PRB 02-14E

THE KYOTO PROTOCOL:
OVERVIEW OF FEDERAL LEGAL MECHANISMS FOR IMPLEMENTATION

Mollie Dunsmuir
Law and Government Division

30 September 2002

PARLIAMENTARY RESEARCH BRANCH
DIRECTION DE LA RECHERCHE PARLEMENTAIRE

The Parliamentary Research Branch of the Library of Parliament works exclusively for Parliament, conducting research and providing information for Committees and Members of the Senate and the House of Commons. This service is extended without partisan bias in such forms as Reports, Background Papers and Issue Reviews. Research Officers in the Branch are also available for personal consultation in their respective fields of expertise.

CE DOCUMENT EST AUSSI PUBLIÉ EN FRANÇAIS

TABLE OF CONTENTS

Page

CANADA

LIBRARY OF PARLIAMENT
BIBLIOTHÈQUE DU PARLEMENT

THE KYOTO PROTOCOL: OVERVIEW OF FEDERAL LEGAL MECHANISMS FOR IMPLEMENTATION

OVERVIEW

The question of climate change has been the subject of international discussions and negotiations for almost 15 years. International cooperation is established under the 1992 United Nations Framework Convention on Climate Change and the Kyoto Protocol of 1997 (named after the city in Japan where the agreement was negotiated). Under the Protocol, Canada's target is to reduce its greenhouse gas (GHG) emissions to 6% below 1990 levels for the period from 2008 to 2012. In fact, Canada's emissions of greenhouse gases have continued to grow and are now 19.6% higher than in 1990,(1) requiring a very significant reduction if the 2008-2012 target is to be met.(2)

The process began in 1988 when the Intergovernmental Panel on Climate Change (IPCC) established internationally agreed-upon assessments of the science of climate change, including causes, impacts and possible responses. Following the first IPCC report in 1990, the United Nations Framework Convention on Climate Change was agreed upon and signed by Canada in 1992 at the Rio de Janeiro "Earth Summit." A series of Conferences of the Parties, referred to as CoP 1, CoP 2, etc., followed. At CoP 3, held in Kyoto, delegates from 160 countries agreed to the Kyoto Protocol. The agreement anticipated that industrialized countries would reduce their GHG emissions by 5.2% overall.(3)

On 2 September 2002, Prime Minister Chrétien announced at the World Summit on Sustainable Development that the Canadian Parliament would be asked to vote on the

---

(1) *A Discussion Paper on Canada's Contribution to Addressing Climate Change*, Government of Canada, Spring 2002, p. 4 (hereinafter cited as "Government paper").

(2) For background information on climate change and the Kyoto Protocol, see *Global Warming, Greenhouse Gases and the Kyoto Protocol*, TIPS 39, Parliamentary Research Branch, Library of Parliament, September 2002.

(3) For further details on the climate change chronology, see the web site of Environment Canada: http://www.ec.gc.ca/climate/action_cando-e.html.

ratification of the Kyoto Protocol before the end of the year. The Speech from the Throne on 30 September 2002 also referred to the introduction of a Parliamentary resolution before the end of the year, but provincial resistance to this schedule has become increasingly pronounced. At this point, it appears unlikely that there will be a provincial consensus to implement the Kyoto Protocol as it now stands, and increasingly possible that the federal government would have to implement the required emission reductions without full provincial legislative cooperation.

Although there has been a good deal of commentary over the past several years as to whether the federal government should ratify the Kyoto Protocol, less attention has been paid to the actual ability of the federal government to implement it. While the federal executive has the authority to sign or ratify any international treaty, the authority to implement it must be found within domestic Canadian constitutional law.

Subject to the provisions of the *Canadian Charter of Rights and Freedoms,*[4] all legislative power in Canada is divided between the federal and provincial governments. If the two levels of government agree to implement Kyoto, or any other treaty, there is little doubt they could do so. However, previous environmental treaties and agreements have generally been implemented through genuine federal-provincial cooperation and, at this time, a provincial consensus to accept the federal plan for implementing Kyoto seems far from certain. Commentators who cite action on acid rain and protecting the ozone layer as precedents for Kyoto tend not to mention that *The Canada-Wide Acid Rain Strategy* and the *National Action Plan* to implement the Montréal Protocol on the ozone layer fully engaged the federal-provincial process.[5]

This paper deals first with the development of the law behind treaty ratification and implementation in Canada. It then summarizes the options given in the federal discussion

---

(4) Although there has been some mention in the media concerning the possible use of the "notwithstanding clause," it is difficult to see how this would apply. The notwithstanding clause, or section 33 of the *Constitution Act, 1982*, allows either Parliament or the legislature of a province to opt out of certain provisions of the *Canadian Charter of Rights and Freedoms*. It is difficult to see how the *Charter* would have any broad application to measures taken to implement the Kyoto accord.

(5) See "What's Being Done? What is Canada Doing?" (http://www.ec.gc.ca/acidrain/done-canada.html) and *2000 Annual Progress Report on the Canada-Wide Acid Rain Strategy for Post-2000* for a description of action taken on acid rain (http://www.ccme.ca/assets/pdf/acid_rain_e.pdf). "The Montreal Protocol: History" (http://www.ec.gc.ca/press/oo1219_b_e.htm) and the *National Action Plan for the Environmental Control of Ozone-Depleting Substances (ODS) and their Halocarbon Alternatives* (http://www.ccme.ca/assets/pdf/nap_update_e.pdf) deal with measures taken to protect the ozone layer.

paper leading up to the consultations in the late spring and summer of 2002,[6] and suggests which federal powers might be involved. Finally, it describes these powers in some detail. In the absence of a clear plan for implementation, it is difficult to assess which constitutional mechanisms the federal government might find most useful. However, certain heads of power seem likely to come into play: the criminal law power; the "national concern" branch of peace, order and good government (p.o.g.g.); the taxing and spending powers; trade and commerce; and interprovincial undertakings.

Although there are a number of greenhouse gases, having different characteristics and subject to different methods of regulation,[7] carbon dioxide or CO_2 is the best known and most important,[8] and this paper limits any references to GHGs to CO_2.

The paper concludes that the main difficulty for the federal government, should it decide to implement Kyoto without provincial agreement, will be to find a strategy that can be put in place without affecting the basic distribution of powers between the federal and provincial governments. Although the Supreme Court has noticeably expanded the federal criminal law power over the past half-dozen years, it has consistently expressed reluctance to uphold federal legislation that would result in any such basic shift in the distribution of powers. On the face of

---

(6) Government paper (2002).

(7) The United States Environmental Protection Agency (EPA) notes: "Some greenhouse gases occur naturally in the atmosphere, while others result from human activities. Naturally occurring greenhouse gases include water vapor, carbon dioxide, methane, nitrous oxide, and ozone. Certain human activities, however, add to the levels of most of these naturally occurring gases: *Carbon dioxide* is released to the atmosphere when solid waste, fossil fuels (oil, natural gas, and coal), and wood and wood products are burned. *Methane* is emitted during the production and transport of coal, natural gas, and oil. Methane emissions also result from the decomposition of organic wastes in municipal solid waste landfills, and the raising of livestock. *Nitrous oxide* is emitted during agricultural and industrial activities, as well as during combustion of solid waste and fossil fuels. Very powerful greenhouse gases that are not naturally occurring include *hydrofluorocarbons* (HFCs), *perfluorocarbons* (PFCs), and *sulfur hexafluoride* (SF6), which are generated in a variety of industrial processes. Each greenhouse gas differs in its ability to absorb heat in the atmosphere. HFCs and PFCs are the most heat-absorbent. Methane traps over 21 times more heat per molecule than carbon dioxide, and nitrous oxide absorbs 270 times more heat per molecule than carbon dioxide," United States EPA web site: *Global Warming: Emissions*, http://www.epa.gov/global arming/emissions/index.html.

(8) An indication of the importance of CO_2 emissions relative to other GHGs is the fact that the Kyoto Protocol comes into force when it has been ratified by 55 nations representing at least 55% of the industrial countries' 1990 CO_2 emissions (Government paper (2002), p. 13). Some commentators have suggested that CO_2 is a longer-term problem and that, in the short term, reducing other GHGs might be easier and more efficient. However, given the importance of CO_2 as a contributor to GHG emissions, it is difficult to imagine any approach to Kyoto that does not substantively deal with CO_2 emissions.

it, the consequences of a program to control GHG emissions might well have such pervasive consequences that a fundamental shift in the distribution of powers would necessarily result from unilateral implementation.

TREATY RATIFICATION AND IMPLEMENTATION[9]

The fact that the federal government has the power to ratify a treaty often leads people to conclude that there must be a similar federal power to implement such treaties; but the situation is considerably more complicated. In order to implement a treaty that it has ratified, the federal government must have the domestic constitutional jurisdiction to either undertake the required actions or pass the required legislation. Where a treaty has significant international implications, it is possible that the courts will be more likely to take an expansive view of federal jurisdiction,[10] such as by referring to the peace, order and good government power; but the government's implementing actions must still be within federal powers under the Canadian constitution.

This distinction between the right to ratify and the right to implement a treaty arises from constitutional history. Under British constitutional tradition, it is the Crown or sovereign who speaks on behalf of the state in international matters, although this power can be delegated. This is one of the Crown prerogatives, or powers vested in the Sovereign personally rather than in Parliament.

In 1867, the British colonies, including Canada, lacked the capacity to enter into treaties and Great Britain spoke for the Empire. However, Canada was self-governing in domestic affairs, and section 132 of the *Constitution Act, 1867* gave the "Parliament and Government of Canada ... all powers necessary or proper for performing the obligations of Canada or of any province thereof, as part of the British Empire, towards foreign countries, arising under treaties between the Empire and such foreign countries." Because it was never considered in 1867 that former British colonies would one day have the capacity to enter into

---

(9) For further information see Peter Hogg, *Constitutional Law of Canada* (looseleaf edition), c. 11; R. E. Sullivan, "Jurisdiction to Negotiate and Implement Free Trade Agreement in Canada: Calling the Provincial Bluff," *University of Western Ontario Law Review*, Vol. 24 (1986), pp. 63-82.

(10) See, for example *Re Regulation & Control of Radio Communication*, [1932] 2 D.L.R. 865.

foreign treaties on their own behalf, the *Constitution Act, 1867* did not address the issue of how such treaties would be implemented.(11)

The first issue to be decided when Canada began to negotiate and ratify its own treaties was the status of section 132. Although there was an early suggestion that the power to implement treaties might be extended from Empire treaties to Dominion treaties,(12) the *Labour Conventions Case* (1937) conclusively decided otherwise.

The *Labour Conventions Case*(13) arose after the International Labour Organization, of which Canada was a member, agreed to enact (pursuant to the Treaty of Versailles) legislation guaranteeing minimum employee rights in such areas as working hours, weekly rest and minimum wage. In 1935, the federal government passed the *Weekly Rest in Industrial Undertakings Act,* the *Minimum Wages Act*, and the *Limitations of Hours of Work Act*, all dealing with subjects that were traditionally considered to be within provincial jurisdiction. The legitimacy of these Acts was argued before the Judicial Committee of the Privy Council, then the ultimate arbiter of Canadian law.

The Privy Council first found that section 132 of the *Constitution Act, 1867* could not support the legislation: "The obligations are not obligations of Canada as part of the British

---

(11) "This idea of Canada as a Dominion being bound by a convention equivalent to a treaty with foreign powers was quite unthought-of in 1867. It is the outcome of the gradual development of the position of Canada vis-à-vis to the mother country Great Britain, which is found in these later days expressed in the Statute of Westminster [in 1931] … It is not therefore to be expected that such a matter should be dealt with in explicit words in either s. 91 or s. 92," *Re Regulation & Control of Radio Communication*, [1932] 2 D.L.R. 865 (hereinafter cited as "*Radio Reference, 1932*")*.*

(12) *Radio Reference, 1932*: "In fine, though agreeing that the [international radiotelegraph] Convention was not such a treaty as is defined in s. 132, their Lordships think that it comes to the same thing. On August 11, 1927, the Privy Council of Canada with the approval of the Governor-General chose a body to attend the meeting of all the powers to settle international agreements as to wireless. The Canadian body attended and took part in deliberations. The deliberations ended in the Convention with general regulations appended being signed at Washington on November 25, 1927, by the representatives of all the powers who had taken part in the conference and this Convention was ratified by the Canadian Government on July 12, 1928. The result is in their Lordships' opinion clear. It is Canada as a whole which is amenable to the other powers for the proper carrying out of the Convention: and to prevent individuals in Canada infringing the stipulations of the Convention it is necessary that the Dominion should pass legislation which should apply to all the dwellers in Canada." The Privy Council, however, also grounded its decision in the federal power over interprovincial works and undertakings.

(13) *A.-G. Canada* v. *A.-G. Ontario (Labour Conventions),* [1937] A.C. 326.

Empire, but of Canada, by virtue of her new status as an international person, and do not arise under a treaty between the British Empire and foreign countries."[14]

They concluded that labour relations legislation was within the purview of the provinces, although certain specific federal heads of power give the federal government jurisdiction over such areas as federal employees.

> For the purposes of ss. 91 and 92, i.e., the distribution of legislative powers between the Dominion and the Provinces, there is no such thing as treaty legislation as such. The distribution is based on classes of subjects: and as a treaty deals with a particular class of subjects so will the legislative power of performing it be ascertained. ...
>
> [T]he legislative powers remain distributed and if in the exercise of her new functions derived from her new international status she incurs obligations they must, so far as legislation is concerned when they deal with provincial classes of subjects, be dealt with by the totality of powers, in other words by co-operation between the Dominion and the Provinces. *While the ship of state now sails on larger ventures and into foreign waters she still retains the water-tight compartments which are an essential part of her original structure.*[15] (italics added)

The reference to "water-tight compartments" has remained the centrepiece of treaty jurisprudence, although it has often been the subject of academic criticism. Professor Hogg, for example, while accepting that the absence of a "treaty power" may be "one of the prices of federalism," concludes that "when all is said and done it is clear that the *Labour Conventions* decision has impaired Canada's capacity to play a full role in international affairs, and Canada has been unable to accept or in some cases to fulfil treaties in respect of labour, education, the status of refugees, women's rights and human rights generally."[16]

Professor Hogg finds some consolation in the fact that, even in the absence of a treaty power, federal powers may be extensive enough to allow for the substantive implementation of some treaties by the federal Parliament alone. As well, the existence of a

---

(14) *Labour Conventions Case,* at 680. The Privy Council also considered the *Radio Reference, 1932* case, which had granted federal jurisdiction over radiotelegraphy subsequent to an international treaty on that subject, but concluded that "the true ground of the decision was that the convention in that case dealt with classes of matters which did not fall within the enumerated classes of subjects in s. 92 or even within the enumerated classes in s. 91."

(15) *Labour Conventions Case*, at 681-682, 683-684.

(16) Hogg (looseleaf), c. 11.5(c).

treaty may help to establish an international aspect that could move the subject matter into the federally governed areas of "national concern" or "international trade."

> Even if the *Labour Conventions* rule continues to govern the implementation of treaties, so that there is no treaty power as such, the federal catalogue of legislative powers is extensive enough to enable many treaties to be implemented by the federal Parliament. Moreover, the existence of a treaty will often be relevant to the characterization of implementing legislation, and will tend to support the federal Parliament's power to enact the legislation.(17)

THE GOVERNMENT OF CANADA'S DISCUSSION PAPER

A Discussion Paper on Canada's Contribution to Addressing Climate Change (the "Government paper") describes four policy options for meeting the Kyoto target:

- *Option 1* envisages a **broad as practical domestic emissions trading** system. This would require fossil fuel suppliers to hold permits equivalent to the CO_2 emissions that result from the combustion of the fossil fuels they sell; non-combustion process emissions would also be covered. This approach would include private-sector use of the international market for emission permits.

- *Option 2*, **all targeted measures**, envisages a broad range of policy instruments including incentives, covenants, regulations and, possibly, fiscal measures. The Government paper suggests that Option 2, in particular, would rely on federal-provincial-territorial cooperation and public-private partnerships.

- *Option 3* is called the **mixed approach – large final emitter domestic emissions trading**. Instead of requiring emission permits for fossil fuel suppliers, Option 3 would require them for major industrial emitters in the following sectors: electricity (coal, oil and gas); oil and gas production, including oil sands; petroleum refining; pipelines; pulp and paper; cement; chemicals; iron and steel smelting; and selected other industries.

- *Option 4*, the **adjusted mixed approach**, is a variation of Option 3. Although there are important policy differences, Option 4 does not seem to raise any additional constitutional implications.

All four options envisage significant purchases of international permits by either the private sector (only Options 1 and 3), government or both.

---

(17) *Ibid.*

To implement these options, the Government paper describes three broad policy instruments, or sets of policy instruments.(18) The left-hand column below describes the government's policy instruments, and the right-hand column suggests the federal legislative powers that might be involved.

Policy instrument	Potential federal powers involved
1. Under a **domestic emissions trading** system, companies would be allocated emission permits. Firms that can reduce their emissions at low cost could sell their excess permits, presumably to firms that can only reduce emissions at a comparatively high cost.(19)	- National concern - Criminal law - Trade and commerce - Interprovincial undertakings
2. **Targeted measures** encourage consumers or particular consumers to employ the best technologies and utilize the best practices. They could include a broad range of policy instruments including incentives, covenants, regulations and fiscal measures.	- Taxing power - Spending power - Criminal law - Interprovincial undertakings
3. **Government purchases of international permits** would involve the purchase of emissions permits on the international market.	- Spending power

It is these federal constitutional mechanisms that are discussed in the rest of the paper.

---

(18) Government paper (2002), p. 18.

(19) See, for example, Joseph F. Castrilli, in association with Pollution Probe, "Legal Authority for Emissions Trading in Canada," March 1998, Appendix 1 to *The Legislative Authority to Implement a Domestic Emissions Trading System*, National Round Table on the Environment and the Economy, January 1999. Castrilli differentiates between a "cap and trading program" (closed) and open market trading: "[A closed system] is limited to a specified group of sources (e.g. large electric utility generators) ... and the total amount of allowable emissions from program participants is capped to a legislatively defined national aggregate. ... The cap creates the motivation to reduce emissions, especially if it is a declining cap that allows smaller amounts of pollutants to be emitted by these sources over time. ... On the other hand, a closed system requires a rigorous method of allocation and can reduce the number of sources eligible to participate, thus reducing the cost differential between sources necessary to induce trading. ... In theory, open market trading can involve any group of pollution sources whose emissions of the same or different pollutants are quantifiable in common terms. ... However, unlike closed market trading, open market trading does not work with a predetermined cap or set of allowances" (pp. 4-5).

THE "NATIONAL CONCERN" BRANCH OF "PEACE, ORDER AND GOOD GOVERNMENT"

Versions of the "national concern" power have been discussed for over 100 years, originally under the terminology "national dimensions," and it has provided the sole basis of the decision in cases dealing with aeronautics (1952), the National Capital Region (1966) and ocean dumping (1988).(20) The nature of the doctrine was extensively discussed by the minority in *R* .v. *Hydro-Québec,* a case involving the validity of the *Canadian Environmental Protection Act* which is discussed in more detail below under "The Criminal Law Power":

- the national concern doctrine is separate and distinct from the national emergency doctrine (another branch of p.o.g.g.), since the latter deals with legislation of a temporary nature;
- the national concern doctrine applies both to new matters which did not exist at Confederation, and to matters which were originally of a local or private nature in a province but have since become matters of national concern;
- 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 the impact of assigning the matter to the federal government must be reconcilable with the fundamental distribution of legislative power under the Constitution; and
- in determining whether a matter has the necessary degree of singleness, distinctiveness and indivisibility to distinguish it from matters of provincial concern, it is relevant to consider the effect outside the province of a provincial failure to deal effectively with the control or regulation of the matter within the province (the "provincial disability" test).(21)

Overall, the Supreme Court has been reluctant to resort to the national concern doctrine when another head of power is available. For example, in *R.* v. *Hydro-Québec* the Court noted:

---

(20) *Johanneson* v. *West St. Paul*, [1952] 1 S.C.R. 292; *Munro* v. *National Capital Commission*, [1966] S.C.R. 663; and *R.* v. *Crown Zellerbach*, [1988] 1 S.C.R. 401. See Hogg (looseleaf), c. 17.3(a), for a full discussion of the history.

(21) *R.* v. *Hydro-Québec*, [1997] 3 S.C.R. 213, para. 65 (hereinafter cited as *Hydro-Québec*). The decision was 5-4 and based on the applicability of the criminal law power. The minority specifically found that the national concern power did not apply, and the majority found that it was not necessary to deal with the question.

> the test for singleness, distinctiveness and indivisibility is a demanding one. Because of the high potential risk to the Constitution's division of powers presented by the broad notion of "national concern," it is crucial that one be able to specify precisely what it is over which the law purports to claim jurisdiction. Otherwise "national concern" could rapidly expand to absorb all areas of provincial authority. ... [O]nce a subject matter is qualified of national concern, Parliament has an exclusive jurisdiction of a plenary nature to legislate in relation to that matter, including its intra-provincial aspects.(22)

Thus, if the national concern doctrine is invoked in broadly based matters, such as the environment, that matter then falls within the exclusive power of Parliament. Whereas legislation based on the criminal law power leaves it open to the provinces to legislate in the same general area on the basis of other powers, legislation based on the national concern doctrine effectively shuts the provinces out of any legislative authority in the matter involved.

> While the constitutional necessity of characterizing certain activities as beyond the scope of provincial legislation and falling within the national domain was accepted by all the members of the Court [in *Crown Zellerbach*], the danger of too readily adopting this course was not lost on the minority. Determining that a particular subject matter is a matter of national concern involves the consequence that the matter falls within the exclusive and paramount power of Parliament and has obvious impact on the balance of Canadian federalism. In *Crown Zellerbach*, the minority (at p. 453) expressed the view that the subject of environmental protection was all-pervasive, and if accepted as falling within the general legislative domain of Parliament under the national concern doctrine, could radically alter the division of legislative power in Canada.(23)

It seems to be generally accepted that the everyday nature of greenhouse gas emissions would create a major barrier to the use of the "national concern" power when implementing Kyoto.(24) CO_2 emissions, in particular, tend to result from the great majority of

---

(22) *Hydro-Québec,* para. 67.

(23) *Hydro-Québec*, para. 115.

(24) See, for example, Castrilli (1998): "The recent decisions of the [Supreme Court of Canada] suggest that there would be great reluctance on the part of the Court to support federal environmental emissions trading legislation on the basis of the national concern doctrine given the potential impact on provincial authority in the same area" (p. 12).

processes involving the production or use of energy or, put another way, from all processes involving the combustion of fossil fuels. This inherently implicates every activity related to resource development, industrial processes, residential heating and cooling, and transportation, among other processes.

Therefore, a judicial determination that the regulation of CO_2 emissions falls within the exclusive jurisdiction of the federal Parliament would seem to "radically alter the division of legislative power in Canada." Stating the goal in other words, such as "measures to combat climate change," does not alter the scope of the potential intrusion into provincial jurisdiction. Although such language might sound closer to a "national concern," it is still the breadth of the measures that would threaten the existing division of legislative power. In fact, giving the federal government exclusive jurisdiction over all facets of "climate change" would likely result in an even more fundamental shift in the division of powers than jurisdiction over greenhouse gases.

THE CRIMINAL LAW POWER

A. A Criminal Public Purpose with a Prohibition and a Penalty

The scope of the criminal law power, which is often described as "plenary,"(25) has proved difficult to define precisely, but has generally expanded as the law evolved and society grew more complex. The "starting point for the contemporary analysis of the criminal law power" is the *Margarine Reference* (1951), in which the Privy Council adopted the reasons of Justice Rand of the Supreme Court of Canada in striking down federal legislation.(26) Justice Rand's three-part test for the valid use of the criminal law power – a prohibition, a penalty and a

(25) "The criminal law power is plenary in nature and this Court has always defined its scope broadly," *RJR-MacDonald Inc.* v. *Canada (Attorney General)*, [1995] 3 S.C.R., para 28.

(26) *Canadian Federation of Agriculture* v. *Quebec (A.G.)*, [1951] A.C. 179, confirming *Reference Re Validity of s. 5(a) of Dairy Industry Act (Canada)*, [1949] S.C.R. 1 (hereinafter cited as the *Margarine Reference*). This case involved the power of the federal government to prohibit the importation, manufacture or sale of margarine. Had there been evidence that margarine was a danger to the public health, a valid criminal public purpose would have been combined with a prohibition and a penalty, and the legislation would have been valid criminal law. However, the court found that the true purpose of the legislation was to protect the domestic butter industry, and so the legislation was found in pith and substance to be in relation to property and civil rights rather than criminal law. See Patrick J. Monahan, *Essentials of Canadian Constitutional Law*, 2nd ed., Irwin Law, Toronto, 2002, pp. 332-333, and Hogg (looseleaf), c. 18.2, for a discussion of this case.

criminal public purpose – remains the foundation of current Supreme Court decisions on the matter:

> A crime is an act which the law, with appropriate penal sanctions, forbids; but as prohibitions are not enacted in a vacuum, we can properly look for some evil or injurious or undesirable effect upon the public against which the law is directed. That effect may be in relation to social, economic or political interests; and the legislature has had in mind to suppress the evil or to safeguard the interest threatened. ...
>
> Is the prohibition then enacted with a view to a public purpose which can support it as being in relation to criminal law? Public peace, order, security, health, morality: these are the ordinary though not exclusive ends served by that law, but they do not appear to be the object of the parliamentary action here.(27)

RJR-MacDonald (tobacco legislation, 1995), *Hydro-Québec* (environmental legislation, 1997) and the *Firearms Reference* (2000), three recent Supreme Court of Canada cases dealing with the relationship between the criminal law power and regulatory measures, have all referred to Justice Rand's definition.(28) The test was most succinctly summed up in the *Firearms Reference*: "As a general rule, legislation may be classified as criminal law if it possesses three prerequisites: a valid criminal law purpose backed by a prohibition and a penalty."(29) Traditionally, a criminal law purpose is nationwide in its application.

It is worth noting that Justice Rand clearly stated that his categories – public peace, public order, public security, public health, and public morality – were not exhaustive or "exclusive." In the event, the courts have interpreted the concept of a criminal public purpose with considerable flexibility:

> Moreover, in contrast to the approach taken in relation to other federal powers such as the peace, order, and good government power or the trade and commerce power, the courts in subsequent cases have construed these criminal purposes in extremely liberal and flexible terms. In their criminal law jurisprudence, the courts have not

(27) *Margarine Reference*, pp. 49-50.

(28) *RJR-MacDonald Inc.* v. *Canada (Attorney General)*, [1995] 3 S.C.R. 199; *R.* v. *Hydro-Québec*, [1997] 3 S.C.R. 213; and *Reference re Firearms Act*, [2000] 1 S.C.R. 7.

(29) *Firearms Reference,* para. 27.

> evinced the same kind of concern (much in evidence in other contexts) about the need to limit the scope of federal authority so as to ensure that federal powers do not intrude into areas of exclusive provincial concern. The result has been that the criminal law power has been treated by the courts as a plenary grant of authority, supporting federal regulation of matters that might otherwise fall within provincial jurisdiction as an aspect of property and civil rights in the province.(30)

It seems generally accepted that the courts' approach to the federal criminal law jurisdiction has been increasingly expansive, despite a formal reliance on a criminal public purpose, a prohibition and a penalty.

> While the exercise of the federal criminal law power cannot amount to a disguised attempt to regulate matters unrelated to the criminal law, the courts have held that federal legislation enacted pursuant to the criminal law power can be preventive or punitive, can include dispensations and exemptions, can determine the extent of blameworthiness, can provide for functionally related civil remedies, and can create new crimes.(31)

With respect to the possible implementation of Kyoto, there are at least four aspects of the development of criminal law jurisprudence that bear comment: the historical treatment of the matter; the extent of the required prohibition; the nature of the criminal public purpose; and the question of whether the use of criminal power so deeply invades provincial jurisdiction as to distort the federal-provincial constitutional balance.

B. The Historical Treatment of the Subject Matter

In 1922, Viscount Haldane held that the criminal law power was applicable only "where the subject matter is one which by its very nature belongs to the domain of criminal jurisprudence."(32) Professor Hogg suggests that Justice Rand's test in the *Margarine Reference*

---

(30) Monahan (2002), p. 333.

(31) Martha Jackman, "Constitutional Jurisdiction Over Health in Canada," *Health Law Journal*, Vol. 8 (2000), p. 95, para. 8.

(32) *Board of Commerce Case*, [1922] 1 A.C. 191, at 198-199. See Hogg (looseleaf), c. 18.2, for a fuller discussion.

is "only a slightly more sophisticated version" of Viscount Haldane's view, and it is worth noting that certain subjects are still treated by the courts as inherently criminal.

When there are potentially conflicting federal and provincial heads of power, the courts will look to the "pith and substance" of the legislation, or its "true meaning and essential character," and then decide whether this purpose comes within the criminal law power.(33) In this analysis, they may look to the historical treatment of the subject.

For example, in a 1993 case dealing with Nova Scotian legislation prohibiting the operation of private abortion clinics, the Supreme Court of Canada found that abortion legislation, or at least the prohibition of abortion with penal consequences, was historically considered to be part of the criminal law. Provincial legislation prohibiting abortions and imposing penal consequences is therefore *prima facie* criminal law, and to regulate the delivery of abortion services validly the Nova Scotia legislation would have to have been more solidly anchored in health care policy.(34)

Similarly, in *Reference re Firearms Act* (2000), the Supreme Court of Canada looked to the history of gun control legislation in determining that the Act is in pith and substance directed to public safety:

> Finally, there is a strong argument that the purpose of this legislation conforms with the historical public safety focus of all gun control laws...
>
> We therefore conclude, viewed from its purpose and effects, the *Firearms Act*, is in "pith and substance" directed at public safety.
>
> In determining whether the purpose of a law constitutes a valid criminal law purpose, courts look at whether laws of this type have traditionally been held to be criminal law: ... Courts have repeatedly held that gun control comes within the criminal law sphere. As Fraser C.J.A. demonstrated in her judgment, gun control has been a matter of criminal law since before the enactment of the *Criminal Code* in 1892, and has continued since that date...(35)

---

(33) *Firearms Act,* para. 15. See also *Hydro-Québec*, para. 113: "Though pith and substance may be described in different ways, the expressions "dominant purpose" or "true character" ... or "the dominant and most important characteristic of the challenged law" ... appropriately convey the meaning to be attached to the term."

(34) *R.* v. *Morgentaler*, [1993] 3 S.C.R. 463.

(35) *Firearms Act*, paras. 22, 26 and 32.

Such dangerous substances as toxic chemicals and inhaled tobacco smoke would seem to come within the concept of historically or inherently criminal matters. However, CO_2 emissions are inherent to almost every human activity; CO_2 is not inherently dangerous; and it is not a pollutant under normal definitions or circumstances. The danger lies in its indirect effects at a global level. It would be difficult to argue that CO_2 emissions are historically or inherently criminal.

C. The Requirement of a "Prohibition"

At one time, it was considered necessary that criminal legislation be based on a clear and general prohibition and, conversely, an extensive regulatory scheme was seen as contra-indicative of legislation with a criminal purpose. However, in *RJR-MacDonald*, *Hydro-Québec* and the *Firearms Reference*, the distinction between a prohibition and a regulatory scheme has been increasingly blurred.

In *RJR-MacDonald*, the tobacco companies argued that the *Tobacco Act* was not valid as criminal law for three reasons:

> First, that the conduct prohibited by the Act does not have an "affinity with a traditional criminal law concern"; second, that Parliament cannot criminalize an activity ancillary to an "evil" if it does not criminalize the "evil" itself; and, third, that the Act is more properly characterized as regulatory, not criminal, legislation.(36)

The latter two of these arguments go to the issue of the nature of the required prohibition.

Although the Court split on the *Charter* issues, seven of nine Justices found that the legislation was properly founded on the criminal law power, and agreed that Parliament had valid reasons not to implement a complete prohibition on the use or manufacture of tobacco products. As long as the measures undertaken were to effect the same underlying criminal public purpose, combating the "evil" of tobacco, and were not instead an attempt to invade a provincial area of jurisdiction, the legislation met the "prohibition" test.

> It seems clear that Parliament's purpose in enacting this legislation was to prohibit three categories of acts: advertisement of tobacco

(36) *RJR-MacDonald*, para. 45.

> products (ss. 4 and 5), promotion of tobacco products (ss. 6 to 8) and sale of tobacco products without printed health warnings (s. 9). These prohibitions are accompanied by penal sanctions under s. 18 of the Act, which ... creates at least a *prima facie* indication that the Act is criminal law.(37)
>
> In my view, once it is accepted that Parliament may validly legislate under the criminal law power with respect to the manufacture and sale of tobacco products, it logically follows that Parliament may also validly legislate under that power to prohibit the advertisement of tobacco products and sales of products without health warnings. In either case, Parliament is legislating to effect the same underlying criminal public purpose: protecting Canadians from harmful and dangerous products.(38)

Mr. Justice LaForest compared the legislation to the *Criminal Code* provisions on soliciting, which prohibit the solicitation of clients for prostitution but do not prohibit prostitution itself. "While I recognize that Parliament has chosen a circuitous path, I find it difficult to say that Parliament *cannot* take this route. The issue is not whether the legislative scheme is frustrating or unwise but whether the scheme offends the basic tenets of our legal system."(39)

The argument that the Act was regulatory rather than criminal was primarily based on the large number of exemptions involved. Mr. Justice LaForest decided that such an argument "disregards the long-established principle that the criminal law may validly contain exemptions for certain conduct without losing its status as criminal law."(40) He cited as examples the *Lord's Day Act* provision prohibiting gambling on a Sunday unless the province had passed legislation to the contrary; the abortion provisions in the *Criminal Code*, which exempted abortions carried out under certain circumstances; and gambling legislation, which exempted provincial lotteries conducted in accordance with the terms and conditions of licences issued by the Lieutenant-Governor.

Mr. Justice LaForest summarized his definition of the criminal law power as follows:

---

(37) *Ibid.*, para. 29.

(38) *Ibid.*, para. 43.

(39) *Ibid.*, para. 50.

(40) *Ibid.*, para. 53.

> The scope of the federal power to create criminal legislation with respect to health matters is broad, and is circumscribed only by the requirements that the legislation must contain a prohibition accompanied by a penal sanction and must be directed at a legitimate public health evil. If a given piece of federal legislation contains these features, and if that legislation is not otherwise a "colourable" intrusion upon provincial jurisdiction, then it is valid as criminal law.(41)

The *Hydro-Québec* case arose from a charge of dumping PCBs(42) into a river, contrary to the *Canadian Environmental Protection Act*. The Court was split, with five judges holding that the legislation was valid, and four holding that it was invalid because it was regulatory rather than criminal. Both the majority and the minority accepted that the protection of the environment was a legitimate criminal law public purpose. For purposes of analyzing the scope of the criminal law power, the minority decision is also useful because it concentrates on clarifying the distinction between criminal and regulatory law.(43)

The provisions at issue were sections 34 and 35, contained in Part II of the Act under the heading "Toxic Substances." The Act provides for a complex structure, including a federal-provincial advisory committee, but essentially the Governor in Council can add a substance to the "List of Toxic Substances" and thus bring it under the regulatory control of section 34. According to the minority decision: "the Governor in Council is given extensive power to prescribe regulations dealing with every conceivable aspect of the listed substance."(44)

The minority found that the impugned provisions of the Act attempted to regulate environmental pollution rather than prohibit it. In passing, they noted that the Act was intended to allow for federal intervention where the environment itself was at risk, regardless of whether there was an effect on human health.

---

(41) *Ibid.*, para. 32.

(42) Polychlorinated biphenyls. The majority held: "One can only conclude that PCBs are not only highly toxic but long lasting and very slow to break down in water, air or soil. They do dissolve readily in fat tissues and other organic compounds, however, with the result that they move up the food chain through birds and other animals and eventually to humans. They pose significant risks of serious harm to both animals and humans. As well they are extremely mobile" (para. 158).

(43) As well, five of the nine judges have since left the Supreme Court, and it is by no means clear what a future decision on a similar case would be.

(44) *Hydro-Québec*, para. 19.

The minority found the legislation to be essentially regulatory in nature, and outside the scope of the criminal law power. In coming to this conclusion, they were influenced by a number of factors:

- any prohibition against the use of toxic substances did not come into effect until the administrative process of classification (adding the substance to the "List of Toxic Substances") had taken place;
- "it would be an odd crime whose definition was made entirely dependent on the discretion of the Executive";(45)
- the Governor in Council can exempt a province if the province already has equivalent regulations in place, and this would be an unusual provision for a criminal law since provinces do not have the jurisdiction to enact criminal legislation;(46)
- unlike *RJR-MacDonald*, there is no general prohibition; and
- the Supreme Court has unanimously held that the environment is a matter of shared jurisdiction, but the wholesale federal regulatory authority envisaged by the Act leaves little room for the provinces.

The majority decision described Part II of the Act as empowering the federal Ministers of Health and of the Environment "to determine what substances are toxic and to prohibit the introduction of such substances into the environment except in accordance with specified terms and conditions":

> In summary … the broad purpose and effect of Part II is to provide a procedure for assessing whether out of the many substances that may conceivably fall within the ambit of s. 11, some should be added to the List of Toxic Substances in Schedule I and, when an order to this effect is made, whether to prohibit the use of the substance so added in the manner provided in the regulations made under s. 34(1) subject to a penalty. These listed substances, toxic in the ordinary sense, are those whose use in a manner contrary to the regulations the Act ultimately prohibits. This is a limited prohibition applicable to a restricted number of substances. The prohibition is enforced by a penal sanction and is undergirded by a valid criminal objective, and so is valid criminal legislation.(47)

(45) *Ibid.*, para. 55.

(46) *Ibid.*, para. 57.

(47) *Ibid.*, para. 146.

Clearly, the nature of the required prohibition has expanded considerably in the past decade. However, there is some evidence that the majority decision in *Hydro-Québec* was influenced by the great importance given to the protection of the environment, as well as by the international nature of many environmental issues. According to Justice LaForest, writing for the majority:

> In *Crown Zellerbach*, I expressed concern with the possibility of allocating legislative power respecting environmental pollution exclusively to Parliament. I 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.(48)

As for the *Firearms Reference*, Alberta and the supporting interveners argued that the only way Parliament could address gun control would be to prohibit ordinary firearms outright. The Court found to the contrary:

> With respect, this suggestion is not supported by either logic or jurisprudence. First, the jurisprudence establishes that Parliament may use indirect means to achieve its ends. A direct and total prohibition is not required. ... Second, exemptions from a law do not preclude it from being prohibitive and therefore criminal in nature. ... Third, as noted above, the prohibition in this case is not merely designed to enforce a fee payment or regulatory scheme separate from the essential safety focus of the law.(49)

Overall, it would seem that the Court would favourably view environmentally directed criminal legislation based on a prohibition with regulatory exemptions, but it may difficult to characterize the measures suggested for the regulation of CO_2 as any type of "prohibition" whatsoever. In *Hydro-Québec*, however regulatory the enforcement scheme may

(48) *Ibid.*, para. 154.

(49) *Firearms Reference,* para. 39.

have looked, it was at least based on the fact of an ultimate prohibition on the use of a toxic substance.

Clearly, it is impossible to completely prohibit CO_2 emissions, and emission trading schemes or targeted measures are likely to be based on a reduction in use, not a prohibition of any type. It has been suggested that it might be possible to prohibit CO_2 emissions above a certain level, but it is unlikely that this could be implemented nationwide. More likely, it would be a sectoral or even regional approach, and such an approach would not seem consistent with the tradition that criminal law apply nationally. It is one thing to create exceptions to a national standard; it is another to not have a national standard at all.

D. The "Criminal Public Purpose" Test: Colourability(50)

The definition of a criminal public purpose is closely linked to the issue of colourability. To the extent that a piece of legislation has a valid criminal public purpose, it is unlikely to be a colourable intrusion upon provincial jurisdiction. Conversely, if the criminal public purpose is weak or unclear, it argues that the legislation may be colourable.

In *RJR-MacDonald,* Mr. Justice LaForest formulated the "criminal purpose" test in the broadest possible terms, asking "whether the prohibition with penal consequences is directed at an 'evil' or injurious effect upon the public."(51) According to Patrick Monahan, "LaForest seem to be suggesting ... that any law that takes the form of a prohibition accompanied by a penalty will be valid as criminal law as long as it is directed at an identifiable matter of legitimate public concern."(52)

In *Hydro-Québec*, the Court appeared to approve of this concept that legislation need only be directed at an "identifiable matter of legitimate public concern" or a "public evil which Parliament wishes to suppress" to meet the test of a criminal public purpose.

> [The criminal law] seeks by discrete prohibitions to prevent evils falling within a broad purpose, such as, for example, the protection of health. In the criminal law area, reference to such broad policy objectives is simply a means of ensuring that the prohibition is legitimately aimed at some public evil Parliament wishes to suppress

(50) "The 'colourability' doctrine is invoked when a statute bears the formal trappings of a matter within jurisdiction, but in reality is addressed to a matter outside jurisdiction," Hogg (looseleaf), s.15.5(f).

(51) *RJR-MacDonald,* para. 2.

(52) Monahan (2000), p. 335.

> and so is not a colourable attempt to deal with a matter falling exclusively within an area of provincial legislative jurisdiction.(53)

In the *Firearms Reference*, the Court assumed that the subject matter of the legislation was a criminal public purpose because of its historical treatment. Once that decision had been made, "incidental" effects on the provincial sphere were irrelevant. In order to establish that the Act was not proper criminal legislation, the provinces would have had to show that the pith and substance of the Act was the regulation of property and civil rights within the province.

> The argument that the 1995 gun control law upsets the balance of Confederation may be seen as an argument that, viewed in terms of its effects, the law does not in pith and substance relate to public safety under the federal criminal law power but rather to the provincial power over property and civil rights. Put simply, the issue is whether the law is mainly in relation to criminal law. If it is, incidental effects in the provincial sphere are constitutionally irrelevant. ... On the other hand, if the effects of the law, considered with its purpose, go so far as to establish that it is mainly a law in relation to property and civil rights, then the law is *ultra vires* the federal government. In summary, the question is whether the "provincial" effects are incidental, in which case they are constitutionally irrelevant, or whether they are so substantial that they show that the law is mainly, or "in pith and substance," the regulation of property and civil rights...(54)

On the basis of the three cases discussed, to implement Kyoto unilaterally the federal government would have to establish that the legislation involved was not in pith and substance directed at property and civil rights within the province, or at any other area of exclusive provincial jurisdiction, and that the provincial effects were merely incidental. Because of the pervasiveness of CO_2 emissions and the lack of practical mitigation technologies, regulating CO_2 will likely entail at least implicit regulation of activities, including industrial production, that result in emissions, as well as the levels of these activities. Arguably, this means that the essence of the legislation could relate to property and civil rights within the province.

---

(53) *Hydro-Québec,* para 132.

(54) *Firearms Reference,* para. 49.

E. Affecting the Basic Distribution of Powers

Although the Supreme Court has notably expanded the scope of the criminal law power in the past decade, it has maintained the view that the exercise of such a power should not intrude into areas of provincial jurisdiction to such an extent as to upset the constitutional balance of powers. However, the Court has not been very forthcoming in indicating at what point that balance would be unconstitutionally altered.

> 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. Given the pervasive and diffuse nature of the environment, this reality poses particular difficulties in this context.(55)

The *Firearms Reference* gives an indication of what legislation should *not* do if the balance of powers is to be maintained. Legislation must not:

- allow the federal government to significantly expand its jurisdictional powers to the detriment of the provinces;
- allow a colourable intrusion into provincial jurisdiction, either in the sense that Parliament has an improper motive or that it is taking over provincial powers under the guise of the criminal law; or
- erode the constitutional balance of powers.(56)

The minority in *Hydro-Québec* summarized the matter as follows:

> Almost everything we do involves "polluting" the environment in some way. The impugned provisions purport to grant regulatory authority over all aspects of any substance whose release into the environment "ha[s] or ... may have an immediate or long-term harmful effect on the environment" ...

(55) *Hydro-Québec*, para. 86.

(56) *Firearms Reference,* para. 53.

> One wonders just what, if any, role will be left for the provinces in dealing with environmental pollution if the federal government is given such total control over the release of these substances.
>
> > "[I]t is ... obvious that 'environmental management' could never be treated as a constitutional unit under one order of government in any constitution that claimed to be federal, because no system in which one government was so powerful would be federal."
>
> Parliament is not without power to act in pursuit of national policies on environmental protection. But it must do so pursuant to the balance of powers assigned by ss. 91 and 92. Environmental protection must be achieved in accordance with the Constitution, not in spite of it.(57)

THE TAXING AND SPENDING POWERS

A. The Taxing Power

One of the clearest of constitutional powers is the federal power to make laws in relation to "the raising of money by any mode or system of taxation" under section 91(3) of the *Constitution Act, 1867*. The one serious limitation on the taxing power is the issue of colourability and, as Professor Hogg points out:

> The pith and substance of a law that imposes a charge or a levy may be held to be some matter other than taxation, for example, insurance, unemployment insurance, banking, export trade, labour standards or marketing.(58)

Nonetheless, the federal taxing power is extensive and rarely challenged. It could presumably be used to support various Kyoto-related mechanisms, including fuel taxes or carbon taxes.(59)

---

(57) *Hydro-Québec*, paras. 60-62.

(58) Hogg (looseleaf), c. 30.1(a).

(59) However, the federal government cannot tax provincial property because of section 125 of the *Constitution Act*, *1867*: "No Lands or Property belonging to Canada or any Province shall be liable to Taxation." In *Re Exported Natural Gas Tax* ([1982], 1 S.C.R. 1004), the Supreme Court of Canada held that Alberta was not liable to pay a federal tax on the export of natural gas which the province itself had produced from its own provincial Crown lands and then exported from Canada.

B. The Spending Power

The "spending power" is not properly speaking a power at all, but rather the obverse of the taxing power. It is simply the ability of the federal government to generate revenue, and therefore spend money, above and beyond the amounts required to fulfil its specific constitutional responsibilities.

Some commentators, and many provincial governments, consider "the magnitude and nature of intergovernmental cash and tax transfers [to be] essentially *de facto* redistributions of power under the Constitution."(60) This view of the spending power as an independent constitutional concept can be summarized as follows:

> Shortly put, the [argument] is that Canada, by the powers of its purse, has unconstitutionally coerced the provinces to participate in certain programmes proposed by Canada, with standards and criteria established by Canada, although such programmes lie exclusively within the jurisdiction of the provinces.(61)

Nonetheless, the Courts have seemed comfortable with the interpretation that the federal government can spend or grant its money as it chooses,(62) so long as it does not directly regulate activities within the provincial sphere of jurisdiction.

> Parliament ... is entitled to spend the money that it raises through proper exercise of its taxing power in the manner that it chooses to authorize. It can impose conditions on such disposition so long as the

---

"The immunity is not lost merely because the Province of Alberta was engaged in the simple removal and transportation of natural gas in its natural unprocessed state. Water and certain impurities were removed somewhere between the wellhead and the international boundary. It is clear that the natural gas was not processed or combined in any way with any other material. At the border the gas was delivered to the United States buyer. It can hardly be said that the Province was in the 'business' of processing natural gas. It was simply selling its property in its natural and deliverable state and to which property the Province undoubtedly has the sole and absolute title" (p. 1080-1).

(60) Thomas J. Courchene, "The Fiscal Arrangements: Focus on 1987," *Ottawa and the Provinces: The Distribution of Money and Power*, Vol. I, Ontario Economic Council Special Research Report, 1985, p. 4.

(61) *Winterhaven Stables Ltd.* v. *Canada* (1988), 53 D.L.R. (4th) 413, at 415.

(62) A number of cases confirm that the federal government can spend its revenue on subject matters outside its legislative competence: *Angers* v. *M.N.R.*, [1957] Ex.C.R. 83 sustains the validity of federal family allowances; and *CMHC* v. *Coop College Residences* (1975), 13 O.R. (2d) 394 (Ont. C.A.) sustains the validity of federal loans for student housing.

> conditions do not amount in fact to a regulation or control of a matter outside federal authority.(63)

Using the spending power, the federal government could implement a wide range of policy instruments, such as incentives, educational measures, and coordinating mechanisms.

THE TRADE AND COMMERCE POWER

Section 91(2) of the *Constitution Act, 1867* gives the federal government the authority to make laws in relation to "the regulation of trade and commerce." Generally speaking, the courts have endorsed federal jurisdiction over interprovincial and international trade, as well as "the general regulation of trade affecting the whole Dominion."(64) The provinces, however, have jurisdiction over intraprovincial and local trade, and it is not always clear where the line is to be drawn in trade issues that have national or interprovincial aspects as well as intraprovincial components.

The federal government has used its jurisdiction over interprovincial and international trade to ban such trade in goods that do not meet federal standards in such areas as motor vehicle safety and emissions (*Motor Vehicle Safety Act*); pesticide labelling (*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 Additives Act*).(65)

In some cases, such legislation can result in effective national standards even with respect to intraprovincial trade. Although the standards in the *Motor Vehicle Safety Act* are theoretically voluntary, over 90% of all motor vehicles manufactured in Canada cross either a provincial or an international border. In all such cases, the use of the national trademark, which requires compliance with applicable safety standards, is mandatory. Since it is impossible during the production process to separate the few vehicles traded locally from those traded

---

(63) *Winterhaven Stables*, at 434.

(64) Hogg (looseleaf), c. 20.3, quoting *Citizens' Insurance Co.* v. *Parsons*, (1881) 7 App.Cas. 96, at 113.

(65) Chris Rolfe, "Putting Strategies into Law: the Constitutional and Legislative Basis for Action," from *Turning Down the Heat* (c. 14), March 1998, Appendix 2 to *The Legislative Authority to Implement a Domestic Emissions Trading System*, National Round Table on the Environment and the Economy, January 1999, p. 10.

interprovincially or internationally, motor vehicle manufactures affix the national trademark to all vehicles.(66) Until recently, the *Motor Vehicle Safety Act* was the only federal law to explicitly authorize emissions credits.(67)

The second branch of the trade and commerce power allows Parliament to enact legislation in relation to general trade and commerce affecting the country as a whole. In a landmark 1989 case (*General Motors*), the Supreme Court of Canada set out five indicia as to whether legislation could be supported under Parliament's authority over the general regulation of trade:(68)

- the legislation must be part of a regulatory scheme;
- such a scheme must be subject to the oversight of a regulatory agency;
- the legislation must be concerned with trade as a whole rather than a particular industry;
- the provinces, either individually or jointly, must be constitutionally incapable of enacting the legislation; and
- the failure to include one or more provinces or localities in the legislative scheme would jeopardize its successful operation in other parts of the country.

The Court indicated that it may not be strictly necessary for federal legislation to meet all five tests, which were described as a "preliminary checklist, the presence of which in legislation is an indication of validity under the trade and commerce power." The overriding consideration remains whether "what is being addressed in a federal enactment is genuinely a national economic concern and not just a collection of local ones."(69)

It has been argued that the general trade and commerce power could support federal implementation of at least the domestic emissions trading component of a Kyoto implementation strategy.(70) On the one hand, in *General Motors*, the Supreme Court of Canada

(66) Monahan (2002), pp. 285-286.

(67) Castrilli (1998), p. 23. In 1999, the emissions credit provisions of the *Motor Vehicle Safety Act* were consolidated in the *Canadian Environmental Protection Act, 1999*, s. 162.

(68) *General Motors of Canada Limited* v. *City National Leasing*, [1989] 1 S.C.R. 641.

(69) Monahan (2002), pp. 293-294.

(70) Castrilli (1998), pp. 16-19.

made a specific comparison between the issue of competition law, the subject of the case, and pollution:

> [These arguments] make it clear that not only is the [Competition Act] meant to cover intraprovincial trade, but that it must do so if it is to be effective. Because regulation of competition is so clearly of national interest and because competition cannot be successfully regulated by federal legislation which is restricted to interprovincial trade, the [provincial] argument must fail. ...
>
> On the other hand, competition is not a single matter, any more than inflation or pollution. The provinces too, may deal with competition in the exercise of their legislative powers in such fields as consumer protection, labour relations, marketing and the like. The point is, however, that Parliament also has the constitutional power to regulate intraprovincial aspects of competition.(71)

On the other hand, legislation respecting such matters as the production and import of fossil fuels, in order to implement the Kyoto Protocol, would fundamentally be legislation relating to the protection of the environment rather than to international, national or interprovincial trade.(72)

In short, viewpoints on the applicability of the trade and commerce power vary significantly but, in any event, such a power would seem to apply only to emissions trading regimes.

INTERPROVINCIAL UNDERTAKINGS

Section 92 of the *Constitution Act, 1867* sets out the vast majority of provincial heads of power, those matters over which the provincial legislature has exclusive jurisdiction. Section 92(10) gives the provinces control over local works and undertakings, with three notable exceptions which fall under federal jurisdiction. The most important of these exemptions is 92(10)(a), which gives the federal Parliament jurisdiction over “lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the province with any other or others of the provinces, or extending beyond the limits of the province.”

---

(71) *General Motors*, pp. 681-2.

(72) Rolfe (1998), p. 11, fn. 38.

A "work" is generally considered to be a "physical thing," while an "undertaking" is "an arrangement under which of course physical things are used."[73] Section 92(10)(a) is normally applied to works or undertakings in the fields of transportation and communication,[74] but this includes interprovincial oil and gas pipelines. Since 85% of Canada's GHG emissions result from producing, transforming and consuming fossil fuels (coal, oil and natural gas),[75] federal regulation of oil and gas distribution systems could play a significant role in implementing Kyoto.

The courts have established "a relatively low threshold" for the interprovincial activity required to classify a particular undertaking as interprovincial.[76] Moreover, a transportation or communication undertaking is subject to regulation by only one level of government. If an undertaking is classified as interprovincial, all of its services are subject to federal regulation.[77] The underlying questions in any approach to section 92(10)(a) are: what degree of interprovincial activity or connection is required to classify an undertaking as interprovincial; and how far can federal jurisdiction be extended to a local undertaking on the basis that it is integrated or connected with an interprovincial undertaking.

The most recent Supreme Court of Canada decision with respect to section 92(10)(a) is *Westcoast Energy* v. *Canada* (1998).[78] Westcoast Energy owned and operated an integrated natural gas pipeline system that transported raw natural gas from production fields, which were located in various jurisdictions, to gas processing plants where impurities were removed. The processed gas was then transported through Westcoast's gas transmission pipeline to delivery points in British Columbia, Alberta and the United States. At issue was whether the gas processing undertaking was so fundamentally different from the gas transmission undertaking that the former could be a local activity, even though the latter was interprovincial

---

(73) *Radio Reference, 1932*, at 86. The Privy Council concluded that "their Lordships have therefore no doubt that the undertaking of broadcasting is an undertaking 'connecting the Province with other Provinces and extending beyond the limits of the Province.'"

(74) Hogg (looseleaf), c. 22.3.

(75) Natural Resources Canada, *Energy in Canada 2000*, Appendix 1, "Climate Change and Energy," http://www.nrcan.gc.ca/es/ener2000/online/html/append_e.htm.

(76) Monahan (2002), p. 358.

(77) Hogg (looseleaf), c. 22.5.

(78) *Westcoast Energy Inc.* v. *Canada (National Energy Board)*, [1998] 1 S.C.R. 322.

and international. The Court found that all of the facilities constituted a single interprovincial undertaking for the purposes of section 92(10)(a).

> In our opinion, the fact that an activity or service is not of a transportation or communications character does not preclude a finding that it forms part of a single federal undertaking for the purposes of s. 92(10)(a) under the first test in Central Western, supra. The test remains a fact-based one ...
>
> That is not to say, however, that it is impossible to identify certain indicia which will assist in the s. 92(10)(a) analysis. In our view, the primary factor to consider is whether the various operations are functionally integrated and subject to common management, control and direction. The absence of these factors will, in all likelihood, determine that the operations are not part of the same interprovincial undertaking, although the converse will not necessarily be true.(79)

Westcoast Energy gives a comprehensive description of the first test, whether a system is a "single federal undertaking." The second test for bringing an otherwise local or provincial undertaking within federal jurisdiction is whether the local undertaking is sufficiently integrated with an interprovincial or international undertaking, or whether the interprovincial undertaking is dependent upon the local undertaking. Although "the precise degree of the connection or integration that is required has been the subject of extensive litigation over the years,"(80) a general test remains difficult to formulate. One of most useful descriptions would seem to be that given as obiter by McLachlin J. (as she then was) in *Westcoast Energy*.

> In order for a provincial work or undertaking to fall under federal jurisdiction under s. 92(10)(a) by reason of its connection with an interprovincial transportation or communications work or undertaking, the provincial work or undertaking must be functionally integrated with the interprovincial transportation or communications enterprise. Functional integration is established if the dominant character of the local work or undertaking, considered functionally and in the industry context, is transformed by its connection to the interprovincial enterprise, from that of a local work or undertaking with a distinct local character, into that of an interprovincial transportation or communications undertaking.

---

(79) *Westcoast Energy*, paras. 64-5.

(80) Monahan (2002), p. 362.

> 148 Various factors may be relevant to whether this test is met. Different factors may prove determinative in different cases, depending on the nature of the work or undertaking and the industry. In this sense, a comprehensive factor-based test is elusive: see A.G.T. v. C.R.T.C., supra, at p. 258. Common management, common ownership and coordination, and dependency of the interprovincial enterprise on the local enterprise are among those factors which may prove useful. The ultimate question, however, is whether the dominant functional character of the provincial work or undertaking has been transformed by the connection to the interprovincial enterprise into that of interprovincial transportation or communication.(81)

A final point of interest with respect to interprovincial undertakings is the apparently anomalous situation surrounding the interprovincial transmission of electricity. On the face of it, electrical distribution systems would seem to be subject to the same jurisdictional principles as oil and gas pipelines. However, for historical and political reasons, electrical transmission facilities have been subject to provincial jurisdiction, and the federal government has not, by and large, attempted to legislate with respect to them.

The most relevant case on the application of section 92(10)(a) to electrical transmission facilities arose not because of a dispute between the two levels of government, but because of a third-party intervention. In 1981, the Supreme Court of Canada decided a case(82) that arose when Calgary Power Ltd. applied to the Alberta Energy Resources Conservation Board for approval to construct and operate an electrical transmission line to a point near the Alberta–British Columbia border where it would interconnect with a transmission line to be built in British Columbia. Several landowners affected by the project claimed that the proposed transmission line was an interprovincial undertaking, and fell under federal rather than provincial jurisdiction. This threatened to disrupt the common understanding between the federal government and the provinces that the production and transmission of electricity would remain within provincial control.

---

(81) *Westcoast Energy*, paras. 147-8.

(82) *Fulton* v. *Energy Resources Conservation Board*, [1981] 1 S.C.R. 153.

As Laskin C.J. noted: "an unusual feature of the proceedings in this Court is the position taken by the intervening Attorney General of Canada. Counsel for the Attorney General supported the jurisdiction of the [provincial] Alberta Energy Resources Board."(83)

> There are a number of important background facts which are relevant to the proper disposition of this appeal. First, it is conceded that there is no existing federal regulatory authority that embraces the situation that is presented here. Second, the respondent Calgary Power Ltd. does not challenge the regulatory power of Parliament, at least at the point of interprovincial interconnection, if Parliament should choose to act. At the present time, however, the federal National Energy Board is not vested with regulatory authority that would bring the project in this case within its regime of control. Third, it does not appear that the Alberta Energy Resources Conservation Board purports to exercise any regulatory control over the relationship between Calgary Power Ltd. and the British Columbia Hydro and Power Authority under their agreement. ... Unexercised federal authority may give leeway to the exercise of provincial authority in relation to local works and undertakings, and that is how I assess the situation here.(84)

However, in the process of deciding that the provincial board had jurisdiction to approve the application, in the absence of federal legislation, Laskin C.J. did address the issue of whether an electrical transmission and distribution system could be an interprovincial undertaking subject to federal regulatory control.

> One matter lightly touched on by counsel for Calgary Power Ltd. but not pressed was whether an electrical distribution system could competently be within s. 92(10)(a). I do not doubt that it can be...(85)

Professor Hogg confirms that "jurisdiction over electrical distributions systems is thus governed by the same principles as jurisdiction over other media of transportation and communications, such as railways, pipelines and telephones."(86)

---

(83) p. 168.

(84) pp. 161-2.

(85) p. 162.

(86) Hogg (looseleaf), c. 29(6)(a).

Arguably, measures implementing Kyoto would have to extend to the level of production of oil and gas within the province, and the methods of production of electricity within the province. Should the federal government wish to exercise jurisdiction over electricity transmission and distribution, in the same manner as it does over oil and gas pipelines, section 92(10)(a) could add a significant mechanism to the implementation of the Kyoto Protocol.

CONCLUSION

CO_2 emissions result from an immense number of energy-related processes. This makes it extremely difficult to see how the entire subject matter of "carbon dioxide emissions" could be placed within federal jurisdiction without affecting the basic distribution of powers within the constitution. Although the federal government has a number of jurisdictional tools available, none of them seem to allow effective unilateral action unless the Supreme Court of Canada is prepared to accept a considerable expansion of p.o.g.g or the criminal law power.

Overall, it would seem that implementing Kyoto unilaterally would require one of two things: a level of federal-provincial cooperation not currently evident; or an extremely complex set of federal mechanisms that incorporates a number of existing federal powers but is based on a careful avoidance of such core provincial powers as property and civil rights or municipal institutions.