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Chair

Mr. Bob Mills

Standing Committee on Environment and Sustainable Development

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● (1530)

[*English*]

The Chair (Mr. Bob Mills (Red Deer, CPC)): If I could bring us to order, please, we do have a very tight schedule and lots to cover.

I would like to start off by just reminding members that the clerk and I worked on a list of the subjects you've put forward to us, and on Wednesday we'll take a look at that in terms of timelines and future business and what we can do from now until June. That's just a heads up for Wednesday; that's what we'll be doing.

I would also like to let you know that we have three witnesses for the first hour and five witnesses in the second hour, so we're going to have to keep it fairly tight. I do want to also mention that we will have some students from the University of Ottawa who will be here in the audience in the second hour. They have requested that if anyone can stay after we adjourn the meeting, they would like to ask us a few questions. I've agreed to stay. Any of you who do have the time to stay would be appreciated.

I would like to begin by welcoming Vicki Pollard, who has come here from Brussels—and has complimented our weather. I think that's probably good. I'd like to welcome you.

Of course, we have two other guests who are here via teleconference, and I welcome them as well.

I'll ask the witnesses to keep their testimony to somewhere around five minutes. I have a little grey box, so I know exactly how long you're taking. We'll do the cut-off if you go too long. That gives our members the maximum time to ask questions.

We'll begin with you, Ms. Pollard. Welcome from the Canadian Parliament.

Ms. Vicki Pollard (Policy Officer, Environment Directorate, Climate Change Strategy and International Negotiation, European Commission): That you very much, Mr. Chair.

Thank you to the committee for inviting the European Commission to present our experience with climate change policy.

[*Translation*]

I am very pleased to be here to speak to you today. As I was saying to the chair, it is really wonderful to have beautiful winter weather and lots of sunshine. It is a pleasure to be here in Ottawa. Thank you very much.

I will continue in English.

[*English*]

I want to start with the basis of the EU's climate policy. The EU's climate policy is driven by scientific evidence on man-made climate change. Its objective for some time has been to limit the average increase of global temperature to a maximum of two degrees Celsius—that's 3.6 degrees Fahrenheit—above pre-industrial levels. Within this threshold we'll still see some serious climate change impacts, but we'll have a reasonable chance of avoiding catastrophic consequences.

This requires swift and ambitious action to put the world on a path to avoiding dangerous climate change. From our perspective, staying within two degrees Celsius means that global greenhouse gas emissions need to peak around 2020 and then be reduced significantly to around 50% of 1990 levels by 2050. Developed countries like our own must take the lead and reduce emissions by 60% to 80% by 2050. This is where we start from, and the first step is meeting our Kyoto commitments.

The EU is on track to meet its commitment to reducing greenhouse gas emissions by 8% compared to 1990 levels by 2008 to 2012. The target is split among EU-15, the old member states, and there are targets for most of the new member states, except for two that don't have targets. We're on track to do this with policies already in place, policies that are now being discussed and being put in place, and with the use of the Kyoto flexible mechanisms of CDM and JI.

Over the past decade, the EU and its member states have put in place a comprehensive array of reduction measures, including: energy efficiency, renewable energy, taxes, and vehicle emission and fuel standards. Probably the most important is the mandatory cap and trade system, the EU emitters trading system, or EU ETS, which provides industry with the necessary political policy certainty, a continuous financial incentive, and the flexibility to take action and innovate in the most effective ways.

The EU ETS covers around 10,000 installations responsible for 40% of the EU's greenhouse gas emissions. We've just completed three years of a learning-by-doing phase, and the EU ETS is functioning well. We're now in the second trading period, which is the trading period that coincides with the Kyoto commitment period, and this is the real crunch time. This period will bring about reductions in emissions relative to 2005 verified emissions of 6.8% over the period 2008-2012, with allowances currently trading, and have been for some time, at more than $30 Canadian per tonne of CO_2.

The EU is also very keen to support the development of the global carbon market, which we see as essential for shifting finance and investment into clear solutions. Member states and the companies in the EU ETS can use credits from international emission reduction projects, such as under the clean development mechanism, to meet part of their reduction objectives.

For us, that is important, both for cost effectiveness to support clean development projects and to engage developing countries in climate action. To give you an idea of the scale, EU member states, at a national level, have set aside €2.9 billion, which is about $4.2 billion Canadian at current exchange rates, for more than 500 million tonnes of CO_2-equivalent reductions over the Kyoto commitment period.

In addition, the private sectors of those companies covered by the EU ETS can also purchase carbon credits from CDM or JI projects, up to 1,400 million tonnes, or 1.4 gigatonnes, up to 2012 as part of their compliance under the EU ETS. They can also buy credits in addition to that, but that's for the EU ETS compliance element.

Obviously, Kyoto is just a first small step. We need to make much greater global emission reductions as part of a comprehensive global agreement post-2012. With this in mind, the EU heads of state and government adopted a package in 2007 under which they called for developed countries together as a group to reduce their greenhouse gas emissions by 30% below 1990 levels by 2020 as part of a comprehensive international agreement.

This makes economic sense, and I think it's important to note. Our own analysis shows that investing in a low-carbon economy would reduce global GDP growth by just 0.19% per year up to 2030. That is just a fraction of the expected projected GDP annual growth rate, which is 2.8%. It is 0.19% related to 2.8%, and this is without taking into account the associated health benefits, greater energy efficiency and security, and reduced damage from avoided climate change.

The EU believes that developed countries must take the lead, and we are serious about leading by example. To show our determination to tackle climate change and our conviction that it's fully compatible with economic growth, the EU has taken a firm, independent commitment to achieve at least a 20% reduction in greenhouse gas emissions by 2020 in the absence of an international agreement.

Last month the European Commission published its detailed proposals on how the EU will meet its greenhouse gas emissions targets for 2020 with the measures needed to reduce emissions by at least 20% of 1990 levels by 2020, regardless of what other countries do—

● (1535)

The Chair: If you could conclude, then we'll get to the questions, if you don't mind.

Ms. Vicki Pollard: Basically, we've put in place a package of measures to get to the 20% target by 2020, but also to extend that to 30% in the case, as we expect, of an international agreement. It covers both climate change action and renewable action, and it's a comprehensive package that allows us to share the effort out between member states. I can come back to how we do that in a minute.

The use of flexible instruments is very important. We're proposing a revision of the legislation underlying the EU ETS. Again, we have looked at the economic analysis.

While it's true that our proposals would have a cost, the benefits by far outweigh the costs. The way we've presented the package, the way we've put it together, is to focus on cost-effectiveness and fair distribution so as to minimize the transition costs. We expect that the impact of our package, cutting emissions by 20% by 2020, will be as low as 0.04% to 0.06% of GDP per year.

In addition to that, we expect very large benefits in terms of fuel efficiency, energy security, and substantial health benefits from reduced air pollution: about €11 billion worth of health benefits—$16 billion Canadian—from taking the measures needed to reduce our emissions by 20% by 2020.

More than that, the package is expected to deliver the kind of structural changes Europe needs to remain competitive. By taking the lead, Europe will be kick-starting the development of a low-carbon economy, a global economy vital to prevent climate change from reaching dangerous levels.

The EU is seriously seeking first-move advantage in a new industrial revolution that will unleash a wave of innovation, job creation, clean energy, and high-efficiency technologies.

Thank you.

● (1540)

The Chair: Thank you.

I'd like to go right to Ms. Arroyo from the PEW institute. I ask you, if you could, to try to keep it to about five to seven minutes, just so the members get a chance to ask questions. Thank you.

Welcome.

Ms. Vicki Arroyo (Director, Policy Analysis, Pew Center on Global Climate Change): Sure.

Thank you for inviting me to speak to your panel today. My name is Vicki Arroyo, and I'm director of policy analysis for the Pew Center on Global Climate Change. The Pew Center on Global Climate Change is a non-profit, non-partisan, and independent organization working to provide analysis and solutions in the effort to address climate change. Some 44 major companies participate in our business environmental leadership council, making ours the largest U.S.-based association of corporations focused on addressing the challenges of climate change.

I direct the Pew Center's analytical program, including work on science, impacts, economics, and policy. We've published more than 100 peer-reviewed reports and analyses over the last 10 years.

I want to congratulate the committee for taking up this initiative. I'm happy to report that there's also tremendous momentum in the U. S. in recent months on climate change, galvanized by a variety of factors: more compelling science, increasing public awareness and concern, barriers to construction of new conventional coal plants, state and regional leadership, and a Supreme Court finding that carbon dioxide is indeed an air pollutant under the Clean Air Act, which EPA has the authority to regulate. Also, we've seen the Democratic Party take over Congress and promise to move climate legislation.

In 2007, there were over 110 climate-related hearings in our Congress, and roughly 150 bills mentioned climate change. We also saw the passage of an energy bill that for the first time in decades strengthened fuel economy standards for vehicles. In addition, we saw a spending bill that directed and funded a new greenhouse gas emissions registry.

We also have calls for action from more and more business leaders. Last year, an historic coalition was announced, the United States Climate Action Partnership. The Pew Center is part of this effort, along with leading companies and nine governmental organizations. It calls for mandatory U.S. climate policy and for cooperation on the policy's design. Many of our presidential candidates are making this an issue. In fact, all the major remaining candidates support a cap and trade program.

The most significant development, perhaps, is the passage through the Senate Committee on Environment and Public Works of Senate Bill 2191, the Lieberman-Warner Climate Security Act. This groundbreaking proposal would create an economy-wide cap and trade system covering all six greenhouse gases. It contains short-, medium-, and long-term reduction targets covering about 87% of U.S. emissions—4% below 2005 levels in 2012, 19% below 2005 levels by 2020, and 71% below 2005 levels by 2050. This refers to the covered sources, and it would mean that by 2050 all U.S. emissions would be reduced to roughly 66% of 1990 levels.

The proposal would permit companies to offset their required submission of domestic allowances by up to 15%. Offsets are seen as a key cost control mechanism. In addition, a company can submit emission allowances, from approved international trading systems, of up to 15%.

The Lieberman-Warner proposal contains specific requirements for allocation of allowances. At first, roughly 74% of allowances are provided to help regulated entities and those affected by the new policy, including consumers, to make the transition. However, the free allowance allocation to affected firms will be phased out by 2031.

The auction revenues are distributed for technology development, since we cannot solve this problem without significant investment in technology. Also, the revenues go to low-income energy consumers through, for example, weatherization programs, worker training, and adaptation.

I should note that separate bills devoted to climate change adaptation are also moving through Congress.

The leadership of both the Senate and the committee are working with the bill's sponsors, and others promoting related bills, to bring forward a bill for a floor vote this spring. In addition, the House Committee on Energy and Commerce has produced white papers on key design elements regarding a cap and trade program and is working to produce a bill. Speaker Pelosi put a climate bill on the short list of her legislative priorities for this year.

While it's unclear if the current president will sign a cap and trade bill, it's worth noting that he might be reluctant, just before an election, to exercise his veto power on something that would have bipartisan support if it passed. As I mentioned, the remaining top candidates from both parties support climate action in the form of cap and trade.

In addition, pressure from industry is increasing through the U.S. Climate Action Partnership. State involvement on this issue is also growing. In fact, state and regional governments are taking the lead in this bipartisan issue. In 2005, California Governor Schwarzenegger called for ambitious long-term reductions of greenhouse gases. In 2006, he signed a law that sets California on the path to meeting those reductions—the state is required to reach 1990 levels of emissions by 2020. Florida Governor Charlie Crist, also a Republican, has put in place ambitious executive orders calling for greenhouse gas emissions to fall to 80% of 1990 levels by 2050.

● (1545)

The northeastern and mid-Atlantic states will be implementing their regional greenhouse gas initiative in 2009. It aims to cap carbon dioxide emissions from utilities starting next year and to reduce them by 10% by 2019. Other regions are following suit. There are regional initiatives to reduce greenhouse gases in both the western and midwestern U.S. in partnership with some Canadian provinces. In addition, 10 U.S. states have joined an International Carbon Action Partnership to develop compatible trading with the EU, New Zealand, Norway, and two Canadian provinces.

The action of all these states is indeed very important and laudable. But in and of itself it is not enough to curb the overall national emissions growth we're seeing. For that reason, and also because it's creating a patchwork of regulations, we would like the regulatory certainty and the comprehensiveness of a federal policy program, such as the Lieberman-Warner bill or other cap and trade bills that Congress would consider.

Thank you, and I look forward to taking your questions.

The Chair: Thank you very much.

We'll go on now to the United Kingdom's representative, Mr. James Hughes.

Mr. James Hughes (Deputy Director, Climate Change and Energy, Strategy and Public Sector Division, United Kingdom Department for Environment, Food and Rural Affairs): Thank you very much, Mr. Chairman.

I just want, first of all, to thank you for inviting me to set out the action being taken by the U.K. to tackle greenhouse gas emissions.

I'd like to start by briefly outlining the U.K.'s goals for emission reductions and its current progress, and then I'll briefly outline how it has made those reductions and mention some of the policies and measures in place.

The key message I want to convey in my presentation is that the U.K. is on track to surpass and perhaps nearly double our Kyoto commitment. We have set ourselves more challenging domestic goals, notably our 2010 goal, and we recognize the need to go further still, which is why the climate change bill will ensure that future governments are legally bound to meet our domestic budgets.

I'll begin just by clarifying the U.K.'s performance against its goals, which can be a source of confusion. The U.K.'s Kyoto Protocol target is to reduce its greenhouse emissions by 12.5% below the 1990 level over the period 2008-2012. Our self-imposed domestic goals are more demanding: to reduce the emissions of carbon dioxide by 20% below 1990 levels by 2010, then by 26% to 32% by 2020, and by at least 60% by 2050. The U.K. climate change bill that is currently being debated by our Parliament would make the carbon dioxide emission goals for 2020 and 2050 legally binding. The bill would require the government to set five-year carbon budgets for three periods ahead, and it would create a committee on climate change to advise on what the level of the budget should be. The committee has also been asked to review the U.K.'s long-term target to see whether it should be increased up to 80% by 2050.

On January 31, 2007, the U.K. published its final figures for greenhouse gas emissions in 2006. These confirm that greenhouse gas emissions have fallen by 20.7% compared with the base year, including trading, and by 16.4% if we exclude trading. In other words, our firms were net purchasers of emissions credits from their EU counterparts.

We forecast that greenhouse gas emissions will fall by over 23% by 2010, but we have not been as successful in cutting carbon dioxide emissions. In 2006 they were 12.1% lower than the base year and 6.4% lower, excluding trading. They're forecast to fall by at least 16% by 2010.

To recount, the U.K. is already below its Kyoto target and it's set to almost double it, but meeting its self-imposed domestic goal for CO_2 is likely to be challenging.

How have we managed to reduce our emissions while growing our economy? There is an element of truth in the “dash for gas” explanation in the nineties, but our economic analysis shows this accounts for a small percentage of the overall reduction. In fact, the reductions in greenhouse gas emissions are, in large part, the result of energy efficiency.

Energy efficiency has been driven by a wide range of policies, including the climate change levy, which is an energy tax to encourage greater energy efficiency in business and the public sector; climate change agreements, which are voluntary agreements where the operators pay a reduced rate of climate change levy in return for meeting challenging energy efficiency targets over a 10-year period; and the carbon trust, which is an organization that gives guidance and support to companies trying to reduce emissions.

In the domestic sector the energy efficiency commitment, which is the requirement on electricity and gas suppliers to achieve targets for the promotion of energy efficiency improvements, has been very successful in delivering energy efficiency in the household sector. The introduction of competitive markets in production and supply in the electricity supply sector such that commercial pressures ensure companies strive at all times to improve their efficiency have driven a large reduction in the U.K.'s greenhouse gas emissions since the early 1990s.

But this is not the only factor in the U.K. seeing a reduction in the emission of CO_2 per unit of energy produced. The U.K. renewables obligation has delivered savings, as has the higher diesel penetration in the transport fleet, the increasing use of biofuels in transport, and the EU emissions trading scheme. These savings are expected to continue to increase.

The other area where we've seen a difference is in our emissions of methane and nitrous oxide, which have reduced by 53% and 40%, respectively. Reductions from industry have come via regulation, enforced emission controls, and reductions from waste have come from reducing the amount of waste going into landfill and from incentives to collect and burn landfill gas. The modern landfill site in the U.K. collects and utilizes at least 90% of the methane produced as waste decomposes.

● (1550)

Overall, our analysis suggests that in round terms in 2006, emission reductions since 1990 due to energy efficiency, lower carbon fuels, and reductions in emissions of greenhouse gases other than CO_2 amounted to some 265 million tonnes of carbon dioxide per year, of which improvements in energy efficiency contributed about 40%, lower carbon fuels about 30%—made up of 20% from the so-called dust-free gas and about 10% from renewables and other low carbon fuels—and 30% due to lower emissions of greenhouse gases other than CO_2.

Along with having various other policies and measures, the U.K. aims to reduce its emissions further in order to meet the targets it's setting itself in the climate change bill. Its current policies and measures are set out in the 2006 climate change program and the 2007 energy white paper.

I hope that's a helpful summary, and I'd be happy to take questions.

Thank you.

The Chair: Thank you very much.

I would ask members to take about eight minutes, and that way we'll keep on schedule. Please be crisp and sharp. I know our witnesses would like to answer.

We'll begin with Mr. McGuinty, please.

● (1555)

Mr. David McGuinty (Ottawa South, Lib.): Thank you, Mr. Chair, and thank you to those who are here by teleconference and by telephone.

I'd like to ask a question first, if I could, to Ms. Arroyo. Perhaps you could help us crystal-ball gaze a little bit. We're a little less than nine months away from the presidential election results in the United States. You mentioned that over 150 bills have mentioned climate change, and there have been 110 climate change hearings on Capitol Hill. I take it the Lieberman-Warner bill is perhaps the most promising bill for bipartisan support in the United States.

Can you help us understand something? One of the comments made by our guest Vicki Pollard from the European Union was that the European Union was seeking what she described as a first-move advantage. In other words, the European Union is not waiting and is simply going at it. Can you give us a sense of where you think a potential Democratic presidency will go? To what extent will a first- or even second-move advantage in the United States kick in? Also, can you help us understand how this issue is going to be seen economically in the United States? Is this going to become a major competitive advantage going forward?

I think this is going to help us understand the implications of the targets being called for here in this particular bill we're examining.

Ms. Vicki Arroyo: Thank you very much. I'll try my best.

First of all, I'd like to say that I think regardless of whether we see a Democratic or a Republican president, given that the two major candidates of each party—Obama and Hillary Clinton in the Democratic Party, and McCain and Huckabee, since he's still in the running—have embraced cap and trade as a way to deal with this problem, they've acknowledged that climate change is happening. As you probably know, Senator McCain has been a leader and has proposed in fact the very first cap and trade bill, and re-proposed it last year.

You're correct in that the vehicle to watch here is really the Lieberman-Warner bill. That's the first one to make it through a Senate committee with the support of Warner, who was the sole Republican. He is committed to reaching out to others in his party. Indeed, others in his party will be needed to get it through the Senate.

Should that happen in the next few months, and should the House do what they are working hard to do, which is to draft a comparable vehicle and put it on the President's desk—as I said, it's hard to predict right now whether or not this President will sign it—I do think it's very hopeful that in the next year or two we will see climate legislation here, if not in 2008 then certainly by 2010, we think.

The economic advantage story is something that some of the people running for office are telling. Certainly Barack Obama and Hillary Clinton, at least, and I think to some extent John McCain, are talking about the green jobs that can come from taking this issue head-on, and the energy security benefits that also coincide with much of what you do for climate change. I also think, in the face of a potential recession, there's some wariness right now as well about whether or not a cap and trade bill would have some detrimental effect in the near term. The bill that is being discussed, the Lieberman-Warner bill, does have some cost control provisions in the form of things like offsets or borrowing from a future allocation but with payback, which are being considered. The Bingaman-Specter bill—and those folks are working very closely with the Lieberman and Warner team—has more of a traditional safety valve approach. Unfortunately, it limits the environmental integrity of the program, but that's also something that might be on the table.

Mr. David McGuinty: Thank you for that.

I would like to move to Ms. Pollard and our guest from the U.K., Mr. Hughes.

Can you help us understand how the three-year trading experience has moved to perfect the trading system in the European Union? To what extent have the challenges and the designed features been ironed out? I thought it was over 11,000 installations, but you say it's 10,000. Fine. That's a lot of installations.

Mr. Hughes, you're the deputy director of the Department of the Environment in the U.K. I take it you would have been following the IPCC's latest reports. One of the things that we hear repeatedly from the IPCC is that we have to make policy now based on science, not on voodoo. Numbers like 2% to 4% keep popping up and were prominent in Bali.

To what extent—in Mr. Hughes' case and perhaps Ms. Pollard's—has science informed the approach of the European Union and the U.K. to this issue?

● (1600)

The Chair: Ms. Pollard.

Ms. Vicki Pollard: Thank you.

First of all, the creation of the EU ETS was a huge undertaking. Basically, in three years we created a new commodity market, so it's a major step forward. It's a commodity market where we have increasing volumes of trade over time. In the first three years there have been a number of criticisms that are well founded, and we've been addressing them.

The first problem we faced was a price crash that happened around May 2006. That was simply an issue of scarcity. When the EU ETS was set up we didn't have verified emissions data for the installations covered, so we used the best available data, which turned out to not be good enough.

In May 2006 we had the first release of verified emissions data because that data was required under the EU ETS legislation. So the first time that data became available was when the legislation made it an obligation to report it. At that stage, it became clear that there were too many allowances in the market, therefore the price crashed. It was simply economics.

We've addressed that in phase two. Now we have verified emissions data. The allocation for phase two has been based on making cuts from the verified emissions data for 2005, and we now have data for 2006. So it's clear that the market is now short, and that's why the price for the second trading period is now well above 20 euros per tonne and has been for some time.

But there are other areas where we've learned simple things like how to release data so as not to give the same data to the market at the same time, which is not always obvious for an environmental regulator. Another important factor is simplification of the legislation. The drop from 11,000 to 10,000 is simply because some of the smaller operators who find it too much of a burden have been dropped to focus on the bigger operators.

Another important change will come in 2012 under our proposals that were published in January. We're looking for an EU-wide cap, rather than individual member states, to simplify the system, but also far more auctioning to deal with the issue of windfall profits. Sectors that can pass on costs to customers shouldn't get the free allocations they've been getting so far.

The Chair: Mr. Hughes, could you give us a quick answer on the science question of Mr. McGuinty, please?

Mr. James Hughes: Sure.

The IPCC report has provided us with evidence that clarifies that urgent action needs to be taken. Even if all greenhouse gas emissions stop tomorrow, we're already locked into about a further 0.6% Celsius warming over the next few decades. If we don't soon review stated current emissions projections, the level of greenhouse gases in the atmosphere are likely to reach 550 ppm CO_2 equivalent by around 2035. That would commit the world to at least a two-degree Celsius warming. As Ms. Pollard said, we need to see emissions peaking in 2020 and reductions between 60% and 80% by 2050.

The Chair: Thank you.

Mr. Bigras, please.

[*Translation*]

Mr. Bernard Bigras (Rosemont—La Petite-Patrie, BQ): Thank you, Mr. Chairman.

Welcome to our witnesses.

My question is for Ms. Pollard. I was in Kyoto in 1997 and I was rather surprised at the European Union's level of preparation for this international conference. I believe that the reason the Europeans have been successful is that as partners, they were able to agree among themselves before turning to the international scene. This enabled you to adopt a triptych approach, that reconciles both sectorial and territorial approaches.

In essence, you made commitments on the world stage concerning an objective, but right from 1997, you allocated differentiated targets between the 15 members of the European Union, taking into account possible energy efficiency, economic structure, demographics and climate.

Has this shared and differentiated approach, suitable to the international commitments and integrated with the European Union been a gauge of success in reaching your greenhouse gas emission targets?

● (1605)

[*English*]

Ms. Vicki Pollard: Thank you.

I'm going to answer in English because I'm more fluent in English.

I think it is important for us—and we're doing it again in the lead-up to 2012—to be clear about our objectives going into negotiations and who's going to do what within that overall target. So part of the package adopted in January was about sharing the effort between member states.

It helps, because there's a policy lag; it takes time to get the policies in place to lead to emissions reductions. It may be a decade or so between when we start discussing how we're going to go about it—doing all the impact assessment and economic, environmental, and social work, deciding on the right piece of legislation, and getting it through the European process and adopted in member states legislation—to the point where it actually starts having an impact in terms of emission reductions.

Given what the science tells us about the need to peak in 2020 and then decrease, we don't have that much time. So we need to start early to be ready for the agreement, which is only about 18 months away. The end of 2009 is not so far away. It's very important.

[*Translation*]

Mr. Bernard Bigras: The bill we are studying, C-377, contains a commitment in terms of reductions for two dates, that is 2020 and 2050, and the reference year set out is 1990. Over the last few weeks, the opposition was in Bali and we saw how the international negotiation was unfolding. The Canadian government was attempting to push the reference year as far away from 1990 as possible. The result of that is to thwart the efforts being made by sovereign states as well as by businesses in various states that are affected.

Does the 1990 reference year allow for past efforts made to be taken into consideration both by the member states of the European Union as well as by the businesses that decided, from 1990 on, to table plans to fight against climate change?

I see that you are also responsible for the environment directorate, climate change strategy and international negotiation unit. Is the reference year a fundamental component of international negotiations?

Ms. Vicki Pollard: In fact, I work for that unit; I am not entirely responsible for it. For us,

[*English*]

the baseline of 1990 is important, and that's what we stick to in all our projections. Although in our new programs we look at verified emission status for 2005 for the installation by installation for ETS, that's why we have data. In the international negotiation context we will always go back to 1990. That's important for us.

[*Translation*]

Mr. Bernard Bigras: My next question is for Ms. Vicki Arroyo.

You said earlier on that despite the stubbornness — that is the word I personally use — of the American administration in distancing themselves from the fight against climate change, the fact remains that there are roughly a dozen states that have decided to be proactive. I must remind you that Quebec, in particular, signed agreements with these states in order to fight against climate change. This is not only the case for the province of Quebec, but also for Quebec financial markets. I am thinking here of the agreement signed by the Montreal Stock Exchange. The Montreal climate exchange signed an agreement with the Chicago stock exchange with a view to a future market for carbon derivatives.

Is there a future for this agreement between the Montreal Stock Exchange and the Chicago exchange for carbon derivative products, and will it be called upon to expand in the future?

● (1610)

[*English*]

Ms. Vicki Arroyo: I'm not really familiar with that agreement. Was it the agreement with the New England states and the Canadian provinces as part of the discussions on RGGI?

[*Translation*]

Mr. Bernard Bigras: Agreements have been signed from government to government, from state to state, but in fact there is a climate exchange that exists in which Montreal has positioned itself over the last few years in order to attract the carbon market. An agreement was signed with the Chicago Stock Exchange, which currently has a voluntary market that is not binding but which nevertheless exists.

Are these links that exist between certain American states and certain Canadian provinces — I am thinking of Quebec and of Ontario — viable, if both federal administrations are deciding to keep their distance as far as the fight against climate change is concerned?

[*English*]

Ms. Vicki Arroyo: I think there's a possibility of a bottom-up approach, whereby you have many of the states and regions, not just in the northeast but also, as I said in my testimony, in the west and in the mid-west, including Canada, that could talk to each other and link trading programs. And then through the ICAP initiative, which I also mentioned, they could link with the EU, Norway, New Zealand, and other places that have trading programs. But that would be at the subnational level. Our preference would be to see a federal policy that is consistent and comprehensive at the federal level.

The Chicago Climate Exchange has been a very good pilot for the private sector, which wants to get its feet wet, so to speak, wants to get a little bit of experience with emissions trading. But it's based on voluntary targets they have taken on that may or may not be deep enough to actually deal with the problem of climate change. Rather than extending those kinds of voluntary targets, we really think you need more ambitious national targets.

Possibly some of the infrastructure that has been set up is something we should take a hard look at when we create an emissions trading program at the federal level here.

The Chair: Thank you, Mr. Bigras.

We'll go to Mr. Cullen, please.

Mr. Nathan Cullen (Skeena—Bulkley Valley, NDP): Thank you, Mr. Chair.

Thank you to our witnesses.

Ms. Arroyo, I'm going to stay with you just for a moment. In terms of the importance of a national framework for this, there's been some agitation within the Canadian business community. As the various provinces come forward with their plans, as the various provinces make agreements with their state partners, there's some disquiet or uncertainty as to what the future looks like for doing business across these various boundaries. Many of these companies we're talking about, in terms of being the largest emitters, work across provincial and state boundaries.

This bill, just for your familiarity, seeks to strike a cap and trade regime in a national context. The bills before you in Congress—you've mentioned the Lieberman-Warner bill.... How critical is it for your industries, the ones engaging in your Climate Action Partnership, to have some uniformity across state and international boundaries? How critical is it for their planning and investment to make sure this is a reality for them?

Ms. Vicki Arroyo: It's certainly an issue that comes up in discussions among the members of the United States Climate Action Partnership. Unfortunately, it's an issue that gets more and more difficult to deal with as we have more delay at the federal level and as more states come online with their own programs.

At the beginning, you saw states and regions acting in a vacuum in a situation in which they did not want to be compelled to act. But they just saw the inaction over many years by the federal government and felt they had to step in to fill that void. Now we've moved to them actually implementing some legislation and regulation and taking a lot of time to do it.

So I think there will be more reticence among states and non-governmental organizations—environmental groups—to support abandoning the state policies or regional initiatives in favour of a federal program. And that's going to be true the further down the line we get without a federal program.

I do think that a tough federal program would make it less likely that we would need to see states doing, for example, cap and trade. We might have, as we have a tradition of having in this country, states setting tougher standards or complementary standards for efficiency, or for vehicles, in the case of California. But it would be really unfortunate, I think, if we had a number of cap and trade programs that couldn't work together.

● (1615)

Mr. Nathan Cullen: Let me ask a question that might be relevant to the primaries that are going on and to the eventual election. As you have mentioned, all three of the remaining candidates on both the Republican and Democrat sides have maintained a position, in some cases a strong position, on the need to do something about climate change, while the U.S. is on the verge or in the midst of a recession.

Our government, similar to your federal government right now, has used the excuse of the economy versus the environment, saying that we have these tough choices to make. Have any of the leading presidential candidates abandoned their climate change plans or initiatives in the face of this oncoming recession? Have they used that excuse to say that clearly doing anything about the environment was for another day, when we were more prosperous, or have they maintained their initiatives?

Ms. Vicki Arroyo: We haven't seen that yet in this presidential election. However, certainly the last time a new president was elected, George Bush had made a campaign promise to deal with carbon dioxide emissions from utilities, from electric generators, and then abandoned that upon coming into office, citing the California energy crisis at the time. We're hopeful that won't happen. There's a lot more evidence on the scientific front. There are a lot more businesses calling for regulatory certainty, who want some kind of comprehensive climate policy. So I'm hoping that's not the case.

The truth is, if that was the Supreme Court position, a cap and trade bill is probably going to be the most effective way to address this. I don't think the companies are really going to want a piecemeal approach that now is clearly, according to the Supreme Court, the law of the land. It's certainly possible. So an EPA could regulate, facility by facility, in a traditional standards-setting approach now under the Supreme Court proclamation, and I think that would be much less cost-effective than the bills we're considering.

Mr. Nathan Cullen: It's very interesting, because just prior to Christmas and going to the Bali negotiations, I met with some of the folks on the Hill who were dealing with these pieces of legislation. When I asked what the Canadian interaction had been with the various senators and Congress, there had been zero. There hadn't been any conversation between the Canadian government and the people proposing these cap and trade bills, which obviously have economic impacts.

I'm going to turn to Ms. Pollard for a moment. You used an expression: “learning-by-doing phase”. Why was that so critical? Why was it not important to get it completely right, before you moved at all, on climate change?

Ms. Vicki Pollard: We had the luxury that we got it in place by the beginning of 2005, which meant that we had three years before the Kyoto commitment period when it became absolutely vital to have the ETS to help us meet our commitments. So we were lucky. But it is a big endeavour, so it does take some careful thinking.

That said, we were the first to do such a big scheme for CO_2 emissions. We learned a lot from the U.S. from the NOx and SOx trading schemes. We're making real efforts now to make sure that other people can learn from us. So we're one of the partners in the ICAP, the International Carbon Action Partnership, which was mentioned by Vicki Arroyo, to help share knowledge and experience to get better-designed ETS schemes in the future.

Mr. Nathan Cullen: Similar to the argument that has been used by this government and previous governments about the environment versus the economy question, there has also been, more recently, a hyped argument that until China, India, and the other developing countries move, it is not an intelligent or wise decision for Canada to make such considerations, to invoke laws like this bill proposed by Mr. Layton.

Why has that not inhibited you from moving forward? Why do you not see it as a competitive disadvantage to do things about climate change, as our government has proposed at even the most recent talks in Bali?

Ms. Vicki Pollard: The EU's position is that we want to see a comprehensive agreement with broad participation, that we're not asking for developing countries or emerging economies to take on the same sorts of commitments that we do, because we think they need room for development. We reflect the same thing in our effort-sharing within the European Union. We look at levels of GDP per capita in sharing out the efforts, but we're also clear that there has to be differentiation between developing countries.

We see it more as a question of, if we can show that we can do it, we can persuade them to take the action. By taking action, which also involves investment in their countries through mechanisms like the CDM, we help demonstrate clean technologies and engage them in innovative policy instruments to show them what can be done, to help them get experience of doing this, and we can help move them along that path towards taking the action or increasing the action they're already taking to the levels to which it needs to be taken.

● (1620)

Mr. Nathan Cullen: As a final question, to Mr. Hughes, you mentioned in your testimony the need, the urgency, and the actions that are taking place by the U.K. You also mentioned that energy efficiency was one of the greatest levers you used. Does a cap and trade type of mechanism allow companies to find those most efficient means to get the job done and allow that urgency for targets to be met?

Mr. James Hughes: Thank you.

Certainly the cap and trade scheme, through the EU ETS, has helped with that, although I think, as you heard from my testimony, the U.K. has actually been a net purchaser of credits. But again, as I said in my testimony, the U.K. has introduced a lot of measures over the last 10 years or so and has targeted energy efficiency as a sort of win–win–win, in terms of energy security, in terms of reducing emissions, but also in terms of saving money.

Going back to a comment that Ms. Pollard made earlier on, she talked about the policy lag. I think the experience we've had in the U. K. has been that we came out with our climate change program originally in 2000, reviewed it in 2006, and found that the emissions reductions we had predicted in 2000 weren't actually being realized to the extent that we hoped they would be, and therefore introduced new measures in 2006, again to help us towards our 2010 targets.

But certainly in the area of energy efficiency we've seen some good progress, and the work on the emissions trading scheme has helped to complement that in terms of additional emissions reductions.

The Chair: Thank you, Mr. Cullen.

Mr. Vellacott.

Mr. Maurice Vellacott (Saskatoon—Wanuskewin, CPC): Thank you, Mr. Chair.

Just off the top, I need to correct the record from Mr. Cullen here because our party's position was alleged incorrectly there. We have in fact committed to absolute reductions of 20% by 2020, just so our witnesses are well aware of that. But we do need to get everybody involved if global emissions are to go down. It's just so that we have the record corrected there.

I'd like to ask the question first to Vicki and then to James as well with respect to their particular spheres in their countries.

If a bill came to your parliaments, the European and the British, a bill like C-377 that we have before us today, a bill like that which was not costed, had no economic analysis, what would you as an adviser be recommending your parliament do with that bill?

Ms. Vicki Pollard: From the European Commission perspective, all legislation that we adopt is associated with impact assessment. The extent of impact assessment depends on the nature of the provisions in that bill.

Mr. Maurice Vellacott: So you would recommend that they go ahead and cost it and get an economic development—

Ms. Vicki Pollard: An impact assessment that looks at the net economic cost of costs and benefits but also social and environmental....

Mr. Maurice Vellacott: Before it proceeds?

Ms. Vicki Pollard: It would have to before it goes ahead.

Mr. Maurice Vellacott: Good.

James, perhaps you could give me a response on that question too in terms of what you'd do if you had a bill like this—no costing, no economic analysis. What would you recommend?

Mr. James Hughes: Here in the U.K. all new regulations in Europe have to go through, as Vicki has mentioned, an impact assessment, and the impact assessment that would be required here would include an assessment of the costs of that policy as well.

Mr. Maurice Vellacott: Okay. I guess this is for the witnesses again. In the last years we've seen countries like China and India begin to acknowledge the fact that they too need to come on board and have responsibilities in fighting climate change. Canada has been there attempting to work as a bridge builder to demonstrate some leadership to bring others on board. And I think we've finally succeeded, at least to a great degree on that, in having all the large emitters signing on to those international agreements, from the city declaration to the recent agreement in Indonesia as well.

Back in probably November, I got a letter, as I think most of the MPs did here, from the British High Commission. In that letter they were indicating and stressing the importance of having the really big emitters involved, for this was the lead-up to the Bali meetings in Indonesia. So the British High Commission letter was pretty clear. It said, in effect, and specifically, that we needed those big emitters on side.

I guess this is my question to our witnesses. If countries like India and China remained as business as usual, were not drawn in to become a part of this, what effect would Canada's domestic action have on climate change?

● (1625)

Mr. James Hughes: Can I perhaps respond to that first? First of all, as far as the U.K. is concerned, we feel the stance tells us we need to take action now. The economics tell us we can't afford not to. So we have to lead starting at home and influencing abroad, recognizing that global environmental problems need an international approach.

We think there needs to be an international agreement that includes all countries, including all the major emitters as well. And we feel they need to be involved.

We think in terms of what this would mean for Canada.... Perhaps I won't comment on what it means for Canada. By looking at what it means for the U.K., we recognize that in terms of direct emissions, we represent about 2% of direct global emissions, and yet we feel it's important that we can show developing countries—

Mr. Maurice Vellacott: I'm going to cut in there, James, and turn it over to my colleague here. I've robbed a bit of his time already. Maybe the other witnesses can wrap some responses to my question in something subsequent here.

Mr. Jeff Watson (Essex, CPC): Thank you, Mr. Chair.

Thank you to the witnesses for appearing.

At this committee we have heard from Canadian IPCC scientists, we've heard from economists, and now we've heard from environmental groups. Now, of course, we're dealing with what I thought were going to be jurisdictional issues with this particular panel. I'd like to get some of our questions down into that. Obviously, if Canada is going to take on emissions trading, we would have to look at examples from around the world and be sure that we're comparing apples to apples and not apples to oranges.

Maybe, Ms. Pollard and Mr. Hughes, I'll start with you. I'd like you to explore for us, in this process of getting the EU ETS up and going, some of the challenges you've had, some of the obstacles you've had to overcome with respect to the EU and its member states, some of the interjurisdictional things, legal challenges or anything like that. Help us to get a glimpse of that.

I think, Ms. Arroyo, I'm going to come to you afterwards and ask the same type of thing with respect to the U.S. federal government and individual states, or maybe some of the state-to-state relationships as well.

I'd like some thought focused around where Canada and the EU may be similar, where Canada and the U.S. may be similar, and where we may be dissimilar. If we're going to do this, there may be some things that might be easily transferrable to our situation and some that may not be. So I'd like it if we could explore that a bit.

Ms. Pollard, we'll start with you. I know it's big. I know it's a lot.

Ms. Vicki Pollard: I have to admit this is a very big subject, and I'm not an expert on Canada, so I'll talk from the European perspective—and also as somebody who wasn't there from the launch of the EU ETS, in the job sense.

The major lesson for us is simplicity. The EU ETS is a relatively simple scheme. You talked about apples versus apples compared to apples versus oranges. We have one common currency, which is a metric tonne of CO_2, and that's very important. Then what we have is an absolute emissions reduction commitment, which at the moment is made up of additions of the 27 member states caps, to have an overall EU cap.

One of the lessons, in terms of simplicity, and one of the lessons we're taking forward to post-2012—so from 2013 onwards—is to have the cap set as far as possible at the EU level, because one of the complications is allocation of allowances. Once you have a scheme up and running there's a lot of money at stake, and that leads to very difficult decisions for whoever is making the decisions, whether it be, in the EU context, the commission looking at national allocation plans or people developing national allocation plans and deciding on what to allocate to different installations within their countries.

The more that can be simplified and the more it's within the confines of what's being done elsewhere in the world, so that the competitive impact on the companies that are exposed to international competition.... The more those allowances can be sold—not allocated, but sold—say, through auction, the easier it will be. So that's an important lesson.

I'll hand it over to James. From a member state perspective, he may have other lessons he wants to raise.

● (1630)

Mr. James Hughes: I have to say that I don't have responsibility for the EU ETS, so I'm afraid I can't speak in detail. But I think one of the lessons, which Vicki touched on as well, has been in terms of the cap that's set. I think, as we already heard, we've had some teething troubles in phase one, where it was over-allocated, and the commission took very welcome action to ensure a tougher regime in phase two. We now have the opportunity of a review of the directive to make that further progress for 2013 and beyond. I think the key has to be to make sure that emissions trading works properly to secure real emission reductions.

Certainly, the proposals that the commission has put forward so far for that third period are very encouraging, and I would support the comment that was made about the benefits of having a central EU-wide cap. So instead of member states actually coming forward to the commission with proposals for their own cap—and the U.K. has tended to be quite stringent in terms of the cap it seeks to set for the U.K.—I think it's very useful actually to have the EU set that cap centrally and be able to make sure we're seeing an increasingly tighter cap over time, which, as you know, will help to guarantee emission reductions.

The Chair: I'm sorry, Mr. Watson, but we do have to call this. We have five more witnesses coming before us.

I certainly want to thank the three of you for a great job. I know the members may not have got all their answers, but at least they got a good idea of what's happening in other places.

Thank you very much.

I now ask the five new witnesses to come forward.

● (Pause) ●

The Chair: I would remind members that we do have five witnesses, and this is going to be about the constitutionality. We have an excellent group of witnesses. It is just too bad we don't have time for each one of you to have a whole session. I would ask you, if you could, to limit yourself to approximately five minutes. That will allow our members to ask the maximum number of questions.

I do want to welcome the students who have joined us here. I've known Mr. Elgie for some time, and I'm sure that you're learning lots from him. Hopefully you will learn something here today from our excellent panel of witnesses as well.

If we could proceed, we will go in the order printed. Please keep it to approximately five minutes so that members will have an opportunity to ask questions.

We will begin with Theresa McClenaghan.

● (1635)

Ms. Theresa McClenaghan (Executive Director and Counsel, Canadian Environmental Law Association): Thank you, Mr. Chairman.

It is my pleasure to appear at the committee's invitation. With me is Mr. Joseph Castrilli, who is also a lawyer with the Canadian Environmental Law Association. I will speak very briefly, with a couple of introductory comments, and Mr. Castrilli will use the bulk of our five minutes or so to highlight a couple of the main points we've addressed.

We were asked to look at the constitutionality of this bill, and that's the specific context for our comments. I should add that the Canadian Environmental Law Association is a 38-year-old, federally incorporated, not-for-profit organization, and it is also an Ontario legal aid clinic. We are strictly non-partisan. We provide advice with respect to proposed and possible law reform, both federal and provincial—and municipal for that matter. We do that with all political parties.

In our efforts we are always supporting multi-jurisdictional work within Canada's constitutional framework. We advocate that there's an important role for municipalities, provincial governments, and for the federal government. We do our work in that way because different scales of effort matter in different issues. This is certainly one of those areas where that is true, where efforts by some of Canada's large municipalities are important, as well as provincial governments and the federal government.

We also will be pleased to assist the committee further after our brief overview and to provide our suggestions and advice as to possibilities going forward.

With that, I would like to ask Mr. Castrilli to highlight two of the heads of power that we addressed in our brief.

Mr. Joseph Castrilli (Counsel, Canadian Environmental Law Association): Thank you, Mr. Chairman, members of the committee.

As we noted in our pre-filed written submissions, 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.

In the time available for our opening comments, I'm just going to focus on two heads of power: peace, order, and good government, and the criminal law power. I will also address briefly certain constitutional questions related to Bill C-377 arising from existing federal and environmental legislation.

With respect to peace, order, and good government, this, as the committee knows, is a residual power reserved to Parliament when a matter does not come explicitly within the classes of subjects assigned to provincial legislatures, or otherwise to Parliament. Therefore, reliance on it to uphold the regulatory limits or emissions trading authorities that are not really spelled out in Bill C-377 could have a major impact on provincial jurisdiction to act in this area, and therefore might not find favour with the Supreme Court of Canada.

However, peace, order, and good government would appear to be the best head of power to rely upon to uphold a more explicit emissions trading and offsets authority than exists in Bill C-377 at the moment, because such a regime might be better capable of being clearly ascertainable through the application, for example, of sector-by-sector measures, and therefore be potentially least intrusive of provincial jurisdiction. Peace, order, and good government would appear to be less likely to find favour with the Supreme Court as a basis for upholding the constitutionality of the regulatory limits authority of Bill C-377 under any circumstances because of the potential for major impact on provincial jurisdiction to act in a host of areas.

With respect to the criminal law power, in light of the Supreme Court of Canada decision in Hydro-Québec, 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 the Canadian Environmental Protection Act, the constitutionality of which was upheld in the Hydro-Québec decision, it is only addressing a limited number of substances—in this context, greenhouse gases.

Moreover, greater particulars would be necessary in Bill C-377 in order to determine whether, or the extent to which, the regime of regulatory limits—or emissions trading, for that matter—could be placed squarely within the line of cases decided by the Supreme Court since the mid-1990s that have upheld complex federal regulatory regimes under the criminal law power.

The last matter I wish to deal with very briefly is constitutional questions in light of existing federal environmental law. Bill C-377 is meant to be a stand-alone law and is silent on any relationship that might exist between it and the Canadian Environmental Protection Act, 1999, relating to substances causing or contributing to climate change. However, whereas CEPA 1999 lists in schedule 1 of that act—that list is known as “List of toxic substances”—the six greenhouse gases that are identified in the Kyoto Protocol, Bill C-377 is silent on which greenhouse gases it might apply to and how these substances are to be characterized.

In the circumstances, some reconciliation of Bill C-377 and CEPA 1999 should or could 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 are already identified as toxic substances under CEPA 1999.

In the alternative—lawyers always like to have an alternative—and as we've suggested above, greater particulars should be considered in Bill C-377 itself if the preference of Parliament is to keep the bill as a stand-alone law. In this regard, I'd suggest three broad areas, and I suspect that in the questions that follow I will have a chance to elaborate: first, identify the greenhouse gases the bill applies to; second, define precisely the situations or activities where emissions are to be controlled or prohibited; and third, make the prohibitions subject to penal consequences.

I'd be happy to answer any questions the committee might have at the appropriate time. Thank you.

● (1640)

The Chair: Thank you very much.

I should mention that Mr. Newman from the justice department is here to answer any questions as well.

Mr. Hogg, please.

Professor Peter Hogg (Scholar in Residence, Blake, Cassels and Graydon LLP): Thank you, Mr. Chair.

You have my written submission. For the purpose of the translator, all I am going to say orally is the little piece under credentials on page 1 and the conclusion on page 4. That's all I will say orally.

Mr. Chair, I am a professor emeritus and former dean of the Osgoode Hall Law School of York University and the scholar in residence at Blake, Cassels and Graydon. My field of expertise is constitutional law, and I have written extensively in the field, including the book, *Constitutional Law of Canada*. Those are my credentials.

Here is my conclusion.

Some hon. members: Oh, oh!

Prof. Peter Hogg: I'm jumping to page 4.

The constitutional problem with Bill C-377 is that it leaves the reduction of greenhouse gas emissions solely to the regulation-making power vested in the executive. The only direction given to the Governor in Council as to the nature of the regulations is that they must be "to carry out the purposes and provisions of this Act" and "to ensure that Canada fully meets its commitment under Section 5"—the section on the targets for 2020—and there is a later target as well.

This extraordinarily broad and sweeping regulation-making power purports to authorize any regulation that would have the effect of reducing greenhouse gas emissions. Such regulations could potentially reach into every area of Canadian economic—and even social—life. The bill enacts no restrictions as to the kinds of laws that are contemplated or the kinds of activities that can be regulated. Such a sweeping grant of authority to the executive is unprecedented outside of wartime and should be a matter of political concern, quite apart from the constitutional issues. However, the constitutional issues are all that I'm concerned with, and they are, in my view, enough to defeat the legislation.

First of all, to take the two heads of power identified by Mr. Castrilli, Bill C-377 is outside Parliament's power over criminal law because that head of power—in addition to a criminal purpose, which it has, being the prevention of global warming and the protection of the environment—also requires a prohibition and a penalty. What the Hydro-Québec case said was that if any part of the prohibition and penalty is to be delegated to the executive to design and enact, the delegation must be "carefully tailored" so that Parliament at least provides the guidelines for the creation of the new criminal offences. Bill C-377 provides no guidelines whatsoever as to the criminal offences that would emerge from the regulation-making power of the Governor in Council.

To take the second head of power identified by Mr. Castrilli, Bill C-377 is also outside Parliament's power over peace, order, and good government because the national concern branch of that power authorizes laws relating to a matter of national concern—and of course the reduction of greenhouse gases is a matter of national concern—only if the matter is sufficiently distinct to distinguish it from matters of provincial concern. The vagueness—and this is basically the exact same point again—and the breadth of Bill C-377 have the potential to reach deeply into many fields of provincial authority. Obviously, the bill can deal with almost all human activity that contributes to greenhouse gas emissions.

● (1645)

So without more careful definition of the kinds of regulations that are contemplated, so as to make a distinct matter that the bill addresses, the bill is outside the national concern branch of peace, order, and good government.

My conclusion is that unless the bill is changed in the ways that Mr. Castrilli suggested in his closing phrases—and these would need to be quite radical changes—the Parliament of Canada simply lacks the power to enact Bill C-377. If Parliament were to enact the bill, it would be struck down by the Supreme Court of Canada.

That concludes my submission, Mr. Chair.

The Chair: Thank you very much—and congratulations, as I didn't think lawyers and politicians could stay on a timeline like that. You're at exactly five minutes and three seconds. So well done. Congratulations.

Prof. Peter Hogg: Thank you, Mr. Chair.

The Chair: Mr. Turmel, please.

Ms. Tamra Thomson (Director, Legislation and Law Reform, Canadian Bar Association): Thank you, Mr. Chair and honourable members.

I will start for the Canadian Bar Association and then Mr. Turmel will conclude.

I'd like to thank the committee for inviting the Canadian Bar Association to appear with respect to Bill C-377. We appear today on behalf of our national environmental, energy, and resources law section, the members of whom represent a broad range of interests related to environmental law from every part of Canada.

The Canadian Bar Association is a national association representing over 37,000 jurists across Canada. Amongst our objectives are improvement of the law and improvement in the administration of justice. It's in that optic that the section has assessed this bill.

Mr. Turmel is the secretary of that section, and as a lawyer from Montreal, he specializes in energy and climate change law.

You have received a copy of our letter analyzing the bill, and I'm going to ask Mr. Turmel to address that in greater detail.

● (1650)

Mr. Andre Turmel (Secretary, National Environmental, Energy and Resources Law Section, Canadian Bar Association): Thank you.

Good afternoon, Mr. Chairman and all members.

My name is Andre Turmel. I'm a partner at the law firm of Fasken Martineau in Montreal. I'm going to address you in French in the following presentation.

[*Translation*]

Bill C-377 addresses Canada's non-compliance in implementing international treaty obligations, specifically in regard to climate change. The CBA Section is certainly concerned about the serious consequences of climate change, and about Canada's failure to implement the Kyoto Protocol as a breach of Canada's international obligations. However, we believe that Bill C-377 should not be passed in its current form. Rather than the proposed legislated targets, the CBA Section urges the government to take immediate steps to meet Canada's international environmental legal obligations to address climate change.

International treaties are the primary tool used by the international community to promote collective action on global environmental problems. Canada is a party to the Vienna Convention on the Law of Treaties, which provides in article 26 that, “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.” International customary legal norms from as long ago as 1938 recognize a duty among nations to prevent transboundary pollution and environmental harm.

More recently, there was the Teck Cominco case which was decided by a U.S. court of appeal. It ruled that the United States had administrative responsibilities with respect to a Canadian company that was emitting on American soil.

At this time, Canada is entering into an increasing number of international agreements addressing environmental issues. The CBA has urged federal, provincial and territorial governments to cooperate to implement these international agreements in a timely and complete manner, according to their respective areas of jurisdiction. Implementation of international conventions and obligations under international law is a matter of support for the rule of law.

I would now like to make a few comments about Bill C-377. This bill is intended to rectify Canada's non-compliance with the Protocol. It would introduce ambitious, and on the basis of current experience, likely unattainable, deferred targets. If legislated targets are to be adopted, they should be linked to, and coherent with current targets in international law. The existence of two, unrelated and incommensurate standards would likely create confusion as to the role of international law in domestic environmental law, and would downplay the importance of Canada's legal obligations under the protocol and other international treaties.

I would now like to list some of the legal consequences should Canada fail to comply with the Kyoto Protocol.

The protocol's Marrakesh Accords address non-compliance with article 3.1. The accord provides, in particular, that the enforcement branch of the compliance committee—that is how it is called—which is responsible for compliance, must ensure that Canada fulfils its obligations.

It must declare Canada to be non-compliant if it deducts from Canada's assigned amount for the second commitment period a number of tonnes equal to 1.3 times the amount in tonnes of excess emissions. It will require Canada to develop a compliance action plan including information provided in the letter that we sent to you. Finally, it can suspend Canada's eligibility to make emissions trading transfers under article 17 of the protocol.

The United Nations Framework Convention on Climate Change, the Kyoto Protocol dictating Canada's international environmental obligations and subsequent negotiated instruments within the framework of the framework convention are likely to remain the primary international legal structures to address climate change, including climate change impacts in Canada, after 2012.

While recourse by a country against Canada before the International Court of Justice is unlikely, domestic litigation against the federal government can be expected. Already, the Friends of the Earth have launched two cases against the Government of Canada with the Federal Court, one under the Canadian Environmental Protection Act and the other under the Kyoto Protocol Implementation Act adopted in 2007.

● (1655)

To conclude, Bill C-377 deals with a subject of profound concern to Canadians and to the international community. However, it would require an 80% target by 2050, a significantly higher target than is currently adopted by most countries, which generally require around 50 or 60% reduction targets by 2050. While high standards are desirable, if attainable, they should be linked to and coherent with target set out in existing international law. The targets in Bill C-377 are not.

We urge the federal government to take immediate steps to honour Canada's international agreements to address climate change before considering the legislated targets proposed in Bill C-377.

Thank you.

[*English*]

The Chair: Thank you very much.

Mr. Elgie, please. Welcome.

[*Translation*]

Professor Stewart Elgie (Professor, Faculty of Law, University of Ottawa, Associate Director, Institute of the Environment, As an Individual): Thank you., I will be speaking in English today but I will try to answer questions in French if you speak slowly.

[*English*]

I am a professor at the University of Ottawa, Faculty of Law. I specialize in environmental and constitutional law. I'm also a recovering litigator. In my previous life I was an environmental lawyer, and I ended up arguing three constitutional environmental cases at the Supreme Court of Canada, including Hydro-Québec, and was fortunate enough to come out on the winning side of each of them, which is perhaps why I no longer litigate. You want to get out while you're ahead.

In any event, we've been asked to speak about the constitutional aspects of this bill today.

Let me, like Peter Hogg, begin by jumping to my conclusion and then work backwards from that.

My conclusion is that I would agree with the others that in all likelihood this bill, as currently drafted, wouldn't pass muster under the criminal law power. My view is there is a better than average chance it would be upheld under the peace, order, and good government power, and I can come back and say a little bit about why I think that, but the most important point I want to speak to is what could be done to the bill to improve its chances of passing muster constitutionally. I think there are some fairly specific doable things that would increase its likelihood of success.

I say that because there are two things about lawyers. The chair has pointed out one, which is that we tend to talk too long. The other is we tend to disagree, and if that were not the case we wouldn't have a profession and there wouldn't be two sides to every case. You'll get different views as to which side of the constitutional line it will fall on, but the important point is what this committee can do to make this bill more likely to be upheld as constitutional, and that's what I'm going to spend a bit of time on.

Very quickly, on the criminal law power, the other witnesses have spoken to the need to flesh out what the regulation-making powers look like, to put more flesh onto them, and I think that would be a good idea and would improve its chances.

On the peace, order, and good government power, I agree with Professor Hogg that the Supreme Court of Canada requires that a law define subject matter in a way that is single, distinct, and indivisible, to use their terms. You have to reduce a subject to its basic elements. The federal government couldn't say it legislates over the environment, that it legislates over all pollution. You have to define it in terms that are relatively narrow.

My view would be that addressing the control of greenhouse gases is reducing it as far as it can be reduced. There are only six greenhouse gases. An international treaty defines those six and the international treaty requires us to address all six. They are a fairly finite list and not never-ending. The Supreme Court has said the fact that an international treaty defines subject matter as a distinct matter is strong evidence. It is not conclusive, but it is strong evidence that will be found to be a distinct and single subject matter for constitutional purposes. In my view, it probably would be found to meet the test of single and distinct.

The biggest test the court uses in measuring whether something is single is whether or not the failure of one province to address that subject effectively would impact other provinces or other countries. Certainly in the case of climate change, the failure of any province to address a subject effectively would have far-reaching effects on other provinces and other nations.

We could say a lot more, but let me jump to what is the more important point, which is what the things are that one might think of doing that would move this up the scale of constitutionality and make it likely to be upheld. Let me point out a bunch of them that I think are all quite doable.

One is that one needs to define the regulation-making power. There seems to be agreement on that point. You don't need to look far to do that. Look to what the court has already upheld. The court has upheld the Canadian Environmental Protection Act as valid criminal law legislation, so one could look to the kind of regulation-making powers that exist under CEPA and simply incorporate those. You don't need to reinvent the wheel.

An even simpler way of doing it would be to look at Bill C-288, which I'll call the KPIA as a short form for purposes of referring to the bill. It has a defined set of regulation-making powers that are drawn from CEPA already. They are a distillation. They are less extensive than CEPA's. There are about six, and CEPA has about 20, but you could simply graft those. They talk about setting targets, setting limits, emissions trading systems. You don't need to reinvent the wheel. You could simply graft the kinds of powers that have been used in other statutes that have been upheld or recently passed by this Parliament.

The second thing: I agree that defining greenhouse gases, to make it clear it's only those six, would go a long way to putting boundaries on the subject matter, and again, the language is there in Bill C-288. It defines them as those six gases. You can simply graft them. You don't need to reinvent the wheel.

● (1700)

Third, I agree again, people have said that we should make reference to and tie into the existing regulatory structure under CEPA, which has been upheld by the Supreme Court of Canada as valid. That could be done very easily in the regulation-making section simply by saying, “the Governor in Council may make regulations under this or any other act of Parliament”. Simply add the words “or under any other act”, and all of a sudden you enable them to use the CEPA regulatory machinery to enact regulations to achieve these goals. It's a much simpler way than having to write the whole CEPA statute out again.

The fourth one I would recommend is that in order to improve the chances of constitutionality under the peace, order, and good government power, the preamble should simply say that greenhouse gases cross national and provincial borders and are a matter of global concern. Again, that language is in the preamble to Bill C-288. Those are the key words the court looks at, and I can tell you, even in the Hydro-Québec case, where the court found that CEPA didn't fall within peace, order, and good government, they said that had it been delineated to deal only with subjects that had an extra-provincial impact, they might have reached a different conclusion. So defining greenhouse gases as a problem that has extra-provincial and extra-national impacts will greatly improve the chances of constitutional success.

By way of clarifying provincial powers, I would recommend that you take another section from Bill C-288, which makes it clear that nothing in the statute in any way restricts or reduces the ability of provinces to legislate to address greenhouse gases. You'll find that in subsection 6(2) of the KPIA. Again, this confirms that provinces have parallel power.

Lastly—I'm probably over my five minutes and the chairman will chastise me for that—one thing that hasn't come up, which I would comment on, is that this act obligates the Governor in Council to achieve all of the targets it has set out by way of regulations. The reality of it is that Canada will meet its greenhouse gas emissions targets not only through regulations but also through other instruments such as spending, taxes, and federal-provincial agreements. So again I would suggest borrowing a section from Bill C-288, subsection 7(3), which says that in making regulations to meet these targets, the Governor in Council may take into account reductions that are achieved by other measures the Government of Canada has taken—spending, taxes, federal-provincial agreements—provided it specifies what the expected reductions are under those other measures. In other words, don't obligate Canada to meet all of its 80% reduction targets simply through regulatory measures. Allow other measures to be there, too, as long as there is rigour to make sure we get to the target.

Last of all, I would simply point out that there was some comment about the fact that getting to minus 25% by 2020 will be a long way to go. It is indeed a long way to go, but since this bill was drafted, Canada has agreed with other developed nations at Bali that this is the target we have agreed to in principle. So Canada, at the Bali negotiations, has agreed with the conference of the parties action plan of negotiating towards reaching reductions in the range of 25% by 2020. So this is now in line with our internationally negotiated commitments, at least in principle.

Thank you. I would be happy to entertain questions.

● (1705)

The Chair: Thank you. You reaffirmed my belief about politicians and lawyers.

We'll go right away to Mr. Godfrey, please.

Hon. John Godfrey (Don Valley West, Lib.): Thank you all.

I think it's been very instructive for all of us. I also think it's been helpful to think through the solutions to the problems you've raised. Stewart Elgie's comments were very helpful in that regard.

It seems to me—and you are the lawyers, I certainly am not. I have a couple of broad questions. One is, why regulate? How urgent is this question, and would that urgency allow us to use the peace, order, and good government provisions?

It seems to me that Peter Hogg gave the show away a bit when he said in his conclusion that you'd have to argue this is as serious as wartime. Indeed, I think we're prepared to argue that. I think the question of how grave a matter this is, not only for Canada but for the planet.... I'd be very surprised, given what we know now, if one couldn't argue that case.

The other question is one of how we would do it. I think some very useful solutions have been put forward. You, of course, reminded us that the federal government has certain abilities—once we've determined this is a crisis—certain ways of doing things, through taxes, for example, which are undisputed as a way of achieving various purposes.

One that I don't think anybody mentioned—outside of the CEPA context—was the ability of the federal government to regulate standards, such as product standards—to regulate low-sulphur diesel for the whole country. We have a number of strategies on the "how" front, once we've determined how important all of this....

Finishing up my opening remarks, I was a little distressed that the Canadian Bar Association seemed to still have doubts about the science of climate change. We might well wish to incorporate—in the language of the preamble to the bill—the latest information from the climate change panel of the United Nations, but I think all reasonable people would now say that we are in a very urgent situation. We can strengthen that language.

Let me turn back to the critics. Maybe we'll start with Professor Hogg on POGG, if I may put it that way. First of all, I'd be interested in your response—if I have treated your argument unfairly about the urgency of the matter.

Second, I'd like to know if the various suggestions put forward by Mr. Castrilli and Professor Elgie—to be more explicit about CEPA, for example, and to tie it in with the language of Bill C-288, to use formulary language that we know about and that has a precedent—would help with some of your concerns and criticisms.

Prof. Peter Hogg: Thank you, Mr. Godfrey.

As a matter of constitutional law, the analogy with wartime is probably not effective. In the First World War and the Second World War, the War Measures Act authorized the entire government of the nation to come under regulation, including areas that in peacetime had been completely under provincial authority. This was done because of the emergency power of peace, order, and good government. The emergency power of peace, order, and good government will not permit temporary legislation as sweeping as that which is contained in this bill.

There might be room for disagreement on this, but I don't think a court would say that we are facing an emergency comparable with the First or Second World War and that comparably sweeping emergency legislation is warranted. I don't think this works as a matter of constitutional law.

I agree entirely with Mr. Castrilli and Mr. Elgie that if the bill were made more specific, there would be a better chance of its holding up. I think it's easier to do a good deal under the criminal law power, because that's what CEPA is enacted under. Much of what can be done to reduce greenhouse gas emissions can undoubtedly be done through amendments to CEPA, and we have a ruling that CEPA is a valid criminal law. So if the bill were more narrowly drafted—especially if, as Mr. Castrilli mentioned, it was reframed as an amendment to CEPA—I would think we would have a valid criminal law. But of course you can't do everything under the criminal law power.

I don't agree with Mr. Elgie that it's easy to fix up under the peace, order, and good government power. Crown-Zellerbach is the case that is the precedent for applying peace, order, and good government. In this case, the federal government passed a law, the ocean dumping act, that prohibited dumping at sea. The court said this could be upheld under the "national concern" branch of peace, order, and good government. The application of the decision was limited to dumping from ships in marine waters.

On this question, the court divided four to three. The majority upheld it, but Justice La Forest, speaking for the minority, said the topic of marine pollution was not sufficiently distinct—it could lead to federal regulation of industrial and municipal activity, resource development, construction, and recreation, because all these matters contribute to marine pollution.

It seems to me that if we limited this to defined greenhouse gases, we would still have to face the potential for regulation of energy production, transportation, buildings, homes, appliances, agriculture, and forestry. All of these things could be regulated by the Governor in Council, under federal legislation, because all of these things would contribute to the reduction of greenhouse gases. I don't think peace, order, and good government will sustain anything as broad as that.

● (1710)

The Chair: Well, Stewart, at least you had your proof, both sides of the issue.

Mr. Bigras and then Mr. Lussier, please.

[*Translation*]

Mr. Bernard Bigras: Thank you, Mr. Chairman. I will be sharing my time with Mr. Lussier.

First of all, in listening to you this afternoon, I'm under the impression that you are sending us the message that the bill needs to be rewritten in order for it to make sense. I'll invite the clerk to note down what our witnesses have said today and to verify the admissibility of certain amendments that will be submitted to us over the next few weeks, to ensure that the amendments proposed by the witnesses are feasible within Bill C-377. According to the comments and suggestions made by our witnesses, I am under the impression that in many cases, these amendments could be ruled inadmissible.

Mr. Hogg, I was struck by your intervention, particularly by page 5 of your testimony where you stated:

> The vagueness and breath of Bill C-377 has the potential to reach deeply into many fields of provincial authority. Without more careful definition of the kinds of regulations that are contemplated, the bill is outside the national concern [...]

And yet, the sponsor of the bill no doubt took this into account by suggesting, in clause 10, that in order to fulfill commitments provided for in clause 5, there must be, and I quote: "(iv) cooperation or agreements with provinces, territories or other governments;".

Am I to understand from your presentation that this aspect of clause 10 doesn't give anymore protection either and that there are numerous aspects that could lead to encroachment regarding sectors of provincial jurisdiction? Would it be possible—I know that this is the case with the Canadian Environmental Protection Act—to sign equivalency agreements with the provinces in certain sectors? Would it be possible to envision equivalency arrangements, not regulatory arrangements but agreements based on results, such as those that we integrated in Bill C-288?

● (1715)

[*English*]

Prof. Peter Hogg: Excuse me, sir, for responding in English.

If the regulation-making power were limited to the kinds of things suggested in the various subheadings in subclause 10(1), in the ways that have been suggested by Mr. Elgie, there would be a much stronger case for upholding the legislation. But as clause 10 stands at the moment, it is simply a list of possible things the Government of Canada might decide to do to ensure that it will meet its clause 5 target. It doesn't impose any limitations. In fact, if the Government of Canada decided to do completely different things to achieve the targets, clause 10 would not be violated. It's really a reporting section rather than a section that limits or guides the actual regulation-making power of the Governor in Council.

[*Translation*]

Mr. Marcel Lussier (Brossard—La Prairie, BQ): I have a question for Mr. Elgie. In the Quebec Hydro ruling, the judges were split five to four. In the arguments outlined by the four dissenting judges, did you find any reasons that could have had an impact on your presentation today?

Prof. Stewart Elgie: The answer is yes. I will continue in English.

[*English*]

In two areas, Hydro-Québec's dissent dealt with both the criminal law power and the POGG power we talked about today. One of the things the dissenting judges made clear—because they didn't agree with upholding CEPA under the criminal power—is that the problem needed to be defined in more narrow terms. Their problem with CEPA was that it defined the term "toxic substance" so broadly that it could include almost any substance you could think of. That was their biggest problem with the act. By contrast, if you define the term "greenhouse gases" in here, you would be limiting it to six substances. Their point was that the way "toxic" was defined in CEPA, it could include thousands and thousands of substances.

So their biggest concern about criminal law power could be dealt with by simply limiting the scope of substances to be dealt with here.

In terms of peace, order, and good government, obviously this isn't the time or place to have a full constitutional debate. The minority said that CEPA was too broad to be upheld under the peace, order, and good government power, but then they gave a road map to the kinds of things that could be redrafted that would make them think it was within the peace, order, and good government power. They said if it were limited, for example, on the basis of the severity of the harmful effect a substance would have.... Well, greenhouse gases are known to have a pretty severe harmful effect. Then they said, "Or if it were limited on the basis of their extra-provincial impacts...." Again, greenhouse gases are the poster child of a substance that has extra-provincial impacts. Everything we put up into the atmosphere has an equal effect around the whole planet.

So without wanting to wade into all the minutiae of it, under the peace, order, and good government power, were you to clarify that greenhouse gases have an international and interprovincial impact, that would certainly help the argument.

● (1720)

The Chair: Mr. Lussier, you have another minute.

[*Translation*]

Mr. Marcel Lussier: Mr. Castrilli, would you make the same comments with respect to the information provided by the dissenting judges? With respect to the Quebec Hydro trial or decision, did the dissenting judges influence the message that you delivered today?

[*English*]

Mr. Joseph Castrilli: I certainly took those points into account, but I was primarily influenced by the majority judgment and the manner in which the majority basically set out a road map for establishing the constitutionality of CEPA based on the criminal law power—an exercise that I think was expanded in the firearms reference about four years later. So I pretty much took my template from the majority decisions, notwithstanding the fact that there was dissent in the case of Hydro-Québec.

The Chair: Thank you.

Mr. Cullen.

Mr. Nathan Cullen: Thank you, Mr. Chair.

Thank you to this distinguished panel. Not being a lawyer, I must confess to some level of intimidation in terms of the wisdom and experience that's being brought before us today.

I'm also very interested in the process that we go through here in Parliament in regard to establishing constitutionality, and also establishing a certain level of unknowns regarding what will be tested in court and what will stand up in court. I'll encourage our witnesses and also committee members that we don't necessarily need to wait for lawyers to agree on this fine point before Parliament acts. I think Canadians would urge us to take some risk on the constitutionality question in order to achieve the targets and goals that Canadians endeavour to have.

In the place of this, we are seeking in this bill to establish national targets based upon scientific measures in order to mitigate the effects to our society and our environment of dangerous climate change. I've not yet heard testimony today saying that the attempt through this bill is a deed that Parliament shouldn't perform. I get a suggestion—there are very different tones and approaches to how this bill is being considered—of the question of whether the witnesses were seeking ways to improve this bill or whether witnesses were seeking ways to prove themselves right and defeat this bill on constitutional grounds.

Mr. Hogg, I'll start with you. There were some questions of specificity in your argument that as it stands now, the bill is not sufficiently specific for a court to feel comfortable with it in terms of the Constitution. From the testimony you've heard today, or perhaps from some other readings you have, do you believe that by including greater specificity, including some of the language out of both the favouring decision in Hydro-Québec and the dissenting one, specifics could be brought to this piece of legislation to, as Mr. Elgie said, move the constitutional meter closer to favourability?

Prof. Peter Hogg: In principle, yes, I do.

What, to me, is wrong with the legislation, both under the criminal law power and the peace, order, and good government power, is it sets a target, a target that we know will be extraordinarily difficult to achieve, that will require very pervasive regulation, and that simply allows the Governor in Council to invent whatever regulations it chooses in order to accomplish the goal.

Mr. Nathan Cullen: Let me stop you just for a moment on that first point, because I looked at that in your testimony. I think today we were seeking testimony with regard to its constitutionality, not the assertive nature of the bill or the aggressive nature of a target that the panellists have brought here today, which is whether the measures being considered are effective. I'll remind some of my government colleagues that some of the measures considered here in this bill were the same measures invoked in the *Turning the Corner* plan. The same mechanism is being considered. The ambition of the target is actually at question, unless you will provide some experience and knowledge in terms of what is actually required for Canada's goal-setting targets. But I don't believe that's your area of expertise. Am I correct?

Prof. Peter Hogg: No, I have no comment on the ambition of the target, except in the sense that we know the target will call for a wide range of severe regulatory measures, and all that is being handed to the Governor in Council without any direction.

Mr. Nathan Cullen: So to calm that fear down, again back to the specifics of what is allowed for this bill to be included...and paragraph 10(1)(a) goes through some of the measures that can be considered by government. If we were to adopt Mr. Elgie's commentary that we could give greater direction to government, to restrict government's powers when invoking the means necessary, to allow, as it is already written into the bill, the cooperation or agreements with provinces and territories, that will allow a constitutional court to have some greater confidence in the bill. Is that correct?

● (1725)

Prof. Peter Hogg: Yes. Absolutely, it will.

What the Hydro-Québec case said was that if part of the criminal prohibition is going to be designed by the executive, then Parliament itself has to provide the guidelines to carefully tailor the power and not simply hand it over to the Governor in Council.

Mr. Nathan Cullen: My last question is to Mr. Elgie.

I will go back to the orientation of our work here at committee with the contribution of the witnesses. There are two orientations. One is the attempt to disprove the merits of this bill, and I can almost see the glee amongst my Conservative colleagues when hearing Mr. Hogg's initial presentation as to its constitutionality. The second is the orientation to improve the bill, the orientation to make this bill a functioning and viable thing.

In accordance with what Canada recently agreed to on the international stage, I think the point is well made. Canada has gone forward and given what's left of its good name in terms of environmental performance to the world community to say that we have agreed in principle to these targets.

This bill is seeking to make that real, to make that live. What confidence level do you have in the ability to incorporate some of the measures that you've considered, and some of the other witnesses, to make this a viable mechanism to achieve the aspirations that Canadians are looking to have and to fulfill our international agreement?

Prof. Stewart Elgie: Responding to the spirit of the question, which is not whether it's the right target but how you get to that target, it seems to me that any lawyer who tells you they're certain of a constitutional outcome is a poor lawyer. But I think the exercise that seems to me most useful is to ask what you could do to this bill that would make it likely to withstand constitutional challenge, because almost every major federal environmental statute in the last 15 years has been constitutionally challenged.

So your goal should not be to avoid constitutional challenge, because then you'd never legislate. The Environmental Assessment Act, the Fisheries Act, CEPA, the ocean dumping act, and no doubt the Endangered Species Act—all of them are going to be challenged. And by the way, none of the environmental ones have been struck down since the mid-1970s, so the federal government has succeeded on almost all of them. But it doesn't mean they'll always succeed. You need to be careful with the drafting.

So in terms of how you draft it, I think the kinds of things we've talked about would substantially increase the likelihood of success. I agree, really, with the essence of Professor Hogg's point , and with Mr. Castrilli's, which is to say that we know a lot more about the boundaries of the criminal law power. The peace, order, and good government power is more amorphous. The court has laid out a less clear road map for that, so it's harder to be as certain. With the criminal law power, they've laid out a relatively clear road map, so you can have a higher degree of confidence in whether you're fitting within that.

So follow the road map that's already been set out. It actually wouldn't be that hard, because really if you want to restrict the powers, you have two models you could use. You could simply take the regulation-making section from CEPA dealing with how you regulate toxic substances, which is the same one you'd use if you regulated under CEPA, and just graft it in, or you could take the shorter list in Bill C-288, which is the same kind of stuff: limits on the amount of gases that may be emitted; performance standards; regulating the use and production of equipments, fuels, vehicles; emissions trading; the same kinds of things that are likely to be the core tools that Parliament is going to use. Just draft them in. That drafting has already been done, as well as I think some of the other things we've talked about, like making reference to CEPA.

The one thing I would add is that if your goal is to piggyback on CEPA, which has already been constitutionally upheld, there are two ways to get there. One of them is, as Mr. Castrilli said, simply to frame this bill as an amendment to CEPA. I haven't thought through all the changes that would need to be made to get there, but it strikes me that you might have to make a bunch of changes to draft this as an amendment to CEPA, but maybe not. He may have thought it through.

The other way to do it, though, is simply to say in this bill that the regulations to achieve this target may be made under CEPA. There's nothing wrong with saying that you may make regulations to achieve the purpose of this bill through another statute of Parliament. You could explicitly say that. It would be five words. By doing that, you would have incorporated the vehicle of CEPA, which has been constitutionally upheld.

So some changes would definitely strengthen the constitutional hand of this in a significant way, and those changes could just be taken by grafting language that's already been drafted and passed by Parliament.

● (1730)

The Chair: Thank you very much.

Members, I'm going to see the clock backwards. I've seen the Speaker move it forward; I'm going to move it back and give Mr. Harvey a seven-minute question period.

I trust that meets with your approval, Mr. Harvey.

[*Translation*]

Mr. Luc Harvey (Louis-Hébert, CPC): Thank you for being here today. I feel it is rather unfortunate that we have so little time to talk, because there are indeed so many questions to ask, particularly as far as the Constitution is concerned, and as to just how far the federal government can go in this regard.

Clearly, Bill C-377 is better than what the Liberals had scribbled out on a napkin when they opted for Kyoto. We are talking about six and a half pages here, including both the French and English versions, a bill that commits Canada to reducing greenhouse gases by more than 53%, which is covered in three and a half pages. We can see the scope of the research carried out by the NDP leader and today we have learned that his bill is not even constitutional. It is rather sad.

I have a question. We can take advantage of this, as we have Mr. McGuinty here, who is the brother of the Premier of Ontario. If the Canadian government wanted to force Ontario to close its seven coal-fired plants tomorrow morning—the main source of greenhouse gas emissions in Canada comes from coal-fired plants—how could this be done?

It is a simple question, addressed to Mr. Hogg.

[*English*]

Prof. Peter Hogg: Under the bill as it now stands, if it were not limited in the kinds of ways that Mr. Elgie and Mr. Castrilli have suggested, and if it were valid, the Governor in Council could direct that the coal-fired plants that generate electricity in Ontario be closed and be replaced with nuclear plants. That, after all, would be a measure that would have the effect of reducing greenhouse gas emissions.

Although obviously no federal government is going to do such a thing, I think it does illustrate, with respect, how very broadly this bill would empower the Governor in Council.

[*Translation*]

Mr. Luc Harvey: Would it be possible, as far as the Constitution is concerned? Could Ontario say that it is not possible or that they do not want to move so quickly, in 5 or 10 years?

[*English*]

Prof. Peter Hogg: There has been a little bit of inconclusive case law on the degree to which a federal law can bind provinces, but most of the cases say that if a federal law is passed within the scope of a federal power, it can be binding on the provinces.

Take, for example, the GST legislation, which did not impose a GST on the provinces but did impose on the provinces the obligation to collect the GST for the federal government when people were engaged in the supply of services that would otherwise require the collection of the GST. Alberta objected to that. It was challenged and went to the Supreme Court of Canada. The Supreme Court of Canada said that when Parliament was exercising its taxing power, it could impose obligations on the provinces.

Now, that's a rather trivial example, because this doesn't come up very often about the federal Parliament. But if the bill were constitutional—and I'm saying that in its present form it is not, but if it were constitutional—then yes, I believe it could close down Ontario's coal-fired electricity generating stations.

● (1735)

[*Translation*]

Mr. Luc Harvey: As we know, Quebec is in the process of building a new electrical power station. Could this bill go so far as to force Quebec to sell its extra power to Ontario in order to force that province to shut down its coal-fired plants?

[*English*]

Prof. Peter Hogg: You're pushing me a little way there. I'm not sure quite how many consequential kinds of laws could then be passed if....

Obviously that is not directly associated with the production of greenhouse gas emissions, although you're saying it's a consequence of something that is a direct reduction of greenhouse gas emissions. So I'm not sure of the answer to that one.

The Chair: Thank you, Mr. Harvey.

I guess that's something like the question “Do angels have wings?” They debated that one for 100 years, I understand, and concluded at the end that some angels do and some angels don't.

Voices: Oh, oh!

The Chair: So that was probably a good answer.

I'd like to thank our witnesses and thank members.

Before I close the meeting, I would remind members that we do have Mr. Elgie's students here. They would like to have a chance, I believe, to meet with us. Certainly if any members can stay, I'd appreciate it.

Thank you. We are adjourned.

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