TESTIMONY BEFORE THE HOUSE OF COMMONS OF CANADA STANDING COMMITTEE ON THE ENVIRONMENT AND SUSTAINABLE DEVELOPMENT ON THE CONSTITUTIONALITY OF BILL C-377 THE CLIMATE CHANGE ACCOUNTABILITY ACT

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I. INTRODUCTION

1. The Canadian Environmental Law Association ("CELA") is pleased to appear before the Standing Committee on the Environment and Sustainable Development to testify on the constitutionality of Bill C-377, the *Climate Change Accountability Act*.

2. CELA is a public interest law group founded in 1970 for the purposes of using and improving laws to protect public health and the environment. Funded as a legal aid clinic in Ontario specializing in environmental law, CELA represents individuals and citizens' groups in the courts and before administrative tribunals on a wide variety of environmental matters. In addition, CELA also is involved in various initiatives related to environmental law reform and public education. CELA lawyers have appeared as counsel before the Supreme Court of Canada in several cases involving the constitutionality of federal and provincial environmental legislation over the years.

II. BILL C-377 – CLIMATE CHANGE ACCOUNTABILITY ACT

A. Summary of Provisions

3. The Preamble to Bill C-377 identifies (1) the serious threat posed by climate change to Canada, (2) the impacts already being felt, (3) the scientific research that has lead to broad agreement on temperature increases that would constitute "dangerous climate change," (4) the atmospheric levels at which greenhouse gases must be stabilize to prevent such danger from materializing, and (5) what Bill C-377 is intended to do to ensure that Canada reduces greenhouse gas emissions.

4. Section 2 defines certain terms used throughout the Bill.

5. Section 3 sets out the purpose of Bill C-377, which is stated to be "to ensure that Canada contributes fully to the stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system." CELA notes that this concept is derived from the United Nations Framework Convention on Climate Change ("UNFCCC"). Accordingly, and as a summary of Bill C-377 also notes, the Bill is intended to ensure that Canada meets its global climate change obligations under UNFCCC.

6. Section 4 states that the Act would bind the Crown in Right of Canada.

7. Section 5 would require the federal government to reduce Canadian greenhouse gas emissions to the levels and by the target years set out in the section.

8. Section 6 would require the Minister of the Environment to set out before Parliament and periodically review an interim greenhouse gas emissions target plan for various years identified in the section beginning with the year 2015 and ending in 2045.

9. Section 7 would authorize the federal cabinet to promulgate regulations, including regulations to ensure that Canada meets its section 5 commitments. Under section 8 such regulations would be subject to notice and comment.

10. Section 9 would require the federal cabinet to ensure that Canada fully meets its commitment under section 5 and the interim targets referred to in section 6 by ensuring that federal positions in all international climate change discussions and negotiations as well as domestic policy development are consistent with meeting the section 5 and 6 commitments and targets.

11. Section 10 would require the Minister to prepare and publish an annual statement setting out how the section 5 and 6 commitments and targets are being met through such measures as (1) regulated emission limits and performance standards, (2) market-based mechanisms such as emissions trading or offsets, (3) spending or fiscal incentives, and (4) provincial-territorial cooperation and agreements.

12. Section 11 makes it clear that the Bill is not intended to preclude the adoption of more stringent plans or other measures by provincial, territorial, or First Nation governments.

13. Section 12 would make it an offence to violate a regulation under the Bill with penalties for such violation to be established by the regulations.

14. Section 13 would require the Commissioner of the Environment and Sustainable Development to produce and submit to Parliament an annual report within 123 days after the release of the section 10 ministerial statement. The Commissioner's report is to provide opinion on the likelihood of the existing and proposed measures identified in the ministerial statement meeting the section 5 targets and any recommendations the Commissioner may have with respect thereto.

15. In summary, the subject matter of Bill C-377 can be characterized as the reduction of greenhouse gas emissions so as to contribute to the protection of the global climate system and to curb the threats posed to it in Canada. The methods by which Bill C-377 proposes to address that subject matter are a combination of regulatory, economic, fiscal, and cooperative measures.

B. Relationship to Other Federal Environmental Laws

16. Bill C-377 is silent on any relationship to other federal environmental laws that might also be applicable to substances suspected of causing climate change. However, the *Canadian Environmental Protection Act, 1999* ("*CEPA, 1999*") lists in Schedule 1 of that Act (List of Toxic Substances) six greenhouse gases: (1) carbon dioxide, (2) methane, (3)

nitrous oxide, (4) hydrofluorocarbons, (5) perfluorocarbons, and (6) sulphur hexafluoride.[1] These same six substances are identified in the Kyoto Protocol as primary causes of climate change and are the substances that signatory and ratifying countries including Canada, committed to reducing emissions of in the global effort to control climate change.[2] Bill C-377 also is silent on which substances (or greenhouse gases) it might apply to and how these substances are to be characterized. We also note that *CEPA, 1999* already contains authority for emissions trading,[3] which is not cross-referenced in Bill C-377. We note further that Bill C-377 is not meant to amend *CEPA, 1999* but would, if enacted, constitute an entirely new federal statute. The constitutional implications of these factors are discussed below (Part III.B).

III. CONSTITUTIONAL CONSIDERATIONS RESPECTING BILL C-377

A. Possible Federal Heads of Power That Could Support Bill C-377

17. In light of the provisions contained in Bill C-377, particularly s. 3 (purpose), s. 7 (regulation-making authority), s. 10 (regulatory, economic, fiscal, and cooperative measures), and s. 12 (offences and authority for imposition of penalties by regulation), we review six possible federal heads of power under the *Constitution Act, 1867* that might support the constitutionality of the Bill. These heads of power include: (1) peace, order, and good government [hereinafter "POGG" – preamble to s. 91], (2) criminal law [s. 91(27)], (3) trade and commerce [s. 91(2)], (4) treaty implementation [s. 132], (5) taxation [s. 91(3)], and (6) spending power [ss. 91(3), 91(1A), 106].

i. Peace, Order and Good Government

18. For federal legislation to be supportable under POGG, the subject matter of the law must be of national concern. To qualify as such, it must have a singleness, distinctiveness, and indivisibility that clearly distinguish it from matters of provincial concern and a scale of impact on provincial jurisdiction that is consistent with the overall distribution of legislative powers between Parliament and provincial legislatures under the Constitution. In making this determination, a relevant consideration is the effect on extra-provincial interests of a provincial failure to deal effectively with the intraprovincial aspects of the matter.[4]

19. Climate change and a regime of federal greenhouse gas emission reductions meet, in some respects, the national concern test. In other respects, they may not. The subject matter meets the test in that climate change is both national as well as international in

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[1] S.C. 1999, c. 33, Schedule 1 - items 74-79.
[2] *Council of the Parties to the United Nations Framework Convention on Climate Change: Kyoto Protocol*, 10 December 1997, 37 I.L.M. 22 (1998) at 42 (Annex A).
[3] S.C. 1999, c. 33, s. 326.
[4] *R. v. Crown Zellerbach Ltd.*, [1988] 1 S.C.R. 401 (marine pollution held to satisfy the national concern test in upholding federal ocean dumping control legislation).

scope and there is the potential for provincial action to be ineffective in responding to the problem so as to meet Canada's interprovincial and international obligations to reduce greenhouse gas emissions.

20. However, given the variety of domestic sources of greenhouse gas emissions both stationary (e.g. energy sector) and mobile (transportation sector), many of them under provincial jurisdiction, there also is the potential for high impact on the operation of provincial laws in the same areas. Moreover, because POGG is a residual power reserved to Parliament when a matter does not come within the classes of subjects assigned to Parliament or provincial legislatures under the Constitution, the Supreme Court of Canada has held that matters upheld on the basis of POGG, fall within the exclusive legislative power of Parliament, including their intraprovincial aspects.[5] Determining that a federal law, such as Bill C-377, is constitutional on the basis of the POGG national concern test effectively makes the area involved a non-concurrent area of jurisdiction that denies provincial authority to legislate in connection with the same subject matter. In the late 1990s, the Supreme Court expressed a reluctance to uphold federal legislation controlling toxic substances on the basis of POGG because of the "obvious impact on the balance of Canadian federalism"[6] and despite the presence of national concern type language in the preamble to that legislation. Accordingly, if there was a constitutional challenge to Bill C-377, the Court might view the regulatory aspects of the Bill [e.g. s. 10(1)(a)(i)] in the same light.

21. However, some commentators have suggested that it may be easier for the Supreme Court to contemplate upholding a greenhouse gas emissions trading regime under POGG where ascertainable, sector-by-sector measures may be set that would avoid federal intrusion in other aspects of provincial jurisdiction in this area.[7] Because portions of Bill C-377 would authorize emissions trading as one approach to the greenhouse gas emissions problem [s. 10(1)(a)(ii)], reliance on POGG to uphold such provisions might find favour with the Court.

ii. Criminal Law

22. To qualify as valid federal legislation under the criminal law power of the Constitution, a statute must (1) have a valid criminal law object or purpose, and (2) address that object or purpose by means of prohibitions backed by penal sanctions.[8]

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[5] *Ibid.* at 433.

[6] *R. v. Hydro-Quebec*, [1997] 3 S.C.R. 213, 288 (federal legislation – *CEPA* – controlling toxic substances upheld under the criminal law power not POGG).

[7] Chris Rolfe, "Putting Strategies into Law: The Constitutional and Legislative Basis for Action," in *The Legislative Authority to Implement a Domestic Emissions Trading System* (Ottawa: National Round Table on the Environment and the Economy, 1999) App. 2, at 14-15; Philip Barton, "Economic Instruments and the Kyoto Protocol: Can Parliament Implement Emissions Trading Without Provincial Co-operation" (2002) 40 Alta. L.Rev. 417.

[8] *RJR-MacDonald Inc. v. Canada (Attorney-General)*, [1995] 3 S.C.R. 199, 240.

23. In *Hydro-Quebec*, the Supreme Court declared that ensuring a clean environment is a public purpose sufficient to support a criminal prohibition: "Pollution is an 'evil' that Parliament can legitimately seek to suppress…a public purpose of superordinate importance; it constitutes one of the major challenges of our time."[9] The Supreme Court majority characterized the law in question – Part II of *CEPA* – as a regime to control toxic substances that may be released into the environment under certain restricted circumstances and which does so through a series of prohibitions to which penal sanctions are attached. The intent of Part II (now Part 5 of *CEPA, 1999*) was not to control all substances, but only those few that are dangerous to the environment, while still giving the provinces ample scope for action.[10] The further value in relying on the criminal law power to uphold such legislation is that it in no way precludes the provinces exercising their constitutional authority to control pollution as well.[11]

24. The four-person dissent in *Hydro-Quebec* argued that Part II of *CEPA* was more in the nature of a regulatory regime not a prohibitory regime and, therefore, not valid criminal law.[12] However, a leading constitutional law authority has observed that *Hydro-Quebec* reinforced the recent trend in Supreme Court cases to "permit an extensive degree of regulation under the criminal law power."[13]

25. The regime of regulatory limits on greenhouse gas emissions and emissions trading and offset measures contemplated by sections 7 and 10 of Bill C-377 may end up being as complex as the regime under *CEPA* for controlling toxic substances. Presumably, Bill C-377 also will be fairly narrowly focused on just a few substances (e.g. the six greenhouse gases identified under both the Kyoto Protocol and Schedule 1 of *CEPA*, 1999). However, the Bill itself is not specific about the characteristics of the regime(s) contemplated, or the actual substances (greenhouse gases) to be addressed, leaving all this detail to be addressed by regulations. Depending upon the particular characteristics of a federal emissions trading and offsets regime, for example, some commentators have suggested that such a system might fall outside of the criminal law power.[14] In the circumstances, greater particulars would be necessary in Bill C-377 in order to determine whether, or the extent to which, the regime (either regulatory limits, or emissions trading, or both) could be placed squarely within the line of Supreme Court

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[9] *Hydro-Quebec*, *supra* note 6 at 293 (5-4 majority holding that Parliament may validly enact prohibitions under criminal law power for the purpose of preventing pollution or causing entry into the environment of toxic substances). *Ibid.* at 296.

[10] *Ibid.* at 302-309 (small number of carefully targeted substances, with the law defining precisely those situations where the use of a scheduled substance is prohibited, and the prohibitions made subject to penal consequences). *Ibid.*

[11] *Ibid.* at 296-297.

[12] *Ibid.* at 250-256.

[13] Peter W. Hogg, *Constitutional Law of Canada*, looseleaf, Vol. 1 (Toronto: Carswell, 2007) at 18-30.

[14] Elisabeth DeMarco, Robert Routliffe, and Heather Landymore, "Canadian Challenges in Implementing the Kyoto Protocol: A Cause for Harmonization" (2004) 42 Alta. L. Rev. 209 at paras. 89-91 (suggesting federal legislation authorizing a covenant-based emissions trading regime might fall outside criminal law power and, therefore, more likely supportable under national concern test of POGG).

cases decided since the mid-1990s that have upheld complex federal regulatory regimes under the criminal law power.[15]

iii. Trade and Commerce

26. The Constitution confers on the Parliament of Canada the power to make laws in relation to "the regulation of trade and commerce." To date the Supreme Court has neither relied upon, nor rarely mentioned, the trade and commerce power as a possible basis for upholding federal environmental legislation. To the extent the Court has considered the trade and commerce power in relation to pollution the results have been inconclusive.

27. In *Hydro-Quebec* the majority did not consider whether regulation of toxic substances under Part II of *CEPA* could be supported by the trade and commerce power. The dissent, however, rejected submissions from some intervenors who had argued that the general trade and commerce power, relying on a late 1980s Supreme Court decision,[16] could justify federal regulation aimed at controlling the use and release of toxic substances in the course of commercial activities.[17] The dissent rejected these submissions in part because in their view the pith and substance of *CEPA* does not concern trade and commerce, even if the provisions controlling toxic substances may affect trade and commerce.[18]

28. Some commentators have suggested that the trade and commerce power could be used to support a federal emissions trading regime.[19] However, other commentators who have considered possible reliance on the trade and commerce power as a basis for upholding a federal greenhouse gas emissions trading regime, have noted that even though tradeable emission rights may have commercial value and be traded like other commercial instruments, the dominant purpose of such a regime would still likely be characterized as designed to protect the environment.[20]

29. Accordingly, it would appear somewhat doubtful that those portions of Bill C-377 authorizing an emissions trading or offset regime [s. 10(1)(a)(ii)] could rely on the trade and commerce power of the Constitution for support.

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[15] In this regard, besides *RJR-MacDonald*, and *Hydro-Quebec*, *supra*, see also *Reference re Firearms Act (Canada)*, [2000] 1 S.C.R. 783.
[16] *General Motors of Canada Limited v. City National Leasing*, [1989] 1 S.C.R. 641.
[17] *Hydro-Quebec*, *supra* note 6 at 264-265.
[18] *Ibid*. at 265-266.
[19] Joseph F. Castrilli, "Legal Authority for Emissions Trading in Canada", in *The Legislative Authority to Implement a Domestic Emissions Trading System* (Ottawa: National Round Table on the Environment and the Economy, 1999) App. 1, at 14-17 (suggesting that because an emissions trading regime converts, for example, emission reduction credits into commodity having economic value to industry, such a scheme is no different from marketing regimes regulating eggs, wheat, or oil that have been upheld by the courts).
[20] See *e.g.* Nigel D. Bankes and Alastair R. Lucas, "Kyoto, Constitutional Law and Alberta's Proposals" (2004) 42 Alta. L. Rev 355 at para. 114.

iv. Treaty Implementation

30. Under section 132 of the Constitution, the federal government has the authority to enter into international agreements. However, the federal government may not enact legislation implementing such agreements where that would infringe upon provincial heads of power under section 92 of the Constitution.[21]

31. Thus, notwithstanding the Bill C-377 links to the UNFCCC, implementation of domestic regulatory or emissions trading regimes with respect to greenhouse gas emission reductions called for under the Bill would not be limited to areas of federal competence but would undoubtedly deal with provincial areas of jurisdiction as well. Accordingly, it would not appear likely that Parliament would have the legislative authority to implement such regimes solely on the basis of the treaty making power of the Constitution. A federal regime of emissions trading relying on an international treaty, for example, would more likely be upheld under the POGG national concern test.

v. Taxation

32. Parliament has broad authority to impose both direct and indirect taxes under the Constitution. Bill C-377 would authorize spending or fiscal measures in respect of greenhouse gas emission reductions [s. 10(1)(a)(iii)]. It is somewhat unclear whether this authority would include a system of taxes, such as a carbon tax, but section 91(3) likely would provide constitutional authority for such a tax.

vi. Spending Power

33. Parliament has relied on the federal spending power of the Constitution to impose national standards for hospital insurance, medical care, and student housing programs as a condition of federal contribution to these provincial regimes. The Supreme Court and lower courts have upheld each of these social and health-related legislative regimes on the basis of the federal spending power authority of the Constitution.[22]

34. A leading authority has suggested that under the federal spending power, Parliament may spend or lend funds to any government, institution, or individual it wishes, for any purpose it chooses, and may attach to any grant or loan any condition it chooses, including conditions it could not directly legislate.[23] The Supreme Court has been prepared to accept the exercise of this power by Parliament because withholding federal monies to fund a matter within provincial jurisdiction does not result in regulation of that matter by the federal government.[24]

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[21] *Canada (Attorney-General) v. Ontario (Attorney-General)* (1937), 1 D.L.R. 673 (P.C.) [*Labour Conventions Case*].
[22] See *e.g. Re Canada Assistance Plan*, [1991] 2 S.C.R. 525; *Eldridge v. British Columbia*, [1997] 3 S.C.R. 624 (*Canada Health Act*); *Central Mortgage and Housing Corporation v. Co-op College Residences* (1975), 13 O.R. (2d) 394 (Ont. C.A.) (upholding federal loans for student housing).
[23] Hogg, *supra* note 13 at 6-18.
[24] *Re Canada Assistance Plan*, *supra* note 22 at 567.

35. Bill C-377 would authorize (1) spending or fiscal incentives, including a just transition fund for industry [s. 10(1)(a)(iii)], and (2) cooperation or agreements with provinces, territories or other governments [s. 10(1)(a)(iv)]. The federal spending power would appear capable of upholding the constitutionality of the first of these two provisions as well as the second, to the extent the latter might involve the imposition of any standards to be met as a condition of receipt of such federal funds.

B. Constitutional Questions in Light of Existing Federal Environmental Law

36. As noted above, the Supreme Court in *Hydro Quebec* upheld pursuant to the criminal law power the constitutionality of provisions relating to control of toxic substances under predecessor legislation to *CEPA, 1999*. The Court did so in part because the statute did not purport to control the universe of environmental pollutants (and thereby potentially infringe on concurrent provincial environmental jurisdiction). Rather *CEPA* sought only to control a distinct subset of such pollutants, namely toxic substances as defined in the statute and listed in a schedule thereto. Therefore, the failure of Bill C-377 to specifically define, identify, or place in a schedule the substances (greenhouse gases) to which it would apply creates uncertainty with respect to the scope of the Bill. This uncertainty risks jeopardizing the constitutional authority of Parliament to legislate to control these substances were the Bill to be enacted and subsequently challenged in the courts.

37. Even if federal authority was eventually upheld, the generality of the Bill on these issues (1) invites to some extent re-litigation of matters that were settled by the Supreme Court in the *Hydro Quebec* decision, (2) could cause confusion in light of existing authority now contained in *CEPA, 1999* to address these same substances (greenhouse gases) and (3) has the potential to slow down the development by the Government of Canada of needed programs while the constitutional issues work their way through the courts.

38. Given the small number of greenhouse gases involved, some of the uncertainty that caused the Supreme Court in *Hydro Quebec* to divide so sharply on the constitutionality of *CEPA* could be removed by simply defining and then listing the six greenhouse gases in a schedule to Bill C-377. Recently, Parliament did something similar to this when it enacted the *Kyoto Protocol Implementation Act*.[25]

39. Furthermore, given that the six greenhouse gases already are identified and listed as "toxic substances" under *CEPA, 1999*, raises the question of why the Bill's authors would want to ignore the constitutionally tested *CEPA* regime in favour of the constitutional uncertainty of enacting a completely new law divorced from *CEPA, 1999*. At a minimum, some reconciliation of Bill C-377 with *CEPA, 1999* should be considered

[25] *Kyoto Protocol Implementation Act*, S.C. 2007, c. 30, s. 2 (defining "greenhouse gas" as any one of the greenhouse gases listed in Annex A to the Kyoto Protocol).

including making Bill C-377 a series of amendments to *CEPA, 1999* rather a stand alone statute.

IV. CONCLUSIONS

40. These submissions have considered six possible heads of federal power under the Constitution as possible constitutional bases for upholding Bill C-377. POGG would appear to be the best head of power to rely upon to uphold the emissions trading and offsets authority of the Bill because such a regime might be capable of being clearly ascertainable and least intrusive of provincial jurisdiction. However, because POGG is a residual authority, reliance on it to uphold the regulatory limits and related authorities of Bill C-377 would have a major impact on provincial jurisdiction to act in this area and might not find favour with the Supreme Court of Canada.

41. In light of the Supreme Court decision in *Hydro-Quebec*, the criminal law power would be the head of power most likely to uphold the constitutionality of the regulatory provisions of Bill C-377. This would appear to be the case even if the regime were complex, so long as the Bill was amended to make it clear that, like *CEPA*, it is only addressing a limited number of substances (greenhouse gases).

42. Other heads of power under the Constitution, such as the spending power, also could be a basis for upholding the spending and related fiscal authorities in Bill C-377.

43. Finally, some reconciliation of Bill C-377 with *CEPA, 1999* should be considered. This could include making Bill C-377 a series of amendments to *CEPA, 1999* rather than a stand-alone statute. This would allow Bill C-377 to take advantage of the constitutional testing to which *CEPA* has already been subjected. This reconciliation also could avoid some of the jurisdictional confusion that might otherwise ensue if Bill C-377 were enacted as is in light of the fact that greenhouse gases already are identified as toxic substances under *CEPA, 1999*.