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ENVIRONMENTAL LAW AS CRIMINAL LAW (for constitutional purposes)

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1. Purpose of paper

I looked in vain for a hot topic of constitutional environmental law in Canada, and all I found was the constitutional authority of the Parliament of Canada to regulate greenhouse gas emissions, a topic on which all our federal politicians seem to have entirely lost interest. A topic that used to be hot has now become cold. However, as long as the received wisdom holds that global warming is the product of human consumption of fossil fuels, the priorities of Canadian (and American) governments may well return to the control of greenhouse gas emissions, and my cold topic will become hot again.

In any case, what I have to say is relevant not only to the control of greenhouse gas emissions, but also to any other future federal Canadian initiatives over the environment. My thesis will be that two recent decisions of the Supreme Court of Canada have shifted the constitutional ground in ways that are remarkably unfriendly to federal legislative initiatives in fields of provincial jurisdiction even where there is a strong policy case for national regulation. The decisions are the *Assisted Human Reproduction Reference* (2010)[1] and the *Securities Reference* (2011)[2]. They do not concern the environment, but later in the paper I will explain why environmental lawyers ought to pay attention to them.

This paper is about federal power, but federal power exists against a background of very extensive provincial jurisdiction under the power over property and civil rights in the province (Constitution Act, 1867, s. 92(13)). The big limitation on provincial power is its restriction to

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[1] [2010] 3 S.C.R. 457.
[2] 2011 SCC 66.

the boundaries of the province. All provinces do in fact regulate the environment, and any federal laws that apply inside provincial borders will often be concurrent with provincial laws.

2. Federal power over the environment

The principal heads of power that are available to the Parliament of Canada to regulate the environment are, in order of importance, (1) the criminal-law power, and (2) the peace, order, and good government power.[3] It may seem odd that I place the criminal-law power first in importance, but, as will be explained, the Supreme Court of Canada has in recent years made clear that the criminal-law power confers on Parliament a more flexible regulatory authority than might be assumed by the name "criminal law". The Court has upheld the predecessor of the current federal Canadian Environmental Protection Act, 1999 (CEPA)[4] under the criminal-law power, and the federal proposals (described later) to regulate greenhouse gas emissions would have taken the form of amendments to that Act and to the regulations made under that Act. Accordingly, the bulk of this paper is addressed to the criminal-law power.

3. Criminal-law power

The Constitution Act, 1867, by s. 91(27), confers on the Parliament of Canada the power to make laws in relation to "the criminal law". That is why the criminal law of Canada, unlike that of the United States and Australia, takes the form of a national code. However, for constitutional purposes, criminal law is not restricted to traditional Criminal Code offences like murder, theft and assault, which are self-applied by citizens and enforced by prosecution and punishment. The courts have defined "criminal law" for constitutional purposes as a law that has three elements: (1) a prohibition, (2) a penalty, and (3) a typically criminal purpose. This is not a very restrictive definition, and the Supreme Court has upheld a variety of *regulatory* laws that have been enacted by Parliament under its criminal-law power on, for example, food and drugs, tobacco advertising, hazardous products, lotteries and gun control—all matters within concurrent provincial jurisdiction.[5]

In *R. v. Hydro-Québec* (1997),[6] the Supreme Court of Canada upheld the 1988 version of CEPA[7] under the criminal-law power. The issue was whether Hydro-Québec could validly be prosecuted for violating an "interim order" made by the federal Minister of Environment that restricted the emission of PCBs by the corporation. The power to make the order came from CEPA, which Hydro-Québec argued was unconstitutional. CEPA established an elaborate regulatory process that involved a review by government of the effects of any substance, which could lead to a finding that the substance was harmful to the environment or human health, in

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[3] Many other heads of power also supply authority over aspects of the environment, for example, fisheries (s. 91(12)), navigation and shipping (s. 91(10)), coastal waters outside provincial boundaries, rivers crossing provincial or international boundaries, federal public lands (s. 91(1A)), industries within federal jurisdiction, Indians and lands reserved for the Indians (s. 91(24)). See *Friends of Oldman River Society v. Can.* [1992] 1 S.C.R. 3 (federal power to order environmental impact assessment of any project that has an impact on a matter within federal jurisdiction).

[4] S.C. 1999, c. 33.

[5] For detailed discussion, see P.W. Hogg, *Constitutional Law of Canada* (5th ed., 2007), ch. 18, Criminal Law.

[6] [1997] 3 S.C.R. 213.

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

which case the Ministers of Environment and Health could recommend to the Governor in Council that the substance be classified as "toxic". Once the Governor in Council had made that classification, CEPA authorized the Governor in Council to make regulations governing the release of the substance into the environment and the manner in which and conditions under which it could be manufactured, imported, processed, transported, stored, sold, used and discarded. Where a substance had not yet been classified as toxic, but either of the two Ministers believed that immediate action was called for with respect to the substance, that Minister was empowered to make an "interim order" before the full process of classification was complete. The interim order was temporary, but could include any regulation that could be imposed on a substance that had been classified as toxic. A breach of an interim order, like a breach of a regulation, was an offence punishable by fine or imprisonment.

It will be obvious that the legislative scheme of CEPA looks nothing like the standard criminal-law prohibition (of murder, theft or assault, for example), which is able to be self-applied by the persons to whom it applies and is enforced only by prosecution and punishment. In CEPA there was no prohibition until the elaborate administrative process to assess the toxicity of a substance (or make an interim order) had been completed. For four of the nine judges on the Supreme Court that was fatal to the classification of the law as criminal: "it would be an odd crime whose definition was made entirely dependent on the discretion of the Executive".[8] The same four were also troubled by a provision in the Act that suspended the application of a CEPA regulation in a province if the province had an equivalent law of its own in place. They pointed out that such an exemption "would be a very unusual provision for a criminal law".[9] But five of the judges, forming the majority of the bench of nine, upheld the Act as a criminal law. La Forest J., who wrote for the majority, held that, because the administrative process culminated in a prohibition enforced by a penalty, the scheme was sufficiently prohibitory to count as criminal law. Nor did he object to the suspension of regulations in provinces that had equivalent laws, because he said that this simply recognized the reality that much of the field of environmental protection is subject to concurrent provincial and federal powers. In the result, the majority view prevailed, of course, and the Act was upheld as criminal law.[10]

Despite the narrow five-four majority, *R. v. Hydro-Québec* settles the constitutionality of federal environmental law on the model of CEPA. The majority held that the sophisticated administrative scheme was a criminal law because it was backed by a prohibition and penalty. And all nine judges agreed that the protection of the environment counted as a sufficient purpose for a criminal law. Therefore CEPA had all three elements constitutionally required for a criminal law, namely, a prohibition, a penalty and a typically criminal purpose.

In the *Assisted Human Reproduction Reference* (2010),[11] the Supreme Court had to decide whether the federal Assisted Human Reproduction Act was a valid exercise of Parliament's criminal-law power. The Act was drafted as a criminal law with the requisite

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[8] *Id.*, para. 55 per Lamer C.J. and Iacobucci J. for the four dissenting judges.

[9] *Id.*, para. 57.

[10] La Forest J. did not decide whether the peace, order, and good government power (pogg) would also authorize the law (para. 161), although he implied that his answer would be no (paras. 115-116). The dissenting judges rejected pogg as authority for the Act (paras. 71-78), as well as the criminal-law power.

[11] [2010] 3 S.C.R. 457. I disclose that I was one of the counsel for the Government of Canada arguing for the validity of the entire Act under the criminal-law power.

prohibitions and penalties. Some of the prohibitions were absolute, for example, of human cloning, and these were conceded to be valid criminal law and the Court so held. But other prohibitions were qualified by exceptions and some of the qualified prohibitions authorized AHR activity only if it was undertaken in accordance with regulations made under the Act by personnel licensed under the Act in premises licensed under the Act. The qualified provisions were attacked by Quebec as being outside the criminal-law power. The Court essentially upheld Quebec's position, although it divided four-four-one in a confusing decision. McLachlin C.J., writing for four judges, would have upheld the entirety of the Act under the criminal-law power. She cited the *Hydro-Québec* case for the proposition that: "The complexity of modern problems often requires a nuanced scheme consisting of a mixture of absolute prohibitions, selective prohibitions based on regulations, and supporting administrative provisions."[12] The purpose of these various prohibitions was to safeguard morality, public health and the personal security of donors, donees and persons not yet born. For her, therefore, the requirements of a valid criminal law--(1) prohibition, (2) penalty, and (3) typical criminal purpose--were satisfied. In light of the decided cases, especially *Hydro-Quebec*, her opinion seemed to be the correct answer to the constitutional question, but it only attracted the support of four judges.

LeBel and Deschamps JJ., with the approval of two others, held (in essential agreement with the Quebec Court of Appeal) that what Parliament had enacted as a single Act was, for constitutional purposes, two Acts: the absolute prohibitions were prohibitions of *reprehensible* practices and were properly classified as criminal law, but the qualified prohibitions—those subject to exceptions or to regulatory or licensing requirements--were the promotion of *beneficial* practices and for that reason outside the realm of criminal law.[13] The pith and substance of the qualified prohibitions was "the regulation of assisted human reproduction as a health service".[14] This matter fell within exclusive provincial jurisdiction over hospitals, the medical profession, property and civil rights and local matters. LeBel and Deschamps JJ. regarded most of the Act as "colourable", although they did not use that word. They said that "Parliament has therefore made a specious attempt to exercise its criminal law power by merely juxtaposing provisions falling within provincial jurisdiction with others that in fact relate to the criminal law".[15] And they added that "Parliament's intention was to enact legislation in relation to a matter outside its jurisdiction".[16] This opinion also had the support of only four judges. But Cromwell J., the ninth judge, in a brief and cryptic opinion which did not explicitly agree with the reasons of LeBel and Deschamps JJ., cast his vote with them to strike down most of the qualified prohibitions in the Act.

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[12] 2010 SCC 61, para. 36.

[13] This involved a considerable contraction of the received scope of the criminal-law power: Hogg, note 5, above, sec. 18.2.

[14] *Id.*, para. 227. In fact, assisted human reproduction is not a "health service" in any obvious sense. While the Act applied to some procedures that are performed by doctors in hospitals, the Act also applied to scientists, researchers, technicians, laboratories, clinics, sperm banks, donors of sperm or ova, surrogate mothers, persons who seek to exploit women and children or who seek to profit from selling the means to the artificial creation of life—as well as healthy persons seeking assistance to have children.

[15] *Id.*, para. 278; I am advised that the word specieux in the French version, which is "specious" in the English version, is often translated as colourable.

[16] *Id.*, para. 280.

While the ratio decidendi of the majority in the *AHR Reference* cannot be articulated, one has to acknowledge that the reasoning of McLachlin C.J., which followed the *Hydro Québec* reasoning, was rejected. For the majority, a detailed regulatory scheme in a field that is otherwise within provincial jurisdiction could not be upheld under the criminal-law power. To be sure, AHR is a sui generis subject matter, and there is no reason to fear that the Court would now overrule *Hydro-Québec* if a new constitutional challenge were mounted to CEPA. However, as I will explain, some of the federal proposals for regulating greenhouse gas emissions would have pushed at the edge of the criminal-law envelope, and must now be regarded as more vulnerable to constitutional attack than would have been the case before the *AHR Reference.*

Another indication of a shift in the constitutional ground came in the *Securities Reference* (2011).[17] In that case, the Supreme Court unanimously struck down a federal proposal to enact a federal regime of securities regulation. The received wisdom among constitutional lawyers was that a national securities regulator would probably be upheld under the trade and commerce power, and this particular proposal was deferential to provincial power in that it was structured to come into force only in consenting provinces (who would opt into the federal regime). So the decision came as a surprise, and its unanimity compounded the surprise. The reasons of the Court discussed only the trade and commerce power, and nothing was said about the criminal-law power, but the Court was expressly concerned about the displacement of a longstanding provincial presence in the field and what it described (despite the opt-in feature) as an "evisceration" of the provincial authority over property and civil rights. Obviously, this is not encouraging to federal initiatives with respect to the environment, another field in which the provinces have a longstanding presence.

4. Federal proposals for regulation of greenhouse gas emissions

In 2007, the Government of Canada issued a policy paper setting out new policy for the control of greenhouse gas emissions, asserting a commitment to reduce Canada's total greenhouse gas emissions, relative to 2006 levels, by 20 per cent by 2020 and by 60 to 70 per cent by 2050.[18] The primary target of the new policy was industrial emissions, and the paper proposed the setting of regulatory standards on an industry by industry basis with a view to reaching the national goals. The paper was vague about the legal vehicle that would be enacted to implement the new policy, but it would almost certainly have been amendments to CEPA. It will be recalled that the *Hydro Québec* case concerned emissions (of PCBs), and so the CEPA framework should work for greenhouse gas emissions. In fact, in 2005, greenhouse gases were assessed under the CEPA process and they were classified as toxic, so that the regulatory powers of CEPA apply to them now, and in fact there are some regulations setting standards for the emission of greenhouse gases by vehicles—although none applicable to industrial emitters. However, at the time of writing (2012), no amendments to CEPA and no new regulations under CEPA have been enacted to give effect to the commitments of the 2007 policy paper.

[17] 2011 SCC 66. I disclose that I was one of the counsel for the Government of Canada arguing for the validity of the Act under the trade and commerce power.

[18] *Regulatory Framework for Air Emissions* (Minister of the Environment, Canada, 2007), 4.

If this initiative were to be revived in some form, the primary means of compliance for a regulated firm would obviously be the adoption by the firm of abatement measures that would reduce the firm's emissions to the regulated standard. However, as well as the in-house abatement of greenhouse gas emissions, the Government of Canada's policy paper proposed (pp. 12-15) three additional means of compliance with the regulatory standard, each of which was intended to soften the impact of criminal prohibitions of excessive emissions.

The first additional means of compliance was to be the use of *emissions credits*. These would be issued to firms that had reduced their emissions more than required by law. The credits could be "banked" to reduce a future compliance obligation or could be immediately sold to firms that had not achieved the required reduction in their emissions. It was contemplated that a private market for emissions credits would develop and they would be traded. The proposal to create transferable emissions credits recognized that different firms in the same sector were likely to experience different costs of emissions abatement. Those firms that did better than their regulated targets would be rewarded with credits that could be sold (or banked for the future). Those firms that were not able to reach their regulated targets would be able to purchase credits in lieu of in-house abatement. The trading scheme was intended to provide some breathing space for firms that would incur excessive costs to get down to their regulated target, and to create incentives for firms to go beyond their regulated targets. The idea was to lower the overall costs of compliance and stimulate the development of abatement technology.

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

The third additional means of compliance proposed by the policy paper was to be contributions to a climate change technology fund. This fund, which would have been administered by an entity independent of government, was to have been invested in projects that would be likely to yield reductions in greenhouse gas emissions. The policy paper (p. 12) said that the primary focus of the fund would be on "technology deployment and related infrastructure projects". One example given was the development of infrastructure for carbon capture and storage. Unlike the purchase of emissions credits and offset credits, firms would not be able to satisfy their regulatory obligations solely by contributions to the technology fund. A firm could use contributions to the fund to satisfy 70 per cent of its obligation in 2010, 65 per cent in 2011, and decreasing percentages thereafter, falling to zero in 2018.

5. Constitutional validity of federal proposals as criminal law

There is no doubt that mandatory reductions in greenhouse gas emissions would be upheld as an exercise of the criminal-law power of Parliament. That is clear from the *Hydro-Québec* case.[19] The only question is whether the three additional means of compliance (emissions credits, offset credits and contributions to a climate change technology fund) could also be upheld as exercises of the criminal-law power. Each would have enabled a regulated

[19] Note 6, above.

firm to meet its obligations without actually reducing its greenhouse gas emissions by the required amount. The rationale in all three cases was the difficulty that some firms would have in achieving their required emissions reductions by the direct means of in-house abatement. The effect in all three cases would have been a reduction in emissions, albeit not one that is made directly by the particular regulated firm that has taken advantage of the additional means of compliance.

There is no doubt that the criminal-law power will extend to some alternative means of compliance, even when those means soften the prohibition that is an essential element of a criminal law. An analogy is *RJR-MacDonald v. Canada* (1995),[20] which is the case in which the Supreme Court held that the federal prohibition on tobacco advertising was a valid exercise of Parliament's criminal-law power.[21] In the case of tobacco, the harm is caused by the product, not by the advertising, and yet the challenged law banned the advertising and not the product. The majority of the Court upheld the law as a criminal law. They recognized that it was not practicable to ban the product in view of the large number of Canadians who were smokers. They recognized that the ban on advertising was intended to pursue the same public purpose, namely, the protection of the public from a dangerous product. And they held that the fact that Parliament chose a "circuitous path" to its destination did not deny to the law the criminal-law classification.

Applying the reasoning of the tobacco case to the regulation of greenhouse gas emissions, before the *AHR Reference* there was a strong constitutional argument that alternative means of compliance that pursued the same public purpose as the prohibitions of excessive emissions should be held to be a valid part of the greenhouse-gas legislative scheme. The argument was easiest with respect to the transferable emissions credits and offset credits, because they were intended to provide incentives for and then recognize equivalent reductions in emissions to those that the regulated firm was bound to achieve. The climate change technology fund was more difficult because the reduction of emissions caused by technology-funded projects would be delayed and when realized might not be equivalent to the credits issued to the firms that contributed the money to the fund. However, the proposal was to make contributions to the fund available only for a transitional period, and to provide credit for only part of a regulated firm's obligations (70% initially, declining annually to zero in eight years).

After the *AHR Reference* one would have to be cautious about any regulatory initiatives that push at the edge of the criminal-law envelope. It is still likely that the logic of *Hydro-Québec* and the tobacco advertising case would persuade the Supreme Court to uphold, under the criminal-law power, the proposals for the regulation of greenhouse gas emissions in the policy paper, including the three additional means of compliance (emissions credits, offset credits and contributions to a climate change technology fund). But the risk of a successful constitutional challenge by a province (protecting provincial turf) or an environmental advocacy group (claiming that the measures were too lenient) has undoubtedly increased.

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[20] [1995] 3 S.C.R. 199.

[21] The Act was struck down under the Charter of Rights, because of the impact of the ban on advertising on freedom of expression. However, a revised version of the Act was later upheld in *Canada v. JTI-Macdonald Corp.* [2007] 2 S.C.R. 610.

6. Regulation of the environment under other federal powers

(a) Peace, order, and good government power

Parliament has the power to enact laws coming within the "peace, order, and good government of Canada", a power that is granted by the opening words of s. 91 of the Constitution Act, 1867. The peace, order, and good government (pogg) power has two branches, an "emergency" branch and a "national concern" branch.[22] The "emergency" branch would authorize federal laws to deal with environmental emergencies, but emergency legislation has to be temporary in its operation. The "national concern" branch would authorize an environmental protection law that is permanent in its operation.

There is no doubt that a federal environmental protection law can be enacted under the "national concern" branch of the pogg power because the Supreme Court so held in *R. v. Crown Zellerbach* (1988).[23] In that case, the majority of the Court upheld a federal law that prohibited dumping at sea. (The facts occurred in waters inside the boundaries of the province of British Columbia.) The decision was put on the basis that marine pollution was a matter of national concern that was distinct from matters of provincial jurisdiction and was beyond the capacity of the provinces to control. A law enacted under the pogg power need not have the characteristics of a criminal law (prohibition, penalty, typically criminal purpose). The law in issue in *Crown Zellerbach* did in fact have those characteristics, but the majority of the Court upheld the law under the pogg power and did not even consider whether it could also be upheld under the criminal-law power. The probable reason for that omission was that the case was decided in 1988, and it was not until 1997 that it became clear (from the decision in *Hydro-Québec*) that the protection of the environment (as opposed to the protection of human health and safety) could serve as a legitimate purpose of a criminal law.[24]

Crown Zellerbach is an important precedent for the use of the national concern branch of pogg to protect the environment, but it is unlikely that a law as far-reaching as CEPA (for example) would be authorized by pogg.[25] The problem is that an element of the national concern requirement is "distinctiveness". LeDain J., writing for the majority in *Crown Zellerbach*, provided what has become the classic definition:[26]

> For a matter to qualify as a matter of national concern . . . it must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution.

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[22] For detailed discussion, see Hogg, note 5, above, ch. 17.

[23] [1988] 1 S.C.R. 401.

[24] The point was addressed in the dissenting opinion of LaForest J. (p. 442). He rejected the criminal-law power as a basis for the anti-dumping provision on the assumption that only the protection of human health would qualify as a legitimate purpose of a criminal law.

[25] So held in *R. v. Hydro-Québec* [1997] 3 S.C.R. 213, paras. 78, 115 (control of toxic substances for environmental protection not sufficiently distinct to come within the national concern branch of pogg).

[26] [1988] 1 S.C.R. 401, 432.

The point of the requirement of distinctiveness is to make clear that pogg should not be allowed to absorb wide fields of legislative jurisdiction, which would be the case if subjects as broad as the environment (or inflation or health) were treated as matters of national concern. Le Dain J., while not asserting federal jurisdiction over pollution at large, held that "marine pollution" had "ascertainable and reasonable limits, in so far as its impact on provincial jurisdiction is concerned".[27] But he was writing for a narrow four-three majority. LaForest J., writing for the three dissenters, would have held that marine pollution lacked the distinctiveness required for a matter of national concern. Marine waters intermingled with fresh waters and were affected by coastal activity and by deposits from the air. The power to regulate marine pollution thus intruded too deeply into industrial and municipal activity, resource development, construction, recreation and other matters within provincial jurisdiction.

In the end, the relatively narrow law (prohibiting dumping at sea) in *Crown Zellerbach* just passed muster over a strong dissent. But the case is not encouraging for more ambitious federal environmental initiatives that have broad impacts on matters within provincial jurisdiction. The criminal-law power, despite its requirement of a prohibition, penalty and typically criminal purpose, probably remains a safer harbour than the national concern branch of the pogg power.

(b) Absence of a federal treaty power

Canada signed the Kyoto Accord[28] in 1997 and ratified it in 2002. The Accord is a multilateral treaty in which each state signatory agreed to make reductions in its greenhouse gas emissions by 2012. Each state signatory chose its own target, and Canada, then under the Liberal government of Prime Minister Chrétien, agreed to bring its emissions down to 6% below the 1990 level by the year 2012. That target was probably unattainable even at the time of signing because in 1997 Canada's emissions had already risen to a level 13% *above* the 1990 level. To move from 13% above to 6% below against a strong trend in the opposite direction would have required government regulation of the most draconian kind. No such action was taken, and the growth of Canada's population and economy relentlessly carried emissions ever upward, making the Kyoto target completely impossible.

Unlike its Liberal predecessors, the present Conservative government of Prime Minister Harper, which took office in 2006, has never claimed that Canada's Kyoto obligation could be fulfilled. However, the Conservative government in 2007 issued the policy paper that has been described earlier in this paper.[29] The 2007 paper (p. 4) said that: "The government is committed to reducing Canada's total emissions of greenhouse gases, relative to 2006 levels, by 20% by 2020 and by 60% to 70% by 2050." Note that the benchmark date is now 2006 not 1990, and the target date is now 2020 not 2012, and the target for 2020 (20% below 2006 levels) is about 19% higher than the Kyoto target for 2012 (6% below 1990 levels). Nevertheless, this was a plan to reduce greenhouse gas emissions, albeit one with easier targets than those agreed to at Kyoto.

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[27] *Id.*, 438.

[28] Kyoto Protocol to the United Nations Framework Convention on Climate Change, agreed to at Kyoto, Japan, December 10, 1997. Canada ratified the Protocol on December 17, 2002, following approval by the House of Commons and the Senate.

[29] Note 18, above.

However, as has been explained above, no legislation was introduced to implement the commitments in the 2007 policy paper, and they seem to have been quietly abandoned.

The Kyoto Accord contains no sanctions for non-compliance by parties. But it also contains in article 27 a provision for withdrawal by a party on one year's notice. Because the obligations of the Accord come to an end at the end of 2012, the last opportunity for a party to withdraw and avoid non-compliance was December 2011. On December 12, 2011, with Canada's greenhouse gas emissions at least 30 per cent above the 2012 Kyoto target, the federal Minister of the Environment, Peter Kent, announced that Canada would invoke its right to withdraw from the Accord, explaining that Canada would have to spend about $14 billion buying carbon credits abroad in order to comply with the Kyoto obligations.[30] This withdrawal from the Accord did not imply that Canada was withdrawing from the United Nations Framework Convention on Climate Change, to which the Kyoto Accord was a protocol, and so Canada will presumably participate in future international discussions on post-2012 climate change, and may even sign future treaties on the topic.

For present purposes, the relevance of Canada's treaty obligations is simply a prelude to note that Canada's accession to a treaty (like the Kyoto Accord) does not give the treaty any force in domestic law within Canada until it is implemented by legislation. And the signing and ratification of the treaty by Canada does not confer on Parliament any additional legislative power to implement the treaty. That was decided in the *Labour Conventions* case (1937),[31] striking down federal laws that attempted to enact national labour standards (minimum wage, maximum hours, and the like) in order to implement obligations undertaken by Canada in a multilateral treaty sponsored by the International Labour Organization. The Privy Council (then Canada's highest court) held that, since labour laws were a provincial responsibility under the division of powers in the Constitution Act, 1867,[32] they remained a provincial responsibility even after Canada signed a treaty agreeing to change its labour laws. Only the provinces could enact the required implementing legislation. In the context of the Kyoto Accord (or some future climate-change treaty), what this means is that Parliament could not use the treaty as the constitutional basis for a law controlling greenhouse gas emissions, even if the purpose of the law was to implement the treaty. That takes us back to the criminal-law power and the pogg power—the powers that exist regardless of the treaty.

(c) Federal taxation power

Parliament has the power to levy "any mode or system of taxation".[33] If Parliament chose to reduce greenhouse gas emissions by levying a "carbon tax" on the production or consumption of energy, it would have the power to do so. The only serious limitation on the federal power is that it cannot tax "lands or property belonging to ... any province",[34] which

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[30] Globe and Mail newspaper, March 13, 2000.

[31] *A.G. Can. v. A.G. Ont. (Labour Conventions)* [1937] A.C. 326 (Privy Council).

[32] The general rule is subject to the exception that industries falling within federal legislative power (for example, banking, shipping, long-haul land transportation, post office, telecommunications, radio and television) are governed by federal labour laws.

[33] Constitution Act, 1867, s. 91(3) ("the raising of money by any mode or system of taxation").

[34] *Id.*, s. 125.

would protect resources extracted by a province (but not by private producers) from provincial Crown lands.[35] However, taxes played no part in the 2007 policy paper proposals.

The climate change technology fund, which was part of the 2007 policy paper proposals, involved contributions by regulated firms in exchange for emissions credits. It was not described as a taxation measure, and the assumption of this paper is that the fund would have had to be justified as an exercise of Parliament's criminal-law power. However, such a fund could be set up under Parliament's taxation power. The contributions could be levied as a tax (from which emissions-compliant firms would be exempt), and the proceeds of the tax could be dedicated to a climate change technology fund. If the legislation establishing the fund were designed and enacted as a tax measure, then the link to the criminal-law power would no longer be necessary to the validity of the fund.[36]

(d) Federal spending power

Ever since Canada signed the Kyoto Accord, one thing that successive federal governments have done to reduce greenhouse gas emissions is to spend money on such things as informing the public on how they can reduce their use of energy (and exhorting them to voluntarily do so) and monetary incentives for green renovations, green technology and the like. The 2007 policy paper (pp. 3-4) commits to various spending (and tax rebate)[37] initiatives. It is clear that Parliament has the authority to authorize the expenditure of public money for any purpose it chooses, including purposes that it could not directly accomplish by regulation.[38]

7. Conclusion

The Parliament of Canada has a suite of powers that enable it to use a variety of regulatory instruments to protect the environment,[39] but each power is limited in a way that makes it difficult to construct a comprehensive environmental law that could be enacted by Parliament alone. The most far-reaching federal statute, the Canadian Environmental Protection Act, has been upheld under the criminal-law power, but recent decisions of the Supreme Court suggest that the constitutional requirements of a prohibition, penalty and typically criminal purpose may restrict the scope of the regulatory regime that can be enacted under that Act (for example, to control greenhouse gas emissions).

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[35] *Re Exported Natural Gas Tax* [1982] 1 S.C.R. 1002.

[36] It could be argued that the law would be only a colourable "tax", and would have to be supported by some power other than the taxation power, but the taxation power is in fact frequently exercised in order to accomplish objectives other than (or in addition to) the raising of revenue, and a colourability argument seems never to have been made before a court and has certainly never been successful. The general assumption is that the taxation power is wide enough to encompass a variety of legislative objectives within the general context of a revenue raising law.

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

[38] Hogg, note 5, above, sec. 6.8.

[39] Note that many federal powers not discussed in this paper supply authority over aspects of the environment: note 3, above.