KYOTO, THE CONSTITUTION, AND CARBON TRADING: WAKING A SLEEPING *BNA* BEAR (OR TWO)

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This article explores the federal government's constitutional authority to pass legislation controlling greenhouse gas emissions, particularly through emissions trading, in light of litigation over the new Kyoto Protocol Implementation Act. The author argues that federal power can be found under three constitutional powers: POGG, treaty implementation, or a combination of Criminal Law and Trade and Commerce — although each would require some extension of existing doctrine, and would confer slightly different powers. Deciding the case based on the Criminal and Trade powers would be the constitutionally safest route, but it would do little to provide further guidance on the scope of federal environmental law-making powers. The Criminal power does not allow Parliament to use all of the tools needed to properly address modern environmental problems, such as climate change. The POGG power provides for a broader range of tools, but limits Parliament's ability to address the full breadth of modern environmental problems by requiring their division into subcomponents. The most helpful basis for deciding the case, in terms of constitutional guidance, would be the federal treaty-implementing power. A number of jurists and scholars have been calling for a re-examination of this issue since 1937, and it is hard to imagine that a better opportunity will arise to do so. The article discusses arguments for and against a federal treaty-implementing power, and several options for determining the scope of such a power. At its essence, the challenge for the courts in this case will be to determine how to reconcile the reality of an increasingly globalized world, and its attendant benefits and constraints, with the reality of Canada's division of powers — and in particular, how to do so in the context of addressing global climate change, arguably the most serious challenge of our time.

Cet article examine l'autorité constitutionnelle du gouvernement fédéral à promulguer des lois visant le contrôle des émissions de gaz à effet de serre, par le biais des échanges de droits d'émission notamment, à la lumière des litiges touchant la nouvelle Loi de mise en œuvre du Protocole de Kyoto. L'auteur soutient que le pouvoir fédéral se trouve à l'intérieur de trois pouvoirs constitutionnels : la disposition concernant la paix et l'ordre ainsi que le bon gouvernement, l'application des traités, ou une combinaison du droit pénal et des échanges et du commerce quoique pour chacun, la doctrine actuelle devrait être développée, et conféreraient des pouvoirs légèrement différents. La voie la plus sûre, d'un point de vue constitutionnel, serait de statuer en se fondant sur les pouvoirs liés au droit pénal et au commerce mais cette voie en ferait très peu pour nous guider davantage quant à l'étendue des pouvoirs législatifs fédéraux en matière d'environnement. Le pouvoir lié au droit pénal ne permet pas au Parlement d'utiliser l'ensemble des instruments nécessaires pour bien aborder les problèmes environnementaux comme le changement climatique. Le pouvoir du gouvernement fédéral de légiférer pour assurer la paix, l'ordre et le bon gouvernement apporte un large éventail d'instruments mais limite la capacité du gouvernement d'aborder l'étendue des problèmes environnementaux contemporains en exigeant qu'ils soient séparés en sous-éléments. Le cadre le plus utile pour régler l'affaire, sur le plan des dispositions constitutionnelles, serait le pouvoir du gouvernement fédéral à appliquer les traités. Depuis 1937, un grand nombre de juristes et de chercheurs demandent que cette question soit réexaminée et il est difficile de croire qu'une meilleure occasion de le faire se présentera. L'auteur examine le pour et le contre du pouvoir du gouvernement fédéral à appliquer les traités ainsi que plusieurs options pour délimiter un tel pouvoir. Essentiellement, le défi des tribunaux dans ce cas, portera sur la façon de réconcilier la réalité de la mondialisation croissante ainsi que ses contraintes et avantages associés à la réalité canadienne de division des pouvoirs, et en particulier, comment le faire dans le contexte du changement du climat mondial qui est sans nul doute le plus grand défi de notre époque.

I. INTRODUCTION

On 21 August 2007, Environment Minister John Baird released Canada's climate change plan,[1] as required under the *Kyoto Protocol Implementation Act*[2] — except that the plan made no pretense of implementing the Kyoto Protocol.[3] Instead, it aimed to exceed Canada's Kyoto emissions target by over 33 percent.[4] "[S]trict adherence to the Kyoto Protocol," the plan argued, "would imply a deep recession."[5] The response from environmental advocates was swift; on 20 September, the Minister was taken to court for breaching the *Act*.[6] Ninety days after passage of the *KPIA*, the battle lines were drawn.

The *Kyoto Protocol Implementation Act*, arguably the most far-reaching private member's bill ever passed by Parliament, became law on 22 June 2007. The *Act* requires Canada to meet its Kyoto commitment, calling for a suite of regulatory, economic, and other measures to achieve a dramatic reduction in greenhouse gas emissions by 2012. With this ambitious objective, the *KPIA* will test the currently articulated limits of federal environmental authority under the Constitution.[7] It raises important questions concerning the meaning of the *British North America Act*, Canada's original constitutional document — some of which have been awaiting an answer for decades.[8]

The way in which these legal issues are resolved may have significant ramifications for the environment. The perils of greenhouse gas (GHG) emissions, and resulting climate change, are well documented. Rapidly rising emissions of GHGs — mainly from the combustion of fossil fuels — are

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1 Environment Canada, *A Climate Change Plan for the Purposes of the Kyoto Protocol Implementation Act 2007* (Ottawa: Environment Canada, 2007), online: <http://www.ec.gc.ca/doc/ed-es/p_123/CC_Plan_2007_e.pdf> [EC, Climate Change Plan, 2007].

2 *Kyoto Protocol Implementation Act*, S.C. 2007, c. 30 [*KPIA*].

3 *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 10 December 1997. UNFCCC COP 3d Sess., UN Doc FCCC/CP/1997/7/Add.1, 37 ILM 22 (1998) [Kyoto or Kyoto Protocol].

4 EC, *Climate Change Plan*, 2007, *supra* note 1 at 19.

5 *Ibid.* at 8.

6 Kirk Makin, "Court action presses Ottawa to obey Kyoto" *The Globe and Mail* (20 Sept. 2007), online: Canada.com < http://www.theglobeandmail.com/servlet/story/LAC.20070920.KYOTO20/TPStory >.

7 *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No.5 [*BNA Act*].

8 *Ibid.* In 1982, the *BNA Act* was renamed the *Constitution, Act, 1867.*

destabilizing the planet's climate. Of particular concern to Canada is that the effects of climate change will become more severe closer to the poles, as is already being observed in Canada's North.[9] Even Prime Minister Stephen Harper, once a skeptic, has called climate change "perhaps the greatest threat to confront the future of humanity."[10]

Scientists estimate that we will need to reduce global GHG emissions by roughly 50 percent by 2050 if we want to minimize the risk of "dangerous" climate change.[11] The Kyoto Protocol, signed in 1997, was meant as a first step in this direction.[12] It calls on developed nations to substantially reduce their collective GHG emissions, starting in the period 2008 to 2012; Canada's target is set at 6 percent below 1990 levels.[13]

In the ten years since signing Kyoto, prior to the *KPIA*, Canada had yet to put in place legislation requiring GHG emissions reductions, at either the federal or provincial level.[14] As a result, Canada's emissions have risen to roughly 30 percent *above* 1990 levels.[15] In April 2007, after several false starts, the federal government promised to bring in a regulatory "cap and trade" program by 2010 that would *stabilize* GHG emissions by 2012,[16] *i.e.,* Canada would miss its Kyoto target by over 30 percent. Unsatisfied with that target, the three opposition parties (which at the time held the majority of seats in Parliament) passed the *KPIA*, setting strict time limits for developing a Kyoto compliance plan, regulations, and other measures that will achieve the treaty's GHG reduction targets. Having waited ten years to enact GHG reduction legislation, Canada will need to take swift and decisive action if it

9 Arctic Climate Impact Assessment (ACIA), *Impacts of a Warming Arctic: Arctic Climate Impact Assessment. ACIA Overview Report* (Cambridge: Cambridge University Press, 2004) at 8-11, online: <http://www.acia.uaf.edu>. [ACIA, *Warming Arctic*, 2004].

10 Lawrence Martin, "Unlike George, Steve Keeps God to Himself" *Globe and Mail* (5 July 2007) A15.

11 Intergovernmental Panel on Climate Change (IPCC), *Contribution of Working Group III (Mitigation) to the Fourth Assessment Report of the United Nations Intergovernmental Panel on Climate Change: Summary for Policy Makers* (Cambridge: Cambridge University Press, 2007) at 15-18, online: <http://www.ipcc.ch/SPM040507.pdf>. [*IPCC, Working Group III, 2007 Report (Summary)*]. The IPCC (and other scientists) generally estimates that avoiding dangerous climate change will require limiting temperature increases to roughly 2°C, and no more than 3° — meaning GHG reductions ranging from roughly 30 to 80 percent below 2000 levels.

12 *Supra* note 3.

13 *Ibid.* at Annex B.

14 There have of course been site-specific requirements to reduce GHG emissions, but no comprehensive requirement for industries (or others) have been put in place.

15 EC, *Climate Change Plan*, 2007, *supra* note 1 at 5.

16 Environment Canada, *Regulatory Framework for Air Emissions* (Ottawa: Environment Canada) at 9, online: <http://www.ec.gc.ca/doc/media/m_124/report_eng.pdf> [EC, *Regulatory Framework*].

is to have any chance of meeting its Kyoto target — some feel it may already be too late.

The *KPIA* also squarely raises several critical legal questions concerning the scope of federal constitutional power over the environment. The way in which these questions are answered will have an important bearing not only on how Canada addresses climate change, but on Parliament's ability to address the growing array of environmental problems confronting the nation. Canada's courts have begun to map out the boundaries of the federal power to regulate on environmental protection, especially under the Criminal Law and Peace Order and Good Government (POGG) powers. However, the current case law leaves many important questions unanswered, and fails to provide the federal government with adequate scope to effectively address many modern environmental problems. Moreover, the federal power to implement environmental (and other) treaties is uncertain, and has been that way for seventy years.

Given the controversy surrounding GHG reductions generally, and Kyoto specifically, it seems all but inevitable that the *KPIA* will be the subject of a constitutional challenge, as have most other new federal environmental laws.[17] When this occurs, the *Act* will test current federal constitutional limits because of several of its distinctive features: first, it addresses a far-reaching environmental problem of critical global importance; second, its stated purpose is to implement a global treaty; third, it is likely to have fairly significant impacts on traditional areas of provincial jurisdiction (because GHGs result mainly from fossil fuel combustion, the main power source for modern economies); and fourth, effective action on GHGs requires a broader toolkit than just punitive measures, in particular it requires emissions trading.

Because of these distinctive features, it is proposed that the *KPIA* raises at least four important and novel questions about the extent of federal constitutional powers, specifically:

1. The extent of federal intrusion into provincial authority permitted under POGG — in particular, whether a greater degree of intrusion is permissible if needed to address a problem of significant global importance;

17 For example, the *Ocean Dumping Control Act*, S.C. 1974-75-76, c. 55, in *R. v. Crown Zellerbach Can. Ltd.*, [1988] 1 S.C.R. 401 [*Crown Zellerbach*]; the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 [*CEAA*], in *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 [*Oldman River*]; and the *Canadian Environmental Protection Act*, R.S.C. 1985, c. 16 [*CEPA*], in *A.G. Canada. v. Hydro-Québec et al.*, [1997] 3 S.C.R. 213 [*Hydro-Quebec*], were all constitutionally challenged and upheld.

2. The existence and nature of a federal treaty-implementing power — one of the most intriguing unanswered constitutional questions of the past seventy years;

3. The scope of permissible regulatory tools that may be used under Criminal Law — in particular, whether emissions trading can fit within a criminal statute; and

4. The ability to use the Trade and Commerce clause for environmental purposes — namely, the creation of a national (and international) emissions trading market.

Flowing from these constitutional questions, the thesis of this article is twofold. First, from a doctrinal perspective, while the above four heads of power provide a reasonable basis for upholding the *KPIA*, doing so will require the courts to extend federal powers somewhat further than in previous cases, and to address important unanswered questions under the POGG, Criminal, and Trade and Commerce powers. Second, from a larger policy perspective, the most critical constitutional question raised by the *KPIA* is how to reconcile the division of powers with Canada's ability to address international issues, particularly when they are part of a treaty — a question that has been awaiting an answer since 1937. It is submitted that it is possible and desirable to uphold the *Act* on the basis of a federal power to implement treaties, within appropriate limits, in order to allow Canada to participate effectively in an increasingly globalized world.

The remainder of this article is organized as follows. Part Two briefly addresses several essential background issues, namely: an overview of climate change and Kyoto; the requirements of the *KPIA* and proposed federal GHG regulations; a brief discussion about emissions trading; a summary of current constitutional doctrine and legal commentary in the area of the environment; and the judicial approach to constitutional analysis. Part Three analyzes the prospects for the *KPIA* being upheld under four different heads of power: POGG, treaty implementation, Criminal Law, and Trade and Commerce. Part Four synthesizes the available constitutional paths, and discusses which ones would be most valuable in terms of providing broader constitutional and policy guidance.

II. ESSENTIAL BACKGROUND MATTERS

Climate Change and Kyoto in a Nutshell

In order to understand the federal power to address climate change, some background on the problem is helpful. Climate change (or "global warming") results from the emission of six main GHGs, of which carbon dioxide is the most prominent. The combustion of fossil fuels (oil, gas, and coal) for energy, industry, transport, heat, *etc.*, accounts for 75 to 80 percent of total GHGs. Other activities, particularly forest loss, account for the remaining 20 to 25 percent.[18]

Once released, these GHGs make their way into the atmosphere where they remain for decades, trapping more and more of the sun's energy, which gradually heats and destabilizes the Earth's climate.[19] GHG levels in the atmosphere have increased by about 33 percent since the industrial revolution, and are projected to climb an additional 33 to 50 percent over the next fifty years, unless substantial efforts are made to curtail emissions.[20] This increase in GHG levels will result in projected temperature increases of two to four degrees celsius (much more in some places), and cause a raft of effects, such as: increases in severe storms; melting glaciers; rising sea levels; changes in rain, drought, and fire patterns; increasing wildlife extinctions (due to changing habitat); increases in human diseases, malnutrition, and mortality; and (potentially) the slowing or reversal of the gulf stream.[21] Unfortunately for Canada, these effects will become more severe the closer ones gets to the poles — as is already being witnessed in Canada's North.[22]

Climate change, to some degree, has always occurred due to natural forces

18 IPCC, *Contribution of Working Group I (Science) to the Fourth Assessment Report of the United Nations Intergovernmental Panel on Climate Change: Summary for Policy Makers* (Cambridge, UK: Cambridge University Press, 2007) at 2-3, online: <http://ipcc-wg1.ucar.edu/wg1/Report/AR4WG1_Print_SPM.pdf> [IPCC, *Working Group I, 2007 Report (Summary)*].

19 IPCC, *Contribution of Working Group I (Science) to the Third Assessment Report of the United Nations Intergovernmental Panel on Climate Change: Summary for Policy Makers* (Cambridge, UK: Cambridge University Press, 2001) c. 4, online: <http://www.grida.no/climate/ipcc_tar/wg1/pdf/TAR-04.PDF> [IPCC, *Working Group I, 2001 Report (Summary)*].

20 IPCC, *Working Group I 2007 Report (Summary)*, *supra* note 18 at 2; IPCC, *Working Group III, 2007 Report (Summary)*, *supra* note 11 at 15.

21 IPCC, *Working Group I 2007 Report (Summary)*, *supra* note 18 at 13; IPCC, *Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change: Summary for Policy Makers* (Cambridge, UK: Cambridge University Press, 2007), online: <http://www.ipcc-wg2.org/> [IPCC, *Working Group II, 2007 Report (Summary)*].

22 ACIA, *Warming Arctic*, 2004, *supra* note 9 at 8-20.

(such as solar activity). What is different about the present problem is that human activity is driving atmospheric GHG concentrations to levels well beyond any witnessed in the past 650,000 years.[23] The past 8,000 years have seen a period of unprecedented climatic stability, which has allowed modern human civilization to flourish.[24] Current levels of GHG emissions threaten to undermine that climatic stability. No one can say for certain what the consequences will be, or how well we can adapt, but it poses a challenge unlike any that human society has ever faced.

GHG emissions are a global problem as a tonne of emissions anywhere has roughly the same effect on the Earth's climate.[25] Therefore, global action is required to solve the problem. The *United Nations Framework Convention on Climate Change* (UNFCCC) was the first step in this direction.[26] Signed in 1992, this convention calls on countries to inventory and report their GHG emissions, and take actions to reduce them, specifying a variety of measures. However, emissions continued to rise following the UNFCCC's signing; as a result, countries decided there was a need to set specific timelines and targets for reduction. These were set out in the Kyoto Protocol to the UNFCCC, signed in December 1997. Kyoto calls on developed nations, collectively, to reduce their GHG emissions by 5 percent below 1990 levels by 2012, with each country having a slightly different target — Canada's target is 6 percent.[27] It also calls for emissions trading, both among developed countries and with developing ones — to encourage them to start taking voluntary reductions.[28] Kyoto is just a first step towards the approximately 50 percent reductions needed by 2050 in order to avoid dangerous climate change.

The *KPIA* and Canada's Climate Plan

In April 2007 the federal government announced its long-awaited climate plan, which promised to bring in regulations that would require stabilization of GHG emissions by 2012, and a 20 percent reduction by 2020 (compared to 2006 levels — not 1990, the Kyoto benchmark).[29] Canada would stay within Kyoto, the plan said, but fall well short of its target.

23 IPCC, *Working Group 1 2007 Report (Summary)*, *supra* note 18 at 2.

24 IPCC, *Working Group I, 2001 Report (Summary)*, *supra* note 19 at 138-140.

25 *Ibid.* at 247.

26 1771 U.N.T.S. 107, (entered into force 21 March 1994) [*UNFCCC*].

27 See Kyoto Protocol, *supra* note 3 at Annex B.

28 *Ibid.* art. 6, 12. It was agreed that developed countries would take the first step by taking on binding targets under Kyoto, since they accounted for the majority of global GHGs and had received the accompanying economic benefits.

29 EC, *Regulatory Framework*, *supra* note 16.

This regulatory announcement, and its abandonment of Canada's Kyoto target, set the stage for the passage of the *KPIA* in June 2007. The *Act* has two key mandatory requirements: first, it requires a climate plan within 60 days, setting out how Canada will comply with Kyoto; and second, it requires the federal cabinet to develop regulations with 180 days that "ensure that Canada fully meets its obligations under Article 3, paragraph 1, of the Kyoto Protocol" (the article setting emissions reduction requirements).[30] The *Act* allows the federal government to make such regulations under other existing acts, including the *Canadian Environmental Protection Act, 1999*,[31] and includes its own regulation-making powers, which may be used to supplement other acts if necessary.[32] It also allows those regulations to be complemented by spending, agreements, and other non-regulatory measures.[33]

Given the fairly comprehensive nature of the powers under *CEPA*, it seems likely that that *Act* will be the main vehicle for developing regulations to meet the *KPIA*'s mandate. The *KPIA* and *CEPA* provide a broad basket of regulatory tools that could be used to meet Canada's Kyoto target (or at least to lower GHG emissions). GHGs are released from a broad array of sources: approximately 50 percent of Canada's emissions come from industry and power generation, 26 percent from transportation, 14 percent from agriculture and forestry, and 7 percent from domestic use.[34] As such, it will require a number of different regulatory tools to achieve reductions from these various sources.

The federal government's recently released climate change plan proposes a range of measures, including:

- limits on industrial emissions of GHGs;
- emissions trading (cap and trade, and offsets);
- vehicle fuel efficiency standards;
- energy efficiency standards for appliances;
- incentive programs of various types (*e.g.*, home insulation, renewable energy);

30 *KPIA*, *supra* note 2 at ss. 5, 7.
31 S.C. 1999, c. 33.
32 *KPIA*, *supra* note 2 at s. 6.
33 *Ibid.* at s. 7(3).
34 Canada, *Fourth National Report on Climate Change* (Ottawa: Environment Canada, 2006) at 15-16, online: Environment Canada <http://www.ec.gc.ca/climate/4th_Report_on_CC_e.pdf> [Canada, *2006 Climate Change Report*].

- promotion of biofuels; and
- phasing out of tax breaks for oil sands.[35]

For purposes of analysis, this discussion will proceed on the assumption that the above-listed regulations and measures will be the main ones taken to implement the *KPIA* (although additional measures and/or more ambitious targets will be needed to meet Kyoto). This list covers a fairly broad spectrum of actions, so it is likely (though not certain) that any further measures that may be added to the list would be covered by the constitutional analysis of the currently proposed measures. In any event, it is the constitutionality of the *Act* itself that will be at issue in any litigation; the implementing regulations simply serve to illustrate the *Act's* potential reach.

Of the above-listed measures, some are more constitutionally contentious than others. For example, there is little doubt about federal authority to use its taxation and spending powers to address climate change (although these powers are not unlimited).[36] Similarly, there is little doubt about the federal government's ability to legally limit *industrial* emissions of GHGs, following the Supreme Court's decision in *Hydro-Quebec* (again, assuming drafters respect the basic limits of the Criminal power).[37] Therefore, this article will focus mainly on the additional proposed regulatory elements. In particular, it will focus on *emissions trading*, since this aspect is integrally linked to industrial emissions limits (under a cap and trade approach), and is an important part of Kyoto. In addition, other regulatory elements, such as requirements for carbon-efficient forestry or agriculture, are briefly examined to the extent that they raise different constitutional issues or nuances.

While this article focuses on the *KPIA*, its analyses and conclusions also address the broader question of the federal government's power to use the above-listed measures to control greenhouse gas emissions in any future legislation.

Emissions Trading: an Important "Next Generation" Tool

Emissions trading schemes are fairly new to Canada,[38] and have never

35 EC, *Climate Change Plan*, 2007, *supra* note 1 at 10-16.

36 For a description of the spending power see P. Hogg, *Constitutional Law of Canada*, 2002 student ed. (Scarborough, ON: Carswell, 2002) at c. 28.2-28.3.

37 See for example, P. Hogg, "Kyoto and Canada: A Legal Perspective" (1998) 1:3 *Alberta Views* at 7-8.

38 The main examples are Ontario's acid rain regulations and the federal CFC (ozone depleting

been constitutionally reviewed. However, they have been used extensively in other countries, especially the United States (U.S.), for over twenty years. The experience in those other schemes demonstrates that, in the right situations, emissions trading can be a highly effective tool. It can significantly reduce the overall cost of achieving emissions reductions, which in turn allows for greater reductions to be achieved.[39] For example, the U.S. acid rain program — the largest experiment to date in emissions trading — achieved estimated cost savings of approximately 40-50 percent, or $1 billion per year, compared to a traditional command-and-control approach.[40] These cost savings led the government to set tougher emissions standards that achieved 25 percent greater reductions.[41] Similar results have been seen in other trading programs.[42]

Climate change is the poster child for a problem that is well suited to emissions trading. GHGs are the ultimate example of uniformly mixed pollutants. Their impacts are global, not local (or even regional). Once emitted, GHGs travel up into the atmosphere, where they mix with GHGs from other sources and spread around the Earth's atmosphere.[43] A tonne of GHGs emitted anywhere on the planet will have approximately the same global impact. This makes GHGs ideal for emissions trading, since a tonne of reductions anywhere will have the same global benefit.

It was for this reason that the nations of the world chose to include emissions trading as an important part of Kyoto — marking the first global experiment with this regulatory tool. Because of the inclusion of emissions trading (and other flexibility mechanisms) in Kyoto, Canada and other nations took on

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substances) program, but these have been small scale and have not generated much activity to date. E. Haites & T. Hussain, "The Changing Climate for Emissions Trading in Canada" (2000) 9 Rev. of European Community & International Environmental Law at 264.

39 S. Elgie, "Carbon Offset Trading: A Leaky Sieve or Smart Step?" 17 J. of Environemtal Law & Policy 3 235 at 246-49 notes 41, 46, 51; OECD, *Implementing Domestic Tradable Permits for Environmental Protection* (Paris: OECD, 1999); Robert N. Stavins, "Experience with Market-Based Environmental Policy Instruments: Discussion Paper 01-58" (Washington: Resources for the Future, 2001), online: Resources for Future <www.rff.org/Documents/RFF-DP-01-58.pdf>.

40 C. Carlson et al., "SO2 Control by Electric Utilities: What Are the Gains from Trade?" (2000) 108 J. of Political Economy. 1292; D. Ellerman et al., *Markets for Clean Air: the U.S. Acid Rain Program* (New York: Cambridge Press, 2000) at 280-96.

41 Environmental Defense, *From Obstacle to Opportunity: How Acid Rain Emission Trading Is Delivering Cleaner Air* (2000), online: <http://www.environmentaldefense.org/documents/645_SO2.pdf> [Environmental Defense].

42 Elgie, *supra* note 39 at 247.

43 IPCC, *Contribution of Working Group I (Science) to the Fourth Assessment Report of the United Nations Intergovernmental Panel on Climate Change: Summary for Policy Makers* (Cambridge, U.K.: Cambridge University Press, 2007) at 247, online: <http://ipcc-wg1.ucar.edu/wg1/Report/AR4WG1_Print_SPM.pdf> (a small percentage of GHGs are not well-mixed in the atmosphere).

more ambitious GHG reduction targets, since trading would allow those targets to be achieved at a lower cost.[44] Kyoto allows for trading both between nations and by private projects or operations.[45] The regime it establishes is global in nature, but it is expected that most nations will set up their own domestic trading schemes to complement and implement the global scheme. Europe has already done so,[46] and Canada is now proposing to follow suit. Emissions trading schemes are also being established in the U.S., despite its failure to ratify Kyoto.[47]

The mechanics of emissions trading can be explained simply. A facility or operation that reduces its GHG emissions below its permitted or "normal" level can sell the resulting "credits" to another facility (to meet a domestic reduction target), or nation (to meet its international Kyoto target). A variety of rules are required to ensure that GHG reductions are real and verifiable, all of which requires an agency to approve projects and oversee trading.[48]

Although specific draft regulations have not yet been released, the Canadian federal regulatory proposal spells out the main elements of a cap and trade plan.[49] Each large industrial emitter of GHGs across Canada will be assigned an emissions limit, set forth by regulation under *CEPA*, and faces penalties if that limit is exceeded. To help achieve its target, each facility will be allowed to engage in emissions trading. Trading may be with other large industrial emitters, or with other firms that do not have an emissions cap (know as offset trading), such as agricultural, forestry or landfill operators.[50] The proposal enables companies to engage in emissions trading at both a national and global scale, and contemplates potential hemispheric trading with the U.S. and Mexico.

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44 S. Oberthur & H. Ott, *The Kyoto Protocol: International Climate Policy for the 21st Century* (New York: Springer, 1999) at 57, 143, 188 (discussing U.S. and EU positions). Canada agreed to take on greater emission reduction targets in Kyoto in part because of the inclusion of emission trading and other flexibility mechanisms in the protocol: Interview with C. Wilkinson, senior policy advisor to Canada's Environment Minister during the Kyoto negotiations, 12 September 2007.

45 Kyoto, *supra* note 3 at art. 6, 12.

46 European Parliament and the Council of the European Union, *Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 Establishing a Scheme for Greenhouse Gas Emission Allowance Trading Within the Community*, [2003] O.J.L. 275/32 at Annex II, online: EUR-LEX <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003L0087:EN:HTML> [EU ETS System].

47 EC, *Regulatory Framework*, *supra* note 16 at 15.

48 Elgie, *supra* note 39 at 259-60.

49 EC, *Regulatory Framework*, *supra* note 16 at 9-15

50 *Ibid.* at 12-15. Firms will also be allowed to contribute to a technology fund, in lieu of reductions, up to a limit.

In sum, emissions trading is an integral part of Kyoto, and of Canada's proposed domestic regulatory approach. Its purpose is twofold: (i) to reduce costs, by achieving greater reductions at lower rates (compared to traditional command and control approaches), and (ii) to engage a broader cross-section of the economy in emissions reductions (by allowing offset trading). Canada is proposing a domestic system to complement and integrate with Kyoto's global system. There are still important details to be worked out in designing Canada's system, but enough is known of the proposed scheme to allow for a preliminary analysis of its constitutionality. Moreover, it is useful to explore the constitutional issues at this stage, while there is still time to refine the scheme.

Note on Climate-Constitutional Literature

Several authors, including Chris Rolfe, Joseph Castrilli, Philip Barton, and Elisabeth DeMarco, have written on the subject of climate change and the Constitution in the past decade.[51] This article aims to build on that work, while carving out new analytical ground. In particular, none of these preceding articles have delved into the specific constitutional issues identified above, at least not in similar depth.[52] Moreover, these earlier articles were written long

51 C. Rolfe, Putting Strategies into Action: The Constitutional Legislative Basis for Action (March, 1998), in National Roundtable on the Environment and the Economy (NRTEE), *Canada's Options for a Domestic Greenhouse Gas Emissions Trading Program* App. 2 (Ottawa: Renouf, 1999), online: NRTEE <http://www.nrtee-trnee.ca/eng/publications/options-emissions-trading/options-emissions-trading-eng.pdf>; J. Castrilli, "Legal Authority for Emissions Trading in Canada", *The Legislative Authority to Implement a Domestic Emissions Trading System* (Ottawa: NRTEE, 1999) App. 1; P. Barton, "Economic Instruments and the Kyoto Protocol: Can Parliament Implement Emissions Trading without Provincial Co-Operation?", (2002) 40 Alberta Law Rev. 417; E. DeMarco et al., "Canadian Challenges in Implementing the Kyoto Protocol: A Cause for Harmonization" (2004) 42 Alberta Law Rev. 209. See also: C. Stockdale, *The Constitutional Implications of Implementing Kyoto* (Centre for Studies in Agriculture, Law and Environment, Saskatoon, 2004); J. Mallet, "Constitutional Support Lacking for Alberta's Bill 32" (2003) Environmental Law Centre News Brief 18:1 at 1-3, online: <http://www.elc.ab.ca/publications/NewsBriefDetails.cfm?id=772>; N. Bankes & A. Lucas, "Kyoto, Constitutional Law and Alberta's Proposals" (2004) 42 Alberta Law Rev. 355.

52 For example, the articles by Rolfe and Castrilli, *supra* note 51, were background papers prepared in 1998 for the NRTEE (and aimed at a non-legal audience); they provide fairly brief summaries of Kyoto-related constitutional issues. The Rolfe article only very briefly addresses the treaty-implementing power (and Trade), and Castrilli does not address it at all. The article by Barton, *supra* note 51 (written as a law student), focuses on emissions trading. Most of the article is devoted to a thorough summary of existing case law of the applicable heads of power — although it does not address the treaty-implementing power. The analysis of how that case law applies to carbon trading legislation is fairly brief, and the article does not seek to address the question of how the case law might evolve to address the issues raised by climate change legislation; as a result, it says little about the four key issues addressed in the present article. DeMarco, *supra* note

before the *KPIA* and the current federal regulatory framework existed, and so were not assessing the same legislative and regulatory provisions.[53] Although their focus and context were somewhat different, the information and ideas in those earlier works were of benefit to this article.

The above-mentioned sources, particularly Barton, also provide a thorough summary of the applicable case law in the area, so that ground will not be rehashed here. Instead, this article will briefly summarize the applicable case law and principles in each area, and then cut to the constitutional chase by honing in on the key issues (in the author's view) that arise in each area.

The Constitution and the Environment: Key Unanswered Questions

To understand the significance of the constitutional issues raised by the *KPIA*, it is important to understand the current state of constitutional-environmental law in Canada. A brief overview is provided here, focusing on federal powers, with more specifics in Part Three.

As environmental problems and concerns have risen over the past few decades, so have federal (and provincial) legislative efforts to address these problems. This has necessitated judicial delineation of the scope of federal powers over the environment, since that subject is not explicitly addressed in the Constitution (being of little concern in 1867). Canada's courts, broadly speaking, have used two types of constitutional powers to support federal environmental laws. The first are "pigeon hole," or subject-specific powers enumerated in the Constitution. Examples of such powers include: Sea Coastal and Inland Fisheries,[54] Navigation and Shipping,[55] and federal lands.[56] Such powers allow Parliament to address specific types, or aspects, of environmental problems, but do not — and were not designed to — allow it to address larger environmental problems, such as toxic pollution, endangered

51, says very little about the treaty and Criminal Law powers, a bit more about POGG, and has a lengthier discussion of the Trade and Commerce power.

53 For example, DeMarco, *supra* note 51 at 233, dismisses Criminal Law as a basis for supporting the then-proposed federal scheme because it would be based on *covenants* not regulations — which is no longer the case with the current proposal.

54 *Constitution Act, 1867*, *supra* note 7 at s. 91(12). The *Fisheries Act*, R.S.C. 1985, c. F-14, was upheld in upheld in *Northwest Falling Contractors Ltd. v. The Queen*, [1980] 2 S.C.R. 292 [*Northwest Falling*].

55 *Ibid.* at s. 91(10). The *Navigable Waters Protection Act*, R.S.C. 1985, c. N-22 was addressed, along with the *CEAA*, in *Oldman River*, *supra* note 17.

56 *Canada National Parks Act*, S.C. 2000, c. 32.

species, or GHG emissions. For such larger problems, courts have had to look to broader, cross-cutting powers in the Constitution, especially Peace Order and Good Government (POGG)[57] and the Criminal Law[58] powers.

The courts, understandably, have been unwilling to give unbridled power to Ottawa over environmental protection under these two powers, since doing so could seriously affect the federal-provincial balance of powers. Therefore, to date, the Supreme Court has used both vertical and horizontal limits to delineate federal environmental powers. Put another way, it has limited the *breadth* of matters that may be addressed, through the POGG power, and the *depth* of the tools that may be used, under the Criminal power.[59]

Under POGG, the Court has limited Parliament to addressing environmental subjects that are narrowly defined ("single, distinct and indivisible") and that have limited impacts on provincial powers — *e.g.*, it may address marine pollution, but not pollution generally.[60] Under Criminal, the Court has limited Parliament to using prohibitive tools, not regulatory ones, to address environmental problems (with some leeway) — *e.g.*, it may prohibit industrial pollution but may not engage in detailed oversight and approval.[61]

These restrictions on breadth and depth have (barely) sufficed for the Court to uphold the impugned statutes in the two main cases to date — *Crown Zellerbach* and *Hydro-Quebec* — by narrow one-vote majorities.[62] However, these restrictions do not afford Parliament sufficient scope to effectively address many (or possibly most) modern environmental problems. The *breadth* restriction under POGG is problematic because ecosystems are integrally interconnected, and a compartmentalized approach to pollution problems is normally of limited effect. The *depth* restriction under Criminal is problematic in that prohibitions are a blunt instrument; most other jurisdictions are finding that a broader array of tools — especially economic instruments (such as emissions trading) — are more effective at addressing most environmental problems.

57 This power stems from the introductory words in section 91 of the *Constitution Act, 1867*, *supra* note 7: "to make laws for the Peace, Order and good Government of Canada, in relation to all matters not coming within the Classes of Subjects by this *Act* assigned exclusively to the Legislatures of the Province."

58 *Ibid.* at s. 91(27).

59 This typology, and this subject in general, will be further developed by the author in a forthcoming article.

60 *Crown Zellerbach*, *supra* note 17.

61 *Hydro-Quebec*, *supra* note 17.

62 *Ibid.*; *Crown Zellerbach*, *supra* note 17.

More will be said about these shortcomings in Part Four. At this stage, suffice it to say that, to date, the Supreme Court has been able to sidestep the most difficult (and important) questions about how to grant Parliament environmental powers that are both effective and bounded. The *KPIA*, by going further in both breadth (impacts on provincial matters) and depth (use of economic instruments) than previously reviewed statutes, and by purporting to implement a treaty, is likely to bring these key constitutional questions to a head.

III. THE CONSTITUTIONALITY OF THE *KPIA*

The approach taken by the courts in a division of powers analysis (when dealing with federal legislation), can be briefly summarized as follows.[63] The first step is to characterize the essential "pith and substance" or "matter" of a statute, recognizing that a statute may address more than one subject matter. The second step is to determine whether that subject matter falls within a federal head of power enumerated in the Constitution, recognizing that a particular statute or subject matter may draw on more than one federal head of power.[64]

Not all activities in society must fall exclusively under a federal or provincial head of power. Many activities have both a federal and a provincial dimension, and can be legislatively addressed by both levels of government — as reflected in the "double aspect doctrine."[65] Many environmental issues have such a double aspect. For example, pollution of a waterway may be addressed by the federal government under its power over Fisheries (section 91(12)) and by a provincial government under its power to address matters of Property and Civil Rights (section 92(13)).[66] Where such overlap arises, both provisions may stand unless they are in conflict. Such "conflict," in the constitutional sense, is rare: it arises only when it is not possible to comply with both provisions. For example, if a federal statute sets a limit on emissions from a particular pollutant, and a province sets a more stringent limit, there is no conflict if a company could comply with both standards by meeting the more stringent one.[67]

63 See generally, Hogg, *supra* note 36 at c. 15, 16.

64 *Ibid.* at c. 15.5(a); *Reference Re Firearms Act (Can.)*, [2000] 1 S.C.R. 783 at 796 [*Firearms Reference*].

65 Hogg, *ibid.* at c. 15.5(c).

66 *Constitution Act, 1867*, *supra* note 7.

67 Hogg, *supra* note 36 at c. 16.2, 16.3. "Conflict" would arise, for example, if a federal statute required the use of a particular pollution-control technology, while a province required a different

What is the *KPIA*'s subject matter? A statute's subject matter may be characterized in somewhat different ways depending on the constitutional lens though which it is viewed.[68] In the case of the *KPIA*, there are three possible characterizations of its subject matter. The first possibility is "the control of GHG emissions." This characterization accurately distills the *Act's* objective and, it is suggested, is the most likely choice for its subject matter for purposes of the POGG or Criminal powers. However, it is also possible that the *Act* will be framed somewhat more broadly, as addressing "international air pollution." This broader frame may help to distinguish between the federal and provincial dimensions of air pollution. Finally, the *Act* also could quite comfortably be framed as "fulfilling Canada's obligations under the Kyoto Protocol and UNFCCC." This characterization, it is suggested, is the most likely choice for its subject matter for purposes of the treaty-implementing power. Recall that a statute may have more than one subject matter, and may rely on more than one head of power, a fact that will become pertinent when the analysis turns to the Trade and Commerce power.

With the above background in mind, let us now turn to the constitutionality of the *KPIA*. The analysis will begin by reviewing the POGG and treaty-implementing powers, then turn to Criminal Law and Trade and Commerce. The article will not attempt a comprehensive review of all issues arising under each head of power, since that has been done elsewhere, rather it will focus on the key issues that a court challenge is likely to turn on.

POGG (National Concern)

The Peace Order and Good Government power in the preamble to section 91 has been held to have two prongs: the "emergency" power, and the "national concern" (or "gap") power.[69] The *KPIA* would not fall under the former (since climate change is not a temporary problem, nor, in all likelihood, has it yet reached the level of an emergency), but potentially the latter. The test for whether a particular subject matter falls under the national concern power was established in *Crown Zellerbach*:

1. The subject matter is of national concern to Canada as a whole;[70]

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kind of technology.

68 *Ibid.* at c. 15.5(a).

69 *Constitution Act, 1867, supra* note 7; Hogg, *ibid.* at c. 17.1, 17.2. The gap branch now seems to be folded into "national concern" by the courts; see *Crown Zellerbach, supra* note 17 at 431-32 (it includes "new matters which did not exist at Confederation").

70 See also, *A.-G. Ont. v Canada Temperance Federation*, [1946] A.C. 193 at 205 (P.C.) [*Canada Temperance*].

2. It has a singleness, distinctness, and indivisibility that clearly distinguishes it from matters of provincial concern;

3. It has a scale of impact on provincial jurisdiction that is reconcilable with the distribution of legislative powers; and

4. In determining whether a subject matter has the requisite degree of singleness, distinctness, and indivisibility it is relevant to consider what would be the extraprovincial consequences of a provincial failure to deal effectively with the intraprovincial aspects of the matter. This is known as the "provincial inability" test.[71]

Crown Zellerbach is also the main case to apply the national concern power to an environmental statute. In that case, the Court concluded that "the environment" or "pollution" are too broad to qualify as subject matters under national concern; they have to be broken down into more bounded component parts.[72] The majority, in a 4:3 decision, found that marine pollution satisfied the requirements of the test and qualified as a matter of national concern, and therefore upheld the *Ocean Dumping Control Act*.[73] The dissent, authored by Justice La Forest, is a powerful statement on the importance and interconnectedness of environmental problems, and the challenge of fitting them into the Constitution. The key points emphasized by La Forest, for purposes of the issue at hand, included: first, that interprovincial or international pollution are matters of national concern; second, environmental problems are interconnected — for example, airborne pollution and pollution of inland rivers both contribute to marine pollution; third, the *Act* at hand did not sufficiently demarcate the limits of marine pollution; and fourth, there was not a sufficient link between the substances covered by the *Act* and marine pollution — many of the substances covered had no apparent polluting effect.[74]

Several later cases, including *Oldman River* and the dissent in *Hydro-Quebec*,[75] have adopted the *Crown Zellerbach* test and applied it to other environmental matters.

The next step is to apply the national concern test to the *KPIA*. The first

71 *Crown Zellerbach, supra* note 17 at 431-33.

72 *Ibid.* at 452-56. This point was made explicitly by the dissent, and the majority implicitly agreed. The full Court later endorsed this conclusion in *Oldman River, supra* note 17 at 51.

73 *Ibid.* at 438.

74 *Ibid.* at 445-46, 456-59.

75 The majority did not address the issue of national concern.

question (which is often simply assumed in national concern judgments), is whether climate change is a matter of national concern to Canada as a whole. In this case, there is no doubt that the answer is "yes" — it is hard to think of a matter of greater national — and international concern and consequence.

Single, distinct, indivisible

Turning to the second stage of the test, the *Act*, and the Kyoto Protocol, identify six specific pollutants as GHGs. These are a very small subset of all air pollutants. GHGs are identified as a distinct, well-defined category of pollutants by Kyoto (a fact noted as relevant in *Crown Zellerbach*[76]), and by almost all climate change regulatory regimes around the world.[77] It is impractical to subdivide GHGs for regulatory purposes. All of them cause climate change (in differing degrees), and the problem cannot be solved by regulating only some. Moreover, Kyoto requires countries to address all six.[78] Nor is it possible to isolate just the emissions that have a cross-border impact; by their nature, all GHG emissions cause a global impact. For these reasons, it seems very likely that this part of the test will be met.[79]

Provincial inability

Again, there is little doubt that this third part of the test will be met; GHG emissions, by their nature, have a global impact. If any province fails to effectively control its emissions, it would have very real extraprovincial impacts, and would exacerbate the climate change problem.[80] It also could cause Canada to be in breach of Kyoto (although this point may be less germane, given that the federal government has already indicated its intent to be so — albeit before the passage of the *KPIA*). GHG emissions are a prototypical example of a problem on which provincial inaction would cause significant extraprovincial impacts.[81]

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76 *Supra* note 17 at 419, 438 (the existence of a treaty addressing a subject can be evidence of its singleness, distinctness and indivisibility).

77 See, for example, EU ETS System, *supra* note 46; *Climate Change Response Act*, New Zealand Statutes, No. 40, 2002, s. 4.

78 Kyoto Protocol, *supra* note 3 at art. 3.1.

79 *Supra* note 51: Rolfe (at 4) and Barton (at 428-29) agree with this conclusion, while DeMarco and Castrilli do not specifically address this question.

80 One might argue that Canada's GHG emissions are just 2 percent of the global total, thus the impact of any province's inaction would not be significant on a global scale. But if this argument were accepted, it would mean that international pollution would almost never be a matter of national concern, since Canada is a very small source (globally speaking) of most pollutants. In any event, Canada's GHG emissions are greater than those of most other countries on Earth, and represent nearly half of the total global target for GHG reductions under Kyoto (5 percent).

81 *Supra* note 51: Rolfe (at 4-5), Barton (at 430-31), and Demarco (at 232) agree on this point, and

Impact on provincial jurisdiction

It is this final prong of the test that will raise the most serious issues for the *KPIA*. Opponents of the *Act* can argue, with some merit, that it is likely to have significant impacts on a range of activities that are normally considered matters of provincial jurisdiction. Overall, reducing GHG emissions will affect many sectors of Canada's economy. More specifically, because GHG emissions are a byproduct of all fossil fuel combustion and many industrial processes, GHG regulations under the *KPIA* would affect (among others): oil and gas extraction and refining, coal power generation, and most large industrial facilities (*e.g.*, mining, pulp, steel, and chemicals).[82] Depending on how far they reach, these regulations could also affect other GHG-producing activities such as agriculture, forestry, landfills, transportation, and home-energy use.

The extent of such impacts would of course depend on the nature and scope of the implementing regulations, but the potential reach of the *Act* is quite broad. In any event, it seems very likely that the *KPIA* will have impacts on activities under provincial jurisdiction that exceed those arising from the *Ocean Dumping Control Act* — which three of seven Supreme Court judges found to be excessive.[83] Does that mean that the *KPIA* will have difficulty satisfying the third element of the national concern test? Answering that question requires a more probing examination of the purposes underlying this element.

The first question is whether the acceptable level of impact on provincial authority is a static threshold (in which case the *KPIA* may not meet it), or whether it may vary depending on other factors. This question does not seem to have been addressed explicitly in the case law. However, it is submitted that the acceptable level of provincial impact cannot be a static threshold; the courts must take into account other factors such as the importance of the subject matter being addressed, its inherent impact, and the options available for reducing that impact. A real life illustration explains why this must be the case. Under its national concern power, the federal government can potentially address a variety of topics, ranging from narrow to broad. At the narrow end, for example, the *National Capital Act*,[84] which was upheld under the national concern power, affects only land use in the Ottawa-Gatineau region — quite

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Castrilli does not address it.

82 All these sectors, and more, will be covered by federal GHG regulations; see EC, *Regulatory Framework*, *supra* note 16 at iv.

83 *Supra* note 17.

84 S.C. 1958, 7 Elizabeth II, c. 37.

a limited impact.[85] At the broad end, for example, all regulation of radio communications and aeronautics in Canada occurs under national concern, and this regulation affects many types of daily household and business activities across the country.[86] National concern is also the basis for federal regulation of other matters such as atomic energy[87] and narcotic regulation.[88] Thus, it is clear that the acceptable level of provincial impact under national concern can vary broadly.

As such, it seems implicit that the courts, in assessing the acceptable level of impact on provincial jurisdiction, take into account factors such as: the subject matter at issue, its scope and importance, and the inherent level of impact its regulation will have. An inherently far-reaching subject matter will have greater impact than a narrow one, but presumably that impact is weighed against the need for and benefits of national regulation. Simply put, an important and far-reaching subject like climate change may justify a greater degree of provincial impact than a less weighty or far-reaching subject. (Of course, the courts also assess whether the subject matter can be further narrowed down to minimize provincial impact, but that issue is addressed in the second prong of the test.)

If this analysis is correct, then the courts would not simply look at the provincial impact of the *KPIA* in isolation. Rather, they would look at that impact in the context of the other elements of the test. Viewed in that light, there appears to be a fairly strong argument that the *KPIA* has an acceptable degree of impact on provincial jurisdiction: the subject of "controlling GHGs" cannot be further subdivided, it is hard to imagine a subject of greater long-term national and global importance, and the consequences of provincial inaction would be very serious and global in scale. Simply put, the problem of GHG emissions seems to be one that must be addressed federally (although perhaps not exclusively so) if it is to be addressed effectively, and that will necessarily involve a fair degree of impact on activities within provincial jurisdiction — because of the nature of the climate change problem.

Of course upholding federal GHG regulations does not necessarily exclude provinces from regulating GHG pollution within their borders. That is the *second component* of the provincial impact equation, and warrants further

85 *Munro v. National Capital Commission*, [1966] S.C.R. 663.

86 *Re Regulation and Control of Radio Communication in Canada*, [1932] A.C. 304; *Johannesson v. Municipality of West St. Paul*, [1952] 1 S.C.R. 292 [*Johannesson*].

87 *Ontario Hydro v. Ontario (Labour Relations Board)*, [1993] 3 S.C.R. 327.

88 *R. v. Hauser*, [1979] 1 S.C.R. 984.

exploration, since it has been the subject of some misunderstanding. The Supreme Court decisions in *Crown Zellerbach* and *Hydro-Quebec* noted that accepting a subject matter as one of national concern gives the federal government "exclusive jurisdiction to legislate over all aspects of that matter."[89] This statement appears to have created the mistaken impression, among some, that provinces are thereby excluded from legislating over any activity that falls within such a national concern. For example, Barton concludes: "The consequence of determining that certain activities are within the ... POGG power is that *provincial jurisdiction over these activities is prevented.*"[90] This supposed federal "preclusion" is put forward as a reason why the courts should be cautious in using the national concern power.

Such an interpretation is at odds with basic constitutional law doctrine, and with the wording of the two cases. It is trite law that an activity may fall within both a federal and provincial head of power, and be regulated by both levels of government, under the double aspect doctrine.[91] A prime example is water pollution, which is regulated both by federal legislation (under the Fisheries power) and provincial laws (under Property and Civil Rights).[92] Determining that a subject matter is one of national concern is roughly equivalent to adding it as a head of federal power. But that does not waive provinces' rights to legislate over provincial aspects of the matter. Such a view harkens back to the "watertight compartments" days of the Judicial Committee of the Privy Council (long since abandoned by the Supreme Court) and ignores the double aspect doctrine. Indeed, even the Privy Council explicitly disavowed this view.[93]

Moreover, a careful reading of the two judgments in question reveals that the Court did not intend to waive the normal application of the double aspect doctrine. The following passage, by Justice La Forest in *Hydro-Quebec*, is often

89 *Crown Zellerbach*, *supra* note 17 at 432-33; *Hydro-Quebec*, *supra* note 17 at 287-88.

90 Barton, *supra* note 51 at 426 [emphasis added]. See also, Mallet, *supra* note 51 at 2, ("the province would be *totally excluded* from important aspects of [GHG] emissions regulation") [emphasis added]; and Castrilli, *supra* note 51 at 12 ("federal emission trading legislation upheld on the basis of the national concern doctrine may also regulate *exclusively* the intra-provincial aspects of the matter") [emphasis added]. The author also has heard this view expressed at conferences and in discussions with legal scholars.

91 Hogg, *supra* note 36 at c. 15.5(c).

92 See: *Fisheries Act*, *supra* note 54, constitutionally upheld in *Northwest Falling*, *supra* note 54, and *Ontario Water Resources Act*, R.S.O. 1990, c. O.40.

93 In discussing the national concern doctrine, in *Canada Temperance*, *supra* note 70 at 205-6, the Privy Council reasoned: "Nor is the validity of the legislation [under POGG] ... affected because there may still be room for enactments by a provincial legislature dealing with an aspect of the same subject in so far as it specially affects that province."

cited as indicating the Court's view that the national concern power precludes overlapping provincial legislation:[94]

> 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.[95]

The first sentence of this passage is simply basic constitutional law: Parliament (like the provinces) has exclusive jurisdiction over subject matters within its domain — the Court was not purporting to waive the normal application of the double aspect doctrine to POGG.[96] The second sentence reveals the Court's *real* concern: if the entire subject matter of "environmental protection" were accepted as a matter of national concern, it would have serious implications for provincial authority. It would mean a province could not legislate for the purpose of environmental protection, since it would in effect have been made a federal subject matter, which *would* affect broad areas of provincial legislation. What the Court is saying is that matters of national concern must be defined more distinctly and narrowly "to distinguish them from matters of provincial concern." For example, Justice La Forest, in *Crown Zellerbach*, indicated that extraprovincial water pollution would qualify as a matter of national concern.[97] This power would give the federal government broad authority over water pollution (since much of it has extraprovincial effects), but would not preclude provincial legislation addressing *intra*provincial pollution — although in many cases both laws would apply to the same discharges by the same facilities.

This clarification is important. It refutes the notion that the POGG power, any more than any other power, prevents provinces from addressing intraprovincial aspects of activities that are federally regulated (under POGG) — indeed the Court has indicated that such cooperation and overlap is often desirable in the area of the environment.[98] The Court is simply expressing a caution to define matters of national concern with precision.

94 See, for example, Barton, *supra* note 51, at 426.

95 *Hydro-Quebec*, *supra* note 17 at 287-88 [emphasis added].

96 Indeed, to do so would have been in direct contradiction of the Privy Council's decision in *Canada Temperance*, *supra* note 70.

97 *Crown Zellerbach*, *supra* note 17 at 445-46.

98 *Hydro-Quebec*, *supra* note 17 at 296-97, 299, 312-14.

Returning to the issue at hand, accepting "controlling GHG emissions" as a matter of national concern should not preclude provinces from legislating over the provincial impact of such pollution — although one could imagine an industry (or other litigant) raising such an argument.[99] If a court wanted to remove any doubt on this score, it could define the subject matter of national concern to be "*international* air pollution," rather than control of GHG emissions, to clarify that provinces are able to legislate over provincial aspects of the problem. Such a finding would be consistent with earlier statements in *Crown Zellerbach* and *Hydro-Quebec* that extraprovincial pollution is a matter of national concern.[100]

In sum, there appears to be a fairly strong argument for upholding the *KPIA* under the national concern power.[101] The main issue would be the scale of impact on provincial jurisdiction. However, as discussed above, the Court is likely to find that the *KPIA*'s provincial impact, though significant, is acceptable in light of the global importance of the subject, its distinctive and indivisible nature, and the serious consequences of provincial inaction. Moreover, the *KPIA* does not exclude provinces from legislating over the provincial aspects of GHG emissions, to the extent that they fall within provincial authority. If provincial laws were found to be in "conflict" with federal ones, the federal rules would prevail to the extent of the conflict (as part of basic constitutional law doctrine).[102] However, the author agrees with Nigel Bankes and Alastair Lucas that federal rules, in their currently proposed form, are unlikely to create a conflict with provincial laws; it is possible to comply with both by adhering to the more stringent standard.[103]

If the *KPIA* was upheld under POGG, what would be the scope of federal power — how far could it reach? When a subject is found to be of national concern, the federal government obtains "plenary" jurisdiction to legislate over that matter.[104] Therefore, the federal government would be able to address any matter directly relating to controlling the release of GHGs, as well as ancillary

99 One answer to such an argument, presumably, could be that the enabling provincial legislation is aimed at air pollution generally (a valid provincial concern), and not specifically at GHGs.

100 *Crown Zellerbach, supra* note 17 at 426-27; *Hydro-Quebec, supra* note 17 at 263. In both cases the statements were by dissenting judges, but the majority did not disagree on this point.

101 *Supra* note 51: this view is shared by DeMarco (at 233), Barton (at 431) and Rolfe (at 5), but not by Castrilli (at 12). These articles all address earlier versions of the proposed GHG rules, but none canvasses all of the above issues.

102 Hogg, *supra* note 36 at c. 16.

103 Bankes & Lucas, *supra* note 51 at 393-95.

104 *Crown Zellerbach, supra* note 17 at 432-33; *Hydro-Quebec, supra* note 17 at 259-60.

matters that are sufficiently connected.[105] There is no doubt that this would include the power to regulate the GHG emissions of industry, power plants, vehicles, *etc.* It also would very likely include emissions trading, since that is simply a form of allocating emissions reductions among firms, and emissions trading is a part of Kyoto. (Although there will be questions about how deeply federal trading rules can delve into provincial matters.)[106] Such a federal power would likely also extend to regulating activities such as agriculture and forestry (which are covered by Kyoto and the UNFCCC), but only for the purpose of controlling GHG releases — much as the federal government regulates the fishery impacts of forestry and agriculture under the *Fisheries Act*.[107] The more federal regulations are applied to areas traditionally seen as core provincial jurisdiction (like forestry), the more likely it is that the courts would require federal rules to be closely linked to GHG-reduction objectives, as they have done for fisheries.[108] For example, it is likely that federal rules could validly include forestry operations in an emissions trading regime, but the more deeply they delve into site-specific practices or activities, the more they would be on thin ice.[109]

Treaty-Implementing Power

The existence and nature of a federal power to implement treaties is one of the greatest unanswered questions in Canadian constitutional law. The issues and arguments have been canvassed by a number of scholars over the past seventy years,[110] and will not be repeated here in detail. Instead, this article

105 Hogg, *supra* note 36 at c. 15.9(c) explains the various tests for the "ancillary power"; he prefers the "rational, functional connection" test.

106 *Supra* note 51: DeMarco (at 233) and Rolfe (at 5) both conclude that there are limits on how for federal legislation on GHGs could reach into areas of provincial jurisdiction, such as forestry.

107 *Supra* note 54.

108 *Northwest Falling, supra* note 54.

109 For example, federal legislation could well be over-reaching if it tried to determine ownership of forest carbon rights in Crown forests, or to prescribe particular types of forest practices. However, including forestry in the proposed GHG offset trading regime, in the author's view, would likely fall within federal power since it specifically focuses on achieving GHG reductions without prescribing how to do so.

110 See for example, Hogg, *supra* note 36 at c. 11; W.R. Lederman, *Continuing Canadian Constitutional Dilemmas* (Toronto: Butterworth's, 1981) at c. 19; T.H. Strom & P. Finkle, "Treaty Implementation: The Canadian Game Needs Australian Rules" (1993) 25 Ottawa Law Rev. 39; N. Mackenzie, "Canada and the Treaty-making Power" (1937) 15 Canadian Bar Rev. 436; F. R. Scott, "The Consequences of the Privy Council Decisions" (1937) 15 Canadian Bar Rev. 485; J. Holmes, "An Australian view of the Hours of Labour Case" (1937) 15 Canadian Bar Rev. 495; R.B. Stewart, "Canada and International Labour Conventions" (1938) 32 American J. of International Law 36; E. McWhinney, "Canadian Federalism, and the Foreign Affairs and Treaty Making Powers: The Impact of Quebec's 'Quiet Revolution'" (1969) 7 Canadian Yearbook

will seek to summarize the main points of the debate and hone in on the key issues, especially as they apply to the *KPIA*.

Before delving into this question, it should be noted that, for purposes of constitutional analysis, the pith and substance of the *KPIA* likely would be characterized somewhat differently in seeking to fit it within a federal treaty-implementing power. In that case, the object of the legislation would most likely be framed as implementation of the Kyoto Protocol and UNFCCC. That this is the object of the *Act* is made plain not only in its title, but also in its preamble which states: "this legislation is intended to meet, in part, Canada's obligations under the UNFCCC and the Kyoto Protocol."[111] Further, the substantive provisions of the *Act* explicitly require Canada to implement its Kyoto requirements through a plan, regulations, and other means.[112] The issue, then, is whether such treaty-implementing power rests with the federal government.

Section 132 of the *BNA Act* gave the federal government full power to implement "empire treaties," *i.e.*, ones signed by United Kingdom (U.K.) on Canada's behalf, at a time when Canada did not have treaty signing authority.[113] In 1926, Canada gained the power to sign treaties on its own behalf.[114] In light of this development, the Privy Council concluded in the 1932 *Radio Reference* case that section 132 no longer applied, and that authority to implement treaties signed by Canada now rested with the federal government, under the POGG power.[115] In 1937, in an apparent about-face, the Privy Council determined in the *Labour Conventions* case that the power to implement treaties did *not* rest with the federal government, but rested with whichever

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of International Law 3; G. La Forest, "The Labour Conventions Case Revisited" (1974) 12 Canadian Yearbook of International Law 137; R. St. J. MacDonald, "International Treaty Law and the Domestic Law of Canada" (1975) 2 Dalhousie Law J. 307; R. Sullivan, "Jurisdiction to Negotiate and Implement the Free Trade Agreement in Canada" (1987) 24 Univ. of Western Ontario Law Rev. 63; J. Ziegel, "Treaty Making and Implementing Powers in Canada: The Continuing Dilemma" in B. Cheng & E. Brown eds., *Contemporary Problems of International Law* (London: Stevens & Sons, 1988); J. Morin, "International Law — Treaty Making Power — Constitutional Law — Position of the Government of Quebec" (1967) 45 Canadian Bar Rev. 160; and A. de Mestral, "Treaty Power and More on Rules and Obiter Dicta" (1983) 61 Canadian Bar Rev. 856. For a comprehensive treatment of the topic, see R. MacCallum, *International Treaties and Canadian Federalism: Reconciling the Labour Dimensions Case* (LL.M. Thesis, unpublished, Queens College, U.K., 2000).

111 *KPIA*, *supra* note 2.

112 *Ibid.* at ss. 5(1)(a), 7(1).

113 *Constitution Act, 1867*, *supra* note 7 at s. 132.

114 Hogg, *supra* note 36 at c. 11.5. The need for formal approval by London remained in place until 1947.

115 *A-G Que. v. A-G Can. et al.*, [1932] A.C. 304 [*Radio Reference*].

level of government had jurisdiction over the particular subject matter at issue (this case also articulated the now-infamous "watertight compartments" view of federalism).[116] In so doing, the Court distinguished the earlier decision (by a different panel), saying that it was based not on a treaty power but on POGG's national concern power, since radio communication was a gap in the *BNA Act* (though nowhere was this mentioned in *Radio Reference*).[117]

The issue of a federal treaty-implementing power has never squarely arisen before the Supreme Court in the subsequent seventy years.[118] During that time, however, several Supreme Court justices have openly questioned the *Labour Conventions* reasoning and indicated the issue may need to be reconsidered.[119] One case even apparently found that a federal treaty-implementing power still does exist, although in less-than-explicit language.[120] After reviewing the various judicial statements on this topic, Chief Justice Laskin, in *MacDonald v. Vapor Canada Ltd.*, concluded "the foregoing references would support a reconsideration of the Labour Conventions case," but that would have to await a case in which a statute had been enacted on the basis of implementing a treaty (which the one in question was not).[121]

It also has been revealed that the Privy Council's decision, though no dissents were published at that time, included a dissenting judge (and likely two).[122] Further, the decision has been the subject of a number of academic articles

116 *A-G Can. v. A-G Ont.*, [1937] A.C. 326 [*Labour Conventions*]. See MacCallum, *supra* note 110, for a thorough analysis of this case and the *Radio Reference*.

117 In *Labour Conventions*, *ibid.* at 351, the Court reasoned, "the true ground of the decision was that the convention in that case dealt with classes of matters [radio communications] which did not fall within the enumerated classes of subjects in s. 92, or ... in s. 91."

118 Appeals to the Privy Council were abolished in 1949: Hogg, *supra* note 36 at c. 8.2.

119 *Francis v. The Queen*, [1956] S.C.R. 618 [*Francis*]; *Re Offshore Mineral Rights of British Columbia*, [1967] S.C.R. 792; *MacDonald v. Vapor Canada Ltd.*, [1977] 2 S.C.R. 134; *Schneider v. The Queen*, [1982] 2 S.C.R. 112. See also: I. Rand, "Some Aspects of Canadian Constitutionalism" (1960) 38 Canadian Bar Rev. 135 at 142-43.

120 In *Johannesson*, *supra* note 86 at 303, Rinfret J. applied the reasoning from *Radio Reference* to uphold the federal *Aeronautics Act*, even though it was based on a post-1926 treaty: "[T]he convention on International Civil Aviation, signed [in] 1944, has since become effective; and *what was said in the Radio Reference by Viscount Dunedin at p. 313, applies here.* Although the convention might not be looked upon as a treaty under s. 132 of the British North America Act, '*it comes to the same thing*'" [emphasis added]. Kellock J. also endorsed and applied the *Radio Reference* reasoning: "To the extent, therefore, to which the subject matter of the Chicago convention of 1944 falls within s. 91, the language of Viscount Dunedin [in Radio Reference] is equally apt." at 311. Also, Justices Locke and Estey approved a similar statement from the *Aeronautics Reference*, [1932] A.C. 54 at 317, 328. See, Lederman, *supra* note 110 at 355.

121 [1977] 2 S.C.R. 134 at 167-72.

122 Lord Wright, (1955) 33 Can. Bar Rev. 1123 at 1125-28. See also, B.J. MacKinnon, "Labour Conventions Case: Lord Wright's Undisclosed Dissent?" 34 Canadian Bar Rev. 114 at 115-17.

and theses — almost all critical of the decision.[123] F.R. Scott, in one of the more pointed critiques, wrote: "So long as Canada clung to the Imperial apron strings, her Parliament was all powerful in legislating on Empire treaties ...; once she became a nation in her own right, impotence descended."[124] On the whole, almost all scholars agree that *Labour Conventions* was badly decided, and the large majority support a departure from its precedent[125] — although not all suggest going so far as to allocate treaty-implementing power to the federal government alone.

Despite this significant scholarly interest, and despite a number of Supreme Court judges indicating an interest in revisiting the decision, the Court has not yet done so — for the simple reason that the occasion has not arisen. In the seventy years since *Labour Conventions*, the Court has not been presented with a case that squarely called on it to revisit the decision. On the surface, this lack of a treaty-implementation case over that time may seem strange. But it is likely a product of the "chicken and egg" dilemma facing the federal government since 1937. Given the *Labour Conventions* decision, and federal-provincial political sensitivities, it would take a bold act by the federal government to pass legislation relying simply on its treaty-implementing power. Such an action would provoke a hostile reaction from provinces, and most likely result in the statute being tied up in constitutional court proceeding for years. Given that, it is perhaps not surprising that no federal government has squarely tested its treaty-implementing power, outside areas of traditional federal authority, since *Labour Conventions*.[126]

The *KPIA*, however, appears destined to awaken this sleeping constitutional bear. The *Act* squarely purports to implement a treaty on an issue that is not

123 See articles cited *supra* at note 110, with the exception of McWhinney and Morin.

124 F.R. Scott, *supra* note 110 at 115.

125 See for example, Hogg, *supra* note 36 at c. 11.5(c), "it is necessary to conclude that the *Labour Conventions* case is a poorly reasoned decision"; Lederman, *supra* note 110 at c. 19, "the Radio case cannot be dismissed as Lord Atkin purports to dismiss it"; Holmes, *supra* note 110 at 503, the decision is "reactionary"; MacDonald, *supra* note 110 at 328; and MacCallum, *supra* note 110. But see for example, McWhinney, supra note 110 at 4-5, and Morin, *supra* note 110 at 164, supporting the policy outcome of the case.

126 It is arguable that federal legislation to implement its various free trade agreements has tested this power. However, the implementing acts, because their subject matter is international trade, very likely fall under the federal Trade and Commerce power, so would not have to rely on a treaty power. See for example, *North American Free Trade Agreement Implementation Act*, S.C. 1993, c. 44. The Province of Ontario actually commenced a constitutional challenge to NAFTA, but later dropped the case for political reasons, after labour and environmental side agreements were added. C.J. Kukucha, "The Role of Provinces in Canadian Foreign Trade Policy" (2004) *Policy and Society* 24 (3) at 110-120.

wholly within traditional federal jurisdiction — and one of great importance that is almost certain to provoke a constitutional challenge. The *KPIA*, more so than perhaps any statute of the past seventy years, invites the courts to revisit *Labour Conventions*, and to rule on federal power to implement treaties.

In the face of this invitation, what should courts do? This is a significant question, and a complete answer is beyond the scope this article. The arguments pro and con have been well-canvassed by other scholars, and can be summarized as follows, beginning with the main arguments *against* the *Labour Conventions* decision:

1. It is illogical that the federal government would have had the power to implement treaties signed by the U.K. government under section 132, but no longer have implementing power once treaty-signing power was patriated in Canada. Such a conclusion seems inconsistent with the structure and intent of the *BNA Act*. Moreover, the Privy Council's reasoning that treaty implementation was not meant to be a constitutional subject matter of its own is at odds with the plain wording of section 132, which did just that.[127]

2. The *Labour Conventions* decision was in conflict with a recent prior decision of the Court (*Radio Reference*), which held that the treaty-implementing power remained with the federal government (under POGG) after treaty-signing power was patriated in Canada. The Privy Council sought to distinguish the *Radio Reference* judgment on the ground that it was based on the national concern (gap) power. But, in fact, *Radio Reference* was not just about national concern. A careful reading of the decision shows that the Court first decided that the *Act* was valid as an exercise of the federal treaty-implementing power (which existed under POGG by analogy to section 132), before going on to address national concern as a separate ground.[128] The Court in *Labour Conventions* appears to have either misunderstood the *Radio Reference* decision, or artificially distinguished it as a means of avoiding overruling a recent decision of the same Court.[129] In either event, the precedent from the Privy Council about a treaty-

127 Most commentators seem to agree on this point. See for example, Hogg, *supra* note 36 at c. 11.5(c); MacCallum, *supra* note 110 at 36-69.

128 *Radio Reference*, supra note 115 at 312-313. Summarizing its reasoning on this point, the Court concluded: "though agreeing that the Convention was not such a treaty as is defined in section 132, *their Lordships think it comes to the same thing*" [emphasis added].

129 Most commentators seem to agree on this point. See *e.g.*: MacCallum, *supra* note 110 at 36-48; Hogg, *supra* note 36 at c. 11.5(c); and Lederman, *supra* note 110 at 353-54.

implementing power is, at the very least, split.[130]

3. Canada is one of only two countries in the world in which the federal government cannot implement the treaties it signs outside its areas of constitutional jurisdiction (the other is Germany, which has more extensive federal powers than Canada).[131] The two most comparable federal states, the U.S. and Australia (both ex-British colonies), both give the federal government power to implement treaties.[132] Like Canada, Australia's treaty-signing authority originally rested with the U.K. before being devolved,[133] and its Constitution does not explicitly include a treaty-implementing power.[134] However, Australia's courts have implicitly read a federal treaty-implementing power into its Constitution.[135] One notable difference is that the issue of Australia's treaty-implementing power has been decided by its own High Court, whereas Canada's was decided by the Privy Council,[136] and the Supreme Court has not subsequently had an appropriate opportunity to revisit it. The difference between the three countries is particularly ironic given that the U.S. and Australian constitutions were intended by drafters to be more decentralist than Canada's.[137]

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130 Lederman, *ibid.*

131 B. Opeskin, "Federal States in the International Legal Order" (1996) 43 Netherlands International Law Rev. 353 at 355. Opeskin also notes the constitutional jurisdiction of Germany's federal government is more extensive than Canada's.

132 Hogg, *supra* note 36 at c. 11.4(c), (d); Strom & Finkle, *supra* note 110. See also, *Missouri v. Holland*, 252 U.S. 416 (1920) [*Missouri*].

133 *The Commonwealth v. Tasmania* (1983), 158 C.L.R. 1, at 298-99, Dawson J. [*Tasmania Dam*]. See also, MacCallum, *supra* note 110 at 17-25.

134 The differences in Australia's constitution can be argued both ways. On the one hand, it explicitly states that the federal government has power over "external affairs," although it does not address treaties (the word "treaties" was taken out of earlier drafts); *Tasmania Dam, ibid.* On the other hand, it does not have a section like Canada's s. 132 which explicitly gave treaty implement power (initially) to the federal government. See also MacCallum, *ibid.*

135 *Tasmania Dam, supra* note 133; *R. v. Burgess; ex parte Henry* (1936), 55 C.L.R. 608 (H.C.A.), *Koowarta v. Bjelke-Petersen (1982), 56 A.L.J.R. 625 (H.C.)Koowarta v. Bjelke-Petersen* (1982), 56 A.L.J.R. 625 (H.C.A.).

136 A majority of the Supreme Court of Canada, in its decision in *Labour Conventions, supra* note 116, agreed that the power to legislatively implement treaties (post 1926) now rested with the federal Parliament; *Reference re Weekly Rest in Industrial Undertakings Act*, [1936] S.C.R. 461. Although the Court split 3:3 on whether the statute was *intra vires* Parliament, four of the six judges agreed on the issue of the federal treaty implementing power — a point not widely recognized. The three judges who upheld the Act, per Duff C.J., agreed on this point, and Rinfret, J. also agreed on this point, at 350: "When once the convention has been properly adopted and ratified, it is, no doubt, transferred to the federal field for the enactment of laws necessary or proper for performing the obligations arising under the convention." Rinfret J. merely differed from Duff C.J. in concluding that the treaty had not been validly ratified.

137 MacCallum, *supra* note 110 at 24, and accompanying sources.

4. The *Labour Conventions* decision "has impaired Canada's capacity to play a full role in international affairs," Peter Hogg concludes. This has meant that "Canada has been unable to accept or in some cases to fulfill treaties in respect of labour, education, the status of refugees, women's rights, and human rights generally."[138] Other authors echo this view and offer further examples of treaties where implementation has been hampered or greatly delayed, due in large part to the impediments flowing from *Labour Conventions*[139] — including in the environmental realm.[140] For example, constitutional uncertainty and provincial objections were major reasons why it took the federal government ten years to pass legislation protecting endangered species, as required by the *Convention on Biological Diversity*,[141] and why the implementing law is mainly limited to federal lands and waters.[142]

On the other side of the issue, the main arguments *for* the *Labour Convention* decision may be summarized as follows (the author's comments are added in parentheses):

1. Section 132, on its face, no longer applied once treaty-signing power devolved to Canada, and the Constitution does not otherwise address treaty-implementing power, so the Court was correct to allocate it according to the existing heads of power. (This is a very literalist reading

138 Hogg, *supra* note 36 at c. 11.5(c).

139 I. Bernier, *International Legal Aspects of Federalism* (Hamden, Conn.: Archon Books, 1973) at 152-58 (citing a number of examples, and concluding: "Canada is clearly at a disadvantage when it comes to participating actively in the development of international cooperation"); Ziegel, *supra* note 110 at 339-41, 345 (citing further examples, and concluding: "Lord Atkin's constitutional theory of a watertight division of power...has come to haunt the present generation of Canadian policy makers with a vengeance." Similarly, the U.N.'s Committee on Economic, Social and Cultural Rights has criticized Canada's record of compliance with its obligations under the *International Covenant on Economic, Social and Cultural Rights*, stating it "regrets" the impediments of Canada's "complex federal system," *Concluding Observations of the Committee on Economic, Social and Cultural Rights* (E/C. 12/1/Add.31, 4 Dec. 1998) at para. 12, referenced in MacCallum, *supra* note 110 at note 234.

140 For a thorough analysis of federal implementation of environmental treaties see, L. Nowlan & C. Rolfe, *Kyoto, Pops and Straddling Stocks: Understanding Environmental Treaties* (Vancouver: West Coast Environmental Law Association, 2003).

141 1760 UNTS 79; 31 ILM 818 (1992) (entered into force 29 December 1993).

142 W. Amos et al., "In Search of a Minimum Winning Coalition: The Politics of Species-At-Risk Legislation in Canada," in K. Beazley & R. Boardman eds., *Politics of the Wild: Canada and Endangered Species* (Toronto: Oxford Press, 2001), at 152-156. See also, *Species At Risk Act*, S.C. 2002, c. 29, ss. 32-34, 58, 61 (Cabinet also has an extraordinary power to protect species outside federal lands, which has never been exercised). By contrast, the U.S. *Endangered Species Act* 16 U.S.C. §§ 1531-1544 (1973) applies to all species, and has been upheld under the federal treaty implementing power; *Palila et al. v. Hawaii Department of Land and Natural Resources*, 471 F. Supp. 985 (Dist. Ct. 1979); aff'd, 639 F.2d 495 (9th Cir. 1981).

of the Constitution. Most scholars, even those who support limiting federal treaty-implementing power, acknowledge the decision was, at the very least, questionable as a matter of law.[143])

2. A federal treaty-implementing power would allow Ottawa to do an end-run around the division of powers, merely by entering into international agreements.[144] (This argument seems a stretch. Countries guard their sovereignty jealously, and would be unlikely to develop treaties simply because Canada wanted to expand its federal power.[145] No evidence has been presented that signing treaties as a "constitutional end-run" has been a real issue in Canada or other federal countries with treaty-implementing power, *e.g.*, Australia and the U.S.[146])

3. Allocating full treaty-implementing power to the federal government would, in some cases, allow for encroachment into provincial constitutional jurisdiction.[147] (This concern, in the author's view, has some validity. There would be some, likely modest, expansion of federal power. The two key questions are: (i) do the benefits of a federal treaty-implementing power justify some incursions into provincial powers, and (ii) are there viable ways to limit impact on provincial jurisdiction? These points are addressed below.)

4. The lack of treaty-implementing power has not meaningfully impaired Canada's ability to effectively participate in international affairs and, particularly, implement treaty obligations.[148] (This claim seems implausible

143 For example, see Hogg, *supra* note 36 at c. 11.5(c); Lederman, *supra* note 110 at 354. Of the many authorities cited at note 110, *supra*, none argues that the decision was correct in *law*, particularly in its interpretation of *Radio Reference* (although La Forest says it was at least a plausible interpretation of the Constitution, *supra* note 110).

144 See, for example, *Labour Conventions*, *supra* note 116 at 352.

145 Lederman, *supra* note 110 at 358.

146 V. Johnson, "Application of the National Basis Test to Treaty-implementing Legislation" (2001) 23:1 Cardozo Law Rev. 347 at 359-64, indicates the opposite: that the U.S. government often avoids ratifying or implementing treaties in areas of sensitivity for states (e.g. human rights). However, no doubt such "ends runs" do occasionally happen. For example, it could be argued that one factor motivating the U.S. to negotiate the *1916 Migratory Birds Convention* (for the original text see, *Migratory Birds Convention Act, 1994*, S.C. 1994, c.22, schedule) was to get around a previous Federal Court decision restricting its power to protect such birds; *Missouri*, *supra* note 132. At the same time, though, this treaty addressed a trans-boundary issue of real concern to both countries, and, in any event, Canada's Parliament likely did not need a treaty in order to legislate over *migratory* birds (see POGG analysis, *supra* pages 8-9).

147 Hogg, *supra* note 36 at c. 11.5(c); Lederman, *supra* note 110 at 357.

148 See, for example, McWhinney, *supra* note 110 at 4-5 (but giving no evidence or support for this proposition); S.A. Williams & A.L.C. de Mestral, *An Introduction to International Law: Chiefly as Interpreted and Applied in Canada* 2nd ed. (Toronto: Butterworths, 1987) at 386.

and there is substantial evidence to the contrary, as noted above.[149]) Even some supporters of the *Labour Conventions* decision acknowledge it has "serious drawbacks" for treaty negotiation and implementation.[150] One may legitimately debate *how much* the *Labour Conventions* rule has impaired Canada's role in international affairs, but not *whether* it has done so at all.)

Based on the above summary of the arguments for and against the *Labour Conventions* decision, it is apparent that the weight of argument favours the conclusion that the case was wrongly decided; it is at odds with the intent expressed in section 132 and with the preceding *Radio Reference* decision. Moreover, as a matter of policy, it significantly constrains Canada's ability to effectively participate in international agreements, at a time when such agreements are more important than ever. This latter point is particularly significant, since it strengthens the argument for a federal treaty-implementing power and has not been well explored in the literature (much of which was written several decades ago). We live in a time when national borders are becoming less significant. Not only pollution, but also goods, capital, people, and information all move across national borders more frequently and rapidly than ever before — with potentially far-reaching impacts on nations, provinces, and communities. Generally, the most effective way for nations to address such cross border issues is through international agreements. (More will be said on this point later, in Part Four).

Therefore, the author shares the view, expressed by many other commentators, that recognition of a federal treaty-implementing power is long overdue. Such a power could come from an extended reading of section 132, or (more likely) from the POGG power, as filling a gap in the Constitution — with reference to section 132 as an indication that treaty-implementing power was meant to rest with Parliament. The recognition of such a power should not emaciate provincial regulatory powers. Such power exists in other federal countries, including the U.S. and Australia, and has not had a serious impact on the powers of their states — federal-state politics has generally constrained their federal governments from using their treaty-implementing powers in areas of

149 The only evidence the author has seen referenced in support of this claim is a 1968 publication by A. Gotlieb, *Canadian Treaty Making* (Butterworths, Toronto) at 49 (cited, for example, by Williams & de Mestral, *ibid*). However, what Gotlieb discusses is the number of treaties *signed* and *ratified* by Canada (which in his view compares favourably to other OECD countries — albeit in the Pearson era); he says nothing about the extent to which those treaties have been *legislatively implemented* — which is the point in question.

150 Morin, *supra* note 110 at 167.

state jurisdiction.[151]

Treaties by definition deal with issues of global or multinational import — matters that are beyond the power of any province, or nation, to effectively address on its own. Treaty-implementing legislation, therefore, typically aims at matters of multinational or international scale, such as trade, cross border pollution, rules of war, or movement of refugees.[152] Undoubtedly such legislation, at times, will affect activities within provincial jurisdiction. However, in a world in which economies, health, and quality of life are increasingly affected by international forces, provinces also derive significant benefits from treaties (as further discussed in Part Four). Moreover, it is important to distinguish between situations where a federal treaty-implementing statute *overlaps with* provinces' authority, and where it *restricts* their authority. Under the double aspect doctrine of Canadian constitutional law, overlapping federal and provincial laws may both stand unless there is actual conflict — which is very rare[153] and unlikely to arise under the proposed federal GHG measures.

Thus, recognizing a federal treaty-implementing power will likely involve only modest restrictions on provincial legislative authority, and will provide significant benefits to Canada (including provinces), in terms of enhanced ability to address transborder matters through multilateral means.

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151 Hogg, *supra* note 36 at c. 11.5(c), note 57; "The American and Australian governments have exercised caution in the making and implementing of treaties upon subjects which would, apart from a treaty, be outside federal legislative competence. Partly this is because the courts in both countries have hinted at limits on federal power, but primarily the caution stems from a general federal policy of not wishing to intrude too vigorously into matters normally controlled by the states." A. Kellow, "Thinking Globally and Acting Federally: Intergovernmental relations and Environmental Protection in Australia," in B. Galligan et al. eds., *Federalism and the Environment: Environmental Policy-making in Australia, Canada and the United States* (London: Greenwood Press, 1996) at 145-52 (following the *Tasmania Dam* decision, Australia's federal government has used its treaty implementing power cautiously, and has shifted to a more cooperative and less coercive role with states in environmental matters). A similar conclusion is reached by H. Charlesworth, "Implementation of Human Rights Treaty Obligations in Australia," in P. Alston, *Treaty-Making and Australia* (Annandale, NSW: Federation Press, 1995) at 138 (deference to states is one of the main reasons for Australia's weak treaty implementation record). See also, Johnson, *supra* note 146 at 359-64 (the U.S. government is generally cautious about implementing treaties in areas of core state jurisdiction). That is not to say, though, that states' powers in the U.S. are not, generally speaking, less extensive than provinces' power in Canada. Rather, the point is simply that federal treaty implementing power in the U.S. (and Australia) has not significantly diminished states' powers.

152 Over 90 percent of the treaties signed by Canada (as of 1968) address matters that are clearly international or fall within federal powers; the most common treaty subjects are: trade and commerce, defence and military, aviation, taxation, customs and immigration, and economic cooperation; Gotlieb, *supra* note 149 at 63-64.

153 Hogg, *supra* note 36 at c. 16.2, 16.3(a).

That being said, in a nation that values federalism, it is desirable to minimize any restriction on provincial legislative authority as far as practical. To that end, several authors have suggested possible "halfway houses" that would give the federal government greater power to implement treaties, without handing over such power unreservedly. William Lederman, after criticizing the *Labour Conventions* decision, suggests that the federal government should have the right to implement treaties (under POGG), except respecting "matters of fundamental significance for provincial autonomy."[154] He acknowledges that this approach would require the courts to delineate between fundamental and non-fundamental provincial matters, but feels this problem is not insurmountable. One weakness of this approach, as pointed out by Hogg,[155] is that it would leave the federal government uncertain about its ability to implement the treaties it signs (as it is now), since there is no preset list of "fundamental" provincial matters. Another weakness is that this approach focuses only on the impact on provinces, and ignores the importance of the treaty's subject matter — and the consequences of a provincial failure to address that matter — as factors that may balance against the provincial impact. In essence, this test would have the courts apply one prong of the national concern test (provincial impact), but not the others.[156]

Hogg, also critical of the *Labour Conventions* decision, suggests an alternative option: that the federal government should have the power to implement treaties "under which states undertake reciprocal obligations to each other," but not ones "concerned only with harmonization of the domestic law of states or the promotion of shared values in domestic law."[157] He argues that this approach is consistent with the *Labour Conventions* and *Radio Reference* decisions, and the treaties involved therein.

The weakness with Hogg's approach is that the line separating treaties involving "reciprocal obligations among states" from those involving "harmonization of domestic standards" can sometimes be very hard to draw, or even non-existent. Hogg explains that "reciprocal" (*i.e.*, federal) treaties are those in which "[e]ach state undertakes its obligations in return for promises that its nationals will receive comparable treatment in other states."[158] Applying this metric, one would conclude that treaties on land mines or other rules

154 Lederman, *supra* note 110 at 356-57.

155 Hogg, *supra* note 36 at c. 11.5(c).

156 In fairness to Lederman, he was writing before the modern articulation of the national concern test had been delivered by the Supreme Court.

157 Hogg, *supra* note 36 at c. 11.5(c).

158 *Ibid.*

of conflict would fall within federal treaty-implementing power, since they involve reciprocal obligations that protect Canadians when they are in other states. However, one could equally argue that the same is true for the labour treaties at issue in *Labour Conventions*, or human rights treaties (which Hogg gives as examples of treaties outside federal power). Admittedly the nature of the interest protected in each case is different — ensuring minimum labour and human rights standards, as opposed to not having one's leg blown off — but both types of treaties have the effect of ensuring Canadian "nationals will receive comparable treatment in other states."

Nevertheless, Hogg's proposed approach is not without merit as it seeks to distinguish between treaties aimed primarily at *domestic* matters and those aimed primarily at *international* or *transborder* matters.[159] Perhaps the solution is to look at the *primary object* of the treaty, not just its effect. For example, while a human rights or labour standards treaty would have the effect of protecting Canadian nationals abroad, its primary purpose (presumably) is to protect nationals of other countries by setting minimum *domestic* standards.[160] Conversely, treaties on air pollution, trade, extradition, or investor protection, for example, are (typically) aimed primarily at *transboundary* matters — *i.e.*, protecting Canadians' domestic interests through reciprocal obligations. Similarly, treaties dealing with the global commons — such as oceans, the Antarctic, or space — are aimed primarily at addressing *international* (or inter-planetary) matters. So, Hogg's proposed approach may be viable with the refinement of focusing on a treaty's primary purpose.

Although they propose slightly different approaches, Hogg and Lederman agree on one point: "a strong central treaty performing power seems necessary for proper participation in the life and progress of the international community."[161]

In addition to these two academics' suggestions, the Supreme Court has

159 This approach bears some similarity to the minority school of thought articulated by Australia's courts: that federal implementing power exists only over treaties that have an (ill-defined) "international element." The majority position is that the federal government has plenary power to implement *all* treaties. See Hogg, *supra* note 36.

160 A land mines treaty might be more difficult to categorize, since presumably one goal is to protect Canadian combatants in foreign countries, as well as foreign nationals. But in any event, implementation of treaties addressing military matters likely will fall within federal legislative power under s. 91 of the *Constitution Act, 1867*, *supra* note 7, so this question may be moot.

161 Lederman, *supra* note 110 at 350. In a similar vein, Hogg, *supra* note 36 at c. 11.5(c), writes that for treaties involving "reciprocal obligations," "the inability of the federal government to ensure the fulfillment of Canada's part of the bargain would be a *very serious disability*" [emphasis added].

provided a third option. In at least two cases it has found that the existence of a treaty will be evidence that a subject matter is one of national concern, such as marine pollution or aviation.[162] This approach does not add much to the basic national concern doctrine. Moreover, it leaves the federal government with even more uncertainty about its treaty-implementing power than either the Lederman or Hogg approaches, since each element of the national concern test would need to be satisfied. In any event, the Supreme Court does not appear to have proposed this approach as a final resolution of the treaty-implementation dilemma — given the comments of several judges that this issue should be revisited — but rather as a partial step until a case arises that squarely raises that issue.[163]

It is far from clear that it is even necessary to adopt one of these proposed "halfway house" approaches, in the absence of any evidence demonstrating that a federal treaty-implementing power would significantly constrain provincial authority, or that any such constraint outweighs the benefits of enhancing Canada's ability to engage in international treaty negotiations and regimes. However, if the courts were to adopt one of these halfway approaches, Hogg's (with the above-suggested refinement) appears to be the preferable one in that it: (i) is consistent with the *Labour Conventions* and *Radio Reference* cases, (ii) provides clear guidance to the federal government on the bounds of its treaty-implementing power, (iii) allows the federal government to implement treaties addressing matters of clear transborder or international impact, and (iv) minimizes the potential for affecting provincial jurisdiction by excluding treaties whose primary aim is domestic (*i.e.*, establishing minimum national standards or rights). Moreover, under Hogg's approach, even for treaties addressing domestic standards, the federal government would be no worse off than it is today in that it could still argue that the matter was one of national concern (with the treaty as evidence); there simply would not be an assumption to that effect by the courts.

In the author's view, however, there is a potentially preferable approach, achieved by applying *part* of Lederman's approach. He recommends that when a federal treaty-implementing statute addresses a matter *outside of normal federal jurisdiction* the federal government should be restricted to doing only

162 *Crown Zellerbach, supra* note 17 at 419, 438. See also, *Johannesson, supra* note 86 at 308 (Kerwin C.J.).

163 Kerwin C.J., who first applied this interpretive approach in *Johannesson, supra* note 86 at 308, opined in a later case that the *Labour Conventions* decision may need to be reconsidered; *Francis, supra* note 119 at 621.

that which is necessary to implement the treaty.[164] In other words, Parliament's scope to address incidental matters should be tightly restrained when stepping beyond its conventional turf. [165] This "interpretive" approach would minimize the potential for encroachment into areas of provincial authority, while still allowing the federal government to ensure Canada's treaty commitments are fully honoured. Best of all, it is simple and clear: it avoids the problem of having to divide treaties into federal and non-federal categories, with the resulting uncertainty over which government has implementing authority.

If this approach were followed, there would be no question of the federal government's authority to pass the *KPIA*, as legislation implementing Kyoto and the UNFCCC. However, when developing implementing regulations in areas of traditional provincial jurisdiction (*e.g.*, forestry, or landfill management), it would need to stick closely to the terms and objectives of the treaty. Even under Hogg's approach, Parliament's authority to enact the *KPIA* seems clear, since it is undoubtedly a treaty involving reciprocal obligations among states, aimed at addressing a transboundary problem. Under Lederman's approach, however, the outcome would be less clear, since the statute could not address "fundamental matters" of provincial jurisdiction, the determination of which no doubt would require judicial delineation.

In sum, the *KPIA* squarely raises the seventy-year-old question of Parliament's constitutional authority to legislatively implement treaties. Several Supreme Court judges have indicated over the years their desire to clarify this question, and the *KPIA* offers a prime opportunity to do so.[166] If the Court were to recognize a treaty-implementing power, even if only the limited power proposed by Hogg or the author, then it is very likely that the *KPIA* will fall within such power. However, given the uncertainty about this particular area of federal authority, it is worthwhile to examine other heads of power — particularly Criminal Law, since it (like POGG), can support broad environmental legislation.

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164 Lederman, *supra* note 110 at 358.

165 A similar approach was proposed by the Supreme Court in *General Motors v. City National Leasing*, [1989] 1 S.C.R. 641 [*GM Leasing*] at 669-71 for use in division of powers cases generally ("As the seriousness of the encroachment on provincial powers varies, so does the test required to ensure that an appropriate constitutional balance is maintained.")

166 Most of the other articles on Kyoto and the Constitution say little about this topic; *supra* note 51, Barton and Castrilli do not address the treaty implementing power at all, and DeMarco and Rolfe touch on it only very briefly. Stockdale, *supra* note 51 at 20-25, spends several pages summarizing the various views expressed on this power, but does not reach any clear conclusions about its application to Kyoto.

Criminal Law Power

Under POGG, the courts have placed *vertical* limits on Parliament's environmental powers, limiting its *breadth*. Under Criminal Law, by contrast, they have placed *horizontal* limits on Parliament's power, limiting the *depth* of tools that may be used; Parliament may address broad subject matters under its Criminal power, but may use only prohibitory tools. The other big difference is that the Criminal power does not require analysis of a federal law's impact on provincial jurisdiction (other than to assess the "colourability" of the law). Do the different configurations of the Criminal power make it a better fit for the *KPIA*? The case law establishes that a statue will fall within the federal Criminal power if it possesses two characteristics: a valid criminal law purpose, backed by a prohibition and a penalty.[167]

Criminal Purpose

As discussed above under POGG, the subject matter of the *KPIA* is the control of GHG emissions (or alternatively the control of international air pollution). There seems little doubt that this purpose fits within the Criminal Law power. The Supreme Court unanimously determined in *Hydro-Quebec* that "protection of the environment" is a valid criminal law purpose.[168] Given that the Court in that case upheld a statute (*CEPA*) addressing a large range of toxic substances, it seems highly likely that it would find that the *KPIA* — which covers only six toxic substances (GHGs) — also addresses a valid criminal purpose. Indeed, GHGs have now been listed as toxic substances under *CEPA*, and the government is proposing to make regulations controlling their emission under that *Act* (which would satisfy the *KPIA*, since it allows for regulations to be made under other acts).[169] Thus, the *KPIA* seems to fall squarely within the *Hydro-Quebec* precedent, in terms of having a valid Criminal purpose.[170]

In theory, one might argue that GHGs are not like other toxins, and thus fall outside the *Hydro-Quebec* precedent. Some climate change skeptics argue that carbon dioxide (CO2), the main GHG, is benign in terms of its direct impact on humans, and is a normal component of our air.[171] However, in

167 *Firearms Reference*, *supra* note 64 at 802-3.

168 *Hydro-Quebec*, *supra* 17 at 289.

169 EC, *Regulatory Framework*, *supra* note 16.

170 Hogg agrees with this conclusion. See *supra* note 37 at 8.

171 See for example: S. Baliunas & W. Soon, "Increasing Carbon Dioxide and Global Climate Change" (1 Jan. 2001) *George C. Marshall Institute*, online: <http://www.marshall.org/article.php?id=13> ("Is Carbon Dioxide a Pollutant? No, it is Essential to Life on Eearth"); T. Ball & T.

Hydro-Quebec the Court made it clear that direct impact on humans is not a prerequisite for the Criminal power; the protection of the environment *per se* is a valid object.[172] More importantly, the fact that CO2 is only harmful in excessive quantities is also irrelevant. The same is true of countless other substances (too much fluoride, for example, is very harmful,[173] yet we use it daily in toothpaste). In *Hydro-Quebec*, the Supreme Court recognized that an assessment of a substance's toxicity can (and should) take into account the quantity and location of its release.[174] CO2, at its current emission trajectory, is having (and will have) a more serious impact on the Earth's environment than any other currently known pollutant.[175] It seems far-fetched to argue that the release of a substance that threatens the planet's climatic stability, with the accompanying consequences for humankind, does not pose a sufficient environmental threat for Parliament to use its Criminal Law power.

Prohibition and Penalty

The real question, it is submitted, under the Criminal power is whether the *KPIA* would satisfy the second element of the test. For legislation to be criminal, it must be essentially "prohibitory" as opposed to "regulatory" in nature.[176] That is, it must accomplish its purpose primarily through the traditional criminal law tools: prohibitions and penalties.[177] Additional non-prohibitory measures will also be allowed, but only to a limited degree. According to Hogg, the ultimate test is that of "colourability": "the more elaborate the regulatory scheme, the more likely the court will classify [it] as regulatory rather than criminal."[178]

The *KPIA*'s regulation-making powers are found in section 6, which provides, in relevant part:

Harris, "Canada's Carbon Dioxide 'Comedy of Errors' a Total Capitulation to Climate Change Dogma" *Canada Free Press* (6 June 2007), online: <http://www.canadafreepress.com/2007/global-warming060607.htm> ("CO2 is not a pollutant and threatens neither us nor the environment. CO2 is essential to life on Earth").

172 *Hydro-Quebec*, *supra* note 17 at 299-300 ("Humanity's interest in the environment surely extends beyond its own life and health.")

173 World Health Organization, *Environmental Health Criteria 227: Fluroides* (Geneva: WHO, 2002), online: <http://www.inchem.org/documents/ehc/ehc/ehc227.htm#1.10>: ("Fluoride has both positive and negative effects on human health, but there is a narrow range between intakes that are associated with these effects.")

174 *Hydro-Quebec*, *supra* note 17, at 304-6,

175 IPCC, *Working Group II 2007 Report (Summary)*, *supra* note 21.

176 Hogg, *supra* note 36 at c. 18.10.

177 *Ibid.*at c. 18.2.

178 *Ibid.* at c. 18.10.

> 6. (1) The Governor in Council may make regulations
>
> (*a*) limiting the amount of greenhouse gases that may be released into the environment;
>
> (a.1) . . . limiting the amount of greenhouse gases that may be released in each province . . . ;
>
> (*b*) establishing performance standards designed to limit greenhouse gas emissions;
>
> (*c*) respecting the use or production of any equipment, technology, fuel, vehicle or process in order to limit greenhouse gas emissions;
>
> (*d*) respecting permits or approvals for the release of any greenhouse gas; [and]
>
> (*e*) respecting trading in greenhouse gas emission reductions, removals, permits, credits, or other units

The first noteworthy point is that the *Act* does not establish prohibitions on its face; it is left to regulation making to specify the prohibited activities. While this is not a traditional prohibitory approach, a similar scheme in *CEPA* was upheld in *Hydro-Quebec* (although the four dissenting judges highlighted this point),[179] so this element of the *KPIA* will not by itself place the *Act* outside the Criminal power.

Section 6 provides for a range of tools to control GHGs. Subsections (a) and (a.1) enable the making of regulations limiting GHG emissions. This is a fairly standard power, and it is well established that a criminal statute may include qualified prohibitions, not just outright ones.[180] Subsections (b) and (c) contain broader powers to control the use, production or performance of equipment, fuels, technology, or processes in order to limit GHG emissions. Similar — in fact broader — regulation-making powers are found in other criminal statutes, including *CEPA*,[181] which the Court considered in *Hydro-Quebec*:

> This is similar to the techniques Parliament has employed in providing for and imposing highly detailed requirements and standards in relation to food and drugs...

179 *Hydro-Quebec, supra* note 17 at 308-9, 310-12 (majority), 251-55 (dissent).

180 *RJR-MacDonald v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 at 247-48 [*RJR-MacDonald*]; *Hydro-Quebec, supra* note 17 at 349.

181 *CEPA, supra* note 17, s. 93(1); see for example, s. 93(1)(g) (providing for restrictions respecting "the manner in which and conditions under which the substance or a product containing it may be ... manufactured, processed or used").

> (see *Food and Drugs Act*...). These techniques have, in a number of cases...been upheld as valid criminal law.... Other statutes providing for extensive control of hazardous products that are justifiable in whole or in part under the criminal law power include the *Hazardous Products Act*...and the *Explosives Act*.[182]

Further, the power to issue permits or grant exemptions, as in subsection (d) of the *KPIA*, can also be supported as part of a criminal statute, as the Court has confirmed in several cases.[183]

In *Hydro-Quebec*, the Court upheld a much more complex scheme in *CEPA* — involving the creation of prohibitions by regulation, combined with detailed regulation-making powers — as essentially criminal, explaining that "[w]hat Parliament is doing in [*CEPA*] s. 34 is making provision for carefully tailoring the prohibited action to specified substances used or dealt with in specific circumstances."[184] Another complex scheme was upheld in the *Firearms Reference*, with the Court noting: "The fact that the *Act* is complex does not necessarily detract from its criminal nature. Other legislation, such as the *Food and Drugs Act*,...and the *Canadian Environmental Protection Act*,...are legitimate exercises of the criminal law power, yet highly complex."[185] These statements are indicative of what Hogg calls "the trend of modern cases to permit an extensive degree of regulation under criminal law."[186]

Thus, the existing case law suggests that subsections 6(a) to (d) stand a good chance of being found to be valid parts of a prohibitory scheme, as they are in line with, and less complex than, the types of approaches that have been upheld in other cases.[187] However, this assessment must be tempered with some caution. A court would do more than just a component-by-component analysis of the *Act*; ultimately its decision would be based on the overall scheme of the *Act*, and on whether it is seen as essentially prohibitory or regulatory in nature.

Subsection 6(e), though, raises different issues. It authorizes the establishment of an emissions trading scheme. Emissions trading is an integral part of Kyoto,

182 *Hydro-Quebec*, *supra* note 17 at 310-12.

183 *R. v. Furtney*, [1991] 3 S.C.R. 89 at 106; *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616, 626-27; *Firearms Reference*, *supra* note 64 at 805-7 (but note the comment that the licencing provisions in that *Act* are created by statute, not regulation).

184 *Hydro-Quebec*, *supra* note 17 at 310-12.

185 *Firearms Reference*, *supra* note 64 at 805-6.

186 Hogg, *supra* note 36 at c.18.10.

187 Hogg, *supra* note 37 at 8, agrees that Parliament likely has authority to control GHG releases under its criminal law power.

and of Canada's proposed GHG reduction scheme.[188] However, whether it could fit within the Criminal power is another question. At first blush, it seems doubtful that trading would be accepted as consistent with a prohibitory regime. There does not appear to be any similar power in other Criminal statutes. One could hardly imagine allowing drivers to trade off units of blood alcohol level, so that one driver could drink more. Such an approach seems at odds with the very idea of defining and sanctioning "wrongful" conduct.

On the other hand, most criminal statutes address a different type of problem than does the *KPIA*. They typically are aimed at sanctioning *individual* behaviour or protecting *individuals* from harm, whereas with GHG emissions (and most pollutants), the problem is the *collective* level of emissions from all polluters. The concern is not individual morality or safety, but overall environmental impact. Because a tonne of GHG emissions has the same atmospheric impact regardless of where it is emitted and by whom, the only thing that really matters is the overall limit on emissions. Trading is simply a means of allocating emissions within an overall cap.

In a typical pollution-control statute, the government allocates emissions limits to firms or sectors. Emissions trading does the same thing, only better. It allows the firms themselves (via a trading market) to decide how to allocate emissions most efficiently within a given cap, rather than having a regulator make this decision. What are being traded are units of compliance with a federal standard. While such trading would be inconsistent with the goal of most criminal statutes, it is quite consistent with the goal of limiting overall impacts on a resource or ecosystem, such as the atmosphere. Viewed in that light, the above analogy to drivers trading units of their blood alcohol limit may be inapposite. A better analogy would be a statute limiting licensed fishers to a catch of four fish per day, but allowing them to trade their unused limit to other fishers. Such a provision (though arising under the Fisheries power, rather than Criminal Law) would seem unobjectionable, since it would achieve the goal of limiting overall impacts to the ecosystem.[189]

When one moves away from the idea that a criminal approach must be about prescribing individual morality or safety (which generally is not the case with environmental problems), then an emissions trading scheme might well be acceptable as part of a criminal statute. Emissions trading still involves

188 EC, *Regulatory Framework, supra* note 16 at 13-15.

189 Assuming the maximum catch limits were properly set to reflect the sustainable limit, taking into account trading.

a classic criminal approach — a qualified prohibition (in the form of an emissions limit) backed by a penalty for breach; the only difference is that firms are allowed to pay others to meet part of their limit for them.

It is difficult to predict whether a court would be willing to accept emissions trading as an element of a prohibitory scheme. Certainly it would require stretching the traditionally accepted basket of criminal tools.[190] But the criminal law may adopt "innovative legislative solutions" to address new challenges, as the Court noted in *RJR-MacDonald*.[191] Such adaptation may well be needed now that the courts have accepted "environmental protection" as a valid Criminal purpose. Environmental problems are often of a different nature than those addressed in a typical criminal statute — targeting cumulative impacts to an ecosystem (or the atmosphere) rather than individual health, safety, or morality — so they may require different tools to achieve their purpose.

Two other potential arguments against the *KPIA* as criminal legislation should be briefly canvassed. First, it could be argued that emissions trading requires a complex regulatory scheme administered by an administrative agency, which is antithetical to a prohibitive approach.[192] While it is true that emissions trading does require administrative oversight, it should not involve a high degree of regulatory complexity (depending on its design). In fact, experience suggests that administering emissions trading generally requires *less* government involvement than does a traditional prohibition-and-permit scheme, which has been accepted as part of a criminal regime.[193] A second possible argument is that the *KPIA* does not on its face set out the penalties for violations; those are to be prescribed by regulation (the *Act* does contain most other elements of a typical punitive regime).[194] This seems like a technical objection. If it is accepted that prohibitions and standards can (and should) be

190 *Supra* note 51, Rolfe (at 14) and Castrilli (at 10) both conclude it would be difficult to fit trading within the current bounds of the Criminal power, and that some stretching would be needed. Barton (at 13) is more optimistic, although he gives short shrift to the counter-arguments (his analysis focuses on previous decisions upholding exemptions and discretion, and assumes trading would fit in the same basket). Demarco does not address this issue.

191 *RJR-MacDonald*, *supra* note 180.

192 Hogg, *supra* note 36 at c. 18.10 describes this general principle.

193 D. Ellerman, *Are Cap and Trade Programs More Environmentally Effective than Conventional Regulation?* MIT Centre for Environmental and Energy Policy Research, Working Paper WP-2003-015, online: <http://web.mit.edu/ceepr/www/publications/emissions.html>; NRTEE, *Emissions Trading - Frequently Asked Questions*, online: <http://www.nrtee-trnee.ca/eng/programs/Past-Programs/emission-trading/DET-FAQ-eng.html>

194 *KPIA*, *supra* note 2 at s. 11.

tailored in specific regulations to fit the problem, it seems to follow that the appropriate penalties may also be defined in regulation.

All that being said, at the very least emissions trading is an untested element under the Criminal Law power. It raises novel issues, ones that would need to be assessed from first principles. It is far from clear whether a court would uphold it as criminal. If not, a court could either hold that this provision colours the entire regime as "regulatory" and strike down the whole statute, or (more likely) sever the trading clause from the *Act*. To avoid such a possibility, the federal government could propose a separate constitutional leg for emissions trading to stand on — namely the Trade and Commerce power.

Trade and Commerce Power

A statute may be about more than one "matter," and may rely on more than one head of power for its constitutional authority.[195] For example, while the bulk of the *Food and Drugs Act* has been upheld under the Criminal Law power, the Supreme Court has indicated that the provisions dealing with marketing likely fall under Trade and Commerce.[196] Thus, if the emission-trading part of the *KPIA* does not fit within Criminal Law, it is arguable that it could be supported under Trade and Commerce (although the whole statute could not, since it clearly is not about trade).

The federal power to regulate Trade and Commerce is more opaque than its POGG and Criminal cousins. The scope of this power has ebbed and flowed over the years, and its boundaries are often difficult to pin down.[197] On its face, section 91(2) appears to confer broad power on Parliament over "the Regulation of Trade and Commerce"; however, it was narrowly interpreted in the era of Privy Council appeals.[198] One thing that can be said with certainty is that — unlike the U.S. Commerce clause (more narrowly worded than Canada's) which has been upheld as the basis for much environmental legislation[199] — Canada's Trade and Commerce power has never been applied

195 *A.G. (Canada) v. Canadian National Transportation*, [1983] 2 S.C.R. 206 at 255; Hogg, *supra* note 36 at 15.5(c), note 38. For example, the "toxics" part of *CEPA* has been upheld under the Criminal Law (*Hydro-Quebec*, *supra* note 17), while the "ocean dumping" part (formerly the *Ocean Dumping Control Act*) has been upheld under POGG, *Crown Zellerbach*, *supra* note 17.

196 R.S., 1985, c. F-27; *R. v. Wetmore*, [1983] 2 S.C.R. 284 at 288.

197 Hogg, *supra* note 36 at c. 20.

198 *Constitution Act, 1867*, *supra* note 7; Hogg, *ibid.* c. 20.2. See, for example *Citizens Ins. Co. v. Parsons (Queen Ins. Co. v. Parsons)* (1881), 7 A.C. 96 [*Parsons*].

199 The U.S. Commerce clause reads: "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." U.S. Const. art. I, § 8, cl. 3. See E. Fitzgerald, "The

to support an environmental statute.[200] The *KPIA* may change that.

The Trade and Commerce power has been separated by the courts into two distinct branches: (a) interprovincial or international trade and commerce, and (b) "general" trade and commerce.[201] These will be addressed separately below, since both arguably apply to emissions trading under the *KPIA*.

In assessing the constitutionality of the *KPIA*'s emissions trading provision, the first step is to characterize the pith and substance of this part of the *Act*.[202] To do that requires a review of what subsection 6(e) enables: it provides for regulations "respecting trading in greenhouse gas emission reductions, removals, permits, credits, or other units." Under a GHG trading scheme, what would be traded are units of a firm's allowable emissions under the *Act* ("allowable emission units" or AEUs). The sole purpose of such trades would be to comply with the *KPIA*'s emissions requirements; the buying company would purchase "credits" (from those who achieve excess reductions) in order to meet its prescribed emissions limit.[203] Needless to say, no market for these credits exists other than for purposes of compliance with this *Act*.[204] Therefore,

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Constitutional Division of Powers with Respect to the Environment in the United States," and J. Kincaid, "Intergovernmental Costs and Coordination in U.S. Environmental Protection" in B. Galligan et al., *supra* note 151 at 21-22, 82-83 (discussion of U.S. environmental laws passed under the Commerce clause).

200 In *Hydro-Quebec*, *supra* note 17 at 264-66, the dissent briefly addressed (and dismissed) the option of upholding *CEPA* under Trade and Commerce.

201 Hogg, *supra* note 36 at c. 20.

202 In a case such as this, in which one *portion* of a statute is alleged to fall within Trade and Commerce, the normal approach to constitutional analysis is set out by the Supreme Court in *GM Leasing*, *supra* note 165 at 666-72. The first question is whether the impugned provision intrudes on provincial powers. If it arguably does, the second question is whether relevant portion (or "scheme") of the *Act* falls within the scope of Trade and Commerce. If so, the final question is "whether the impugned provisions are sufficiently integrated with the scheme that it can be upheld." In this case, the "portion of the *Act* dealing with trade" and the "impugned provision" are one and the same — section 6(e) provides authority to create an emission trading regime by regulation. Therefore in this case, the only questions would be: does the emission trading scheme in s. 6(e) fall within Trade and Commerce, and does it unduly intrude on provincial powers? The latter question is already an element of the constitutional test for the Trade and Commerce power (see below), and so will be largely addressed in answering the first question. In other words, the pertinent constitutional question is "does the emissions trading scheme in s. 6(e) fall within Trade and Commerce"?

203 For example, firm A could pay firm B to reduce its emissions by an *additional* 10 tonnes below its limit, and acquire the rights to that 10 tonne reduction (i.e. 10 Allowable Emission Units), which it could use towards meeting its own emissions limit. The result is that the same total reduction would occur, but a different firm would be doing it.

204 For clarification, GHG emissions trading markets already do exist, to some extent. But virtually all trading is being done for the purpose of either complying with Kyoto or with domestic legislation (such as the EU's trading regime). In each case, what is being traded is an AEU (or

the most likely characterization of the pith and substance of this part of the *KPIA* would be "the establishment and regulation of trading in GHG emission credits under the *KPIA*." The term "establishment" is needed since the *Act* does not enable regulation of an *existing* trading market (as most trade statutes do); rather, it enables the *creation* of a new trading market, whose sole purpose is compliance with the *KPIA*. This distinction may be of some relevance, as discussed below.

Interprovincial and International Trade and Commerce

On its face, it seems a bit of a stretch to argue that subsection 6(e) falls within the first branch of Trade and Commerce, since it does not purport to be directed at (or restricted to) interprovincial or international trade. It speaks of trade in GHG emission units generally. One might argue that in reality most trading in Canada will be interprovincial, because major emitters are spread out across the country, with no province having more than 31 percent of the total emissions.[205] One could also argue that Kyoto provides for emissions trading, and that the federal plan is to link in with this international trading regime.[206] It is possible that a court may accept such an argument — that section 6(e) falls under Trade and Commerce because it regulates a market that is primarily interprovincial and international. Indeed, Hogg has written: "Whenever a market for a product is national (or international) in size, as opposed to local, there is a strong argument that effective regulation of the market can only be national."[207]

Further, in recent decades Canada's courts have on several occasions accepted that a federal interprovincial trade regime may incidentally cover intraprovincial trading as well[208] — a notable departure from the previous approach of the Privy Council, which excluded virtually all intraprovincial reach.[209] But in each of those recent cases, the clear *purpose* of the statute in

equivalent) under those acts or Kyoto. There is also a small volume of "voluntary" trading, in credits created by private brokers that have no legal effect (now); this generally is being done in anticipation of the establishment of domestic legal trading regimes (especially in the U.S.). See, World Bank, *State and Trends of the Carbon Market 2007* (Washington D.C: World Bank, 2007).

205 Of Canada's total GHG emissions, the biggest contributors are Alberta (31 percent) and Ontario (26 percent); Canada, *2006 Climate Change Report*, *supra* note 34 at 145-46.

206 EC, *Regulatory Framework*, *supra* note 16 at 15.

207 Hogg, *supra* note 36 at c. 20.2(b).

208 *Caloil Inc. v. Canada*, [1971] S.C.R. 543, *The Queen v. Klassen* (1959), 20 D.L.R. (2d) 406, leave to appeal to SCC refused; and *Murphy v. Canadian Pacific Railway Co.*, [1958] S.C.R. 626.

209 *Parsons*, *supra* note 198; *A.-G. Canada v. A.-G. Alberta (Insurance Reference)*, [1916] 1 A.C. 588; *Toronto Electric Comm. v. Snider*, [1916] A.C. 396. See also, more recently, *Dominion Stores Ltd. v. The Queen*, [1980] 1 S.C.R. 844.

question was interprovincial or international trade, with intraprovincial effects being secondary.[210] In the case of the *KPIA*, it is less clear that the purpose is interprovincial or international, even though that may be its main effect. As Hogg noted, there is a sound policy argument for finding such a federal regime to be valid because the market is primarily national and/or global, but such a finding would require a stretch of the existing judicial precedent.[211]

The more interesting question — and in the author's view more apposite — is whether the existing precedent, with its judge-made distinction between *extra*provincial and *intra*provincial trade, should even be applied to a statute like the *KPIA*. Recall that section 91(2), on its face, does not limit federal regulatory authority to just transborder trade and commerce. That restriction was read in by the courts as a "subtraction" from the scope of federal power under section 91(2) in order to prevent "serious curtailment" of provincial power to regulate property and economic activity in the province.[212] However, in the case of the *KPIA*, such a restriction is very likely unnecessary and inappropriate. A province *could not* regulate intraprovincial trading in emissions credits under the *KPIA*, since the only purpose of such trading (as discussed above) is to achieve compliance with this federal statute. A province cannot prescribe alternative means of complying with restrictions in a federal Act (unless the Act authorizes it). Therefore, federal regulation of intraprovincial trade in GHG emission credits under the *KPIA* does not interfere with provincial authority, since provinces have no authority over this matter. Thus, the underlying reason for judicially carving intraprovincial trading out of federal powers in section 91(2) is absent when no provincial interference exists.

A province might argue, in response, that while it cannot regulate trading in GHG emission credits under the *KPIA*, it *can* regulate trading for purposes of compliance with *provincial* GHG emissions laws. Assuming provinces have the constitutional authority to regulate GHG emissions, presumably that power includes the ability to establish intraprovincial emissions trading regimes. But

210 Hogg, *supra* note 36 at c. 20.2(b).

211 *Supra* note 51, Castrilli (at 15), DeMarco (at 235-37) and Barton (at 441) all agree with this conclusion — that it dubious that the intraprovincial aspects of GHG emission trading fall within federal power, based on existing case law. Castrilli and DeMarco both suggest that a collaborative federal-provincial approach to emission trading could be upheld (if carefully designed); however, the prospects of this happening in the near future seem dim; see *infra* notes 230 and 242, and accompanying text.

212 *Reference re Farm Products Marketing Act*, [1957] S.C.R. 198 at 209, Rand J., quoting from *Lawson v. Interior Tree, Fruit and Vegetable Committee of Direction*, [1931] S.C.R. 357 at 366.

it is far from clear that a federal trading regime would interfere with such a provincial regime. Each is dealing with a separate matter: one is concerned with trading to meet an emissions limit under a federal act, the other with trading to meet a provincial limit. The two regimes have different objects and can coexist. For example, if firm A had an emissions limit of 1,000 tonnes under the *KPIA*, it could reduce its emissions to 1,100 tonnes and buy 100 tonnes of credits from a firm in another province, thus complying with the *KPIA*. If that same firm also had a provincial emissions limit of 1,000 tonnes, it could not count the out-of-province credit purchase, so it would either need to reduce its own emissions by 100 more tonnes or purchase credits from a provincial source. In so doing it would comply with both laws.

While the two trading regimes can coexist, it could be argued that the existence of dual regimes, at the very least, would be somewhat cumbersome. This is likely true, but there are many examples of overlapping regulatory regimes in Canada that are somewhat cumbersome but still constitutionally valid.[213] Moreover, any "cumbersomeness" would arise mainly from the existence of two parallel emissions *control* regimes with different targets (which is constitutionally acceptable),[214] rather than from the emissions *trading* systems appended to those control regimes. Most of all, this argument does not address the basic point that the two regimes deal with trade in *different* (though overlapping) things: an allowable emission unit under a federal and a provincial act. A province cannot prescribe trading rules for purposes of compliance with the *KPIA*. If the *KPIA* were prevented from addressing intraprovincial trading, it would create a vacuum; firms could *only* trade emission credits with firms in *other* provinces or countries, not within their province — an absurd result that would penalize firms in high emitting provinces (such as Alberta and Ontario) by diminishing the pool of emission credit buyers and sellers.

In other words, this is not a typical trade regulation situation. A typical Trade and Commerce constitutional challenge involves the federal government attempting to regulate an already existing provincial trade market. In the absence of federal regulation, the province can still regulate and the market

213 Hogg, *supra* note 36 at c. 16.2, 16.3(a); *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161.

214 The case law on "paramountcy" establishes that overlapping federal and provincial laws (that are otherwise valid) can co-exist unless they are in "conflict" — in the sense that it is impossible to comply with both, or one frustrates the purpose of the other; See generally, *Canadian Western Bank v. Alberta*, [2007] S.C.J. No. 22 at paras. 71-73. Federal and provincial laws that prescribe two different standards have been found not to be in conflict as long as it is possible to comply with both by meeting the more rigorous standard — as would very likely be the case with GHG laws; Hogg, *supra* note 36 at c. 16.3(a).

will still function. In this case, there will be no trading market (at least in emissions units under the *KPIA* or Kyoto) unless the *KPIA* applies. The *Act* not only regulates the market, it also *creates* it. This is an important distinction to keep in mind.

Therefore, the stronger argument is that the traditional restriction on the federal Trade and Commerce power to matters of extraprovincial trade should not apply to the *KPIA*, since the underlying purpose of this restriction — preventing interference with provincial powers — does not apply. However, such a finding would involve stretching a judicial precedent that has been in place for over a century, or at least adapting it to a new situation. Therefore, it is difficult to predict whether a court would follow such a path. For that reason, it is necessary to consider the second prong of the Trade and Commerce power.

"General" Trade and Commerce

Section 91(2) also gives the federal government power over the "general regulation of trade affecting the whole dominion."[215] This second branch was first articulated by the Privy Council in the *Parsons* case in 1881.[216] It then lay all but dormant for over a century — only one statute was upheld under it in that time[217] — before being revived in the *General Motors v. City National Leasing* (*GM Leasing*) case in 1989.[218] In *GM Leasing*, the Supreme Court set out a five-step test for determining whether a statute fell within the general trade power:

1. the impugned legislation must be part of a general regulatory scheme;
2. the scheme must be monitored by the continuing oversight of a regulatory agency;
3. the legislation must be concerned with trade as a whole rather than with a particular industry;
4. the legislation should be of a nature that the provinces jointly or severally would be constitutionally incapable of enacting; and
5. the failure to include one or more provinces or localities in a legislative scheme would jeopardize the successful operation of the scheme in other parts of the country.[219]

215 *Constitution Act, 1867*, *supra* note 7.
216 *Parsons*, *supra* note 198.
217 Hogg, *supra* note 36 at c. 20.3.
218 *GM Leasing*, *supra* note 165.
219 *Ibid.* at 674-83.

The "common theme" weaving through these criteria is "that the scheme of regulation is national in scope and that local regulation would be inadequate."[220] This test, on its face, bears some resemblance to the national concern test; elements (4) and (5) have a striking similarity to "provincial inability." However, there are also some noteworthy differences; for example, there is no consideration of the "impact on areas of provincial jurisdiction" — which, it will be recalled, was the element of the national concern test that was most problematic for the *KPIA*.

In examining whether the *KPIA* falls under the general trade power, the first issue is whether the part of the *Act* dealing with trade is a "general regulatory scheme." A full answer to this question is premature; the *Act enables* the creation of a trading scheme by regulation, and so its full details are not yet known. However, an emissions trading system by its very nature *must* involve a fairly complex regulatory scheme. It must: set an overall cap for emissions; allocate firm-specific limits within that cap; set the rules for trading; have an oversight body; and have a monitoring, verification, and enforcement regime. A review of the proposed federal emissions trading regime reveals that all those elements (and more) are present.[221]

A more subtle question is whether there must be an "*economic* regulatory scheme" — a term which the Court uses several times in *GM Leasing* (though it is not part of the test *per se*).[222] If this *is* a requirement (which is far from clear), one could argue that the purpose of the overall *KPIA* is environmental, not economic, as Barton does.[223] However, such an argument would miss the point that, for purposes of the Trade and Commerce power, the constitutional analysis would focus only on the *trade component* of the *KPIA*, *not* the *Act* as a whole (since no one would argue that the whole *Act* fits under Trade and Commerce).[224] The purpose of that component most likely would be seen as "economic" in nature. Emissions trading does not aim to reduce emissions but simply to redistribute them;[225] what it does aim to achieve is *lower cost*

220 *Ibid.* at 678.

221 EC, *Regulatory Framework*, *supra* note 16 at 9-15, 20-21.

222 *GM Leasing*, *supra* note 165 at pages 676-677 [emphasis added].

223 Barton, *supra* note 51 at 443 asserts that "the dominant purpose of trading is one of environmental protection," but does not explain *why* this is so, or address the points made below in the accompanying text.

224 EC, *Regulatory Framework*, *supra* note 16 at 15.

225 Environment Canada, in an overview document on the proposed system, clearly explains: "Emissions trading itself does not result in emissions reductions; emission reductions are driven by the regulated targets." (Environment Canada, "Industrial Regulatory Framework: Cross-Cutting Consultations — Emissions Trading." presentation at the Industrial Regulatory Framework: Cross-Cutting Consultations, May 2007 at 3 [EC, "Emissions Trading"]). However,

emissions reductions.[226] Thus, its main purpose is not environmental, it is economic (cost saving) — suggesting that the *Act's* trading provision likely does involve an economic regulatory scheme (*if* this is a requirement of the test).

The second step in the test also will likely be met; there will be a "regulatory agency" overseeing the trading regime. This intention is stated in the regulatory proposal,[227] and it is hard to imagine an emissions trading regime without an oversight agency.

The third step in the test — that the *Act* (or part thereof) "is concerned with trade as a whole rather than with a particular industry" — also seems to be met by the *KPIA*. Section 6(e) speaks of GHG emissions trading generally, not in a particular sector; and the government's proposed trading regime would apply to all large GHG emitting facilities, regardless of their industry sector.[228]

DeMarco, however, argues that this requirement may not be met, because emissions trading would apply only to the largest industrial emitters (comprising nine sectors), and not to other smaller GHG emitting activities, such as transport, households, and small industries.[229] The reason for this restriction is that it is not feasible to include small sources (such as individual vehicles, homes or small businesses) in a cap and trade regime, since their trades would normally be too small to be economically viable, *i.e.*, the transaction costs would normally exceed the gains from trading.[230] (These small actors' GHG

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emissions trading often leads to greater emission reductions *indirectly*, since the cost savings from trading allows the government to set lower emission targets. For example, the U.S. government set 25 percent lower targets for SO2 reduction in its Acid Rain program because of the inclusion of emissions trading; see *supra* note 39.

226 Environment Canada explains that emissions trading and other flexibility mechanisms are being included in the proposed regulations, "[i]n order to minimize costs to industry and the impact on the economy," and to "reduce overall costs"; see EC, *Regulatory Framework*, *supra* note 16 at 7, 13.

227 EC, "Emissions Trading," *supra* note 225 at 7. See also, Environment Canada, *Industrial Regulatory Framework: Cross-Cutting Consultations — Offset System* (presentation at the Industrial Regulatory Framework: Cross-Cutting Consultations, May 2007) at 7 (explaining the various roles of the "Program Authority" overseeing the system).

228 EC, *Regulatory Framework*, *supra* note 16 at iv, lists the nine targeted industrial sectors. Canada's most recent report to the UNFCC explains that these are the largest emitting industrial sectors (note: 'transportation' is not an industrial sector); Canada, *2006 Climate Change Report*, *supra* note 34 at 32-33.

229 DeMarco, *supra* note 51 at 237.

230 Elgie, *supra* note 39; N. Gunningham & D. Sinclair, *Leaders and Laggards: Next Generation Environmental Regulation* (Sheffield, U.K: GreenLeaf Publishing, 2002) at 29. There *are* exceptions, though, which is why the government is also proposing an "offset" system, whereby small businesses and others can sell emission reduction credits on a project-by-project (offset) basis. Thus these firms are included in the trading regime, just on a voluntary basis.

emissions are therefore addressed through other measures.)[231] It seems very unlikely that a court would find that the *Act's* trading regime is not "concerned with trade as a whole" simply because it is restricted to large industrial sources — particularly since it covers a broad array of sectors.[232] The exclusion of small actors is common in regulatory regimes; thus, it seems likely that the third step in the test is met.[233]

The same can be said of the fourth step, which asks whether a province would be "constitutionally incapable" of establishing such a legislative regime. To be clear, a province arguably *could* enact its own GHG trading scheme, aimed at meeting *provincial* targets (although it is less clear whether it could address extraprovincial trading).[234] However, that is not the question. What is at issue is trading in emissions reduction units under the *KPIA*, not GHG emissions reductions generally. As discussed above, emissions trading is not like most other types of trading, which involve pre-existing commodities or instruments that can be readily exchanged. What is being traded is a unit of compliance with a particular *Act* (the *KPIA*) or treaty (Kyoto) — *i.e.*, the thing being traded exists only for purposes of its parent *Act*. For that reason, a province in all likelihood *would* be constitutionally incapable of regulating the trading of *KPIA* emissions credits (just as Parliament would be incapable of regulating the trading of credits under a provincial pollution law).

The fifth step asks, if it were left to provinces to enact this scheme,[235]

231 EC, *Regulatory Framework*, *supra* note 16 at 2-5, 29-31.

232 *Ibid.* at iv: The sectors covered are: electricity production, oil and gas, forest products, smelting and refining, iron and steel, cement, lime, chemicals and mining.

233 An interesting side question, though, arises from the fact that the Court, at two points in *GM Leasing*, *supra* note 165 at 644, 678, speaks about whether the legislation is focused on "a particularly industry *or commodity*." This selective addition of "or commodity" seems anomalous; that term does not appear in the Court's articulation of the test, or in the bulk of the case law. (It appears to originate from *Re: Board of Commerce Act (Canada)*, [1920] 60 S.C.R. 456, per Duff J.) In the unlikely event that this term *was* to be added as a requirement, it could be argued that GHGs are a single "commodity." However, the better argument is that GHGs are not a commodity; they are a *byproduct* generated in the production of *many* commodities and products, such as oil, gas, coal, energy, waste, steel, timber, etc. To characterize GHGs — an unwanted pollutant — as a "commodity" seems a stretch.

234 The courts have strictly limited provinces' ability to regulate extra-provincial trading or pollution; see Hogg, *supra* note 36 at c. 13.3(d), 21.9(c). See also, *Interprovincial Co-op. Ltd. v. The Queen*, [1976] 1 S.C.R. 477. If a province were to give credit for an emission reduction occurring in another province or country, it is not clear how that could be said to be directed at a valid provincial purpose.

235 These words are not explicitly included in the test, but it is submitted that they must be implicitly intended. The Court is not likely to be referring to a *federal* scheme, since the federal government normally would not set national emission standards that omitted a province (unless that province was unaffected or in a different position, which is not the case with GHGs). Moreover, the Court

would the failure to include one or more provinces in the scheme jeopardize its successful operation in other parts of the country? (This question is very similar to the "provincial inability" test under POGG.) This is a very real question, given the provinces' widely differing views on how (and whether) to develop a common approach to GHG emissions reductions and trading.[236] In this case, the question is likely moot, since the provinces would almost surely be constitutionally incapable of regulating the trading of emission reduction units under the *KPIA*, as noted above. Leaving aside mootness, the exclusion of one or more provinces from a nation-wide GHG emissions trading regime would certainly affect its operation; emissions reductions would be more expensive in the excluded provinces (because emissions trading significantly lowers costs), and likely more expensive in other provinces as well (because there would be fewer buyers and sellers of credits, so the market would be thinner). Such higher costs also would likely create pressure for less stringent emissions reduction targets, since the cost of compliance is a factor in setting targets.[237] Therefore, the exclusion of one or more provinces would certainly hinder the operation of the trading scheme, although it is arguable whether it would "jeopardize" the scheme. (But again, this point is likely moot because of constitutional impediments to provinces enacting such a scheme.)

Thus, there is a strong argument that the emissions trading component of the *KPIA* satisfies the five criteria from *GM Leasing*, although a couple of the points raised are at least arguable.[238] More importantly, distilling these criteria down to their "common theme," the essence of the Court's decision in *GM Leasing* was that "competition cannot be effectively regulated unless it is regulated nationally"[239] — and the same can be said of trade in GHG emission reduction units under the *KPIA*: it can only be effectively regulated

in *GM Leasing*, *supra* note 165 at 662-63, juxtaposed this fifth question with the fourth one: "that the provinces ... would be constitutionally incapable of passing such an enactment" — suggesting it was also referring to provincial legislation in question five. In any event, the answer to the question is the same regardless of whether it refers to a federal or multi-provincial scheme.

236 L. Greenberg & J. Fekete, "Premiers Split on Climate Change" *CanWest News Service* (10 August 2007), online: <http://www.canada.com/victoriatimescolonist/news/story.html?id=7ac41ae9-de84-473d-a185-89190bcc771c&k=34336> [Greenberg & Fekete].

237 See Environmental Defense, *supra* note 41.

238 *Supra* note 51, Castrilli (at 17) also concludes that GHG emission trading legislation likely would fall under the general Trade and Commerce power; DeMarco (at 237-38) believes this conclusion may be overly optimistic — although both reach their conclusions based on only limited analysis; Barton (at 443) also questions Castrilli's conclusion, based on the premise (unsupported) that emission trading has an environmental purpose, not an economic one — a premise that is ill-founded, for reasons discussed above (see *supra* notes 225 and 226).

239 *GM Leasing*, *supra* note 165 at 680.

nationally.[240]

In sum, the common element in the analysis of both branches of the Trade and Commerce power is that the trade component of the *KPIA* does not intrude into provincial regulatory jurisdiction; it regulates an activity that cannot be provincially regulated — namely, trade in *KPIA* emissions credits. For this reason, along with the others canvassed above, it seems reasonably likely that courts would uphold the *KPIA*'s trading provision under one or the other branch of the Trade and Commerce power. However, this conclusion must be tempered with some caution, since the existing doctrine in this area will need to be adapted to address the novel nature of emissions trading.

IV. ANALYSIS AND SYNTHESIS

The preceding analysis has revealed that the *KPIA* has a good prospect of being upheld under one of three constitutional powers: POGG, treaty implementation, or a combination of Criminal Law and Trade and Commerce. However, this conclusion is by no means certain. In each case, it would require a modest extension of the pre-existing doctrine, or at least its adaptation to new circumstances, for the *Act* to be fully upheld.

Of these three potential constitutional foundations, the safest, from a doctrinal perspective, would be the Criminal-Trade combination. The main elements of the *KPIA*, excluding the trading powers, are quite similar to — and less far-reaching than — those in *CEPA*, the statute upheld under Criminal Law in *Hydro-Quebec*. As for the *KPIA*'s trade provisions, it is arguable they might also be upheld under Criminal Law, but in any event there is a strong argument that they fit under Trade and Commerce. Therefore, upholding the *Act* under these two constitutional powers would require only a modest stretching or adaptation of existing doctrine (to fit emissions trading within Trade and Commerce) — more would be required to uphold the *Act* under POGG or treaty implementation.

While upholding the *Act* (or, more accurately, determining its constitutionality) under the Criminal-Trade powers may be the safest constitutional route,

240 Indeed, one could even go so far as to say that GHG emissions trading *in general* likely cannot be effectively regulated by provinces — at least at a national or international scale. This is primarily due to constitutional constraints (as noted earlier), but also due to the ongoing inability of provinces' to agree on the need for and aim of such a system (Greenberg & Fekete, *supra* note 236), and the consequences to other provinces and countries if some provinces failed to take effective action.

it also would be the least helpful one from a larger policy perspective, since the courts would be foregoing an opportunity to provide guidance on two very important outstanding constitutional questions: clarifying the scope of federal environmental powers under POGG, and determining the existence of a federal treaty-implementing power. Both issues are raised squarely by the *KPIA* (particularly treaty implementation), and a similar opportunity to provide guidance on these key questions may not arise again for years. Let us briefly explore the reasons why the courts might want to provide guidance on these two questions, beginning with the POGG power.

Over the past twenty years, the Supreme Court has used both vertical and horizontal limits to delineate federal power over environmental matters, as discussed earlier. Put another way, it has limited the *breadth* of matters that may be addressed through the POGG power, and has limited the *depth* of the tools that may be used under the Criminal power. These limitations are designed to restrict federal intrusion into areas of provincial jurisdiction, but each also limits Parliament's ability to effectively address environmental problems, and creates uncertainties that inhibit federal law makers, as further explained below.

Deciding the case on the basis of the Criminal power (plus Trade) would allow the courts to provide further guidance on one of the two axes used to restrict federal environmental powers — the depth of tools that may be used. The problem with this restriction is that most environmental problems cannot be effectively addressed through a punitive approach alone. The first generation of environmental laws relied mainly on a punitive approach (qualified prohibitions), and achieved some notable improvements, but the limits of that approach are now well-recognized. For example, a punitive approach is reactive (it deals with end-of-pipe symptoms, rather than the front-end root causes of pollution problems); it relies on government's will and capacity to enforce (which are often lacking); it is firm or pollutant-specific and does not deal well with cumulative problems (multiple sources of pollutants); it is often highly costly; and, most of all, it penalizes "bad" behaviour but does not encourage "good" behaviour — *i.e.*, it is all stick and no carrot.[241]

The next generation of environmental approaches relies on a broader array of regulatory tools.[242] Climate change is a perfect example. Reducing GHGs, of

241 N. Gunningham & P. Grabosky, *Smart Regulation: Designing Environmental Policy* (Oxford: Claringdon Press, 1998) at 38-47.

242 For a discussion of "next generation" environmental regulatory tools see Gunningham & Sinclair, *supra* note 230, especially 193-94, 115-20; and M. Chertow & D. Estey, *Thinking Ecologically: The*

course, will require limits on industrial emissions, a typical criminal approach. But a range of other tools will be even more important (as used in various jurisdictions). These include: emissions trading, pollution taxes, fuel efficiency standards for vehicles, renewable portfolio standards (requiring energy utilities to use a certain percentage of clean energy), changing forestry and agricultural practices, and improving energy efficiency standards for homes and appliances.[243] These regulatory tools go beyond the punitive measures allowed under the Criminal power.

To its credit, the Supreme Court appears to have recognized this problem, and has shown a willingness to relax *somewhat* the restriction to punitive measures by allowing qualified prohibitions, permit powers, and other measures.[244] However, there is a limit to how far the Court can (and will) stray from the Criminal power's punitive foundation. The Criminal power, as currently conceived, likely cannot be expanded enough to allow for the full array of regulatory tools needed to effectively address climate change, or most other modern environmental problems.

Of course Parliament still has the option of using a *multipower* approach to draft environmental laws; it can add additional regulatory tools (on top of criminal prohibitions) to a statute if it can find other specific constitutional powers to support them. Indeed, the inclusion of a trading power in the *KPIA* appears to reflect such an approach. If the courts uphold this power on the basis of Trade and Commerce, that would represent an important precedent, since emissions trading is a valuable second generation tool for addressing pollution problems.[245] But it is just one such tool. Clarifying Parliament's power over emissions trading will do nothing to elucidate its power to use the many other modern regulatory tools needed to effectively address climate change and other environmental problems.

Ultimately, the Criminal power, with its restriction on the depth of tools that may be used, is fatally limited as a basis for federal environmental law-making. It allows Parliament to address most significant environmental problems, but not necessarily to use all the tools needed to *properly* address those problems. That is like asking someone to fix a car, but letting them use only half the tools in their toolkit (the older, generally less useful ones), and leaving uncertainty about which tools they can and cannot use.

Next Generation of Environmental Policy (New Haven, CT: Yale Press, 1997), see esp. 105-15.

243 IPCC, *Working Group III 2007 Report (Summary)*, *supra* note 11, see esp. c. 13.

244 *Hydro-Quebec*, *supra* note 17; *Firearms Reference*, *supra* note 64; *RJR-MacDonald*, *supra* note 180.

245 Chertow & Estey, *supra* note 242 at 105-15.

Deciding a constitutional challenge to the *KPIA* on the basis of Criminal-Trade powers would shed light on the availability of one important environmental regulatory tool (emissions trading), but it ultimately leads Parliament down a constitutional path that will be of limited utility in addressing modern environmental problems, such as climate change. That being said, constitutional cases are primarily about determining the legality of a particular statute, not about setting broader precedents. For that reason, one would expect the courts to assess the *KPIA*'s constitutionality under the Criminal and Trade powers, since that appears to be the safest ground for upholding it, in terms of current doctrine. However, one hopes the courts also will go on and consider additional constitutional bases, particularly POGG and treaty implementation, since these involve broader constitutional questions on which guidance is much needed.

Deciding the case under POGG would allow the courts to clarify the second axis of restriction on federal environmental powers — the limit on the *breadth* of subjects Parliament may address. The national concern test requires the federal government to carve up environmental subjects into their elemental components. The aim is to minimize intrusion into provincial powers — an important goal. However, the problem with this approach is that ecosystems are interconnected, meaning that environmental problems rarely can be effectively addressed through a compartmentalized approach. Justice La Forest recognized this challenge in *Crown Zellerbach*, explaining that effectively addressing marine pollution would require not only controlling direct ocean discharges (which the impugned act did), but also pollution of inland rivers flowing to the sea and air pollution that is blown out to sea[246] — in fact the latter two are arguably bigger problems than the first.

The national concern test limits the breadth of federal environmental powers in two main ways: by restricting (i) the scope of subject matters that may be addressed, and (ii) the scale of impact on provincial jurisdiction. The *KPIA* is not likely to test the first of these restrictions. As discussed above, the *KPIA*'s subject matter — "controlling GHGs" (or "international air pollution") — seems to meet the test of being "single, distinct and indivisible." However, the *KPIA* likely *will* test the bounds of the second restriction. Curtailing GHG emissions is likely to have a fairly significant impact on many facets of Canadian life and industrial activity, including areas of provincial responsibility.

A key unanswered question under the national concern test is whether

246 *Crown Zellerbach*, supra note 17 at 446.

the acceptable scale of impact on provincial jurisdiction varies with the severity of the problem being addressed, as discussed earlier. Addressing a subject with potentially far-reaching consequences (such as climate change, terrorism, or communications) will normally involve a greater degree of intrusion than subjects with more limited consequences (such as planning the national capital region), and also provide greater benefit to provinces. This latter point is important. The national concern test, in its federal-provincial calculus, should recognize that there are real *benefits* to provinces of having transboundary problems (which they cannot remedy) effectively addressed at the national and/or international level, and these benefits should be balanced against any incursion into provincial jurisdiction. In other words, a greater degree of federal intrusion should be justified by greater gains to the provinces (and the nation) flowing from that intrusion.

It seems reasonable to posit that the national concern test ought to reflect this co-variation between the gravity of a problem and the scale of acceptable intrusion.[247] However, to date, this question does not appear to have been explicitly addressed by the Supreme Court.[248] Having the courts address this question would be of real value in clarifying the scope of federal power over the environment (and other matters). Ultimately, POGG has greater potential than the Criminal power as a foundation for federal environmental law making, since it allows Parliament to use the full basket of regulatory tools to address a problem. However, addressing this question — which goes to the heart of federal-provincial balancing of powers — means wading into unexplored and delicate constitutional turf, and so is less constitutionally "safe" than deciding under the Criminal power. It is also makes the outcome more difficult to predict.

As an aside, if the courts do address the POGG power, it is hoped that they also will clarify that the normal rules of the double aspect doctrine apply to that power — *i.e.*, that federal legislation under POGG does not preclude valid provincial regulation of the same activities, any more than is the case under other constitutional powers. As noted above, there appears to be some confusion on this point.

Deciding a constitutional challenge to the *KPIA* on the basis of the POGG

247 This assumes, of course, that the problem has been defined in a "single, distinct and indivisible" manner. In other words, the national concern test will not allow Parliament to address an *aggregate* problem, such as inflation, on the ground that it will have great impacts on provinces.

248 Although one might argue that such co-variation has been *implicitly* accepted by the Supreme Court, through allowing greater degree of intrusion in addressing weightier problems (such as communications, or atomic energy).

and Criminal-Trade powers could be very helpful in further clarifying the boundaries of these existing federal powers, particularly as applied to environmental matters. However, the *most* helpful basis for decision, from a larger policy and precedent-making perspective, would be the federal treaty-implementing power. The existence and scope of this power is a crucial constitutional question — one that has been hibernating for seventy years. There are a number of reasons why the treaty-implementing power would be the most helpful basis for decision, in terms of providing constitutional guidance:

1. The question of the federal power to implement treaties has been awaiting resolution (or re-examination) since 1937. Since that time, several Supreme Court justices, and a number of eminent constitutional scholars, have emphasized the desirability of fresh judicial direction on this subject.

2. It is hard to imagine that a better opportunity will arise for the courts to clarify this question, or at least begin to do so. The *KPIA* was unambiguously crafted by Parliament for the purpose of implementing a treaty — a very rare occurrence (likely owing to its conception as a private member's bill). Its title, preamble, and provisions are specifically aimed at compliance with Kyoto and the UNFCCC. Therefore, the *Act* raises the issue of the treaty-implementing power as squarely as could be.

3. A treaty-implementing power (presumably) would have much clearer boundaries than the POGG or Criminal powers. Unlike the national concern power, which involves three fairly malleable criteria, or the Criminal power, which involves uncertainty about the extent of permissible tools, a treaty-implementing power will be defined by the ambit of a treaty. There will, of course, still be questions about whether a particular statutory provision is sufficiently "related to" a treaty to pass constitutional muster, but such questions arise under all heads of power.[249] By providing clearer constitutional boundaries, a treaty-implementing power would reduce uncertainty for federal law makers and treaty negotiators.

4. A treaty-implementing power is not likely to significantly impinge on provincial powers, for several reasons. First, most issues covered by treaties already fall within federal power (since treaties typically address transboundary or "federal" matters);[250] a treaty-implementing power simply removes uncertainty about the existence and scope of such power.

249 Hogg, *supra* note 36 at c. 15.9(c).
250 *Ibid.* at c. 16.2, 16.3(a).

Second, it seems highly unlikely that such a power would be used as a backdoor way for Parliament to expand its powers by creating new treaties (as has been suggested), because treaty creation is no simple matter and countries would not bargain away their sovereignty so lightly.[251] Third, a treaty-implementing power would not preclude provincial laws which address the same activities (unless they were in conflict with federal laws).

Of course, there is potential for some modest expansion of federal powers (accompanied by attendant benefits for provinces). If this is of concern to the courts, they could proceed cautiously by initially applying one of the "halfway house" approaches discussed earlier. In this vein, the author would recommend a federal power either (a) to implement treaties that address transboundary or international matters (as proposed by Hogg), or (b) to implement all treaties, with strict interpretive limits when addressing matters within core provincial jurisdiction (as suggested by the author). The *KPIA* likely would meet either of these tests, although perhaps with some interpretive limits on its scope under the latter one.

5. The need for the federal government to have clear power to participate in international treaties is increasingly important. We live in a world in which transboundary and global forces have a greater impact on Canada and Canadians than ever before. Treaties are the main vehicle for addressing those global forces — both the opportunities and threats they pose. Canada's present position, with a federal government that has arguably the weakest authority in the world to implement treaties,[252] can only be a hindrance in a world where addressing global forces is increasingly vital to a nation's prosperity and wellbeing (how great a hindrance is debatable, but that it is a real hindrance seems beyond debate). This is the strongest reason for addressing the treaty-implementing power in a *KPIA* court challenge.

V. CONCLUSION

To date, the courts have limited both the breadth of matters (through POGG) and the depth of tools (through Criminal Law) that Parliament may use to address environmental matters. The *KPIA*, and any subsequent climate

251 Lederman, *supra* note 110 at 358.

252 Hogg, *supra* note 36 at c. 16.2, 16.3(a).

change legislation, is likely to test these historical limits; it is both broader and deeper than previously upheld federal legislation. The *Act* is likely to have broader impact on activities within provincial jurisdiction than was the case in *Crown Zellerbach*, and it arguably contains a deeper range of regulatory tools than was the case in *Hydro-Quebec* (namely emissions trading). At the same time, the *KPIA* addresses a problem (climate change) that is more serious and far-reaching than was the case in either *Crown Zellerbach* or *Hydro-Quebec*.[253] The greater breadth (of impact) and depth (of tools) in the *KPIA* is necessitated by the nature of the climate change problem; it requires far-reaching action that will affect most sectors of the economy, and requires a range of tools that goes far beyond mere prohibitions.

It seems very likely that the *KPIA* will be the subject of a constitutional challenge, as are most major federal environmental laws. When this happens, the courts will be called upon to reconcile two competing pulls: on the one hand, a growing global problem that may be the greatest environmental and economic challenge of our time, and on the other hand, federal environmental legislation that arguably extends further in depth and breadth than previously upheld statutes. Simply put, courts will be asked to balance the importance of allowing Parliament to effectively address a global problem of the highest importance, with the need to maintain effective provincial powers under the Constitution. The stakes are high on both sides.

No doubt the courts will be presented with plausible legal arguments for and against the *Act's* constitutionality (many of which are canvassed above). However, at its heart, the issue before them is more than just a legal or constitutional one. The federal legislation in question is a response to global forces. The global nature of the climate change problem — both its causes and effects — has necessitated one of the most far-reaching international treaties ever signed. All around the developed world, countries are taking measures similar to, and often stronger than, those being proposed by Canada.[254] Domestic governments, including Canada's, may be the *agents* enacting these measures, but the *driver* is clearly global.

So the larger question at issue is Canada's ability to participate as a member of the global community in addressing matters of profound global importance.

253 *Supra* note 17: *Crown Zellerbach* involved an Act addressing the problem of ocean pollution. *Hydro-Quebec* involved an Act addressed the problem of toxic pollution generally and PCB pollution specifically. This same *Act* (*CEPA*) is also proposed to be used as a vehicle to address GHG pollution; if that happens, it will raise many of the issues addressed in this article.

254 IPCC, *Working Group III 2007 Report (Summary)*, *supra* note 11 at c. 13.

The question that has been left open since 1937 must now be answered — or at least the opportunity to do so is squarely presented. And the need to answer that question is more pressing than ever. The reality is, we live in a world in which global forces are increasingly important. Not just pollution, but also goods, information, capital, and people all move across borders at a rate, and with impacts, never before seen (bringing with them a healthy debate about whether such globalization is, on balance, a good or bad thing).

Unarguably, globalization has an impact on matters of provincial jurisdiction, just as it does on matters of federal jurisdiction. The increasing crossborder flow of goods, pollutants, information, and capital, accompanied by increasing global integration and rules inevitably impinges on domestic sovereignty to a degree. It constrains the policy autonomy of both federal and provincial governments; but those constraints come with corresponding benefits from being more integrally connected to the global community — benefits such as trade opportunities, pollution control, investor protection, and conservation of migratory wildlife. One cannot have the benefits of treaties without accepting the constraints. Presumably, governments believe that the net benefits of such global integration outweigh the concomitant limitations on domestic sovereignty (just as provinces presumably believed in 1867 that the benefits of integrating to form Canada, in the face of changing continental forces, justified the constraints on their autonomy).

Certainly in the case of climate change, the benefits to Canada of concerted global action are enormous. While Canada generates only 2 percent of global GHGs,[255] it will be disproportionately affected by climate change. As a northern nation, Canada will experience more serious changes than almost any other country (as is already being witnessed in the Arctic).[256] These changes will have far-reaching impacts on Canada, including matters within provincial jurisdiction, such as declining river flows and lake levels, increasing forest fires and insect outbreaks, agricultural impacts (droughts), more severe storms, flooding of coastal areas, loss of species, melting of Arctic ice, and increased mortality and morbidity (from heat and air pollution).[257] Canada's only hope for minimizing these impacts, and avoiding even greater ones, is global action to dramatically reduce GHG levels. Because 98 percent of the problem stems from other countries' emissions, Canada's ability to address

255 Canada, *2006 Climate Change Report*, *supra* note 34 at 12-13. On a per capita basis, however, Canada is the second highest generator of GHGs.

256 AICA, *Warm Arctic*, 2004, *supra* note 9 at 8-20.

257 Canada, *Climate Change Impacts and Adaptation: A Canadian Perspective* (Ottawa: Natural Resources Canada, 2004) at viii-xxiv.

this crucial domestic threat is almost entirely dependent on a concerted global effort. These are the global forces behind the passage of the *KPIA* and related GHG reduction measures.

In sum, when the *KPIA* is constitutionally challenged — as seems almost inevitable — the issue before the courts, on its face, will be one of constitutional line drawing. But at its heart, the author submits, the issue will be Canada's ability to participate as a member of the global community: to act on the problems and opportunities that come from being part of an increasingly globalized world. Viewed through this lens, the issue before the courts will not just be "measuring national dimensions" (to use Dale Gibson's oft-quoted phrase), but measuring international dimensions. The judicial challenge will be to determine how to allow Canada to effectively participate in achieving international solutions to problems of international scale, and do so in a manner that minimizes the resulting impacts on provincial legislative autonomy — recognizing that provinces also benefit from Canada's participation in such international regimes. Simply put, the issue will be how to reconcile the reality of an increasingly globalized world, and its attendant benefits and constraints, with the reality of Canada's federal-provincial division of powers — and in particular how to do so in the context of addressing global climate change, arguably the most serious challenge of our time.

The *Kyoto Protocol Implementation Act* appears destined to be the stage on which this larger drama will be played out . . . or at least its first act.