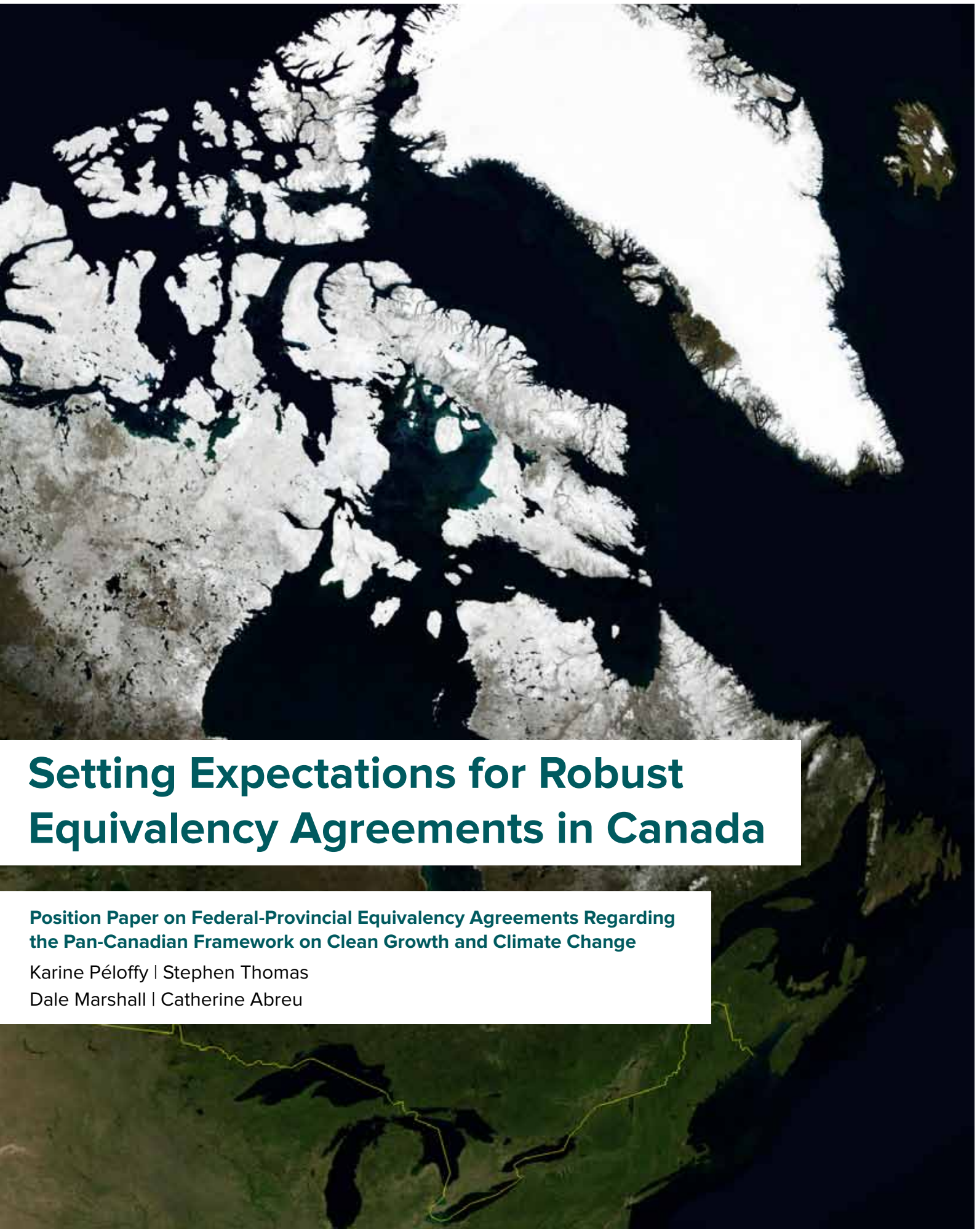

Setting Expectations for Robust Equivalency Agreements in Canada

Position Paper on Federal-Provincial Equivalency Agreements Regarding the Pan-Canadian Framework on Clean Growth and Climate Change

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Front Cover: Statellite image of Canada in June 2004.
Screenshot from NASA World Wind, Blue Marble Next-Generation layer.
Above: Global View of the Arctic Ocean in 2002. NASA Jet Propulsion Laboratory.

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Executive Summary

The Pan-Canadian Framework on Clean Growth and Climate Change (PCF) was adopted on December 9, 2016 by the federal government and all provinces and territories, with the exception of Saskatchewan and Manitoba. Alberta has since announced it would be dropping out. The foreword of the Framework states that its implementation will be consistent with Canada's commitments under the 2015 Paris Agreement, and thus "increase the level of ambition over time."

The Pan-Canadian Framework includes many greenhouse gas reductions measures and policies, several of which are expected to be adopted through the development of further regulations under the *Canadian Environmental Protection Act (CEPA), 1999*.

CEPA allows provinces to adopt their own regulations and have the federal ones stand down, but only if provincial regulations would achieve equivalent or better environmental outcomes. Consequently, a significant outcome of the PCF will be the signing of equivalency agreements between federal and provincial governments.

Final federal methane regulations under CEPA were released in April 2018, and final coal regulations under CEPA were released in December 2018. A clean fuel standard for fuels used in transportation, industry, and buildings is under development.

Another key measure of the PCF is the federal carbon pollution pricing system – the backstop – which will apply in jurisdictions that do not have carbon pricing systems. The federal backstop was enacted through the Greenhouse Gas Pollution Act, which was passed into law in June 2018. Whilst the Act does not provide for an equivalency system, lessons learned here should also apply to how the federal government will decide in which provinces the backstop will apply based on whether provincial systems are deemed equivalent or not.

This paper begins with an in-depth exploration of the historical genesis of equivalency agreements in Canada, a process that has been controversial from the moment a provision for equivalency agreements was added to the first *Canadian Environmental Protection Act (CEPA)* in 1988. To further contextualize the development of equivalency agreements, a case study is provided on the first concluded between Canada and a province concerning greenhouse gases - the *Canada-Nova Scotia Equivalency Agreement on the Reduction of Carbon Dioxide Emissions from Coal-Fired Generation of Electricity*.

Given the limited history and mixed results of equivalency agreements in Canada, Climate Action Network - Réseau action climat (CAN-Rac) Canada proposes a clear set of expectations for federal-provincial equivalency agreements arising from the Pan-Canadian Framework on Clean Growth and Climate Change. The paper explains these recommendations in detail.

Recommendation 1:
For climate regulations requiring GHG reductions, amend CEPA 1999 to include a legislative test for equivalency.

Recommendation 2:
Ensure enforcement.

Recommendation 3:
Set floors, not ceilings.

Recommendation 4:
Ensure increasing ambition over time.

Recommendation 5:
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III Introduction

The *Pan-Canadian Framework on Clean Growth and Climate Change* (PCF) was adopted on December 9, 2016 by the federal government and all provinces and territories, with the exception of Saskatchewan and Manitoba. Alberta has since announced it would be dropping out. The foreword of the Framework states that its implementation will be consistent with Canada's commitments under the 2015 Paris Agreement, and thus "increase the level of ambition over time."

The Pan-Canadian Framework includes many greenhouse gas reductions measures and policies, including: a phase out of coal-fired electricity by 2030, a clean fuel standard for fuels used in transportation, industry, and buildings, and a reduction of methane emissions from the oil and gas sector, including offshore activities, by 40-45 percent from 2012 emission levels by 2025. In particular, these three federal measures from the PCF are either in process or are expected to be adopted through the development of further regulations under the *Canadian Environmental Protection Act, 1999* (*CEPA*). Federal methane regulations under CEPA were released in April 2018, and final coal regulations under CEPA were released in December 2018.

CEPA allows provinces to adopt their own regulations and have the federal ones stand down, but only if provincial regulations would achieve equivalent or better environmental outcomes. Consequently, a significant outcome of the Pan-Canadian Framework will be the signing of equivalency agreements between federal and provincial governments.

In accordance with the terms of the Framework, "[n]ew policies will be designed to focus on GHG-emission outcomes and will recognize flexibility for regional differences, including through outcomes-based regulatory equivalency agreements." More specifically, the Framework states that measures to reduce methane emissions may include equivalency agreements.

Another key measure of the PCF is the federal carbon pollution pricing system – the backstop –, which will apply in jurisdictions that do not have carbon pricing systems. The federal backstop was enacted through the Greenhouse Gas Pollution Act, which was passed into law in June 2018. Whilst the Act does not provide for an equivalency system, lessons learned here should also apply to how the federal government will decide in which provinces the backstop will apply based on whether provincial systems are deemed equivalent or not.

1. Historical and Legal Context of Equivalency Agreements in Canada

A. Genesis of Equivalency Agreements in Canada

The federal Minister of the Environment and Climate Change is authorized to enter into equivalency agreements between the federal government and a second-tier government (provincial, territorial or Aboriginal government), to be signed under *CEPA* s.10. Such agreements stipulate that a federal regulation enacted under *CEPA* will be rendered non-enforceable within the territorial jurisdiction of the second-tier government, on condition that the second-tier government's provision is declared to be equivalent to that of the federal government.

That process has been controversial from the moment a provision for equivalency agreements was added to the first *Canadian Environmental Protection Act (CEPA)* in 1988. A number of factors contributed to the decision.

Equivalency arrangements were included at the last moment through "behind closed door meetings with the provinces" to the great disappointment of the environmental community, which had been heavily involved in helping the federal government develop effective legislation on toxic substances. It was suggested that the federal government had received conservative legal advice on its constitutional authority to enact *CEPA*. Provinces exerted pressure and threatened constitutional court challenges. Industrial interests, who opposed *CEPA*, advocated in favour of equivalency mechanisms. In short, the provision allowed the federal government to pass the costs of environmental regulation on to the provinces, all while avoiding constitutional conflicts, even if equivalency agreements:

> "...effectively and deliberately undermine the federal government's ability to implement a comprehensive nationwide toxics program. Clearly, extensive use of the equivalency provisions can only result in a patchwork of inconsistent regulations and enforcement practices across Canada. Different penalties for essentially the same offenses may be established, and this may result in so-called 'pollution havens.'"

These concerns are just as relevant today in the context of the PCF.

At their best, equivalency agreements can address the complexities that may arise from duplicate environmental regulations in a given territory, most notably stemming from shared constitutional jurisdiction over the environment between the federal and provincial levels of government. An agreement signed between a province and the federal government "may encourage efficiency by preventing overlapping regulation by different levels of government on the same issue and may encourage cooperation between the provinces and the federal government."

Federal and provincial governments have previously entered into two equivalency agreements, under *CEPA 1988* and *1999* respectively: the 1994 Alberta Equivalency Agreement (*Agreement on the Equivalency of Federal and Alberta Regulations for the Control of Toxic Substances in Alberta)*, enacted under the statutory framework of *CEPA 1988,* and the 2015 Nova Scotia Equivalency Agreement (*An Agreement on the Equivalency of Federal and Nova Scotia Regulations for the Control of Greenhouse Gas Emissions from Electricity Producers in Nova Scotia*), enacted under section 10 of *CEPA 1999*. The vast majority of federal-provincial agreements entered into under *CEPA* have been administrative in nature and governed by section 9, reproduced in Annex 1).

III B. Constitutional and Legislative Background to Equivalency Agreements

Equivalency agreements are premised on the idea that each level of government has constitutionally valid legislation on the relevant matter. Thus, the constitutional validity of each jurisdiction's legislation must be determined at a preliminary stage, even if in practice new legislation has been adopted in the context of the negotiation of an equivalency agreement.

"In exercising their respective legislative powers, both levels of government may affect the environment, either by acting or not acting". Further,

> "...'environmental management' does not, under the existing situation, constitute a homogeneous constitutional unit. Instead, it cuts across many different areas of constitutional responsibility, some federal and some provincial. And it is no less obvious that 'environmental management' could never be treated as a constitutional unit under one order of government in any constitution that claimed to be federal, because no system in which one government was so powerful would be federal."

Thus, it is established under Canadian law that both the federal and provincial levels of government have jurisdiction to enact environmental regulations, in accordance with their respective constitutional heads of power.

i) Constitutional jurisdiction over climate change

The issue of federal jurisdiction over climate change is complex. Federal jurisdiction to regulate GHG emissions under its criminal law power is well established. Additional grounds for federal jurisdiction identified by jurists include the interprovincial and international nature of the impacts of climate change, the residual federal powers over matters of national concern and emergencies under the principle of Peace, Order, and Good Government (POGG), trade and commerce and the declaratory power, providing for "ample authority within the Constitution for a strong federal role in regulating GHG emissions and pricing carbon without displacing appropriately scoped provincial climate programs." The main heads of powers are briefly reviewed below.

Provinces have the authority to regulate greenhouse gas emissions under their property and civil rights power. The Courts have held that "when the matter is one of provincial jurisdiction, a province is not prevented from imposing stiffer requirements than those which the federal Parliament may have prescribed."

Regulations to reduce methane emissions or phase out coal power are most likely to be justified by the federal government's criminal law power, which grants Parliament the ability to "deal with and make laws with regard to new realities, such as pollution, […] that are considered undesirable. Thus, Parliament retains flexibility in making decisions to prohibit conduct it considers reprehensible and to prevent the undesirable effects of such conduct." The *Syncrude decision confirmed that the federal government can use its criminal law power to regulate GHGs. It was also specified in this case that the purpose of criminal law is to modify behaviour, and not simply to criminalize specific activities. A justification of the methane or coal regulations on the basis of the federal government's criminal law power is likely to be accepted, as "[t]he courts have often upheld laws aimed at changing behaviour without fully prohibiting the central activity.*"

Beyond the criminal law power, federal jurisdiction could potentially rest on its residual power over matters of interprovincial concern not specifically allocated to either federal or provincial authority under the Constitution.

The federal government could justify climate change-related regulations on the basis of POGG, on the condition that the courts determine the policy to be of national concern. However, in order to qualify, the matter must also have a "singleness, distinctiveness and indivisibility" that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution" Thus, the courts could apply a test of asking what could happen if one province failed to deal effectively with the issue within its borders." For instance, a province's failure to pass methane regulations that were equivalent or better than the federal ones could "undermine other provinces' efforts to reduce GHGs or Ottawa's chances of meeting its international targets." According to professors Chalifour and Elgie, "[t]he fact that the law targets a specific group of pollutants covered by the Paris climate accord also strengthens Ottawa's case under POGG, as does the fact that it has been designed to minimize impact on provincial authority – by deferring to equivalent provincial laws." For professor Chalifour:

> "One of most compelling ways to justify authority for legislation with a GHG emissions reduction purpose under the National Concern branch would be to show that the failure of one province to deal with the problem could injure the residents of other provinces. For example, if a province, say Alberta or Saskatchewan, were to fail to reduce its GHG emissions, the effects on another province, say an Atlantic province or a Northern Territory, might be increased risks to human health, food security and/or economic harms from climate- related impacts. To make it even more concrete, consider that P.E.I. is losing an estimated 28 cm of shoreline every year, and that the winter road infrastructure of the three Territories is compromised due to melting permafrost. Saskatchewan's (or another province's) failure to effectively mitigate its GHG emissions could have serious effects on P.E.I.'s shoreline or the NWT's road infrastructure."

Still, it bears mentioning that the federal government's POGG power "has been circumscribed by the courts over the years to minimize federal intrusion into provincial jurisdiction."

Both federal and provincial levels of legislation apply unless "one law expressly contradicts the other in the sense that it is impossible to comply with both laws," but this rarely occurs. For instance, "if the federal and provincial regulations prescribed different levels of emissions reductions for a particular firm, that would not count as an express contradiction; the firm could comply with both laws by meeting the more stringent standard, whether that standard was the federal one or the provincial one". The other case of conflict, frustration of federal purpose, only occurs rarely, in situations "where the provincial law would frustrate the purpose of the federal law". According to Professor Hogg, "[i]t is possible that a court would hold that a provincial cap-and-trade system would frustrate the purpose of a similar federal system, but since the purpose of the two laws are basically the same (to reduce greenhouse gas emissions), this is unlikely". Arguably, only an insufficiently ambitious or rigorous provincial reduction system could frustrate a federal purpose, and this is precisely what equivalency agreements would seek to achieve.

ii) Constitutionality of equivalency agreements

Canadian jurisprudence has long upheld the principle established in *Prince Edward Island (Potato Marketing Board) v. H.B. Willis* "that where one order of government wishes to use the same inspectors or agents as another order of government to fulfil a role for which it is responsible, this may be accomplished by both orders of government designating the same persons or agencies to fulfil their respective roles and responsibilities." In addition, an order of government wishing to adopt identical standards to those of another order of government for the purpose of regulating

a given activity can do so via incorporation by reference, "so that the standards adopted by one are incorporated by reference into the legislation of the other".

By contrast, several questions of constitutionality are raised if equivalency agreements result in devolution of jurisdiction or decision-making power from the federal to provincial levels of government. According to Hogg, "[t]he only vestige of a prohibition against inter-delegation which now remains is the rule that one legislative body cannot enlarge the powers of another by authorizing the latter to enact laws which would have no significance and validity independent of the delegation." In order to evaluate the constitutionality of a delegation of power, it must be determined "whether the scheme of inter-delegation purports to enlarge the powers of one of the primary legislative bodies." A delegation of powers is constitutionally valid on the condition that it does not give rise to such an enlargement of powers. So it must be determined whether a given equivalency agreement constitutes a constitutionally invalid delegation of legislative powers, or a constitutionally valid delegation of administrative functions.

Another view is that, while equivalency agreements may not entail an improper legislative delegation of power that would violate the constitutional division of powers in a strict sense, the devolution of decision-making that results from these agreements may in fact contravene several constitutional principles:

> "There may be impermissible interdelegation where, by agreement or exercise of executive authority, the federal government agrees not to exercise its legislative powers, refuses to intervene, or gives discretion to the province in the administration and enforcement of federal law that amounts to a policy and law-making function. Finally, even if there is no legislative delegation as a matter of black-letter law, intergovernmental arrangements should be examined in order to determine whether they offend the *principles* of responsible government and accountability and the *federalism values* which motivated the rule against legislative interdelegation in the first place."

In this context, it will be important that the federal government keeps powers of oversight, does not allow for provincial discretion in the administration and enforcement of equivalency agreements as well as the threat of direct application of federal law in case of provincial non-compliance with the terms of the equivalency agreement.

iii) Legislative context of equivalency agreements under *CEPA*

The scope of *CEPA* regulations which can be subject to an equivalency agreement is limited by s.10(1) and (2) to only certain sections of *CEPA*. These include section 93(1), which allows for federal regulation of toxic substances. Greenhouse gases have been declared to be toxic substances, therefore "federal GHG emissions control regulations fall into this category." That would include regulations under CEPA on upstream oil and gas methane, coal-fired power, and the Clean Fuel Standard.

Equivalency agreements are only one part of the legislative equivalency framework (see section 10 reproduced in Annex 2). When an equivalency agreement is reached, "the Governor in Council can suspend the application of the specified *CEPA 1999* regulations in the signing province [through an equivalency order], so that only the equivalent provincial regime applies".

The recommendations in Section 2 of this report address aspects of the legal framework relevant to the rigorous design of future equivalency agreements.

iv) Legal validity and enforceability of intergovernmental agreements

Intergovernmental arrangements for environmental management have been described as a "twilight zone" that often culminates in agreements that "largely escape legislative control and judicial review".

Federal-provincial agreements such as the Pan-Canadian Framework are different from ordinary contracts, and the performance obligations embodied in ordinary contracts may not necessarily be observed in intergovernmental agreements adopted under a legislative scheme. Parliamentary sovereignty implies that the government cannot bind Parliament as to the substance of future legislation:

> If this appears to deprive the Agreement of binding effect or mutuality, which are both features of ordinary contracts, it must be remembered that this is not an ordinary contract but an agreement between governments. Moreover, para. 8 of section 10 itself contains an amending formula that enables either party to terminate at will. In lieu of relying on mutually binding reciprocal undertakings, which promote the observance of ordinary contractual obligations, these parties were content to rely on the perceived political price to be paid for non-performance. *(Emphasis added)*

The extent to which this reasoning applies to equivalency agreements under *CEPA 1999* s.10 is open for debate, with few sources available for guidance. On one hand, equivalency agreements would not violate the principle of Parliamentary sovereignty because they only provide for the suspension of a regulation, which is within the purview of government, not Parliament. On the other hand, *CEPA* s.10(8) provides that agreements may be terminated upon notice, which could militate against its legal enforceability. On the other hand, it could mean the federal decree could be rescinded, at which point federal regulation would apply once again in the province, which could have drastic effects, therefore militating in favour against unilateral termination or weak administration and enforcement by the province.

Concerns have arisen with similar intergovernmental agreements in the environmental sphere. The heart of a lawsuit brought by *Canadian Environmental Law Association* expressing concern over federal-provincial agreements signed under the *Canada-Wide Accord on Environmental Harmonization* was that it would "establish a structure under which the respective governments will rearrange among themselves their roles and responsibilities, and this will obligate the federal government to refuse to exercise some of its jurisdiction in environmental matters, and thus lead to a diminution in environmental protection for Canadians".

The Attorney General of Canada argued that there was "no legal content to the issues that have been placed before the Court," as "the agreements are statements of political intention by governments, […] they constitute statements of policy goals, and […] they do not affect legal rights or have legal consequences." Consequently, the counsel for the Minister asserted "that the parties cannot be compelled to comply with the agreements and that they cannot be prevented from acting within their respective jurisdictions, notwithstanding that such actions may contravene the agreements." The Court recognized that the federal-provincial agreements made under the umbrella agreement, the Canada-Wide Accord on Environmental Harmonization, "contain statements of political intention, objectives that the respective governments hope to implement", and decided they must be characterized "as agreements in principle, under which further decisions must be taken before the specific matters to which they apply can be known."

As such, the Court dismissed the case. However, subsequent developments led to the adoption of Canada-Wide Standards, "formal agreements signed between the Federal government and all of the provincial governments [that] engage the different parties to respect the agreement and meet the standards within a certain period of time and put in place appropriate measures". They were adopted under s.9 of *CEPA 1999*, which governs administrative

agreements, and, according to the OECD, are not strictly legally binding.

While equivalency orders enacted by the Governor in Council under s.10(3) after an equivalency agreement is concluded are legally binding, they simply state that federal laws will not apply in a given province/territory, and do not affect the enforceability of the obligations and targets set out in equivalency agreements. The orders that accompanied the two existing equivalency agreements with Nova Scotia and Alberta discussed below were very brief, comprising only two provisions, and did not restate provisions of the equivalency agreement.

Due to the uncertainty surrounding the legal validity and enforceability of equivalency agreements by both governments or third parties, it is recommended that equivalency orders include the entire equivalency agreement as conditions precedent to the issuance of the order.

III C. Case Study: The 2015 Canada-Nova Scotia Equivalency Agreement

The Nova Scotia EA, the first concluded between Canada and a province concerning greenhouse gases, is the most relevant for future EAs under the PCF, and is analyzed below in contrast with the Alberta 1994 EA. The 2015 equivalency agreement signed between Nova Scotia and the federal government specifically addresses the regulation of coal-fired electricity greenhouse gas emissions. The Nova Scotia Equivalency Agreement's expressed intent is to "avoid duplication of effort in controlling greenhouse gas emissions". The Agreement provides that "[t]he effect on greenhouse gas emissions levels of the limits, determined in tonnes of carbon dioxide equivalent, that are applicable under the [provincially-legislated] *Environment Act* and the *Greenhouse Gas Emissions Regulations* is […] equivalent to the effect on greenhouse gas emissions levels of the limits imposed under the *CEPA* and the *Reduction of Carbon Dioxide Emissions from Coal-Fired Generation of Electricity Regulations*" (CFGRs), for the calendar years of 2015-2019 and from 2020-2030.

The purpose of the Nova Scotia Agreement "is to allow existing coal fired facilities to continue generating even though they will not be able to meet the standards prescribed by the federal regulations". The federally-enacted CFGRs "establish a performance standard of 420 tonnes of carbon dioxide per gigawatt-hour (tCO2/GWh) for new coal-fired electricity generation units and those that have reached the end of their useful life". In order to comply with these regulations, Nova Scotia would have been required to "retire its coal fired units totalling 952 MW of capacity between 2020 and 2030". The government of Nova Scotia "sought to avoid this result (with the implication that it would need to build new natural gas capacity) and therefore entered into negotiations for an equivalency agreement".

Given that this equivalency agreement is outcome-based, like those announced under the PCF, "[a] finding of equivalency is justified on the basis that Nova Scotia will achieve reductions equivalent to those that will be achieved through the federal regulations by reduced generation at coal facilities and by other measures that have nothing to do with the coal sector". Among these measures are Nova Scotia's "commitment to increase the share of renewable energy in the province's energy mix through a number of initiatives including a feed in tariff program, and support for the Muskrat Falls hydro project, as well as various energy efficiency programs including smart metering." In the process of negotiating the agreement, and as a pre-condition to the issuance of the equivalency order, Nova Scotia agreed to adopt a hard cap on emissions in the electricity sector by "amend[ing] its regulations to ensure that electricity producers must meet certain caps prescribed in the Agreement," in order to provide "some certainty as to reduced emissions in the sector."

It is worth noting that this equivalency agreement accounts for the period of time that follows the automatic termination of the agreement required by section 10(8) of *CEPA*, five years after that agreement comes into effect. This is because the Government of Canada wanted to be satisfied that the NS GHG regulations would continue to result in a GHG emissions outcome equivalent to what would have occurred under the federal coal-fired electricity regulations after 2019. The aim is to provide regulatory certainty, over the longer term, both to allow industry to make informed investment decisions and to facilitate the renewal of the equivalency agreement following its initial five-year term. This approach mitigates the risk that the NS GHG regulations would not be deemed to have an equivalent effect on GHG emissions in the future, resulting in the sudden application of the federal coal-fired electricity regulations in the province. Such a situation could lead to immediate closures of coal-fired plants, disruption to Nova Scotia's electricity supply, and/or a possible situation of non-compliance with the federal coal-fired electricity regulations, for which the province's electricity producer could face large fines and penalties.

Importantly, since there is no legal definition for the notion of equivalency, it is currently a political determination. This gap will have to be corrected for equivalency agreements to be robust. Still, for the Nova Scotia EA, Environment Canada conducted a Regulatory Impact Analysis Statement (RIAS) that detailed the methodology the government

applied to determine equivalency, and which may inform future equivalency determinations. The RIAS essentially consists of a cost-benefit analysis that tests the existence of equivalency through a comparison of two future outcomes: a business as usual (BAU) scenario, and the regulatory scenario.

The BAU scenario estimates "what the electricity generation sector in the province will look like in the future if the proposed OiC is not implemented." In other words, the equivalency agreement is assumed to have not been concluded, and consequently "the federal coal-fired electricity regulations [in addition to other applicable provincial measures] would continue to be in effect and the electricity producer would retire its coal-fired units at the end of their useful life." The regulatory scenario "establishes what the electricity generation sector is expected to look like with the implementation of the proposed Order in Council (i.e. the federal regulations are backed out and the incremental provincial commitments apply)."

The RIAS determined that "[t]he proposed OiC and the 2021–2030 provincial GHG emission caps are expected to result in a cumulative reduction in generation from coal units and natural gas units relative to the BAU scenario," as well as "cumulative reductions in GHG emissions over 2015–2030 compared to the BAU scenario." According to the RIAS, the proposed OiC and the 2021–2030 provincial GHG emission caps on the sector introduced as a precondition to the EA were expected to result in an incremental reduction of 0.3 Mt CO_2e of GHG emissions compared to the BAU approach between 2015 and 2020. The regulatory scenario produced an incremental reduction of about 3 Mt CO_2e of GHG emissions compared to the BAU approach over the 2021-2030 period.

The RIAS also analyzed the NO_x, SO_x and particulate matter emissions of the BAU and that of the regulatory scenario, in Section 8.7.2, "Potential health and environmental impacts of changes in air pollutant emissions". Future Equivalency Agreement processes should also consider these non-GHG emissions and potential health and environmental impacts.

Environment Canada concluded that an equivalency did in fact exist, and recommended the enactment of an order in council:

> "GHG emission levels from Nova Scotia's electricity sector that would have occurred under the federal coal-fired electricity regulations were modelled by Environment Canada and compared to those expected to occur under the Nova Scotia GHG regulations both for the period of the equivalency agreement (2015–2019) and for the 2020–2030 period.
>
> "Environment Canada is satisfied that the effect on GHG emission levels of the limits, determined in tonnes of CO_2e, that are applicable under Nova Scotia's *Environment Act* and the *Greenhouse Gas Emissions Regulations* is, for the calendar years 2015 to 2019, and is expected to be, for the calendar years 2020 to 2030, equivalent to the effect on emission levels of the limits imposed under CEPA 1999 and the *Reduction of Carbon Dioxide Emissions from Coal-fired Generation of Electricity Regulations*. The effect of the GHG emission limits under each regime will be re-evaluated prior to amending or renewing the agreement, to ensure that CEPA 1999 conditions for the equivalency agreement continue to be satisfied.
>
> "Environment Canada is also satisfied that Nova Scotia's *Environment Act* contains mechanisms that are similar to sections 17 and 20 of CEPA 1999 for the investigation of alleged offences, and therefore that all CEPA requirements related to equivalency agreements have been met.
>
> "An order in council suspending the application of the federal coal-fired electricity regulations in Nova Scotia is recommended to minimize regulatory duplication in Nova Scotia, and to allow the province to attain agreed GHG outcomes in a way that best suits its particular circumstances.

> "This approach reduces regulatory duplication and financial burden, resulting in a NPV [net present value] of $122 million. This is in line with Government of Canada objectives regarding regulatory coordination and cooperation with relevant jurisdictions."

The E3MC model and the underlying data and assumptions on which this analysis rests are not accessible to the public, making it very difficult to assess whether the approach is robust. For example:

The avoided cost of decommissioning coal facilities is a quantified benefit under the analysis, with no consideration for the fact that those costs are simply delayed beyond the time scale for which equivalency is established.

- It is not clear why reduced cumulative electricity exports are counted as a benefit.
- The social cost of carbon was calculated based on CO2 equivalents, as was Environment Canada's approach at the time. Future RIAS should factor in the social costs of other GHGs (NO2 and CH4) that have since been introduced.
- The RIAS includes an analysis of whether small businesses would be affected, but fails to consider whether costs will simply be passed on to electricity consumers, which is a very important concern.

The ensuing equivalency order, *Order Declaring that the Reduction of Carbon Dioxide Emissions from Coal-fired Generation of Electricity Regulations Do Not Apply in Nova Scotia*, entered into force on July 1, 2015 and is very brief, containing only two articles (see Annex 3).

2. Expectations for Equivalency Agreements

Given the limited history and mixed results of equivalency agreements in Canada, CAN-Rac proposes a clear set of expectations for federal-provincial equivalency agreements arising from the Pan-Canadian Framework on Clean Growth and Climate Change.

Going forward, effective implementation of the federal regulations, and provincial ones where equivalency agreements have been established, will need to be a key focus. Indeed, laws do not self implement and past experience with other environmental issues involving both jurisdictions indicates a general federal unwillingness to intervene in order to protect the environment where the provinces fail to effectively do so. The Species At Risk Act is one example of this dynamic, where the federal government is consistently reluctant to protect species at risk under provincial jurisdiction despite clear powers to do so. Therefore implementation of the equivalency framework, including enforcement mechanisms, will be key.

The current process for establishing equivalency agreements is highly political and, partly for this reason, lacks transparency. To avoid the needless bureaucratic complexities that might otherwise underpin a decision to issue an equivalency order, it's important to set clear benchmarks and expectations—especially as the country moves forward on its commitments under the Pan-Canadian Framework. It's important to set clear benchmarks and expectations as we move forward.

Recommendations:

Recommendation 1

- **For climate regulations requiring GHG reductions, amend CEPA 1999 to include a legislative test for equivalency:** In the context of regulations targeting climate mitigation outcomes (i.e. GHG emissions reductions), the absence of a legislated test for a finding of equivalency is the most important gap to be filled. CEPA currently does not define "equivalency", so this crucial underlying detail is left to political consideration rather than rigorous determination. Ideally, the federal law, regulation and / or practice would include a test that requires substantive equivalency of outcomes between federal and provincial environmental regimes - in this case in terms of quantitative GHG reductions- before an equivalency order can be issued. It should be required to demonstrate within the equivalency agreement that in coming to that determination, the following factors have been taken into account:
  - The potentially different nature of regulatory systems in place, and the resulting difference in uncertainty, with transparent modelling.
  - Variable baseline years for targets across jurisdictions, taking into account the ambition in past targets that pre-date the PCF.
  - Synergies and interplays across different regulatory and market instruments. For example, avoid the risk that regulatory measures could result in a huge volume of free credits flooding a cap and trade system.
  - The full range of environmental and health outcomes anticipated as a result of the federal rule (see Recommendation 8).

  Finally, federal and provincial emissions targets subject to outcome-based equivalency arrangements must be legislated and legally binding.

Recommendation 2

- **Ensure enforcement:** Enforcement of environmental law by both levels of government is a major issue in Canada, beginning with the risk that administrative federalism could undermine the federal government's ability to compensate for provincial inaction, and vice versa. Enforcement provisions must also consider that the federal government may lack the political will to intervene in a province's handling of environmental protection if it does not comply with the terms of an equivalency agreement. The new regime should ensure varied options for enforcement by both levels of governments and third parties, including investigative procedures that are "equivalent" rather than "similar" to *CEPA* and provisions for citizen legal action that cannot be arbitrarily stayed by the attorney general.

Recommendation 3

- **Set floors, not ceilings**: Terms of equivalency should not lead to outcomes that are less ambitious than those foreseen under the federal or provincial reference case, nor prevent provinces from doing more.
  The government can include a provision similar to Principle 11 of the *Canada-Wide Accord on Environmental Harmonization* in the statutory framework for enacting equivalency agreements: "[T]he environmental measures established and implemented in accordance with this Accord [law] will not prevent a government from introducing more stringent environmental measures to reflect specific circumstances or to protect environments or environmental values located within its jurisdiction, [including GHGs]." Further, if the established federal regulations are less ambitious a province's *pre-existing* commitment, that commitment should stand.

Recommendation 4

- **Ensure increasing ambition over time:** Success in achieving past policy goals should be celebrated, but should not be used as a tool to ensure weakened future ambition. Caution should be used when considering past actions as reason for justifying non-equivalent future environmental outcomes. Over achievement during the duration of the term of one Equivalency Agreement should not be used to balance deficiencies in the outcomes of a future Equivalency Agreement.

Recommendation 5

- **Ensure flexibility and drive progress**: Long-term, cost-effective GHG policy must drive increasingly stringent GHG ambition, with "updating to address economic growth and decline. At the extreme, flexibility also means equivalency agreements may need to be abandoned should they impede the alignment of subnational systems, or if they become too complicated in practice." Five-year terms under *CEPA* s. 10 (8) should be timed to coincide with Canada's stocktaking and increasing ambition under the Paris Agreement. Equivalency agreements should also be open to revision to ensure transformational rather than marginal GHG reductions.

Recommendation 6

- **Include accountability measures:** There are several ways to ensure transparency and oversight:
  i. The federal government should refrain from delegating all responsibility for greenhouse gas reporting to a province or territory. When any such responsibility is delegated, it is imperative that the subnational jurisdiction meet federal standards for reporting greenhouse gases.
  ii. Information shared under equivalency agreements must be made public by default, rather than subject to access to information requests. Determinations of equivalency must be made transparently, using open-access models that make underlying assumptions explicit with freely accessible data.
  iii. EA implementation must be subject to frequent performance reviews, preferably by an independent party such as the Auditor General of Canada or the Commissioner of the Environment and Sustainable Development, before they can be renewed.

Recommendation 7

- **Ensure fairness in single-sector approaches:** For equivalency with policy measures intended for a single sector, such as the phase out of coal-fired electricity or reduction of methane in upstream oil and gas, elements of equivalency must remain within that sector to maintain the intent of the original emissions reduction policy and ensure fairness within and among sectors. A multi-sector approach would introduce much complexity in emissions accounting to ensure reductions are not double-counted in any future RIAS, and risks reducing incentives to achieve reductions through more ambitious policy.

Recommendation 8

- **Ensure health and environmental outcomes are considered**: For equivalency with policy measures intended to reduce greenhouse gas emissions, it is also important to consider potential health and environmental impacts from emissions other than GHGs, as well. For example, the amount of reductions of NO_x, SO_x and particulate matter emissions of the BAU and that of the equivalency scenario for coal phase-out policies should be included, along with the health benefits of those reductions.

III Annexes

Annex 1: Administrative Agreements under Section 9 of *CEPA*

Administrative agreements "are working arrangements between the federal government and provincial and territorial governments to streamline efforts in administering regulations […] usually cover[ing] inspections, enforcement, monitoring and reporting, and so forth, with each jurisdiction retaining its legal authorities". Provincial and federal governments have entered into administrative agreements as an alternative to the Section 10 framework of equivalency arrangements when facing duplicate or conflicting obligations under legislation adopted by each of the orders of government. The statutory framework for administrative agreements is provided for under section 9 of *CEPA*, and establishes the same obligations for the federal government as section 10 with regard to public consultation, publishing, and reporting to Parliament. Administrative agreements differ from equivalency agreements, in that both the federal and provincial regulations remain enforced after an administrative agreement is reached. Thus, administrative agreements "represent cooperation towards a common goal, rather than a delegation of authority under CEPA 1999". Unlike equivalency agreements, administrative agreements do not require an order by the Governor in Council to enter into effect. Furthermore, it is important to note that the statutory framework of administrative agreements under section 9 of *CEPA*, unlike that of equivalency agreements under section 10, contains a provision preventing backsliding – section 9(9) – which reads: "No agreement made under this section shall limit or restrict the carrying out of any action the Minister deems necessary for the administration and enforcement of this Act, including the conduct of inspections or investigations."

To date, two administrative agreements between the federal government and individual provinces have been entered into under section 9. The *Canada-Saskatchewan Administrative Agreement for the Canadian Environmental Protection Act* "establish[es] a work-sharing arrangement for the cooperative administration of *CEPA*, *EMPA*, *CAA*, *ODSCA* and *SOERA*," in view of each government's stated commitment to "maximizing cooperation and coordination in their respective compliance and enforcement programs". The 2012 *Canada-Quebec Bilateral Agreement Regarding the Application in Quebec of the Federal Environmental Regulations Pertaining to the Pulp and Paper and Metal Mining Sectors*, the latest of administrative agreements between Quebec and Canada concerning the pulp and paper sector since 1994, also favours coordination of federal and provincial regulations, "recogniz[ing] Quebec as the principal interlocutor for receiving, from the pulp and paper sector, most of the data and information required pursuant to" *CEPA* and *Fisheries Act* regulations. Under the terms of the agreement, Quebec "acts as a 'single window' for the gathering of information from Quebec pulp and paper manufacturers and forwards such information to Environment and Climate Change Canada for the purpose of enabling the latter to implement its Act". Both the federal and provincial levels of government "retain full responsibility for carrying out inspections and investigations and for taking appropriate enforcement measures in order to ensure compliance with their respective requirements on the part of the industry" under this agreement.

In addition to the Quebec and Saskatchewan agreements, a variety of agreements that are not administrative agreements in the strict sense have also been entered into through the statutory framework of section 9:

> Under Section 9 of the Canadian Environmental Protection Act (CEPA) 1999, the federal government may negotiate an agreement with provinces and territories for the purpose of promoting co-ordinated environmental management. These agreements are work-sharing arrangements that can cover any matter

> related to the administration of the Act and represent co-operation and co-ordination of efforts to focus priorities for future actions. Nothing in these agreements releases the federal government from any of its responsibilities under the law, nor do they delegate legislative power from one government to another.

These agreements enacted under section 9 can be bilateral (between the federal government and one province in particular), or multilateral (between the federal government and various provinces). Multilateral agreements entered into under section 9 include the Canada-wide Standards and the *Agreement Respecting the National Air Pollution Surveillance (NAPS) Program Memorandum of Understanding (MOU)* of April 2010, negotiated between the federal government and all provinces and territories with the exception of Nunavut. Bilateral agreements entered into under section 9 include:

a) Canada-Ontario agreement on Great Lakes water quality and ecosystem health, 2014
b) Canada–Ontario agreement respecting the Great Lakes basin ecosystem (2007-2010)
c) Canada-Alberta agreement on emission inventory cooperation
d) Canada-Alberta environmental occurrences notification agreement
e) Canada-British Columbia environmental occurrences notification agreement
f) Canada-Manitoba environmental occurrences notification agreement
g) Canada-Northwest Territories environmental occurrences notification agreement
h) Canada-Ontario environmental occurrences notification agreement
i) Canada-Saskatchewan environmental occurrences notification agreement
j) Canada-Yukon environmental occurrences notification agreement
k) Environmental performance agreements

Section 9 CEPA – Agreements Respecting Administration

Negotiation of agreement

9 (1) The Minister may negotiate an agreement with a government or with an aboriginal people with respect to the administration of this Act.

Publication of negotiated agreements

(2) The Minister shall publish any agreement negotiated under subsection (1) before it is entered into, or give notice of its availability, in the *Canada Gazette* and in any other manner that the Minister considers appropriate.

Comments or objections

(3) Within 60 days after the publication of an agreement or notice of its availability under subsection (2), any person may file with the Minister comments or a notice of objection.

Publication by Minister of results

(4) After the end of the period of 60 days referred to in subsection (3), the Minister shall publish in the *Canada Gazette* and in any other manner that the Minister considers appropriate a report or a notice of the availability of a report that summarizes how any comments or notices of objection were dealt with.

Entering into agreements

(5) The Minister may, after publishing a report or notice under subsection (4),

(a) with the approval of the Governor in Council, enter into an agreement with a government or an aboriginal people with respect to the administration of this Act; and

(b) subject to any terms and conditions that the Governor in Council may specify in the approval, agree to amendments of the agreement.

Publication of final agreements

(6) The Minister shall publish any agreement under subsection (5), or give notice of its availability, in the *Canada Gazette* and in any other manner that the Minister considers appropriate.

Termination

(7) An agreement made under subsection (5) terminates five years after the date on which it comes into force or may be terminated earlier by either party giving the other at least three months notice.

Annual report

(8) The Minister shall include in the annual report required by section 342 a report on the administration of this Act under agreements made under subsection (5).

Action not limited by Agreement

(9) No agreement made under this section shall limit or restrict the carrying out of any action the Minister deems necessary for the administration and enforcement of this Act, including the conduct of inspections or investigations.

Annex 2: Section 10 of CEPA - Agreements Respecting Equivalent Provisions

Non-application of regulations

10 (1) Except with respect to Her Majesty in right of Canada, the provisions of a regulation made under subsection 93(1), 200(1) or 209(1) or (2) do not apply within the jurisdiction of a government for which there is in force an order, made under subsection (3), declaring that the provisions do not apply within that jurisdiction.

Non-application of regulations

(2) Except with respect to a federal source, the provisions of a regulation made under section 167 or 177 do not apply within the jurisdiction of a government for which there is in force an order, made under subsection (3), declaring that the provisions do not apply within that jurisdiction.

Declaration of equivalent provisions

(3) Subject to subsections (4), (5) and (6), where the Minister and a government agree in writing that there are in force by or under the laws applicable to the jurisdiction of the government

(a) provisions that are equivalent to a regulation made under a provision referred to in subsection (1) or (2), and

(b) provisions that are similar to sections 17 to 20 for the investigation of alleged offences under environmental legislation of that jurisdiction, the Governor in Council may, on the recommendation of the Minister, make an order declaring that the provisions of the regulation do not apply in an area under the jurisdiction of the government.

Publication of agreements

(4) The Minister shall publish any agreement referred to in subsection (3) before it is entered into, or give notice of its availability, in the *Canada Gazette* and in any other manner that the Minister considers appropriate.

Comments or objections

(5) Within 60 days after the publication of an agreement or notice of its availability under subsection (4), any person may file with the Minister comments or a notice of objection.

Publication by Minister of results

(6) After the end of the period of 60 days referred to in subsection (5), the Minister shall publish in the *Canada Gazette* and in any other manner that the Minister considers appropriate a report or a notice of the availability of a report that summarizes how any comments or notices of objection were dealt with.

Publication of final agreements

(7) The Minister shall publish any agreement referred to in subsection (3) after it is entered into, or give notice of its availability, in the *Canada Gazette* and in any other manner that the Minister considers appropriate.

Termination

(8) An agreement made under subsection (3) terminates five years after the date on which it comes into force or may be terminated earlier by either party giving the other at least three months notice.

Revocation of order

(9) The Governor in Council may, on the recommendation of the Minister, revoke an order made under subsection (3) if the agreement referred to in that subsection terminates or is terminated.

Report to Parliament

(10) The Minister shall include in the annual report required by section 342 a report on the administration of this section.

Annex 3: Order Declaring that the Reduction of Carbon Dioxide Emissions from Coal-fired Generation of Electricity Regulations Do Not Apply in Nova Scotia

Declaration
Non-application

1 The *Reduction of Carbon Dioxide Emissions from Coal-fired Generation of Electricity Regulations* do not apply in Nova Scotia.

Coming into Force
July 1, 2015

2 This Order comes into force on July 1, 2015.

Annex 4: CEPA provisions on investigations and actions.

Investigation of Offences
Marginal note: Application for investigation by Minister

- **17 (1)** An individual who is resident in Canada and at least 18 years of age may apply to the Minister for an investigation of any offence under this Act that the individual alleges has occurred.
- Marginal note: Statement to accompany application

  (2) The application shall include a solemn affirmation or declaration

  - **(a)** stating the name and address of the applicant;
  - **(b)** stating that the applicant is at least 18 years old and a resident of Canada;
  - **(c)** stating the nature of the alleged offence and the name of each person alleged to have contravened, or to have done something in contravention of, this Act or the regulations; and
  - **(d)** containing a concise statement of the evidence supporting the allegations of the applicant.
- Marginal note: Form

  (3) The Minister may prescribe the form in which an application under this section is required to be made.

Marginal note: Investigation by Minister

18 The Minister shall acknowledge receipt of the application within 20 days of the receipt and shall investigate all matters that the Minister considers necessary to determine the facts relating to the alleged offence.

Marginal note: Progress reports

19 After acknowledging receipt of the application, the Minister shall report to the applicant every 90 days on the progress of the investigation and the action, if any, that the Minister has taken or proposes to take, and the Minister shall include in the report an estimate of the time required to complete the investigation or to implement the action, but a report is not required if the investigation is discontinued before the end of the 90 days.

Marginal note: Minister may send evidence to Attorney General of Canada

20 At any stage of an investigation, the Minister may send any documents or other evidence to the Attorney General of Canada for consideration of whether an offence has been or is about to be committed under this Act and for any action that the Attorney General may wish to take.

Marginal note: Discontinuation of investigation

- **21 (1)** The Minister may discontinue the investigation if the Minister is of the opinion that
  - **(a)** the alleged offence does not require further investigation; or
  - **(b)** the investigation does not substantiate the alleged offence.
- Marginal note: Report

  (2) If the investigation is discontinued, the Minister shall

- **(a)** prepare a report in writing describing the information obtained during the investigation and stating the reasons for its discontinuation; and

- **(b)** send a copy of the report to the applicant and to any person whose conduct was investigated.

A copy of the report sent to a person whose conduct was investigated must not disclose the name or address of the applicant or any other personal information about them.

Environmental Protection Action

Marginal note: Circumstances when an individual may bring an action

- **22 (1)** An individual who has applied for an investigation may bring an environmental protection action if

  - **(a)** the Minister failed to conduct an investigation and report within a reasonable time; or

  - **(b)** the Minister's response to the investigation was unreasonable.

- Marginal note: Nature of the action

  (2) The action may be brought in any court of competent jurisdiction against a person who committed an offence under this Act that

  - **(a)** was alleged in the application for the investigation; and

  - **(b)** caused significant harm to the environment.

- Marginal note: Relief that may be claimed

  (3) In the action, the individual may claim any or all of the following:

  - **(a)** a declaratory order;

  - **(b)** an order, including an interlocutory order, requiring the defendant to refrain from doing anything that, in the opinion of the court, may constitute an offence under this Act;

  - **(c)** an order, including an interlocutory order, requiring the defendant to do anything that, in the opinion of the court, may prevent the continuation of an offence under this Act;

  - **(d)** an order to the parties to negotiate a plan to correct or mitigate the harm to the environment or to human, animal or plant life or health, and to report to the court on the negotiations within a time set by the court; and

  - **(e)** any other appropriate relief, including the costs of the action, but not including damages.

III Endnotes

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6. *Canadian Environmental Protection Act 1999*, S.C. 1999, c. 33, s. 10.
7. Tingley, D. (1991). *Conflict and Cooperation on the Environment,* in Canada : The State of the Federation, D. M. Brown (ed) (1991). p. 145.
8. Taylor, G.E. (2014). *All Things Being Equal: A Consideration of the Use of Equivalency Arrangements under the Canadian Environmental Protection Act 1999 in the Case of Greenhouse Gas Emissions Control*, at 6-7. Accessed at: http://www.graytaylorlaw.com/blog/-all-things-being-equal-a-consideration-of-the-use-of-equivalency-arrangements-under-the-canadian-environmental-protection-act-1999-in-the-case-of-greenhouse-gas-emissions-control-written-in-2014 and Tingley *op. cit.* p. 145.
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10. Taylor *op. cit.* p. 6.
11. These two successive statutory frameworks are fairly similar in their approach to equivalency.
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16. *Friends of the Oldman River Society* v. *Canada (Minister of Transport* O, [1992] 1 S.C.R. 3, at 65.
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18. Chalifour, N. (2016). "Canadian Climate Federalism: Parliament's Ample Constitutional Authority to Legislate GHG Emissions through Regulations, a National Cap and Trade Program, or a National Carbon Tax", (2016) 36(2) National Journal of Constitutional Law. Pp. 331-407.
    Note that since the federal backstop returns revenues to provinces it may not be justified under the taxation power. Chalifour, N. and Elgie, S. (2017). Brad Wall's carbon-pricing fight is constitutional hot air. *The Globe & Mail.* Accessed at: https://www.theglobeandmail.com/opinion/brad-walls-carbon-pricing-fight-is-constitutional-hot-air/article35297947/
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20. *Interprovincial Co-operatives Ltd. et al. v. R.*, [1976] 1 SCR 477, at pages 515-516, referencing *Ross v. Registrar of Motor Vehicles*, [1975] 1 S.C.R. 5.
21. Reference re *Assisted Human Reproduction Act*, 2010 SCC 61, at para. 235.
22. *"It must be recalled that it is uncontroverted that GHGs are harmful to both health and the environment and as such, constitute an evil that justifies the exercise of the criminal law power."* (Syncrude Canada Ltd. v. Canada (Attorney General), 2016 FCA 160, para. 62) (*Syncrude*)
23. Chalifour and Elgie *op. cit.*
24. *Interprovincial Co-operatives Ltd. et al. v. R.*, [1976] 1 SCR 477. Note this was a split decision rendered in the context of assessing the constitutional validity of provincial rather than federal measures with three judges dissenting and one writing concurrent reasons.
25. Chalifour *op. cit.* p. 364.
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27. *Ibid.*
28. *Ibid.*
29. *Ibid.*
30. *Ibid.*
31. Hogg *op. cit.* p. 510.
32. *Ibid.* pp. 510-511.
33. *Ibid.* p. 510.
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35. *Canadian Environmental Law Assn. v. Canada (Minister of the Environment)*, [1999] 3 F.C. 564, at para 12. Accessed at: https://advance.lexis.com/api/permalink/7dfefb05-577c-4b36-854d-3ba1efd5babc/?context=1505209.
36. *Ibid*. See also, Coughlin v. Ontario (Highway Transport Board), [1968] S.C.R. 569; R. v. Furtney, [1991] 3 S.C.R. 89.
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46. *Ibid*. p. 573, para 8.
47. *Ibid.*
48. *Ibid*. pp. 573-574, para. 10.
49. OECD. (2007). *Instrument Mixes for Environmental Policy.* p. 24. Accessed at: https://books.google.ca/books?id=QKHVAgAAQBAJ&pg=PA124&lpg=PA124&dq=federal+provinces+agreement+legally+binding&source=bl&ots=-RMOSB5xfX&sig=Pyss7wFpxSp_P3Tvtz6D8pXmTac&hl=en&sa=X&ved=0ahUKEwjJl8bb9NnUAhVI1oMKHftpDjI4ChDoAQhXMAg#v=onepage&q&f=false.
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53. *Ibid.* s. 2.1)A).
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