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TURNING DOWN THE HEAT

Emissions Trading and Canadian Implementation of the Kyoto Protocol

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1998

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Chapter 14:

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

> *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 government 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, 1867[1] 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 stymie effective environmental legislation, combined with the courts' deep respect for a balanced Canadian Confederation. This theme 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.

Courts have strived to avoid technical approaches to the Constitution which could confound effective environmental policy.

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

1 *Constitution Act, 1867* (U.K.), 30 & 31 Vict. c. 3.
2 *Ibid.*, s. 91.
3 *Ibid.*, s. 92.
4 *Ibid.*, s. 92(2).
5 *R.* v. *Lake Ontario Cement Ltd.* (1973), 11 C.C.C. (2d) 1 (Ont. H.C.).

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 laws extend to federal lands, such as ports and Indian Reserves, and federal undertakings such as inter-provincial 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.

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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 Tort."

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 concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power...."[13] 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.

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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.

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

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

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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 of 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.

provincial politicians vowing to resist regulatory measures.[17] These statements support the argument that, not 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 could be that the federal government has a limited ability to deal with a problem that is a global concern.

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

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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."

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.

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".

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 government to protect the broader national and international interests. One 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

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

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 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.

Federal calls for provincial implementation plans may give the provinces the greatest flexibility without stymieing effective federal powe

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.

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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.

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

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.

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

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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.

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 pre-disposed 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

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27 Above at footnote 14.

> 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:

> 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 prohibitions. Nor were they concerned that

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28 Above at footnote 14, at 61.

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

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

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.

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

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 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's 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

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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.

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.

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 in 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 inter-provincial 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.

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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.

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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. vs. 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.

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 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

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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.

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.

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.

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 intra-provincial works and undertakings, the provinces have control over roads in the province, intra-provincial 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

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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.

will be relevant to fuel efficiency standards for ships and planes as well as regulations specifically aimed at inter-provincial and international transportation undertakings.

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 interprovincial pipelines, rail companies or trucking companies) must not significantly impair those undertakings or be overly specific as to how they are managed.[50]

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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

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

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.

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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.

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 fund to fund emission reduction project	• clear authority	• clear authority
3. Energy efficiency standards, technology standards and labelling standards.	• clear authority for goods crossing provincial or international boundaries • very strong authority, under national concerns or criminal law power, for all goods	• clear authority
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 fees	• 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 trading.	• very strong authority	• medium authority
7. Urban growth management/road transportation planning	• no authority (except see 11)	• 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 federal undertakings (e.g. inter-provincial pipelines and facilities)	• clear authority	• no authority unless part of general program; no authority if limits impair operation of understanding
11. Ability to regulate forest sinks, urban growth etc. if provinces fail to implement measures in their areas of jurisdiction	• very uncertain authority	• not applicable

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

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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.

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, 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

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54 See *Re Kendrick and Ontario* (Milk Control Board), [1935] O.R. 308 (C.A.).

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.

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.

- **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

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[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.

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 re-introduced 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]

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[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

- 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 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]

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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.

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.

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, 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

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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.

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

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*, provide 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* provide any basis on which the federal government could establish criteria to be met by provincial action plans for

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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.

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.

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

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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*

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 on-site 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 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]

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.

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*

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

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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).

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.

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]
- 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]

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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."

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.*

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 BC[83] 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.

Utilities Commission Act

The *Utilities Commission Act*,[86] could be used to impose requirements to offset emissions through off-site 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

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81 S.B.C. 1990, c. 40.
82 R.S.B.C. 1979, c. 290.
83 Section 740.
84 Section 734.
85 Municipalities can only require certification of *plans* by engineers to ensure compliance with *provincial* energy standards: section 734.2.
86 S.B.C. 1980, c. 60.
87 S.B.C. 1994, c. 35.

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 Act*[90] 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.

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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, its 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.

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?

Discussion:

Which level of government should be responsible for implementing particular aspects of a 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 inter-provincial 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 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.

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

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 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 advise 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 a federal action should include spending programs such as 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.

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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 basis 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 note 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 an 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 affects 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 areas 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, Utility Act* or *Environmental Assessment Act* could be used to support some greenhouse 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.