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BACKGROUND

ECONOMIC GROWTH AND INNOVATION

A Question of Parliamentary Power:

Criminal Law and the Control of Greenhouse
Gas Emissions

Peter W. Hogg



In this issue...

The federal government proposes to impose limits on greenhouse gas emissions by large industrial emitters. But under what authority could Parliament implement the regulations?

THE STUDY IN BRIEF

THE AUTHOR OF THIS ISSUE

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Does the Parliament of Canada have the constitutional authority to regulate greenhouse gas emissions? Through its *Regulatory Framework* paper, the federal government proposes to impose limits on greenhouse gas emissions by large industrial emitters. Regulatory limits will vary from sector to sector. Each regulated firm may choose among different options to comply. They may reduce emission levels to prescribed levels; make contributions to a climate-change technology fund; or, comply through a cap-and-trade system. Under the cap-and-trade system, a regulated firm can comply by purchasing “emissions credits” from firms in the same sector, or by buying “offset credits” from firms in unregulated sectors.

But does Parliament have the legal authority to implement these proposals? This paper reviews a string of court decisions that have a bearing on the answer. The author places emphasis on Parliament’s criminal-law power, because that is the constitutional basis for the current *Canadian Environmental Protection Act, 1999* (CEPA). The government’s *Regulatory Framework* proposals will likely take the form of amendments to that Act, regulations made under that Act, or both.

The author concludes that the proposals of the Government of Canada for the regulation of greenhouse gas emissions in the *Regulatory Framework* paper are likely to be upheld as constitutional exercises of the federal criminal-law power.

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INDEPENDENT • REASONED • RELEVANT

This paper¹ examines the Parliament of Canada's constitutional authority to regulate greenhouse gas emissions. My analysis is based on the Government of Canada's policy paper, *Regulatory Framework for Air Emissions* (Environment Canada 2007a),² which represents the current policy of the federal government.

In the paper I emphasize Parliament's criminal-law power, because that is the constitutional basis for the current *Canadian Environmental Protection Act, 1999* (CEPA).³ The *Regulatory Framework* proposals will likely take the form of amendments to that Act, regulations made under that Act, or both.

I do not discuss the role of the provinces, although it is clear that they have the constitutional authority to regulate emissions from industries within their borders. All provinces have in fact announced plans to introduce controls on greenhouse gas emissions, and Alberta has actually enacted a regime of control. But it is obvious that air is not confined by provincial borders, nor is competitive economic activity, so some form of national regime is required, which does not necessarily exclude a role for the provinces.⁴

The Kyoto Accord, which I describe below, identifies carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons and sulphur hexafluoride as six gases believed to contribute to

global warming. The federal *Regulatory Framework* paper proposes to impose limits on emissions of these gases by large industrial emitters. Regulatory limits will vary from sector to sector. Each regulated firm may choose among different options to comply. They may reduce emission levels to prescribed levels; make contributions to a climate-change technology fund; or, comply through a cap-and-trade system. Under the cap-and-trade system, a regulated firm can comply by purchasing "emissions credits" from firms in the same sector, or by buying "offset credits" from firms in unregulated sectors.

The Kyoto Accord

The Kyoto Accord of 1997⁵ is an international treaty that sets specific targets for the reduction of greenhouse gas emissions.⁶ 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 agreed to reduce its emissions to 6 percent below its 1990 level by the year 2012. That target was probably unattainable even when the treaty was signed in 1997, because by that time Canada's emissions had already risen 13 percent *above* the 1990 level. To move from 13 percent above to 6 percent below against a strong trend in the opposite direction would have required immediate government action of the most draconian kind. No such action was taken. Apart from financial incentives to improve energy efficiency and exhortations to voluntary restraint

The author advises clients on matters discussed in this *Backgrounder*.

- 1 The paper is a revised and expanded version of one presented at the C.D. Howe Institute Policy Conference "The Economics of Greenhouse Gas Emissions Control in Canada" on December 7, 2007.
- 2 A March 10, 2008 news release announced more detail, but at the time of writing no regulations have actually been issued to carry out the proposals; see EC (2008).
- 3 S.C. 1999, c. 33.
- 4 See EC (2007a), pp. 8-9 for the Regulatory Framework's discussion on the role for provinces.
- 5 Some three dozen nations agreed to the Kyoto Protocol to the United Nations Framework Convention on Climate Change at Kyoto, Japan on December 11, 1997. Canada ratified the Protocol on December 17, 2002, following approval by the House of Commons and the Senate.
- 6 Kyoto followed the 1992 UN Framework Convention, see previous note, in which signatory countries, including Canada, undertook to reduce emissions, but without stipulated targets. The Kyoto Protocol is an amendment of that Convention. In this regard, Canada's failure to take action to reduce greenhouse gases after signing the Kyoto Protocol in 1997 is all the more astonishing when one considers that the international obligation to do so was actually undertaken in 1992.

in the use of energy – which measures did not disturb the upward trend of emissions – (Jaccard 2006), the federal government did nothing to reduce emissions. The growth of Canada’s population and economy carried emissions ever upward, making the target completely unattainable.

In April 2007, when Ottawa issued the *Regulatory Framework* paper, Canada’s emissions were 33 percent above 1990 levels. The *Regulatory Framework* paper (p. 4) says that: “The government is committed to reducing Canada’s total emissions of greenhouse gases, relative to 2006 levels, by 20 percent by 2020 and by 60 percent to 70 percent by 2050.” Note that the benchmark date is now 2006, not Kyoto’s 1990, and the target date is now 2020, not 2012. And the target for 2020 (20 percent below 2006 levels) is about 19 percent higher than the Kyoto target for 2012 (6 percent below 1990 levels). In other words, the many years of pretending that Canada would meet its Kyoto target were officially over.

When the federal government abandoned the Kyoto target, it lacked a majority in both the House of Commons and the Senate. It was unable to control the legislative agenda, and the combined forces of the opposition parties led to the passage of a private member’s bill, the *Kyoto Protocol Implementation Act*,⁷ which became law on June 22, 2007. Section 7 of the Act contains the remarkable, perhaps unprecedented, provision that, “the Governor-in-Council shall ensure that Canada fully meets its obligations under . . . the Kyoto Protocol by making, amending or repealing *the necessary regulations* under this or any other Act.” (Author’s emphasis added.)

One can only speculate as to what would be “the necessary regulations” that, after so many years of government inaction, would suddenly bring greenhouse gas emissions down to 6 percent below 1990 levels by 2012 – five years from the

date of enactment. When the federal government officially confirmed that it could not meet this target (EC 2007b), saying that it “would imply a deep recession,” environmental advocates brought proceedings against the government in the Federal Court for breach of its statutory duty under the *Kyoto Protocol Implementation Act*.⁸ At the time of writing that case has not come to trial.

Parliament’s Treaty Power (or non-power)

It is clear that, despite the statutory duty imposed by the *Kyoto Protocol Implementation Act*, Canada will not comply with the Kyoto Accord. However, the Accord remains an international treaty that is binding on Canada as a matter of international law.

It is important to note, however, that Canada’s accession to a treaty does not confer on Parliament any additional legislative power to implement the treaty. That was decided in the *Labour Conventions* case (1937)⁹ that struck down federal laws that attempted to enact national labour standards (minimum wage, maximum hours and the like) in order to implement obligations undertaken by Canada in a multilateral treaty sponsored by the International Labour Organization. The Privy Council (then Canada’s highest court) held that since labour laws were a provincial responsibility under the division of powers in the *Constitution Act*, 1867, they remained a provincial responsibility even after Canada signed a treaty agreeing to change its labour laws. Only the provinces could enact the required implementing legislation.

In the context of the Kyoto Accord, this means that Parliament cannot use the treaty as the constitutional basis for a law controlling greenhouse gas emissions. Instead, the federal power to directly control greenhouse gas emissions must be based on either Ottawa’s responsibility for “peace, order, and good government” or criminal law – powers that exist regardless of the treaty.

7 S.C. 2007, c. 30, s. 7.

8 See Makin (2007).

9 *A.G. Can. v. A.G. Ont. (Labour Conventions)* [1937] A.C. 326 (Privy Council); for discussion, see Peter W. Hogg, 2007. *Constitutional Law of Canada*. Toronto: Carswell, 5th edition. Sec. 11.5.

Parliament's "peace, order, and good government" Power

This *Backgrounder* assumes that the Regulatory Framework proposals will be enacted under the federal government's criminal-law power, probably as amendments to the *Canadian Environmental Protection Act*, 1999 (CEPA) and the regulations made under the Act. CEPA, as we shall see, was upheld by the Supreme Court as criminal law in *R. v Hydro-Québec* (1997). Before that decision, the general assumption of constitutional lawyers was that a nationwide environmental protection law would have to be enacted under the "peace, order, and good government" (POGG) power contained in the opening words of Sec. 91 of the *Constitution Act*, 1867.¹⁰

There is no doubt that a federal environmental protection law could be enacted under the "national concern" branch of the POGG power. The Supreme Court so held in *R. v Crown Zellerbach* (1988),¹¹ in which the majority upheld a federal law that prohibited dumping at sea. The court determined that marine pollution is under federal jurisdiction because it is a matter of national concern that is distinct from matters of provincial jurisdiction and is beyond the capacity of the provinces to control.

A similar argument can be made about the control of greenhouse gases. In *Crown Zellerbach*, the court did not consider whether the law 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.

Parliament's Taxation Power

Parliament has the power to raise money by "any mode or system of taxation."¹² 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 this federal power is that it cannot tax "lands or property belonging to any province."¹³ This exception would preclude the taxation of resources extracted by a province (but not by private producers) from provincial Crown lands.¹⁴ However, taxes play no part in the current *Regulatory Framework* proposals, although carbon taxes have been enacted in the provinces of British Columbia and Québec, and one has been proposed by the opposition at the federal level.

The *Regulatory Framework* proposals do include the creation of a climate-change technology fund to which regulated firms can make contributions in exchange for emissions credits. It is not described as a taxation measure, but simply as part of a package of cap-and-trade measures. Nevertheless, the fund could be set up under Parliament's taxation power. The contributions could be levied as a tax (from which emissions-compliant firms would be exempt), and the tax could be dedicated to the technology fund.

Parliament's Spending Power

Ever since Canada signed the Kyoto Accord, one thing the government of Canada has done is to spend money on the promotion of voluntary initiatives and monetary incentives for green renovations, green technology and the like (Jaccard 2006). The government's *Regulatory Framework* paper (pp. 3-4) also commits Ottawa to various spending and rebate initiatives. It is

10 In *Hydro-Québec*, La Forest J., for the majority, in upholding CEPA under the criminal-law power, did not decide whether the "peace, order, and good government" power 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 [1988] 1 S.C.R. 401.

12 *Constitution Act*, 1867, Sec. 91(3).

13 *Constitution Act*, 1867, Sec. 125.

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

clear that Parliament, through such programs, can authorize the expenditure of public money for any purpose it chooses, including purposes that it could not directly accomplish by regulation.¹⁵

Parliament's Criminal-Law Power

SECTION 91(27) OF THE CONSTITUTION ACT, 1867: The *Constitution Act*, 1867, by Sec. 91(27), confers on Parliament the power to make laws in relation to “the criminal law.” The courts have defined a “criminal law” for constitutional purposes as a law that has three elements: (1) a prohibition, (2) a penalty and (3) a typically criminal purpose.¹⁶ And, if one thinks of the Criminal Code for example, it is true that a criminal law ordinarily consists of a direct prohibition of harmful conduct that is to be self-applied by the persons to whom it is addressed. There is not normally any intervention by an administrative agency or official prior to the application of the law. The law is “administered” by law enforcement officials and courts of criminal jurisdiction only in the sense that they bring to bear the machinery of punishment (investigation, charge, prosecution, trial, penalty) against the offender after a breach of the law has occurred.

REGULATION AND CRIMINAL LAW: In the past, the Privy Council consistently held that Ottawa’s criminal-law power would not sustain a regulatory scheme that relied upon more sophisticated tools than a simple prohibition and penalty. For example, Parliament’s early efforts to enact a competition law under its criminal-law power came to grief in the two cases where the law vested

powers in an administrative agency. The Privy Council in the first case and the Supreme Court in the second case held that these powers could not be sustained as criminal law.¹⁷ Only the provinces could enact regulatory schemes of this kind.

Federal efforts to regulate the insurance industry ran into the same problem. After the Privy Council struck down a federal statute purporting to regulate the insurance industry by licensing, Parliament added a section to the Criminal Code making it an offence to carry on the business of insurance without a licence from the minister of finance. But the Privy Council held that the “pith and substance” of the new law was the establishment of licensing authority in the minister and, accordingly, struck down the law as an unconstitutional attempt to do indirectly what Parliament could not do directly.¹⁸ Once again, it was the provinces that had the exclusive power to regulate the insurance industry.

After appeals to the Privy Council ended in 1949, the distinction between regulation and criminal law did not seem as clear cut to the judges of the Supreme Court of Canada as it had seemed to their lordships of the Privy Council. For example, the court upheld as criminal law the provisions of the Criminal Code that permitted abortions approved by a therapeutic abortion committee.¹⁹ The Court also upheld the provisions of the Criminal Code that permitted lotteries licensed by the provinces.²⁰ In both cases, the criminal prohibition depended on a discretionary decision by an administrative body.

For present purposes, the truly important development came in *R. v Hydro-Québec* (1997).²¹ In that case, the Supreme Court upheld, under the

15 Hogg (2007), Sec. 6.8.

16 For detailed discussion, see Hogg (2007), Chapter 18, “Criminal Law.”

17 *Re Board of Commerce Act* [1922] 1 A.C. 191; *Reference re Dominion Trade and Industry Comm. Act*, [1936] S.C.R. 379.

18 *A.-G. Ont. v Reciprocal Insurers* [1924] A.C. 328.

19 *Morgentaler v The Queen* [1976] 1 S.C.R. 616. This was a pre-Charter case. The provisions were later struck down by the Court under the Charter of Rights: *Morgentaler v The Queen* [1988] 1 S.C.R. 30.

20 *R. v Furtney* [1991] 3 S.C.R. 89.

21 [1997] 3 S.C.R. 213.

criminal-law power, the *Canadian Environmental Protection Act* (CEPA), which is a federal law that establishes a scheme for the regulation of toxic substances. Under the Act, the federal ministers of environment and health have authority to examine the effects of any substance and to recommend to the Governor-in-Council that the substance be classified as “toxic.” Such a finding is based on a determination that the substance is harmful to the environment or a danger to human health. Once classified as toxic, the substance comes under the regulatory authority of the Governor-in-Council, which adds the substance to a schedule of CEPA and may make regulations governing its release into the environment.

Hydro-Québec was prosecuted for excessive emissions of PCBs (which were the subject of an interim toxic classification). The corporation’s defence was that CEPA was beyond the reach of Parliament’s criminal-law power because there was no prohibition until the administrative process to classify the substance (or to make an interim order) was complete. Four judges accepted that argument, but the five-judge majority rejected it. The majority held that, because the administrative procedure for assessing the toxicity of substances culminated in a prohibition enforced by a penal sanction, the scheme was sufficiently prohibitory to be a criminal law. CEPA was upheld, and the trend of the modern cases to permit an extensive degree of regulation under the criminal-law power was emphatically reinforced.

In *Re Firearms Act* (2000),²² a challenge was mounted to Canada’s gun-control legislation, which is part of the Criminal Code. The *Firearms Act’s* main techniques of control consisted of requirements to register all firearms and to license all firearms owners. The Supreme Court of Canada held that the purpose of gun control is

public safety, a typical and justifiable objective of the Criminal Code. The Act attempted to achieve that purpose by a prohibition of unregistered guns and unlicensed owners, backed by penalties. It was argued that the law was regulatory rather than criminal legislation because of the complexity of the regime and the discretionary powers vested in the licensing and registration authorities. Only an outright prohibition of guns, it was argued, would be a valid criminal law. But the Court unanimously upheld the gun-control legislation, relying on its prior decision in *R. v Hydro-Québec* for the proposition that the criminal-law power authorizes complex legislation, including a grant of discretionary administrative authority before there is any prohibition.

Another point that was important in *Re Firearms Act* was the holding that a criminal-law purpose may be pursued by indirect means. For this finding, the Court relied on its prior decision in *RJR-MacDonald v Canada* (1995),²³ which held that a ban on the advertising of tobacco (but not an outright ban on the harmful product itself) was authorized under the criminal-law power.

Just as the health risks of tobacco did not require the outright banning of cigarettes, neither did the safety risks of guns require the outright banning of guns for it to be justifiable as criminal law. Measures that would indirectly advance a legislative purpose, such as the advertising ban in *RJR-MacDonald* or the licensing and registration requirements of the gun-control legislation, are authorized by Parliament’s criminal-law power.

The line of cases that I have described grants to the criminal-law power a considerable capacity to authorize sophisticated regulation that goes well beyond the prohibiting and penalizing of harmful conduct. Indeed, the success of the federal government in persuading the Court to

22 [2000] 1 S.C.R. 783.

23 [1995] 3 S.C.R. 199. La Forest J. with the support of six other judges wrote the majority opinion on the criminal-law point. The Act was later struck down by the Court under the Charter of Rights as an abridgment of freedom of expression. In a sequel case, *Can. v JTI-Macdonald Corp.* [2007] 2 S.C.R. 610, the Court upheld a less sweeping ban on advertising of tobacco products and unanimously reaffirmed (para. 20) of the *RJR* ruling that “restrictions on tobacco advertising are a valid exercise of Parliament’s criminal-law power.”

uphold the regulation of toxic emissions, the ban on tobacco advertising and the regime of gun control under the criminal-law power makes it hard to predict what kind of federal law would actually cross the line into the prohibited zone of regulation.

Controlling Greenhouse Gas Emissions

The next frontier may turn out to be the proposals for the control of greenhouse gas emissions in the federal government's *Regulatory Framework* policy paper (EC 2007a). Despite the narrow five-to-four majority, *R. v Hydro-Québec* settles the constitutionality of CEPA as criminal law. In 2005, the six main greenhouse gases were assessed under the CEPA process and added to the list of toxic substances in the schedule to the Act. Therefore, the regulatory powers of CEPA apply. Of course, standards still have to be set, sector by sector, for the limits on emissions that will be required of large industrial emitters under the regulations. Then, the prohibition and penalty provided by CEPA will apply to greenhouse gas emissions.

At first blush, it seems odd that carbon dioxide, which is the main greenhouse gas, would be classified as a toxin, since it occurs naturally in the air and is benign in its direct effect on life on earth. But "toxic" is a defined term in CEPA, Sec. 64(a). Part of the definition states: "a substance is toxic if it is entering or may enter the environment in a quantity or a concentration or under conditions that . . . may have an immediate or long-term harmful effect on the environment." The Kyoto Accord is predicated on the belief that the discharge of greenhouse gases into the environment in current quantities is causing global warming with a long-term harmful effect on the environment. This is enough to satisfy the definition of toxic in the Act. And this definition does not raise a constitutional issue since *Hydro-Québec* establishes that Parliament's criminal-law power is no longer limited to the protection of life or health, but also extends to measures for the protection of the environment.

Once emissions standards have been prescribed by regulation for industrial sectors, firms that fail to abate emissions as required will be subject to criminal penalties. In light of the decision in *Hydro-Québec*, this is all a perfectly safe exercise of Parliament's criminal-law power.

However, while in-house abatement will be the standard method of compliance with the regulations, the *Regulatory Framework* paper also proposes to introduce three additional means of compliance. One is the creation of emissions credits that can be earned by firms that have reduced emissions below the regulated standard. These credits can be purchased by those who have failed to reduce their own emissions to the required level.

A second means of compliance is the creation of offset credits that can be earned for reductions in emissions by firms that are in unregulated areas like agriculture, forestry or landfill operations. These, too, can be purchased by regulated firms and used as credits towards the regulated standard.

The third means of compliance is a contribution to a government-created but independently operated climate-change technology fund that would invest in projects likely to yield reductions in emissions.

Can these three additional means of compliance – emissions credits, offset credits and contributions to a technology fund – be upheld under the federal criminal-law power? Each enables a regulated firm to meet its obligations without actually reducing emissions to the regulated standard. For most kinds of criminal behaviour, the purchase of exemptions from the criminal prohibitions would be unthinkable. But the protection of the environment differs from other criminal purposes in that it is concerned with the *overall* reduction of emissions more than the *individual* behaviour of particular emitters.

Emissions trading allows a market to develop that provides some choices for private firms as to the most efficient allocation of the resources required for emissions reductions. Measures that are likely to speed up the overall reduction of emissions are squarely within the purpose of protecting the environment. This is so even if the

alternative measures are not themselves prohibitions of the harmful conduct – like the prohibition of advertising that was upheld in the tobacco case. It is likely, therefore, that alternative means of compliance with the regulated limits on greenhouse gas emissions will be upheld as criminal law.²⁴

In the case of the emissions credits and offset credits, their constitutionality seems clear. They provide incentives for and then recognize equivalent reductions in emissions to limits that the regulated firm is bound to achieve. Since the goal is to reduce overall emissions, a reduction anywhere is equally beneficial.

The constitutionality of the proposed climate change technology fund is less clear. The reduction of emissions caused by technology-funded projects will come long after the contributions to the fund. And when realized, the reduction may not be equivalent to the credits issued to the firms that contributed the

money to the fund. However, this exemption is also directed to the ultimate reduction in emissions, and is likely to be upheld as a valid part of the scheme, especially since, according to the *Regulatory Framework* paper, it will be available only for a transitional period and will provide credit for only part of a regulated firm's obligations (70 percent initially, declining annually to zero in eight years).

Conclusion

My view is that the proposals of the Government of Canada for the regulation of greenhouse gas emissions in the *Regulatory Framework* paper, including the three additional means of compliance (emissions credits, offset credits and contributions to a climate-change technology fund), are likely to be upheld as constitutional exercises of the federal criminal-law power.

²⁴ A considerable administrative process will no doubt be needed to register the existence of credits and transactions with credits, but this is unlikely to be a constitutional impediment in view of the complex administration of the toxicity process that was upheld in *Hydro-Québec*.

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