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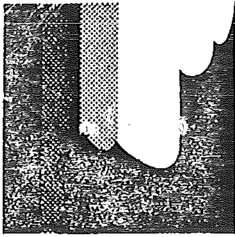

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ENVIRONMENT AND THE CONSTITUTION

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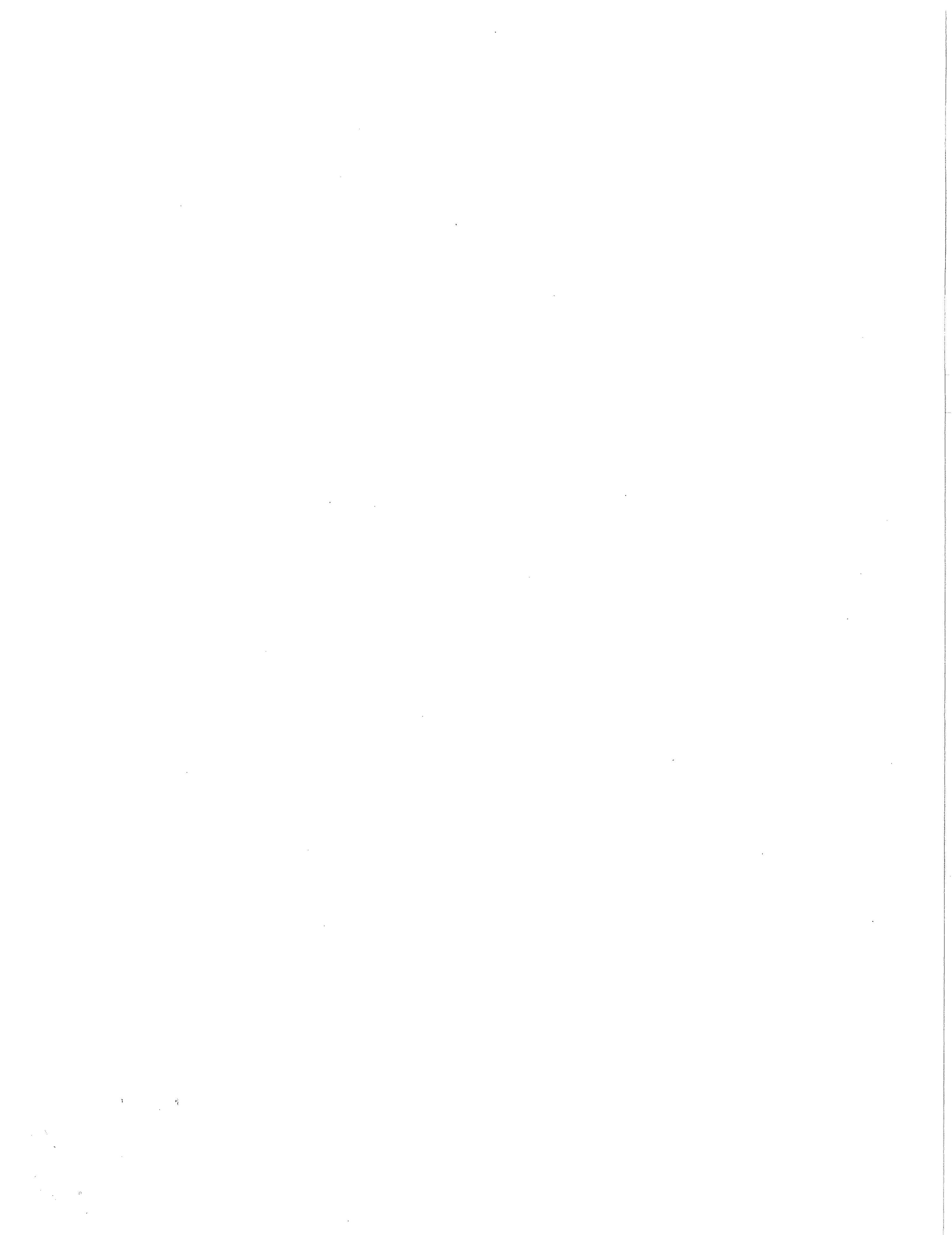

TABLE OF CONTENTS

EXECUTIVE SUMMARY i

1.0 INTRODUCTION 1

2.0 ENVIRONMENT AS A FUNDAMENTAL VALUE FOR CANADA 5
- 2.1 Principles of Sustainable Development 6
- 2.2 Recommendation 8

3.0 ENHANCEMENT AND PRESERVATION OF ECOLOGICAL INTEGRITY 9
- 3.1 The Importance of Environmental Rights 10
  - 3.1.1 Environmental Rights Recognizes the Inherent Value of Nature and Natural Resources 12
  - 3.1.2 Environmental Rights Empower People to Protect the Environment that Sustains Them 13
  - 3.1.3 Environmental Rights Have Become Legitimate Provisions of National Constitutions 14
  - 3.1.4 Environmental Rights are Becoming Recognized Under International Law 15
- 3.2 Nature of the Environmental Rights 16
  - 3.2.1 Recognition of the Public Trust Doctrine 17
- 3.3 Recommendation 17

4.0 DIVISION OF POWERS 18
- 4.1 Introduction 18
  - 4.1.2 The Residual Power under Peace, Order and Good Government ("POGG") 23
  - 4.1.3 Transfer of Exclusive Jurisdiction 23
  - 4.1.4 Streamlining Government 24
  - 4.1.5 Approval Mechanisms for Cooperation 24
- 4.2 Free Trade Between the Province 25
- 4.3 Recommendation 25

5.0 PROPERTY RIGHTS AND THE ENVIRONMENT 27
- 5.1 Introduction 27
- 5.2 Property Rights: Entrenching Uncertainty 29
- 5.3 Challenges to Existing Environmental Regimes 33
  - 5.3.1 Land Use Planning Laws 33
  - 5.3.2 Resource Extraction and Environmental Management 34
  - 5.3.3 Impediments to Environmental Enforcement 35
- 5.4 The Ill-Conceived Links Between Environmental Protection and Property Rights 36
- 5.5 Property Rights - A Right to Develop 38
- 5.6 Are Property Rights Needed 38
  - 5.6.1 Expropriation 39
- 5.7 The Enhanced Need for Environmental Rights if Property Rights are Included 40
- 5.8 Recommendation 40

6.0 CONCLUSION 41

Appendix A The Brundtland Commission and Sustainable Development.. 42

Appendix B Canada: Environmental Legislative Reform......... 49

Appendix C The Canada Clause in the Constitution Act, 1867.. 56

Appendix D Form and Content of Enshrining Mechanisms in the Constitution to Enhance and Preserve Ecological Integrity.. 58

Appendix E Division of Powers.............................. 68

Appendix F Economic Union.................................. 83

EXECUTIVE SUMMARY

The Canadian public is very concerned about the state of the nation's environment. The environment is seen by most Canadians as both a unifying value for Canada and as an integral part of the economy of the country. Accordingly, when the federal government revealed its constitutional reform package, Shaping Canada's Future Together, in September of 1991, there were high expectations that the reforms would reflect these concerns and fundamental values. The reforms, however, did not meet these expectations. In fact, if the constitutional reforms go forward as proposed, environmental protection and enhancement will be severely limited. These proposed constitutional reforms are environmentally unfriendly at best, and better described as contributing to further ecological demise in Canada.

This submission was prepared by the Canadian Environmental Law Association and Pollution Probe. Its purpose is to outline the major concerns with respect to the constitutional proposals and then to propose a series of reforms to overcome the weaknesses in the reform package and the status quo. The recommendations of this submission can be summarized as follows:

Recommendation 1 - Environment as a Fundamental Value

The federal government proposes that a "Canada Clause" be added to the Constitution. This clause would be a preamble that would "affirm" the Canadian identity. The clause commits Canada to the

"objective of sustainable development."

We recommend that the objective of sustainable development be either replaced with more specific langauge or better defined to include the following principles:

[1] the recognition that a healthy environment is a precondition to a healthy economy. This imposes a duty to integrate environment into economic decisions;

[2] the principle of "anticipate and prevent" which can be implemented in a number of ways; including the requirement of mandatory environmental assessments on all government action and policy that has an environmental impact;

[3] the "polluter pays" principle;

[4] the requirement of public participation in all environmental decision-making; and

[5] the necessity to protect and enhance biodiversity.

Recommendation 2 - Enhancement and Preservation of Ecological Integrity

Within the package of constitutional reforms, there is no recognition of the rights and responsibilities of governments and the public in terms of the environment and natural resources. This notable absence is out of step with the global trend of nations to ensure the public has a meaningful role in the protection of the environment.

We recommend that the Constitution vest in Canadians a set of rights to a heathful environment which define their rights and responsibilities and the responsibilities of their governments to protect the environment.

Recommendation 3 - Division of Powers

The proposed constitutional proposals affect, directly or by

implication, the division of legislative powers between the federal and provincial governments. In effect, the proposals further devolve federal responsibility over the environment and serve to confuse, rather than clarify, legislative authority to protect the environment.

> **We recommend that environmental protection and resource conservation continue to be a shared responsibility of federal and provincial governments. Clarification is needed to allow substantial provincial autonomy over local matters and federal jurisdiction over extraprovincial and international matters. The federal government, however, should also have clear authority to set uniform national standards, allowing the provinces to enact more stringent standards.**

Recommendation 4 - Economic Union

The federal government proposes that there be "free trade" between the provinces. This means that the provinces will be curtailed in their enactment of progressive environmental legislation. Such legislation will be subject to challenge as "unfair trade practises" or "non-tariff barriers to trade."

> **We recommend that free trade between the provinces must neither violate present or future national environmental standards nor compromise any province's ability to enact and enforce environmental laws specific for local conditions.**

Recommendation 5 - Property Rights

The federal government proposes to include property rights in the Canadian Charter of Rights and Freedoms. This provision would create enormous uncertainty for every environmental protection regime in the country as well as constitutionally entrench the right to pollute.

We recommend that the proposal to include property rights in the constitution be withdrawn.

In light of the importance of these issues, it is imperative the the federal government undertake in-depth consultation immediately with environmentalists across the country to ascertain how best to incorporate the environment into the constitution.

CONSTITUTIONAL PROPOSALS ANALYSIS

1.0 INTRODUCTION

In September of 1991, the Conservative government unveiled its latest series of constitutional proposals. The preface to the first of the three proposal documents, "Shaping Canada's Future Together"[1], begins:

> Canadians are proud of their land and their shared values and the advantages and opportunities provided by Canadian citizenship. But Canadians are now searching for new arrangements that will serve as a blueprint for the future.[2]

With such a forward looking vision, it would seem clear that the fundamental respect and concern Canadians have for their environment would figure prominately in the proposals. It is with great sorrow that we find nothing in the proposals enshrining constitutional protection for the environment, except for a proposal for the inclusion of the concept of "sustainable development" in the "Canada clause".

In light of the state of the world environment, and the state of the environment in Canada,[3] it is imperative that meaningful action take place to stem the onslaught of degradation and begin repairing our ailing globe. The Constitution, as the supreme law of the land, plays an important role in shaping Canadian values,

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[1] Canada Shaping Canada's Future: Proposals (Ottawa: Supply and Services, 1991).

[2] Ibid., p.iii.

[3] See Appendices A and B for further detail.

and ensuring that sustainable development, as envisioned by the Brundtland Commission,[4] be given meaning. Accordingly, we urge the government to consider our recommendations for ensuring our constitution assists, rather than hinders, the ongoing struggle we face to integrate the economy and the environment. Our recommendations will assist Canada in preserving and enhancing this wonderful country; as well as allow us to do our part for the rest of the world, for our lives and the lives of future generations.

The constitutional proposals carry two themes applicable to the environment; strengthening federalism through the clarification of federal and provincial jurisdictions, and economic renewal. There is no question that the environment and the economy are inextricably linked. This undeniable truth was finally confirmed for the world through international effort.[5] Economic renewal is constrained by the state of the environment and vice versa.

Global concern for the environment and the longevity of the planet resulted in the World Commission on the Environment and Development and the "Brundtland Report", which advocates "sustainable development". We recommend that Canada look to this valuable resource for guiding principles on how to achieve

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[4] World Commission on Environment and Development, <u>Our Common Future</u> (New York: Oxford University Press, 1987).

[5] <u>Ibid.</u>

sustainable development. The guidelines put forward by the Brundtland Commission are framed as conceptual guidelines for institutions at the national level.[6]

Three main concepts can be extracted from the Brundtland Report that pertain to constitutional reform in Canada: public access to environmental justice, the need for clear environmental standards, and the necessity to integrate environmental and economic decision-making at the level of government at which decisions and policies are formed that impact on the environment.

The constitutional mandate as set out above, and the objectives recommended by the Brundtland Commission are neatly integrated by our proposals for constitutional reform. We advocate that the following vision for our Constitution:

1. Recognition of the environment as a fundamental value;

2. A set of rights recognizing the role of the public and their governments in enhancing and protecting the environment;

3. Concurrent jurisdiction over environmental protection and resource conservation: in the event of conflict, paramountcy would operate to sustain the jurisdiction with the strictest regulation; and

4. No constitutional protection for property rights under any circumstances.

To ensure the public has adequate access to environmental justice, legal tools must be available. The most important such

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[6] Ibid., p. 309.

tool is a constitutionally protected right to a healthful environment. The entrenchment of property rights, on the other hand, would be the most effective way to negate the public's access to environmental justice.

Governmental departments responsible for policies and laws that have environmental impact must also have responsibility for environmental policy. In Canada, this means the strengthening of federalism through provincial autonomy. Given that the provinces have jurisdiction over property, including resources, and local enterprises, they must have jurisdiction to regulate environmental effects.

At the same time it is crucial that the federal government maintain its role to regulate environmental protection and resource conservation where there are extraprovincial effects and international effects, and have clear jurisdiction to set national standards and policies. In addition, we argue that in order for Canada to play an effective role internationally, and follow through domestically, an external affairs power should be added to the Constitution.

It must follow, therefore, that we can not endorse the proposals which will have the effect of reducing the federal government's jurisdiction over the environment. Similarly, we strongly urge the removal of the property rights proposal due to the lack of a

clear need for its inclusion and clearly much potential for legal dispute over what is a reasonable limit in a free and democratic society.

Appendices A and B set out further background on the Brundtland Report and the Canadian Bar Association Report on Sustainable Development; information relevant to constitutional reform in Canada.

2.0 ENVIRONMENT AS A FUNDAMENTAL VALUE FOR CANADA

For Canadians, the environment is one of the unifying values of this country. Even though Canada encompasses a huge land of enormous natural variety, the lakes and rivers, forests, grasslands and tundra, mountains and seas of Canada define us as people. Protecting that natural heritage for future generations of Canadians is a value that is shared in all regions of Canada.

Indeed, polls well document the commitment of Canadians to this value. Moreover, the report of the Citizens' Forum on Canada's Future noted that, although the forum was not looking for comment on environmental issues, "over half of the discussion groups who reported to the Forum identified the environment as a major issue for the country.[7]

[7] The message from the Students' Forum was that "pollution is a 'motherhood' issue...[students] want pollution stopped, wildlife preserved, and the protection of the environment to be a

Environment is a value that unites, rather than divides, Canada. It should be recognized and included as a fundamental value in the Constitution. But how should this be done? In the package of constitutional reforms, Shaping Canada's Future Together, it is proposed that a "Canada Clause" be added in the body of the Constitution "to affirm the identity and aspirations of the people of Canada." It is proposed that entrenched in section 2 of the Constitution Act, 1867 would be:

> ...a commitment to the objective of sustainable development in recognition of the importance of the land, the air and the water and our responsibility to preserve and protect the environment for future generations.[8]

The Canada Clause proposal raises a number of important issues which are discussed below.

2.1 Principles of Sustainable Development

The concept of sustainable development frustratingly eludes precise definition.[9] Although the nature of the concept should be capable of evolution through legislative and judicial interpretation, it should nevertheless be accompanied by guiding principles to assist in its interpretation. We recommend that

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top national priority.

[8] Supra, note 1.

[9] It does mean many things to many people. See: N.A. Robinson, "A Legal Perspective on Sustainable Development" in J. Owen Suanders, (ed.) The Legal Challenge of Sustainable Development" (Calgary: Canadian Institute for Resources Law, 1990 at 15-33, and other works within the publication.

these principles entail:

[1] the recognition that a healthy environment is a precondition to a healthy economy and this imposes a duty to integrate environment into economic decisions;[10]

[2] the principle of "anticipate and prevent" which can be implemented a number of ways, including the requirement of mandatory environmental assessments on all government action and policy that has an environmental impact;[11]

[3] the "polluter pays" principle;[12]

[4] the requirement of public participation in all environmental decision-making;[13] and

[5] the necessity to protect and enhance

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[10] This principle pervades the Brundtland Commission's report, supra, note 4, and is being actively discussed through the federal and provincial roundtables on environment and environment. It is also recognized in the Green Plan and thought of as an emerging international norm. See: Government of Canada, Canada's Green Plan (Ottawa: Ministry of Supply and Services, 1990), p. 16 and P. Muldoon, "The International Law of Ecodevelopment" (1987), 22 Texas International Law Journal 1.

[11] The federal government already accepts this principle, See: F. Bregha, et al., The Integration of Environmental Considerations into Government Policy (Ottawa: Canadian Environmental Association Research Council, 1990); and Environmental Assessment and Review Process Guidelines Order, SOR/84-467.

[12] The federal government has accepted this principles in a number of contexts, such as in water, see: Canada, Federal Water Policy (1988) and Government of Canada, Canada's Green Plan supra, note 10, p. 16.

[13] This principle has been recognized for some time, though not always implemented. See: Citizen's Code of Regulatory Fairness, in Treasury Board of Canada Secretariat, The Federal Regulatory Process: An Interim Procedures Manual for Departments and Agencies, Ottawa, 1991. World Commission on Environment and Development, Our Common Future Supra, note 4, p. 65.

biodiversity.[14]

These principles would serve to clarify and define the concept of sustainable development as well as articulate concepts which already have achieved broad social consensus.

The principle of enshrining our national values in the constitution is welcome as long as the appropriate language is used so that the values have some meaning. It is possible that such a clause would be used as an aid to interpretation with respect to disputes under the Constitution Act, 1982, the "Charter"; however, such a clause will not have any binding effect and will not have the weight of entrenched rights and freedoms. Accordingly, it can not be seen as a substitute to the entrenchment of a right to a healthful environment.

2.2 Recommendation

The federal government proposes that a "Canada Clause" be added to the Constitution. This clause would be a preamble that would "affirm" the Canadian identity. The clause commits Canada to the "objective of sustainable development."

We recommend that the objective of sustainable development be

[14] This principle would simply keep Canada in line with host of international pronouncements on the matter, including the World Conservation Strategy, see: International Union for Conservation of Nature and Natural Resources, World Conservation Strategy: Living Resource Conservation for Sustainable Development (1980).

either replaced with more specific language, or better defined, to include the following principles:

> **[1] the recognition that a healthy environment is a precondition to a healthy economy. This imposes a duty to integrate environment into economic decisions;**
>
> **[2] the principle of "anticipate and prevent" which can be implemented in a number of ways, including the requirement of mandatory environmental assessments on all government action and policy that has an environmental impact;**
>
> **[3] the "polluter pays" principle;**
>
> **[4] the requirement of public participation in all environmental decision-making; and**
>
> **[5] the necessity to protect and enhance biodiversity.**

3.0 ENHANCEMENT AND PRESERVATION OF ECOLOGICAL INTEGRITY

Over the past two decades, the level of public concern over the environment has been unprecedented. It is demonstrated in the polls, in community action, publications, and in consumer demand. Yet there has been a failure of democracy as the legal framework of Canada demonstrates a clear lack of recognition of the public's concern about environmental protection. Both during the consultations during the development of the Canadian Environmental Protection Act ("CEPA")[15] and the Green Plan, the same message has prevailed as will during this constitutional debate - **Canadians want to be vested with certain constitutional rights to a healthful environment which define both their rights**

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[15] Canadian Environmental Protection Act, R.S.C. 1985 (4th Supp.) c.16.

and responsibilities and those of their government. This proposal has been supported by leading constitutional scholars,[16] public interest groups,[17] the Canadian Bar Association, and other members of the legal community.[18] In this regard, the Canadian Bar Association Committee on Sustainable Development in Canada proposed in their recommendations for federal environmental reform that:

> The Government of Canada should adopt a long-term strategy to entrench the right to a healthy environment in the Canadian Constitution.[19]

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[16] For example, see: Constitutional Entrenchment of Environmental Rights" in N Duple, ed. Le droit a la qualite de l'environnement: un droit en devenir, un droit a definir (Quebec/Amerique, 1988).

[17] For instance, see: P. Muldoon, "The Fight for an Environmental Bill of Rights: Legislating Public Involvement in Environmental Decision-Making" Alternatives, vol. 15, no 2 April/May 1988); F. Gertler and T. Vigod, "Submission by the Canadian Environmental Law Association to the Select Committee on Ontario in Confederation: Environmental Protection in a New Constitution: (Toronto: CELA June, 1991). A submission endorsed by twelve environmental groups called for provincial environmental rights, see: "An Overview to the Essential Principles of an Environmental Bill of Rights" A Briefing Document to the Minister of the Environment on a Proposed Environmental Bill of Rights, March 20, 1991.

[18] J. Swaigen and R. Woods, "A Substantive Right to Environmental Quality" in J. Swaigen (ed.) Environmental Rights in Canada (Toronto: Butterworths, 1981); D. Saxe, Environmental Offences: Corporate Responsibility and Executive Responsibility (Aurora: Canada Law Book, 1990), at 5-20; M. Rankin, "An Environmental Bill of Rights for Ontario: Reflections and Recommendations, A Discussion Paper" (1991). See generally:C. Stevenson, "A New Perspective on Environmental Rights After the Charter" (1983), 21 Osgoode Hall Law Journal 390.

[19] Report of the Canadian Bar Association Committee on Sustainable Development in Canada: Options for Law Reform (Ottawa: Canadian Bar Association, 1990), p. 27.

3.1 The Importance of Environmental Rights

There are a number of reasons why environmental rights are so important. These reasons underscore a number of the weaknesses in Canadian law concerning the protection of the environment.

Firstly, entrenching environmental rights would be a clear step toward mandating and requiring the full integration of due consideration of environmental quality into all public and private sector decision-making.[20]

Secondly, in contrast to ordinary statutory guarantees, such rights could not easily be repealed by subsequent legislatures or overridden without the serious political consequences which accompany disregard for fundamental rights.[21]

Thirdly, constitutional protection would have an educational function. Public and private sector actors are more likely to take all environmental norms and issues more seriously if a healthful environment is recognized as a fundamental right.[22]

Fourthly, it is also suggested that entrenching a Charter right to a healthful environment is consistent with recommendations

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[20] "Environmental Protection in a New Constitution" supra, note 17, p.3.

[21] Ibid., p.

[22] Ibid. p. 4.

from the Brundtland report which concludes that because "perceived" needs are culturally and socially determined, "...sustainable development requires the promotion of values that encourage consumption standards that are within the bounds of the ecological possible and to which all can reasonably aspire"[23] It has been suggested by one commentator that a Charter right to a safe and healthy environment would give moral authority to environmental rights which would forge an environmental ethic: "In giving courts a foundation upon which arguments against the traditional legal conceptions of property could be accepted, an educational function would ultimately be performed."[24]

Other reasons for the importance of environmental rights are as follows.

3.1.1 Environmental Rights Recognizes the Inherent Value of Nature and Natural Resources

Typically, people have "rights." These rights are based upon some notion that there is societal contract whereby everyone is vested with certain obligations and corresponding benefits. Who speaks on behalf of, and for, the environment? The environment has special intrinsic value and worth apart from being its value

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[23] Brundtland Report, supra, note 4, p.44.

[24] M. Walters, "Ecological Unity and Political Fragmentation: The Implications of the Brundtland Report for the Canadian Constitutional Order" (1991) 29 Alta. Law Review 420, at p. 431; citing Colin Stevenson, "A New Perspective on Environmental Rights after the Charter" (1983) 21 Osgoode Hall Law Journal 390 at p.403.

in use and for consumption by humans. By entrenching environmental rights, the inherent value of the environment would be formally recognized. Such recognition is consistent with the understanding that without our environment, individual rights can have no meaning.

3.1.2 Environmental Rights Empower People to Protect the Environment that Sustains Them

Environmental rights give individuals the tools to protect the environment. At present, Canadians must rely on their government to act in their interest to ensure environmental integrity and resource conservation. Surely the government, playing all roles of owner, manager and arbitrator of environmental and natural resource issues, is subject to many conflicts of interest. It is fundamentally important that citizens be empowered with legal rights to protect their health and environment, and to require that any question of a conflict of interest will be adjudicated in an independent forum.

According to the report of the World Commission on Environment and Development, Our Common Future,[25] participatory rights are an integral component of the principle of sustainable development. The report states that governments must recognize not only their responsibility in ensuring a viable environment for present and future generations, but they must also recognize

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[25] Brundtland Report, supra, note 4, p.330.

certain other environmental rights enjoyed by citizens:

> ...progress will also be facilitated by recognition of, for example, the right of individuals to know and have access to current information on the state of the environment and natural resources, the right to be consulted and to participate in decision-making on activities likely to have a significant effect on the environment, and the right to legal remedies and redress for those whose health or environment has been or may be seriously affected.

3.1.3 Environmental Rights Have Become Legitimate Provisions of National Constitutions

Some eighteen countries now have constitutions which either expressly or impliedly have the right to a healthful environment, including several western democracies, the European socialist countries, China and a number of other countries. As well, the right to a clean environment has been recognized in a number of U.S. state constitutions.[26] According to one author, Canada may be the only country to have adopted or amended a constitution since 1975 which did not include a recognition of some environmental right.[27] Not waiting for constitutional reform, jurisdictions in Canada are gradually moving ahead and vesting citizens with environmental rights; such as in the Yukon,

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[26] See Appendix E for a list of other jurisdictions that have enacted some form of constitutional right to a healthful environment.

[27] Saxe, supra, citing New Human Rights, a discussion paper prepared by A.H. Robertson and A.C. Kiss, at 5.

Northwest Territories, and Ontario.[28]

3.1.4 Environmental Rights are Becoming Recognized Under International Law

Constitutional recognition of a right to a healthful environment would bring Canada into conformity with the growing recognition in international instruments, including several to which Canada is a party, of the emerging right to environmental quality.[29] At present, the Stockholm Declaration recognizes this right to environmental quality.[30] Many other international rights codes may imply such a right, such as the Universal Declaration of Human Rights, the International Covenant of Civil and Political Rights and the International Covenant of Economic, Social and

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[28] Bill 20, Environment Act, 2nd Sess. 27 Leg. Yukon, 1991 (assented to 29 May 1991). Bill 17, Environmental Rights Act, 7th Sess, 11th Leg. Northwest Territories, 1990 (assented to 11 June 1990). Ontario has created a task force to develop an environmental bill of rights. For the history of this effort, see: Muldoon, "The Fight for Environmental Rights," _supra_, note 17. Also see: _Environment Quality Act_, (Quebec), ss. 19.1.

[29] For example, see: _Declaration of the United Nations Conference on the Human Environment_ June 16, 1972, Principle 1, reprinted in UNEP, _In Defence of Earth: The Basic Texts on Environment_ (Nairobi: UNEP, 1981); _Universal Declaration of Human Rights_ December 10, 1948, G.A. Res. 217 A (III), Articles 3 and 25 (right to life and standard of living adequate for health and well-being); _International Covenant on Civil and Political Rights_ (1976) C.T.S. 47, Article 6 (right to life); and _International Covenant on Economic, Social and Cultural Rights_ (1976), C.T.S. 46, Articles 7 and 12 (safe and healthy work conditions and right to physical and mental health). See generally, F. Gertler, P. Muldoon and M. Valiante, "Public Access to Environmental Justice: in Canadian Bar Association, Committee Report, _supra_, note 20 (1990), at 79-84.

[30] _Ibid._

Cultural Rights.[31] Further, the most recent formulation of the right to environmental quality is in the Legal Experts Report to the World Commission on Environment and Development, the Brundtland Report. The text provides that:

> All human beings have the fundamental right to an environment adequate for their health and well-being and States shall ensure that the environment and natural resources are conserved and used for the benefit of present and future generations.[32]

3.2 Nature of the Environmental Rights

A number of options have been proposed concerning the nature and precise content of the environmental rights included in the Constitution. Models for such rights could be those rights drafted by the Legal Working Group of World Commission on Environment and Development, those rights included in the recent legislation in the Yukon and the North West Territories, or proposals set out in scholarly literature. These proposals, however, have two common components:

(1) the vesting in citizens of the right to a healthful environment; and

(2) the imposition of a duty of governments to protect public resources in the nature of a public trust.

In addition to the discussion above, see Appendix D for detailed analysis of the form and content of such a right in our

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[31] Ibid.

[32] World Commission on Environment and Development, Experts Group on Environmental Law, Environmental Protection and Sustainable Development: Legal Principles and Recommendations (London: Graham & Trotman/Martinus Nijhoff, 1987), at 38-42.

Constitution.

3.2.1 Recognition of the Public Trust Doctrine

The notion of a public trust doctrine is not new. It has been discussed at length in the literature[33] as well as implied in a number of initiatives, such as the Green Plan[34] and the National Task Force on Environment and Economy.[35] In fact, the present constitutional reform proposals suggest the public trust doctrine when it states that "the land itself, vast and beautiful, is a rich inheritance held in trust for future generations.[36] The essential notion of the trust is that the governments hold public resources in trust for present and future generations. As holders of the trust, they have certain obligations to ensure for the sustainability of the trust property.

3.3 Recommendation

Within the package of constitutional reforms, there is no recognition of the rights and responsibilities of governments and

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[33] Hunt, "Public Trust", in Swaigen, supra, note 19.

[34] The Green Plan states that "The Governments are the trustees of the environment on behalf of the people." See: Canada's Green Plan (Ottawa: Minister of Supply and Services, 1990), p. 17.

[35] The Task Force report states that the "Governments act as trustees of the resources we will pass on to future generations." See: Report of the National Task Force on Environment and Economy (Canadian Council of Resource and Environment Ministers, 1987), p. 6.

[36] Supra, note 1 at p. v.

the public in terms of the environment and natural resources. This notable absence is out of step with the global trend of nations to ensure the public has a meaningful role in the protection of the environment.

We recommend that the Constitution vest in Canadians a set of rights to a healthful environment which define their environmental rights and responsibilities and the responsibilities of their governments to protect the environment.

4.0 DIVISION OF POWERS

4.1 Introduction

The Constitution Act, 1867, sets out the respective jurisdictions of the federal and provincial governments. It is not surprising that the environment was not first and foremost on the framers' minds, and consequently, the environment was not listed as a delegated head of power.

The division of powers in Canada is intended to be exhaustive and exclusive; meaning that sections 91 and 92[37] divide all jurisdictional matters between Parliament and the provinces. Both the provinces and the federal government, however, have jurisdiction over the environment through specific heads of power. Given that much environmental degradation is manifest in land and results from local industry, the provinces clearly have

[37] Constitutional Act, 1867.

a large role to play through their jurisdiction over property and civil rights,[38] and matters of a merely local nature.[39] In addition, the provinces have jurisdiction over all provincial lands, mines and minerals,[40] and over non-renewable natural resources, forestry resources and electrical energy.[41]

Parliament arguably derives its jurisdiction over environmental matters through a combination of powers. Commentators have identified at least eleven such possible sources of jurisdiction.[42] The residual power under peace, order and good government and the criminal law power are the most obvious. It is by no means clear the Parliament has the jurisdiction to regulate over all aspects of environmental protection and resource conservation.[43]

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[38] Ibid., s.92(13).

[39] Ibid., s.92(16).

[40] Ibid. s.109.

[41] Ibid. s.92A.

[42] P. Hogg, Constitutional Law of Canada, 2nd ed (1985: Toronto, The Carswell Co. Ltd.) See Appendix E for a further discussion of this point.

[43] See Appendix E for a further discussion of this point. See also: Gibson, "Environmental Protection and Enhancement under a New Canadian Constitution," in Beck and Bernier, eds., Canada and the New Constitution (Montreal: The Institute for Research on Public Policy, 1983); Mains, "Some Environmental Aspects of a Canadian Constitution", (1980) 9 Alternatives 14; Andrews, "The Public Interest Perspective" in Donna Tingley, ed., Environmental Protection and the Canadian Constitution, Proceedings of the Canadian Symposium on Jurisdiction and Responsibility for the Environment (Edmonton: Environmental Law Centre, 1987); Lindgren, "Toxic Substances in Canada: The Regulatory Role of the Federal

The confusion that has resulted from this patchwork of jurisdiction has a number of effects detrimental to the protection and enhancement of the environment, and the efficient functioning of the union. First and foremost, the Canadian public does not have clear accountability from its governments on environmental matters. It is often unclear as to which government is responsible for particular issues. It has also been suggested that constitutional confusion makes meaningful public participation difficult and costly as citizens and public interest groups can not be sure which government is accountable.[44]

Undoubtedly, this confusion exists within government as well, and leads at best to overlap, and at worst to inaction. Sometimes governments engage in jurisdictional "buck passing", and constitutional questions frequently arise in relation to which level of government will deal with questions such as biotechnology, and cleanup of hazardous waste sites.[45] As a result, parts of Canada run the risk of becoming "pollution

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Government," in Into the Future: Environmental Law and Policy for the 1990s (Edmonton: Environmental Law Centre, 1989); Emond, "The Case for a Greater Federal Role in the Environmental Protection Field", (1972), 10 Osgoode Hall Law Journal 647; and T. Vigod and J. Swaigen, Brief to the Joint Senate/House of Commons Committee on the Constitution of Canada Bill - C-60 (Toronto: CELA, Sept. 29, 1978).

[44] M. Walters, supra, note 24.

[45] "Environmental Protection in a New Constitution", supra, note 17, p. 16.

havens" where environmental regulation is not as stringent due to political inaction or aspirations towards an industrial friendly investment climate.

Other gaps exist in that the courts have afforded general immunity from provincial legislation to the federal government, crown agencies and enterprises.[46]

Accordingly, our first requirement of public access to environmental justice is unmet in the present state of affairs. It should also go without saying that both the access and the justice should be uniform across Canada.

Also due to the confusion, business challenges environmental regulation as being beyond a particular government's jurisdiction. Where concurrency is not recognized, due to the exhaustive and exclusive nature of the division of powers, if one government has jurisdiction, then the other cannot. This again results in inefficiency as these constitutional court battles are extremely costly, and the government is compelled to use society's resources to defend their jurisdiction while the merits of the case are pushed to the back burner. There have been constitutional challenges to the former Ocean Dumping Control

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[46] For example, Eldorado Nuclear Ltd. (1980), 9 CELR 142 (Ont. Prov. Ct.).

Act,[47] the Clean Air Act,[48] the Environmental Protection Act,[49] as well as to the federal environmental assessment review process.[50]

Other consequences of this confusion are that there are no clear national standards for industry. This undoubtedly leads to inefficiency. The absence of those standards leave Canadians at risk of living in a "pollution haven" due to individual provincial governments opting for a laxer regulatory climate to attract industry.

Finally, the integration of environmental and economic decision-making is hampered as confusion over jurisdiction cannot possibly foster proactive planning and decision-making.

It is clear that the current state of affairs does not assist us in reaching either the Brundtland objectives or the constitutional reform objectives as we have defined them as being applicable to the environment. Refer to appendices A, B, and E

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[47] R. v. Crown Zellerbach, [1988] 1 S.C.R. 401.

[48] Re Can Metal Co. Ltd and the Queen (1982), 144 D.L.R. (3d) 124.

[49] R. v. TNT Canada (1986), 37 DLR (4th) 297; Re Canadian National Railway Co. et. al. and Director under the Environmental Protection Act et al. and two other appeals (1991), 80 DLR (4th).

[50] The Queen in Right of Alberta v. Friends of the Oldman River Society S.C.C. No. 21890; the decision has yet to come down from the Supreme Court of Canada at the time of writing.

for further discussion of these issues.

4.1.2 The Residual Power under Peace, Order and Good Government ("POGG")

We have reviewed the residual power of the federal government and assume that in the current constitutional proposals a small concession is being made with respect to this source of jurisdiction.[51] Nonetheless, if we are unable to reach our objective of explicit concurrency with respect to the environment, we advocate the retention of the full residual power given that it cannot be predicted with any certainty how it might be useful in the future. Refer to appendix E for further discussion of this issue.

4.1.3 Transfer of Exclusive Jurisdiction[52]

The proposal to transfer exclusive jurisdiction to the provinces of tourism, forestry, mining, recreation, housing and municipal affairs, is also unwise in the face of confusion over environmental jurisdiction. It is not inconceivable that a federal role would be required in setting national standards and policy affecting any of these jurisdictions; undoubtedly more likely affecting the areas of forestry, mining, and municipal affairs. Although the concept of exclusive jurisdiction is

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[51] See Appendix E for further discussion. It is our assumption that proposals offer the provinces the "gap" power as articulated by P. Hogg, Supra, note 42, at p. 373.

[52] Proposals, supra, note 1, pp. 36-37 and p. 58.

somewhat misleading under the Constitution, there appears to be no real reason to enumerate these areas as separate sources of jurisdiction, if indeed this is a "constitutional proposal". It would seem that these areas are all clearly provincial in any event.

4.1.4 Streamlining Government[53]

Similarly, the section entitled "Candidates for Streamlining" poses conceptual difficulties. Presumably this is not a constitutional proposal. Significant areas for the environment are; wildlife conservation and protection, transportation of dangerous goods, and soil and water conservation. We advocate a strong federal presence in these areas; especially with respect to establishing minimum standards and with respect to the exercise of its spending power.

4.1.5 Approval Mechanisms for Cooperation[54]

Finally, we can not agree with enshrining the requirement of seven provinces' approval with 50% of the population, as a prerequisite to the exercise of the federal spending power in areas of exclusive provincial jurisdiction. It simply is a fact of life in the context of Canadian federalism that such agreement would be extremely difficult to obtain, even in the face of substantial public support for the initiatives involved. Refer

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[53] Ibid., p. 37-39 and p. 58.

[54] Ibid., pp. 39-40 and p. 59.

to Appendix E for further discussion.

4.2 Free Trade Between the Provinces[55]

The proposals also call for reduction of trade barriers between the provinces through the broadening of the common market clause.[56] While this may be a laudable theoretical goal in terms of economic efficiency, it could prove to be a substantial impediment to provincial autonomy, and to progressive provincial initiatives. A review of experience under the General Agreement on Tariff and Trade ("GATT") and the Free Trade Agreement ("FTA"), foreshadows the challenge to environmental regulation, arguments that it is a non-tariff barrier to trade. Lawyers will be under an obligation to inform their corporate clients of this type of defence to perceived unfair application of another province's environmental regulation.

The effect of such a proposal will likely be to harmonize environmental regulation downwards; especially if the jurisdiction of parliament to legislate national minimum standards for the environment is unclear. Refer to Appendix F for further discussion.

4.3 Recommendation

The proposed constitutional proposals affect, directly or by

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[55] Ibid., pp. 29-30 and p. 55-56

[56] The Constitution Act, 1867, s.121.

implication, the division of legislative powers between the federal and provincial governments. In effect, the proposals further devolve federal responsibility over the environment and serve to confuse, rather than clarify, legislative authority to protect the environment.

We recommend that environmental protection and resource conservation continue to be a shared responsibility of federal and provincial governments. Clarification is needed to allow substantial provincial autonomy over local matters and federal jurisdiction over extraprovincial and international matters. The federal government, however, should also have clear authority to set uniform national standards, allowing the provinces to enact more stringent standards.

In the alternative, we urge Parliament to maintain the status quo with respect to the division of powers. Given that a clear federal role in environmental matters is necessary, it must be recognized that Parliament will likely require its entire arsenal of jurisdictional powers to play this role fully. Specifically, we are referring to the full residual power, the declaratory power, the "general" power under trade and commerce, and the spending power.

5.0 PROPERTY RIGHTS AND THE ENVIRONMENT

5.1 Introduction

The definition of property is very broad at common law. It encompasses rights of possession, rights of ownership, rights of user, rights to preservation, rights to exclude others, rights of disposition and transmission, rights to enjoy the fruits and profits generated by property, and rights to injure or destroy property.[57] Almost every law passed by Parliament or the legislatures is related to property.[58]

In Shaping Canada's Future Together,[59] the federal government proposes to entrench the right to property in the Canadian Constitution. The recommendation states:

> It is...the view of the Government of Canada that the Canadian Charter of Rights and Freedoms should be amended to guarantee property rights.[60]

We contend that the proposal to include the right to property in the Constitution should be defeated. We advance number of arguments are to support this position. In particular, we argue that the proposal to include property rights would:

(1) instill an unprecedented degree of uncertainty in the regulatory frameworks governing property and in particular, pose a threat to a number of regulatory and

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[57] H. Poch, Corporate and Municipal Environmental Law (1989 The Carswell Company Limited), p. 450.

[58] Ibid.

[59] Proposals, supra, note 1.

[60] Ibid., at p. 3.

policy regimes relating to environmental protection and resource management;

(2) in effect, bestow an inherent right to pollute onto property owners, transfer the onus of those seeking to limit such rights to pollution victims, with the rights of nature to be protected for its own sake totally lost; and

(3) be redundant in the context that the existing common law and statute provisions provide a sufficient basis to protect those property interests in need of protection.

The overall impact of this proposal is clear. It would fundamentally undermine the constitutional validity of environmental and resource management legislation and the ability of governments to develop new or different regimes to protect and enhance the environment. Furthermore, it will in practice significantly hinder provincial autonomy as most regulation affecting property is within provincial jurisdiction. Provinces will have to bear the political pressure such a provision will bring, in addition to bearing the costs of defending its legislation in court during lengthy <u>Charter</u> battles.

Once these arguments have been examined, the following sections will discuss what kind of safeguards must be included should the constitutional proposal to include property rights proceed. Property rights, if included in the constitution, further accentuate the need for parallel environmental rights and the

inclusion of a public trust doctrine.[61]

5.2 Property Rights: Entrenching Uncertainty

No definition of property is given, including whether it includes "economic rights". The federal proposal to entrench a right to property does not reveal the nature, extent and precise wording of how to include this right in the Constitution. For example, it is unclear if the proposal is to include the right to property in section 7 (where the right to "life, liberty and the security of the person" is guaranteed), in some other existing section of the *Charter*, in an new section of the *Charter* or other components of the Constitution. Moreover, it is unclear whether the right to property would be a substantive right, a procedural or due process right, or an ancillary right to some other right guaranteed in the *Charter*.

A "procedural" right entitles a review of whether a property owner was treated fairly by the process that restricted his rights. In contrast, a "substantive" right requires the court to review the purpose of the legislation to see if it appears to be appropriate. The distinction is somewhat academic given that regardless of the wording chosen, the courts will conduct whatever depth of review they feel warranted by the circumstances. In large part, their decision of how far to foray

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[61] See above and Appendix D for further discussion of environmental rights.

into the legislative arena will depend upon the perceived importance of the type of right being restricted. We assume from the common law tradition that property rights will be taken very seriously indeed. An analysis of two of the Supreme Court decisions respecting section 7 of the Charter, a "procedural" right, shows that the court is clearly engaging in substantive review.[62]

Finally, we must look south of the border where it is said that an entrenched right to property exists and there is no problem. It must be remembered that at one time, albeit a tragic time in U.S. history, the U.S. Supreme Court ruled that slaves were property.[63] What implications are there for plant and animal species, biogenetics or bioengineering? Will our anthropomorphic rights system lead to the inclusion of such entities as property of mankind?

Further, the U.S. Court engaged in substantive review of several pieces of social welfare legislation, and under the guise of upholding property rights struck down such fundamental laws as

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[62] Reference Re Section 94(2) of the Motor Vehicle Act R.S.B.C., [1985] 2 S.C.R. 486; R. v. Morgentaler [1988], 1 S.C.R. 30; See P. Hogg " Interpreting the Charter of Rights" (1990) 28 Osgoode Hall Law Journal 817; at pp. 822-823.

[63] Dred Scott v. Sandford (1857), 19 How. 393.

minimum wage regulations.[64] It is possible that with property rights entrenchment we could be looking forward to decades of turmoil while our courts engage in substantive review of all our social welfare legislation, sorting out the legal impact of entrenched property rights, such as a right to a certain quality of air and water. There is no doubt that the courts will not confine themselves to a procedural due process review. In addition, we should not underestimate the "chilling effect" entrenched property rights would have upon legislatures, especially provincial legislature. These governments would likely shy away from further enactments affecting property rights to avoid confrontation with the business lobby in politics and in court. Environmentalists and other members of the public may find themselves with another reason for governmental inaction and frustration of the public's demands.

Assuming property rights would be subject to the balancing test under s. 1, the analysis required under the Charter may prove unsatisfactory. This section requires a court, among other things, to determine whether the end justifies the means and whether the government has looked at other ways to obtain the objective without affecting the right infringed. In this context, it is sometimes very difficult to support the objective of

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[64] This period of U.S. constitutional law is known as the "Lochner era". After the decision in Lochner v. New York (1905), 198 U.S. 45 in which the Court struck down maximum hours legislation. See P. Hogg, supra, note 42, p.654; Tribe, American Constitutional Law (1978), ch.8.

legislation and to prove harm and what caused that harm. Finally, it is not clear that a court will attach due regard for common property rights, such as rights to a certain quality of air or water.

It is unclear how the courts will decide issues involving a constitutional right to property. The litigation over such rights will be extremely costly, and therefore a great deal of society's scarce resources will be wasted maintaining and defending the current inadequate state of regulation.

Even in absence of a concrete proposal, the very inclusion of a right to property would instill a degree of uncertainty as to the constitutional validity of every statute pertaining to property in the country. In the province of Ontario alone, there are over 540 statutes. A very cursory estimate suggests that some one-half of these statutes in one way or another pertain to property. In addition to statute law, there is a broad and intertwined regime of common law governing property, including tort law (such as trespass, nuisance) and riparian rights. A right to property sets the stage to have every aspect of property law in the country subject to challenge - property rights in the context of matrimonial property; labour law, landlord and tenant, taxation, real property conveyance, easements, registration and foreclosure; economic, tax and fiscal policy; environmental legislation and virtually every area related, even remotely, to

property.[65] In effect, property rights and property law would be left in a state of chaos.

The state of uncertainty left by the inclusion of property rights is not justified in terms of the corresponding benefits. Quite the opposite, the inclusion creates little benefit while imposing considerable harm to the regulatory fabric of the country.

5.3 Challenges to Existing Environmental Regimes

A new right to property would impose an unacceptable degree of uncertainty over all legal regimes governing property in the country. More particularly, the area most impacted in terms of a long, sustained wave of legal challenges would be in the realm of land use and environmental management legislation. There are many examples.

5.3.1 Land Use Planning Laws

At present, every province has legislation, together with municipal by-laws, governing the land-use planning process. Within this process, there are a whole array of regulations on the use of property, such as zoning by-laws, property standards, subdivision regulations and severance controls that could be

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[65] See: Jean McBean, "The Implications of Entrenching Property Rights in Section 7 of the Charter of Rights" (1988), 24 Alta. L. Rev. 548, at 576-580.

subject to challenge.[66] What are the reasonable limits of these restrictions with the right to property? Should courts have to decide these questions as opposed to provincial and local governments in consultation with planning experts? Depending on the judicial interpretation of the right to property, it may be argued that the onus would be on government and the public-at-large to demonstrate the unreasonableness of the development before restrictions could remain on land use.

It should also be noted that every province has a different regime with respect to property rights. Some provinces have literally re-written common law property rights through an array of statutes affecting property rights. By entrenching the right to property in the Constitution, not only would these regimes be challenged, but the entrenched property can be viewed as an infringement on traditional legislative authority of the provinces under section 92(10) of the Constitution Act, 1867 to make laws concerning property and civil rights.

5.3.2 Resource Extraction and Environmental Management

Apart from land use laws, provincial and municipal regimes governing a whole range of resource and environmental management schemes would be up for a challenge. In other words, environmental protection measures may be taken to be an

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[66] Peter Mulvihill, "Would Constitutional Property Rights Inhibit Environmental Protection?" Alternatives, vol. 15, no. 2, 1988, 5 at p. 7.

encroachment on the rights of property owners to freely enjoy their property. Hence, there are numerous examples where challenges could be foreseen, including land rehabilitation requirements, controls over the extraction of minerals and aggregates, woodlot preservation policies, wetlands protection programs and air and water quality controls.[67] The common feature of these schemes is an historical progression of, or evolution, of policies attempting to balance the rights of developers and polluters to undertake their economic activities with the interests of society as a whole and the sustainability of the environment. In effect, this evolution of the tenuous reconciliation of these goals would be subject to being questioned and re-evaluated.

5.3.3 Impediments to Environmental Enforcement

At present, enforcement of environmental legislation is less than satisfactory. Indeed, in Ontario, 57% of direct dischargers to Lake Ontario are not in compliance with existing requirements.[68] With property rights, every aspect of environmental enforcement and compliance policies and practices could be challenged, including such issues such as the validity of strict and absolute liability offences, the requirements for prosecution initiation, including such issues as search and seizure, monitoring and

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[67] Ibid.

[68] Ministry of the Environment, Direct Dischargers Report - 1988 (1988).

reporting regimes, the parameters of the "due diligence" defence, among many other issues. Especially important to environmentalists, is the ability to obtain information from corporations on discharges, etc. Information is a form of property and if protected in the Constitution, it would allow corporations to resist reporting such information.

In light of the vast uncertainty a property rights provision in the Constitution would cause, on this ground alone, it is necessary to ask whether such inclusion is justified. We contend that it is not. Others agree. One learned commentator concluded this way:

> Do the benefits of entrenchment of property rights in s.7 outweigh the risks now that we know that s.7 is not merely a procedural protection? The answer must be a clear no.[69]

5.4 The Ill-Conceived Links Between Environmental Protection and Property Rights

Proponents of property rights argue that, by entrenching the right to property in the Constitution, there will be some positive benefits in terms of environmental protection. This argument is premised on the basis that the constitutional protection of private property rights will instill some additional and further sense of stewardship over their

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[69] McBean, supra, note 63 at p. 575.

property.[70] This assumption is simply not supportable.

Indeed, quite the opposite. Further property rights could erode the environmental protection measures. At present, environmental legislation commonly prohibits pollution and resource degradation unless there is some approval or permit granted. This approval is based on a whole regime of standards, guidelines and objectives designed to maintain the sustainability and integrity of the environment. With property rights, the presumption will shift to the notion that there is an absolute right to use and abuse one's property, limited only to the extent that it will interfere with the specific and defined rights of another owner. The consequences, hence, will be:

* since the presumption is that one can do what one wants with his/her property, there is an inherent, and constitutionally recognized **right to pollute**, subject only to the extent other property rights holders are infringed;

* the onus of establishing the "limits" of the right to pollute will be on those complaining of harm (the pollution victim or their representative, the government); while this is the case at present, the courts will have to define the precise nature of that burden in the context of the entrenched property right;

* with the onus on those interests trying to limit the rights of property rights holders, it will be the courts, and not the legislatures which will have the power to adjudicate the extent and degree of environmental and resource protection in Canada; and

* the rights of the environment, and the notion of protecting nature for its own sake, will be simply

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[70] Terence Corcoran, "Save the Environment, Fix Property Rights" Globe and Mail, Report on Business, September 1991, page B2.

lost. The individual will triumph over the collective and nature.

5.5 Property Rights - A Right to Develop?

Proponents of property rights outline a number of reasons to justify the inclusion, including the potential for governments to expropriate without compensation (an argument dealt with below). Other justifications include the fact that delays in land use approvals and restrictive zoning and land use requirements unreasonably interfere with the full enjoyment of benefits of landownership. In effect, proponents of property rights are suggesting that there is a **right** to develop that cannot be unreasonably interfered with. Such a proposition may have dire consequences for the land use planning regimes in Canada. Just one example may be the whole issue of delay. Could anyone have anticipated that the right to a trial within a reasonable time could result in the Askov decision where trial must be undertaken within eight months? Can now anyone anticipate the ramifications of the right to develop, especially when the issue of delay is one of the more vocal justifications for the inclusion of the right? If there is a need to remedy the ailments of the land-use planning regimes, it should be done provincially through legislative changes.

5.6 Are Property Rights Needed?

In light of the potential problems with the constitutional entrenchment to property, a simple question needs to be asked:

Are property rights needed in the first place? The weight of scholarly legal opinion, and seemingly judicial opinion, suggests that, despite the absence of specific entrenchment of property rights in the Charter, these rights are significantly protected both through common and statute law.

Both common law and statute law provide significant property rights, including land ownership (such as the right to acquire property and the right not to have property taken away) and land use (such as limits on governments and administrative bodies' power to restrict property use).[71] The question of expropriation is discussed below. In terms of land use, certainly the common law concepts of nuisance, trespass, riparian rights, and even the principle of Rylands v. Fletcher,[72] provide rules as what is the reasonable use of property.

5.6.1 Expropriation

The right not to have property taken away is protected by traditional public law.[73] It would seem that even in absence of the Charter, the courts will imply that a fair procedure must be employed in taking the property, unless there an express

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[71] Robert G. Doumani and Jane Matthews Glenn, "Property, Planning and the Charter" (1989), 34 McGill Law Journal 1036, at pp. 1040 to 1043; 1047 to 1050.

[72] [1861-73] ALL E.R. Rep. 1.

[73] Glenn, supra, note 71 at p. 1041 to 1043.

exemption to that.[74] If there are problems with this regime, which we maintain have not been demonstrated, the solution is legislative reform, not constitutional reform.

5.7 The Enhanced Need for Environmental Rights if Property Rights are Included

Both on the basis of the negative effects the inclusion of property would have on the environment and the corresponding little benefits that would be gained from the inclusion, the property rights proposal should be defeated. If this proposal is supported, however, we conclude that property rights should not be included unless there are balancing or corresponding environmental rights. Such environmental rights are inherently valuable on their own as is discussed above and in Appendix D.

5.8 Recommendation

The federal government proposes to include property rights in the Canadian Charter of Rights and Freedoms. This provision would create enormous uncertainty for every environmental protection regime in the country as well as constitutionally entrench the right to pollute.

We recommend that the proposal to include property rights in the constitution be withdrawn.

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[74] McBean, supra, note 65, at p.551.

6.0 CONCLUSION

We have analyzed what is necessary to adequately protect the environment and the health of Canadians in the Constitution. This requires a set of enforceable constitutional rights which encompass a healthful environment and the protection of the public trust. In addition, the division of powers must be clarified to allow the federal government jurisdiction to establish national environmental and resource conservation standards and national policies where necessary.

Further, we have analyzed the federal government's proposals and found them to be sorely lacking in environmental protection. Instead of environmental rights, we have been handed property rights and a gratuitous unenforceable reference to sustainable development. Instead of a strong federal role, we have been handed significant devolution of federal powers. Clearly, the proposals are unacceptable and all present and future Canadians will suffer if the debate is not now expanded to include consideration of the environment, and specifically the proposals put forward in this brief.

APPENDIX A

THE BRUNDTLAND COMMISSION AND SUSTAINABLE DEVELOPMENT IN CANADA

The Brundtland report, Our Common Future[75], contains a number of insights that are of value to consider in the context of Canada's constitutional debate; especially concerning the importance given to economic renewal. The Brundtland recommendations have been strongly endorsed in Canada by the National Task Force on Environment and Economy.[76]

The message is that without sound environmental planning, integration of environment and economy, and substantive and clear environmental rights and obligations, we will have no common future. We can not over-emphasize the breadth of the challenge ahead as it involves a fundamental restructuring of societal values. Without fundamental change in our attitudes and institutions and law and policy, environmental degradation will continue unabated at its exponential rate. What better way to start to change the path of a nation than in its constitution?

The report paints a very depressing picture indeed: "Greater attention to resource efficiency can moderate the increase, but, on balance, environmental problems will intensify in global

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[75] World Commission on Environment and Development, Our Common Future (New York: Oxford University Press, 1987).

[76] The National Task Force on Environment and the Economic Report (CCREM, September 1987).

terms."[77] One such threat is the 'greenhouse effect' which is directly caused by increased resource use. Burning fossil fuels and cutting and burning trees all release carbon dioxide (CO_2) into the atmosphere. As CO_2 accumulates with other gases, solar radiation is trapped near the Earth's surface, causing global warming.

Another major threat is the depletion of the atmospheric ozone by gases released as a result of the production of foam and the use of refrigerants and aerosols. At the same time, air pollution, in the form of acid rain, is killing trees and lakes and damaging buildings and cultural treasures, both near and far away from emission sources. The disposal of toxic wastes presents another threat to the health and well-being of the planet.

Meanwhile, each year another 6 million hectares are degraded to desert-like conditions. More than 11 million hectares of tropical forests are destroyed per year.[78] This destruction, causes the extinction of species of plants and animals which reduces the genetic diversity of the world's ecosystems.

> This process robs present and future generations of genetic material with which to improve crop varieties, to make them less vulnerable to weather stress, pest attacks, and disease. The loss of species and subspecies, many as yet unstudied by science, deprives us of important potential sources of medicines and industrial chemicals. It removes

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[77] Supra, note 1, p. 32.

[78] Ibid., p. 34.

> forever creatures of beauty and parts of our cultural heritage.[79]

Of prime importance is the reality that environmental stresses are inextricably linked. This means that these problems must be tackled simultaneously. Also a reality that some governments like to ignore is the fact that environmental stresses and patterns of economic development are also inextricably linked. For example, agricultural and energy policies affect the environment, and environmental problems threaten economic development. Also worth stressing is the fact that environmental stresses do not respect political boundaries, be they between nations, states or provinces.

Responsibility for environmental matters has been placed with environmental ministries that often have little or no control over destruction caused by agricultural, industrial, urban development, forestry, and transportation policies and practices.

> Thus our environmental management practises have focussed largely upon after-the-fact repair of damage: reforestation, reclaiming desert lands, rebuilding urban environments, restoring natural habitats, and rehabilitating wild lands. The ability to anticipate and prevent environmental damage will require that the ecological dimensions of policy be considered at the same time as the economic, trade, energy, agricultural, and other dimensions."[80]

Accordingly, the Brundtland Commission identified the concept of

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[79] Ibid., p. 35.

[80] Ibid., p. 39.

"sustainable development" to be used as a global objective and to be adopted as the objective for each nation. Sustainable development is defined as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs."[81]

The Commission describes the challenge as;

> The ability to choose policy paths that are sustainable requires that the ecological dimensions of policy be considered at the same time as the economic, trade, energy, agricultural, industrial, and other dimensions - on the same national and international institutions.[82]

The Commission recommends that sustainable development objectives be incorporated in the terms of reference of those cabinet and legislative committees dealing with national economic policy and planning as well as those dealing with key sectoral and international policies. Furthermore, the major central economic and sectoral agencies of governments should now be made directly responsible and fully accountable for ensuring that their policies, programmes, and budgets support development that is ecologically sound as well as economically sustainable.

An important step towards sustainable development stated by the Commission is the recognition by states of the right of individuals to know and have access to current information on the

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[81] Ibid., p. 43.

[82] Ibid., p. 313.

state of the environment and natural resources, the right to be consulted and to participate in decision making on activities likely to have a significant effect on the environment, and the right to legal remedies and redress for those whose health or environment have been or may be seriously affected.[83]

The Commission sets out strategies for sustainable industrial development and notes that it is essential that industry, government, and the public have clear benchmarks. The Commission further states:

> Where the workforce and financial resources permit, national governments should establish clear environmental goals and enforce environmental laws, regulations, incentives, and standards on industrial enterprises.... The regulations and standards should govern such matters as air and water pollution, waste management, occupational health and safety of workers, energy and resource efficiency of products or processes, and the manufacture, marketing, use, transport, and disposal of toxic substances. **This should normally be done at the national level, with local governments being empowered to exceed, but not to lower, national norms.**[84]

The implications for Canada are that a strong national role must be taken by Parliament to ensure that economic planning and the protection of the environment are integrated. The federal government therefore should be responsible for ensuring the development of national standards on environmental matters, as

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[83] Ibid., p. 330.

[84] Ibid., pp. 219-220.

well as ensure that clear national policies exist to assess the environmental impact of **all** key sectoral and international policies.

CELA has set out three areas of reform that follow from the Brundtland recommendations.[85] These suggestions cover the need for an environmental bill of rights, the need for comprehensive environmental assessment, and the need for clear enforced environmental standards, regulations and incentives.

One final note with reference to the inherent right of Native self-government, the Report states:

> Tribal and indigenous peoples will need special attention as the forces of economic development disrupt their traditional lifestyles - lifestyles that can offer modern societies many lessons in the management of resources in complex forest, mountain, and dryland ecosystems. Some are threatened with virtual extinction by insensitive development over which they have no control. Their traditional rights should be recognized and they should be given a decisive voice in formulating policies about resource development in their areas.[86]

Conclusion

Three main concepts can be extracted from the Brundtland report

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[85] Rick Lindgren, "Future Directions for Environmental Law: Implementing the Brundtland Report" (Toronto: CELA, February 18, 1989).

[86] Brundtland Report, supra, note 1. We support the inherent right of Native people in Canada to self-government and in no way wish our recommendations to hamper the negotiation process to that end.

that pertain to constitutional reform in Canada: public access to environmental justice, the need for clear environmental standards, and the necessity to integrate environmental and economic decision-making at the level of government at which decisions and policies are formed that impact on the environment.

APPENDIX B

CANADA: ENVIRONMENTAL LEGISLATIVE REFORM

The Canadian Bar Association (CBA), Sustainable Development Committee Report recognizes that the Brundtland Commission "clearly calls for strong national standards, legislation and regulations and for enforcement of these laws."[87]

Among other law reform issues, the CBA committee documents important gaps in the federal legislative scheme with respect to toxic contamination, waste management, drinking water safety and the protection of Canada's unique ecological and renewable resources.[88]

Solid Waste Management

The CBA committee recommends a comprehensive federal strategy to deal with the management of solid wastes. The recommendation is for a 50% reduction of municipal solid waste during the next decade. It is argued that the development of packaging regulations to promote resource conservation, energy efficiency and waste management objectives is a valid extension of current packaging controls established for consumer protection and public

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[87] Report of the Canadian Bar Association Committee on Sustainable Development in Canada: Options for Law Reform (Ottawa: Canadian Bar Association, 1990), p. 2.

[88] Ibid., p. 3.

health reasons.[89] This argument has not been subject to judicial scrutiny.

Toxic Contamination

The CBA committee recommends a comprehensive federal strategy to deal with existing toxic contamination and to prevent future toxic contamination in Canada. This federal strategy should explicitly contain a national regulatory goal of zero discharge for "persistent" toxic chemicals and toxic use reduction goals for all other toxic substances. It is further argued that what is needed is an absolute or overall reduction of specific pollutants entering the environment. The CBA report notes:

> Environmental legislation in Canada has evolved in a piecemeal, fragmented fashion responding separately to air pollution, water pollution and, more recently, the degradation of land-based resources. At the federal level, some 30 federal statutes and 24 departments have responsibility over different aspects of toxic and hazardous substance control.[90]

The federal government tried to enact comprehensive regulations regulating all toxic chemicals "cradle to grave", but due to constitutional pressures, the current law is insufficient as it applies only to some chemicals and is not cradle to grave.[91]

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[89] Ibid., p. 11.

[90] Ibid., p. 12.

[91] R. Northey, "Federalism and Comprehensive Environmental Reform: Seeing Beyond the Murky Medium," (1991) 29 Osgoode Hall Law Journal 127, at p. 129.

Pesticide Regulation

It is recommended that federal law reform take place to ensure the development of ecologically acceptable pest management strategies. Given that the provinces play an important role in the regulation of pesticides, it is argued that the federal government establish minimum national standards for matters of national interest including:

(a) training and licensing programs for all commercial pest control product users, dealers, wholesalers and retailers;

(b) training of farm workers as prescribed in WHMIS regulations;

(c) the reuse, recycling, collection, storage and disposal of containers;

(d) the collection, storage and disposal of pesticide wastes;

(e) storage and warehousing of pesticides;

(f) suggested action levels for pesticides in groundwater and drinking water;

(g) certification of farmers;

(h) buffer zones; and

(i) emergency response measures.[92]

Protecting the Atmosphere

Recommendations are for the federal government and the provinces to:

1. adopt the goal of achieving at least a 20% reduction of

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[92] T. Vigod, "CBA Sustainable Development Action Plan Federal Pesticide Regulation", supra, note 1, at pp. 163-164.

CO_2 emissions by the year 2005;

2. to encourage through legislation and policy the use of alternatives to the burning of fossil fuels, with the first priority given to energy efficiency and conservation; and

3. to cease to subsidize the development of otherwise uneconomic large scale fossil fuel megaprojects.[93]

Protecting the Ocean

The CBA report notes that land-based activities are the most important cause of degradation of the marine environment. Other significant sources are airborne pollution, oil spills, ocean dumping, seabed mining and petroleum activities and over-harvesting of fish stocks.[94]

Several federal policy initiatives are suggested to better control marine pollution from land-based sources:

(a) establish national marine environmental equality objectives and standards;

(b) base control of marine pollution on a precautionary approach where strict limitation on emissions of pollutants at source should be imposed for safety reasons, even if the state of scientific knowledge is insufficient and a causal link has not been established;

(c) set a goal of "zero discharge" for persistent toxic substances into the marine environment;

(d) give high priority to coastal planning initiatives. The new Oceans Act, presently being drafted by the federal government, provides an opportunity to launch a national coastal management program involving government decision-makers, industries and coastal

[93] Ibid., p. 14.

[94] Ibid., p. 15.

communities in understanding the sources of marine pollution and in forging clean-up strategies;

(e) promote policy shifts in various resource sectors to reduce pollution. For example, agricultural dependence on chemical pesticides and commercial fertilizers, a significant cause of land-based pollution, might be lessened through a conceptual shift towards integrated pest management and revival of organic farming methods. The countering of acid rain and the "greenhouse effect", which may also be considered forms of land-based pollution, will require more than technological and regulatory "fixes" such as a reorientation of energy and transportation policies towards renewable fuels and mass transit alternatives.[95]

Conservation of Canada's Water Resources

Unanticipated effects of large scale water diversions led Parliament to consider legislation to promote water conservation, namely the proposed Canada Water Preservation Act, which died on the order paper. This proposed legislation only dealt with exports of water. The CBA report argues that the federal government has the constitutional power to regulate water diversion for export and water diversion that crosses provincial boundaries. To determine whether this is correct in law will require a court challenge. Moreover, the federal government's power to regulate inter-basin diversions within a province may not withstand judicial scrutiny. The CBA report recommends that any legislation reflect the principle that inter-basin diversions

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[95] M.L. McConnell and D. Vander Zwaag, "Sustainable Development and Marine Environmental Protection", supra, note 1, pp. 184-185.

be regarded as prima facie undesirable.[96]

Sustainable Forestry

The CBA report cites the need for federal law reform in the forestry area. Intense harvesting and poor land management have resulted in continuous loss of unexploited productive forest land. The report states that much of what remains intact today tends to be inaccessible and uneconomic to harvest and timber supply shortages have emerged in every province. It is urged that the federal government develop a national forestry policy and codes of practise for the forestry sector based on the principles of sustainable development.[97]

Conclusion

Although the federal government has endorsed the concept of sustainable development, it has not translated this concept into a reality. For example, during the free trade debate we were told that the Free Trade Agreement (FTA) was not about the environment. This statement was made notwithstanding the inclusion of Canada's natural resources in the agreement. Nonetheless, the FTA is the perfect example of the opportunity the Brundtland commission urges us to use to integrate the environment and the economy.

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[96] Ibid., p. 16.

[97] Ibid., p. 17.

Once again we are afforded an opportunity to effect positive change for the environment through reform of our constitution. Once again it appears that the environment has been left out of the debate. Clearly, where the CBA advocates comprehensive legislative reform as above, there should be analysis of the present constitutional limitations for such reform. We have done such an analysis, as have other commentators and constitutional scholars, and the consensus appears to be there is considerable doubt that the present distribution of powers will facilitate a strong federal role.[98]

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[98] See Appendix E and the section on "Division of Powers" in the main text.

APPENDIX C

THE CANADA CLAUSE IN THE CONSTITUTION ACT, 1867

The proposals recommend a "Canada clause" that acknowledges who we are as a people, and who we aspire to be, to be entrenched in section 2 of the Constitution Act, 1867. The following language refers to the environment:

> ... a commitment to the objective of sustainable development in recognition of the importance of the land, the air and the water and our responsibility to preserve the environment for future generations.[99]

The principle of enshrining our national values in the constitution is welcome as long as the appropriate language is used so that the values have some meaning.[100] We recommend reviewing other jurisdictions for appropriate wording. As an example, the declaration of the U.S. Congress as to national environmental policy under the National Environmental Policy Act contains wording that we submit is much more meaningful than "sustainable development":

> The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man,

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[99] Canada, Shaping Canada's Future Together: Proposals (Ottawa: Supply and Services, 1991), pp. 7 and 52.

[100] See discussion on this point in the section called "Environment as a Fundamental Value in Canada" in the main brief.

declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfil the social, economic, and other requirements of present and future generations of Americans.[101]

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[101] National Environmental Policy Act 42 U.S.C. 4331 [NEPA 101].

APPENDIX D

FORM AND CONTENT OF ENSHRINING MECHANISMS IN THE CONSTITUTION TO ENHANCE AND PRESERVE ECOLOGICAL INTEGRITY

As set out in the main brief[102] above, Canada has not protected its citizens' rights to a healthful environment, nor do its citizens have the right to know and have access to current information on the state of the environment and natural resources. Moreover, Canada's citizens do not have the right to participate in decision-making on activities likely to have a significant effect on the environment, and the right to legal remedies and redress for those whose health or environment has been or may be seriously affected.

To adequately enshrine a set of rights to accomplish our objectives as set out in the main brief[103] and directly above, we recommend that a set of constitutional substantive provisions ensuring a right to a healthful environment have five key elements and characteristics.[104] These rights would be enforceable by members of the pubic and unincorporated associations representing the public.

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[102] See the main brief; the section on "Enhancing and Preserving Ecological Integrity.

[103] See p. 2-3 of the main text.

[104] See T. Vigod & F. Gertler, Environmental Protection in a New Constitution (Toronto: Canadian Environmental Law Association, June 1991) which deals with environmental rights in the Ontario constitution. We are grateful for the valuable discussion with Franklin Gertler regarding the application of his work in this brief to the incorporation of such a right in the constitution of Canada.

1. There should be a separate part of the Constitution Act, 1982, which would be entitled something like "Enhancement and Preservation of Ecological Integrity". This separate status would ensure that this part is applicable both to the public and the private sector; similar to the interpretation of s.35, the rights of the aboriginal peoples of Canada.

2. Given that the rights would not be included in the Charter per se, there should be some limiting language incorporated such that the balancing exercise involved in section 1 would be applicable.

3. These rights should be drafted as to make it clear that it is not merely declaratory of existing rights and protections, but rather imposes a positive first-order constitutional duty on all persons and organizations, including governments, to legislate, administer public and private property and act in all matters in strict accordance with the substantive right to a healthful environment.

4. Although section 52 would clearly apply, operating to render inconsistent laws inoperative, a provision such as s.24, providing any remedy a court of competent jurisdiction considers appropriate and just in the circumstances, should be added. This remedy section would include injunctions against the Crown. The court of competent jurisdiction should include inferior tribunals charged with land and resource use and environmental matters.

5. Finally, the right would be subject to a strictly limited notwithstanding clause allowing for legislative override. Such a provision may be necessary to allow for the validity of certain specific and circumscribed legislation or government action which would otherwise breach the right to a healthful environment. The notwithstanding clause would be an effective override for a renewable period of five years and could only be activated by a two-thirds (2/3) majority of all the members (including those not present) of the government seeking to apply the override.

A review of other jurisdictions would assist in deciding upon the exact wording of such rights.

Following this discussion is a summary of other jurisdictions

which have constitutional protection of environmental rights, including several U.S. states.[105]

Another example worth noting is the applicable draft language for a proposed Ontario Environmental Bill of Rights, Private Member's Bill 13, s.2;

> (1) The people of Ontario have a right to clean air, pure water and the preservation of the natural, scenic, historic and aesthetic values of the environment.
>
> (2) Ontario's public lands, waters and natural resources are the common property of all the people, including generations yet to come, and, as trustee of those lands, waters and resources, the Government of Ontario shall conserve and maintain them for the benefit of present and future generations.
>
> (3) It is hereby declared that it is in the public interest to provide every person with an adequate remedy to protect and conserve the environment and the public trust therein from contamination and degradation.

Conclusion

We must seize this opportunity to enshrine protection for our health and our environment in the Constitution. This is not a radical proposal and would likely be met with widespread approval from the Canadian public. We urge the federal government to begin consultation on these issues immediately.

ENVIRONMENTAL CLAUSES IN CONSTITUTIONS

A. Foreign Constitutions

1. Bulgaria, 1971, Art. 31

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[105] This compilation comes from Appendix A of the paper "Environmental Protection in a New Constitution", supra, note 3.

> The state bodies and enterprises, the cooperatives and public organizations, as well as every citizen, are duty-bound to protect and preserve nature and natural resources, the water, air and soil, as well as the cultural monuments.[106]

2. Chile, 1980, Art. 19 sec.(8)

> The right to live in an environment free from contamination. It is the duty of the State to watch over the protection of this right and the preservation of nature.
>
> The law may establish specific restriction on the exercise of certain rights or freedoms in order to protect the environment.[107]

3. China, 1982, Art. 9

> The state ensures the rational use of natural resources and protects rare animals and plants. The appropriation or damage of natural resources by any organization or individual by whatever means is prohibited.[108]

4. German Democratic Republic (GDR), 1974, Art. 15

   1. The soil of the GDR is one of its most valuable natural riches. It must be protected and utilized rationally. Forest and cultivated land may be withdrawn from such use only with the agreement of the responsible state organs.

   2. In the interests of the well-being of citizens, the state and society care for the protection of nature. The competent bodies shall insure the purity of water and the air, and protection for flora and fauna and the natural beauties of the homeland; in addition this is the affair of every citizen.[109]

5. Greece, 1975, Art. 24

   1. The protection of the natural and cultural environment

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[106] Blaustein Flanz, Constitutions of the Countries of the World, vol. 3.

[107] Ibid., Historic Constitutions, vol. 3.

[108] Ibid., vol. 4.

[109] Ibid., vol. 4.

constitutes a duty of the State. The State is bound to adopt special preventive or repressive measures for the preservation of the environment...[110]

6. India, 1989, Sec. 48A, 51A(g)

48A The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country.

51A(g) It shall be the duty of every citizen of India...to protect and improve the natural environment including forests, lakes, rivers and wildlife and to have compassion for living creatures.[111]

7. Mexico, 1987, Art. 27

...The Nation shall at all times have the right to impose on private property such limitations as the public interest may demand, as well as the right to regulate the utilization of natural resources which are susceptible of appropriation, in order to conserve them to ensure a more equitable distribution of public wealth, to attain a well-balanced development of the country and improvement of the living conditions of the rural and urban population. With this end in view, necessary measures shall be taken to put order to human settlements and establish adequate lands, waters and forests provisions, uses, reserves and purposes, so as to carry out public works and to plan and regulate the foundation, conservation, betterment and growth of the centers of population; to preserve and restore the ecological balance; ...and to prevent the destruction of natural resources and to protect property from damage to the detriment of society.[112]

8. Mozambique, 1980, Art. 11

The state shall promote knowledge, surveys and evaluation of natural resources, guaranteeing the ecological balance and the conservation and preservation of the environment.[113]

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[110] Ibid., vol. 6.

[111] Ibid., vol. 7.

[112] Ibid., vol. 10.

[113] Ibid., vol. 11.

9. Namibia, Art. 95(1), 91(c)

> 95(1) ...the ecosystems, essential ecological processes and biological diversity of Namibia are maintained and living natural resources are utilized on a sustainable basis for the benefit of all Namibians, both present and future; in particular the Government shall provide measures against the dumping or recycling of foreign nuclear and toxic waste on Namibian territory.
>
> 91(c) (The Ombudsman has)...the duty to investigate complaints concerning the over-utilization of living natural resources, the irrational exploitation of nonrenewable resources, the degradation and destruction of ecosystems and failure to protect the beauty and character of Namibia.[114]

10. Netherlands, 1987, Art. 21

> It shall be the concern of the authorities to keep the country habitable and to protect and improve the environment.[115]

11. Nicaragua, 1987, Art. 102

> The natural resources are national patrimony. The preservation of the environment, and the conservation, development and rational exploitation of the natural resources are responsibilities of the state; the state may formalize contracts for the national exploitation of these resources when required by the national interest.[116]

12. Peru, 1979, Art. 123

> Everyone has the right to live in a healthy environment, ecologically balanced and adequate for the development of life and the preservation of the countryside and nature. Everyone has the duty to conserve said environment.
>
> It is the obligation of the State to prevent and

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[114] "Environmental Law", Centre for Applied Legal Studies, University of Witwatersrand, Oct. 1990, p. 63.

[115] Ibid., vol. 11.

[116] Ibid., vol. 12.

control environmental pollution.[117]

13. Poland, 1952, Art. 71

    Citizens of the Polish People's Republic shall have the right to benefit from the natural environment and it shall be their duty to protect it.[118]

14. Portugal, 1982, Art. 66

    1. Everyone shall have the right to a healthy and ecologically balanced human environment and the duty to defend it.

    2. It shall be the duty of the State, acting through appropriate bodies and having recourse to popular initiative to:

        a. Prevent and control pollution and its effects and harmful forms of erosion;

        b. Have regard in regional planning to the creation of balanced biological areas;

        c. Create and develop natural reserves and parks and recreation areas and classify and protect landscapes and sites so as to ensure the conservation of nature and the preservation of cultural assets of historical or artistic interest;

        d. Promote the rational use of natural resources, safeguarding their capacity for renewal and ecological stability.

    3. Everyone shall have the right, in accordance with the law, to promote the prevention or cessation of factors leading to the deterioration of the environment and, in the case of direct losses, to a corresponding compensation.[119]

15. Soviet Union, 1977, Art. 18

    In the interests of the present and future generations, the necessary steps are taken in the

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[117] Ibid., vol. 14.

[118] Ibid., vol. 14.

[119] Ibid., vol. 15.

USSR to protect and make scientific, rational use of the land and its mineral and water resources, and the plant and animal kingdoms, to preserve the purity of air and water, ensure reproduction of natural wealth, and improve the human environment.[120]

16. Spain, 1978, Art. 45

    1. Everyone has the right to enjoy an environment suitable for the development of the person as well as the duty to preserve it.

    2. The public authorities shall concern themselves with the rational use of natural resources for the purpose of protecting and improving the quality of life and protecting and restoring the environment, supporting themselves on an indispensable collective solidarity.

    3. For those who violate the provisions of the foregoing paragraph penal or administrative sanctions, as applicable, shall be established and they shall be obliged to repair the damage caused.[121]

17. Sri Lanka, 1978, Sec. 27(14)

    The State shall protect, preserve and improve the environment for the benefit of the community.[122]

18. Yugoslavia, 1974, Art. 87

    Working people and citizens, organizations of associated labour, socio-political communities, local communities and other self-managing organizations and communities shall have the right and duty to assure conditions for the conservation and improvement of the natural and man-made values of the human environment, and to prevent or eliminate harmful consequences of air, soil, water or noise pollution and the like, which endanger these values and imperil the health and lives of

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[120] Ibid., vol. 18.

[121] Ibid., vol. 16.

[122] Ibid., vol. 16.

people.[123]

B. U.S. State Constitutions[124]

19. Massachusetts, amend. Art. 49

> The people shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic and aesthetic qualities of their environment; and the protection of the people in their right to the conservation, development and utilization of the agriculture, mineral, forest, water, air and other natural resources is hereby declared to be a public purpose.
>
> The general court shall have the power to enact legislation necessary or expedient to protect such rights. In the furtherance of the foregoing powers, the general court shall have the power to provide for the taking, upon payment of just compensation therefore, or the acquisition by purchase or otherwise, of lands and easements or such other interests therein as may be deemed necessary to accomplish these purposes.
>
> Lands and easements taken or acquired for such purposes shall not be used for other purposes or otherwise disposed of except by laws enacted by a two-thirds vote, taken by yeas and nays, of each branch of the general court.

20. Rhode Island, Art. 37, sec. 1

> The people shall continue to enjoy and freely exercise all the rights of fishery, and the privileges of the shore, to which they have been heretofore entitled under the charter and usages of this State; and they shall be secure in their rights to use and enjoyment of the natural resources of the State with due regard for the preservation of their values; and it shall be the duty of the general assembly to provide for the conservation of air, land, water, plant, animal, mineral and other

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[123] Ibid., supplement.

[124] Other U.S. state constitutions with environmental rights include Alaska Constitution, art. 8; Florida Constitution, art. 2, s.7; Georgia Constitution, art. 3, s.8; Hawaii Constitution, art. 10, s.1; Montana Constitution, art. 9, s.1; New Mexico Constitution, art. 20, s.21; New York Constitution, art. 14, s.4; North Carolina Constitution, art. 14, s.5 and Virgina Constitution, art. 11, s.1.

natural resources of the State, and to adopt all means necessary and proper by law to protect the natural environment of the people of the State by providing adequate resource planning for the control and regulation of the use of the natural resources of the State and for the preservation, regeneration and restoration of the natural environment of the State.

21. Texas, Art. 16, sec. 59(a)

> The conservation and development of all of the natural resources of this State, including the control, storing, preservation and distribution of its storm and flood waters, the waters of its rivers and streams, for irrigation of its arid, semi-arid and other lands needing irrigation, the reclamation and drainage of its overflowed lands, and other lands needing drainage, the conservation and development of its forests, water and hydro-electric power, the navigation of its inland and coastal water, and the preservation and conservation of all such natural resources of the State are each and all hereby declared public rights and duties; and the legislature shall pass all such laws as may be appropriate thereto.

22. Pennsylvania, Art. 1, sec. 27

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and aesthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

23. Michigan, Art. 4, sec. 52

> The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people. The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction.

APPENDIX E

DIVISION OF POWERS

The Constitution Act, 1867, sets out the division of powers between the federal and the provincial governments. The list of powers is meant to be exhaustive and the federal and provincial governments are to be supreme within their own sphere.[125]

Provincial Jurisdiction

The provinces have jurisdiction to regulate with respect to pollution matters by virtue of their primary jurisdiction over "Property and Civil Rights in the Province" (s.92(13)) and "Generally all matters of a merely local or private nature in the Province" (s.92(16)). It can be said that property and civil rights are the provincial equivalent of the federal peace, order and good government.[126] Given that a good deal of pollution arises in the context of land use and land use planning, pollution regulation appears to be of a local and regional nature. Provinces do not, however, have the right to regulate

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[125] See discussion in the main brief. P. Hogg, Constitutional Law of Canada, 2nd ed., (Carswell: 1985), p. 332-333 and 339-34.

[126] H. Scott Fairly, "The Environment, Sustainable Development and the Limits of Constitutional Jurisdiction" in Sustainable Development in Canada: Options for Law Reform (1990: Canadian Bar Association), p. 57.

out of province companies.[127] Other sources of provincial jurisdiction are found in their control and ownership of their land, mines and minerals (s.109) and non-renewable natural resources, forestry and electrical energy (s.92A).

Federal Jurisdiction

The federal power to legislate over environmental matters is clear where such matters have interprovincial and international effects[128]; however, it is unclear that the power to legislate national environmental standards would survive a jurisdictional challenge.

Parliament's jurisdiction to regulate the environment comes from a number of different heads of power. It is questionable that any one head of power gives Parliament the jurisdiction that it needs to play a strong role in providing national standards and policy. Especially in areas where land pollution, land use and resource conservation are involved, the federal government would undoubtedly be challenged for stepping into provincial jurisdiction.

The significant federal powers involved can be characterized into

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[127] Interprovincial Cooperatives Ltd. et al v. The Queen in Right of Manitoba (1975) 53 DLR (3d) 321.

[128] R. v. Crown Zellerbach Canada Ltd., (1988) 49 DLR 161, at p. 184.

two groups; functional and conceptual.[129] The functional powers are as follows:

- "Navigation and Shipping" (s.91(1))
- "Sea Coast and Inland Fisheries" (s. 91(12))
- "Canals, Harbours, Rivers and Lake Improvements" (s. 108)
- "Federal Works and Undertakings" (s.91(29) and 92(10))

While "Agriculture" (s.95) might be added to this list, and although it is framed as a concurrent power, that is shared with the provinces, it has essentially been emptied of meaning by judicial pronouncement. It is difficult to see it as a true concurrent power.[130]

It is clear that the above exclusive powers allow Parliament to legislate over specific activities which necessarily involve matters of environmental quality.

The conceptual powers, however, arguably provide Parliament with general authority to legislate over broadly defined activities which by analogy or implication include matters of environmental quality. They are as follows:

- "Criminal Law" (s. 91(2))
- "Peace, Order and Good Government" (s.91)

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[129] P. Emond, "The Case for a Greater Federal Role in the Environmental Protection Field" (1972), 10 Osgoode Hall Law Journal 646, at p. 656.

[130] R. Northey, "Federalism and Comprehensive Environmental Reform: Seeing Beyond the Murky Medium", (1991) 29 Osgoode Hall Law Journal 128, at p. 167.

- "Taxation" (s. 91(3))
- "Trade and Commerce" (s.91(2))
- "Public Debt and Property" (the Spending Power - s. 91(1A))

A close analysis of these heads of power reveals strong doubts that none is satisfactory alone to support a strong federal role regulating environmental protection and resource conservation. Moreover, it may be that even taken altogether, these powers are not sufficient for the leadership role we envision for the federal government.

Criminal Law

Traditionally, the criminal law power (s. 91(27)) has been used to prohibit conduct which is detrimental to the public good, for example conduct detrimental to health.[131] This power has been the subject of much judicial debate.[132] Environmental legislation enacted to protect public health has been upheld under the criminal law power: most importantly, the former Clean Air Act.[133]

The criminal law power has been limited to preserve the division of powers so that the federal government may not regulate in

[131] Canadian Federation of Agriculture v. A.-G. Que [1951] A.C.179; known as the "Margarine Reference" (1951).

[132] Hogg, supra, note 1, at pages 399-402.

[133] Re: Can. Metal Co. and R. (1983), 144 DLR (3d) 124.

areas of exclusive provincial jurisdiction simply because there is a perceived health risk. Accordingly, there must be strong evidence of a risk to human health[134] before wide sweeping federal environmental legislation will be upheld where there is significant intrusion on provincial jurisdiction.

Another limitation on this power is that it is arguably only available for prohibition of conduct, rather than wide sweeping regulation.[135]

Peace, Order, and Good Government (POGG)

The POGG power appears to be a valuable tool for the federal government in regulating matters of "national concern" after Crown Zellerbach[136], which upheld federal legislation applied to marine pollution in coastal waters within provincial boundaries.

The proposals state that the Government of Canada proposes to reserve to itself the Peace, Order and Good Government clause of the Constitution Act, 1867 to maintain its authority to deal with national matters or emergencies. They propose, however, to transfer to the provinces authority for non-national matters not

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[134] G.V. LaForest, The Legal Framework, Water Resources Study of the Atlantic Provinces, p. 18 cited in D. Gibson, "Constitutional Jurisdiction over Environmental Management in Canada" (1973), 23 U of T. Law Journal 54 at p. 82.

[135] Hogg, supra note 1, pp. 415-417; LaForest, supra, note 10, p. 18.

[136] Ibid., supra, note.

specifically assigned to the federal government under the Constitution or by virtue of court decisions. It is not clear what they are purporting to give away as the "residual power", as such matters would normally fall into provincial jurisdiction under property and civil rights and/or matters of a local nature.

According to Estey, J. in Labatt Breweries of Canada Ltd. v. A.G. Canada,[137] there are three applications of POGG;

1. national emergencies
2. new matters not existing in 1867, which are not local matters, and;
3. matters which were once local but now go beyond provincial ability to regulate and are therefore of "national concern"

Similarly, Peter Hogg states that the POGG power gives rise to three branches of legislative power;

(1) the "gap" branch;

(2) the "national concern" branch; and

(3) the "emergency" branch.[138]

The "gap" branch, as articulated by Hogg, appears to be closest to what the federal government wishes to devolve to the provinces. This branch has been used for a number of matters;

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[137] (1980) 1 SCR 914.

[138] Hogg, supra, note 1, p. 373.

incorporation of companies with federal objects[139], the treaty power[140], the Official Languages Act[141], and offshore minerals[142]. Hogg calls the subject matter of these cases part of the gap power because in each case the constitution deals with subject matter involved but not completely, and the gaps are therefore residual to Parliament's jurisdiction.[143]

If there is indeed a separate residual power from POGG, the question of the uncertainty of what new matters may arise must be examined. Several examples of new matters may be: genetic engineering, nuclear fusion, weather control, and cloning.[144] The federal government must have the jurisdiction to deal with unforseen matters that require national action.

Disregarding the proposal about the residual power, the question remains whether the POGG power can support the federal government's jurisdiction to enact national standards and policies for environmental matters. It is not clear from the

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[139] Citizen's Insurance Co. v. Parsons (1881) 7 App.Cas.96

[140] Re Regulation and Control of Radio Communication in Canada, [1932] A.C.304; although see discussion regarding the evolution of this power in Hogg, supra, note 1, p. 373.

[141] Jones v. A.G. N.B., [1975] 2 S.C.R. 182.

[142] Re Offshore Mineral Rights of B.C., [1967] S.C.R. 792; Re Nfld. Continental Shelf, [1984] I.S.C.R. 86.

[143] Hogg, supra, note 1, pp. 373-374.

[144] R. Ross, "Transfer of the Residuary Power to the Provinces" (1981) 39 U.T. Faculty Law Review 30, at p. 34.

Crown Zellerbach decision, although the thrust of that decision is towards limiting the federal government's jurisdiction to interprovincial and international effects.

The test as set out in the Crown Zellerbach[145] decision is that the POGG power may be used for matters of national concern. To qualify as a matter of national concern, the matter must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the constitution. In order to determine whether the matter has the required degree of singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern, it is relevant to consider the effect on extraprovincial interests if a province did not deal effectively with the control or regulation of the intraprovincial aspects of the matter. This latter requirement is known as the provincial inability test. This test is one of the indicia for ascertaining whether a matter has that character of singleness or indivisibility required to bring it within the national concern doctrine.[146] In addition, in order for a matter to qualify as one of national concern, it must have ascertainable and reasonable limits in so far as its impact on provincial

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[145] supra, note 4.

[146] Ibid., pp. 184-185.

jurisdiction is concerned.[147]

LaForest, J., however, writing for the minority, states that "...the control of inflation and environmental protection, are all-pervasive, and if accepted as items falling within the general power of Parliament, would radically alter the division of legislative power in Canada." This was in fact the opinion of the Supreme court in the Anti-Inflation Reference.[148]

Concurrency

Limited concurrency is recognized in agriculture and in the export of non-renewable and forestry resources and electrical power. There is also functional concurrency in water pollution; for example, the Ontario Water Resources Act and the federal Fisheries Act.

In the situation of concurrency, the paramountcy doctrine operates, meaning that where both governments have jurisdiction, and where there is a conflict, the federal legislation prevails.

The Supreme Court of Canada has refused to accept the functional concurrency doctrine in respect of Manitoba legislation with respect to pollution of Manitoba waters by extraprovincial sources. The Manitoba enactment was held to be invalid even

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[147] Ibid., p. 188.

[148] Re Anti-Inflation Reference, [1976] 28 DLR (3d) 452.

though there was no contradictory federal legislation in place.[149]

One commentator has analyzed two regulatory areas which he argues are now operating as concurrent jurisdiction: agricultural concurrency and the regulation of pesticides and transportation concurrency and regulation of dangerous goods.[150] With respect to the regulation of pesticides, there is a functional division of power: the federal government focuses on pesticide registration whereas the provincial governments focus on pesticide use. The federal government power in agriculture has been interpreted narrowly by the courts, such that the federal power has been defined according to what other federal legislation exists. Accordingly, it appears that the concurrent power is divided according to traditional division of powers. This leads to fragmentation as no one government deals with the overall scheme.

In contrast, the concurrent power over transportation of dangerous goods shows a division of powers along geographic lines. The federal government has exclusive authority over interprovincial transportation while the provincial governments have authority over intraprovincial transportation. It is

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[149] Ibid., supra, note 6.

[150] R. Northey, supra, note 6.

suggested that this example shows that concurrency does not mean that the federal government takes over the field, and therefore concurrency need not threaten provincial autonomy. It is not clear, however, that even this model of concurrency could be used to support a federal role in setting minimum national standards.

The other issue which arises with respect to concurrency is the paramountcy doctrine. This doctrine holds that where there is a conflict, the federal legislation governs. In order to best enhance and protect the environment we recommend paramountcy operate to give jurisdiction to the stricter regime.

The amendment to the constitution we propose, specifying concurrent jurisdiction over environmental protection and resource conservation, would be in practice to move toward a form of "geographical federalism": the provinces would essentially deal with local environmental problems, being constrained only by national minimum standards, and the federal government would deal with national environmental problems. The traditional division of powers must give way though to allow the federal government to enact minimum national standards in areas of provincial jurisdiction. This would only be an intrusion into traditional provincial jurisdiction, if the provinces refused to act.

It can be argued that this type of federalism with respect to environmental protection and resource conservation is more

consistent with the Brundtland Commission recommendations as the responsibility for environmental effects would clearly be with the ministries who are formulating and administering policy with respect to managing resources. Finally, such a division of powers in practice would be basically consistent with the distribution of power under the constitution as set out in the residual POGG power and the provincial "residual" power of s.92(13) and s. 92(16), forgetting the myth of "exclusivity". In other words, significant provincial autonomy is maintained, as long as minimum national standards are upheld.

In essence, this concurrent power would force the federal government and the provinces to co-operate on environmental protection and resource conservation matters. It may be that a forum would be necessary to resolve conflicts: consultation is necessary on these important issues.

Declaratory Power, s.92(10)(c)

The federal government has the power to regulate local works, although wholly situate within the province, which are, before or after their execution, declared by the Parliament of Canada to be for the general advantage of two or more of the provinces. The federal government proposes to give away its declaratory power.

The declaratory power has been used only 9 times since 1950 and

not at all since 1961. There have been 470 declarations in all, but mainly in respect of local railways.[151] In one case, however, the federal government supported regulation of the grain trade by declaring all grain elevators and warehouses to be for the general advantage of Canada.[152] Other cases where it has been used involved; tramways, canals, bridges, dams, tunnels, harbours, wharves, telegraphs, telephones, mines, mills, grain elevators, hotels, restaurants, theatres, oil refineries and factories of various kinds.[153]

In the absence of clear concurrent jurisdiction over the environment, the declaratory power could be useful in protecting the environment. This power is part of the federal government's jurisdictional arsenal over the environment, in conjunction with POGG, the criminal law power, and trade and commerce, as well as the federal spending and taxation powers, to regulate matters affecting the environment. For example, it is argued that the federal government could use its declaratory power to create a national scheme of toxic disposal sites, thus removing a major regulatory burden facing the provinces.[154] Finally, it is arguable that the federal environmental assessment power of

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[151] Hogg, supra, note 1, p. 58.

[152] Ibid., p. 492; The King v. Eastern Terminal Elevator Co., [1925] SCR 434.

[153] Ibid., p. 491.

[154] R. Northey, supra, note, p. 180.

provincial works is supportable under the declaratory power.

The Spending Power - No New Shared Cost/Conditional Transfers

Shared cost programs and conditional transfers have enabled Canadians, regardless of in which province they reside, to have access to a high minimum standard of some important services; for example with respect to medicare and welfare. Via the federal government's spending power[155], the federal government may influence areas of provincial jurisdiction by subsidizing certain provincial activities and by allocating conditional grants to provinces where they follow federal rules. In the absence of a clear concurrent power over environmental protection and resource conservation, the use of such persuasion could be valuable tool for environmental regulation, especially with respect to national standard setting.

The requirement of seven provinces' approval with 50% population will undoubtedly prove to be a significant hinderance to the federal government's spending power when it comes to implementing national programs and standards. This comment goes equally to the same limitations on the federal spending power in areas of exclusive provincial jurisdiction. There appears to be no need for constitutionalizing such a provision as it appears that at least since 1969 broad national consensus in favour of the

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[155] Hogg, supra, note 1, p. 123; see in general his discussion from p. 119.

proposed shared cost program is sought prior to implementation.[156] Indeed it is suggested that: "without the federal initiative and the federal sharing of the costs, it is certain that some at least of these services would have come later, at standards which varied from province to province, and not at all in some provinces."[157]

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[156] Hogg, supra, note 1, p. 121-122.

[157] Ibid., p. 121.

APPENDIX F

ECONOMIC UNION

The proposal is to broaden s.121, the so called "common market" clause, so that it reads that "Canada is an economic union within which persons, goods, services and capital may move freely without barriers or restrictions based on provincial or territorial boundaries"[158]. This would essentially constitutionalize free trade between provinces. What does this mean for the environment and environmental regulation on the provincial level? Two sources of comparison are instructive to discern how this section would be used; the General Agreement on Tariff and Trade, ("GATT") and the Free Trade Agreement ("FTA"). Jurisprudence under these agreements would likely be referred to in the event of a dispute.

Essentially, under a provision such as is proposed, environmental regulation that affects commerce within a province may be challenged by business that wishes to do business in that province but does not want to comply with that regulation. It may be that business does not face such regulation in other provinces. Accordingly, this section will be used to prevent a province from enacting progressive environmental legislation where it is in the forefront doing so. Overall, this proposal will limit provincial autonomy and impact on the quality of the

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[158] Canada, " Shaping Canada's Future Together: Proposals" (Ottawa: Supply and Services, 1991), p.56

environment, especially where there are no minimum national standards.

Under GATT, there have been many challenges to environmental legislation in one country under the complaint that the legislation is a "non-tariff barrier" to trade. For example, the Court of Justice of the European Communities held that a Danish environmental law requiring all beer and soft drinks to be sold in returnable containers was a non-tariff barrier to trade. This ruling was made even though the regulation was non-discriminatory and "highly effective".[159]

Other examples include the successful use of GATT by Canada and the EC to challenge a U.S. Superfund Act (1988) tax on petroleum[160].

In addition, in mid-August, a GATT panel ruled that a U.S. ban on imports of Mexican tuna was an extraterritorial application of U.S. law and such an exception to GATT practice could only be legitimate if the reason for the prohibition related to the

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[159] S. Shrybman, "Selling the Environment Short: An Environmental Assessment of the First Two Years of Free Trade Between Canada and the United States (Toronto: CELA, May, 1991), citing Re Disposable beer cans: E.C. Commission v. Denmark, (1989), 1 C.M.L.R. 619 (European Court of Justice).

[160] "Selling the Environment Short", supra, note 2, at p. 13, citing OECD, Trade and the Environment: Issues Arising with Respect to the International Trading System, (Note by the Secretariat, Paris, June 29, 1990. TD/TC (90)14).

product itself rather than to a process to obtain the good.[161]

Under the FTA, both Canada and the U.S. have challenged each other's environmental regulations as "unfair trade practises".

The first trade dispute to be adjudicated under the FTA involved a challenge by the U.S. to regulations under Canada's Fisheries Act established to promote conservation of herring and salmon stocks in Canada's Pacific coast waters. This particular conservation program required that all fish commercially caught in Canadian waters be landed in Canada for biological sampling, to deter false reporting and for in-season management. After reporting in this manner, U.S. fisherman were free to export to the U.S.

In its first decision to be released under the FTA , the Canadian regulations were deemed to be "incompatible with the requirements of Article 407 of the FTA". In deciding the case, the FTA dispute panel concluded that where a conservation measure had a trade-restricting effect it could be sustained only if it could be said to be "primarily aimed at conservation ". Considering the Fisheries Act regulation the panel stated:

> An important reason for the specific rule requiring all salmon and herring to be landed in Canada was to make exports more amenable to data collection and this, in fact, is its principle effect.

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[161] Inside U.S. Trade, October 4, 1991, p. 10.

Notwithstanding this finding however, the panel went on to hold that it is also incumbent upon the country seeking to justify a conservation program that may have trade restricting effects to establish that the program "was established for conservation reasons alone and that no other means were available to accomplish those objectives".[162] This we submit is an onerous test and one which many provincial initiatives would be likely to fail.

In July 1989, the EPA announced that it was introducing regulations to phase out the production, import and use of asbestos over seven years. The ban represented the culmination of over ten years of struggle that had involved several Congressional investigations, 45,000 pages of analyses, comments and testimony and thousands of lives. Mr. Reilly, the U.S. EPA administrator, estimated that the ban on this cancer causing material could save 1900 lives by the turn of the century. No sooner was the program announced than it was denounced as being insincere and politically motivated. Involved was the government of Quebec, a province with a substantial interest in asbestos mining.

Intervening to assert the interests of the Quebec asbestos mining

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[162] "Selling the Environment Short", supra, note 2, citing In the Matter of Canada's Landing requirement for Pacific Coast Salmon and Herring (Canada - United States Trade Commission Panel, October 16, 1989, 2TCT 7162).

industry, the government of Canada joined in a legal challenge to the U.S. EPA initiative. In its brief to the U.S. Court of Appeals for the Fifth Circuit, Canada argued that U.S. asbestos regulations under the Toxic Substances Control Act violate U.S. obligations under GATT and FTA, and made the following argument:

> Moreover under Article 603 of the Canada-U.S. FTA the parties may not adopt standards-related measures that create unnecessary obstacles to trade. Unnecessary obstacles are deemed not to be created if the measures achieve "a legitimate domestic objective". While the protection of human life or health is a legitimate domestic objective, Canada submits that to the extent that the EPA rule bans the importation of products that do not cause unreasonable risks to life or health, the rule is not necessary to achieve a legitimate domestic objective, and therefor runs counter to U.S. FTA commitments.[163]

Just recently, the U.S. court of appeal struck down this ban on asbestos. The court said in its ruling that more evidence is needed to support the ban.[164]

In a similar vein, the U.S. non-ferrous metals industry has used a provision of the U.S. legislation implementing the FTA to challenge Canadian pollution control programs which include loans and investment credits. The Non-Ferrous Metals Producers Committee (NFMPC) has assailed as unfair trade practices a variety of federal and provincial programs intended to reduce

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[163] Corrosion Proof Fittings et al v. Environmental Protection Agency, (In the United States Court of Appeals for the Fifth Circuit, May 22, 1990).

[164] Globe & Mail, October 22, 1991.

emissions from, and improve workplace safety in, several Canadian lead, zinc and copper smelters. The U.S. Trade Representative has determined that there is "a reasonable likelihood" that this complaint is well-founded and investigated these Canadian pollution control programs.[165]

In addition, the "chilling effect' of these rulings cannot be underestimated as governments are keenly aware of the potential implications of new regulatory initiatives and have a strong inclination to accommodate corporate interests before the point of confrontation is reached.

Conclusion

This analysis shows that great caution must be exercised in implementing "free trade" between the provinces from an environmental perspective. A full debate must ensue as to the necessity of such a constitutional provision, compared to the damage it may do. If such a clause receives widespread support, a full debate must ensue as to how to exempt environmental regulation from challenge as a non-tariff barrier to trade, or devise some other way to stave off this area of attack on the existing inadequate environmental regulatory regime.

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[165] GATT FLY, "U,S. Companies Use FTA to Attack Regional & Environmental Aid", (Toronto: September, 1989).