

National Round Table on the Environment and the Economy Table ronde nationale sur l'environnement et l'économie

The Legislative Authority to Implement a Domestic Emissions Trading System

Domestic Greenhouse Gas Emissions Trading Technical Paper Series

Droits d'échange d'émission nationaux des gaz à effet de serre Série de documents techniques

The Legislative Authority to Implement a Domestic Emissions Trading System

Prepared for:

Multistakeholder Expert Group on Domestic Emissions Trading National Round Table on the Environment and the Economy

Prepared by:

Elizabeth Atkinson National Round Table on the Environment and the Economy

January 1999

National Round Table on the Environment and the Economy



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Putting Strategies into Law: The Constitutional and Legislative Basis for Action

Introduction

The National Round Table on the Environment and the Economy (NRTEE) has established a multistakeholder expert group to design and assess different options for a domestic emissions trading program for greenhouse gases. Its work will help to inform the public debate on emissions trading and also provide valuable input for assessing ways to implement the Kyoto Protocol when the national multistakeholder post-Kyoto process begins to address domestic emissions trading in detail.

This short paper is one of a series of papers that discuss possible mechanisms to address key issues that must be considered in the design of a variety of potential emissions trading systems for greenhouse gases. Specifically, this paper and the two appended papers deal with the division of legislative powers between the federal and provincial governments and the uncertainty created by this division when trying to determine what level of government has authority to implement an emissions trading system for greenhouse gases in Canada.

Of the six options under consideration by the NRTEE multistakeholder expert group, five note that federalprovincial cooperation is likely to be an important element in the design and implementation of a domestic emissions trading system for greenhouse gases.¹ If that element is in fact important, then problems with resolving disputes around legislative competence must either be resolved immediately or be subordinated to the more pressing needs that gave rise to the discussion around an emissions trading system in the first place. As will be seen in what follows, and in the two appended papers, the question of legislative control is a thorny one and is not likely to be resolved short of litigation. Therefore, to overcome the constitutional debate and breathe more life into five of the six options under consideration, two existing cooperative mechanisms are introduced in the material that follows.

Legislative Authority

Canada's Constitution sets out the rules by which the country is governed, but does not mention the environment and its management. Therefore, the regulation of environmental matters cannot be specifically determined to fall within the exclusive realm of either the federal or the provincial governments. Because environmental issues can touch various categories of legislative authority, the power to make laws in the area of emissions trading could be either federal or provincial. For example, the trading of greenhouse gas emissions credits or allowances could be characterized as a matter of trade, and therefore within federal competence,² or as a matter of property and civil rights, a provincial area of responsibility.3 Depending on which category greenhouse gas emissions trading eventually settles into, the manner in which the trading program is administered could be affected.

Currently, some provinces have legislation that explicitly authorizes emissions trading, but other provinces and the federal government do not have such legislation in place. This is not surprising as there has as yet been little effort to use emissions trading as a policy tool to manage environmental problems in Canada.

¹ See the following NRTEE extended description papers: Option 4, Cap on Carbon Content of Fossil Fuels Produced and Imported; Option 8, Voluntary Credit Trading with Mandatory Performance Standards; Option 13, 11 and 14, Description of Different Potential Greenhouse Gas Emission Trading Programs for Canada.

² Constitution Act, 1867 (U.K.), 30 & 31 Vict. C. 3, s. 91(2).

³ Ibid., s. 92(13).

The consistency of the legislation, where it exists, and the legislative requirements to implement a response to the greenhouse gas issue, and specifically emissions trading, are discussed in the appended papers by Chris Rolfe⁴ and Joseph Castrilli.⁵ The authors agree on one key element — it is uncertain where the power is vested to create the legislation that would permit an emissions trading program. Where this power falls within the Canadian Constitution whether within the federal or provincial domains, or within the domain of both jurisdictions - could have serious implications for how an emissions trading system is established, administered, monitored and enforced, and whether the program is effective in achieving the intended environmental results. Without the full agreement of the provinces and the federal government on this matter, uncertainty will remain — unless the matter is referred to the Supreme Court of Canada for determination, or unless legislation is contested as to its constitutionality.

An analysis of existing and proposed Canadian legislation pertinent to the creation of emissions trading programs is supplied in the Castrilli paper. With the exception of the Motor Vehicle Safety Act (MVSA), no reference is made to emissions trading within existing federal legislation. The MVSA provisions for emissions trading will be consolidated under the Canadian Environmental Protection Act (CEPA), as proposed in the CEPA 19986 amendment. Wholesale revisions to CEPA do provide broad authority for many of the emissions trading system components, but the ensuing regulations that would determine CEPA 1998's adequacy are yet to be developed. While the CEPA 1998 regulations would give the federal government the ability to implement an emissions trading system for greenhouse gases, the constitutional authority for their operation would still have to be determined.

Existing provincial legislation that explicitly authorizes emissions trading includes Alberta's *Environmental Protection and Enhancement Act*, the *Waste Management Act* of British Columbia, the *Environment Act* of Manitoba, and Nova Scotia's *Environment Act*. The Nova Scotia *Environment Act* is the most advanced, having developed regulations for emissions trading. However, even the Nova Scotia regulations have considerable deficiencies for governing the complexities of an emissions trading system. Castrilli concludes that "the development of emissions trading legislation in Canada must be regarded as still in its infancy."⁷

The Rolfe paper examines federal and British Columbia legislation for a statutory basis for reducing greenhouse gas emissions. After analysing various pieces of legislation, Rolfe determines that while the existing and proposed legislation could address some of the features necessary for reducing greenhouse gas emissions, none is able to fully implement an emissions trading program. In the end, Rolfe's findings are not dissimilar to Castrilli's. When a domestic emissions trading program is designed, new legislation will be required, no matter what level of government is ultimately responsible for implementing the program.

The papers are dissimilar in one key element. Rolfe ascertains that it is uncertain how a court of law would rule on the constitutional authority to implement legislation respecting the regulation of greenhouse gases, but that the federal government would likely have the power to implement major economic instruments, such as emissions trading. To do so, the federal government could use the "peace,

⁴ Chris Rolfe, "Putting Strategies into Law: The Constitutional and Legislative Basis for Action," *Turning Down the Heat: Emissions Trading and Canadian Implementation of the Kyoto Protocol* (West Coast Environmental Law Research Foundation, 1998) c. 14 (hereafter "the Rolfe paper").

⁵ Joseph F. Castrilli, in association with Pollution Probe, "Legal Authority for Emissions Trading in Canada" (paper submitted to Pilot Emission Reduction Trading, March 1998) [unpublished] (hereafter "the Castrilli paper").

⁶ Bill C-32, Canadian Environmental Protection Act, 1998, 1st Sess., 36th Parl., 1997-98.

⁷ Castrilli paper, p. 35.

order and good government" authority. Castrilli also concludes that the federal government is likely to have the requisite authority to implement a national emissions trading system, but suggests that this authority lies under the trade and commerce head of power. According to Castrilli, this may be an important distinction, with implications for the manner in which the system will be administered.

In looking to the administrative complexity necessarily characteristic of a national emissions trading system, and arguing for federal legislative competence, Rolfe proposes an "ideal" federally dominated program, where the provinces and federal government negotiate the actions that would be taken by the provinces. Should the provinces fail to develop and implement such actions, the federal government may have the authority to develop regulations within the provincial domain. This power might be found in the *Constitution Act, 1867* as the federal government's general power to "make laws for the peace, order and good government of Canada."⁸ Case law interprets this as permitting federal regulation of "matters of national concern."⁹

Intergovernmental Cooperation and Environmental Protection

While the question of legislative competence makes for a very interesting debate, it is likely not immediately helpful in finding a workable model for implementation of an emissions trading system. Instead, a look at existing mechanisms that permit the various levels of government to cooperate in environmental management might provide inspiration for the design of a cooperative administrative effort for emissions trading. At least two such mechanisms in the environmental area are currently operating: the Montreal Protocol and the Accord on Environmental Harmonization.

The Montreal Protocol on Substances that Deplete the Ozone Layer¹⁰

The Montreal Protocol is the first international mechanism conceived to address an ensuing environmental problem at a global level. Setting out the actual measures to implement controls on the production and consumption¹¹ of ozone-depleting substances, the Protocol is part of the Vienna Convention, a framework for controls development and for facilitating research cooperation. Canada ratified the Vienna Convention in June 1986 and the Montreal Protocol in June 1988.

Sources of ozone-depleting substances — and its effects — are dispersed globally. The Montreal Protocol attempts to include, through a number of special provisions, mechanisms that are responsive to some countries' special circumstances (for example, countries with low production levels, developing countries, and countries with different economic and political structures). Canada's domestic timetable set target dates that exceeded the original requirements of the Montreal Protocol. An accelerated schedule for the phase-out of ozone-depleting substances in the Montreal Protocol was adopted in 1992, more closely aligning the Protocol timetables with the domestic targets established by Canada.

Given the nature of the issue, an integrated approach to constitutional powers was necessary to manage a national action plan to reduce ozone-depleting substances. The Federal/Provincial Working Group

⁸ Constitution Act, 1867 (U.K.), 30 & 31 Vict. C. 3, s. 91.

⁹ Ibid.

¹⁰ Material for this section was compiled from postings at Environment Canada's Green Lane at http://www.ec.gc.ca/ozone/protect and from the report by the Federal Provincial Working Group on Controls Harmonization, *Canadian Ozone Layer Protection Program Strategy and Recommendations for a Consistent Federal Provincial Regulatory Approach*, September 1990.

¹¹ Consumption is defined as production + imports - exports.

on Controls Harmonization (Ozone-depleting Substances) was established in 1989 to develop a coordinated national strategy to eliminate emissions of ozone-depleting substances in Canada and to facilitate the introduction of harmonized regulations by the various governments. As a result, both the federal and provincial governments are responsible for regulating various aspects of this matter, a shared responsibility that could be replicated in the design of an emissions trading system for greenhouse gases. The federal government regulates the Montreal Protocol, including controls on the manufacture, import and export of ozone-depleting substances, through the Canadian Environmental Protection Act (CEPA).¹² Provincial governments regulate emissions and discharges to the environment, and govern the implementation of ozone-depleting substances recovery and recycling programs, and emissions controls.13

Specifically regarding the program's trading mechanism, federal regulations under *CEPA* permit participants to transfer or trade "consumption allowances" to meet the Montreal Protocol commitment.¹⁴ This mechanism was created following industry stakeholder consultation before the regulations were drafted, to provide industries flexibility in choosing the methods by which they could eliminate their use of ozone-depleting substances.¹⁵

The Montreal Protocol is used here as an example of federal-provincial cooperation for implementing a national strategy in an area of jurisdiction that is not clearly within either the federal or provincial domain. However, with regard to the Protocol's consumption allowance trading program, the federal government is administering this system exclusively, albeit with the representation of provincial government stakeholders. Federal administration of the allowance trading program is conducted apparently without resistance from the provinces. This lack of resistance is likely explained by two factors. First, the trading program applies to a small number of companies, which results in a very limited number of trades within each group of ozone-depleting substances.¹⁶ Second, none of the substances are produced in Canada and as imports become a matter of federal trade and commerce.

Because a greenhouse gas emissions trading system, whether it is designed as a credit or allowance trading program, should have the broadest possible geographic scope and cover as wide a range of gases/sources, sinks and reservoirs as is feasible,17 there may not be the same impetus for provincial acquiescence to federal administrative and regulatory control. Given these features, the number of entities affected by such a program will be quite large and therefore likely to require a more complex administrative structure than the one used in the Montreal Protocol. As noted in the Castrilli paper, the federal government and a number of the provincial governments either have emissions trading legislation in place already or are in the process of drafting legislation that would permit emissions trading. This leads to the conclusion that a contest over jurisdiction could develop. It is prudent to anticipate this, even given that regulations detailing the scope

¹² Canadian Environmental Protection Act, R.S.C. 1985, c. 16 (4th Supp.).

¹³ For example, the Ozone-Depleting Substances Regulation (Alta. Reg. 125/93) in Alberta, the Ozone Depleting Substances Regulation (B.C. Reg.53/93) in British Columbia, the Ozone Depleting Substances — General Regulation (R.R.O. 1990, Reg.356) in Ontario, and the Ozone Layer Protection Regulations (N.S. Reg. 54/95) in Nova Scotia.

¹⁴ Ozone-depleting Substances Regulations (SOR/95-576).

¹⁵ The mechanics of this trading system are described in the NRTEE extended description paper on Option 4, Cap on Carbon Content of Fossil Fuels Produced and Imported.

¹⁶ The transferable consumption allowance trading system applied to approximately 12 companies producing or importing chlorofluorocarbons and methyl chloroform, and it is still applicable to some 12 companies using hydrochlorofluorocarbons. Methyl bromide allowances are distributed to 133 users. See the NRTEE Option 4 extended description paper, *Cap on Carbon Content of Fossil Fuels Produced and Imported*.

¹⁷ See NRTEE Issue Paper 8, Analysis of Emissions Trading Program Design Features.

and nature of each of the existing or proposed legislated emissions trading frameworks have yet to be designed.

In summary, the Montreal Protocol provides an example of federal and provincial cooperation to implement an international environmental treaty. A national plan to meet the commitments under the Montreal Protocol was agreed upon with regulations complementary to those of the federal government being created by provincial and municipal authorities. This is so, despite the fact that the federal government has assumed exclusive administrative control of the allowance trading system under the Protocol. It is arguable that the provinces have failed to contest that control because of the relatively limited scope of the program. Many of the characteristics of the Montreal Protocol implementation might serve as precedents for a federal-provincial sharing of regulatory responsibility in the area of an emissions trading program for greenhouse gases.

A Canada-wide Accord on Environmental Harmonization

The problems and uncertainties associated with environmental protection, conservation and management in Canada have led to the creation of the Canada-wide Accord on Environmental Harmonization.¹⁸ The Accord was signed in January 1998 by the members of the Canadian Council of Ministers of the Environment (CCME), an organization comprising the 13 ministers of the environment of the federal, provincial and territorial governments.¹⁹

The purpose of the Accord is to build a more effective and efficient system of environmental management in which the actions of all Canadian governments would be complementary and appropriate to their jurisdiction. The common vision, objectives and principles that govern the partnership among jurisdictions, and the development and implementation of sub-agreements, are set out in the framework agreement.

To accomplish their objectives of enhancing environmental protection, promoting sustainable development, and achieving greater effectiveness, efficiency and predictability on a Canada-wide basis, the governments agreed to a number of fundamental principles, including the polluter pays principle, the precautionary principle and a recognition that pollution prevention is the preferred approach to environmental protection. Most importantly, the Accord does not alter the original legislative authority of the respective governments.

The Accord permits the governments to make multilateral sub-agreements related to specific components of environmental issues that need addressing on a cooperative national basis. The subagreements set out the specific roles and responsibilities to provide a one-window approach in implementing the environmental measure. The roles and responsibilities are divided among the governments based on which level is best situated to effectively discharge them. Where governments are unable to reach consensus on a national approach, each government may act within its existing authority, effectively relegating the question of constitutional competence to one of a last resort. Currently, sub-agreements exist to address environmental inspections, environmental standards and environmental assessment.

While the measures for implementing the Accord do not appear to reflect the goals of an emissions trading system for greenhouse gases as closely as do those of the Montreal Protocol, there is considerable evidence here that shared responsibility in areas of national

¹⁸ Material for this section was compiled from postings on http://www.mbnet.ca/ccme/harmonization.html.

¹⁹ The province of Quebec is not a signatory to the Accord. Before Quebec signs the Accord and sub-agreements, it requires that certain conditions be met.

environmental concern can work in practice. This is so, despite potential constitutional uncertainty. Especially in the case of a wide range of sources of emissions, the Accord offers an attractive model for administrative and regulatory cooperation.

A domestic greenhouse gas emissions trading system and the complementary policies necessary for the effective implementation of such a system require cooperation in an area of shared constitutional authority. While it is true that there are serious constitutional questions to be discussed relative to ultimate legislative competence in the area, more immediate needs require the design of a system that can be administered and regulated in a spirit of constitutional cooperation. Both the Montreal Protocol and the Accord on Environmental Harmonization offer suggestions for the implementation of such a cooperative effort.

6

Appendix 1

Legal Authority for Emissions Trading in Canada

Submitted to

Pilot Emission Reduction Trading (PERT)

Prepared by Joseph F. Castrilli Barrister & Solicitor 98 Borden St. Toronto, On. M5S 2N1

in association with **Pollution Probe**

March 1998

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National Round Table on the Environment and the Economy



Table ronde nationale sur l'environnement et l'économie

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I. Introduction

As part of a North American strategy for reducing air emissions that contribute to acid rain, smog, and pollution from toxic substances, governments in Canada and the United States increasingly are turning to strategies other than traditional command and control regulatory approaches to solving these problems.¹ In the United States, the engine driving a departure from conventional environmental regulation for some of these pollutants is Title IV of the Clean Air Act Amendments of 1990 ("CAAA").² These amendments contain two innovative features that represent significant departures from traditional regulatory approaches. These are (1) an emissions cap for sulphur dioxide;³ and (2) allowance trading for sulphur dioxide.⁴ Under the allowance trading program, if a facility reduces its emissions below its authorized emissions level, it can switch those

allowances to another of its production units, bank them for future use, or sell them to another facility.⁵ As the Title IV program increases in scope and impact in the United States,⁶ and as state programs develop under the authority of other parts of the CAAA,⁷ there is increasing interest in examining the possible development of similar regimes at the federal and provincial levels in Canada.⁸

The purpose of this report is to examine the existing legislative and regulatory regime for selected jurisdictions in Canada with a view to determining whether the current Canadian framework explicitly authorizes, may be interpreted to permit, or would require amendments to allow, the use of emissions trading. Part II of the report provides background on the characteristics of emissions trading programs including goals, types, uses, and typical components

2 42 U.S.C.A. §§ 7651a-7651o (West 1998).

8 Pollution Probe, York Centre For Applied Sustainability, Conference Board of Canada, Emissions Trading & Public Policy Conference 1 (1998).

A traditional command and control approach to regulation authorizes government to establish or set uniform source specific technology based standards for the regulated community to comply with. See Lisa Heinzerling, *Selling Pollution, Forcing Democracy*, 14 Stan. Envtl. L.J. 300, 301 (1995)(traditional command and control regulation where government sets specific emission rates or technologies for individual firms); and Larry B. Parker et al., *Clean Air Act Allowance Trading*, 21 Envtl. I. 2021, 2022 (1991)(traditional command and control approach requires the regulated community to install specified control technology or to meet plant-specific performance levels across all affected sources). Perceived limitations in this traditional regulatory approach include that the establishment of clean-up goals based on current technology hampers least cost innovations that could achieve pollution goals beyond the mandated standards. See Dallas Burtraw & Byron Swift, *A New Standard of Performance: An Analysis of the Clean Air Act's Acid Rain Program*, 26 Envtl. L. Rep. 10411, 10412 (1996)(command and control approach of calculating allowable emission rates based on engineering assessments of technological feasibility and modelling of ambient environmental quality does not allow industry to choose different and less costly compliance options); and David Sohn & Madeline Cohen, *From Smokestacks to Species: Extending the Tradable Permit Approach from Air Pollution to Habitat Conservation*, 15 Stan. Envtl. L.J. 405, 411 (1996)(command and control regulation imposes absolute limitations on regulated entities, providing no incentive to "overcomply" by emitting less than the prescribed level).

³ Id. § 7651b(a)(1)(West 1998)(by the year 2000 overall national sulphur dioxide air emissions from utilities must be reduced in the aggregate to 8.9 million tons per annum).

⁴ Id. §§ 7651a(3)(each allowance gives a utility right to emit one ton of sulphur dioxide per year), 7651b(b)(allowances may be transferred by owners or operators of sources affected by Title IV).

⁵ Sulphur Dioxide Allowance System, 40 C.F.R. § 73.1 (1993).

⁶ See 42 U.S.C.A. § 7651c (West 1998)(Phase I of the sulphur dioxide requirements, which apply to approximately 110 utilities in 21 eastern and mid-western states, have been law since January 1, 1995); and § 7651d (West 1998)(Phase II of the sulphur dioxide requirements, which will apply to all other electric utilities of a certain capacity, become law after January 1, 2000).

⁷ Title I of the CAAA requires states to develop state implementation plans ("SIPs") for the purpose of ensuring that National Ambient Air Quality Objectives ("NAAQS") and other requirements of the CAAA are met. As part of the SIP program, states may develop economic incentive programs, which may include a system of marketable permits pursuant to rules established by the Environmental Protection Agency ("EPA"). See 42 U.S.C.A. §§ 7511a(g)(3)-(5), 7512a(d)(3), (g). The EPA rules explicitly contemplate state establishment of emissions trading markets. See Economic Incentive Programs, 40 C.F.R. § 51.491 (1994). These markets may be either of the allowance trading or emission reduction credit variety. Id. 40 C.F.R. § 51, App. X (1996). Under the SIP program, EPA has approved a number of state emissions trading regimes. *See, e.g.*, Massachusetts Emissions Banking, Trading, and Averaging Program Approval, 40 C.F.R. § 52 (1996).

of such systems, as well as application to particular pollution sources and pollutants. Part III briefly reviews the constitutional authority at the federal and provincial levels in Canada for emissions trading in light of the characteristics that may be embodied in such legislation. Part IV analyzes existing and proposed legislation in Canada relevant to establishing emissions trading programs. Where possible the report notes the extent to which existing or proposed legislation in Canada is sufficiently broad to authorize an emission trading program in light of the prevailing characteristics of such regimes. Part V provides brief conclusions and recommendations.

II. Background: Characteristics of Emissions Trading Programs

There are certain fundamental characteristics that have developed in emissions trading programs to date and that are likely to be necessary for successful establishment of such programs in Canada. This part examines the goals of emissions trading programs, the particular pollution sources and pollutants to which such programs may be applicable, the types, and components of such regimes, as well as potential uses for credits or allowances.

A. Goals of Emission Trading Programs

The ultimate goal of any system of pollution control is to achieve environmental quality. How that goal and the objectives to achieving it are defined will vary from jurisdiction to jurisdiction. They may be set out in broad qualitative terms in a statute, or they may be set out in detail in regulations as maximum concentrations of particular pollutants in air or water for particular industrial sectors, or both. As noted above, command and control regulation imposes absolute limitations on regulated entities, providing no incentive to over-comply by emitting less than the prescribed limit. Those who advance emissions trading as a substitute or partial substitute for traditional command and control regulation argue that an economic approach to environmental compliance can meet, if not exceed, environmental goals at less cost.9 Those who question the extent to which emissions trading may substitute for traditional command and control regulation argue that: (1) environmental protection is not limited to the setting and enforcing of limits on clearly defined pollutants into air and water; (2) environmental problems are not solely created by a finite number of primarily large stationary sources; and (3) equal amounts of discharges from any of these sources do not necessarily have roughly the same environmental effect regardless of geographic location.¹⁰ Resolving the arguments both pro and con for emissions trading is beyond the scope of this report, but these issues have begun to be considered in the literature in Canada.11

11 Pollution Probe, supra note 8, at 20-21.

⁹ See, e.g., Marshall J. Breger & Richard B. Stewart et al., Providing Economic Incentives in Environmental Regulation, 8 Yale J. on Reg. 463, 468-471 (1991).

See, e.g., William F. Petersen Jr., The Limits of Market-Based Approaches to Environmental Protection, 24 Envtl. L. Rep. 10173, 10174-10175 (1994)(noting that most arguments for emissions trading have centered on the regime's appropriateness for addressing air and water discharges of traditional pollutants from a few large stationary or point sources, but that emissions trading is less suitable for addressing pollutants from small sources, hazardous pollutants, or hazardous wastes sites). See also Sam Hays, Emissions Trading Mythology, 12 Envtl. F. Jan.-Feb. 1995, at 15 (arguing that emissions trading is a relatively minor provision of Title IV of the CAAA and pales into insignificance when compared with the overriding decision to reduce sulphur dioxide emissions from utilities by 50 percent, to 8.9 million tons per year, and to cap it at that figure).

The theory behind a marketable rights scheme, such as Title IV of the CAAA, is that a maximum pollution level can be established (a cap), regulated entities can choose how best to achieve this level, as well as take the opportunity to sell the results of any over-compliance to other companies. Initial results under Title IV of the CAAA suggest that such an approach can stimulate innovation and investment in a variety of compliance options, lead to lower compliance costs, and exceed the environmental goals of the program.¹²

B. Application of Emission Trading Programs to Particular Pollution Sources

There are at least three categories of pollution sources to which emissions trading programs may be applied. These include: (1) stationary sources; (2) mobile sources; and (3) non-point sources. Each of these is discussed below.

1. Stationary Sources

Most emissions trading programs have focused on stationary sources of air pollution emitting contaminants through discrete stacks. Measurement from a stack at a stationary source has been important to the ability to verify the quantity of pollutants covered by the program emitted by a particular facility. A focus on stationary sources, particularly where only one or two pollutants are part of the program, also has made it possible to keep the program manageable since, in most instances, regulators are dealing with a comparatively finite number of large sources. The Title IV Acid Rain program exemplifies this approach.¹³

2. Mobile Sources

Traditionally, the emission reductions necessary to produce emission reduction credits ("ERCs"),14 have been obtained from trades between stationary sources. However, mobile sources of air pollution, such as cars, trucks, and buses, are significant additional sources of air pollution. While stationary sources number in the thousands, mobile sources may number in the millions. Consequently, the latter produce a significant proportion of ozone, carbon monoxide, and nitrogen dioxide, particularly in urban areas, and may account to a significant degree for exceedances of air quality standards and objectives in those locations. In some jurisdictions in the United States, reductions in mobile source emissions may be used to offset stationary source emissions. For example, typical mobile ERCs include accelerated retirement of older vehicles, which often are dirtier than newer model vehicles, and the introduction of fleets of clean-fuel vehicles, both of which may be traded against emissions from stationary sources.15

¹² Byron Swift, *The Acid Rain Test*, 14 Envtl. F., May –June 1997, at 16, 19-20 (noting that emissions data from 1995 and 1996 show that Phase I utilities have over-complied with the Title IV program by emitting approximately 30 percent less sulphur dioxide than the program's emissions cap allows, while producing significant compliance cost savings due to an ability to choose from a variety of competing technologies such as fuel blending, fuel switching, etc.).

¹³ Carlos A. Gavilondo, Comment, Trading Clean Air – The 1990 Acid Rain Rules: How They Will Work and Initial Responses to the Market System, 67 Tulane L. Rev. 749, 754 (1993). See also Karen Hiyama Schodowski, Notes, Title IV of the Clean Air Act Amendments of 1990: Will Emissions Trading Work in the Fight Against Acid Rain?, 37 Wayne L. Rev. 1883, 1898 (1991) (noting that the community regulated under Title IV constitutes a small, limited number of utilities who are easily identifiable emitters of sulphur dioxide).

¹⁴ ERCs are actual air pollution reductions from an emitting source that go beyond those required, for example, by state law and which may be marketed. *See, e.g.*, Massachusetts Emissions Banking, Trading, and Averaging, 310 Mass. Regs. Code § 7.00, App. B(2)(1996). Title I of the CAAA authorizes states to allow sources to convert excess emission reductions to ERCs. 42 U.S.C.A. § 7511a(g).

¹⁵ Perry S. Goldschein, Going Mobile: Emissions Trading Gets a Boost From Mobile Source Emission Reduction Credits, 13 UCLA J. Envtl. L. & Pol'y 225, 238-246 (1995).

3. Non-Point Sources

In many watersheds, non-point sources of water pollution, that is, over-land runoff from agricultural and urban areas contaminated with chemicals, sediments, nutrients, and pesticides may be major impediments to achieving water quality objectives.¹⁶ Historically, these sources of water pollution largely have been unregulated in comparison to point sources.¹⁷ Therefore, water pollution control has been considered a further area where emissions trading may be applied. In this context, point source dischargers would provide funds for non-point controls instead of advanced point source treatment requirements that otherwise would be necessary to achieve water quality objectives.¹⁸

C. Application of Emission Trading Programs to Particular Pollutants

Emissions trading has been used, is being used, or is being considered for use, in connection with a wide variety of pollutants, including sulphur oxides, nitrogen oxides, volatile organic compounds, carbon monoxide, particulate matter, greenhouse gases, phosphorous in water, and toxics such as lead and mercury.¹⁹ Most trading that has occurred, however, has been of the same pollutant, rather than of different pollutants, in the same trade.²⁰

D. Types of Emissions Trading Programs

There are essentially two types of emissions trading programs: (1) closed systems; and (2) open systems. Each are discussed briefly below.

1. Closed Systems: Emissions Cap and Allowance Trading

Title IV of the CAAA may be defined as a "closed system" because its application is limited to a specified group of sources (e.g. large electric utility generators) of sulphur dioxide, and the total amount of allowable emissions from program participants is capped to a legislatively defined national aggregate tonnage. The cap creates the motivation to reduce emissions, especially if it is a declining cap that allows smaller amounts of pollutants to be emitted by these sources over time.²¹ In practice, this system does not work with emission reduction credits as the medium of exchange. Instead, sulphur dioxide emissions allowances are distributed to existing participants according to a pre-determined methodology.22 Sources within this regulated group comply with pollution control requirements not by meeting specified emissions limitations, but by holding or acquiring enough allowances to cover actual sulphur dioxide emissions for a given calendar year. Thus, company A can generate excess allowances to sell to

¹⁶ David Letson, Point/Nonpoint Source Pollution Reduction Trading: An Interpretive Survey, 32 Nat. Resources J. 219, 220 (1992).

¹⁷ Point sources of water pollution include direct municipal or industrial discharges to bodies of water through discrete conveyances or pipes. Point sources also include indirect industrial discharges to municipal sewers that flow into sewage treatment plants that in turn discharge to bodies of water.

¹⁸ Esther Bartfeld, Point-Nonpoint Source Trading: Looking Beyond Potential Cost Savings, 23 Envtl. L. 43, 60-61 (1993).

¹⁹ Ron Nielsen, Pollution Probe, An Assessment of Emissions Trading for NOx and VOCs 1 (1998).

²⁰ Id. at 31. Some trading programs in the United States that managed the phase out of ozone-depleting substances (halons and chlorofluorocarbons) included limited inter-pollutant trading. Protection of Stratospheric Ozone, 40 C.F.R. §§ 82.1-82.14 (1992).

²¹ Burtraw & Swift, *supra* note 1, at 10420-10421, 10423 (suggesting that the overall level of the sulphur dioxide emissions cap may have to be reconsidered, if not reduced, nationally or regionally to take into account cumulative impacts of past acid rain deposition on sensitive areas of the United States, such as the northeast).

In Phase I under the Title IV program, which began on January 1, 1995, power plants subject to the program were provided specific emission allowances for sulphur dioxide based on each plant's annual average baseline fuel consumption in the period 1985-1987. U.S.C.A. § 7651c(a), Table A (West 1998). In Phase II, which is scheduled to commence on January 1, 2000, other power plants will be allocated reduced sulphur dioxide allowances based on a variety of formulas set out in the CAAA. Id. § 7651d (West 1998). The total of Phase II allowances are subject to a statutory cap of 8.9 million tons. Where the total number of allowances authorized would otherwise exceed the cap, EPA must reduce the allowance allocation for each facility on a pro rata basis to ensure the cap is not exceeded. Id. § 7651b(a) (West 1998).

company B by limiting sulphur dioxide emissions below the annual amount company A is otherwise authorized to produce according to the number of allowances it holds. Company A can also bank excess allowances for future use. This approach ensures that emission targets are met and, if necessary, can be reduced over time. On the other hand, a closed system requires a rigorous method of allocation and can reduce the number of sources eligible to participate, thus reducing the cost differential between sources necessary to induce trading.²³ There are examples of closed systems at the state level as well.²⁴

2. Open Systems: Open Market Trading

In theory, open market trading can involve any group of pollution sources whose emissions of the same or different pollutants are quantifiable in common terms. However, unlike closed market trading, open market trading does not work with a predetermined cap or set of allowances.²⁵ Open market trading would allow company B to meet any applicable emissions limitations through the application of emission reduction credits obtained from company A, or other sources, against the actual emissions company B produces. Credits result solely from surplus emission reductions (relative to an established level of emissions limits) that go beyond regulatory compliance requirements.²⁶ With an open market system there is theoretically more flexibility in the number and kinds of sources eligible to participate. As a result, greater opportunities for cost differentials to arise between sources may act as an economic incentive for trades to occur between such sources.²⁷ On the other hand, an open market system may not ensure that emissions reduction targets are achieved.²⁸

E. Selected Components of Emissions Trading Programs

There are a number of common attributes of an emission trading program that can contribute to the overall effectiveness of such a regime. These are briefly reviewed below.

1. Legal Definition and Effect of the Allowance or Credit

Jurisdictions that have developed emissions trading programs have had to consider the nature of the legal interest created by the allowance or credit. For an emissions trading market to develop, interests in the allowance or credit must be sufficiently protected to merit investment.²⁹ On the other hand, creating a property right or interest in the allowance or credit, may potentially hamper the ability of regulatory agencies to intervene where necessary,³⁰ or to develop

25 Glenn L. Unterberger, Let's Make a Deal: Transferring Pollution-Reduction Credits, 10 Nat. Resources & Env't 28, 29 (1996).

²³ Nielsen, supra note 19, at 25.

²⁴ Daniel P. Selmi, Transforming Economic Incentives From Theory to Reality: The Marketable Permit Program of the South Coast Air Quality Management District, 24 Envtl. L. Rep. 10695, 10698-10701 (1994); and Matthew Polesetsky, Will a Market in Air Pollution Clean the Nation's Dirtiest Air? A Study of the South Coast Air Quality Management District's Regional Clean Air Incentives Market, 22 Ecology L.Q. 359, 382-390 (1995) (the South Coast Air Quality Management District, the California state agency that regulates air pollution in the Los Angeles area, adopted a market-based approach in its Regional Clean Air Incentives Program – RECLAIM – that allocates pollution credits to participating firms to facilitate achieving mandated emissions reductions). Though similar to Title IV of the CAAA, RECLAIM does not allow banking of credits.

²⁶ Nielsen, supra note 19, at 26.

²⁷ Unterberger, supra note 25, at 29; and Burtraw & Swift, supra note 1, at 10417.

²⁸ Nielsen, *supra* note 19, at 26. This problem is most likely to occur where a trading regime is used solely as a means of meeting existing emission limits with no corresponding legal requirement to achieve emission reductions over time.

²⁹ Jeanne M. Dennis, Smoke for Sale: Paradoxes and Problems of the Emissions Trading Program of the Clean Air Act Amendments of 1990, 40 UCLA L. Rev. 1101, 1118 (1993).

³⁰ Breger & Stewart, *supra* note 9, at 480 (noting that according legal rights to allowances in the United States would likely result in regulatory interference in those rights being deemed a "taking" entitling a company to compensation under the Fifth Amendment to the U.S. Constitution). In Canada, although there is no constitutional provision respecting compensation for takings, the common law always has protected interests in property such that the creation of an allowance or credit trading system would have to be carefully drafted to ensure the ability of regulatory agencies to act.

public support for a program perceived to be authorizing a "right to pollute."³¹ Consequently, in most jurisdictions that have established emissions trading programs the nature of the entitlement that has been created is that of a revocable licence. For example, under Title IV of the CAAA, the United States Congress made it clear that property rights are not created in allowances.³²

2. When a Trade Will Be Recognized

In jurisdictions particularly with emission reduction credit programs, trades only will be recognized if the emissions reductions are: (1) real (result in actual reductions in emissions); (2) surplus (exceed the reductions mandated by a source's permit or other applicable law); (3) quantifiable (measurable according to a method acceptable to the applicable level of government); (4) enforceable (by the appropriate level of government by permit, agreement, or other legal instrument or authority); and (5) permanent (assured, through an enforceable mechanism, for the lifetime of the credit).³³

3. Regulatory Agency Ability to Measure Source Pollution

The regulatory agency responsible for overseeing the program must possess the legal authority to require the measurement of pollution levels at source by the regulated entity. The obligation on the regulated entity should include the requirement to measure the baseline pollution level and the changes from that baseline that allow the source to generate tradable emission credits.³⁴ The baseline pollution level for a source has been defined as that level of pollution below which the source will produce emission. reductions that will generate ERCs.³⁵ Consequently, an emissions trading program requires a strict monitoring regime to ensure the integrity of the process.³⁶ Under Title IV of the CAAA, for example, emissions must be measured by a continuous emission monitoring system ("CEMS") which record actual utility emissions of sulphur dioxide.37 Where the monitoring system is not working the CAAA makes it clear that the source will be deemed to be operating in an uncontrolled manner during the entire period for which data is not available.³⁸ The effect of such a presumption is that there is an incentive to ensure that the monitoring system at a

³¹ Polesetsky, supra note 24, at 370-371 (noting that a number of views have raised moral objections to emissions trading).

³² Under the CAAA, "an allowance...is a limited authorization to emit sulphur dioxide in accordance with [Title IV]. Such allowance does not constitute a property right. Nothing in [Title IV or other laws] shall be construed to limit the authority of the United States to terminate or limit such authorization..." 42 U.S.C.A. § 7651b(f) (West 1998).

³³ Wendy B. Jacobs & Anne D. Berlin, The Challenge of Designing a Successful Air Emission Trading Program in Massachusetts, 37 Boston B.J. 27, 27-28 (1993); and Robert L. Schroder & S. Lee Johnson, Using Market Forces to Reduce Pollution: Michigan's Emission Reduction Credit and Emission Averaging Rules, 76 Mich. B.J. 70, 71 (1997). State rules on recognizing emission trades are based on EPA requirements promulgated pursuant to Title I of the CAAA. Economic Incentive Programs, 40 C.F.R. § 51.493 (1994) (state program requirements).

³⁴ Michael C. Naughton, Establishing Interstate Markets for Emission Trading of Ozone Precursors: The Case of the Northeast Ozone Transport Commission and Northeast States for Coordinated Air Use Management Emissions Trading Proposals, 3 N.Y.U. Envtl. L.J. 195, 204 (1994).

³⁵ Id. at 204 n.45. See also Massachusetts Emissions Banking, Trading, and Averaging, 310 Mass. Regs. Code § 7.00, App. B(2) (1996) (baseline means the emission level set for a source which reflects the lower of actual emissions, or allowable emissions and which serves as the level below which emission reductions are considered surplus and can be eligible for approval by the state as ERCs).

³⁶ Alexander F. Skirpan Jr., Plus Ça Change, Plus C'est La Meme Chose: 1990 Amendments to the Clean Air Act and Their Impact on Utility Regulation, 55 U. Pitt. L. Rev. 171, 183 (1993); Burtraw & Swift, supra note 1, at 10421; and Gavilondo, supra note 13, at 773 (noting that EPA regards strict monitoring as essential to the concept of allowance trading under Title IV of the CAAA because a loose system of monitoring would devalue the financial value of allowances to emissions traders, and fail to instill confidence in the environmental community that claimed reductions were actually occurring).

^{37 42} U.S.C.A. §§ 7651a(7), 7651k(a) (West 1998) (CEMS means equipment required by Title IV to sample, measure, and provide on a continuous basis a permanent record of emissions from a facility subject to Title IV program).

³⁸ Id. § 7651k(d) (West 1998).

source is operating correctly at all times, otherwise the source's emissions will be presumed to be higher and will start eating up allowances.³⁹ EPA regulations under Title I of the CAAA also allow states to impose different monitoring, record-keeping and reporting requirements on sources subject to their respective emissions trading programs.⁴⁰ These alternate methods usually are employed for smaller sources that could not otherwise afford to install a CEMS.

4. Large Number of Pollution Sources With Variable Control Costs

To create a permit with economic value and to avoid market imperfections such as collusion and hoarding, ideally there should be a large number of sources with significant variations in control costs.⁴¹ Where trading is authorized only with respect to one or two pollutants, the likelihood of having a sufficient number of pollution sources to trade with in one jurisdiction may be diminished, and the need for trans-border trades may be increased.⁴²

5. No Creation of Pollution Hotspots

To ensure a greater likelihood of public support for an emissions trading program, the trading process should not result in regionally or locally higher concentrations of pollutants that would cause "hotspots" of environmental or health damage in sensitive areas.43 Therefore, the trading program should result in pollutants only having generalized effects over a large area. An emissions cap system may do more to ensure that such hotspots do not occur, because pollutants do not increase with economic growth.44 Acid rain and greenhouse gases have been described as examples of pollution that have a generalized effect. In contrast, with toxic substances, if one company were to acquire many credits from other sources, there might be a large dose of toxic releases in a limited area with serious effects on local health and environment.⁴⁵ To prevent such problems from occurring it also may be necessary to control both the directionality and seasonality of trades⁴⁶ as well as adjust the level of the emissions cap to minimize potential adverse effects on sensitive areas.47

- 39 Id. §§ 7651j(a)(b) (West 1998)(utilities must account for any excess emissions in subsequent years with additional allowances and must pay a \$2,000 penalty for each additional ton of sulphur dioxide emitted that is not accounted for by an allowance).
- 40 Economic Incentive Programs, 40 C.F.R. 51.493 (1994)(state program requirements may include continuous monitoring of mass emissions or emission rates, in situ or portable measurement devices to verify control operating systems, periodic measurement using reference test methods, procedures to prevent, identify, or remedy non-complying conditions, manual or automated recordkeeping of material usage, inventories, throughput, production activities, any combination of these methods, and procedures for determining required data for periods for which data monitoring is not performed).
- 41 Breger & Stewart, *supra* note 9, at 471. *See also* Dennis, *supra* note 29, at 1135 (noting that hoarding of allowances could force up their price, make compliance more expensive, and adversely affect expansion of particular sources subject to the program).
- 42 Frederic C. Menz, *Transborder Emissions Trading Between Canada and the United States*, 35 Nat: Resources J. 803, 813-814 (1995)(noting that implementation of a sulphur dioxide emissions trading program in Canada alone may be of concern because of the thinness of the potential market for emissions allowances due to the small number of domestic sources – six companies in Canada accounting for approximately 50 percent of total Canadian sulphur dioxide emissions; and suggesting that enhancing the size of the Canadian emissions allowance market by allowing trades with the United States would expand the opportunities for emissions transfers).
- 43 Burtraw & Swift, supra note 1, at 10421.
- 44 Id. The emission trading provisions of the CAAA also are subject to health-based regulations concerning sulphur dioxide emissions such as those arising from NAAQS and SIPs. Title IV itself makes it clear that nothing governed by Title IV may be construed as affecting the obligation to comply with other provisions of the CAAA. 42 U.S.C.A. §§ 7651b(f), 7651l (West 1998).
- 45 Breger & Stewart, supra note 9, at 471. See also Nancy J. Cohen, Emissions Trading and Air Toxics Emissions: RECLAIM and Toxics Regulations in the South Coast Air Basin, 11 UCLA J. Envtl. L. & Pol'y 255, 258, 270-272, 294 (1993)(noting need for closer review and reporting of air toxics trades to avoid adverse environmental health effects).
- 46 Letter from Erik Haites, President, Margaree Consultants Ltd., to Joseph F. Castrilli (Apr. 13, 1998)(on file with author).
- 47 Burtraw & Swift, supra note 1, at 10423 (for sulphur dioxide); Cohen, supra note 45, at 288-291 (for air toxics).

6. Clear Government Legal Authority to Implement and Enforce Program

Explicit legislative authority to embark on an emissions trading program is necessary to avoid a number of problems. First, if a legal basis of a program is ambiguous, opponents can delay its implementation by raising court challenges. Second, the absence of express legal authority for emissions trading is likely to make a regulatory authority more hesitant about embarking on such a regime in comparison to other more clearly authorized programs.⁴⁸ This is particularly the case where an emissions trading program requires particular attributes to succeed, such as allowances, auctions of allowances, an audit regime, CEMS or other monitoring network, or excess emissions administrative penalties and offsets, not otherwise authorized by statute.49 In such circumstances, the lack of express statutory authority can only jeopardize fulfillment of the objectives of the program by making it more vulnerable to third party challenge. Third, the lack of express statutory authority for such a program is likely to make the regulated community reluctant to participate.50

7. No Unreasonable Restrictions on Trading

If regulatory restrictions on trading and transaction costs resulting from administrative requirements are excessive, the viability of an emissions trading program will be reduced. The greater the administrative obstacles to trading, the lesser the economic value of the trade.⁵¹

8. Clear Program Objectives

Public support for emissions trading also requires that there be clearly identified goals and objectives connected with the program.⁵² Establishment of Title IV of the CAAA to combat acid rain was preceded by an exhaustive examination and public debate about the environmental and health problems connected with continued failure to reduce emissions of sulphur dioxide. The eventual compromise achieved — a cap to ensure measurable progress on reduction of emissions and trading that could reduce compliance costs — was supported in large measure by both companies and environmental groups.⁵³

9. Equitable and Simple Method for Allocating Allowances or Credits

A fair method of allocating allowances or facilitating trades is necessary to induce firms to pursue emissions trading.⁵⁴ In addition to private trades between sources subject to the program,⁵⁵ under Title IV two additional methods are employed to achieve this result. First, sulphur dioxide allowances are allocated based on historical emissions scaled down so that aggregate emissions meet the cap with each allowance authorizing the emission of one ton per year of the pollutant.⁵⁶ Second, auctions are authorized for the

- 52 Naughton, supra note 34, at 204.
- 53 Burtraw & Swift, supra note 1, at 10412-10413.
- 54 Tripp & Dudek, supra note 48, at 376-377.
- 55 42 U.S.C.A. § 7651b(b)(West 1998)(allowances may be transferred between owners and operators of sources subject to Title IV).
- 56 Supra note 22. See also 42 U.S.C.A. § 7651a(3)(West 1998)(an allowance gives the holder the right to emit one ton of sulphur dioxide into the air per year).

⁴⁸ James T.B. Tripp & Daniel J. Dudek, Institutional Guidelines for Designing Successful Transferable Rights Programs, 6 Yale J. on Reg. 369, 375 (1989).

⁴⁹ Brennan Van Dyke, Emissions Trading to Reduce Acid Deposition, 100 Yale LJ. 2707, 2709-2714 (1991)(noting that Title IV of the CAAA established many of these attributes for the first time in federal environmental law in the United States). Title IV also requires affected sources to obtain allowance permits and to develop a compliance plan. 42 U.S.C.A. § 7651g (West 1998) (permits and compliance plan requirements).

⁵⁰ Tripp & Dudek, *supra* note 48, at 375.

⁵¹ Id. at 377.

purchase of allowances on an annual basis.⁵⁷ This approach increases the likelihood that the allowance will reflect what the market will bear, and that the allowances will be distributed in an equitable manner.⁵⁸

10. Consistent Ground Rules Across Jurisdictions

Given the potentially international, national and regional scope of emissions trading, there must be consistent ground rules from one trading jurisdiction to another with respect to such matters as: (1) creating, banking, and trading of allowances or credits; and (2) facilitating cross-border, including interprovincial and international trades.⁵⁹ Consistent rules are necessary to ensure that no one jurisdiction unduly sacrifices either environmental quality or economic development.⁶⁰

F. Uses for Credits or Allowances

The willingness of companies or others to engage in emissions trading depends on the ends to which allowances or credits acquired may be used. In the United States, potential uses may include offsetting to facilitate establishment of major new or modified sources,⁶¹ compliance with required standards,⁶² and improvements in environmental quality by the acquisition and retirement of credits or allowances.⁶³

III.Constitutional Authority for Legislation Establishing Emissions Trading Programs in Canada

In recent decisions of the Supreme Court of Canada, the Court has made it clear how the question of the constitutional validity of a legislative enactment relating to the environment should be approached. The Court has stated that the environment is not an explicit or discrete subject matter of legislation under the Canadian Constitution, the Constitution Act, 1867.64 According to the Court, the environment is a diffuse subject matter that cuts across many different areas of constitutional responsibility, some of which are federal and others of which are under provincial jurisdiction.65 In assessing the constitutional validity of an environmental provision, the Court initially examines the legislative powers listed in the Constitution Act, 1867 to see if the provision falls within one or more of the powers assigned to Parliament or the provincial legislature that enacted the legislation. If the provision falls within the parameters of any such power, then it is constitutionally valid.66 The validity of a legislative provision, including one related to environmental protection, must be tested against the specific

^{57 42} U.S.C.A. § 76510(d)(2)(West 1998)(EPA to conduct annual auctions of allowances commencing in 1993 and in each year thereafter).

⁵⁸ New Strategies for a New Market: The Electric Industry's Response to the Environmental Protection Agency's Sulphur Dioxide Emission Allowance Trading Program, 47 Admin. L. Rev. 469, 474-479 (1995)(review of results of first three auctions).

⁵⁹ Menz, supra note 42, at 815-818 (suggesting establishment of a northeastern North American bilateral cap and trading zone agreement for acid rain between Canada and the United States). See also Jeffrey C. Fort & Cynthia A. Faur, Can Emissions Trading Work Beyond a National Program: Some Practical Observations on the Available Tools, 18 U. Pa. J. Int'l Econ. L. 463, 466-470 (1997)(suggesting international emission reduction and credits regime for greenhouse gases).

⁶⁰ Menz, supra note 42, at 818-819 (at the national and bilateral level); and Naughton, supra note 34, at 204-205 (at the sub-national level).

⁶¹ Schroder & Johnson, *supra* note 33, at 72 (major new or modified sources in areas that are not in compliance with NAAQS may obtain offsets which are compensating emission reductions from other sources to counterbalance increased emissions from the new or modified source).

⁶² *Id.* at 73 (where pollution control equipment purchased and approved with a view to achieving compliance with particular standards is not capable of meeting the requisite standards, emission credits could be obtained to avoid the need to re-open the permit).

⁶³ Id. (conservation groups could purchase and retire allowances or credits to improve area air quality).

⁶⁴ R. v. Hydro-Quebec, [1997] 3 S.C.R. 213, 286.

⁶⁵ Id.

⁶⁶ Id.

characteristics of the head of power under the Constitution that purportedly justifies it. While the Court has generally taken the view that the Constitution should be interpreted so as to afford both levels of government with ample authority to protect the environment, the general structure of the Constitution must be respected, including maintaining the balance of Canadian federalism.⁶⁷

This overall approach of the Court to examination of the constitutional validity of legislation, including environmental legislation, must be carefully considered when evaluating either existing or proposed legislation concerning emissions trading. It is also important to keep in mind some of the likely characteristics of such emission trading programs that were summarized above. For example, emissions trading may encompass a variety of pollution sources such as stationary, mobile, and non-point and be both intraprovincial as well as interprovincial, if not international, in scope. Emissions trading programs also may be highly detailed, regulatory, and administrative in nature, as well as affect the contractual rights of parties, as opposed to simply imposing criminal sanctions for non-compliance with statutory prohibitions. Each of these and related characteristics may have implications for the type of law both levels of government may enact, and which head(s) of power under the Constitution will support such legislative enactment. Key heads of constitutional power at the federal and provincial levels are briefly considered below.

A. Federal Authority

At the federal level there are primarily three different heads of power that could support emissions trading legislation: (1) the peace, order and good government power;⁶⁸ (2) the criminal law power;⁶⁹ and (3) the trade and commerce power.⁷⁰

1. Peace, Order and Good Government Power

The Constitution confers on the Parliament of Canada the power "to make laws for the Peace, Order and Good Government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces..."⁷¹ The power to make laws for the "Peace, Order and Good Government of Canada" ("POGG") is residual in nature in its relationship to provincial heads of power. That is, Parliament only may rely on this head of power to support federal legislation if the subject matter of the legislation is confined to "matters not coming within the classes of subjects" assigned by the Constitution to provincial legislatures.⁷²

One branch of POGG that has been developed by the Supreme Court to uphold federal legislation, including certain federal environmental legislation, is the national concern test or doctrine. The Court has characterized the national concern doctrine as follows:

 The national concern doctrine applies to both new matters which did not exist at Confederation and to matters which, although originally matters of a local or private nature in the province, have since, in the absence of national emergency, become matters of national concern;

⁶⁷ Id. at 267, 288-289.

⁶⁸ Const. Act, 1867, s. 91(preamble).

⁶⁹ Id., s. 91(27).

⁷⁰ Id., s. 91(2).

⁷¹ Id., s. 91(preamble).

⁷² Peter W. Hogg, *Constitutional Law of Canada* 443-444, 446 (4th ed. 1997)(purpose of POGG is to accommodate matters which do not come within any of the enumerated heads of federal or provincial power).

- 2. For a matter to qualify as a matter of national concern it must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution;
- 3. In determining whether a matter has attained the required degree of singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern it is relevant to consider what would be the effect on extra-provincial interests of a failure to deal effectively with the control or regulation of the intra-provincial aspects of the matter.⁷³

Where federal legislation meets these criteria, as was the case with legislation regulating marine pollution in R. v. Crown Zellerbach, the Court may uphold it.74 However, because POGG is a residual power reserved to Parliament under the Constitution when a matter does not come within the classes of subjects assigned by the Constitution to the federal or provincial legislatures, the matters dealt with by federal legislation upheld in reliance on that power, fall within the "exclusive legislative power of Parliament."75 Indeed, once a subject matter is characterized as being of national concern: "Parliament has an exclusive jurisdiction...to legislate in relation to that matter, including its intraprovincial aspects."76 Therefore, deciding that federal legislation may be upheld under the national concern doctrine of POGG means that the area involved is not a concurrent area of jurisdiction and there is no constitutional authority for provincial legislation in connection with the same subject matter. As the Court has noted: "determining that a particular subject matter is a matter of national concern involves the consequence that the matter falls within the exclusive and paramount power of Parliament and has obvious impact on the balance of Canadian federalism."⁷⁷ The Court has noted further that the subject of environmental protection is all pervasive, and if accepted as falling within the general legislative domain of Parliament under the national concern doctrine, "could radically alter the division of legislative power in Canada."⁷⁸

The Court in other cases interpreting federal environmental legislation has stated that the Constitution should be interpreted to afford both levels of government ample means to protect the environment while maintaining the general structure of the Constitution.⁷⁹ Therefore, the Court will be unlikely to "enthusiastically adopt" the national concern doctrine as a basis for upholding federal legislation,⁸⁰ because by definition the Court would be removing the area from the possibility of concurrent provincial legislation. Indeed, the fourperson minority judgment in Hydro-Quebec would not have upheld federal legislation controlling toxic substances on the basis of POGG because of the potential for such legislation to "encroach widely upon several provincial heads of power."81 Moreover,

80 Hydro-Quebec, 3 S.C.R. at 288.

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⁷³ R. v. Crown Zellerbach Ltd., [1988] 1 S.C.R. 401, 432.

⁷⁴ Id. at 436-438. Logging operator charged with breaching section of Ocean Dumping Control Act that prohibited any person from dumping at sea except in accordance with terms and conditions of a permit. Sea defined as including the internal waters of Canada other than fresh waters. No evidence that dumping had affected marine life, though dumping area connected to Pacific Ocean. Legislation upheld as constitutionally valid under POGG in relation to protection of ocean from marine pollution. Id. at 407, 414-415, 436-438.

⁷⁵ R. v. Hydro-Quebec, [1997] 3 S.C.R. 288 (noting that the Court held in *Crown Zellerbach* that marine pollution fell within the exclusive legislative power of Parliament under POGG).

⁷⁶ Crown Zellerbach, 1 S.C.R. at 433.

⁷⁷ Hydro-Quebec, 3 S.C.R. at 288.

⁷⁸ Id.

⁷⁹ Friends of the Oldman River Society v. Canada (Minister of Transport & Minister of Fisheries and Oceans, [1992] 1 S.C.R. 3, 62-65.

⁸¹ Id. at 263 (Lamer and Iacobucci JJ., dissenting; Sopinka and Major JJ., concurring).

the majority in *Hydro-Quebec* declined to consider POGG as a basis for upholding federal toxic substances legislation⁸² although the preamble to the statute refers to the problems posed by toxic substances having become a matter of national concern.⁸³

The approach of the Court with respect to reliance on the national concern doctrine as a basis for upholding federal environmental legislation has significant consequences for potential federal emissions trading law. Given the likely characteristics of federal emissions trading legislation - e.g. interprovincial and international trading of certain pollutant emissions from pollution sources with interprovincial and international effects --- such a law could arguably be upheld on the basis of the national concern doctrine. However, to do so would significantly impact on the ability of the provinces to adopt similar legislation, because federal emissions trading legislation upheld on the basis of the national concern doctrine may also regulate exclusively the intraprovincial aspects of the matter. The recent decisions of the Court suggest that there would be great reluctance on the part of the Court to support federal environmental emissions trading legislation on the basis of the national concern doctrine given the potential impact on provincial authority in the same area. Consequently, other heads of potential federal power should be examined that would permit concurrent federal and provincial laws to operate together.

2. Criminal Law Power

The Constitution confers on Parliament the power to make criminal law.⁸⁴ The Supreme Court has long held that to qualify as valid federal legislation under the criminal law power, a statute must meet two requirements. First, it must have a valid criminal law object or purpose. Second, it must address that object by means of prohibitions backed by penal sanctions.⁸⁵ In *Hydro-Quebec*, both the majority and dissent agreed that the control of toxic substances under the Canadian Environmental Protection Act ("CEPA") met the first test, but disagreed on whether it met the second test.⁸⁶ This disagreement has major significance for future amendments to CEPA that may establish an emissions trading program, particularly for "non-toxic substances."⁸⁷

a. Legitimate Public Purpose

The Court's decisions in the criminal law area indicate that Parliament can decide what evil it wishes to suppress by penal prohibition and what threatened interest it wishes to safeguard, as long as it does not colourably invade areas of exclusive provincial legislative competence.⁸⁸ However, a legitimate public purpose must underlie the prohibition. The Court has previously identified several examples of legitimate public purposes for legislation supported by the criminal law power, including public peace, order, security, health, and

⁸² Id. at 318.

⁸³ Canadian Environmental Protection Act (CEPA), R.S.C. 1985, c. 16 (4th Supp.)(preamble noting that the presence of toxic substances in the environment is a matter of national concern).

⁸⁴ Const. Act, 1867, s. 91(27).

⁸⁵ RJR-MacDonald Inc. v. Canada (Attorney-General), [1995] 3 S.C.R. 199, 240.

⁸⁶ Hydro-Quebec, 3 S.C.R. at 248 (Lamer and Iacobucci JJ., dissenting; Sopinka and Major JJ., concurring) (protection of environment a legitimate criminal public purpose); 293, 297 (LaForest J., for majority) (protection of environment valid criminal public purpose sufficient to support a criminal prohibition). Enabling authority under CEPA for control of toxic substances and interim order issued thereunder for control of PCBs upheld under criminal law power. Id. at 318 (LaForest J., for majority).

⁸⁷ See Bill C-32, Canadian Environmental Protection Act, 1998 (CEPA 1998), 36th Parl., 1st Sess., 46-47 Eliz II 1997-98, s. 326 (first reading Mar. 12, 1998, House of Commons)(emissions trading authority proposed for nutrients, fuels, international air and water pollution, pollution from government operations and federal and aboriginal lands, as well as toxic substances). An earlier version of CEPA 1998 was introduced in late 1996 but died in the last session of Parliament because of the intervening federal election of June 1997. See Bill C-74, Canadian Environmental Protection Act, 1997, 35th Parl., 2nd Sess., 45 Eliz. II (first reading Dec. 10, 1996, House of Commons).

⁸⁸ Hydro-Quebec, 3 S.C.R. 290-291.

morality, while noting that the list is not exhaustive.⁸⁹ In *Hydro-Quebec*, the Court declared that protection of a clean environment is also a public purpose sufficient to support a criminal prohibition: "Pollution is an 'evil' that Parliament can legitimately seek to suppress...a public purpose of superordinate importance; it constitutes one of the major challenges of our time."⁹⁰ In particular, it was the majority's view that Parliament may validly enact prohibitions under its criminal law power against specific acts for the purpose of preventing pollution or causing entry into the environment of certain toxic substances.⁹¹

b. Prohibitions Backed by Sanctions or Regulatory Regime

The debate about whether the criminal law power will sustain establishment of a sophisticated regulatory regime, and whether CEPA is such a regulatory regime, is at the heart of the dispute between the majority and dissenting opinions in Hydro-Quebec. The majority characterized Part II of CEPA as a regime to control toxic substances that may be released into the environment under certain restricted circumstances and which does so through a series of prohibitions to which penal sanctions are attached. The intent of Part II is not to control all substances, but only those few that are dangerous to the environment, while still giving the provinces ample scope for action. A small number of substances are carefully targeted, the Act defines precisely those situations where the use of a scheduled substance is prohibited, and the prohibitions are made subject to penal consequences.92

The four-person dissent in Hydro-Quebec advanced five principal reasons for concluding that CEPA was not valid criminal law. First, a lengthy and elaborate list of authorities for regulating substances in the Act suggested that CEPA was more regulatory than criminal.93 Second, unlike other federal laws that have been upheld under the criminal law power, there is no prohibition in the sections of Part II of CEPA that were the subject of the challenge, again suggesting a regulatory not a prohibitory regime.94 Third, while criminal law ordinarily consists of a prohibition that must be complied with directly by the person to whom it is addressed, CEPA contains no offence until an administrative agency intervenes to decide which substances are to be placed on a list of toxic substances and the standard of conduct expected in relation to such substances. The effect is to leave to ministerial discretion the criminalization of a sweeping area of behaviour.95 Fourth, the equivalency provisions of CEPA permit the federal government to exempt a province from regulations made under CEPA if that province already has "equivalent" regulations in force. Because provinces do not have the constitutional authority to enact criminal legislation, and the federal government cannot delegate such authority to them, any environmental legislation enacted by provinces must be of a regulatory nature. Therefore, deferring to provincial regulatory schemes on the basis that they are "equivalent" to federal environmental regulations made under CEPA creates a strong presumption that the federal regulations are themselves of a regulatory, not a criminal nature.96 Fifth, the CEPA enabling provisions purport to grant regulatory authority over

⁸⁹ Reference re Validity of s. 5(a) of Dairy Industry Act (Canada) (Margarine Case), [1949] S.C.R. 1, 50, aff'd sub nom. Canadian Federation of Agriculture v. Quebec (Attorney General), [1951] A.C. 179 (P.C.).

⁹⁰ Hydro-Quebec, 3 S.C.R. 293.

⁹¹ Id. at 296.

⁹² Id. at 302-309.

⁹³ Id. at 250 (Lamer and Iacobucci JJ., dissenting; Sopinka and Major JJ., concurring).

⁹⁴ Id. at 250-253 (referring to R.S.C. 1985, c. 16 (4th Supp.), s. 34 - regulation making authority - and s. 35 - emergencies).

⁹⁵ Id. at 253-254.

⁹⁶ Id. at 254-255.

all aspects of any substance whose release into the environment has or may have an immediate or long term effect on the environment. According to the dissent, this leaves nothing for the provinces to do if the federal government can exercise such complete control over the release of toxic substances.⁹⁷

c. Implications of Hydro-Quebec Decision for Emissions Trading Law

While the dissent's views did not prevail in the result, the closeness of the vote (5-4) and pending major amendments expected for CEPA are important in considering the nature and extent of future federal involvement with respect to emissions trading. Sound environmental law is a combination of criminal law and administrative law. It is not just about simple prohibitions and penalties. Often it is about managing the environment with detailed and sophisticated rules, standards, codes, and directives. In the case of substances that are the potential source of trading, such as those associated with acid rain, it also is not just about controlling toxic substances.

Effective environmental control of acid rain also may no longer be just a command and control system of regulation. The federal government has expressed interest in emissions trading. Given the elaborate administrative characteristics of an effective emissions trading regime⁹⁸ and the likely need to trade emissions of "non-toxic substances," it would be very difficult to justify such a program under the traditionally narrow ambit of the criminal law power; that is, a prohibition and penalty type regime.⁹⁹ In the respectful view of this author, to justify any type of significant federal involvement in this area that is not unduly confined to narrow prohibitions, and that permits a concurrent and compatible provincial role, other heads of federal power under the Constitution should be explored. These are discussed below.

3. Trade and Commerce Power

The Constitution confers on the Parliament of Canada the power to make laws in relation to "the regulation of trade and commerce."¹⁰⁰ Despite this broad language, the trade and commerce power historically was interpreted narrowly by the Privy Council to accommodate the provincial power over "property and civil rights."¹⁰¹ Since the abolition of appeals to the Privy Council, the Supreme Court of Canada has permitted the trade and commerce power to expand somewhat,¹⁰² but to date the Court has neither relied upon, nor rarely mentioned, the trade and commerce power as a basis for upholding federal environmental legislation.

The trade and commerce power has traditionally been interpreted as including regulation of: (1) interprovincial and international trade and commerce; and (2) general trade and commerce affecting the whole country.¹⁰³ Emissions trading, by introducing economic and market approaches to environmental protection, may represent the first realistic opportunity to test the scope of the trade and commerce power in relation to environmental law under either approach.

103 Id. at 530 (noting that these two branches of the trade and commerce power have been so identified since Parsons).

⁹⁷ Id. at 255-256.

⁹⁸ See supra part II.

⁹⁹ See Joseph F. Castrilli, R. v. Hydro-Quebec: The Criminal Law Power May Hinder the Future of Federal Protection of the Environment, 9 Crim. Rep. (5th) 312, 317-319 (1997).

¹⁰⁰ Const. Act, 1867, s. 91(2).

¹⁰¹ *Id.*, s. 92(13). See Hogg, *supra* note 72, at 530 (noting that trade and commerce is carried on by means of contracts which give rise to civil rights over property and referring to Citizens' Insurance Co. v. Parsons (1881), 7 App. Cas. 96, 113 (P.C.) which held that the trade and commerce power should not be regarded as including the power to regulate by legislation the contracts of a particular business or trade in a single province).

¹⁰² Hogg, supra note 72, at 533-534.

a. Interprovincial or International Trade and Commerce

Since the abolition of appeals to the Privy Council, the Supreme Court of Canada has exhibited a greater willingness to uphold federal legislation regulating the interprovincial as well as ancillary intraprovincial aspects of such commodities as wheat¹⁰⁴ and oil,¹⁰⁵ under the trade and commerce power. While that willingness has not, to date, extended to environmental legislation, the characteristics of some of the federal laws that have been upheld bear a resemblance to the type of regime envisioned in an emissions trading scheme.

In Re Agricultural Products Marketing Act, 106 the federal and provincial governments entered into an agreement whereby the parties agreed to establish a comprehensive egg marketing scheme. The Supreme Court upheld federal, and related provincial egg marketing statutes that had the following characteristics. The program involved federal and provincial marketing plans establishing quotas for export, interprovincial, and intraprovincial trade. A federal agency was established and set overall quotas for each province. The federal agency could impose levies or charges on the marketing of eggs by egg producers and these were to be collected on behalf of the agency by local egg boards. Each province set production quotas for individual producers based on the province's quota set by the federal agency. There also was a prohibition on persons operating without

a quota. Two judgments in the decision upheld both federal and provincial rules that established the production quotas on the ground that while "the control of production, whether agricultural or industrial, is prima facie a local matter [within] provincial jurisdiction,"¹⁰⁷ Parliament is not "precluded from allocating quotas on an industrywide basis if it relates to its regulatory control in relation to interprovincial and export trade."¹⁰⁸ The federal levies also were upheld as long as they were limited to interprovincial and export trade.¹⁰⁹ Although certain aspects of the federal scheme were not upheld,¹¹⁰ the overall impact of the decision constituted an expansion of federal trade and commerce power.¹¹¹

The statutory regimes upheld in *Re Agricultural Products Marketing Act* contain parallels to potential federal and provincial emissions trading regimes, particularly with respect to the setting of national quotas of production for a particular commodity for each province. This could be analogized to a national cap and trading regime for particular pollutant emissions.

While subsequent decisions of the Supreme Court continued to reject reliance on the first branch of the trade and commerce power — interprovincial and international trade and commerce — as support for federal legislation that purports to regulate local or intraprovincial trade,¹¹² or sets compositional standards for a product without regard for whether

¹⁰⁴ R. v. Klassen (1959), 20 D.L.R. (2d) 406 (Man. C.A.), *leave to appeal denied*, [1959] S.C.R. ix (federal legislation regulating interprovincial and export trade in wheat may validly apply to purely local work – feed mill processing locally produced wheat sold as feed to local farmers – as regulation of such intraprovincial transactions incidental to main purpose of law).

¹⁰⁵ Caloil v. A.G. Can., [1971] S.C.R. 543 (federal prohibition on the transportation or sale of imported oil west of Ottawa Valley, which caught many intraprovincial transactions, upheld as incidental in the administration of an extra-provincial marketing scheme designed to control imports).

¹⁰⁶ Re Agricultural Products Market Act, [1978] 2 S.C.R. 1198.

¹⁰⁷ Id. at 1293 (Pigeon, J.).

¹⁰⁸ Id. at 1265 (Laskin, C.J.).

¹⁰⁹ Id. at 1263 (Laskin, C.J.).

¹¹⁰ Id. at 1292 (Pigeon, J. holding for the majority that the federal agency could not be empowered to buy and sell surplus eggs in local trade).

¹¹¹ Hogg, *supra* note 72, at 535-536 (noting that the case constitutes a major expansion of federal power into local markets, but may be limited in its precedental value due to its unusual facts).

¹¹² Dominion Stores v. The Queen, [1980] 1 S.C.R. 844 (federal law establishing agricultural grades and grade names for agricultural products held unconstitutional attempt to regulate local trade).

the product moves across provincial boundaries,¹¹³ recent cases have begun to change this view under the general trade and commerce branch of the trade and commerce power.

b. General Trade and Commerce

Under the second branch of the trade and commerce power, as interpreted by the Court, Parliament can enact legislation in relation to general trade and commerce affecting the whole country.¹¹⁴ However, until recently the Supreme Court, following Privy Council decisions, had been reluctant to give much scope to this branch of the power because of concern about interfering with provincial power over property and civil rights.¹¹⁵ In General Motors of Canada v. City National Leasing¹¹⁶ this restrictive view was loosened as a majority of the Court upheld federal competition law and, in doing so, set out five indicia for the valid exercise by Parliament of the general trade and commerce power. First, the legislation must be part of a general regulatory scheme. Second, the scheme must be monitored by the continuing oversight of a regulatory agency. Third, the legislation must be concerned with trade as a whole rather than with a particular industry. Fourth, the legislation should be of a nature that the provinces jointly or severally would be constitutionally incapable of enacting. Fifth, the failure to include one or more provinces or localities would jeopardize the successful operation of the scheme in other parts of the country.117

The effect of the application of the second branch of the trade and commerce power is to authorize federal regulation of intraprovincial trade; something the first branch largely has not been permitted to allow.¹¹⁸ Because of *General Motors*, Parliament *and* the provinces have the constitutional power to regulate the intraprovincial aspects of competition.¹¹⁹ Indeed, the Court noted that not only would competition meet the third indicia noted above, but so would pollution.¹²⁰

To the extent that the Court has considered the trade and commerce power in relation to pollution, the results have been inconclusive. In Hydro-Quebec, the majority did not consider whether regulation of toxic substances under Part II of CEPA could be supported by the trade and commerce power. The dissent, however, rejected submissions from some intervenors who argued that the general trade and commerce power, relying on General Motors, could justify federal regulations aimed at controlling the use and release of toxic substances in the course of commercial activities.¹²¹ The dissent rejected these submissions in part because in their view the pith and substance of CEPA does not concern trade and commerce, even if trade and commerce may be affected by the provisions controlling toxic substances,122

It is submitted that the dissent's observation in *Hydro-Quebec* is wrong in two respects. First, pollution does have an important economic

116 General Motors of Canada Limited v. City National Leasing, [1989] 1 S.C.R. 641.

121 R. v. Hydro-Quebec, [1997] 3 S.C.R. 213, 264-265.

¹¹³ Labatt Breweries v. A.G. Can., [1980] 1 S.C.R. 914, 939, 943 (federal law setting compositional standards for beer held unconstitutional under trade and commerce power as being primarily concerned with the production and local sale of specified products of the brewing industry).

¹¹⁴ Citizens' Insurance Co. v. Parsons (1881), 7 App. Cas. 96, 113 (P.C.).

¹¹⁵ Hogg, supra note 72, at 538. See also A. Wayne MacKay & Dianne Pothier, Developments in Constitutional Law: The 1988-89 Term, 1 Supreme Court L. Rev. (2d) 121, 123-124 (1990); and Neil Finklestein, Case Note on General Motors of Canada Limited v. City National Leasing, 68 Can. B. Rev. 802, 805-806 (1989).

¹¹⁷ Id. at 661-662.

¹¹⁸ Hogg, supra note 72, at 543.

¹¹⁹ General Motors, 1 S.C.R. at 682.

¹²⁰ Id. (pollution not a single matter).

¹²² Id. at 265-266.

dimension in its impact on trade and commerce. There is little incentive for company A to clean up in one province if company B in another province can continue to pollute and thereby obtain an economic advantage over company A. By not responding with effective legislation, or by imposing lower environmental standards, it is possible for provinces to subsidize existing and attract new businesses to their jurisdictions, thus creating competitive, commercial, and trade imbalances across the country.¹²³ These imbalances often are described as "pollution havens."124 Moreover, because air and water pollution often do not respect political boundaries, even if one province were to clean up, if its neighbour provinces did not, the first province could still end up living with the other jurisdiction's pollution.¹²⁵ All of these factors speak to the need for a federal responsibility to address the economic, trade, and commercial dimension of the pollution problem through its authority under the trade and commerce power.

Second, even if, as the dissent appears to suggest, traditional environmental regulation does not concern trade and commerce because it limits trade and commerce for non-trade or non-commercial reasons,¹²⁶ emissions trading is a different type of regime. Emissions trading adopts an economic or market approach to environmental pollution by turning, for example, a pollution/emission reduction credit/allowance into an article of trade; that is, a commodity that has economic value to industry. By this yardstick, emission trading is no different from a marketing regime regulating eggs, wheat, or oil.

Thus, despite the observation of the dissent in Hydro-Quebec, it is submitted that federal emissions trading legislation could meet each of the five indicia noted in General Motors for the valid exercise of the general trade and commerce power. First, it would require a general regulatory scheme to implement what would appear to be elaborate components characteristically necessary for emission trades. Second, the regulatory scheme would require continuing oversight and monitoring by the regulatory agency. Third, emissions trading legislation would be concerned with trading in general, albeit trading of emission reduction credits or allowances for certain pollutants, rather than in respect of a particular industry. Fourth, the legislation would be of such a nature that the provinces jointly or severally would be constitutionally incapable of enacting such legislation. Fifth, the failure to include one or more provinces or localities in an emissions trading regime would jeopardize the successful operation of emissions trading in other parts of the country. Finally, reliance on the trade and commerce power to establish federal emissions trading law would have none of the drawbacks noted above of reliance on POGG,¹²⁷or the criminal law power,¹²⁸ would permit a broad and flexible approach, and would permit concurrent and compatible provincial legislation to apply intraprovincially.

¹²³ Paul Emond, The Case for a Greater Federal Role in the Environmental Protection Field: An Examination of the Pollution Problem and the Constitution, 10 Osgoode Hall LJ. 647, 648-649 (1972).

¹²⁴ Edward A. Fitzgerald, The Constitutionality of Toxic Substances Regulation Under the Canadian Environmental Protection Act, 30 U. Brit. Colum. L. Rev. 55, 93 (1996).

¹²⁵ Martin Mittelstaedt, Quebeckers Rap Hydro Over Power Plant's Emission Plans, Globe & Mail (Toronto), Feb. 27, 1998, at A6 (noting that Ontario Hydro's plans to not install up-to-date air pollution controls at its fossil fuel power stations may result in increased emissions in Quebec of nitrogen oxides, a major component of acid rain, smog and particulates).

¹²⁶ Hydro-Quebec, 3 S.C.R. at 265.

¹²⁷ See supra part III.A.1 (exclusion of provincial law).

¹²⁸ See supra part III.A.2 (restriction of federal law to a prohibition/penalty-type regime).

B. Provincial Authority

The Constitution also enumerates several provincial heads of power. The key head of power that supports provincial legislative authority, including environmental authority, is "property and civil rights in the province."¹²⁹

1. Property and Civil Rights

The Constitution confers on provincial legislatures the power to make laws in relation to "property and civil rights in the province."¹³⁰ This power is regarded as the most important head of provincial power,¹³¹ and would be the primary basis for supporting the constitutionality of emissions trading legislation. In the environmental context, the provincial power over property and civil rights authorizes the regulation of land use and most aspects of mining, manufacturing, and other business activity, including the regulation of emissions that could pollute the environment.¹³² Property and civil rights has been the basis for upholding the constitutionality of most pieces of provincial environmental legislation.¹³³

However, provincial environmental legislation cannot have an extra-provincial effect. Provincial legislation dealing with the impacts of pollution has controlling effect within the territorial limits of the province that enacted it. However, environmental injury that is caused by acts performed outside a territory of a province is not a matter within the legislative authority of the province harmed. Thus, legislation in province A that is otherwise constitutionally valid as applied within that province, cannot be applied to activities in province B, even where the activities in province B cause environmental harm in province A.¹³⁴

Provincial legislation authorizing marketing controls on various products such as milk or oil also bears a close analogy to possible emissions trading legislation. The Supreme Court of Canada has upheld provincial marketing controls that primarily were directed at intraprovincial trade, even if they had an incidental effect on products produced in other provinces.135 Thus, in the context of potential emissions trading legislation, a province could approve in-province trades that had only an incidental pollution and trade effect interprovincially. However, the Supreme Court also has struck down provincial marketing legislation where the Court concluded that the provincial law not only had an incidental effect on interprovincial trade, but also aimed at the regulation of such trade.136

¹²⁹ Const. Act, 1867, s. 92(13).

¹³⁰ Id.

¹³¹ Hogg, supra note 72, at 546.

¹³² Id. at 738.

¹³³ R. v. Lake Ontario Cement Ltd., [1973] 2 O.R. 247, 254-255 (Ont. H.C.)(upholding Ontario Environmental Protection Act prohibition under both property and civil rights – s. 92(13) – and matters of a local or private nature in the Province – s. 92(16) – of the Constitution with respect to the emission of contaminants even though pollution had become a matter of "national concern").

¹³⁴ Interprovincial Co-operatives v. The Queen, [1976] 1 S.C.R. 477, 505-507, 510-511, 516 (Martland, Pigeon, Beetz, JJ., plurality opinion), 523-525 (Ritchie, J., concurring on this point)(chemical manufacturing plants in Ontario and Saskatchewan discharging mercury wastes into rivers flowing into Manitoba causing harm to Manitoba fishermen, not justifying Manitoba legislation imposing liability on, or removing statutory protection of, out of province plants).

¹³⁵ Home Oil Distributors v. A.G.B.C. [1940] S.C.R. 444 (provincial regulation of gasoline and fuel oil prices in province upheld notwithstanding incidental effect on products produced out of province); and Carnation Co. v. Quebec Agricultural Marketing Board [1968] S.C.R. 238 (provincial marketing plan for sale of milk by Quebec farmers to Carnation causing company to absorb higher prices than other local processors even though company sold most of its product out of province, upheld as in relation to intraprovincial trade and merely affecting interprovincial trade).

¹³⁶ A.G. Man. v. Man. Egg & Poultry Assn. (Manitoba Egg Reference), [1971] S.C.R. 689 (provincial legislative scheme applying to eggs sold in province, as well as to eggs produced elsewhere held unconstitutional as aim of law was regulation of interprovincial trade); and Central Canada Potash v. Government of Saskatchewan [1979] 2 S.C.R. 42 (provincial imposition of production quotas on producers of potash in the province held unconstitutional as virtually all of potash produced in province destined for export resulting in scheme regulating export production).
In the context of emissions trading, which often will involve interprovincial, as well as international trading of emission reduction credits or allowances, the legal authority of the provinces to address effectively a variety of extra-provincial issues is doubtful. For example, if a company in Nova Scotia was in over-compliance with Nova Scotia law on sulphur dioxide emissions, and agreed pursuant to Nova Scotia and Ontario law to sell its emission credits or allowances to an Ontario company, the trade could increase Ontario's sulphur dioxide emissions in Quebec137 or New England. The Supreme Court of Canada previously has held that provinces are without legal authority to licence an inprovince company's extra-provincial acts of contamination.¹³⁸ Therefore, this type of situation could only be resolved along the lines of the federalprovincial legislative approach in Re Agricultural Products Marketing Act, discussed above.139

Overall, however, the provincial power over property and civil rights will be the primary constitutional basis for provincial emission trading legislation that has intraprovincial effects, or that only has incidental effects on interprovincial interests.

2. Other Powers

The Constitution grants the provinces other powers such as authority to deal with matters of a local or private nature¹⁴⁰ and municipal institutions in the province.¹⁴¹ These powers would appear to be additional authority for provincial control over local trade¹⁴² and could potentially support local municipal emission trading laws.

3. Summary

Emissions trading programs could include a variety of characteristics. First, application to a variety of pollution sources such as stationary, mobile, and non-point sources is likely over the long-term. Second, there is a likelihood of intraprovincial, interprovincial, and international trades. Third, such regimes are likely to include detailed administrative and regulatory components, as opposed to the simple imposition of criminal sanctions for non-compliance with statutory prohibitions. Fourth, such regimes are likely to impact on the contractual rights of parties. These characteristics suggest the need for both federal and provincial emission trading laws. The most appropriate constitutional authority for federal emissions trading law is the trade and commerce power. This power has none of the drawbacks of reliance on POGG, which would result in the exclusion of provincial law. Trade and commerce also is a superior power for the federal government to rely on than the criminal law power, which would restrict federal law to a comparatively narrow prohibition and penalty-type regime. The trade and commerce power would permit a broad and flexible federal approach, and would allow concurrent and compatible provincial legislation relating to intraprovincial aspects of emission trading.

The primary power authorizing provincial emissions trading law would be property and civil rights with respect to the intraprovincial aspects of such a program. Other provincial powers, in conjunction with property and civil rights, would be authority for the establishment of local-municipal emission trading legislative programs.

¹³⁷ See, e.g. Mittelstaedt, supra note 125, at A6.

¹³⁸ Interprovincial Co-operatives, 1 S.C.R. at 511-512, 515 (Martland, Pigeon, Beetz, JJ.)(noting that water pollution from mercury wastes discharged by Ontario and Saskatchewan companies ultimately flowing into Manitoba waters necessarily having an interprovincial effect and therefore a subject matter within the exclusive authority of Parliament under POGG thereby rendering provinces of Ontario and Saskatchewan without authority to licence companies' acts of pollution).

¹³⁹ See supra notes 106-111 and accompanying text.

¹⁴⁰ Const. Act, 1867, s. 92(16).

¹⁴¹ Id., s. 92(8).

¹⁴² Hogg, supra note 72, at 549.

IV. Analysis of Existing and Proposed Legislation in Canada Relevant to Establishing an Emission Trading Regime

Most environmental legislation in Canada is of the command and control type. By comparison, the development and implementation of federal or provincial emission trading legislation is in its infancy. At the federal level existing legislation, with some notable exceptions such as the Motor Vehicle Safety Act ("MVSA"),143 is largely silent on the subject of emission trading. Some attributes of federal toxic substance legislation, such as emission standards under the CEPA144 for industries emitting certain scheduled substances, may be valuable when enabling authority for emission trading is developed under this statute. However, CEPA is fairly narrow, with few substances subject to emission standards under the law. Federal environmental assessment law, the Canadian Environmental Assessment Act ("CEAA"),¹⁴⁵ also might be enlisted in some limited circumstances to offset emissions from projects subject to CEAA. However, CEAA is not well suited for implementing or enforcing such a regime. Prospectively, proposed amendments to CEPA would authorize economic instruments, including emissions trading, for such matters as toxic substances,

nutrients, fuels, international air and water pollution, and substances emitted from federal facilities or operations on federal and aboriginal lands. The emissions trading enabling authority in proposed amendments to CEPA is extensive. However, the nature, scope, and adequacy of this authority will depend to a significant degree on both: (1) the content of still to be developed regulations; and (2) what constitutional authority the federal government is prepared to invoke, and the Supreme Court to support, in connection with such a program.

At the provincial level, most legislation also is of the command and control variety. The extent to which such existing legislation could be used to support emissions trading without explicit legislative amendment is comparatively limited. This is particularly true in provinces where air quality regulations are of the ambient or point of impingement variety as opposed to the emission limits variety. However, some provinces have long had air pollution regulations in place which establish a cap on total loadings per year to the atmosphere from particular pollutants, such as sulphur dioxide. A regime of this type would be eminently suitable for development of an emissions cap and allowance trading scheme with appropriate legislative amendment. Several provinces have enacted enabling legislation authorizing emissions trading. However, the details of these regimes only will be known when regulations are developed. This also is true for territorial and potentially local legislation that may be interpreted to authorize emissions trading.

¹⁴³ Motor Vehicle Safety Act (MVSA), S.C. 1993, c. 16.

¹⁴⁴ CEPA, R.S.C. 1985, c. 16 (4th Supp.).

¹⁴⁵ Canadian Environmental Assessment Act (CEAA), S.C. 1992, c. 37.

A. Federal

1. Existing Legislation: Traditional Command and Control Approaches

a. Canadian Environmental Protection Act

CEPA, enacted in 1988, is a command and control statute that governs certain toxic substances, international air pollution, ocean dumping, and pollution from federal facilities. The Act also authorizes the issuance of non-enforceable national air quality objectives for certain substances.

i. Part I – Environmental Quality Objectives

The Minister is authorized to formulate environmental quality objectives that specify goals or purposes toward which an environmental control effort is directed. These goals may be stated in quantitative or qualitative terms.¹⁴⁶ Pursuant to this authority, the federal government has promulgated national air quality objectives relating to ambient air quality for certain major pollutants such as sulphur dioxide, nitrogen oxide, carbon monoxide, ozone, and total suspended particulates.¹⁴⁷ These objectives do not impose enforceable limits on the amount of air pollution that an individual source may emit, and therefore do not lend themselves to being used in an emissions trading regime, even if CEPA explicitly authorized such a program.

ii. Part II – Toxic Substances

Part II of CEPA addresses control of toxic substances, which are defined broadly under the statute.¹⁴⁸ The Act contains a variety of information gathering, notification, disclosure, and assessment requirements relating to identification, description and evaluation of substances to determine if they should be declared "toxic," placed in a schedule, and made subject to controls under the Act. Where substances have been deemed toxic, controls may be imposed on them in the form of emission standards, which are promulgated as enforceable regulations under the Act. Unlike the national air quality objectives, violation of these regulations is enforceable against individual companies. Very few substances have been made subject to air emissions standards under CEPA, and where this has occurred the regulations have been industry as well as substance specific, thus further reducing the scope of coverage of Part II. For example, emission standards have been promulgated for lead from secondary lead smelters,149 and for mercury from chlor-alkali plants.¹⁵⁰ Because regulations promulgated under Part II set maximum emission limits that subject industries must comply with, these regulations lend themselves more readily to application in a regime of emissions trading. Amendments to CEPA proposed in late 1996, and reintroduced in early 1998, discussed more fully below, would have authorized emissions trading of such substances.¹⁵¹ However, because Part II regulations only are developed for toxic substances, an emissions trading regime for such substances would have to ensure that pollution or toxic hotspots were not an end result of the process.

146 CEPA, R.S.C. 1985, c. 16, s. 8(1)(a) (4th Supp.).

- 150 Chlor-Alkali Mercury Release Regulations, SOR/1990-130 (1990).
- 151 See supra note 87. See also infra part IV.A.3.a.

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¹⁴⁷ National Ambient Air Quality Objectives for Air Contaminants, Order in Council P.C. 1989-1482 (1989), reprinted in Canada Gazette Part I at 3642-3645 (1989).

¹⁴⁸ CEPA, R.S.C. 1985, c. 16, s.11(a)-(c) (substance is toxic if entering the environment in a quantity or concentration that may have an immediate or long-term harmful effect on the environment, constitute a danger to the environment on which human life depends, or constitute a danger in Canada to human life or health).

¹⁴⁹ Secondary Lead Smelter Release Regulations, SOR/91-155 (1991).

iii. Part IV – Federal Facilities

Part IV of CEPA addresses pollution from federal departments, agencies, Crown corporations, works, undertakings, and lands. Regulations may be authorized prescribing limits on the release of emissions and effluents from such activities.¹⁵² To date no such regulations have been promulgated. Proposed amendments to CEPA, discussed more fully below, would authorize emissions trading concerning such federal activities.¹⁵³

iv. Part V – International Air Pollution

Part V of CEPA addresses international air pollution. The federal government may promulgate regulations where an air contaminant alone or in combination with other air contaminants derived from sources within Canada, creates air pollution in another country, or violates an international agreement to which Canada is a signatory.¹⁵⁴ Before exercising this authority, the federal government must have been unsuccessful in persuading the provinces in which the pollution sources are situated to undertake measures to control the problem.¹⁵⁵ There have not been any federal regulations adopted pursuant to Part V. However, amendments proposed for CEPA, discussed below, would authorize emissions trading in connection with substances regulated under Part V.¹⁵⁶

b. Canadian Environmental Assessment Act

CEAA requires that a federal authority, called a responsible authority under the law, in four circumstances must conduct an environmental assessment. First, an environmental assessment must be conducted where the responsible authority is the proponent of a project. Second, where the federal government pays for the project or provides financial assistance in connection therewith. Third, where federal land is disposed of by sale, lease, or other means to enable the project to proceed. Fourth, an environmental assessment must be conducted where the federal government exercises a prescribed regulatory duty such as issuing a permit, licence, or approval.¹⁵⁷ Generally, CEAA applies to physical works unless exempted.¹⁵⁸ The law only applies to physical activities if specifically included by regulation.¹⁵⁹ The law is silent on permitting offsets of emissions from physical works or physical activities. However, even if offsets might be possible concerning particular projects, the general structure of CEAA could prove problematic in systematically facilitating such a process. For example, the ability and willingness of responsible authorities to ensure consistent compliance and implementation of such measures may be uncertain because responsible authorities will vary from project to project.160 Overall, CEAA would not appear to be a law that can be relied upon consistently for implementing emissions trading policies.

- 152 CEPA, R.S.C. 1985, c. 16, s. 54 (4th Supp.).
- 153 See infra part IV.A.3.a.
- 154 CEPA, R.S.C. 1985, c. 16, s. 61(1)(a)(b) (4th Supp.).
- 155 Id., s. 61(2).
- 156 See infra part IV.A.3.a.
- 157 CEAA, S.C. 1992, c. 37, s. 5.
- 158 *Id.*, ss. 5, 7. Projects are physical works that include any proposed construction, operation, modification, decommissioning, abandonment or other undertaking in relation to those physical works. *Id.*, s. 2. A physical work may be exempted by regulations under the Act (Exclusion List Regulations, SOR/94-639), or if the project is to be carried out in response to an emergency.
- 159 Id., s. 59(b). Projects are physical activities that do not relate to a prescribed physical work designated under s. 59(b). Physical activities designated by other regulations under the Act (Inclusion List Regulations, SOR/94-637) are projects subject to the CEAA.
- 160 Id. ss. 2, 20, 37(2) (responsible authority is the federal department, board, or agency that is responsible for complying with, and making decisions, under CEAA).

2. Existing Legislation Authorizing Emissions Credits

a. Motor Vehicle Safety Act

The MVSA is the primary air pollution control statute in Canada for mobile sources. It also is the only federal law at present that explicitly authorizes emissions credits. The Act allows regulations that prescribe emissions standards also to provide for a system of credits in the following circumstances. First, a company may establish that a vehicle conforms to emissions standards by applying credits against emissions in the manner to be prescribed by the regulations.¹⁶¹ The MVSA allows such credits to be obtained by a company by: (1) reference to emissions of a vehicle that more than satisfy the requirements of the standards; or (2) payment to the federal government of an amount determined at a prescribed rate in relation to vehicle emissions.¹⁶² Moreover, credits obtained by reference to emissions may be transferred to or from a company.¹⁶³ Companies engaging in the emissions credit program must provide an account to the federal government of any emission credits obtained or applied and the vehicle type involved.164

The effect of the program is that instead of each vehicle having to meet emission standards prescribed under the Act, some model vehicles may emit more air pollution as long as others emit less. This would be achieved by some companies exceeding the emission standards by paying the equivalent of a pollution tax to the government, while other

- 165 Motor Vehicle Safety Regulations, C.R.C. 1038, s. 1102 (1993).
- 166 Id., s. 1103 (hydrocarbon, carbon monoxide, and nitrogen oxides).
- 167 Id., s. 1105 (hydrocarbons).
- 168 CEPA 1998, s. 162 (mobile sources).
- 169 Id., s. 326 (stationary sources). See also supra note 87 (noting history of predecessor Bill C-74, CEPA 1997, which did not proceed in the last session of Parliament due to an intervening June 1997 federal election. The emissions trading provisions of both sets of amendments are the same).
- 170 Id., s. 322.

companies would obtain a pollution credit for overcompliance. While regulations under the MVSA have established standards for crankcase,¹⁶⁵ exhaust,¹⁶⁶ and evaporative emissions,¹⁶⁷ regulations have not been promulgated with respect to the emissions credit regime authorized by the statute. The emissions credit provisions of the MVSA are to be consolidated under CEPA in amendments to the latter statute due this year.¹⁶⁸

3. Proposed Legislation That Would Authorize Emissions Trading

a. Bill C-32: Canadian Environmental Protection Act, 1998

Perhaps the most comprehensive set of emissions trading requirements yet developed under Canadian law for stationary sources were proposed in late 1996, and re-introduced in early 1998, as part of a major overhaul of CEPA. Bill C-32, the Canadian Environmental Protection Act, 1998 ("CEPA 1998"), would introduce emissions trading requirements in connection with the following areas: toxic substances, nutrients, fuels, international air and water pollution, and substances emitted from federal facilities or operations on federal or aboriginal lands.¹⁶⁹

CEPA 1998 would authorize the federal government to establish programs and other measures for the development and use of "economic instruments" and "market-based approaches" respecting "tradeable units."¹⁷⁰ None of these terms is defined in CEPA 1998. The bill would authorize the Minister to make

¹⁶¹ MVSA, S.C. 1993, c. 16, s. 8(1)(a).

¹⁶² Id., s. 8(1)(b)(i)(ii).

¹⁶³ Id., s. 8(1)(c).

¹⁶⁴ Id., s. 8(3).

regulations relating to "tradeable units" in the exercise of the government's general regulation making power over toxic substances, nutrients, fuels, international air and water pollution, and substances emitted from federal facilities or operations on federal or aboriginal lands.¹⁷¹ In particular, regulations under this authority may provide for, or impose requirements regarding, the following matters:

- the substance, product containing a substance or quantity or concentration of the substance that is released or activity in relation to which the system is established;
- the methods and procedures for conducting sampling, analyses, tests, measurements or monitoring under the system;
- the description and nature of a tradeable unit, including allowances, credits or coupons;
- the baselines to be used for comparison or control purposes in relation to the system and the maximum limits applicable to the system and the manner of determining those baselines and maximum limits;
- the conditions related to the creation, distribution, exchange, sale, use, variation or cancellation of a tradeable unit;
- the creation, operation and management of a public registry related to the system;
- the conditions for the use of and participation in the system, including environmental and temporal limits;
- reports and forms related to the system; and
- the maintenance of books and records for the administration of regulations made under the regime.¹⁷²

Under CEPA 1998, the Minister also may: (1) issue an order setting conditions regarding the trading, suspension or cancellation of the trading of tradeable units; or (2) invalidate any trade of tradeable units where the government is of the opinion that the trade or use of a tradeable unit may cause certain problems. These problems include that the trade may: (1) have an immediate or long-term harmful effect on the environment; (2) constitute a danger to the environment on which human life depends; or (3) constitute a danger in Canada to human life or health.¹⁷³

The proposed provisions of CEPA 1998 constitute perhaps the most extensive statutory authorization for an emissions trading program in Canada. They contain authority for many of the components that traditionally have characterized such regimes. These include: (1) defining the nature of, as well as the conditions respecting the use of, a tradeable unit; (2) methods of monitoring; (3) the use of baselines for measuring source pollution; (4) creating a registry; and (5) establishing clear legal authority for emissions trading.

Given the general language employed in CEPA 1998, determining the adequacy of the eventual emissions trading program to be created would require examination of regulations that are not yet available. However, even in the absence of such regulations, several observations may be made about the prospective program. First, compared with the MVSA,¹⁷⁴ CEPA 1998 is not explicit about authorizing offsets, or payments to the government in lieu thereof, with respect to stationary sources of pollution.

Second, while CEPA 1998 permits the government to impose monitoring requirements, the bill is silent on the use of CEMS and does not specify what type of

¹⁷¹ Id., s. 326.

¹⁷² Id., s. 326(a)-(i).

¹⁷³ Id., s. 327. This is the same test as that for defining a "toxic substance" under CEPA. See CEPA, R.S.C. 1985, c. 16, s. 11(a)-(c) (4th Supp.). Under CEPA 1998, the definition for "toxic substance" remains the same. CEPA 1998, s. 65(a)-(c).

¹⁷⁴ MVSA, S.C. 1993, c. 16, s. 8; and CEPA 1998, s. 162 (mobile sources).

monitoring systems will be required. As noted above, CEMS or some similarly effective monitoring system is necessary to ensure the ability of government to measure accurately source pollution changes from baseline conditions.¹⁷⁵ It is possible that regulations promulgated under CEPA 1998 may require CEMS, or some similarly effective monitoring system, but there is nothing in the bill that explicitly requires these approaches.

Third, CEPA 1998 also does not explicitly authorize allowance permits, auctions of allowances, an audit regime, or administrative penalties for emissions in excess of allowance, offset, or credit limits. Each of these elements is integral to a sound emissions trading program.

Fourth, CEPA 1998 does not explicitly authorize an emissions cap approach which, when employed with allowance trading, can be effective in reducing emissions.

Fifth, CEPA 1998 is silent on the relationship, if any, between its emissions trading regime and those which may develop under provincial laws, or those of other countries concerning the same substances. Overall, CEPA 1998 constitutes a significant federal initiative in the area of emissions trading. However, a complete analysis of the adequacy of the emissions trading program to be established pursuant to CEPA 1998 must await development of regulations which will set out the particulars of the program.

B. Provincial

Selected Existing Legislation That Is Silent on Emissions Trading

a. Ontario Environmental Protection Act

i. General Statutory Provisions

One of the oldest command and control environmental statutes in Canada is Ontario's Environmental Protection Act ("OEPA").176 The OEPA, administered by the Ministry of the Environment ("MOE"), is the province's most comprehensive environmental law, and is the primary legal authority for controlling air pollution in the province. The statute contains a general prohibition on pollution,177 establishes a permit program for emissions which, in effect, constitutes an exception to the general pollution prohibition,178 authorizes the issuance of a variety of other environmental approvals,179 programs,180 and orders,181 creates an appeals tribunal in respect of approvals and orders,182 establishes a complex set of offences and penalties,183 including provisions creating environmental liability for officers and directors of corporations,184 and allows the MOE to promulgate regulations.185

While the OEPA is a traditional command and control statute, there are certain aspects of the regime that should be considered in the context of a review of emissions trading. First, the authority to issue various approvals and orders under the OEPA is designed to ensure that each industrial operation

- 176 R.S.O. 1990, c. E.19, as amended.
- 177 Id., s. 14.
- 178 Id., s. 9 (air).
- 179 Id., part V (waste management).
- 180 Id., ss. 10-11 (program approvals).
- 181 Id., ss. 7 (control), 8 (stop), 17 (remedial), 18 (preventive measures), 43 (waste removal), etc.
- 182 Id., part VIII (appeal board).
- 183 Id., ss. 186-194.
- 184 Id., s. 194.
- 185 Id., ss. 175.1, 176.

¹⁷⁵ See supra part II.E.3.

stays within authorized pollution limits. It would be open to the province under the OEPA to authorize a company to over-comply with a licensing approval through, for example, a program approval; the latter being a form of voluntary compliance regime.186 In theory, the amount of any over-compliance achieved is usually what jurisdictions with emissions trading laws characterize as a "credit." 187 However, the OEPA is not an emission trading law and does not recognize the concept of a "pollution credit" or an "emission reduction credit". Moreover, the OEPA does not allow a "credit" to be sold to, or used by, another company that is not in compliance, if the effect of the sale would be to allow the latter company to increase emissions and exceed its licence or the general air pollution regulations. This would appear to be the case even if the effect of the transaction was a net reduction in emissions as between the two companies. Therefore, in the absence of clear statutory authority for emissions trading with particular characteristics, it would not be possible to employ the OEPA in such a capacity. The province has committed to exploring "emissions reduction trading" through a pilot project that examines how economic incentives can be used to manage local airsheds.188 What statutory form, if any, the results of this exploration eventually will take remains to be seen. In this regard, the province has recently introduced amendments to the OEPA as part of a

larger legislative program on energy competition. The amendments would authorize the government to promulgate regulations establishing programs for emissions trading and other market-based approaches. The purposes of the market-based approaches must be to maintain or improve existing environmental standards, protect the environment, and achieve environmental quality goals in a costeffective manner.¹⁸⁹ However, the proposed amendments provide no detail about what type of program is actually planned, as the teeth of the program will be contained in regulations not yet released in draft form.

Second, the primary air pollution regulation promulgated under the OEPA does not establish prestack emission limits for substances listed in the regulation.¹⁹⁰ Rather the regulation establishes concentrations for listed substances¹⁹¹ based on a point of impingement measurement from the source of contaminant.¹⁹² A regulation based on point of impingement measurements is difficult, if not impossible, to use in connection with an emissions trading program because of the potential confounding influence of other pollution sources at the point of impingement.¹⁹³ Consequently, even if the statute was amended to authorize emissions trading, the general air pollution regulation of the province could not be employed easily to determine baseline or other levels for use in establishing credits

190 General Air Pollution Regulation, R.R.O. 1990, Reg. 346.

¹⁸⁶ *Id.*, s. 10 (person responsible for a source of contaminant may submit to the MOE a program to prevent or to reduce and control the discharge into the natural environment of any contaminant from the source of contaminant).

¹⁸⁷ See supra note 14.

¹⁸⁸ Ont. Ministry of the Env't and Energy, 1997-1998 business plan 11 (1997).

¹⁸⁹ See Bill 35, Energy Competition Act, 1998 (ECA, 1998), 36th Leg., 2nd Sess., 47 Eliz. II, Sch. D, s. 10 (amendments to OEPA, s. 176.1)(first reading June 9, 1998, Ont. Leg.).

¹⁹¹ Id., Sch. 1 (87 substances listed without regard to industrial sector, such as sulphur dioxide, mercury, etc.).

¹⁹² Id., s. 5.

¹⁹³ There also may be some concern about using regulations based on point of impingement measurements in an emissions trading program where the substance at issue may pose a threat to health and the regulation provides health-based protection limits to potential receptors at the point of impingement.

or allowances.¹⁹⁴ This problem would not be of concern in those provinces that establish air pollution regulations on the basis of pre-stack emission limits or at the federal level because there would be no confounding emissions from other sources to impede measurements from the source at issue.¹⁹⁵

Third, Ontario has established a series of company specific acid rain regulations that impose an annual limit on total loading to the atmosphere of sulphur dioxide and nitric oxide per company.¹⁹⁶ These regulations are, in effect, an emissions cap and could form the basis for an emissions trading program with appropriate amendments to the OEPA. These regulations are discussed more fully below.

ii. Acid Rain Regulations – Emissions Cap Without Allowance Trading

Since the mid-1980s, due to concerns regarding the adverse environmental effects associated with acid rain, Ontario has imposed by regulation annual aggregate emission limits for four companies that are the major sources of sulphur dioxide in the province.¹⁹⁷ The total annual loadings for each company were slowly reduced each year from 1985 to 1994 as part of the Countdown Acid Rain Program of the province.198 This initiative is part of the larger eastern Canada acid rain program that seeks to cap sulphur dioxide emissions at 2.3 million tonnes per year.¹⁹⁹ Since the beginning of 1994, the total annual aggregate emissions per company have been fixed at particular amounts. For example, since the beginning of 1994, emissions of sulphur dioxide and nitric oxide from the fossil-fuel electric generating stations of Ontario Hydro have not been permitted to exceed, taken together, 215 kilotonnes per year.²⁰⁰ Sulphur dioxide emissions from these Ontario Hydro facilities are not permitted to exceed 175 kilotonnes per year.²⁰¹ The regulations require each company to perform studies and research to determine the options necessary to meet the prescribed limits and to file quarterly reports with the MOE in connection therewith.202

- 195 See, e.g., CEPA, Vinyl Chloride Release Regulations, SOR/92-631, s. 4 (1992)(prohibiting operator of vinyl chloride plant from releasing the substance from a process vent or other plant source into the air in excess or certain concentrations). Of course, there may be other potential problems with such regulations, such as whether in the circumstances of particular locations the trading of emissions of certain substances could produce pollution or toxic "hotspots."
- 196 See, e.g., Ontario Hydro Regulation, R.R.O. 1990, Reg. 355.
- 197 *Id. See also* Algoma Sinter Operation Regulation, O. Reg. 663/85; Falconbridge Smelter Complex Regulation, O. Reg. 661/85; Inco Sudbury Smelter Complex Regulation, O. Reg. 660/85.
- 198 Ont. Ministry of the Env't, Countdown Acid Rain: Government Review of the 1994 Progress Reports submitted by Ontario's Four Major Sources of Sulphur Dioxide 1 (1996)[hereinafter Countdown Acid Rain](annual aggregate emissions limits for the four companies went from 1557 kilotonnes in 1985 to 665 kilotonnes in 1994).

- 200 Ontario Hydro Regulation, R.R.O. 1990, Reg. 355, s. 2.
- 201 Id., s. 4.
- 202 Id., ss. 5-6.

¹⁹⁴ In theory, because point of impingement measurements are determined through both monitoring and modelling, it should be possible to determine both emission rates and annual aggregate loadings by multiplying maximum concentration limits by the number of hours of operation or production volume. This could form the basis for evaluating reductions from point of impingement requirements. In practice, because of the factors noted above such as emissions of other sources of the same pollutant having a confounding influence on the results, and concerns about trading emissions in respect of health-based limits, it is unlikely that Ontario would be in a position to develop an emissions trading program based on the current point of impingement regulations have remained largely unchanged for several decades and have been the subject of sharp criticism from the provincial auditor in recent years. Office of the Provincial Auditor of Ontario, Annual Report 116 (1996)(noting that many of the standards for air pollutants were developed over 20 years ago and were out of date, with a significant number requiring substantial reduction and/or reassessment). Finally, most jurisdictions that have employed emissions trading – whether of the allowance or credit variety – have usually incorporated some type of legal obligation to reduce emissions over time. Ontario's regulations do not incorporate such a requirement, thus making reliance on the current regulatory regime to incorporate emissions trading even less attractive.

¹⁹⁹ Id. at 1.

In practice, the Countdown Acid Rain Program has resulted in the four companies over-complying with the requirements of the regulations. For example, in 1994 the combined sulphur dioxide emissions for the four companies were 356 kilotonnes, or 46 per cent below the 1994 limit of 665 kilotonnes.²⁰³ Ontario Hydro's emissions were 106 kilotonnes of sulphur dioxide and 135.5 kilotonnes of combined sulphur dioxide and acid gas emissions.²⁰⁴

As noted above, Ontario's Countdown Acid Rain Program is effectively an emissions cap program without an allowance trading regime. Given the overcompliance that has been achieved in the program to date if, for example, Ontario Hydro were in a jurisdiction that authorized emissions trading, the company would be deemed to have surplus allowances that it could sell on the market to other companies. While the OEPA does not authorize such trades, with appropriate amendments, such requirements in conjunction with the acid rain regulations would constitute an emissions cap and allowance trading regime for sulphur dioxide and acid gases. It is unclear whether such an emissions cap and allowance trading regime is contemplated in connection with recently proposed amendments to the OEPA that would authorize emissions trading.205

2. Selected Existing Legislation That Explicitly Authorizes Emissions Trading

Several provinces have explicitly authorized emissions trading in their environmental legislation. Much of this legislative initiative at the provincial level has not

- 206 See supra part II.
- 207 S.A. 1992, c. E-13.3, as amended.

produced comprehensive requirements that explicitly address the typical characteristics of emissions trading regimes discussed above.²⁰⁶ Most of what has been enacted is primarily enabling authority. The particulars of these regimes, with some exceptions, have yet to be fleshed out in regulations.

a. Alberta Environmental Protection and Enhancement Act

The Alberta Environmental Protection and Enhancement Act ("AEPEA") was enacted in 1992, and came into force in 1993.²⁰⁷ The Act, in many respects, is similar in form to the OEPA. Therefore, its traditional command and control aspects are not repeated here. However, the AEPEA also authorizes the Minister, in accordance with regulations that have not yet been promulgated, to establish programs and other measures for the use of economic and financial instruments and market-based approaches.²⁰⁸ Among the economic approaches authorized is "emission trading."²⁰⁹ The statute makes it clear that the purposes of such a regime include: (1) protecting the environment; and (2) achieving environmental quality goals in a cost-effective manner.²¹⁰

While the AEPEA has not yet resulted in emission trading regulations, the province has promulgated general air emissions regulations.²¹¹ These regulations address such matters as maximum concentrations of particulates, lead, and vinyl chloride that may be emitted from particular industries.²¹² These regulations appear to be "point of emission" standards, as opposed to "point of impingement" regulations like Ontario's general air pollution

²⁰³ Countdown Acid Rain, supra note 198, at 14.

²⁰⁴ Id. at 11.

²⁰⁵ See supra note 189 and accompanying text.

²⁰⁸ Id., s. 13.

²⁰⁹ Id., s. 13(a).

²¹⁰ Id., s. 13. These purposes are similar to those contained in recently proposed amendments to the OEPA. See supra note 189 and accompanying text.

²¹¹ Air Emissions Regulation, Alta. Reg. 124/93 (1993).

²¹² Id., ss. 8, 9, 11.

regulation. As noted above, point of emission regulations, or emission standards, are more likely to be successfully used in an emissions trading regime than point of impingement standards. With point of emission standards, it is far easier to calculate how much compliance, under-compliance, or overcompliance is being achieved by a pollution source with respect to a particular contaminant because the measurement occurs at or before the point at which the contaminant enters the natural environment. Consequently, determinations may be made about what emission reduction credits a source may be entitled to in the circumstances. One potential drawback however with Alberta's air emissions regulation is that it does not appear to create specific emission standards for many substances. In addition, the AEPEA air emissions regulations do not establish an annual aggregate cap on total emissions to the atmosphere of particular substances. Therefore, while these regulations may be used in conjunction with an emission reduction credit regime, as currently drafted, they could not be used to support an emissions cap and allowance trading regime.

b. Manitoba Environment Act

The Manitoba Environment Act ("MEA"), enacted in the late 1980s, authorizes a limited form of emission trading. The enabling provisions of the statute authorize the "sale of marketable emission rights."²¹³ The MEA authorizes the Manitoba government, "where it is consistent with established environmental quality objectives" to market units of "allowable emission of specific pollutants" in accordance with the regulations.²¹⁴ The Act makes it clear that the revenue generated from such marketing initiatives may be held in trust by the Minister of Finance as an environmental contingency fund, to be used at the request of the Minister of Environment in the event of an environmental emergency.²¹⁵ Because the regulations contemplated under the MEA have not been promulgated, it is difficult to predict how this law will operate in practice.

c. Nova Scotia Environment Act

Perhaps the most sophisticated provincial regime in place with respect to emissions trading is that of Nova Scotia, which came into force in 1995. While the wording of the enabling provisions of the Nova Scotia Environment Act ("NSEA") is similar to that of the AEPEA, Nova Scotia developed regulations which have put some flesh on the statute's concepts, and have effectively created an emissions cap and allowance trading regime. The NSEA authorizes the Minister, in accordance with the regulations, "to establish programs for the research, development and use of economic instruments and market-based approaches for the management of the environment and for achieving environmental quality objectives in a cost-effective manner."²¹⁶ Among the economic approaches authorized are "tradeable emission and effluent permits," and "offsetting environmental costs and benefits,"217

The Air Quality Regulations promulgated under the Act establish ambient air quality criteria for such substances as carbon monoxide, nitrogen dioxide, ozone, sulphur dioxide, total suspended particulate, and hydrogen sulphide.²¹⁸ These regulations, like those under the OEPA, do not lend themselves to use in an emissions trading regime. However, the regulations also establish an annual provincial sulphur dioxide emission cap of 189 kilotonnes. This figure is based on the Canada-Nova Scotia Agreement Respecting an Acid Rain Reduction Program.²¹⁹ The

219 Id., s. 7.

²¹³ S.M. 1987-88, c. 26, s. 45, as amended.

²¹⁴ Id.

²¹⁵ Id.

²¹⁶ S.N.S. 1994-95, c. 1, ss. 15, 25(1)(c).

²¹⁷ Id., ss. 15(a)(b).

²¹⁸ Air Quality Regulations, N.S. Reg. 55/95, s. 4 and Sch. A (1995) (establishment of maximum permissible ground level concentrations).

regulations create a further schedule and assign to companies listed therein, annual sulphur dioxide emission allocations. The only company listed currently in the schedule is Nova Scotia Power Incorporated. The schedule states that from 1995 onward, the annual emissions of sulphur dioxide from fossil fuel fired thermal power generating stations owned or operated by Nova Scotia Power and its subsidies must not exceed, in the aggregate, 145 kilotonnes.²²⁰

In addition, the regulations require that any person who owns, operates or is responsible for facilities that release emissions in excess of 90 tonnes of sulphur dioxide per year in the aggregate, must no later than February 15 of each year submit a report to the Minister on the sulphur throughput noting such matters as fuel usage, sulphur content and corresponding sulphur dioxide emissions from each facility owned or operated by that person for the previous calendar year.²²¹ The first report required under the regulations was due no later than February 15, 1996.²²²

The regulations require further that in the event that the annual sulphur dioxide emission allocation assigned to a person in the schedule is exceeded, the person responsible must do two things. First, the person must, within the three year period following the calendar year in which the excess emissions occurred, compensate for the excess emissions by reducing annual emissions to a level below the annual sulphur dioxide allocation assigned to that

person that will result in a total reduction of emissions equal to the amount of the excess emissions, in accordance with a plan submitted to and approved by the Minister. Second, the person, no later than February 15 of the year following the calendar year in which the excess emissions occur, must submit to the Minister for approval a plan indicating how the excess emissions will be recovered.²²³ Finally, the regulations indicate that for the purposes of achieving environmental quality standards and objectives in a cost effective manner, an annual sulphur dioxide emission allocation approved under the regulations may be altered in accordance with a sulphur dioxide emissions trading program or another market based program approved under the NSEA.224

The Nova Scotia emissions cap and allowance trading law is the most sophisticated emissions trading regime in Canada. It suggests how Ontario could modify its current emissions cap program for sulphur dioxide, and how other provinces with emissions trading enabling authority in their legislation, such as Alberta, could develop appropriate regulations. The primary drawbacks to the Nova Scotia law are its focus on just one substance (sulphur dioxide), and the lack of detail or authority in the statute or regulations regarding some of the other typical characteristics of such emissions trading programs discussed above.²²⁵ At a minimum, the Nova Scotia law could benefit from several of the enabling provisions contained in CEPA 1998.²²⁶

²²⁰ Id., s. 7(2) and Sch. C.

²²¹ Id., s. 7(3).

²²² Id., s. 7(4).

²²³ Id., s. 7(5).

²²⁴ Id., s. 7(6).

²²⁵ See supra part II.

²²⁶ See supra part IV.A.3.a.

d. British Columbia Waste Management Act

The British Columbia Waste Management Act ("BCWMA")²²⁷ is another statute with primarily a command and control approach to environmental protection. However, the law also may be the best example of a provincial emissions credit regime for mobile sources in Canada. The enabling authority for mobile emissions trades in the BCWMA is not obvious. The Act authorizes regulations under which, for each manufacturer of new motor vehicles, the motor vehicles that are produced and delivered for sale in the province during a specified time must be a mix of motor vehicles determined in accordance with a specified formula.²²⁸ The Act also requires the submission of plans from each manufacturer of new motor vehicles for reducing motor vehicle emissions,²²⁹ and the prescribing of requirements for the contents of, and emission reduction goals that must be met by such plans.²³⁰ The regulations themselves authorize trading among vehicle manufacturers in order to meet vehicle emission standards.231

C. Territorial

1. Existing Legislation That May Authorize Emissions Trading

a. Yukon Environment Act

Territorial legislation also may provide for establishment of emissions trading programs. Under the Yukon Environment Act ("YEA"),²³² the territorial government may promulgate regulations prescribing economic regimes or the use of economic tools for encouraging efficiency in air quality protection.²³³ This enabling provision is very broad and potentially could permit development of an emissions trading regime. However, to date no regulations have been promulgated. Therefore, the statute's emissions trading authority is more theoretical than actual. Moreover, given the characteristics typically contained in emissions trading regimes, the territorial law lacks the type of particulars that could provide assurance that an appropriate regime would be developed.

D. Municipal

1. Existing By-Laws and Their Potential Application to Emissions Trading

a. Montreal Urban Community

Municipal governments are creatures of the provinces under the Constitution.²³⁴ Most provinces have enacted statutes that grant municipalities a wide range of powers. These enabling statutes are usually applicable to all municipalities in the province. In some provinces, very large urban areas like Vancouver, Toronto, and Montreal will justify their own special statutes. These statutes often grant the large cities additional authority to act. In Quebec, the Montreal Urban Community Act ("MUCA"),²³⁵ has long granted the City of Montreal authority to address air pollution matters. The City's air pollution by-law²³⁶ contains point of impingement²³⁷ as well as

²²⁷ R.S.C. 1996, c. 482.

²²⁸ Id., s. 41(j).

²²⁹ Id., s. 41(k).

²³⁰ Id., s. 41(1).

²³¹ Motor Vehicle Emission Reduction Regulations, B.C. Reg. 517/95, s. 5 (1995).

²³² S.Y. 1991, c. 5.

²³³ Id., s. 145(h).

²³⁴ Const. Act, 1867, s. 92(8).

²³⁵ S.Q. 1994, c. 37.2.

²³⁶ City of Montreal, By-Law 90 (1986).

²³⁷ Id., s. 3.01.

point of emission standards.²³⁸ While the former are not suitable for application in an emissions trading program for the reasons set out above,²³⁹ the latter are. The substances covered under the point of emissions approach include from particular industries particulates, sulphur dioxide, organic substances, nitrogen oxides, and carbon monoxide.²⁴⁰

While the Montreal by-law does not address emissions trading issues, the enabling statute, MUCA, could be amended to authorize such a regime. The use of an emissions trading regime, whether of the allowance or credit variety, has been employed in large urban areas in other jurisdictions,²⁴¹ and could be implemented in Montreal for substances regulated by pre-stack emissions or point of emissions sections of the air pollution by-law.

E. Selected List of Federal and Provincial Standards

Most jurisdictions in Canada have developed air quality standards. However, some jurisdictions have employed point of impingement standards, or developed ambient air quality criteria, neither of which is necessarily suitable for use in connection with an emission trading regime.²⁴² Primarily those jurisdictions that have developed pre-stack emission limits, point of emission standards, or emission caps on aggregate annual emissions are appropriate for use with either an emission reduction credit or allowance trading regime. The following list in Table 1 outlines a selection of approaches and substances covered for several key federal and provincial jurisdictions with respect to stationary sources of air pollution. It is evident from Table 1 that of the jurisdictions examined, a variety of approaches to standards are employed. Most jurisdictions examined address many of the same substances but may not employ the same type of standard to control those substances. Therefore, when attempting to develop an emissions trading regime there may be some difficulty in moving from one jurisdiction to another for the purposes of facilitating trades of either allowances (under a closed system) or credits (under an open system) for particular substances.

238 *Id.*, s. 6.01(requiring that any pollutant produced from activities listed in Table 6 of the by-law must be reduced by the percentage, concentration, or rate set out in the Table).

239 See supra notes 193-194.

240 City of Montreal By-Law 90, Table 6.

241 See supra note 24 and accompanying text (RECLAIM program created by state agency for Los Angeles area).

242 See supra notes 193-194 and accompanying text.

TABLE 1					
Jurisdiction	AAQ Crit./Obj.	Point of Impingement	Pre-Stack Emission	Emissions Cap	
Canada	SO2 NOX CO O3 SPM		lead mercury vinyl chloride asbestos (by industrial sector)		
Ontario		SO2 NOX CO O3 SPM 82 other substances (non-industrial sector specific)		SO2 NO (4 companies)	
Quebec	SO2 NO2 CO O3 SPM		organic and inorganic substances and particulates for over 20 industrial sectors	SO2 (2 smelters)	
Nova Scotia	SO2 NO2 CO O3 TSP H2S			SO2 (1 company, others likely in future)	
Alberta	· · · · · · · · · · · · · · · · · · ·		organic and inorganic particulates lead vinyl chloride (by industrial sector)		
B.C.			organic and inorganic particulates (for certain industrial sectors and incinerators)		
Montreal			particulates SO2 organic substances NOX CO (by industrial sector)		

V. Conclusions and Recommendations

The purpose of this report has been to examine the existing legislative and regulatory regime for selected jurisdictions in Canada with a view to determining whether the current Canadian framework explicitly authorizes, may be interpreted to permit, or would require amendments to allow, the use of emissions trading. Part II of the report provided background on the characteristics of emissions trading programs including goals, types, uses, and typical components of such systems, as well as application to particular pollution sources and pollutants. Emissions trading regimes could include a variety of characteristics. First, application to a variety of pollution sources such as stationary, mobile, and non-point sources is likely over the long-term. Second, there is a likelihood of intraprovincial, interprovincial, and international trades. Third, such regimes are likely to include detailed administrative and regulatory components, as opposed to simple imposition of criminal sanctions for non-compliance with statutory prohibitions. Fourth, such regimes are likely to impact on the contractual rights of parties. These characteristics suggest the need for both federal and provincial emission trading laws. The information contained in Part II was used as a benchmark for examining both the constitutional and statutory aspects of federal and provincial regimes.

Part III briefly reviewed the constitutional authority at the federal and provincial levels in Canada for emissions trading in light of the characteristics likely to be embodied in such legislation. The most appropriate constitutional authority for federal emissions trading law is the trade and commerce power. This power has none of the drawbacks of reliance on POGG, which would result in the exclusion of provincial law. The trade and commerce power also is more preferable for the federal government to rely on than the criminal law power, which would restrict federal law to a comparatively narrow prohibition and penalty-type regime. The trade and commerce power would permit a broad and flexible federal approach, and would allow concurrent and compatible provincial legislation relating to intraprovincial aspects of emissions trading. The primary power authorizing provincial emissions trading law is property and civil rights with respect to the intraprovincial aspects of such a program.

Part IV analyzed existing and proposed legislation in Canada relevant to establishing emissions trading programs. Most environmental legislation in Canada is of the command and control type. At the federal level existing legislation, with the exception of the MVSA, is silent on the subject of emissions trading. Prospectively, amendments to CEPA by CEPA 1998 would authorize emissions trading for such matters as toxic substances, nutrients, fuels, international air and water pollution, and substances emitted from federal facilities or operations on federal and aboriginal lands. The emissions trading authority in CEPA 1998 is broad. However, the nature, scope, and adequacy of this authority will depend to a significant degree on both: (1) the content of still to be developed regulations; and (2) what constitutional authority the federal government is prepared to invoke, and the Supreme Court of Canada to support, in connection with such a program. Despite its scope, CEPA 1998 lacks several essential features characteristic of successful emissions trading laws.

At the provincial level, most legislation also is of the command and control variety. The extent to which such existing legislation could be used to support emissions trading without explicit legislative amendment is comparatively limited in provinces such as Ontario. This is particularly true because even where a company may over-comply and effectively be in an emissions credit position, existing law does not allow another company to use these credits if the effect would be to place the latter company in a position of non-compliance. Moreover, in provinces where air quality regulations are of the ambient or point of impingement variety, such as Ontario, emissions trading may not be possible because of the great difficulty in determining a particular source's contribution to overall violation of such standards. Recently proposed amendments to Ontario law would authorize establishment of an emissions trading regime. However, it will not be possible to analyze the adequacy of the proposed regime until regulations are made available, though it is unlikely that Ontario's point of impingement regulations will be relied upon for emissions trading purposes. Where provinces appear to employ a prestack emission or point of emission regulation for particular substances (e.g. Quebec, Alberta, British Columbia), an open market emissions trading system will be possible. Some provinces, such as Ontario, also have long had air pollution regulations in place, which establish a cap on total loadings per year to the atmosphere from particular pollutants, such as sulphur dioxide. A regime of this type would be entirely suitable for development as a closed system (emissions cap and allowance trading) with appropriate legislative amendment. It is possible that Ontario's recently proposed amendments that would authorize emissions trading will rely on the existing emissions cap regulations.

The Nova Scotia emissions cap and allowance trading law may be the most sophisticated emissions trading regime in Canada. Nova Scotia's approach suggests how Ontario could modify its current emissions cap program for sulphur dioxide, and how other provinces with emissions trading authority in their legislation, such as Alberta, could develop appropriate regulations. The primary drawbacks to the Nova Scotia law are its focus on just one substance (sulphur dioxide), and the lack of detail or authority in the statute or regulations regarding some of the other typical characteristics of such emissions trading programs. At a minimum, the Nova Scotia law could benefit from several of the enabling provisions contained in CEPA 1998. In turn CEPA 1998 could benefit from both Nova Scotia's and Ontario's use of an emissions cap.

Overall, given the characteristics needed for emissions trading legislation to succeed, the constitutional issues which must be addressed, and the limited programs that have been proposed or implemented to date, the development of emissions trading legislation in Canada must be regarded as still in its infancy. Whether and, if so, how rapidly this situation changes remains to be seen.

Appendix 2

Putting Strategies into Law: The Constitutional and Legislative Basis for Action

Chapter 14

Turning Down the Heat

Emissions Trading and Canadian Implementation of the Kyoto Protocol

By Chris Rolfe

March 1998

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"The all important duty of Parliament and the provincial legislatures to make full use of the legislative powers respectively assigned to them in protecting the environment has inevitably placed upon the courts the burden of progressively defining the extent to which these powers may be used to that end. In performing this task, it is incumbent on the courts to secure the basic balance between the two levels of government envisioned by the Constitution. However, in doing so, they must be mindful that the Constitution must be

interpreted in a manner that is fully responsive to emerging realities and to the nature of the subject matter sought to be regulated."

Mr. Justice Gerald La Forest, Supreme Court of Canada, in R. v. Hydro Quebec, September 18, 1997.

An effective greenhouse gas emission strategy will contain numerous disparate elements. Possible elements include changes to tax laws, emission trading programs, energy efficiency standards, programs or regulations to increase carbon sequestered in soils and forests, restrictions on nitrogen content in fertilizer, urban growth management legislation, requirements for methane recovery at landfills, etc. So far this report has examined the different potential elements of a greenhouse gas emission reduction program with little examination of how a particular program should be put into law.

This chapter addresses how greenhouse gas emission strategies should be implemented in legislation. The focus of the chapter is on establishment of emission trading or carbon coupon trading programs. It looks at the provinces' and the federal government's constitutional powers to implement greenhouse gas emission reduction programs and other factors that underlie how greenhouse gas emission reduction programs should be implemented in legislation. It also examines the extent to which existing legislation could support different elements of an emission reduction program.

Designing a program to reduce Canada's greenhouse gases is complicated by the limited powers of both federal and provincial governments. Any program, unless it is purely voluntary, will require some legal basis, most likely a mix of statutes and regulations, and these must be within the constitutional powers of the government passing them. Regulations are laws passed by bodies to whom provincial legislatures or the federal parliament have delegated regulation making authority. Most regulations are passed by either Lieutenant Governors in Council or the Governor in Council (that is, provincial or federal cabinets with the approval of Lieutenant Governors or Governors General). Regulation making authority can be also be given to independent authorities (such as the Canadian Radio and Telecommunications Commission) or to local and regional governments. Like statutes, regulations must be within the constitutional powers of whichever level of government passed them. They must also be authorized by statute.

The courts are responsible for determining whether or not government has the constitutional authority to pass a particular regulation or statute and whether a statute gives it the authority to enact a particular regulation or gives administrators the power to act in a particular way.

This chapter begins with a review of the constitutional division of responsibilities between the federal and provincial governments as they relate to greenhouse gas emissions as well as a review of the factors that determine what statutory basis is needed for regulations aimed at reducing greenhouse gases. It then answers the two crucial issues that flow from the preceding analysis: how should responsibilities for reducing greenhouse gas emissions be divided between the federal and provincial governments? And what steps are necessary to ensure a proper statutory basis for legislation aimed at reducing greenhouse gas emissions?

Greenhouse Gases and the Division of **Responsibilities**

Both the federal and the provincial governments have wide powers to pass laws for the purposes of reducing greenhouse gases, but neither level of government has an unlimited power to enact any instrument for any purpose. The division of powers between the federal and provincial governments is based on the Constitution Act, 18671 as interpreted by the courts. Both levels of government have powers to regulate for the purpose of reducing greenhouse gas emissions based on the subject areas over which they have authority under the Constitution Act, 1867. Jurisdiction of either level of government to pass laws relating to greenhouse gas emissions will depend both on how climate change is characterized by the courts and on the form and scope of any law aimed at it.

In reading the leading constitutional law cases dealing with environmental matters, one cannot avoid being struck by the courts', and especially the Supreme Court of Canada's, profound desire not to

Courts have strived to could confound effective environmental policy.

stymie effective environmental legislation, combined with the courts' deep respect for a avoid technical balanced Canadian approaches to the Confederation. This theme Constitution which pervades both majority and minority decisions in a series of cases decided in the late 1980s and 1990s. For environmental

threats that extend across provincial and national boundaries there appears to be a willingness to avoid technical approaches to the Constitution which could confound effective policy, so long as legislative drafters respect the importance of a balanced Confederation.

The federal power to pass regulations impacting on greenhouse gas emissions is based mainly on federal powers related to peace, order and good government; criminal law; taxation and trade and commerce.² The provinces' powers over the environment are based mainly on their authority over property and civil rights, local matters, intra-provincial undertakings and forest resources.³ The provinces also have an authority to levy direct taxes.4 Municipalities, regional and territorial governments have no constitutional powers, but instead have whatever powers are delegated to them by the federal or provincial governments.

Often provincial and federal powers overlap. For instance, the federal government might establish national energy efficiency standards based on its criminal law power while the provinces establish higher standards based on their powers over property and civil rights.

Provincial Powers over Property and Civil Rights

The "property and civil rights" head of power is the constitutional basis for most provincial environmental initiatives.⁵ Provincial regulations restricting the production and use of ozone depleting substances, provincial permits to introduce air contaminants into the environment, and permits requiring certain monitoring devices and imposing reporting requirements are all based on the property and civil rights head of power. Among other things, the property and civil rights power allows provinces to regulate emissions, building codes, land use, efficiency standards, and product stewardship and recycling requirements — all measures which affect greenhouse gas emissions directly or indirectly. Subject to some limits discussed below, provincial

Constitution Act, 1867 (U.K.), 30 & 31 Vict. c. 3. 1

² Ibid., s. 91.

Ibid., s. 92. 3

^{4.} Ibid., s. 92(2).

R. v. Lake Ontario Cement Ltd. (1973), 11 C.C.C. (2d) 1 (Ont. H.C.).

laws extend to federal lands, such as ports and Indian Reserves, and federal undertakings such as interprovincial natural gas pipelines.⁶

Although provinces cannot regulate imports *per se*, they may be able to do so in combination with regulation of fossil fuels produced in a province.⁷ Thus, provinces could potentially establish cap and carbon coupon trading programs. Subject to the possibility that the courts might find climate change to be a matter of national concern over which the federal government has exclusive authority,⁸ provinces should also have clear authority to establish regulatory standards for greenhouse gases, credit trading programs and cap and emission allowance trading programs.

Federal Power over Matters of National Concern

The Constitution gives the federal government an overarching power to pass laws for the "Peace, Order and Good Government" of Canada. This power has been interpreted as allowing regulation of "matters of national concern".⁹ There is a strong likelihood that the courts would uphold direct federal regulation of greenhouse gases as a matter of national concern, but the exact limits of this federal power are uncertain.

The leading case addressing which environmental issues constitute matters of national concern is *The Queen* v. *Crown Zellerbach Canada Limited*.¹⁰ In a five to four split decision the Supreme Court of Canada upheld the federal *Ocean Dumping Act*.¹¹ That Act regulated dumping of waste into marine waters both within and outside of provinces.

Crown Zellerbach: Majority Supports Core Jurisdiction

In the majority judgment, the Court stated that legislation upheld under the national concerns test must be in relation to a subject matter which either did not exist at Confederation (for example, aviation) or which, although a local or provincial matter at Confederation in 1867, has grown to be a matter of national concern.¹² The subject matter must also have "a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial

3

⁶ A number of cases reject the idea that federal lands are enclaves from provincial law: Montcalm Construction Inc. v. Minimum Wage Comm'n (1978), 93 D.L.R. (3d) 641 (S.C.C.) at 660, and Cardinal v. A.G. Alta. (1973), 40 D.L.R.(3d) 553 (S.C.C.) at 560. Cases upholding application of environmental laws to federal lands include: Canadian National Railway Co. v. Ontario (Director appointed under the Environmental Protection Act) (1992), 8 C.E.L.R. (N.S.) 1 (Ont. C.A.), in which a provincial order requiring the preparation of a report on contamination of federal land was held valid because it did not purport to regulate the use or ownership of the federal land; and R. v. Harrt and Stewart (1979), 94 D.L.R. (3d) 461 (N.B.S.C., App. Div.) in which provincial game laws were held to apply to federal land.

⁷ Case law is divided on this point with some cases supporting provincial marketing restrictions that apply to products imported into a province (*Carnation Co. v. Quebec Agricultural Marketing Board*, [1968] S.C.R. 238; followed in *Can. Indemnity Co. v. A.G.B.C.*, [1976] 5 W.W.R. 748 (S.C.C.); *Shannon v. Lower Mainland Dairy Products Board*, [1938] A.C. 708 (P.C.); and *Home Oil Distributors v. A.G.B.C.*, [1940] S.C.R. 444) and other cases rejecting provincial laws that apply to nationally marketed goods. Provincial schemes must not, for instance, be aimed at restricting intra-provincial trade disadvantaging out of province producers: see *A.G. Manitoba v. Manitoba Egg & Poultry Association*, [1971] S.C.R. 689 and Peter Hogg, *Constitutional Law of Canada*, loose-leaf edition (Toronto: Carswell, 1992) at 21-19. See also *British Columbia (Milk Marketing Board)* v. *Bari Cheese Ltd.*, [1996] B.C.J. No. 1789 (B.C.C.A.).

⁸ See below under the heading "Overlapping Powers and the National Concerns Test."

⁹ The Constitution Act, 1867 actually gives the federal government a general power to "make laws for the peace, order and good government [POGG] of Canada, in relation to all matters not coming within" subject matters specifically assigned to the provinces. The Constitution Act, 1867 then lists a number of "federal heads of power" as examples. The Courts have generally interpreted POGG narrowly, limiting federal POGG powers to "matters of national concern," emergencies, and matters not dealt with in the Constitution Act, 1867.

^{10 [1988] 1} S.C.R. 401; 3 C.E.L.R. (N.S.) 1.

¹¹ Ocean Dumping Act, S.C. 1974-75-76, c. 55.

¹² R. v. Crown Zellerbach Canada, above at footnote 10; Labatt Breweries of Canada Limited v. Canada (A.G.), [1980] 1 S.C.R. 914 at 944 to 945.

concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power....⁷¹³ In determining whether a matter has the required degree of "singleness, distinctiveness and indivisibility", the Court said that it is particularly relevant to consider the effect of a provincial failure to deal effectively with the issue on extra-provincial interests.

According to the majority, ocean dumping had the requisite singleness, distinctiveness and indivisibility because the federal legislation was limited to dumping in marine waters. The majority noted various international protocols dealing with ocean dumping and noted that it would be difficult for the federal government to distinguish between disposal of waste in marine waters internal to a province and those external to a province.

The application of the national concern test to environmental matters was revisited by a minority of the Supreme Court of Canada in *R. v. Hydro Quebec.*¹⁴ The primary issue in the *Hydro Quebec* case was whether federal regulation of toxic substances under Part II of the *Canadian Environmental Protection Act*¹⁵ (*CEPA*) was constitutional. The majority of the Court upheld Part II of *CEPA* on the basis of the federal criminal law power and thus did not deal with the constitutionality of Part II under the national concerns test.

The minority was of the opinion that Part II did not meet the national concerns test because, in their view, it did not have the necessary singleness, distinctiveness and indivisibility. The minority focused on the fact that *CEPA*, even though it only applied to a handful of highly toxic substances in practice, could potentially apply to any substance harmful to the environment regardless of factors such as degree of toxicity, persistence or potential for extra-provincial effects. The minority in *R. v. Hydro Quebec*, while rejecting application of the national concerns test to any substances that cause harm to the environment, strongly suggests that federal legislation would be upheld if it were clearly limited to diffuse, persistent toxic substances.

These cases suggest that the regulation of greenhouse gases likely has the singleness, distinctiveness and indivisibility required for a matter of national concern. Although their sources are myriad, greenhouse gases are treated as a distinct topic within environmental protection distinct from local air pollution, toxic pollution or regional air pollution. It is thus distinct from the wide range of topics that according to the minority in R. v. Hydro Quebec could be covered by CEPA Part II. Also, as in the case of ocean dumping an international legal agreement deals specifically with climate change. Most importantly, greenhouse gases will persist in the environment and have effects outside the province regulating them.¹⁶ Federal jurisdiction is also supported by the pronouncements of provincial politicians vowing to resist regulatory measures.¹⁷ These statements support the argument that, not

¹³ R. v. Crown Zellerbach Canada, above at footnote 10, at C.E.L.R. 32.

¹⁴ September 18, 1997, doc. no. 24652, Supreme Court of Canada.

¹⁵ R.S.C. 1985, c. 16 (4th Supp.).

¹⁶ Subsequent judgments have highlighted the importance of considering whether a province's failure to deal effectively with the intra-provincial aspects of the matter could have an adverse effect outside the province. See Re: RJR MacDonald Inc. v. Canada (Attorney General) (1993), 102 D.L.R.(4th) 289 (Que. C.A.) and Labatt Breweries, above at footnote 12. Similarly, federal regulation of nuclear power has been held valid because the failure of one province to adequately regulate nuclear safety could expose other provinces' residents to extreme risk: Ontario v. Ontario Hydro, [1993] 3 S.C.R. 327.

¹⁷ See, for instance, Sheldon Alberts, "Greenhouse gases treaty under gun. Alberta will fight mandatory cutbacks." 22 October 1997 Edmonton Journal page A1, in which Alberta Environment Minister Ty Lund is quoted as saying "We are going to resist binding, regulatory measures ... The province has made it very clear that if we do not agree, then the feds will be responsible to implement them."

only is there a potential for provincial inaction having extra-provincial consequences, but there is a real likelihood of it.¹⁸

On the other hand, federal regulation must have a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power. It must have "ascertainable and reasonable limits, in so far as its impact on provincial jurisdiction is concerned".¹⁹ In *Crown Zellerbach* the court decided that this condition was met because the federal legislation being attacked was limited to marine waters and did not apply to other activities such as air emissions and dumping into rivers, which might affect ocean pollution but would mean a greater intrusion on provincial jurisdiction. Essentially, the majority appeared willing to accept somewhat artificial boundaries on what was truly a broader topic.

Applying this test to greenhouse gases, it is unclear where federal jurisdiction would begin or end. Where would a court draw the boundary around federal jurisdiction? Any boundary is likely to be arbitrary. One possibility is that courts will simply look at the level of intrusion on areas traditionally regulated by the province. The courts are likely to uphold energy efficiency standards that apply to all goods sold in Canada, as well as direct regulation of greenhouse gas emissions, because regulation in these areas would have little impact on the overall balance of powers between the federal and provincial governments.²⁰ On the other hand, the courts are unlikely to uphold federal legislation which involves a major intrusion on traditional provincial jurisdiction: e.g., regulating urban growth, improving transit, or regulating forests on provincial crown land. Unfortunately, the end result

So long as legislation is clearly linked to reducing international pollution, the federal government may not be constrained by artificial boundaries.

could be that the federal government has a limited ability to deal with a problem that is a global concern.

Crown Zellerbach: Minority Supports Comprehensive Jurisdiction

In order to avoid that outcome, a court might turn to the minority judgment in *Crown Zellerbach*. Although a minority opinion, nothing in the majority opinion or either of the opinions in the *Hydro Quebec* case contradicts the minority in *Crown Zellerbach*. The dissenting judges recognized the artificiality of the distinction between dumping in coastal marine waters and territorial waters and the problems that would arise from trying to draw similar distinctions in other environmental cases. The attempt to define "ocean pollution" as a distinct legislative category could only create "a truncated federal pollution control power only partially effective to meet its supposed necessary purpose".

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¹⁸ It should also be noted that federal authority to regulate greenhouse gases is not limited only by the possibility that provinces might solve the problem through cooperative provincial action. In R. v. Crown Zellerbach the majority refers to and rejects an academic article discussing this issue. The article postulates that, if provinces can deal fully with a problem through cooperative action, the national concerns test only justifies federal legislation aimed at the risk of non-cooperation. The majority rejects that approach, stating that where a matter is upheld under the national concerns test, Parliament has an exclusive, plenary jurisdiction to regulate, including regulation of intra-provincial aspects. See Crown Zellerbach, above at footnote 10, at 33. The academic article referred to is Gibson "Measuring 'National Dimensions'" (1976), 7 Man L. J. 15.

¹⁹ R. v. Crown Zellerbach, above at footnote 10.

²⁰ Current federal regulation of energy efficiency is based on the federal power over inter-provincial or international trade, and only applies to goods crossing provincial boundaries. As is discussed in Chapter 6, this causes some problems.

According to the minority in Crown Zellerbach, so long as federal legislation is clearly linked to the matter of national concern, the federal government is not constrained by artificial boundaries that give the subject matter the required distinctness. The federal government would have jurisdiction over dumping into rivers, air pollution or groundwater pollution, so long as there was evidence that federal regulation was linked to protection of oceans:

In legislating under its general power for the control of pollution in areas ... falling outside provincial jurisdiction, the federal Parliament is not confined to regulating activities taking place within those areas. ... Regulation to control pollution ... could arguably include ... not only emission standards but the control of substances used in manufacture, as well as the techniques of production generally, insofar as these may have an impact on pollution.21

The minority recognized the huge implications of its reasoning on the balance of federal-provincial powers. Courts, the minority said, would need to develop "judicial strategies" to confine the ambit of federal legislation and avoid encroaching on provincial powers while still allowing the federal

implementation plans may give the provinces the greatest flexibility without stymieing effective federal power.

government to protect the broader national and Federal calls for international interests. One provincial judicial strategy supported by the minority was to require evidence of a link between the federal regulation and the matter of national concern. For instance, if there was clear evidence that

pollution of a river (a matter of provincial concern) was linked to ocean pollution (a matter of national concern) the federal government would have power to regulate river pollution. If the federal government regulates direct greenhouse gas emissions in a flexible manner, the clear link to an international problem would likely be sufficient to support federal jurisdiction.

Another judicial strategy may be to allow federal intervention only if legislation provides the provinces with an opportunity to regulate instead of the federal government. For instance, the Canadian Environmental Protection Act provides that federal regulations will not apply to a province if the province has equivalent legislation. However, this approach gives provinces no flexibility in how they approach a matter, and the minority opinion in Hydro Quebec suggests that equivalency provisions undermine the national concerns test by showing that a subject matter is divisible.22

An approach which offers greater flexibility to the provinces is for the federal government to provide the provinces with an opportunity to reduce their emissions before the federal government intervenes. Under the draft Canadian Environmental Protection Act, 1997, before regulating provincial sources, the federal Minister of Environment must consult with provincial governments. If the provincial governments are unable to prevent pollution under their laws, or are unwilling to do so, the federal government can regulate the problem.²³ The difficulty with this approach is that the majority opinion in Hydro Quebec, as well as earlier cases, stresses that matters upheld under the national

Sections 166(2)(3) and 167. 23

²¹ R. v. Crown Zellerbach, above at footnote 10, at 3 C.E.L.R. 44.

²² In the opinion of the writer this reasoning is unsound. "Indivisibility" should be interpreted as meaning that there is a need for coordination for regulation to be effective. Essentially the minority in Hydro Quebec suggests that the possibility that a provincial enactment, dealing with one aspect of a larger subject area, might be equivalent to one of many federal regulations is evidence of divisibility. If followed, this would mean that, to qualify as a matter of national concern, subject matters must be very narrowly defined. For instance, the government might only be able to pass legislation enabling regulations on PCBs from incinerators only, ocean dumping from oil platforms only, airplane radio requirements only, rather than the broader areas in relation to which courts have upheld federal legislation, e.g. persistent diffuse toxic substances, ocean dumping or aeronautics.

concerns test are matters of exclusive federal jurisdiction. This suggests that, if based on the national concerns test, federal legislation on greenhouse gases must exclude the potential for provincial legislation directly aimed at greenhouse gas emissions.

There is a third approach which, although novel, may be most consistent with case law. Federal legislation could establish its own program directly aimed at reducing greenhouse gas emissions, but also give provinces the opportunity to take additional necessary actions that indirectly affect emissions. For instance, the federal government might specify its intention to establish an emission trading program, directly regulate some sources and set efficiency standards for some products and processes. It could then request provinces to develop a provincial implementation plan that includes matters which are essential but are closely tied to areas of clear provincial jurisdiction and lie outside the scope of the federal program. The provincial implementation plans might, for instance, deal with forest carbon sinks, transportation demand management, or demand side management. If provincial governments fail to develop plans, or fail to develop plans that meet criteria established by federal legislation, the federal government could regulate in those areas.

Requirements for provincial action plans that supplement federal action are unprecedented in Canada. It is, however, a component of other federal systems and analogous to the approach used in the US *Clean Air Act*. Although potentially controversial, it may be the best means of minimizing federal intrusion into areas of traditional provincial jurisdiction while at the same time ensuring that matters of national concern are dealt with effectively.

The federal government could buttress the incentives for provinces to take necessary steps by making federal funding available to provinces for programs such as demand side management and making such funding contingent on the existence of acceptable provincial action plans. Using funding to ensure provincial adherence to national standards has been the usual, albeit sometimes contentious, means of promoting national standards in areas such as welfare and health care.

Federal Treaty Power

It may also be possible to uphold federal regulation of greenhouse gases on the basis of a federal power to implement treaties. Although the federal government has the power to implement British Empire treaties, neither the Constitution Act, 1867, nor the subsequent constitutional amendments that gave Canada the power to enter into treaties on its own behalf, explicitly gave the federal government the power to implement its own treaties. A 1937 decision of the Judicial Committee of the Privy Council (formerly Canada's highest court) decided the Canadian federal government did not have the power to implement treaties in areas of provincial jurisdiction.²⁴ This decision was made despite earlier cases to the contrary, despite the anomaly of being able to implement empire treaties but not other treaties and despite other federal governments having powers to implement treaties.

Several Supreme Court of Canada cases have expressed a willingness to reconsider the issue, so long as the federal legislation that is being attacked clearly states federal jurisdiction is based on implementation of treaties.²⁵ A number of constitutional scholars have criticized the 1937 decision, suggesting that implementation of treaties should be considered a matter of national concern.²⁶ Thus, if Canada ratifies the *Kyoto Protocol* there is a chance that federal jurisdiction to implement it would be upheld.

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²⁴ A.G. Canada v. A.G. Ontario (Re: Labour Conventions), [1937] 1 D.L.R. 673 (J.C.).

²⁵ MacDonald v. Vapour Canada Ltd., [1977] 2 S.C.R. 134; Francis v. The Queen, [1956] S.C.R. 618, at 621.

²⁶ For example, see Hogg, above at footnote 7.

However, once again it is likely that the courts will want to minimize the intrusion of federal laws into areas of provincial jurisdiction. The above strategies to address this concern could also be applied to implementation of Canadian commitments under the *Kyoto Protocol*.

Federal Criminal Law Power

The federal Parliament has exclusive legislative authority in relation to "The Criminal Law". Along with the national concerns test, this power provides the primary constitutional support for federal regulation of greenhouse gases. A court may be predisposed to upholding federal greenhouse gas legislation on the basis of the criminal law power simply because, unlike the national concerns test, upholding federal regulation of environmental matters under the criminal law power does not preempt provincial regulation of the same subject matter. On the other hand, using the criminal law power to support a complex system of regulation through systems such as emission trading would involve an unprecedented extension of what is considered to be criminal law.

In R. v. Hydro Quebec,²⁷ the Supreme Court of Canada upheld Part II of the *Canadian Environmental Protection Act* as a valid exercise of the criminal law power. Part II establishes a system of notification and approval for new substances being brought into Canada; it includes provisions for the mandatory provision of information on potentially toxic substances; it includes a system for assessing existing substances; and it gives the Governor in Council broad regulation making powers in relation to the use, release, processing, packaging, sampling etc. of substances that may cause harm in the environment. The decision of the majority, written by Mr. Justice La Forest, indicates that environmental regulation is largely an area of concurrent jurisdiction. The reasons shows a willingness of the Court to accept a major federal role on environmental matters, so long as this does not preempt more stringent provincial action. Mr. Justice La Forest quotes from the World Commission on Environment and Development (the Brundtland Commission) in its report Our Common Future:

It is becoming increasingly clear that the sources and causes of pollution are far more diffuse, complex, and interrelated — and the effects of pollution more widespread, cumulative, and chronic — than hitherto believed.

...[N]ational governments should establish clear environmental goals and enforce environmental laws, regulations, incentives, and standards on industrial enterprises.

The regulations and standards should govern such matters as air and water pollution, ... energy and resource efficiency of products and processes, and the manufacture, marketing, use, transport, and disposal of toxic substances. This should normally be done at the national level, with local governments being empowered to exceed, but not to lower national norms. [emphasis added by Mr. Justice La Forest]²⁸

Mr. Justice La Forest also refers to his statement for the minority in *Crown Zellerbach*, to the effect that allocating environmental pollution exclusively to the federal Parliament would involve "sacrificing the principles of federalism enshrined in the Constitution".²⁹ He then goes on to say that he:

²⁷ Above at footnote 14.

²⁸ Above at footnote 14, at 61.

²⁹ Crown Zellerbach, above at footnote 10, at 51.

would be equally concerned with an interpretation of the Constitution that effectively allocated to the provinces, under general powers such as property and civil rights, control over the environment in a manner that prevented Parliament from exercising the leadership role expected of it by the international community and its role in protecting the basic values of Canadians regarding the environment through the instrumentality of the criminal law power.³⁰

While these excerpts and others show strong support for the policy of broad concurrent federal and provincial environmental powers, federal legislation upheld on the criminal law power will need to meet some of the previously established tests for valid use of the criminal power. The courts will generally uphold a law as criminal if two conditions are met. First, the purpose of the law must be to suppress some "evil, or injurious or undesirable effect upon the public. The effect may be in relation to social, economic or political interests...." Second, the law must be characterized as a prohibition and penalty. Both tests are relevant in considering whether a federal statute regulating greenhouse gas emissions would be upheld using the criminal law power.

In R. v. Hydro Quebec both the majority and the minority agreed that protection of the environment was a legitimate aim of the criminal law. The majority stated that "Parliament may validly enact prohibitions under its criminal law power against specific acts for the purpose of preventing pollution or, to put it in other terms, causing the entry into the environment of certain toxic substances." Parliament clearly has a wide ambit to protect the environment by means of prohibitions and penalties.

It is also clear that the federal Parliament has considerable latitude in what enactments will be characterized as prohibitions and penalties. For instance, the majority in *Hydro Quebec* upheld the regulation of toxic substances under Part II of the *Canadian Environmental Protection Act* as valid under the criminal law power. They were unconcerned that *CEPA* itself (as opposed to the regulations under it) did not contain any actual

It is not clear if economic instruments for reducing greenhouse gases would constitute criminal prohibitions and penalties.

prohibitions. Nor were they concerned that many of *CEPA's* regulation making powers were expressed in terms of setting emission limits, requiring reporting, putting conditions on use of substances, rather than simple prohibitions. Moreover, in other cases the courts have been willing to uphold prohibitions on activities that are only an indirect cause of the harm at which the law is directed.³¹ This suggests that bans on activities or products indirectly increasing greenhouse gas emissions might be upheld.

However, it is not clear that courts will uphold all federal environmental laws simply because they use prohibitions and penalties for the purposes of regulation. The majority in *Hydro Quebec* raises the possibility that a particular prohibition could be so wide as to be no longer in relation to the environment. Mr. Justice La Forest states "a particular prohibition could be so broad or all encompassing as to be found to be, in pith or substance, really aimed at regulating an area falling within the provincial domain and not exclusively at protecting the environment."³² He was also careful to point out that *CEPA*, Part II, worked in such a way that it only applied to a narrow range of very harmful substances.

Would a system prohibiting excess greenhouse gas emissions be too "all encompassing" as to fall outside the proper purposes of criminal law? Such a system would apply to a much broader field of activity than the legislation considered in cases where the criminal

³⁰ R. v. Hydro Quebec, above at footnote 14, at 72.

³¹ For instance, a prohibition of tobacco advertising was valid under the criminal law power even though it was only indirectly aimed at the underlying public purpose of reducing smoking: *RJR MacDonald v. Canada*, above at footnote 16.

³² R. v. Hydro Quebec, above at footnote 14, at 63.

law power has been upheld.³³ However, the *Hydro Quebec* majority's reference to federal laws being too all-encompassing to be upheld under the criminal law appears to be a response to the fear that the federal government might try to regulate all aspects of the environment using *CEPA*, Part II.³⁴ Greenhouse gases are a discrete environmental problem and are not all encompassing in this way. Indeed, Mr. Justice La Forest refers to environmental pollution as "a by-product of everything we do" and refers to the need for effective federal regulation. This suggests a very broad ambit for federal regulation.

It is unclear from *Hydro Quebec* whether a system of greenhouse gas regulation might at some point become so complex that it could no longer be viewed as a prohibition and penalty. The minority in *Hydro Quebec* quoted a statement by one of Canada's leading constitutional law experts that "the more elaborate a regulatory scheme, the more likely it is that the court will classify the dispensation or exemption as being regulatory rather than criminal".³⁵ More importantly, the majority was careful to characterize *CEPA*, Part II as primarily legislation aimed at creating prohibitions.

Would the courts accept that an emissions trading program is primarily a system of prohibitions? This would require an even more liberal approach to what constitutes a system of prohibitions and penalties than was necessary to characterize *CEPA*, Part II and the regulations under it as prohibitions and penalties. However, it would seem nonsensical for the courts to uphold the regulation of greenhouse gas emissions where a system of strict emission limits is used, but hold that the federal government has no power where they use a more flexible approach. The policy directions espoused by the majority in *Hydro Quebec* support an interpretation of the law that gives the federal government latitude in how they regulate greenhouse gases, but, outside of the *Hydro Quebec* case, there are few guides to how the court will define what regulatory systems can be upheld under the criminal law power.

Thus, the criminal law power as interpreted in Hydro Quebec provides the federal government with strong authority to regulate some of the areas that affect greenhouse gas emissions. It provides strong support for national standards that relate to greenhouse gas emissions, for instance, energy efficiency of equipment, houses and buildings, landfill methane recovery. This is significant, because federal regulation of energy efficiency standards is currently based on the federal trade and commerce power and only applies to goods crossing provincial or national borders.³⁶ Given the decision in Hydro Quebec, the federal government should feel confident that it can set national standards without the unnecessary complexity of only regulating goods in interprovincial or international trade. The criminal law as interpreted in Hydro Quebec may also provide support for a national program of emissions trading. However, there is some uncertainty in this regard because a trading program is relatively complex and not obviously characterized as primarily a prohibition and penalty provision.

³³ Prohibitions upheld as valid criminal law include anti-combines prohibitions, price fixing, sale of dangerous or adulterated food products: Proprietary Articles Trade Association v. A.G. Canada, [1931] A.C. 368; A.G. B.C. v. A.G. Canada, [1937] A.C. 368; R. v. Wetmore, [1983] 2 S.C.R. 284.

³⁴ The reference can be interpreted as an acknowledgment by the majority that if they interpreted Part II in the same way as the minority — as "the wholesale regulation by federal agents of any and all substances which may harm any aspect of the environment or which may present a danger to human life or health" — they might find it to be unconstitutional. See *R. v. Hydro Quebec*, above at footnote 14, at 26.

³⁵ Above at footnote 14, at 30.

³⁶ The federal government has used a ban on international or inter-provincial trade of goods that do not meet federal standards to create national standards for motor vehicle safety and emissions (*Motor Vehicle Safety Act*); pesticide labeling (*Pest Control Products Act*, section 5(2)); appliance energy efficiency (*Energy Efficiency Act*); motor vehicle fuel efficiency (*Motor Vehicle Fuel Consumption Standards Act* section 6(1) (not in force)); and fuels (*Manganese Based Fuel Additive Act*).

Federal Trade and Commerce Power

Another area of federal jurisdiction that may be important in any national greenhouse gas emission reduction strategy is the Canadian government's power to regulate "trade and commerce". As noted above, the federal government has a clear power to set labelling standards, energy or fuel efficiency standards, or emission standards for any good traded across provincial boundaries.³⁷ The Canadian federal government could also arguably use the "trade and commerce" power to justify regulating the production and import of fossil fuels but such a basis for regulation is very uncertain.³⁸

Federal and Provincial Taxation Powers

Under the *Constitution Act, 1867*, the federal government has the power to raise revenue through both direct and indirect taxation. This gives the federal government a clear power to impose an energy tax or a carbon tax applied either on the retail sale or production and import of fossil fuels. Taxes are routinely used to discourage undesirable activities such as smoking, drinking or fossil fuel combustion.³⁹ As well, most of the tax subsidies to fossil fuel industry in Canada are federal, and the federal government also has the ability to alter the tax structure to remove federal tax subsidies to mining and oil and gas production.

Provinces can also alter their tax systems to remove or reverse subsidies in favour of carbon intensive energy use and establish new taxes that encourage sustainable energy use. In regard to ending existing subsidies, provinces can end the exemption of gasoline from provincial sales tax.⁴⁰

In regard to new taxes, a province can impose direct taxes, but not indirect taxes.⁴¹ A tax will be indirect if it relates to units of a particular commodity and is charged to a person other than the consumer.⁴² A charge on greenhouse gas emissions (for instance, the addition of greenhouse gas emissions to the *BC Waste Management Permit Fee Regulation*) would be legal as a direct tax, as it is not charged on units of production or import and can be avoided or reduced

40 In British Columbia and other provinces, exemptions from the provincial sales tax exist for motor fuels, but separate motor fuel taxes are imposed. Since motor fuel taxes are generally dedicated to providing services to motorists, i.e., road construction and maintenance, the exemption from sales taxes constitutes a subsidy: See Chapter 6.

41 Constitution Act, 1867, s. 91(3) and 92(2). An exception exists for natural resources produced in the province.

³⁷ Dominion Stores v. The Queen, [1980] 1 S.C.R. 844.

³⁸ It has usually been assumed that simply because markets for fossil fuels are national in scope the federal government likely cannot impose a national cap on production of fossil fuels on the basis of its trade and commerce power. Cases have upheld federal legislation regulating the trade, including the intra-provincial trade, of products like oil and wheat that are routinely traded across provincial boundaries, but these cases involved protecting international marketing schemes for wheat or protecting western oil producers from foreign competition. However, in these cases, the regulation of intra-provincial trade was clearly tied to international trade issues, not protection of the environment. When federal regulation of a national market has been used for other purposes, such as consumer protection, it has been found unconstitutional: *Labatt Breweries Ltd. v. Canada (Attorney General)*, [1980] 1 S.C.R. 844 (1979).

³⁹ The main limit on federal taxation powers is that they cannot be used as a means of forcing compliance with a regulatory scheme: see G.V. La Forest, "The Allocation of Taxing Power Under the Canadian Constitution" Toronto: 1981. The Canadian approach to the limits of the taxing power is much more restrictive than in the United States, where a tax is valid even if aimed purely at regulation with negligible revenue generating potential: see for instance United States v. Sanchez (1950), 340 U.S. 42. Nonetheless, extremely high taxes for foreign publishers of Canadian magazine editions aimed at protecting Canadian publishers have been upheld by the courts. Reader's Digest Association (Canada) Ltd. v. Attorney General of Canada (1967), 59 D.L.R. (2d) 54.

⁴² See Simpsons-Sears Ltd. v. Provincial Secretary of New Brunswick (1976), 71 D.L.R. (3d) 717 at 724, rev'd (1978), 82 D.L.R.(3d) 321 (S.C.C.). Although the Supreme Court of Canada was equally divided on this point, the decision of the New Brunswick Court of Appeal was supported by G.V. La Forest prior to his appointment to the Supreme Court of Canada: G.V. La Forest, The Allocation of Taxing Power Under the Canadian Constitution, 2d ed. (Toronto: Canadian Tax Foundation, 1981) at 83. See also Canadian Industrial Oil & Gas Ltd. v. Government of Saskatchewan (1977), 80 D.L.R.(3d) 449 (S.C.C.) for a discussion of how courts distinguish between direct and indirect taxes.

by more energy efficient production.⁴³ On the other hand, a fuel tax, applied per unit of fuel, will be an indirect tax if applied to producers or distributors of fuel, but will be a direct tax if applied at the consumer level.⁴⁴ Similarly, a charge on electricity distribution paid for by distribution utilities would be an indirect tax.⁴⁵

Thus, provincial carbon taxes or electricity line charges would clearly be legal if paid by industrial, commercial or residential and mobile consumers. Second, if paid for by energy producers or distributors, they would be valid if ancillary to a regulatory scheme. For instance, they may be valid if earmarked for a greenhouse gas emission reduction fund, or a demand side management fund.⁴⁶ Applying the charge under the same statute as other discharge fees would help support a finding that a tax is ancillary to a regulatory scheme. However the province cannot adopt a carbon tax applied to importers, producers or distributors if the tax has a major revenue raising function.⁴⁷

Federal and Provincial Powers in Relation to Forests

Most forests in Canada are on provincial crown land. As owner, the provinces have the ability to control the resource, restricting logging or establishing silviculture requirements that protect carbon sinks. The provinces also have control over forests on private land through their power over property and civil rights, and their power over forest resources. The federal parliament controls forests on federal land and in the territories (although much of the latter power has been delegated to the territorial governments).

Provincial and Federal Powers over Transportation

Using their powers over local matters, municipal institutions, property and civil rights, management and sale of provincial crown land, and intraprovincial works and undertakings, the provinces have control over roads in the province, intraprovincial railway systems and intra-provincial trucking companies. These powers could be used to achieve emission reductions in a number of areas, for instance, by adjusting speed limits, achieving shifts in patterns of road development, and requiring emission reduction plans from intra-provincial trucking or railway companies, etc.

The federal government, on the other hand, has the power to regulate railway, trucking, pipeline and shipping operations which extend beyond provincial boundaries. It also has power over aeronautics and ship standards. These powers will be relevant to fuel efficiency standards for ships and planes as well as regulations specifically aimed at inter-provincial and international transportation undertakings.

- 46 In Allard, *ibid.*, a municipal tax charged per unit of gravel produced was upheld because the revenues were intended to cover damage to roads caused by gravel trucks.
- 47 It would be possible to impose a carbon tax under the province's power to impose indirect taxes on "non-renewable...resources in the province and the primary production therefrom": section 92A Constitution Act 1867, as amended by Constitution Act 1982. This was intended to allow provinces to capture a greater portion of the profits from oil and gas production on their territory. However, it does not allow placement of a carbon tax on fossil fuels imported into a province and is unlikely to be an effective way of affecting final retail price and consumption levels.

⁴³ Discharges resulting from the manufacture of a good are analogous to products purchased and incorporated into another product which is sold. Courts have held that taxes on such products are direct: *Cairns Construction Ltd. v. Saskatchewan*, [1960] S.C.R. 619, 24 D.L.R.(2d) 1.

⁴⁴ British Columbia (Attorney General) v. Canadian Pacific Railway, [1927] 4 D.L.R. 113 (P.C.) outlawed a BC tax that applied to wholesale fuel sales but allowed the tax when applied to the consumer: British Columbia (Attorney General) v. Kingcome Navigation, [1934] A.C. 45 (P.C.).

⁴⁵ Even if a carbon tax had exemptions for renewable content so that there was not a perfect correlation between the tax and the increased cost of fuels, it would likely be treated as an indirect tax. The relevant question is whether a tax clings to the vast majority of units which enter the market: *Allard Contractors Ltd. v. Coquitlam (District)* (1993), 109 D.L.R. (4th) 46 (S.C.C.) at 64.

Overlapping Powers and the National Concerns Test

The fact that the federal government has the power to regulate pollution of international or inter-provincial airsheds does not mean that the provinces do not have powers to impose higher standards in their environmental regulation of these airsheds.⁴⁸ Merely because the federal government has the power to regulate a particular subject does not mean that the provinces do not have this power and vice versa. For instance, if the federal government strategy to reduce greenhouse gases uses the federal criminal law power and the federal tax and spending powers, the provinces also would be able to regulate greenhouse gases using their power over "property and civil rights".

Courts will allow otherwise constitutional federal and provincial laws to operate concurrently unless there is a direct clash of purposes or an operational conflict (in the sense that one law says a person must do something which another law forbids).⁴⁹ If both levels of government regulate the same issue, citizens must obey the highest standard. If there is a conflict, however, the federal law prevails. There are some limits to the extent of permissible overlap. For instance, provincial regulations that affect federal undertakings (such as inter-provincial pipelines, rail companies or trucking companies) must not significantly impair those undertakings or be overly specific as to how they are managed.⁵⁰

If the federal government establishes a trading program based on its power over matters of national concern, the federal action may reduce the range for provincial programs.

Most importantly, provincial environmental laws will not be upheld if their dominant aspect is characterized as being in relation to a matter of federal jurisdiction. For instance, provincial regulation of land use will not apply to federally owned land, because regulation of federally owned public land is an area of exclusive federal jurisdiction.⁵¹ The possibility of provincial legislation being unconstitutional because it is characterized as relating to an area over which the federal government has exclusive jurisdiction is greater if federal programs are upheld on the basis of the national concerns test. In R. v. Hydro Quebec the Court is clear in stating that the national concerns doctrine operates by assigning full power to regulate an area to the federal Parliament, and warns against the danger

⁴⁸ In R. v. Nitrochem Inc., (1993), 14 C.E.L.R. (N.S.) 151 (Ont. Ct. J. Prov. Div.) the court held that provincial statutes which supplemented CEPA provisions for discharges into inter-provincial waters were valid. See also TNT Canada Inc. v. Ontario (1986), 1 C.E.L.R. (N.S.) 109 (Ont. C.A.).

⁴⁹ Multiple Access Ltd. v. McCucheon, [1982] 2 S.C.R. 161 at 163; Bank of Montreal v. Hall, [1990] 1 S.C.R. 121.

⁵⁰ In Ontario. v. Canadian Pacific Ltd. (1993), 10 C.E.L.R. (N.S.) 169 (Ont. C.A.), aff'd R. v. Canadian Pacific Ltd. (1995), 125 D.L.R. (4th) 385 (S.C.C.) the Ontario Court of Appeal upheld provincial environmental protection laws which prohibited the cheapest method of vegetation clearing along a railway right of way because the provincial regulations did not "bear essentially upon the management" of the federal undertaking. At the Supreme Court of Canada written reasons were not given, but in oral reasons the Court referred to a decision that allowed provincial regulations so long as they do not "sterilize" the federal undertaking. See also R. v. Norris (1992), 17 W.C.B. (2d) 160 (Ont. Ct. J. Prov. Div.). The trend of recent cases suggests that provincial environmental regulation of greenhouse gases from federal undertakings would likely be valid so long as it does not target federal undertakings, does not have significant adverse impacts on a federal undertaking and is not overly specific as to how federal undertakings are managed. See Hogg, above at footnote 7, at 15-30 to 15-31. Irwin Toy v. Quebec, [1989] 1 S.C.R. 9 stated that provincial laws can affect a vital part, as long as the effect is indirect. See also R. v. Nitrochem Inc., above at footnote 48, which upheld application of provincial spills legislation to a federal undertaking. On the other hand, courts have invalidated provincial regulation of labour relations at federal undertakings because they do bear essentially upon "a vital part of the management and operation of federal undertakings": Commission de Salaire Minimum v. Bell Telephone Co., [1966] S.C.R. 767; Alberta Government Telephones, [1989] 2 S.C.R. 225.

⁵¹ Cases where provincial or municipal regulation has been struck down include Canadian Occidental Petroleum v. North Vancouver (1986), 13 B.C.L.R. (2d) 34 (B.C.C.A.); Delta v. Aztec Aviation Group (1985), 28 M.P.L.R. 215 (B.C.S.C.); International Aviation Terminal Inc. v. Richmond (Township) (March 16, 1992) Van. Reg. CA 01384, (B.C.C.A.); Surrey v. Peace Arch Enterprises Ltd.(1970), 74 W.W.R. 380 (B.C.C.A.); all of these involved provincial or municipal attempts to regulate use of federal land through zoning and building bylaws.

of invoking too readily a doctrine that places matters beyond the scope of provincial jurisdiction. The approach of the court appears to be as follows: use of the national concerns test should be avoided unless it is the only head of power available to uphold federal legislation; however, once invoked it may make provincial legislation that is essentially aimed at the matter of national concern unconstitutional.

If courts can construe laws on bases other than the national concerns test, they can avoid taking powers away from the provinces. It may be possible to construe a federal law as essentially being a prohibition and penalty, or as a law in relation to trade and commerce, or as a tax. However, in the case of some legislative programs, in particular emissions trading, it is not clear whether the court has an alternative to using the national concerns test. Thus, the effect of a federal emissions trading program may be to reduce the potential range of provincial action. This could mean that provincial legislation aimed solely at greenhouse gases might be unconstitutional. Nonetheless, provinces would continue to have powers to affect greenhouse gas emissions through their powers over land use, forestry, road transport, etc.

Summary of Federal and Provincial Powers

Case law strongly supports the federal government having jurisdiction to unilaterally implement major economic instruments to reduce greenhouse gas emissions. Except in relation to direct carbon taxes or energy taxes, provincial authority to implement major economic instruments is less certain. This is especially true if the federal government has acted first on the basis that greenhouse gases are a matter of national concern. Moreover, implementation of a national program by the provinces may be difficult and inefficient. Both the federal and provincial governments have authority to establish energy efficiency standards and emission standards for greenhouse gases. Federal authority is not limited to establishment of standards for goods crossing national and provincial borders. Provincial standards can exceed federal standards.

Many essential aspects of a program are best implemented by provincial governments because they relate to matters traditionally within the provincial realm, e.g. forestry, urban growth management, regulation of utilities. However, the federal government may have some authority over these subject areas if federal intervention is necessary for an effective greenhouse gas emission reduction program. Federal intervention in these areas should, however, be designed to avoid unnecessary intrusion in areas of provincial jurisdiction.

Table 1 sets out conclusions regarding the powers of the federal and provincial governments to impose some of the potential elements of a greenhouse gas emission reduction program. The references under the second and third columns specify the degree of certainty with which one can conclude that the federal or provincial governments respectively have the requisite authority. These conclusions are tentative, with the actual constitutional basis for programs depending to some extent on the details of regulations and statutes.

Table 1: Federal and Provincial Powers to Legislate in Relation to Greenhouse Gases				
Program Element	Federal Power	Provincial Power		
1. Carbon tax	clear authority	• clear authority if direct tax		
2. Establishment of climate fun fund emission reduction pro	id to • clear authority ject	• clear authority		
3. Energy efficiency standards, technology standards and labelling standards	 clear authority for goods crossing provincial or international boundaries 	• clear authority		
	 very strong authority, under national concerns or criminal law power, for all goods 			
4. Cap and emission allowance trading for greenhouse gases	 very strong authority, under national concerns test; medium authority under criminal law power 	• very strong authority, but may be excluded if court finds climate change is matter of national concern		
5. Emission limits and credit trading or atmospheric user	 very strong authority, under national concerns test; good authority under criminal law power 	• very strong authority, but may be excluded if court finds climate change is matter of national concern		
6. Cap and carbon coupon trad	ling • very strong authority	medium authority		
7. Urban growth management/ road transportation plannin	• no authority (except see 11) g	• clear authority		
8. Forest management for sequestration	• no authority for private South of 60 or provincial Crown land (except see 11)	• clear authority		
9. Mandatory energy audits	 clear authority for federal government and federal undertakings; some authority for other facilities 	 clear authority for facilities other than federal undertakings or the federal government 		
10. Limits on emissions from fea undertakings (e.g. inter-prov pipelines and facilities)	deral • clear authority vincial	 no authority unless part of general program; no authority if limits impair operation of understanding 		
11. Ability to regulate forest sin urban growth etc. if provinc to implement measures in th areas of jurisdiction	ks, • very uncertain authority es fail neir	• not applicable		

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Statutory Basis for Reducing Greenhouse Gases

As discussed in the introduction to this Chapter, any program to reduce greenhouse gas emissions must have both a constitutional basis and a legislative basis. The statutory basis for a program will depend on several factors. Statutes must authorize all the regulatory or administrative requirements imposed by a program. Valid regulations must be authorized by statute, and valid permits and orders issued by government officials ("administrative requirements") must be authorized by either regulation or statute. Although some components of an emission reduction program could, as a matter of law, be included in either regulation or statute, there may be policy reasons for putting them in one or the other. This section reviews the various factors affecting this decision. It then considers whether or not new statutes need to be passed or existing statutes amended.

Statutory Interpretation

The courts are responsible for interpreting statutes to determine if they allow governments to regulate in the manner they have chosen. In deciding whether a particular administrative or regulatory requirement is authorized, courts will apply rules of statutory interpretation and administrative law.

Courts use these rules to ensure that regulations and administrative requirements are applied fairly and reflect the intention of Parliament or legislature. While courts in Canada have been liberal in broadly interpreting statutory mandates to pass regulations, in some circumstances courts may require very specific statutory mandates in order to uphold certain types of regulations.⁵² For instance, the BC *Waste Management Act* states that the "Lieutenant Governor in Council may make regulations." While courts may interpret this as allowing regulations requiring traditional end of pipe waste treatment, they are less likely to interpret it as permitting a relatively novel approach to environmental protection.⁵³ The result is that more specific regulation making power may be necessary. Often it will be impossible to provide all necessary regulation making powers until the basic elements of a program are known.

In addition, there are regulatory actions against which "presumptions of statutory interpretation" exist. For these actions very specific statutory authority will be necessary to overcome the presumption that they are not authorized. There are a number of instances where presumptions of statutory interpretation will necessitate very specific statutory provisions:

- Limiting Access to Judicial Review. Specific statutory authority would be needed to limit the public's ability to have administrative decisions reviewed by the courts.⁵⁴ In many programs it may, in the interest of expediency and certainty, be necessary to limit the ability of affected parties to have the courts review administrative decisions. For instance, in a cap and emissions allowance trading program, if administrative officials determine how many allowances each emitter receives, it would be important to ensure that implementation of the program could not be impeded by emitters seeking judicial review of their allocations.
- Imposition of Criminal or Administrative Penalties. Regulations cannot impose liability,

⁵² See CKOY Ltd. v. The Queen, [1979] 1 S.C.R. 2 and John Keyes, Executive Legislation: Delegated Law Making by the Executive Branch (Toronto: Butterworths, 1992) at 181-187.

⁵³ The fact that legislation such as the BC *Waste Management Act* enumerates very specific regulation making powers worsens the problem. Judges may infer that if the legislature specifically empowered a regulation to do A, but did not specifically allow a regulation to do B, they had no intention to allow regulation of B.

⁵⁴ See Re Kendrick and Ontario (Milk Control Board), [1935] O.R. 308 (C.A.).
either criminal liability for an offence or liability to pay an emission fee, tax or an administrative penalty, unless there is clear statutory authority to do so.⁵⁵

- Absolute Liability Offences. Specific statutory authority may be required to pass regulations which create absolute liability offences.
- Sub-Delegation of Regulation Making Power. When Parliament delegates a regulation making power to a regulator, the regulator will not be allowed to delegate standard setting powers to a third party without the specific statutory authority to do so.⁵⁶ For instance, if the Lieutenant Governor in Council wants to incorporate a specific monitoring standard into regulations, including future amendments to that standard, it must have specific authority.
- Transformation of Regulation Making Powers. Courts will generally presume that where the legislature delegates a power to make regulations, the delegate must exercise that power through regulation making rather than *ad hoc* administrative decisions. For instance, if an agency were given the power to pass regulations establishing energy efficiency standards, the agency could not pass regulations which allowed it to set standards on a case by case basis through permits.⁵⁷
- Defining Appeal Procedures. Unless statutes state otherwise, courts will assume that any administrative powers given to government officials are to be exercised according to the "rules of procedural fairness and natural justice". The exact content of these rules will depend on the situation, ranging from a right to be notified of a decision and discuss it to more extensive

rights such as the right to cross examination. Usually where significant administrative powers such as allocation of emission allowances or permitting of emissions are delegated to officials, legislation defines an appeal process. This helps to establish the otherwise vague standards of procedural fairness.

Policy Issues

Even where the rules of statutory interpretation allow government to implement a program based on cursory regulation making powers, there are a number of policy reasons for establishing a program in statute. These include:

- Democratic Process and Accountability. New regulatory programs that represent major changes in the way an environmental problem is handled or affect large segments of the economy are usually based on relatively detailed legislation, not cursory regulation making powers. This allows for fuller parliamentary debate. Detailed legislation is also often less open to political attacks based on unfounded fears.
- Commitment. Enshrining a principle or policy in statute rather than leaving it to regulation or administrative action shows a government's commitment to that principle or policy. For instance, the *Canadian Environmental Protection Act* included a requirement for a parliamentary review of *CEPA* five years after its passage into force. Emissions trading legislation might make a similar commitment to review.
- Focusing Stakeholder Discussions. Legislation can focus discussions among stakeholders, by resolving key issues that would otherwise block progress.

⁵⁵ See Elmer Driedger, *Construction of Statutes*, 2d ed. (Toronto: Butterworths, 1983) at 318 and Keyes, above at footnote 52 at 166.

⁵⁶ The more the authority delegated involves discretion, the more likely it cannot be delegated without statutory authority: see Steve Dart Co. (1974), 46 D.L.R. (3d) 745 (F.C.T.D.); Dene Nation v. The Queen, [1984] 2 F.C. 942 (T.D.), and Keyes, above at footnote 52.

⁵⁷ See Brant Dairy Company v. Milk Commission of Ontario, [1973] S.C.R. 720 for an analogous situation of allotment of marketing board quotas for milk.

- Certainty. Establishing a program, or the basic elements of a program, in legislation rather than regulation will provide greater security that the program or elements of it will not be changed. For instance, legislation establishing a tradeable allowance program would give parties contemplating investments in emission reductions greater confidence.
- Control. Legislatures or Parliament may want to enact detailed legislation in order to exercise control over the bodies empowered to pass regulations. This is especially true where a body independent of government is given regulation making authority. For instance, if the federal parliament established an independent climate fund to invest in greenhouse gas emission reduction opportunities, detailed legislation would be necessary to guide the agency.
- Political Mileage. New legislation may be chosen as it provides politicians with an "announceable" for which they receive political credit.

The Adequacy of Existing Legislation

Given the policy and legal reasons that determine when issues should be dealt with by statute, how can existing Canadian and British Columbian legislation be used to reduce greenhouse gas emissions? This section reviews how existing legislation could be used to pursue greenhouse gas emission reduction goals.

Federal Statutes

Canadian Environmental Protection Act

Canada's premier environmental protection legislation for air pollution is the *Canadian Environmental Protection Act (CEPA)* passed in 1988. In December 1996, the government introduced a bill into Parliament that, if it had passed, would have repealed *CEPA* and replaced it with the *Canadian Environmental Protection Act*, 1997 (*CEPA*, 1997). *CEPA*, 1997 was not passed when Parliament dissolved for the 1997 election, but may be reintroduced into Parliament.

Both *CEPA* and *CEPA*, 1997 contain International Air Pollution divisions. Although both laws are apparently intended to give the Governor in Council wide regulation making authority to deal with international atmospheric problems in the event provinces do not reduce emissions, there are some problematic ambiguities:

- It is possible to make a technical argument that *CEPA*, 1997 and to a lesser extent *CEPA* do not apply to greenhouse gases.⁵⁸
- If some provinces take sufficient action to reduce greenhouse gases, but others do not, it is not clear whether or not the federal government can

⁵⁸ CEPA, 1997, section 166 lays out the conditions that must be met before government regulates under Division VI. The Ministers of Environment and Health must "have reason to believe that a substance released from a source in Canada creates (a) air pollution in a country other than Canada; or (b) air pollution that violates, or is likely to violate, an international agreement binding on Canada." "Air pollution" is defined as the condition of the air caused by the release of substances into it, not the substances per se. Because of this, it is possible to argue that Canada did not create the condition of the air but only contributed to it. Although Canadians are among the world's biggest greenhouse gas emitters on a per capita basis, we only contribute two percent to global emissions. This argument is buttressed by the changes in the wording from the earlier Act. In particular, s. 61 of CEPA refers to air contaminants released from Canadian sources resulting in violation of an international agreement, and refers to air contaminants, "either alone or in combination with other air contaminants" creating air pollution. However, since most international air pollution is caused by sources in more than one country, interpreting "creation of air pollution" as not including "contribution to a global air pollution problem" would be overly narrow, and contrary to the general rule that legislation be interpreted liberally. A less significant ambiguity exists for both CEPA and CEPA, 1997. The international air pollution divisions in both Acts apply only to substances which cause air pollution. Air pollution is defined broadly, as "a condition of the air" which causes various problems. Nothing in the definitions makes it absolutely clear that atmospheric pollution is covered, and because air pollution is often used in a way which refers to local and regional air pollution only, one can argue that neither Act applies to greenhouse gases.

regulate provincial sources (which account for the vast majority of greenhouse gases) in the provinces that have taken sufficient action.⁵⁹ Thus it is not clear whether the federal government could intervene to establish a national program.

• It is not clear how much time the federal government must give provinces to reduce their greenhouse gas emissions before facing federal regulation. The uncertainty could delay federal action.

Thus, the international air pollution provisions in both *CEPA* and *CEPA*, 1997 provide a shaky basis for federal regulation of greenhouse gas emissions. While application of both acts to greenhouse gases would likely be upheld in court, the slight uncertainty could create some difficulty, especially in relation to trading programs, where the American experience shows the need for a clear statutory basis.⁶⁰

Nor do the CEPA and CEPA, 1997 divisions for the regulation of "toxic substances" give an ideal basis for regulation of greenhouse gases. Toxic substances under CEPA and CEPA, 1997 are defined broadly to include substances entering the environment in quantities that have or may have a long-term harmful effect on the environment. Based on a strict interpretation either Act would likely support the regulation of greenhouse gases; however, the Supreme Court of Canada decision suggests a narrower interpretation of CEPA, implying such an interpretation may be necessary for it to be

constitutional.⁶¹ Thus, relying on either act's toxic provisions may invite a constitutional challenge even if there is a clear constitutional power to regulate greenhouse gases.

If the federal government attempted to regulate on the basis of the international air pollution provisions of either *CEPA* or *CEPA*, 1997, the specific regulation making powers are sometimes deficient.

Neither CEPA nor CEPA, 1997 provide a strong basis for regulating greenhouse gases through use of emission trading.

- The general regulation making powers (powers other than those related to trading) associated with the international air pollution provisions of CEPA and CEPA, 1997 are limited to prescribing the minimum average or maximum quantity or concentration of substances.⁶² This very narrow regulation making power provides little basis for most of the sorts of regulations that have been suggested for reducing greenhouse gas emissions. It may not, for instance, be an adequate basis for requiring mandatory landfill gas recovery, quotas for the carbon content in imported electricity, minimum ethanol requirements for gasoline or requirements for fugitive methane controls.
- There is no express power to implement any form of trading program under either the international air pollution or the toxic substances divisions of *CEPA*. Although existing regulatory provisions have formed the statutory basis for trading programs for ozone depleting substances,

62 Section 87 of CEPA, and s. 330 of CEPA, 1997.

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⁵⁹ The term "provincial sources" is used here to mean sources (provincial or federal) which are not "federal sources" under CEPA, 1997 or "federal works and undertakings" in the case of CEPA. CEPA, 1997 defines federal sources as the federal government, federal crown agencies and federal crown corporations and federal works undertakings (e.g. inter-provincial railways, airlines etc.). Section 166(2)(3) and 167 of CEPA, 1997 and s. 61 of CEPA state that before regulating provincial sources the Minister of Environment must consult with provincial governments. If the provincial governments can prevent or control the pollution under their laws, and are willing to do so, the Minister does not have the authority to act.

⁶⁰ James T.B. Tripp and Daniel J. Dudek, "Institutional Guidelines for Designing Successful Transferable Rights Programs" (1989) 6 Yale Journal on Regulation 369.

⁶¹ Even though there are ample grounds for concluding that the federal government has the power to regulate greenhouse gases, an interpretation of CEPA, Part II that supported a regulation aimed at greenhouse gases would have to be so broad that CEPA, Part II would be unconstitutional even if the regulation was, by itself, constitutional: See R. v. Hydro Quebec, above at footnote 14. All naturally occurring substances, including carbon dioxide, are deemed to be on the Domestic Substances List: Supplement to the Canada Gazette, January 26, 1991, iv.

they are an insufficient basis for developing a more extensive program of emission trading. Again, American experience indicates the need for certain legislative authority.

- Both the international air pollution divisions of CEPA, 1997 provide the legislative basis for the central elements of credit trading, cap and allowance trading and cap and carbon coupon trading programs. It does not provide a clear basis for imposing requirements related to the implementation of offsite emission reduction projects through permits (required for the enforcement of an emission reduction credit trading program).
- *CEPA*, *1997* does not provide a clear power to auction allowances.⁶³
- Neither Act provides inspection powers necessary to inspect the implementation of off-site emission reduction projects or records of credit generators.
- Neither *CEPA* nor *CEPA*, 1997, provides the legislative basis for establishing a system of administrative penalties, a system which is essential to the smooth running of any allowance or emission reduction credit trading program.
- Under both *CEPA* and *CEPA*, 1997 there is a risk that a court would find that regulations could not define allowances as revocable licences.⁶⁴

- There is no clear power to impose auditing requirements or licence environmental compliance auditors, essential or at least likely elements of an open market trading program.
- CEPA, 1997 only allows a stand-alone trading program, not allowing a trading program which is integrated with provincial programs or programs of other jurisdictions.
- Neither CEPA nor CEPA, 1997 provides any basis on which the federal government could establish criteria to be met by provincial action plans for greenhouse gas emission reduction, or under which the federal government could intervene on issues that affect greenhouse gas emissions indirectly.

Although it would be possible to make a series of minor amendments to *CEPA* and *CEPA*, *1997* to correct the above problems, it is recommended that any major federal initiatives on greenhouse gases, especially any initiative involving emission limits and potential trading of allowances, coupons or emission reduction credits, should be based on legislation specifically designed for such a program. Basing such a program on specific legislation would allow for increased public and Parliamentary debate, and could specify the basic framework of a program, helping to focus debate over the details that would be included in regulation.

⁶³ Section 326 of *CEPA*, 1997 only refers to making regulations providing for "the conditions related to distribution of a tradeable unit". Courts require relatively clear statutory powers to impose liabilities and charge fees. They are likely to require similar clear statutory authority in relation to selling a right that was previously free. Section 328(1) allows the Minister to make regulations prescribing fees or the manner of determining fees for services, use of facilities, rights, privileges, processes or approvals. The amounts chargeable for services, use of facilities, processes and approvals are all limited to cost recovery. The amounts chargeable for rights and privileges are not limited. Because section 328 involves regulations by the Minister, rather than Governor in Council, and because it generally empowers cost recovery fees rather than auctions, it is likely to be narrowly interpreted. The failure to make references to auctions for rights or tradeable units likely means the Minister does not have the power to unilaterally establish auctions. Finally, because the fees are likely to be major revenue raisers they may be treated as taxes which can only be imposed by Parliament directly.

⁶⁴ The author is of the opinion that any form of property created by regulation is inherently a revocable licence which can be canceled through amendments to the regulation. This opinion is backed up by several leading Ontario and British Columbia court cases, but conflicts with one New Brunswick case: see Chris Rolfe and Linda Nowlan, *Economic Instruments and the Environment: Selected Legal Issues* (Vancouver: West Coast Environmental Law Research Foundation, 1993) at 109 to 111. Moreover, litigation in the US has challenged the ability to revoke banked allowances.

Energy Efficiency Act and Motor Vehicle Fuel Consumption Standards Act

The federal government regulates energy efficiency of energy using products through the *Energy Efficiency Act*,⁶⁵ and has also passed but not proclaimed the *Motor Vehicle Fuel Consumption Standards Act (MVFCSA)*.⁶⁶ Both Acts are based on the federal power to regulate trade and commerce and only apply to standards of products crossing provincial or international boundaries.

The imposition of energy efficiency legislation through regulation of goods crossing provincial borders causes several problems. First of all, average efficiency standards such as CAFE and CAFC are normally based on numbers of vehicles sold in a jurisdiction, rather than vehicles crossing provincial boundaries. The MVFCSA tries to solve this problem by requiring all vehicles that cross provincial boundaries to carry a national fuel consumption mark. The CAFC standard is based on the average fuel efficiency of vehicles carrying the national fuel consumption mark. Unfortunately, there is a slight chance that this provision, which indirectly regulates fuel efficiency and labelling of vehicles manufactured and sold within a province, could be ruled unconstitutional.67

Only applying energy efficiency standards to goods entering the country or crossing provincial boundaries could also lead to potential challenges to these measures on the basis that they are contrary to international trade law.⁶⁸ Although such challenges are unlikely to succeed, they could be avoided through basing energy efficiency standards on the national concerns test.⁶⁹

Given the strong support in the *Hydro Quebec* case for national standards for energy efficiency, the federal government should feel comfortable in establishing national energy and fuel efficiency standards that apply to all goods manufactured or sold in Canada regardless of whether or not they cross provincial boundaries. This would also avoid the need to duplicate regulatory development in all provinces.

Canadian Environmental Assessment Act

The Canadian Environmental Assessment Act,⁷⁰ is not designed to allow the consistent application of onsite greenhouse gas emission reduction requirements or requirements for off-site emission reduction projects. First, it generally only applies to projects requiring transfer of federal lands, federal undertakings, and federally funded or regulated projects.⁷¹ It also allows the Minister of Environment and Secretary of State for External Affairs to require assessments of projects which in their opinion would lead to significant environmental effects outside of Canada.⁷² This limited scope of powers would not provide for consistent application of greenhouse gas emission requirements although it could be used

⁶⁵ R.S.C., c. E-6.4.

⁶⁶ R.S.C., c. M-9.

⁶⁷ Similar provisions, which required foods to carry the federal agricultural product grade name to meet federal standards, were ruled unconstitutional in *Dominion Stores v. The Queen*, above, at footnote 37. *Dominion Stores* was decided by a narrow majority and has been criticized by Canada's leading Constitutional scholar, Peter Hogg: Hogg, above at footnote 7, at 20-9.

⁶⁸ Imposing national standards through inter-provincial trade in products which do not meet a standard, has been challenged as a protectionist measure contrary to international trade law. The only manufacturer of the fuel additive banned by the *Manganese Based Fuel Additive Act* has claimed that the legislation is trade illegal: see Barrie McKenna, "Trade row looms over MMT" Globe and Mail, Tuesday, September 10, 1996, p. B-1.

⁶⁹ The argument that standards only applying to international or inter-provincial trade is trade illegal ignores Canadian constitutional realities and ignores the practical impact of such standards in effectively imposing national standards rather than protecting domestic production. See letter to Lloyd Axworthy from Chris Rolfe, June 3, 1996, available at West Coast Environmental Law Association's website: http://vcn.bc.ca/wcel.

⁷⁰ S.C. 1992, c. 37.

⁷¹ Section 5.

⁷² Section 47.

where a project will have a major impact on Canada's emissions.⁷³ Second, the federal government may have difficulty enforcing the implementation of emission reduction projects or other mitigation measures under federal environmental assessment.⁷⁴ Third, the responsibility for ensuring compliance with terms would be scattered among a number of federal departments.⁷⁵

British Columbia Legislation

Waste Management Act

The Waste Management Act, the centerpiece of BC's antipollution laws, provides limited authority to regulate greenhouse gases. Waste is defined as including "a substance that is emitted into the air and that is capable of damaging... air, land, water or other external conditions under which man, animals and plants live". Although historically waste management officials have not considered greenhouse gases as a waste, the definition in the Waste Management Act appears sufficiently broad to include them. However, like federal legislation, the application of the *Waste Management Act* could be made clearer.⁷⁶

The Waste Management Act is already used to regulate greenhouse gas emissions such as landfill methane, and could be used to set emission/fuel efficiency standards for new vehicles,⁷⁷ set energy efficiency standards for large facilities that rely on fossil fuels for energy, and charge large facilities a greenhouse gas emission charge dedicated to administration and projects to offset greenhouse gas emissions from industrial sources. On the other hand the Waste Management Act has a number of weaknesses:

- It does not permit atmospheric user fees on emissions that exceed permitted amounts.
- It contains no specific powers to pass regulations which establish trading programs, and, given the very specific regulation making powers used elsewhere in the Act, courts are unlikely to imply the power to establish trading programs.⁷⁸

- 75 Depending on who is the responsible authority under the Act: s. 37(2).
- 76 It has been argued that the Waste Management Act does not cover greenhouse gases because the damage and injuries caused by greenhouse gases are indirect as compared to other pollutants. However, many pollutants which only indirectly cause environmental damage are regulated. For instance, volatile organics are regulated because of their tendency to react with other substances and form ground level ozone. Secondly, it is sometimes argued that interpreting waste as including greenhouse gases leads to the absurd result that all breathing humans require waste management permits. However, this absurd result is not unique to greenhouse gases. Read literally the Waste Management Act requires all painters and offices with photocopiers to hold permits because they are emitting volatile organics. This simply does not happen because common sense is used in application of the Waste Management Act. It is only applied to significant sources.
- 77 Section 24.3 enables government to set average emission standards and could be used to create average emission standards for carbon dioxide (essentially the same as Corporate Average Fuel Efficiency Standards). Similar to the way the BC *Motor Vehicle Emission Reduction Regulation* adopts US emission standards, average greenhouse gas emission standards could adopt the certification process for fuel efficiency used by the American CAFE process.
- 78 The only trading program established by BC regulation is a very limited program for trading among vehicle manufacturers to meet vehicle emission standards. This appears to be based on the specific reference to establish "schemes requiring vehicle manufacturers to sell a mix of vehicles determined by formula."

⁷³ For instance, the New Zealand government used their environmental assessment legislation in an *ad hoc* manner to require the offsetting of emissions from a project which had the potential to add substantially to New Zealand's global emissions.

⁷⁴ Sections 20(2) and 37(2) make the federal authorities responsible for ensuring the implementation of mitigation measures, but do not specifically give the authorities a power to ensure such implementation. It is usually assumed that the federal government powers to impose mitigation measures include powers associated with the regulatory approval which triggers an environmental assessment. (For instance, if an application for a permit under a particular act triggers an assessment, the federal government can impose conditions in that permit that are provided for under the particular act.) In *Curragh Resources Inc. v. Canada (Minister of Justice)* (1993), 11 C.E.L.R.(N.S.) 173 (Fed. C.A.) the Federal Court of Appeal found that a federal government power to impose conditions (payment of security) was implied by environmental assessment legislation. However, Curragh was decided in the context of the territories (where different constitutional factors come into play), and was decided under the *Environmental Assessment Review Process Guidelines Order* (the predecessor to CEAA). Curragh also involved a condition which could be fulfilled prior to giving an approval. (If the federal government did not receive the required security payment, it could withhold approval.) Enforcement of offsets may be difficult in other situations (unless the government imposes requirements for bonds to pay for offsets in the event of default).

- The inspection powers would not allow inspection of off-site emission reduction projects or records of credit generators.
- The permitting powers do not include powers necessary to impose ad hoc off-site emission reduction requirements on either the parties required to offset their requirements or credit generators.
- It does not provide the legislative basis for establishing a system of administrative penalties.
- It does not include a power to mandate energy audits (although the Province can encourage facilities to audit energy use as part of the permitting process).
- There is no means of encouraging energy efficiency at facilities that are not direct emitters (i.e. electricity users).
- A court could find that legislation, not regulation, is necessary to define allowances as revocable licences.⁷⁹
- There is no power to make a "rolling reference" to international standards or other jurisdictions' regulations, an ability which could become very important if the Province takes part in a coordinated national or international trading program.⁸⁰

Energy Efficiency Act

The BC *Energy Efficiency Act*⁸¹ could be used to impose minimum energy efficiency performance standards and energy efficiency technology standards for products manufactured or sold in British Columbia. The *Energy Efficiency Act* does not permit average energy efficiency performance standards. Enforcement of the *Energy Efficiency Act* could be enhanced through the use of administrative penalties, but this would require amendments.

The Municipal Act

Under the *Municipal Act*,⁸² the Minister of Municipal Affairs can adopt energy efficiency standards under the Building Code of BC⁸³ and municipal councils can adopt more stringent standards.⁸⁴ Several changes would enhance cost effective enforcement of energy code provisions. For instance municipalities could be given a power to require certification by a professional engineer that a building complies with approved plans, or that building plans comply with higher energy efficiency standards imposed by a municipality.⁸⁵ Energy planning, currently a voluntary process, could also be made a necessary element of community planning.

84 Section 734.

⁷⁹ See above at footnote 64.

⁸⁰ A "rolling reference" is a reference to a standard or regulation "as it is amended from time to time" and is often necessary to ensure a program is harmonized with other jurisdictions. Regulations which incorporate other jurisdictions' regulations or standards are based on specific provisions of the *Waste Management Act*: see for instance, section 35 of the *Waste Management Act*.

⁸¹ S.B.C. 1990, c. 40.

⁸² R.S.B.C. 1979, c. 290.

⁸³ Section 740.

⁸⁵ Municipalities can only require certification of *plans* by engineers to ensure compliance with *provincial* energy standards: section 734.2.

Utilities Commission Act

The Utilities Commission Act⁸⁶ could be used to impose requirements to offset emissions through offsite projects. Such requirements could be imposed on an ad hoc basis by Cabinet for significant new or significantly expanded thermal generating stations. The conditions that can be attached to Orders in Council granting an energy project certificate or energy operation certificate are relatively unlimited.

BC Environmental Assessment Act

The BC *Environmental Assessment Act*⁸⁷ allows a project approval certificate to include measures to minimize greenhouse gas emissions. Although the Act does not include a specific power to require project proponents to undertake off-site greenhouse gas emission reduction projects, tribunals in other jurisdictions have ruled that a power to impose mitigation measures includes a power to require carbon dioxide offsets.⁸⁸ However, requirements relating to monitoring appear to be limited to monitoring the impacts of the project assessed, not the off-site emission reduction project.⁸⁹

The Social Service Tax Act

The Social Service Tax Act⁹⁰ could be used to charge environmental levies on the sale of electricity or fossil fuels.⁹¹

Designing Legal Tools for Achieving Reductions in Greenhouse Gas Emissions

Given the needs for legislation which is constitutionally valid, regulations which are firmly based in statute, clear policy directions and democratic discourse, how can we begin to develop the legal tools that would implement emissions trading and other aspects of a national program to reduce greenhouse gas emissions? The key design issues are:

- dividing the responsibilities for reducing greenhouse gas emissions between the provinces and the federal government;
- ensuring that a proper statutory basis exists for the different elements of an emission reduction strategy.

Design Issue 36: Dividing Responsibilities Between the Provinces and Federal Government

Issue

Which level of government should be responsible for implementing different elements of a greenhouse gas emission reduction strategy?

⁸⁶ S.B.C. 1980, c. 60.

⁸⁷ S.B.C. 1994, c. 35.

⁸⁸ The power to require mitigation under the New Zealand Resource Management Act, 1991 has been interpreted by the New Zealand Minister of Environment and a Board of Inquiry established under the Act to include the power to require mitigation. Although offsets are a form of mitigation that falls outside the sort of mitigation measures typically included in project approvals, it is unlikely a judge would find that Environmental Assessment Act mitigation powers do not include the power to require offsets.

⁸⁹ See section 38.

⁹⁰ R.S.B.C., c. 388.

⁹¹ Section 2.4 permits the Lieutenant Governor in Council to set environmental levies for "hazardous products". Hazardous products do not need to be actually hazardous, but can include any product prescribed as a hazardous product. The Lieutenant Governor in Council has used this provision to charge environmental levies on products no more hazardous than tires. The Social Service Tax Act exemption for fossil fuels in section 4 does not apply to environmental levies.

Discussion

Which level of government should be responsible for implementing particular aspects of greenhouse gas emission reduction strategies depends on the constitutional abilities of federal and provincial governments, the efficiency and effectiveness of national or provincial programs and the political ramifications of a particular level of government regulating in a particular field. Essentially there are two main options for how a program could be structured. A national program could either place the greatest responsibility for reducing greenhouse gases on the provinces, or the federal government could assume the greatest responsibility.

Provincially Dominated Program

In a provincially dominated program, the federal government could keep to its limited areas of traditional jurisdiction, assisting provinces with development of their own standards, adjusting taxes and establishing efficiency standards for goods in inter-provincial trade, and establishing funding programs for emission reduction initiatives. The provinces could take primary responsibility for emission reductions.

If emissions trading is part of an emission reduction strategy, a provincially dominated trading program should rely on parallel, interlocking legislation. Provincial legislation could establish emission limits for provincially regulated sources; federal legislation could establish limits for federally regulated sources such as federal undertakings. Both federal and provincial legislation could establish the concept of emission reduction credit trading in legislation. Provincial legislation might then delegate to the federal government the power to pass regulations which define the criteria for credits used in interprovincial trade, and the power to determine if credits that have been used meet these criteria. Federal legislation could regulate the standards that must be met by emission reduction credits traded across provincial borders.

Politically, a provincially dominated program has the advantage that it avoids an extension of federal regulation into new areas. Given the resistance of provinces like Quebec, Alberta and British Columbia to extensions of federal control, this may avoid discontent

Negotiating separate provincial emission caps may place strains on national unity as each province has different perceived challenges to reducing emissions.

among some provincial politicians. On the other hand, when the time comes for actual implementation, even these provinces may be loathe to taking primary responsibility for reducing greenhouse gas emissions within their boundaries.

While there is potential for a provincially dominated program made up of interlocking provincial and federal programs, establishing such programs adds a significant layer of complexity and leads to duplication of bureaucracies in different provinces. Negotiating separate provincial emission caps or negotiating a formula that determines provincial emission caps may place strains on national unity as each province has different perceived challenges posed by population growth, current levels of carbon intensity or reliance on renewable energy. Moreover, even if a national program of interlocked provincial emission trading programs can be initially negotiated, changes to the program necessary to meet national commitments may prove impossible to negotiate.

Finally, because matters of national concern exclude provincial jurisdiction, a greenhouse gas trading program relying on provincial legislation is more susceptible to legal challenges than purely federal programs. The federal government has stronger constitutional authority to establish a greenhouse gas emission trading program.

Federally Dominated Program

In a federally dominated program, the federal government could establish broad based measures such as emission trading mechanisms and national climate funds, set efficiency standards for a wide range of products, and adjust taxes. The provinces could supplement federal actions and take action in areas such as reforming forest practices, transportation, land use planning, etc.

Ideally, provinces and the federal government could negotiate the actions that would be taken by the provinces to reduce greenhouse gases. This could either take the form of emission reduction targets that different provinces would meet through their own emission reduction plans or it could be in the form of policy measures that all provinces would agree to implement. These provincial responsibilities would, however, be more limited than responsibilities under a provincially dominated program. The federal government would, for instance, be primarily responsible for implementing any emissions trading programs or developing standards for consumer products and industrial processes.

As discussed above, the federal government may be able to use its peace, order and good government power to require provinces to develop implementation programs, and, if provinces fail to develop and implement programs that have a reasonable likelihood of success, the federal government may have powers to develop regulations in areas of traditional provincial jurisdiction. Unfortunately, the existence of such far reaching federal powers is uncertain.

Uncertainty could stymie development of a coherent, effective national greenhouse gas emission reduction program. To help dispel the uncertainty, the federal government should ask the Supreme Court of Canada for advice on the constitutionality of different strategies for reducing greenhouse gas emissions. Although considerable work would be necessary to define the questions being put to the Court, the federal government has the power to submit such "reference questions" to the Supreme Court.⁹²

Conclusions

The federal government should assert primary responsibility for reducing greenhouse gases. If an emissions trading program is part of a national program, it should be established by the federal government, after consultation with stakeholders including the provinces. The federal government can also take a more proactive approach in setting national standards for energy efficiency and emission performance, setting standards that are binding whether or not the regulated product crosses provincial boundaries. Other aspects of federal action should include spending programs such as a climate action fund aimed at realizing no regrets emission reductions, reform of federal taxes and application of federal environmental assessment to all projects that have major greenhouse gas implications.

While the above measures will all be important in reducing greenhouse gas emissions, additional actions will be necessary in areas traditionally regulated by the provinces. Ideally the federal government and provinces should negotiate actions to be implemented by the provinces. However, if one or more provinces are unwilling to cooperate in taking their share emission reduction measures, the federal government should consider passing legislation requiring provinces to develop implementation plans, and, if such plans are not developed and implemented, allowing the federal government to take steps in areas of provincial jurisdiction that directly affect greenhouse gas emissions. Prior to passing any such legislation the government should submit it to the Supreme Court of Canada for a reference regarding its validity.

⁹² Supreme Court Act, R.S.C. 1985, c. S-26, s. 53.

Design Issue 37: Ensuring a Proper Statutory Basis

Issue

What statutes need to be in place to support elements of a greenhouse gas emission reduction strategy?

Discussion

As discussed above, there are a number of legal and policy reasons that determine what legislation will be necessary to reduce greenhouse gases. Current legislation allows for many actions to reduce greenhouse gases, but does not provide a statutory basis for major emission trading regimes.

New Legislation for Emission Trading

Although there is only limited room on the parliamentary agenda for major pieces of legislation, new legislation specifically relating to greenhouse gases is likely necessary for any major greenhouse gas emission trading program. Such legislation could either be in the form of a new statute or a new part to existing legislation.

Legislation specifically relating to greenhouse gas emissions has the advantage that it can be designed to support the constitutionality of a federal greenhouse gas emission strategy. Legislation which is more broadly aimed — for instance, at international air pollution — must by necessity be worded in a manner that is broad and applicable to numerous circumstances. Because the legislation has to support regulation in a variety of circumstances, the subject matter of the legislation is less separate, distinct and indivisible, and thus less likely to be constitutional under the national concerns test.

Legislation specifically intended for greenhouse gas emission trading is also advisable for many of the legal reasons discussed above. In many cases, the necessary elements of a trading program will need specific legislative support, but the details of needed legislation will not be apparent until basic policy choices are made. For instance, the administrative penalty system appropriate for an allowance trading program will be different from the system appropriate for credit trading (under allowance trading, the administrative penalties may be automatic; while in credit trading, there is a need for expert judgment and there may need to be expert tribunals to estimate the validity of credits). Similarly, if allocations of allowances turn on administrative decisions (as would be necessary in any annual allocation of allowances based on a formula) it may be necessary to restrict the ability to have allocation decisions reviewed by the court.

Finally, there are a number of policy reasons for creating legislation specifically aimed at greenhouse gas emission trading. Because of the national importance of a trading regime it is worthwhile debating its basic framework in Parliament. Framework legislation could also set basic principles. For instance, it could specify that any cap on emissions should be no higher than the estimated actual emissions in the year prior to the cap being set. It could direct the use of discount factors for leakage and certainty in a credit trading program. Once basic policy decisions are made it could be used to focus discussions among stakeholders.

Any legislative initiative related to emissions trading should include a commitment to review of emissions trading after several years of experience. As noted in Chapter 7, environmentalists have one fundamental concern in relation to trading versus regulation. Trading removes decisions on how and where emissions will be reduced from the public sphere, thus removing the public's ability to influence adoption of measures that have multiple social and environmental benefits. A commitment to review may partially alleviate this concern as it creates a new venue for public involvement in decision making. This was a factor in the decision to include a commitment to public review after two years of experience in RECLAIM's implementing regulations. Similarly, a commitment to review by a

parliamentary committee was included in the *Canadian Environmental Protection Act* when it was passed in 1988.

Amendments to Existing Legislation

While new legislation is appropriate for establishing an emissions trading program, in many other cases policies could be implemented without making major amendments or additions to federal and provincial legislation. For instance, statutes such as the federal *Energy Efficiency Act* or the *Motor Vehicle Fuel Consumption Standards Act* could be easily amended by making them apply to all goods offered for sale in Canada or imported into Canada. A statute such as the *Canadian Environmental Assessment Act* could be amended to allow regulations specifying that projects will be assessed if their impacts on greenhouse gas emissions exceed a defined threshold.

Conclusion

Although various steps to reduce greenhouse gas emissions through regulatory measures can be taken under existing federal and provincial legislation, legislative changes are necessary. In particular, new legislation, either in the form of a new statute or a new part to existing legislation, and specifically aimed at greenhouse gases, is advisable for any major greenhouse gas emissions trading program. Legislation will likely be necessary to give regulation makers sufficient legislative authority for all aspects of a trading program. Any legislative initiative related to emissions trading should be used to enshrine basic principles necessary for environmental effectiveness of a program and should include a commitment to review of emissions trading after several years of experience. For many other measures, amendments ranging from minor to major are necessary.

Summary

How a greenhouse gas emission strategy is put into effect will depend on the constitutional powers of the governments implementing the strategy. In determining the constitutionality of environmental laws, courts have endeavored to ensure that governments' ability to effectively deal with environmental problems not be constrained, while at the same time working to maintain a balanced Confederation. These competing judicial policies are particularly important in relation to greenhouse gases due to the ubiquitous sources of greenhouse gases and the international nature of the problem.

Courts have tried to resolve the tension between effective environmental law and a balanced Confederation through several strategies. They have interpreted the federal criminal law power in such a way that the federal government can establish national standards and provincial governments can establish higher levels of protection. They have also recognized a federal power to regulate emissions that have impacts in other provinces or nations, but have tried to devise means to limit the intrusion on provincial jurisdiction this could imply.

Although there is uncertainty in how courts would apply the Constitution in relation to laws aimed at reducing greenhouse gases, the federal government appears to have authority to unilaterally implement major economic instruments for greenhouse gases. Provincial authority to implement major economic instruments is less certain, especially if the federal statutes occupy the field of greenhouse gas emission regulation. Federal jurisdiction in this area may be advantageous as implementation of a national program by the provinces could prove both difficult and inefficient. Nonetheless, the provinces have a clear power to reduce greenhouse gases through a number of initiatives, including establishment of some economic instruments. For instance, provinces can impose direct carbon taxes, possibly directing the revenue to funding projects that reduce greenhouse gases and are worth pursuing for other reasons.

Both the federal and provincial governments have authority to establish energy efficiency standards and emission standards for greenhouse gases. Federal authority is not limited to establishment of standards for goods crossing national and provincial borders. Provincial standards can exceed federal standards.

One of the most difficult issues to predict is how the courts will respond to federal legislation that deals with topics that are closely linked to areas of provincial jurisdiction but directly impact greenhouse gases, e.g. sequestration of carbon in forests on provincial land, utilities, land use planning and community energy planning. Although these aspects of a greenhouse gas emission reduction strategy are probably best implemented by the provincial governments because they are traditionally within the provincial realm, they may also be essential components of an effective national emission reduction strategy. Failure of a province to cooperate could have adverse effects outside the province. Because of this, the federal government may have some authority over these subject matters if federal intervention is necessary. Federal action in this area would, however, need to be designed to avoid unnecessary intrusion in areas of provincial jurisdiction.

Legal instruments to reduce greenhouse gases require both a constitutional basis and a statutory basis. Although many existing laws such as the federal *Canadian Environmental Assessment Act, Canadian Environmental Protection Act* and the provincial *Waste Management Act, Utilities Commission Act* or *Environmental Assessment Act* could be used to support some greenhouse gas emission reduction requirements, none of them is well suited to implementation of emissions trading. In many cases, once new initiatives to reduce greenhouse gas emissions are designed, new legislation will be necessary to support the initiative.