenhouse gas emissions is to spend money on such things as informing the public on how they can reduce their use of energy (and exhorting them to voluntarily do so) and monetary incentives for green renovations, green appliances, green technology, and the like. The *Regulatory Framework*⁶⁶ commits to various spending and tax rebate⁶⁷ initiatives. It is clear that Parliament has the authority to authorize the expenditure of public money for any purpose it chooses, including purposes that it could not directly accomplish by regulation.⁶⁸ However, spending measures have not arrested the upward trend of Canada's greenhouse gas emissions in the past and are not likely to do so in the future.⁶⁹

X. CONCLUSION

The Government of Canada's *Regulatory Framework* proposals for controls on industrial emitters are likely to take the form of amendments to the *CEPA 1999* and its regulations, which have already been upheld under Parliament's criminal law power. The basic scheme will be the establishment of mandatory emissions standards for large industrial emitters, sanctioned by a criminal penalty. The scheme also contemplates the creation of "emissions

in any case give priority to expenditures of that kind.

⁶⁴ There are some design issues which are fully explained in Nathalie J. Chalifour, "Making Federalism Work for Climate Changes: Canada's Division of Powers over Carbon Taxes" (2008) 22 N.J.C.L. 119. As the author notes, a carbon tax is open to the provinces as well, and in fact, carbon taxes have been enacted by Quebec and British Columbia.

⁶⁵ The proposal was part of the Liberal platform for the federal election of 14 October 2008, when the Conservative government was re-elected.

⁶⁶ *Supra* note 2 at 3-4.

⁶⁷ Tax rebates can be viewed as exercises of the taxation power or as expenditures of the foregone tax revenue (tax expenditures) that are equivalent to direct spending. Either way, they are within the power of Parliament.

⁶⁸ Hogg, *Constitutional*, *supra* note 17 at para. 6.8.

⁶⁹ This was another point of consensus among the economists who participated in the C.D. Howe Conference, *supra* note 1.

credits” and “offset credits” that could be sold by those who have exceeded their targets to those who have not reached their targets. It is a cap-and-trade system. Contributions to a “climate change technology fund” are also contemplated as a partial mode of compliance limited to the early (transitional) years of the scheme. It is likely that the criminal law power will extend beyond the simple prohibition and penalty to these kinds of additional compliance measures.

The provinces have the authority to regulate greenhouse gas emissions by firms operating within their borders under the property and civil rights power. They also have the power to institute a cap-and-trade system. Alberta has already enacted and implemented a cap-and-trade system for large industrial emitters and other provinces have announced plans to follow suit. While federal and provincial regulatory regimes could theoretically operate side by side, a cap-and-trade system is so complex that two layers of regulation would be intolerably complicated for regulated firms. It will be important for the federal government to negotiate agreements with the provinces to harmonize the requirements as far as possible.