January 2014

The Constitutionality of a Federal Emissions Trading Regime

Kai D. Sheffield

University of Toronto, Faculty of Law, kai.sheffield@gmail.com

Follow this and additional works at: https://ir.lib.uwo.ca/uwojls

Part of the Atmospheric Sciences Commons, Climate Commons, Constitutional Law Commons, Earth Sciences Commons, Energy Policy Commons, Environmental Law Commons, Environmental Policy Commons, International Business Commons, International Relations Commons, Public Administration Commons, Public Affairs Commons, Public Policy Commons, and the Technology and Innovation Commons

Recommended Citation


This Article is brought to you for free and open access by Scholarship@Western. It has been accepted for inclusion in Western Journal of Legal Studies by an authorized editor of Scholarship@Western. For more information, please contact tadam@uwo.ca, wlswadmin@uwo.ca.
The Constitutionality of a Federal Emissions Trading Regime

Abstract
It is impossible to know in advance what legal form, if any, Canada’s emissions trading regime will ultimately take. However, the current Conservative government’s explicit policy of replicating the United States’ greenhouse gas reduction goals and legislation offers some clues. Based on the government’s legislation and rulemaking thus far, the emissions trading regime that emerges in the short term may be an informal collection of emissions trading provisions contained in industry-specific regulations passed under the Canadian Environmental Protection Act. Such a regime may not be the most effective in staving off climate change, but it will impose additional costs on certain activities and, consequently, increase the possibility of a legal challenge from one of the provinces or from an economic actor sanctioned for failing to comply with the regime. Considering the likelihood of such a constitutional challenge, this paper explores the potential constitutional bases for such a regime, focusing on the three heads of federal power: criminal law, trade and commerce, and the “national concern” branch of the “peace, order, and good governance” power. It concludes that only one of these heads of power, trade and commerce, will likely support the contemplated emissions trading regime.

Keywords
Climate change, federalism, trade and commerce, POGG, constitution, environment, environmental law, global warming, geopolitics, emissions, greenhouse gases, Conservative Government

Cover Page Footnote
Kai Sheffield completed his J.D. at the University of Toronto Faculty of Law in the spring of 2012 and is currently an associate at Sullivan & Cromwell LLP in New York City. He completed his undergraduate degree in International Relations at the University of British Columbia. Kai wrote an earlier version of this paper as a third-year law student for Professors John Terry and Dennis Mahony’s Climate Change Law class and is very grateful to Professors Terry and Mahony for their guidance and encouragement.

This article is available in Western Journal of Legal Studies: https://ir.lib.uwo.ca/uwojls/vol4/iss1/4
INTRODUCTION

It is impossible to predict what legal form, if any, Canada’s emissions trading regime will ultimately take. However, the current Conservative government’s explicit policy of harmonizing Canadian emissions regulations with those of the United States offers a clue. Given this rulemaking approach, the emissions trading regime likely to emerge will be based on an informal collection of trading provisions contained in industry-specific regulations passed under the Canadian Environmental Protection Act. Such a regime may not be the most effective in staving off climate change, but it will impose additional monetary costs on certain activities and, consequently, increase the possibility of a legal challenge. A constitutional challenge to such an emissions trading regime could come from one of the provinces. Alberta is a likely candidate, given its staunch objection towards Kyoto Protocol implementation a decade ago. A challenge could also originate from any economic actor sanctioned for failing to comply with the regime. Considering the likelihood of such a constitutional challenge, this article explores the potential constitutional bases for such a regime, focusing on the three heads of federal power: criminal law, trade and commerce, and the “national concern” branch of the “peace, order, and good governance” power. It concludes that only one of these heads of power—trade and commerce—will likely support the contemplated emissions trading regime.

I. THE FUTURE FACE OF CANADIAN GREENHOUSE GAS REGULATION

Global climate change, driven in significant part by human emissions of greenhouse gases (GHGs), is now a scientific and political reality. According to the *Fourth Assessment Report of the International Panel on Climate Change* (“IPCC”),
released in 2007, it is “unequivocal” that a warming of the global climate system has been observed. The report also stated that it is “very likely” that anthropogenic GHG emissions have caused most of the observed global average temperature increase since 1950. The Canadian Government accepts the IPCC’s conclusions and has cited them in its own literature. As a party to the United Nations Framework Convention on Climate Change (UNFCCC), Canada has committed itself, under the non-binding Copenhagen Accord of 2010, to an economy-wide emissions reduction target of 17 per cent below 2005 levels by 2020. Therefore, Canada has—at least ostensibly—the policy goal of implementing some sort of legislative or regulatory regime in order to achieve these reductions.

Despite Canada’s ostensible commitment to a reduction in GHG emissions, the extent of actual regulation in this area has been limited. In 2005, the Liberal government added six GHGs, including carbon dioxide, to the list of toxic substances under the Canadian Environmental Protection Act (CEPA). This change enables regulation of those GHGs under the “toxic substances” regime of CEPA. Such regulation has yet to be created, although the current Conservative government has taken some steps to further the development of such regulations. In 2008, the Conservative government released the Regulatory Framework for Industrial Greenhouse Gas Emissions. The framework built upon the Regulatory Framework for Air Emissions released the year before and proposed specific compliance mechanisms intended to facilitate the establishment of a GHG emissions trading system. This system was to be established by means of regulations under CEPA, which already specifically contemplates such

---

3 Ibid. at 39.
4 See e.g. Natural Resources Canada, From Impacts to Adaptation: Canada in a Changing Climate 2007 (Ottawa: Natural Resources Canada, 2008) at 22.
6 Order Adding Toxic Substances to Schedule 1 to the Canadian Environmental Protection Act, 1999, SOR/2005 345.
regulations and would therefore not need to be amended. Nonetheless, no regulations ever emerged in the wake of the framework, and a 2010 audit report of the Commissioner of the Environment and Sustainable Development criticized the government for the continuing absence of a concrete GHG reduction policy. Since the release of the commissioner’s report, no steps have been taken to implement the framework or to build any other comprehensive GHG reduction strategy.

While the framework appears to have quickly fallen out of favour since it was introduced, this may be due to a shift in strategy rather than its content. The Conservative government has decided to closely align any action on GHG emissions with measures undertaken by the United States. This decision has been repeatedly emphasized in public statements of policy and even enshrined in Canada’s Copenhagen target as well as in other official Canadian documents within the UNFCCC framework. Significantly, in his 2009 speeches, Minister of the Environment Jim Prentice outlined Canada’s change of course away from the framework and towards synchronization with United States policy. Prentice strongly indicated that such a policy would most likely be a continent-wide cap-and-trade system, implemented through CEPA regulations rather than independent legislation.

Therefore, a regulatory system of overall emissions caps with tradable emissions credits (cap-and-trade), like that contemplated in the framework, and implemented as

---

9 Canadian Environmental Protection Act, SC 1999, c 33 [CEPA]. (CEPA provides generally for the Development of systems of “deposits and refunds” and “tradable units,” and the creation of regulations surrounding such systems. ss 322, 325-326. Significantly, the Act also shows some sensitivity to federalism issues, perhaps in an attempt by its drafters to stave off constitutional challenges: it provides that in developing emissions trading systems, “the Minister shall offer to consult with the government of a province” and representatives of aboriginal governments, but that if such an offer is not accepted within 60 days, the Minister may act unilaterally. s 323.)


14 Copenhagen Targets Letter, supra note 5.

15 See e.g. Fifth National Communication on Climate Change: Actions to Meet Commitments Under the United Nations Framework Convention on Climate Change (Ottawa: Government of Canada, 2010) at 1 [Fifth National Communication].


---
regulations under CEPA, has not been rejected as a policy option for Canada. Rather, it has been postponed pending similar action by the United States.

Although no steps have been taken towards the development of an economy-wide cap-and-trade system since the collapse of proposed United States legislation in 2010, Canada’s limited actions regarding GHG emissions since 2010 have confirmed three aspects of the government’s approach. First, CEPA regulations are the government’s preferred tool for climate change lawmaking. Second, cap-and-trade is its preferred mechanism for emissions reductions. And third, synchronization with US legislation is Canada’s overarching priority. In 2010, Canada introduced the Passenger Automobile and Light Truck Greenhouse Gas Emission Regulations (“Vehicle Emissions Regulations”), a new set of regulations under CEPA that are explicitly synchronized with new United States legislation setting out vehicle emissions standards and a related regime of tradable emissions credits. The government is also developing a proposed regulation on the reduction of carbon dioxide emissions from coal-fired power plants and has indicated its intention to employ absolute limits, rather than intensity-based limits, in future GHG regulations; both of these measures followed developments in United States policy. In 2011, after the elections in which the Conservative Party won a majority government, Minister of the Environment Peter Kent re-emphasized that Canada’s GHG reduction efforts would mirror those of the United States. Kent stated that “[t]here’s no expectation of cap-and-trade continentally in the near or medium future and we don’t believe that it would be wise to go with a shallow market in a closely integrated continental economy.” In 2013, in announcing that forthcoming emissions regulations for the oil and gas sector would be delayed, Minister of the Environment Leona Aglukkaq stated that Canada would continue to take a “sector-by-sector approach.” All of these developments indicate that a comprehensive new piece of cap-and-trade legislation is unlikely to be tabled by the Conservative government. The most likely cap-and-trade regime to emerge is a patchwork of CEPA regulations, modelled after United States initiatives, gradually cohering into something

vaguely resembling the framework. The statements and actions of the government seem to indicate that the primary motivation for such a regime will be maintaining economic integration with the United States rather than any independent desire on the part of the Canadian government to reduce GHG emissions.

II. PREVIOUS SCHOLARSHIP

The constitutionality of a prospective emissions trading regime has been analyzed in a number of papers over the past several years. The authors of these papers have unanimously agreed that the three heads of power that provide the strongest constitutional basis for a federal emissions trading regime are section 91(27), the criminal law power; section 91(2), the trade and commerce power; and the “national concern” branch of the federal government’s “peace, order, and good governance” (POGG) power. However, these authors have not agreed on which, if any, of these heads of power would actually justify such a regime. Joseph Castrilli, in a 1999 paper, argued that an emissions trading regime could be justified on trade and commerce grounds but probably not on the basis of the criminal law or POGG. In 2002, Philip Barton argued the reverse: the criminal law and POGG could justify an emissions trading regime, but the requisite “pith and substance” analysis would undermine a trade and commerce justification. Nigel Bankes and Alastair Lucas, in a 2004 paper, discussed each of these heads of power but declined to reach conclusions on their constitutionality, given the absence of a proposed federal regime at the time. Lucas and Janette Yearsley revisited the same argument in a 2012 paper that argued that, although “direct and discrete” federal GHG emissions regulations could be constitutionally valid exercises of the criminal law power, the 2006 Clean Air Bill, a failed amendment to CEPA, and the Conservative government’s proposed coal-fired

23 Peter Hogg, “A Question of Parliamentary Power: Criminal Law and the Control of Greenhouse Gas Emissions” (2008) C.D. Howe Institute Backgrounder, No. 114 [Hogg 2008]. (Peter Hogg has addressed the federal government’s section 91(3) taxation power, stating that the regulation of GHG emissions through taxation would undoubtedly be constitutional. However, Hogg notes that “taxes play not part” in the Framework emissions trading scheme, and therefore that section 91(3) cannot support the constitutionality of a similarly structured emissions trading regime at 3.); Mahoney, supra note 12 at 455, 4-56 (The proposal of such a measure in the future is also politically unlikely given the lack of support for former Liberal Party leader Stéphane Dion’s proposed carbon tax in the 2008 federal election at 4-56).
25 Barton, supra note 1.
electricity generation regulations would both be unconstitutional. Finally, Peter Hogg assessed the constitutionality of the proposed framework in 2008 and suggested that such a regime was “likely” justifiable under the criminal law power. Hogg only briefly and ambiguously discussed the POGG power and did not address trade and commerce at all. Recent developments have further clouded the picture. The Conservative government has shifted away from the framework and towards a United States-centric approach since 2009 and, in 2011, the Supreme Court of Canada further elucidated the parameters of the trade and commerce power in Securities Reference, potentially affecting the analysis under section 91(2). In consideration of these developments and the underlying academic disagreement as to the constitutionality of an emissions trading regime under the criminal law, trade and commerce, and POGG powers, those three heads of power are analyzed afresh here.

III. THE CRIMINAL LAW: HYDRO-QUEBEC’S INEXACT PRECEDENT

The most constitutionally contentious aspect of a federal cap-and-trade regime is not the regulation of GHG emissions per se but rather the creation of, and provision for the trading of, emissions credits. The federal government’s authority to impose a simple cap on emissions, without an accompanying emissions trading scheme, is clear in light of the Supreme Court’s decision in R. v. Hydro-Québec. Hydro-Québec upheld the constitutionality of CEPA as a valid exercise of the federal criminal law power under section 91(27) of the Constitution Act, 1867. Despite the regulatory complexity of CEPA’s treatment of “toxic substances” and the existence of administrative discretion and exceptions in the imposition of penalties; Justice La Forest’s five-four majority judgment stressed the necessity of less conventional, broader, and more flexible criminal law regimes in the particularly complex context of environmental regulation. CEPA was substantially amended in 1999, and the amendments make the capping of GHGs less controversial than it had been previously. While the provisions allowing regulation of “toxic substances” still stand, new provisions governing the prevention of international air pollution appear deliberately constructed to avoid t accusations of being overly broad that nearly toppled the “toxic substances” regime in Hydro-Québec.

29 Hogg 2008, supra note 23 at 3.
30 Reference re Securities Act (Canada), 2011 SCC 66 [Securities Reference].
32 R v Hydro-Québec [1997] 3 SCR 213 at para 134, La Forest J [Hydro-Québec majority].
33 CEPA, supra note 9, ss 64-103.
Sections 166 and 167 of CEPA set out a scheme whereby the federal government may (or in some cases, shall) regulate emissions that “may reasonably be anticipated to contribute to (a) air pollution in a country other than Canada; or (b) air pollution that violates, or is likely to violate, an international agreement binding on Canada in relation to the prevention, control, or correction of pollution.” The definition of “air pollution” under CEPA comfortably encompasses GHG emissions, even where the effects of the presence of a GHG in the air can only be demonstrated to “partly” contribute to “indirect” harm to property or human, plant, or animal life. However, this definition is less susceptible to attack for overbreadth as an exercise of the criminal law power than the definition of “toxic substances” that was at issue in Hydro-Québec. In Hydro-Québec, one key assertion of the dissenting judges was that the definition of “toxic substances” is potentially all-encompassing and that the question of which actual substances were to be prohibited by CEPA was “made entirely dependent on the discretion of the Executive.” By contrast, the definition of “air pollution” contains no discretionary elements and covers a more discrete area of behaviour than “toxic substances” does. It is also worth noting that the Vehicle Emissions Regulations, the only cap-and-trade regulations passed under CEPA, are not grounded in the “air pollution” or “toxic substances” provisions of CEPA but rather in very narrow provisions that specifically relate to vehicle emissions. Lastly, La Forest’s judgment indicated that it was not necessary to determine the law’s “pith and substance” prior to justifying it on the basis of the criminal law power. The majority in Hydro-Québec upheld the broad, discretionary “toxic substances” regime of CEPA as a valid exercise of the criminal law power. Furthermore, the Firearms Reference reinforced that “highly complex” regimes can still be criminal in nature. Thus, it is very unlikely that the Supreme Court would strike down any new emissions cap regulations on grounds of overbreadth if such regulations were implemented as CEPA regulations under section 167 and pursuant to the federal government’s jurisdiction under section 91(27).

34 Ibid, s 166(1).
35 The full definition reads as follows: “‘air pollution’ means a condition of the air, arising wholly or partly from the presence in the air of any substance, that directly or indirectly (a) endangers the health, safety or welfare of humans; (b) interferes with the normal enjoyment of life or property; (c) endangers the health of animal life; (d) causes damage to plant life or to property; or (e) degrades or alters, or forms part of a process of degradation or alteration of, an ecosystem to an extent that is detrimental to its use by humans, animals or plants.” Ibid, s 3(1).
37 Ibid at para 55.
38 CEPA, supra note 9, ss 160-162.
39 Hydro-Québec majority, supra note 32 at para 117.
40 Reference re Firearms Act (Canada), 2000 SCC 31 at para 36, 185 DLR (4th) 577 [Firearms Reference].
However, while the constitutionality of federal CEPA regulations imposing caps on emissions appears to have been settled by *Hydro-Québec*, the constitutionality of an emissions trading regime has not been. Such a regime would go beyond merely imposing permissible levels of conduct for each emitter. Rather, an emissions trading regime would, at a basic level, set out an economy-wide cap on GHG emissions, allocate entitlements to create GHG emissions, and then permit these entitlements to be traded amongst emitters. The permissible level of emissions for each emitter would be determined by the actors’ decisions to moderate their emissions and buy or sell permits, and therefore ultimately by the market itself. The framework proposed such a scheme, with some additional features that would take the regime even further away from *Hydro-Québec*: permits could not only be bought and sold but banked for later use, and certain foreign emissions credits could be purchased and used instead of domestic credits. The obligation to purchase credits could be avoided either by investing in domestic “offsets,” certified by Environment Canada, that reduced GHG emissions, or by paying into a “technology fund” to promote the development and diffusion of GHG-reducing technologies. For the sake of brevity, and because of the current government’s stated reluctance to enact a comprehensive cap-and-trade regime, this article’s analysis will focus on the most basic of the aforementioned framework features—the establishment of a system of tradable emissions credits (hereafter the “emissions trading regime”). This kind of basic regime seems the most likely to emerge from the current US-centric, industry-by-industry approach to GHG regulation.

CEPA was upheld as valid criminal law in *Hydro-Québec* because, despite the wide administrative discretion and immense complexity of the “toxic substances” regime, Justice La Forest found that the regime ultimately “precisely defined” situations of prohibition and provided “for carefully tailoring the prohibited action to specified substances used or dealt with in specific circumstances.” The regime was ultimately analogous to traditional, “self-applicable” criminal laws like the prohibition on murder because the administrative process, however elaborate, ultimately culminated in a concrete prohibition. An emissions trading regime would not do this. The administrative process would culminate in the initial allocation of credits but, after that point, any level of emissions of each regulated substance would remain permissible.

41 Bankes and Lucas, *supra* note 26 at para 98.
43 Mahony, *supra* note 12 at 3-32.
44 Some of the various supplementary mechanisms discussed above raise their own distinct constitutional issues; for example, Hogg argues that the constitutionality of the “technology fund” is less clear than the rest of the Framework regime under the criminal law power because the fund will issue emissions credits based on undetermined reductions that its investments may achieve at some indefinite point in the future. Hogg 2008, *supra* note 23 at 7.
45 *Hydro-Québec* majority, *supra* note 32 at paras 150-51.
provided the emitter was able and willing to purchase sufficient credits. Market forces—and the freely made economic decisions of emitters—would ultimately determine the “prohibited” level of emissions.

The creation of an emissions trading regime would also not constitute “carefully tailoring the prohibited action.” In fact, it is exactly the opposite. The public policy goal of such a system is to reduce the total, aggregate creation of the undesirable substance without regard to where the reductions come from. The particular circumstances of any individual emitter is irrelevant.47 Governmental administrators broadly tailor the prohibited conduct but then deliberately step back to allow the market to sort out the details. As Hogg notes, “[f]or most kinds of criminal behaviour, the purchase of exemptions from the criminal prohibitions would be unthinkable.”48 Indeed, a system of tradable permits to commit an offence, whether it be murder or exceeding the speed limit in one’s car, seems to utterly contradict the notion of “carefully tailored” criminal prohibitions. Yet Hogg goes on to argue that such a regime is constitutional in the emissions trading context:

In the case of the emissions credits and offset credits, their constitutionality seems clear. They provide incentives for and then recognize equivalent reductions in emissions to limits that the regulated firm is bound to achieve. Since the goal is to reduce overall emissions, a reduction anywhere is equally beneficial.49

Hogg is correct in noting that tradable credits are a potentially useful legal tool in preventing environmental harm; GHG emissions affect overall global atmospheric concentrations regardless of where in Canada, or the world, they occur,50 so emissions trading could very likely improve the efficacy of any GHG reduction measures. However, “[t]he efficacy of a law, or lack thereof, is not relevant to Parliament’s ability to enact it under the division of powers analysis.”51 As discussed below, the ability of the emissions trading scheme to achieve its goal will not save it if it does not meet the formalistic requirements of a criminal law.

Finally, an emissions trading regime could come under even more intense scrutiny than the “toxic substances” regime in Hydro-Québec because of its more significant intrusions into provincial heads of power. Section 92(13) places property and
civil rights within provincial jurisdiction, and an emissions permit could be construed as a piece of property. The Supreme Court recently held that a fishing licence qualifies as personal property within the statutory definition of the Bankruptcy and Insolvency Act. However, in the same case, the court noted that “it is extremely doubtful that a simple licence could itself be considered property at common law.” Federal emissions credits could also intrude on various other provincial heads of power: “local works and undertakings,” “matters of a merely local or private nature,” and the exploitation of natural resources. In light of all of this, and given the close 5–4 decision in Hydro-Québec, the permissibility of a cap-and-trade regime that strays even further from the conventional criminal law model, in the manner just described, is questionable.

IV: CRIMINAL LAW: BEYOND HYDRO-QUEBEC

Hogg and Barton contend that the criminal law power may be the head of power that most intuitively seems to support an emissions trading regime implemented under CEPA. However, as previously discussed, the holding in Hydro-Québec is not broad enough to encompass a regulatory scheme that sets an overall societal restriction, and then relies on the market—rather than an administrative agency—to determine whether each individual’s conduct is prohibited. It is further argued here that such a regime does not otherwise contain a valid prohibition, and therefore is not a valid exercise of the federal criminal law power.

The test for valid criminal laws under section 91(27) comprises three prerequisites: a valid criminal law, public purpose backed by a prohibition, and a penalty. The first and last of those criteria would easily be satisfied by-cap-and-trade regulations under CEPA. The majority and dissent in Hydro-Québec agreed that the “protection of the environment” was a valid public purpose. Likewise, the existence of a penalty for the violation of any CEPA regulations, including any that establish an emissions trading regime in the future, is incontrovertible. Section 272 states that any contravention of the act or regulations, or any obligation or prohibition arising from them, has committed an offence punishable by a fine, imprisonment, or both. In

52 Constitution Act, 1982, s 92(13), being Schedule B to the Canada Act 1982 (UK), 1982, c 11.
53 Bankes and Lucas, supra note 26 at para 23.
54 Saulnier (Receiver of) v Saulnier, 2008 SCC 58 at para 46, 298 DLR (4th) 193.
55 Ibid at para 23.
56 Ibid, s 92(10).
57 Ibid, s 92(16).
58 Ibid, s 92A.
59 Firearms Reference, supra note 40 at para 27.
60 Hydro-Québec majority, supra note 32 at para 123; Hydro-Québec dissent, supra note 36 at 43.
61 The penalty on summary conviction carries a maximum penalty of a $300 000 fine or a sentence of 6 Months imprisonment or both; on indictment, the maximum penalty is a $1 000 000 fine or 3 years
Hydro-Québec, section 113(f) of CEPA, which provided for identical penalties to those in the current section 272, was held valid. However, the second criterion—the need for a valid prohibition that the dissent found unmet in Hydro-Québec—is far more difficult to satisfy.

In RJR-MacDonald Inc. v. Canada (Attorney General), the Supreme Court held that a law prohibiting tobacco advertising, rather than tobacco consumption itself, was a valid exercise of the criminal law power, despite the law’s attenuated connection with the legitimate purpose of protecting public health, because “[g]iven the addictive nature of tobacco products, and the fact that over one-third of Canadians smoke, it is clear that a legislative prohibition on the sale and use of tobacco products would be highly impractical” and “the mere fact that it is not practical or realistic to implement a prohibition on the use or manufacture of tobacco products does not mean that Parliament cannot, or should not, resort to other intermediate policy options.” Barton considers RJR-MacDonald highly relevant to an emissions trading regime:

Indirect criminal sanction by a GHG cap, instead of a complete prohibition on GHG emissions or GHG production, is an innovative policy in light of the fact that Canadians are arguably addicted to fossil fuels. . . The practical reality is that there cannot be a complete prohibition on GHG emissions. However, indirect regulation of GHGs can reduce this dependency.

Barton’s analogy between smokers’ chemical addiction to nicotine and society’s economic reliance on fossil fuels overlooks the point that no emissions trading regime seeks to completely prohibit GHG emissions. The most drastic climate change mitigation scenario contemplated by the IPCC would stabilize global average temperatures at 2.0° to 2.4°C above pre-industrial levels. This scenario is the worst case in terms of economic cost, and would require at most an 85 per cent reduction in GHG emissions from 2000 levels by 2050, leaving some level of relatively harmless emissions intact. Therefore, unlike the prohibitions on advertising in RJR-MacDonald, which were intended to indirectly reduce another kind of behaviour that Parliament wished to ultimately eliminate, emissions trading is intended to reduce GHG emissions to an optimal level, and never to eliminate GHG emissions entirely.

imprisonment or both. CEPA, supra note 9, s 272(2).
62 Hydro-Québec majority, supra note 32 at paras 22; Hydro-Québec dissent, supra note 36 at 146.
63 Hydro-Québec dissent, supra note 36 at para 53.
65 Ibid at para 54.
66 IPCC, supra note 2 at 67.
Hogg recognizes this, but he still finds *RJR-MacDonald* relevant, arguing that the emissions trading regime is an indirect means for each economic actor to achieve through “alternative means of compliance,” an emissions reduction proportionate to the broader societal goal.\(^{67}\) Although this argument, unlike Barton’s, recognizes that emissions trading differs from tobacco regulations in that its intent is not to prohibit GHG emissions entirely, Hogg still seems to give too broad a reading to the word “indirect.” The court in *RJR-MacDonald* did not uphold a criminal law providing for alternative means of compliance; it upheld a law criminalizing activities indirectly connected to the legitimate public purpose. This is not an issue in regards to emissions trading, as the legal regime remains directly connected to its legitimate purpose of environmental protection. Rather, the “indirectness” involved is that emissions trading allows polluters to buy their way out of direct compliance if the costs of the prohibition are too high, a concept that finds no analogy in the advertising ban in *RJR-MacDonald*. Courts seem to view all cases involving such a balancing of legitimate criminal purposes against crass economic considerations with great suspicion. For example, a recent federal court case found the implementation of the North American Free Trade Agreement (NAFTA) pharmaceutical trade secret regime, which balances the interest in public health served by cheaper generic prescription drugs against the economic interests of innovator drug manufacturers, to not be a valid exercise of the criminal law power.\(^{68}\) In short, *RJR-MacDonald* permits alternative targets of governmental regulation but not alternative means of compliance. In light of this analysis, the criminal law power does not appear to support a federal emissions trading regime, and the viability of other heads of power must be examined.

V. PITH AND SUBSTANCE

The threshold issue of the characterization of the “pith and substance” of CEPA regulations establishing an emissions trading regime should be addressed before the regime’s classification under any one of the specific legislative heads of power is considered, pursuant to the two-step method of constitutional federalism analysis.\(^{69}\) The importance of the characterization stage of the judicial review of legislation has sometimes been given short shrift in past analyses of the constitutionality of climate change legislation; Hogg and Castrilli barely touch upon pith and substance in their respective papers.\(^{70}\) Barton, however, gives great weight to pith and substance, arguing

---


\(^{68}\) *Canadian Generic Pharmaceutical Assn v Canada (Minister of Health)*, 2009 FC 725 at para 78 [*Generic Pharmaceutical*].

\(^{69}\) See e.g. *R v Morgentaler*, [1993] SCR 463 at para 27.

that, despite seeming to satisfy all of the other jurisprudential requirements of a valid trade and commerce law, an emissions trading regime would not be a valid exercise of section 91(2) authority because its pith and substance does not concern trade and commerce.\textsuperscript{71} If the pith and substance analysis does in fact have the potential to render an otherwise constitutional emissions trading regime invalid, a thorough focus on this stage of the inquiry seems to be warranted.

There are strong indications, however, that the pith and substance of an emissions trading regime implemented under CEPA will not ultimately be determinative of its constitutionality. An already somewhat arbitrary and subjective analytical step—one in which, according to Hogg, “[l]ogic offers no solution”\textsuperscript{72}—pith and substance seems to radically diminish in significance in the face of complex regulatory schemes that touch upon environmental or economic issues across a broad range of industries and activities. Notably, in \textit{Hydro-Québec}, the majority of the Supreme Court placed far less emphasis on pith and substance than the dissent. Justices Lamer and Iacobucci, in arguing in dissent for the unconstitutionality of the impugned CEPA provisions, reached a pith and substance determination \textit{before} proceeding to the classification stage of the analysis; they stated that “the impugned provisions are in pith and substance aimed at protecting the environment and human life and health from any and all harmful substances by regulating these substances.”\textsuperscript{73} By contrast, Justice La Forest, for the majority, argued for “the simple proposition that the validity of a legislative provision . . . must be tested against the specific characteristics of the head of power under which it is proposed to justify it.”\textsuperscript{74} In other words, bypassing the pith and substance analysis can be appropriate, at least in cases like \textit{Hydro-Québec}. By extension, pith and substance could be bypassed when assessing the emissions trading regime at issue here.

It could be pointed out by way of rebuttal that the majority holding in \textit{R. v. Crown Zellerbach Canada Ltd.} employed a decisive pith and substance analysis in upholding an environmental law on federalism grounds; in that case, Justice Le Dain held that the Ocean Dumping Control Act “may be properly characterized as directed to the control or regulation of marine pollution”\textsuperscript{75} while Justice La Forest, in dissent, eschewed a strict determination of pith and substance. He argued that issues of environmental protection inherently fall within multiple federal and provincial heads of power.\textsuperscript{76} While La Forest was in dissent in \textit{Crown Zellerbach}, he later took the

\begin{itemize}
  \item \textsuperscript{71} Barton, \textit{supra} note 1 at paras 61, 71.
  \item \textsuperscript{72} Peter Hogg, \textit{Constitutional Law of Canada}, 4th ed (Scarborough: Carswell, 1997) at 384 [Hogg 1997].
  \item \textsuperscript{73} \textit{Hydro-Québec} dissent, \textit{supra} note 36 at para 33.
  \item \textsuperscript{74} \textit{Hydro-Québec} majority, \textit{supra} note 32 at para 117.
  \item \textsuperscript{75} \textit{R v Crown Zellerbach Canada Ltd.}, \textit{[1988]} 1 SCR 401 at para 18 [\textit{Crown Zellerbach}].
  \item \textsuperscript{76} \textit{Ibid} at para 70.
\end{itemize}
opportunity in *Friends of the Oldman River Society v. Canada (Minister of Transport)*, another case dealing with the constitutional validity of a federal environmental law, to quote favourably from his minority opinion in *Crown Zellerbach* and restrictively read down the majority holding in that case.\(^{77}\) In *Hydro-Québec*, La Forest re-emphasized the diffuse nature of environmental legislation, quoting from both of his previous opinions in declining to decide the pith and substance of the CEPA provisions.\(^{78}\) The strict characterization of the pith and substance of environmental legislation appears, in light of this line of precedent, to be strongly disfavoured.

The ambiguity of the pith and substance analysis in the face of complex, far-reaching legal regimes was recently called into focus again in the *Securities Reference*. In this reference, the court conducted an extensive pith and substance analysis of the proposed Securities Act, only to hold that its conclusions did not permit the classification of the act as falling within any particular head of power.\(^{79}\) “In some cases,” stated the court, “determining the main thrust of a law will be pivotal in terms of its ultimate constitutional validity. In others, validity may depend on close analysis of the constitutional power that is said to support it . . . this case is of the latter sort.”\(^{80}\) The *Securities Reference* therefore suggests that all complex, multifaceted regulatory regimes—not just strictly environmental ones—defy strict characterization. The same reasoning would apply to an emissions trading regime comprising a patchwork of CEPA regulations relating to a broad range of industries and commercial activity. Given the international nature of the targets, the use of market-based mechanisms, and the likely need to harmonize with analogous American regulations, a more complex, multifaceted regime is difficult to imagine.\(^{81}\) Hogg and Castrilli, then, may ultimately be correct in looking past pith and substance and directly to the underlying heads of power.

VI. TRADE AND COMMERCE

The federal government could also seek to justify an emissions trading regime on the basis of the “general” branch of the section 91(2) trade and commerce power.\(^{82}\) *General Motors of Canada Ltd. v. City National Leasing Ltd.* sets out a five-step test for

\(^{77}\) *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3 at paras 47 and 93 [*Oldman River*].

\(^{78}\) *Hydro-Québec* majority, *supra* note 32 at paras 115-16.

\(^{79}\) *Securities Reference*, *supra* note 30 at paras 106-07.

\(^{80}\) *Ibid* at para 94.

\(^{81}\) Banks and Lucas, *supra* note 26 at para 112.

\(^{82}\) The general branch is one of two branches of T&C set out in *Citizens Insurance v. Parsons*; Commentators including Hogg and Castrilli agree that it’s unlikely this head would be used because it’s not judicially favoured. Castrilli, *supra* note 24 at 15; Hogg 1997, *supra* note 72 at 535-36.
judicial review of federal trade and commerce legislation.\textsuperscript{83} This test was most recently reaffirmed in the Securities Reference with the caveat that the steps are “indicia” that “are not cast in stone and are interrelated and overlapping.”\textsuperscript{84} The first two indicia, that “the impugned legislation must be part of a general regulatory scheme” and that this scheme “must be monitored by the continuing oversight of a regulatory agency”\textsuperscript{85} would easily be satisfied by an emissions trading regime implemented as regulations under the “international air pollution” and “tradable units systems” provisions of CEPA, which are overseen by the minister of the environment.\textsuperscript{86} The satisfaction of each of the remaining three indicia is far less certain because the legislation “must be concerned with trade as a whole rather than with a particular industry . . . [it] should be of a nature that the provinces jointly or severally would be constitutionally incapable of enacting; and 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.”\textsuperscript{87} An overarching conflict underlying this entire analysis is whether emissions trading is related to trade and commerce at all. Castrilli argues that emissions trading is far more trade-related than normal environmental protection legislation because it commoditizes emissions reductions and provides for market-driven regulation.\textsuperscript{88} Barton dismisses this head of power because the pith and substance of an emissions trading scheme would be environmental, not trade-related.\textsuperscript{89} However, as argued above, the Supreme Court’s approach in situations of complex environmental legislation has been to avoid sweepingly characterizing the scheme at the pith and substance stage, instead preferring to conduct a detailed analysis of the legislation in light of each head of power.

The third branch of General Motors requires that legislation concern trade as a whole rather than within a particular industry. A piecemeal, industry-by-industry emissions trading regime like the one currently favoured by the government seems to run afoul of this requirement. However, the Securities Reference indicates otherwise. In that case, the Supreme Court treated securities themselves as a “particular industry” and found the “main thrust” of the proposed act to be the regulation of that industry, while noting that control of systemic risk and data collection were acceptable “larger national goals.”\textsuperscript{90} It would be harder to argue that emissions trading is a “particular industry” in this sense. Unlike the securities industry, which was already well established in all provinces in 2011, the emissions trading market would be expressly created by the

\begin{footnotesize}
\begin{itemize}
\item[84] Securities Reference, supra note 30 at para 84.
\item[85] GMC, supra note 83 at para 32.
\item[86] CEPA, supra note 9 at ss 3(1), 166-74, 322-27.
\item[87] GMC, supra note 83 at paras 34-36.
\item[88] Castrilli, supra note 24 at 14-17.
\item[89] Barton, supra note 1 at para 69.
\item[90] Securities Reference, supra note 30 at paras 116-17.
\end{itemize}
\end{footnotesize}
federal government in service of larger national goals, including the systemic national reduction of GHG emissions and the synchronization of trade with the United States. Additionally, in *General Motors* itself, the court stated *in dicta* that pollution, like competition and inflation, was “not a single matter.”91 Furthermore, the objective of broad economic harmonization with the United States makes a piecemeal approach to the enactment of an emissions trading regime necessary, if that is the approach pursued in the United States. The previously discussed case on generic pharmaceutical drugs under NAFTA strongly supports this argument. It upheld the federal government’s Data Protection Regulation under the trade and commerce power despite the fact that the impugned legislation “deal[t] with the manufacture and marketing of drugs, a local matter in a single industry.”92 The federal court held that “Canada’s implementation or failure to implement such international trade agreements has a national dimension that relates to Canada’s ability to participate in world trade. In this sense, the Data Protection Regulation deals with a genuine national economic concern of the kind considered by Justice Dickson in *Canadian National Transportation*.”93 Canada’s withdrawal from the Kyoto Protocol means it cannot argue the necessity of treaty implementation. However, the national objective of synchronizing standards with the United States seems, on its own, to be a sufficient national concern under the third branch of *General Motors*.

The fourth branch of *General Motors* requires provincial constitutional incapacity to enact a regime similar to the one challenged. The portions of the proposed Securities Act dealing with systemic risk and data collection passed this test in part in *Securities Reference* because, although the provinces could in theory collaborate towards such goals, their “inherent prerogative to resile from an interprovincial scheme . . . limits their constitutional capacity to achieve the truly national goals of the proposed federal act.”94 The same logic holds true for emissions trading. Regardless of whether provinces could—as Alberta has already done95—enact emissions trading regimes and synchronize them, their inability to bind one another to such a regime is inescapable. Furthermore, a federal securities regime would completely displace provincial securities laws,96 whereas an emissions trading regime would leave provinces wide latitude to maintain complementary GHG reduction schemes, including a carbon tax like British Columbia’s or even a more stringent emissions trading regime.97 The likelihood of a

---

91 *GMC*, *supra* note 83 at para 66.
92 *Generic Pharmaceutical*, *supra* note 68 at para 104.
93 *Ibid* at para 105.
94 *Securities Reference*, *supra* note 30 at paras 120-21.
court viewing the regime as a legislative “overreach” as it did in the *Securities Reference*\(^98\) is therefore significantly lower.

The fifth and final branch of the test looks for indications that the omission of one province from the legislative scheme would jeopardize its overall success. From a purely environmental perspective, any emissions reductions will have some incremental effect, even if a large polluter such as Alberta were to opt out of an emissions trading scheme. However, once economic considerations are taken into account, the unfeasibility of an emissions trading scheme covering only some provinces becomes clear. Increased costs would place participating provinces at a disadvantage, while provinces outside of the scheme would enjoy environmental benefits that they had no part in generating. Incomplete provincial participation would, in turn, undermine Canada’s competitiveness in global trade, most significantly if the result was that some Canadian exports did not meet American environmental standards. Former Minister of the Environment Jim Prentice, in outlining the rationale for Canada’s United States-centric GHG regulation approach, stated that United States GHG regulations “would have trade-related consequences for Canada if we don’t have equivalent environmental legislation in place.”\(^99\) This statement underscores the centrality of international trade considerations to any Canadian emissions trading regime. In *Securities Reference*, the court found that the portions of the proposed Securities Act deemed acceptable under the fourth branch of *General Motors* also passed the fifth branch because “fair, efficient and competitive markets” and the other larger national goals addressed by the act were “genuine national goals” rather than “lesser regulatory matters.”\(^100\) Emissions trading raises analogous fairness and competition issues, and the prevention of pollution also seems to be a valid national goal, as discussed above under branch three.

The main legal uncertainty in regards to the trade and commerce power is the government’s industry-by-industry approach to GHG regulation, which may undermine the strength of its case under the third branch of *General Motors*. Any kind of “opt-in” approach to provincial participation in the scheme would also significantly weaken the analysis under branch five, as it did in *Securities Reference*.\(^101\) Nonetheless, given that an emissions trading regime seems capable of satisfying all five branches of *General Motors*, and that the branches of *General Motors* are merely indica in a flexible overall approach to trade and commerce, an emissions trading regime seems justifiable under the trade and commerce power. This is especially true in light of the federal

---

\(^{98}\) *Securities Reference*, supra note 30 at paras 121-22.


\(^{100}\) *GMC*, supra note 83 at para 123.

\(^{101}\) *Securities Reference*, supra note 30 at para 123.
government’s understanding of such a regime as an economic, rather than purely environmental, measure.

VII. PEACE, ORDER, AND GOOD GOVERNANCE

Finally, the federal government has a residual “peace, order, and good governance” power that may be invoked to justify an emissions trading scheme. POGG will only be considered if none of the enumerated heads of power provide justification for the impugned legislation. Of the three branches of POGG—“gap,” “emergency,” and “national concern”—“national concern” is by far the most plausible basis for emissions trading legislation. This branch of POGG was used to uphold the Ocean Dumping Control Act in Crown Zellerbach, leading Hogg to conclude in his analysis of federal GHG regulations that “[t]here is no doubt that a federal environmental protection law could be enacted under the “national concern” branch of the POGG power.” This does not mean, however, that all federal environmental protection laws can be enacted under “national concern.” In fact, the precedential value of Crown Zellerbach in this respect is extremely questionable given Justice La Forest’s subsequent treatment of the case, as discussed earlier, in his majority opinions in Oldman River and Hydro-Québec. In an illustrative passage from Hydro-Québec, La Forest states:

In Crown Zellerbach, the minority 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. The minority position on this point (which was not addressed by the majority) was subsequently accepted by the whole Court in Oldman River.

The holding in Crown Zellerbach, favourable at first glance to upholding an emissions trading regime under POGG, must therefore be read with extreme caution. Any

102 Constitution Act, 1982, supra note 52, s 91.
103 Hydro-Québec majority, supra note 32 at paras 115-16.
104 The “gap” branch is irrelevant because the environment has been described by the Supreme Court as a “diffuse subject that cuts across many different areas of constitutional responsibility, some federal, some provincial”, as opposed to one that fits within none of the enumerated heads of power. Oldman River, supra note 77 at para 93; “emergency” untenable if only because, even if climate change became an emergency situation, caps could be an emergency measure but trading is not a necessary addition; also it would only be temporary. Hogg 1997, supra note 72 at 443-44.
105 Crown Zellerbach, supra note 75 at para 40.
107 Hydro-Québec majority, supra note 32 at paras 115-16.
attempted use of the POGG power to justify emissions trading legislation will likely give rise to intense judicial scrutiny. Although an emissions trading regime seems to satisfy the formalistic requirements of national concern, the use of POGG to support such legislation, thereby stripping the provinces of jurisdiction over emissions trading, runs afoul of the Supreme Court’s plainly stated intentions.

For emissions trading to qualify as a matter of national concern under POGG, it must satisfy a rough two-factor test articulated in *Crown Zellerbach*: “it must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution.”\(^{108}\)

Furthermore, as a corollary to the “singleness, distinctiveness and indivisibility” factor, the matter must satisfy the “provincial inability test,” an inquiry into “the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the intra-provincial aspects of the matter.”\(^{109}\) The provincial inability test seems to be satisfied by the same factors relevant to the fifth branch of the *General Motors* test, discussed earlier in this article, and the analysis will not be restated here. A strong argument can be made that emissions trading also satisfies the remainder of the *Crown Zellerbach* test.

Anthropogenic GHG emissions present a stronger case for “singleness, distinctiveness and indivisibility” than the “marine pollution” recognized to satisfy that test in *Crown Zellerbach*.\(^{110}\) Even more so than marine pollution, GHG emissions have “predominantly extra-provincial as well as international character and implications.”\(^{111}\) Practically speaking, distinction between provincial and federal portions of the atmosphere is not just difficult, like the distinction between territorial seas and internal marine waters,\(^{112}\) but impossible. Furthermore, the scale of impact on provincial jurisdiction is more inherently limited than the ban on all marine dumping considered in *Crown Zellerbach*. GHGs are a defined group of substances,\(^{113}\) the harmful effects of which are substantiated by a massive body of scientific evidence;\(^{114}\) these factors help establish the “ascertainable and reasonable limits” that were found to exist in *Crown Zellerbach*.\(^{115}\) All of these factors would help emissions trading avoid the pitfall that

---

\(^{108}\) *Crown Zellerbach*, supra note 75 at paras 33-34.

\(^{109}\) Ibid.

\(^{110}\) Ibid at para 37.

\(^{111}\) Ibid.

\(^{112}\) Ibid at para 38.

\(^{113}\) The six GHGs added to the CEPA list of toxic substances in 2005, carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulphur hexafluoride, are the same six covered under the Kyoto Protocol’s Annex A and have been monitored by Environment Canada since 1990. Barton, *supra* note 1 at para 29.

\(^{114}\) Bankes and Lucas, *supra* note 26 at para 117.

\(^{115}\) *Crown Zellerbach*, supra note 75 at para 39.
CEPA’s “toxic substances” regime almost fell prey to in *Hydro-Québec*, where the four-justice minority applied the national concern doctrine and found that it did not provide adequate justification for the impugned regulations.\(^{116}\) The minority reached this conclusion because “[i]n Part II of the Canadian Environmental Protection Act, there is no analogous clear distinction between types of toxic substances, either on the basis of degree of persistence and diffusion into the environment and the severity of their harmful effect or on the basis of their extra-provincial aspects.”\(^{117}\) Barton argues that the minority may have upheld the provisions based on POGG if not for these concerns.\(^{118}\) Not only are GHGs a more analogous, limited group of chemicals, but the new CEPA provisions relating to international air pollution through which an emissions trading regime would likely be introduced are, as discussed earlier, far more narrowly tailored than the “toxic substances” regime.

Furthermore, the existence of an international treaty recognizing the “singleness” of marine dumping seems to have been influential in *Crown Zellerbach*,\(^ {119}\) and this factor is also present with respect to GHGs: the United Nations Framework Convention on Climate Change deals exclusively with the “stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.”\(^ {120}\) Canada remains a party to this treaty despite having withdrawn from the Kyoto Protocol.\(^ {121}\) Lastly, and significantly, the industry-by-industry approach now favoured by the federal government would further establish ascertainable and reasonable limits, diminishing any remaining threat of an all-encompassing legislative regime.\(^ {122}\) Therefore, an emissions trading regime seems to meet all the requirements of the national concern branch of POGG even more so than the legislation upheld in *Crown Zellerbach*. This suggests that even under a strict reading of *Crown Zellerbach*, the national concern doctrine could provide sufficient justification for a federal emissions trading regime.

POGG is unlikely to support an emissions trading regime, however, because a court’s holding that a matter falls within the “national concern” branch of POGG grants Parliament “an exclusive jurisdiction of a plenary nature to legislate in relation to that matter.”\(^ {123}\) This has the effect of foreclosing future provincial efforts to legislate with

---

\(^{116}\) *Hydro-Québec* dissent, *supra* note 36 at para 75.

\(^{117}\) *Ibid*.

\(^{118}\) Barton, *supra* note 1 at para 22.

\(^{119}\) *Crown Zellerbach*, *supra* note 75 at para 38.


\(^{121}\) Fifth National Communication, *supra* note 15 at 1.

\(^{122}\) This concern has been raised by a number of authors specifically with respect to the “singleness” requirement of the national concern branch of POGG. Bankes and Lucas, *supra* note 26 at para 115; Castrilli, *supra* note 24 at 12; Barton, *supra* note 1 at para 35.

\(^{123}\) *Crown Zellerbach*, *supra* note 75 at para 34.
respect to that matter and, in the case of climate change, would invalidate the existing provincial scheme in place in Alberta. Such a scenario would be radically different from one in which a federal emissions trading scheme was upheld under the criminal or trade and commerce power, with the doctrines of “double aspect” and “ancillary powers” permitting significantly overlapping and even concurrent emissions trading regimes at the federal and provincial level.\textsuperscript{124} Indeed, the point made by Justice La Forest in his \textit{Crown Zellerbach} dissent and repeatedly emphasized in his subsequent majority opinions is that “the Constitution should be so interpreted as to afford both levels of government ample means to protect the environment while maintaining the general structure of the Constitution” and that “[t]his is hardly consistent with an enthusiastic adoption of the ‘national dimensions’ doctrine.”\textsuperscript{125} Thus, even if an emissions trading scheme could satisfy the legal test for the “national concern” doctrine, as this paper argues it could, the Supreme Court unmistakably signaled in \textit{Oldman River} and \textit{Hydro-Québec} that it would not use POGG in most, if not all, environmental contexts in order to preserve provincial capacity to pass environmental legislation.

\textbf{CONCLUSION}

This paper has argued that the trade and commerce power, not the criminal law power or POGG, provides the best justification for a federal emissions trading regime—at least one established by means of industry-by-industry regulations under CEPA. This conclusion may seem counterintuitive, given that both the criminal law power and POGG were used in the past twenty years by the Supreme Court to uphold environmental legislation while the trade and commerce power has not. Furthermore, the Supreme Court recently held that trade and commerce did not support the proposed Securities Act, a piece of legislation analogous to a nation-wide emissions trading regime in some respects.

Nonetheless, several overarching factors make the trade and commerce power the best constitutional basis for an emissions trading regime. The market-based aspects of emissions trading make it very difficult to defend as valid criminal law, but those same market aspects, framed in the context of a policy of regulatory harmonization with the United States, suggest that such a regime would be a valid exercise of the trade and commerce power. Additionally, the environmental aspects of emissions trading make it a poor candidate for the national concern branch of POGG, which would strip provinces of their authority to restrict GHG emissions but by the same token further reinforce the argument for trade and commerce, and which would permit both levels of government


\textsuperscript{125} \textit{Hydro-Québec} majority, \textit{supra} note 32 at para 116.
to act while recognizing the federal government’s unique capacity to create the mandatory, uniform regime required for effective action. In light of all of this, the federal government’s current United States-centric approach to the development of GHG regulations, while criticized by some as being tentative and inadequate, may ultimately be important in bolstering the constitutional defensibility under trade and commerce of any emissions trading regime that emerges from it.