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## Federalism and Comprehensive Environmental Reform: Seeing Beyond the Murky Medium

Rodney Northey

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## Federalism and Comprehensive Environmental Reform: Seeing Beyond the Murky Medium

### Abstract

This article examines the legal constraints that Canadian federalism places on comprehensive environmental reforms. Having specific regard for the Canadian Environmental Protection Act and its regulation of toxic substances, the article questions the ability of federal constitutional powers to support a broad scope for the statute. The article then examines two approaches to this problem. First, it examines an alternative vision of federalism which provides the federal government with broad environmental authority. Secondly, it examines various mechanisms of federal-provincial cooperation for their application to comprehensive environmental schemes. It concludes that these options provide enough scope to regulate environmental activities comprehensively and imaginatively.

### Keywords

Environmental law; Federal government; Canada

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# FEDERALISM AND COMPREHENSIVE ENVIRONMENTAL REFORM: SEEING BEYOND THE MURKY MEDIUM<sup>o</sup>

BY RODNEY NORTHEY\*

This article examines the legal constraints that Canadian federalism places on comprehensive environmental reforms. Having specific regard for the *Canadian Environmental Protection Act* and its regulation of toxic substances, the article questions the ability of federal constitutional powers to support a broad scope for the statute. The article then examines two approaches to this problem. First, it examines an alternative vision of federalism which provides the federal government with broad environmental authority. Secondly, it examines various mechanisms of federal-provincial cooperation for their application to comprehensive environmental schemes. It concludes that these options provide enough scope to regulate environmental activities comprehensively and imaginatively.

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\* Associate, McCarthy Tétrault (Toronto). This paper is part of my LL.M. thesis at Osgoode Hall Law School (1988). I am grateful for the help of Professors Allan Hutchinson, who supervised my thesis and assisted me on this paper, and Bruce Wildsmith, who provoked and encouraged my thinking on federalism.

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## I. INTRODUCTION

In today's environmental debates, reforming the behaviour of individuals and corporations is the major concern; the topic of constitutional reform is rarely addressed. Canadian environmentalists have not appreciated how the Canadian constitution has limited environmental reform. Yet Canadian federalism limits virtually all major environmental reforms proposed by the federal government. Environmentalists may compare the situation in Canada with that of the United States. Modern American law projects the image of law as an instrument of the people and it carries this image into federalism. American federalism allows the states and the federal government to respond to public pressure and to carry out environmental reforms within their geographic boundaries. Canadian federalism appears to lack this instrumentalism. Instead, federalism appears as an opaque medium: if not blocked out altogether, comprehensive reforms refract dramatically in the prism of constitutional principles.

The Canadian public has expressed great interest in environmental problems, but few appreciate the constitutional limits on major environmental reforms. Although Canadian constitutional lawyers have provided some general scholarship on the environment

and the federal-provincial division of powers,<sup>1</sup> their efforts have been one-sided. In their examination of constitutional powers of environmental importance, they have failed to relate these powers to the enactment of major environmental reforms.<sup>2</sup>

Environmentalists studying the *Canadian Environmental Protection Act*<sup>3</sup> suffered from this lack of awareness of Canadian federalism. Although their comments provoked numerous changes to the *CEPA* before its proclamation, environmentalists did not effect some of the more important changes. Some important changes were the result of constitutional pressures, particularly the pressures of federalism. These pressures led the federal government to question the scope of the *CEPA* in one of its most important reforms — the regulation of toxic chemicals. From the initial draft legislation providing comprehensive regulation over toxic chemicals, constitutional pressures resulted in a legislative scheme which is ambiguous and piecemeal. The government retreated from regulating all toxic chemicals from cradle-to-grave; the current law only applies to some chemicals and may not regulate any chemical completely from cradle-to-grave.<sup>4</sup> In this way, the division of powers reduced an important environmental innovation down to another piece of Canada's environmental law jigsaw puzzle. This reduction leaves environmentalists with continued uncertainty about environmental responsibility in Canada.

The constitutional pressures visible in the legislative process of the *CEPA* apply to other major environmental reforms. In fact, these pressures apply to any Canadian effort to provide

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<sup>1</sup> See D.P. Emond, "The Case for a Greater Federal Role in the Environmental Protection Field" (1972) 10 Osgoode Hall L.J. 647; D. Gibson, "Constitutional Jurisdiction over Environmental Management in Canada" (1973) 23 U.T.L.J. 54; and D. Tingley, ed., *Environmental Protection and the Canadian Constitution* (Edmonton: Environmental Law Centre, 1987).

<sup>2</sup> A limited exception is A.R. Lucas's paper "Natural Resources and Environmental Management: A Jurisdictional Primer" in Tingley, *ibid.* at 31-43, but Lucas' analysis is very general. More recently, Lucas provided a more detailed analysis of *CEPA* and the constitutional division of powers in *Case Comment on R. v. Crown Zellerbach Canada Ltd* (1989) 23 U.B.C. L. Rev. 355.

<sup>3</sup> R.S.C. 1985 (4th Supp.), c. 16 [hereinafter *CEPA*].

<sup>4</sup> See *infra*, note 35.

comprehensive environmental regulation of the sort provided by American federal environmental laws dealing with toxins in the air, water, and ground. The presence of these pressures suggest that legislation resembling the American *Clean Air Act*,<sup>5</sup> *Water Quality Act of 1987*,<sup>6</sup> and the *Solid Waste Disposal Act*<sup>7</sup> is impossible in Canada.

This paper begins with an examination of the *CEPA* to show the type of environmental reform which runs into constitutional difficulty. It examines how the *CEPA* has reformed the law of toxic chemicals, showing the meaning and importance of comprehensive environmental laws. Then the paper examines the federal government's basic legislative powers for their potential to support a major environmental reform like the *CEPA*. It focuses on the legislative power over peace, order, and good government.<sup>8</sup> Together, these sections introduce the problems of federalism affecting comprehensive environmental reform in Canada.

The second part of the paper examines ways around the murky medium of Canadian federalism. It turns to the common element of the instrument/medium dichotomy: each is a mediator. The second part emphasizes the role of constitutional law as mediator. Just as instruments and media stand between things, constitutional law stands between legal interests. The *Canadian Charter of Rights and Freedoms*<sup>9</sup> stands between individuals and the state, for example. Federalism involves a more complex relationship between Canadians and the state. It places two institutions between individuals and the state: the federal and provincial governments. This placement adds two institutional relationships to the individual-state relationship. Federalism mediates relationships between the federal government, the provincial governments, and the courts.

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<sup>5</sup> 42 U.S.C. §§ 7401-642.

<sup>6</sup> 33 U.S.C. §§ 1251-376 [hereinafter *Clean Water Act*].

<sup>7</sup> 42 U.S.C. §§ 6901-87.

<sup>8</sup> *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3 [hereinafter *Constitution Act, 1867*] s. 91 [hereinafter POGG].

<sup>9</sup> Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

In this respect, federalism is about two dialogues:<sup>10</sup> dialogue with the provinces and dialogue with the courts. Dialogue captures the idea that federalism provides no final answers. Each dialogue presents a different approach to federalism problems in the environment. Under the heading of dialogue with the courts, the paper approaches Canadian federalism in terms of paradigms,<sup>11</sup> not just isolated cases or principles. It examines the plausibility of adapting Canadian federalism to an American-style federalism. Under the heading of dialogue with the provinces, the paper approaches the problems of federalism in terms of administrative cooperation between the federal and provincial governments. It focuses on three schemes of federal-provincial cooperation which have importance for comprehensive environmental regulation in Canada.

This vision of federalism gives Canadian environmentalists a spectrum of approaches to current federalism problems: at one extreme, they can push for a change of current federalism limits and allow the federal government to exercise broader responsibility over the environment. This response is appropriate where environmentalists feel that divided jurisdiction means divided responsibility and unclear accountability. At the other extreme, environmentalists can leave federalism alone and push for stronger ties of administrative cooperation between the two levels of government. Cooperative federalism can stand for more comprehensive environmental measures than unilateral government action. Environmentalists will also find in this paper a number of options which fit between these two extremes. These options mix judicial precedents and administrative arrangements in ways helpful to implementing comprehensive environmental reforms in Canada.

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<sup>10</sup> The use of the term "dialogue" within theory comes from the philosophic tradition which emphasizes the root of dialogue: *logos*. Thinking of dialogue and not simply *logos* adds the perspective that lawmaking does not have an eternal essence; it is intersubjective activity. For an affirmation of a "conversational" ideal for philosophy, see R. Rorty, *Philosophy and the Mirror of Nature* (Princeton: Princeton University Press, 1979) at 389-94, and P. Monahan, "At Doctrine's Twilight: The Structure of Canadian Federalism" (1984), 34 U.T.L.J. 47 at 98-99.

<sup>11</sup> For an explanation of this term, see T. S. Kuhn, *The Structure of Scientific Revolutions*, 2d ed. (Chicago: University of Chicago Press, 1970).

## II. FEDERALISM PROBLEMS FOR COMPREHENSIVE ENVIRONMENTAL REFORM

### A. *Comprehensive Reform: the CEPA Initiative on Toxic Chemicals*

The *CEPA*<sup>12</sup> now in force is Canada's widest ranging environmental legislation yet in existence. It amends or replaces six federal statutes<sup>13</sup> to bring various aspects of air and water pollution within its scope. Part II of the *Act* provides for the regulation of toxic substances.<sup>14</sup> It sets out the federal approach to cradle-to-grave regulation.

#### 1. Weaknesses of the *Environmental Contaminants Act*<sup>15</sup>

Cradle-to-grave regulation is important from two standpoints. In terms of legislative history, cradle-to-grave regulation overhauls earlier federal legislation covering toxic chemicals. The scheme set out in Part II of the *CEPA* replaces the universally criticized regime provided by *ECA*.<sup>16</sup> The *ECA* had three major shortcomings. First, it lacked clear administrative priorities. Potentially, the *ECA*

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<sup>12</sup> Part II of the *Act*, Toxic Substances, incorporates cradle-to-grave regulation and its description uses the expression *life cycle* regulation. The federal government has used the cradle-to-grave expression to describe the aims of the *Act*: see Environment Canada, *Development of the EPA* (Background Paper) (Ottawa: Ottawa Congress Centre, March 22, 23, and 24) at 5.

<sup>13</sup> Part VII of the *Act* shows: (1) amendments to the *Access to Information Act*, R.S.C. 1985, c. A-1 and to the *Canada Water Act*, R.S.C. 1970 (1st Supp.), c. 5, and (2) the repeal of the *Clean Air Act*, R.S.C. 1985, c. C-32; the *Department of the Environment Act*, R.S.C. 1985 (2d Supp.), c. 14; the *Environmental Contaminants Act*, R.S.C. 1985, c. E-10, except s. 4(6), and the *Ocean Dumping Control Act*, R.S.C. 1985, c. O-2.

<sup>14</sup> This term is not a term of art. Similar American law uses the classification of hazardous substances: see the *Solid Waste Disposal Act*, *supra*, note 7.

<sup>15</sup> *Supra*, note 13 [hereinafter *ECA*].

<sup>16</sup> In its brief history, the *Act* was ineffective: its schedules included only seven substances.



encompassed all substances<sup>17</sup> entering or "likely to enter the environment in quantities that may constitute a danger to human health or the environment."<sup>18</sup> However, the *Act* provided no guidance on how to rank the substances. Moreover, the federal government allocated few resources to *ECA* administrators. Thus, the *Act* proved to be more symbolic than substantive. Secondly, the *Act* excluded the public. It made no provision for public input into the regulation of environmental contaminants, nor was there any provision for public supervision of government activity. Thirdly, the *ECA* failed to address toxic chemical disposal. Although federal air and water pollution laws have covered some types or methods of waste disposal, they have not covered the disposal of solid wastes, which includes toxic wastes.

## 2. The reform provided by the *CEPA*: cradle-to-grave regulation

The *CEPA* deals with all three shortcomings of the *ECA*. First, by using the term "toxic substances" rather than environmental contaminants, the *CEPA* specifically provides administrative priorities: administrators shall begin regulating the most toxic of substances.<sup>19</sup> The implicit policy is that the federal government will control waste problems of acute toxicity, leaving the provinces responsible for waste problems stemming from sheer volume.<sup>20</sup>

Secondly, the *CEPA* also improves upon the *ECA* by encouraging public participation: anyone may add a substance to the priority substance list in the *Act* by making a request;<sup>21</sup> anyone

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<sup>17</sup> See section 2(1) of the *ECA*, *supra*, note 13, which covered "any distinguishable kind of inanimate matter (a) capable of becoming dispersed in the environment, or (b) capable of becoming transformed in the environment into matter described in paragraph (a)."

<sup>18</sup> *Ibid.*, s. 3(1).

<sup>19</sup> See the Priority Substances List, *supra*, note 3, s. 12.

<sup>20</sup> Contrast this view with the American system where the federal government regulates both aspects of waste disposal: see the *Solid Waste Disposal Act*, *supra*, note 7.

<sup>21</sup> See *supra*, note 3, s. 12(4).

may request a public review of a ministerial decision,<sup>22</sup> and any two adults who believe a person or corporation has violated the *Act* may notify the Minister of the Environment.<sup>23</sup> Under the latter "whistle blower" provision, the minister must investigate the claim and report back to the persons involved.

Thirdly, the *CEPA* provides a new theory of environmental control. It remedies the omission in the *ECA* of disposal provisions by adopting the theory of cradle-to-grave regulation. The cradle-to-grave approach to toxic chemicals has been in place in the United States since the 1970s.<sup>24</sup> Cradle-to-grave regulation differs widely from the approach taken by other environmental laws. Most environmental regulation focuses on individual processes causing a certain type of pollution. For example, air pollution regulation focuses on individual contributions to air pollution within a certain geographical jurisdiction.<sup>25</sup> As well, most environmental regulation focuses on production processes, providing point-source regulation of pollution. Air and water pollution regulation controls point sources like smoke stacks, exhaust pipes, and sewers.<sup>26</sup> By contrast, cradle-to-grave regulation tracks and limits the flow of toxic chemicals everywhere the chemical exists. It goes beyond point-source regulation to include regulation of the workplace, places of storage, means of transportation, uses of the toxin, and finally, disposal of the toxin.<sup>27</sup> It stands for a new level of coordinated environmental control.

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<sup>22</sup> Members of the public have sixty days to appeal any ministerial regulation or order made under the toxic substance powers: *ibid.*, ss 13, 48, and 89.

<sup>23</sup> *Ibid.*, ss 108-9.

<sup>24</sup> *Supra*, note 7. However, California cradle-to-grave law preceded the federal law: see *Hazardous Waste Control Act*, Cal. Health And Safety Code §§ 25100-240 (West, 1984).

<sup>25</sup> In Canada, see the provincial environmental protection Acts; in the United States, see the *Clean Air Act*, *supra*, note 5. For development and analysis of the latter *Act*, see R.B. Stewart & J.E. Krier, *Environmental Law and Policy*, 2d ed. (New York: Bobbs-Merrill, 1978) at 333-47.

<sup>26</sup> For example, see the U.S. *Clean Water Act*, *supra*, note 6, § 1311, and the U.S. *Clean Air Act*, *supra*, note 5, §§ 7411, 7412, and 7521. Also see N.A. Ashford, C. Ayers & R.F. Stone, "Using Regulation to Change the Market for Innovation" (1985) 9 *Harv. Envt'l L. Rev.* 419 at 424 n. 11.

<sup>27</sup> *Supra*, note 3, s. 34(1).

The *CEPA* provides two levels of cradle-to-grave control. The first level of control concerns information. The *Act* uses a multi-media approach. In the first place, it increases the Environment Minister's own network of information gathering, providing for monitoring stations, environmental research, and the sharing of information with the provinces.<sup>28</sup> To regulate toxic chemicals, the minister may gather information, conduct investigations,<sup>29</sup> and request information held by individual parties regarding any substance, its uses, and its composition.<sup>30</sup> These provisions cover chemicals now in use in Canada and any chemicals hereafter used, stored, treated, or released in Canada.

But the *CEPA* is not simply oriented to government action. It makes increased demands on industry for information related to toxicity. There is a positive duty upon any importer, manufacturer, processor, or distributor of a toxic substance to forward immediately any information relevant to toxicity.<sup>31</sup> Parties may declare information confidential,<sup>32</sup> but this privilege is limited. The *CEPA* covers a wide range of information that is outside confidentiality.<sup>33</sup>

Going beyond information control, the *CEPA* provides cradle-to-grave standard setting. As with earlier federal statutes, it provides for the establishment of guidelines and codes of practice.<sup>34</sup> Yet the *CEPA* also provides binding regulatory standards. Though the *CEPA* exempts some substances,<sup>35</sup> the minister has over twenty

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<sup>28</sup> *Ibid.*, ss 7 and 8.

<sup>29</sup> *Ibid.*, s. 15(a).

<sup>30</sup> *Ibid.*, s. 16.

<sup>31</sup> *Ibid.*, s. 17.

<sup>32</sup> *Ibid.*, s. 19(1).

<sup>33</sup> *Ibid.*, ss 20(2)-(6).

<sup>34</sup> *Ibid.*, s. 8(1).

<sup>35</sup> The *Act* makes two types of exemption. First, it exempts substances regulated by other federal departments, *ibid.*, s. 34(3). Thus, pesticides remain under the supervision of the Department of Agriculture; nuclear wastes remain under the supervision of the Department of Energy, Mines, and Resources; the transportation of dangerous goods remain under the Department of Transport; and deleterious substances remain under the supervision of the Fisheries Department. Secondly, the *Act* appears to provide a small generators exemption.

powers to cover toxic chemicals from cradle-to-grave. These powers include regulating commercial and manufacturing processes and regulating the location of a toxic chemical. The *Act* also specially provides for federal action on emergencies or impending disasters involving toxic chemicals.<sup>36</sup> The *CEPA* combines these regulatory powers with enforcement provisions covering investigations,<sup>37</sup> offences,<sup>38</sup> and statutory remedies.<sup>39</sup>

### B. *Law as Medium: Constitutional Limits on Federal Environmental Powers*

However worthy the objectives of the *CEPA*, it must satisfy constitutional limits. The Canadian constitution tables over fifty powers for division between the federal and provincial governments. The federal government has over thirty of these powers. Several federal powers have some relationship to the environment, but only three powers have the scope to provide for comprehensive

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Section 30(1)(b) requires the Minister to add a substance to the Domestic Substances List [hereinafter DSL] where any individual's usage exceeds 1000 kilograms in any year, accumulates to over 5000 kilograms over a period of time, or exceeds a prescribed quantity; see also section 25(1)(a). However, the *Act* provides no minimum standard for substances on the Toxic Substances List in section 12. Nor is there any requirement that a toxic substance be on the DSL. Compare this approach with the *Solid Waste Disposal Act*, *supra*, note 7, which reduces the requirements for generators producing less than 1000 kilograms per month and generally exempts producers of less than 100 kilograms per month: § 6921(d)(1). However, this exemption is not absolute. Section 6921(d)(4) revokes this exemption where protection of human health or the environment requires it.

<sup>36</sup> *Supra*, note 3, ss 35 and 36.

<sup>37</sup> The *Act* gives the federal government the power to appoint its own investigative unit or delegate the responsibility to provincial officials: *ibid.*, s. 99(1)(b).

<sup>38</sup> The *Act* creates several offences: first, offences contravening minor provisions of the *Act*; secondly, offences under section 115(1)(a), *ibid.*, for damaging the environment and under section 115(1)(b) for harming or risking harm to persons; and thirdly, an offence under section 115 for intentionally or recklessly causing harm to the environment or to the health of any person.

<sup>39</sup> There are remedies attaching to personal liberty including imprisonment, *ibid.*, ss 114, 115, and 116, injunctive relief, s. 135, and a wide variety of discretionary orders, ss 130 and 132. Additionally, there are monetary remedies including damages, ss 39 and 136, restitution, s. 130(1)(1), and fines, ss 106 and 121.

environmental regulation: criminal law,<sup>40</sup> trade and commerce,<sup>41</sup> and the general power of POGG.

### 1. Limits on the criminal law and trade and commerce powers

While each of these federal powers has received extensive judicial analysis, they remain close to their conceptual roots as they concern environmental regulation. Conceptual problems with the criminal law and trade and commerce powers coincide with the constitutional restrictions on these powers. There are conceptual problems with the criminal law power as a vehicle for major environmental reform because it is an extreme vehicle of change. It is extreme because of the standards it sets and because of its means of applying those standards. Concerning the types of standards, the criminal law power encompasses harm to human health; therefore, criminal sanctions are justified where actions result in danger or injury to health. However, most environmental problems are complex, mixing concerns for human health with concern for environmental health and for continued economic development. Even if a court accepts that criminal law includes regulation and not just prohibition,<sup>42</sup> it is unclear whether the criminal law power supports regulation which does not simplify into pure human health standards. Thus, it is unclear whether the criminal law power extends to environmental harm<sup>43</sup> and it is

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<sup>40</sup> *Constitution Act, 1867*, *supra*, note 8, s. 91(27).

<sup>41</sup> *Ibid.*, s. 91(2).

<sup>42</sup> See *Proprietary Articles Trade Association v. A.G. Canada*; (*Reference Re Combines Investigation Act and S. 498 Criminal Code*), [1931] A.C. 310, [1931] 2 D.L.R. 1 (P.C.) [hereinafter *Proprietary Articles Trade Assoc.*] and *R. v. Wetmore*, [1983] 2 S.C.R. 284. See also Emond, *supra*, note 1 at 663-64.

<sup>43</sup> For the view that the criminal law power extends to environmental harm only as it affects human interests, see Law Reform Commission of Canada, *Crimes Against the Environment* by E.W. Keyserling (Ottawa: The Commission, 1985) at 67. For support of the view that the criminal law power supports any interest in human health, see *Standard Sausage v. Lee*, [1934] 1 D.L.R. 706 (B.C.C.A.) [hereinafter *Standard Sausage*]. In that case, the Court permitted the criminal law power to ban food additives although the additives had not been proven harmful. Note, however, that the indictable offences in section 115(1)(a) of the *CEPA*,

unclear how far criminal law power extends into economic concerns.<sup>44</sup> Criminal law is also extreme because of its process: it relies on blunt force. One does not negotiate criminal standards with guilty actors: one applies the full force of the law against them. However, in complex environmental problems, negotiation is essential.<sup>45</sup> These problems with criminal law standards and with the criminal law process indicate that the criminal law power is an inappropriate vehicle for major environmental control.

There are conceptual problems with the trade and commerce power as a vehicle of environmental reform because it reduces the environment to an economic commodity. Many attribute this characterization of the environment as the main cause of current environmental problems.<sup>46</sup> While a regulatory power exists in order to control the regulated activity, environmental regulation does not seem to resemble other trade and commerce regulation: for example, it does not preserve trade and commerce from predatory or deceitful interests.<sup>47</sup> Environmental regulation seems to limit trade and commerce for reasons unrelated to trade

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*supra*, note 3, extend beyond human health to human interests in property and economic protection. It protects *uses* of the environment.

<sup>44</sup> The courts have sustained economic regulation like anti-combines law under the criminal law power: see *Proprietary Articles Trade Assoc.*, *supra*, note 42,. But note that *Canadian Federation of Agriculture v. A.G. Quebec*, (1950), [1951] A.C. 179, [1950] 4 D.L.R. 689 (P.C.) [hereinafter *Margarine Reference*], denied that the criminal law power permits the prohibition of commercial products solely for economic reasons.

<sup>45</sup> For a discussion of negotiation process characterizing Canadian environmental law, see Law Reform Commission of Canada, *Political Economy of Environmental Hazards* by T.F. Schrecker (Ottawa: The Commission, 1984) at 7-9. The case of *Reference Re The Board of Commerce Act, 1919 And Combines and Fair Prices Act, 1919* (1921), [1922] 1 A.C. 191 (P.C.) [hereinafter *Re Board of Commerce*] determined that the criminal law power could not support case-by-case standard setting.

<sup>46</sup> See J.A. Livingston, *The Fallacy of Wildlife Conservation* (Toronto: McClelland and Stewart, 1981) at 16-17; but also see, *infra*, note 93.

<sup>47</sup> Even these regulatory interests have been controversial in Canadian federalism. Although upheld in *General Motors of Canada Limited v. City National Leasing* (1989), 93 N.R. 326 (S.C.C.) [hereinafter *General Motors*], combines legislation covering predatory interests has been struck down several times under the trade and commerce power. Similarly, legislation covering trade standards has been allowed for general standards, subject to strong limitations: see *Labatt Breweries of Can. Ltd v. A.G. Canada*, [1980] 1 S.C.R. 914.

and commerce.<sup>48</sup> While American courts have had no trouble reading into their federal interstate commerce power the power to regulate the environment,<sup>49</sup> Canadian courts have read Canada's federal trade and commerce power restrictively.<sup>50</sup> This tradition limits the application of the trade and commerce power to environmental law.

## 2. The federal power to legislate under POGG.

The only general federal power without conceptual difficulty for environmental reform is the general power of POGG. The heading of peace has limited environmental connections, but there is a strong basis for environmental control in the other two terms. Comprehensive environmental reform is both a question of order and of good government. Moreover, conceptually, there seems an important place left open to POGG. If criminal law displays the mediation of force, and commerce provides the mediation of money,<sup>51</sup> POGG may suggest the mediation of conversation.<sup>52</sup>

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<sup>48</sup> The only exception to this may be environmental regulation of sustainable development, but the federal government will face limits if it applies sustainability differently to different industries.

<sup>49</sup> See P. Soper, "The Constitutional Framework of Environmental Law" in E.L. Doglin & T.G.P. Guilbert, eds, *Federal Environmental Law* (St. Paul: West Publishing, Environmental Law Institution, 1974) at 20-125.

<sup>50</sup> For a very recent discussion of this tradition, see N. Finkelstein, "Note on *General Motors of Canada Limited v. City National Leasing supra*, note 47 and *Quebec Ready Mix Inc. v. Rocois Construction Inc.* [(1989) 93 N.R. 388 (S.C.C.)]" (1989) 68 Can. Bar Rev. 802.

<sup>51</sup> The conceptual distinctions between these powers were provoked by a discussion of law in J. Habermas, *Communicative Action*, vol. 2, trans. T. McCarthy (Boston: Beacon Press, 1987) at 178 and 365.

<sup>52</sup> Good government implies government will be responsive to the needs of those it governs, not just state needs: good government, not good statesmanship. Were this term the subject of judicial scrutiny for legislative initiatives relying on POGG, one might expect the legislation to follow upon extensive public consultation and to provide for citizen involvement in the implementation, administration, and enforcement of the scheme.

a) *The test set out in R. v. Crown Zellerbach*<sup>53</sup>

Constitutional jurisprudence uses all three terms within the expression, peace, order, and good government. In *Crown Zellerbach*, one finds POGG divided into two powers: (1) an emergency power; and (2) a power to deal with any matter causing "national concern." The emergency power derives from the terms peace and order. The national concern power derives from the terms order and good government: it includes all matters not otherwise covered by the constitution, and matters needing order in the form of national uniformity. Currently, the procedural element of good government is not widely discussed, but there are some Canadian precedents of responsive government within POGG.<sup>54</sup>

Although the emergency power has limited application to environmental legislation, it merits some attention since the *CEPA* establishes emergency powers for the cleanup of toxic chemicals.<sup>55</sup> In *Reference Re The Anti-Inflation Act*,<sup>56</sup> the scope of this power is articulated. There, a majority of the Supreme Court of Canada held that the emergency power could justify only temporary measures to control inflation. More recently in *Crown Zellerbach*, the court re-affirmed limiting this emergency power to temporary measures.<sup>57</sup> Since the general scheme provided by the *CEPA* is permanent — a must for businesses to amend their conduct — the emergency power cannot provide comprehensive environmental control.

The general power of POGG, articulated under the national dimensions test, is the most likely source of federal environmental control. The *Crown Zellerbach* decision traced the development of

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<sup>53</sup> (1988), 3 C.E.L.R. (N.S.) 1 (S.C.C.) [hereinafter *Crown Zellerbach*].

<sup>54</sup> In particular, the prohibition cases provided referendum mechanisms enabling each community to decide its implementation of federal legislation: see *A.G. Ontario v. A.G. Canada*, [1896] A.C. 348 (P.C.) [hereinafter *Local Prohibition*], and *A.G. Ontario v. Canada Temperance Fed.*, [1946] A.C. 193, 2 D.L.R. 1 (P.C.) [hereinafter *Canada Temperance Federation*].

<sup>55</sup> *Supra*, note 3, ss 35 and 36.

<sup>56</sup> [1976] 2 S.C.R. 373, 68 D.L.R. (3d) 452 [hereinafter *Anti-Inflation Reference* cited to D.L.R.].

<sup>57</sup> *Supra*, note 53 at 32.



the national dimensions power back forty years. The court concluded that the power includes two types of subject matter.<sup>58</sup> First, it includes classes of subject matter not included in the 1867 list of the division. Secondly, it includes classes of subject matter which were originally allocated to the provinces but which are now matters of national concern.

This second branch of POGG has enormous potential for federal environmental reforms. It allows the federal government to legislate in matters clearly within provincial jurisdiction. In particular, this branch of POGG may allow for the federal regulation of economic incentives,<sup>59</sup> pollution compensation schemes,<sup>60</sup> and an environmental bill of rights.<sup>61</sup> These federal efforts would stem from a failure by the provinces to enact similar effective reforms.<sup>62</sup>

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<sup>58</sup> *Ibid.*

<sup>59</sup> J.W. Dales, *Pollution, Property, and Prices* (Toronto: University of Toronto Press, 1968) at 81 provides a good start to economic incentives with the three legal instruments that government may choose: regulation, subsidies, and charges to control economic behaviour adversely affecting the environment. Federal environmental control follows the regulation model almost exclusively. The only exception is the subsidy used in programmes such as DRECT, the Class 34 Energy Conservation Equipment Tax Incentive Program for energy conservation, the Environmental Partners Fund for community clean up, and the St. Lawrence River Environmental Technology Development Program: see the *Guide to Federal Programs and Services (10th)* (Ottawa: Supply and Services, 1990). Subsidies, however, do not have the public support needed to effectively control pollution.

<sup>60</sup> In the United States, for example, the federal government has provided a scheme to clean up unsafe disposal sites: see the *Comprehensive Environmental Response, Clean-up, and Liability Act*, 42 U.S.C. §§ 9601-57 [hereinafter CERCLA]. This *Act* creates a fund to clean up disposal sites across the U.S. In Canada, the provinces may pass compensation schemes for the environment: see *Interprovincial Cooperatives v. R.*, [1976] S.C.R. 477, 53 D.L.R. (3d) 321 [hereinafter *International Cooperatives* cited to D.L.R.]. However, the federal government is restricted: see *A.G. Canada v. A.G. Ontario*, [1937] A.C. 355 (P.C.) [hereinafter *Employment and Social Insurance Reference*].

<sup>61</sup> The federal government appears restricted from enacting a general environmental bill of rights covering all government action because the provinces have jurisdiction over civil rights under section 92(13) of the constitution, *supra*, note 8. This restriction was commented upon most recently in the case of *MacDonald v. Vapour Canada* (1976), [1977] 2 S.C.R. 134, 66 D.L.R. (3d) 1. In that case, Laskin C.J. struck down federal legislation because it created civil causes of action independent of a federal regulatory scheme. However, the passage of the federal *Bill of Rights*, S.C. 1960, c. 44 suggests that the federal government can provide a bill of rights applicable within its own domains.

<sup>62</sup> Ontario is an exception: it has provided a compensation scheme for pollution in its *Environment Enforcement Statute Law Amendment Act*, S.O. 1986, c. 68. However, even the

The extension of the *CEPA* into these areas would strengthen its aim of comprehensive environmental regulation.

The court in *Crown Zellerbach* clarifies, however, that any matter fitting under this second branch of POGG must satisfy certain requirements.<sup>63</sup> First, the matter must have a singleness, distinctness, and indivisibility that clearly distinguishes it from provincial matters. It cannot group clearly provincial matters, masquerading them as new national concern. Secondly, the matter cannot overly prejudice provincial interests. The court requires that federal involvement is necessary for the interests of Canada as a whole, and that such involvement use measures the least intrusive to provincial interests.

In considering this second matter, the court may have regard to the extraprovincial effect of a province not regulating this area. Where a province's failure to enact regulations has prejudiced the interests of other provinces, accommodating federal regulation has additional legitimacy.

In *Crown Zellerbach*, the court applied this national concern test to the federal *Ocean Dumping Control Act*.<sup>64</sup> The *Act* prohibited dumping into the ocean, including provincial waters, unless a license was obtained. Because the *Act* clearly applied to provincial waters, the federal government had to argue that ocean dumping in provincial waters could no longer be left in provincial hands. The court accepted this argument by finding that ocean dumping was a unified and distinct aspect of water pollution — it was distinguished from fresh water pollution, for example. The court used this finding to decide also that the scope of the legislation sufficiently accommodated provincial autonomy. Lastly, the court found that not granting the federal government this jurisdiction would cause uncertainty and regulatory chaos in ocean dumping.

The court's conclusions, however, were not unanimous. Justice La Forest provided a strong, conceptually grounded dissent

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Ontario government has failed to enact an environmental bill of rights or involve economic incentives in regulation.

<sup>63</sup> *Supra*, note 53 at 32.

<sup>64</sup> This *Act*, now repealed, is incorporated into Part VI of the *CEPA*, *supra*, note 3.

which received the support of Justices Beetz and Lamer. For La Forest J., the basic issue was whether any federal constitutional power could support regulation of an activity on provincially owned land within a province, with only local works and undertakings involved, when that activity had no impact beyond the limits of that province.<sup>65</sup>

In his view, POGG provided the only answer. Turning to POGG, La Forest J. agreed with Justice Le Dain's characterization of its scope. Applying POGG to environmental matters, La Forest J. allowed that it could extend to the regulation and prohibition of intraprovincial dumping if that dumping had potential impact on federal waters. He also allowed that POGG could regulate the sources of ocean pollution, extending to provincial water and to air emissions which landed in the ocean. Furthermore, regulation could include emission standards and standards to control the substances used in manufacture or the techniques of production.<sup>66</sup>

La Forest J. did not, however, agree that POGG could support the *Ocean Dumping Control Act*. He disagreed with the majority on every aspect of the application of POGG. First, La Forest J. denied that POGG could extend to blanket coverage of intraprovincial activity without a clear indication of federal concern with non-hazardous substances. He demanded evidence that the full range of control was necessary to prevent the regulated harm.<sup>67</sup> Secondly, La Forest J. denied that ocean dumping is sufficiently discrete and distinctive. He found that marine waters are not bounded by the Canadian coast, that the line between salt and fresh water is unclear, that the intermixture of ocean and fresh waters necessitates that pollution control extend to both, and that ocean pollution is not confined to water emissions, but includes air emissions. He summarized this part of his argument by saying that the current *Act* tried to control pollution on unclear geographic grounds. Thirdly, La Forest J. found this legislation had great impact on provincial interests. Not only could the *Act* control

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<sup>65</sup> *Crown Zellerbach, supra*, note 53 at 42.

<sup>66</sup> *Ibid.* at 44.

<sup>67</sup> *Ibid.* at 46.

activities on provincially owned land, it could control municipal and industrial water emissions from all urban centres — a field traditionally regulated by municipal governments. Lastly, La Forest J. assessed the impact that the failure of the federal legislation would have had on the country as a whole. He found this impact unclear since there was no evidence that the dumping of non-deleterious substances raised problems beyond any provincial boundary. Thus the attempt to regulate the activities of local industries on provincial lands was impermissible without evidence of a clear connection to a federal purpose.

By way of remedy, because he found the definition of federal waters in the *Act* excessively broad, Justice La Forest refused to read down the federal legislation to include only federal waters.

b) *Applying the Crown Zellerbach test to the cradle-to-grave control in the CEPA*

The general importance of *Crown Zellerbach* for environmental control is in its application to other environmental regulation. Can the regulation of toxic chemicals in the *CEPA* satisfy the *Crown Zellerbach* principles? The Declaration and the Preamble to the *CEPA* suggest that the federal government is relying on POGG for this regulation.<sup>68</sup> Unfortunately, the *CEPA* does not fit into the *Crown Zellerbach* test as clearly as the ocean dumping scenario. Turning to the singleness and distinctness of the scheme, the federal government has in its favour the unifying concept of cradle-to-grave regulation. Such a concept, however, resembles inflation which failed the national dimensions test in *Anti-Inflation Reference*. A court may find that, like inflation, cradle-to-grave control is simply a new grouping of traditionally discrete subjects.<sup>69</sup> Moreover, the fact that many of these matters are federal — as is the regulation of

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<sup>68</sup> The Declaration, *supra*, note 3, states that the "[p]rotection of the environment is essential to the well-being of Canada." The Preamble which follows identifies toxic substances as a "matter of national concern."

<sup>69</sup> Note especially the dissent of La Forest J. in *Crown Zellerbach*, *supra*, note 53 at 48-51, where he relates the inflation heading to environmental protection.

extraprovincial pollution from toxic chemicals<sup>70</sup> — may be outweighed by the inclusion of matters having a provincial tie. These matters include regulation of the workplace, local trades and businesses,<sup>71</sup> and waste disposal sites.

Another strike against the *CEPA* is its definition of toxic chemicals.<sup>72</sup> The definition is very broad, providing no limitation on the number of chemicals it may regulate.<sup>73</sup> Thus, if a court accepted this definition and granted the federal government basic jurisdiction over toxic chemicals, the *CEPA* would seem to substantially violate provincial autonomy.

The most substantial invasion of provincial autonomy is the standard-setting powers the *CEPA* provides for cradle-to-grave regulation. These powers apply to over twenty domains, including the following domains of provincial authority:

- (1) the "commercial, manufacturing and processing activities in the course of which the substance may be released;"
- (2) the quantity of the substance that may be produced;
- (3) the manner in which the substance may be transported; and
- (4) the "manner, conditions, places and methods of disposal of the substance or a product containing the substance

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<sup>70</sup> Support for this power comes from the decision of *Interprovincial Cooperatives, supra*, note 60. The decision provided a territorial limit on provincial pollution legislation. It was suggested that the problem unsuccessfully addressed by the provinces might be addressed under the residual power of POGG.

<sup>71</sup> The application of POGG to particular industries on a case-by-case basis was first denied in *Re Board of Commerce, supra*, note 45, a case regarding the federal regulation of profits.

<sup>72</sup> Section 11, *supra*, note 3, specifies that a substance is toxic if it enters or may enter the environment *in a quantity or concentration or under conditions*: (a) having or that may have an *immediate or long-term harmful effect* on the environment; (b) constituting or that may constitute a danger to the environment on which human life depends; or (c) constituting or that may constitute a danger in Canada to human life or health (emphasis added).

<sup>73</sup> At present, the *Act* does not cover substances regulated cradle-to-grave by other federal statutes, but as these other federal statutes do not have cradle-to-grave scope, the *CEPA* may regulate some aspects of chemical use not covered elsewhere under its residual environmental power: *supra*, note 3, s. 54.

including standards for the construction, maintenance, and inspection of disposal sites."<sup>74</sup>

The *CEPA* tries to limit its substantial impact on provincial authority in three ways. First, it provides a small generators exemption.<sup>75</sup> Secondly, the regulations of the *CEPA* may not apply to substances and activities in provinces where the federal cabinet has written evidence of federal-provincial agreement that some standards are "equivalent" *and* where the enforcement provisions are "similar."<sup>76</sup> Lastly, the *CEPA* creates a federal-provincial advisory committee to avoid "conflict between, and duplication in, federal and provincial regulatory activity."<sup>77</sup> Recent amendments<sup>78</sup> to the *CEPA* require the federal government to receive advice from the advisory committee before making any regulations under section 34.

Yet these limits do not affect the basic scope of the *CEPA*. Were cradle-to-grave regulation in the *CEPA* to exist for hundreds of chemicals, provincial jurisdiction would be eliminated in many spheres of local environmental interest. However, the provincial equivalency test in the *CEPA* has one significant constitutional result: each toxic substance receives different regulatory treatment. This brings into play the severability doctrine.<sup>79</sup> This doctrine allows a court to discard unconstitutional provisions or regulation without striking down the scheme as a whole. Since much depends on the respective provincial laws concerning the substance, constitutional challenges for any one regulation on a substance appear severable from the constitutionality of other regulations on the same substance and from the constitutionality of the scheme as a whole.

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<sup>74</sup> *Ibid.*, s. 34(1).

<sup>75</sup> See *supra*, note 35.

<sup>76</sup> *Supra*, note 3, s. 34(6).

<sup>77</sup> *Ibid.*, s. 6(1).

<sup>78</sup> S.C. 1989, c. 9.

<sup>79</sup> See *Reference Re Agricultural Products Marketing Act*, [1978] 2 S.C.R. 1198, 84 D.L.R. (3d) 257 [hereinafter *Egg Marketing Reference*] and P.W. Hogg, *Constitutional Law of Canada* 2d ed. (Toronto: Carswell, 1985) at 325-27.

The federal scheme is helped also by the fourth component in the *Crown Zellerbach* test, the "provincial inability" consideration.<sup>80</sup> It addresses the prejudice that would result from individual provinces not regulating toxic chemicals cradle-to-grave. The federal government may assert two reasons why cradle-to-grave regulation requires indivisible application across the country. First, the federal legislation eliminates pollution havens. Were cradle-to-grave legislation left to the provinces, a province might enact legislation to attract businesses disenchanted with regulatory costs. Only federal legislation avoids this problem. Secondly, federal regulation may create an equitable distribution of toxic waste disposal sites across Canada. Toxic chemicals present enormous disposal problems.<sup>81</sup> Because of the persistence of such chemicals, and because of the severity of effects resulting from slight leakage, no province benefits from locating a dump site within its boundaries. Rather, a province providing such sites would benefit other provinces since they would use those sites to dispose of their waste. This prospect means that provinces refrain from providing their own dumpsites. As a consequence, Canada suffers from a shortage of proper disposal facilities and implicitly encourages illegal or unsafe disposal practices. The provinces cannot control this problem: a provincial law prohibiting a province from receiving wastes from another province would conflict with the spirit of the constitution on free trade between the provinces.<sup>82</sup>

These two considerations in favour of a national scheme of regulation are not enough to justify federal cradle-to-grave regulation. The majority decision of *Crown Zellerbach* makes the provincial inability problem an ancillary consideration only: it arises

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<sup>80</sup> *Supra*, note 53 at 32-34.

<sup>81</sup> American legal scholars describe this problem as the "reverse commons" problem: see K.L. Florini, "Issues of Federalism in Hazardous Waste Control: Cooperation or Confusion?" (1982) 6 *Harv. Env'tl L. Rev.* 307 at 324-26.

<sup>82</sup> Section 121 of the *Constitution Act, 1867*, *supra*, note 8, requires free trade between the provinces for all articles of growth, produce, and manufacture. Only where a court took a strict view of section 121 would waste be deemed outside the section, although it might be *ultra vires* a province since it deals with interprovincial trade and commerce which is exclusive federal jurisdiction. For U.S. litigation on same topic, see Florini, *ibid.* at 327-31. However, as Florini notes at 331-34, state ownership (in contrast to state regulation) of disposal sites may overcome the problem.

only where a court finds a singleness about the regulation *and* a lack of serious risks to federalism. Because of the extensive scope of the regulation into several areas of provincial control, and because of the vagueness of the definition of a toxic substance, this singleness and distinctness does not appear to exist.

## II. LEGAL DIALOGUE ABOUT FEDERALISM

### A. *Reassessing Judicial Dialogue: the Paradigms of Canadian Federalism*

The preceding analysis of Canadian federalism suggests grave difficulties for the federal government in providing major environmental reforms: there are basic problems with providing major environmental reforms by the use of the basic federal powers over POGG, criminal law, and trade and commerce. Problems with these basic powers are complemented by a peculiar notion of federalism in general. Canadian federalism is not just geographic, it is jurisdictional.

#### 1. Contrasting Canadian and American federalism: jurisdictional v. geographical federalism

Canadian federalism presents the image of law as a medium. To understand this image, think of a telescope. We stand on side with an intention to focus on something. We train the telescope on that thing and, if all works perfectly, we achieve that focus. The telescope is a medium because it affects our image of the world. If the telescope does not function properly, we do not see the thing clearly. Or, more appropriately, if the telescope has murky lenses, the thing we focus upon is murky. The Canadian picture of federal law appears to be a murky medium because, like a malfunctioning telescope, the application of Canadian federalism onto federal environmental initiatives leaves the constitutionality of those initiatives extremely murky.

Taking only the general powers of trade and commerce, criminal law, and POGG, Canadian federalism appreciates federal



reforms in peculiar ways. Initiatives that involve trade and commerce initiatives have been coloured into the shades of criminal law,<sup>83</sup> criminal law initiatives have been coloured into POGG,<sup>84</sup> and POGG initiatives have been blacked out simply according to the times.<sup>85</sup> In this murky medium, reforms do not merely risk murky definition, they risk being indefinitely obscured.<sup>86</sup>

Federalism need not be a murky medium. In particular, the Canadian image of federalism has little in common with the American version. American federalism hinges on the federal authority over interstate commerce.<sup>87</sup> Over the years, American courts have read this authority broadly, providing federal control of any activities impacting on such commerce.<sup>88</sup> This reading has provided the American federal government with virtually unlimited regulatory abilities.<sup>89</sup> On the other side, the states have authority over all residual matters.<sup>90</sup> This authority allows states to regulate most concerns not addressed by the federal government. The image of law present to American reformers in dealing with their system of federalism is as an instrument.<sup>91</sup> American federalism is a tool

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<sup>83</sup> See, for example, *Proprietary Articles Trade Assoc.*, *supra*, note 42.

<sup>84</sup> See *R. v. Hauser*, [1979] 1 S.C.R. 984, 98 D.L.R. (3d) 193.

<sup>85</sup> See the prohibition cases from *Russell v. R.* (1882), [1881-82] 7 A.C. 829 (P.C.) to *Canada Temperance Federation*, *supra*, note 54.

<sup>86</sup> Combines legislation was severely restricted for over sixty years because it was not supportable under the trade and commerce power.

<sup>87</sup> U.S. Const. art. I, § 8, cl. 3.

<sup>88</sup> See the cases of *Ogden v. Gibbons*, 22 U.S. (9 Wheat.) 1 (1824), *Wickard v. Filburn*, 317 U.S. 111 (1942), and *Perez v. U.S.*, 402 U.S. 146 (1971) which held that American federal government had exclusive control over (1) the prevention of the misuse of the channels of commerce, (2) the protection of the instrumentalities of commerce, and (3) the regulation of activities affecting interstate commerce. These activities affecting interstate commerce include impacts on production, consumption, or marketing, including any indirect impact.

<sup>89</sup> See *Soper*, *supra*, note 49 at 25.

<sup>90</sup> U.S. Const. amend X. See J.R. Alexander, "State Sovereignty in the Federal System: Constitutional Protection Under the 10th and 11th Amendments" (1986) 16 *Publius* 1.

<sup>91</sup> For a discussion of this image in relation to American law, see M.J. Horwitz, *The Transformation of American Law 1760-1860* (Cambridge: Harvard University Press, 1977), particularly at 16-30.

clarifying and assisting implementation, not one inhibiting it. Therefore, in the field of environmental regulation, American federalism adheres to an idea of joint autonomy: each level of government is capable of passing comprehensive legislation. The restrictions are geographical. The federal government cannot invade purely intra-state activities, while states cannot regulate interstate activities.<sup>92</sup>

Joint sovereignty gives American federalism the image of law as an instrument of each level of government. So long as governments respect geographic boundaries, each level may enter a regulatory field. As a result, federal-state controversies emphasize policy not law: they deal with the question of who is best suited to provide a certain regulation.<sup>93</sup>

In terms of the American example, Canadian federalism is both geographical and jurisdictional. In addition to geographic limits, each level of government relies on different powers of legislation. Areas within provincial powers do not have federal counterparts and vice-versa. The foundation of this jurisdictional federalism is the provincial power over property and civil rights. Any area involving property and civil rights cannot be regulated by the federal government.<sup>94</sup> The broad interpretation of the property and civil rights power has resulted in a black hole into which no federal reform may pass.<sup>95</sup> Therefore, the jurisdictional basis of

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<sup>92</sup> In the United States, the only real controversies surrounding federal jurisdiction involve matters where the federal government has tried to pressure state governments to administer federal Acts: see J. Kessler, "The Clean Air Act Amendments of 1970: A Threat to Federalism?" (1976) 76 *Columbia L. Rev.* 990, and Stewart & Krier, *supra*, note 25 at 1009.

<sup>93</sup> The instrumental status of law need not be tied to an instrumental relation to nature. Some legal commentators argue that instrumentalism of the American type may promote conservation tactics: see Soper, *supra*, note 49 at 34.

<sup>94</sup> Section 94 of the *Constitution Act, 1867*, *supra*, note 8, seems to conflict with this proposition: it only clearly restricts the federal government from regulating property and civil rights for the province of Quebec. However, section 94 provides two additional limits on federal regulation: first, it applies only where the common law provinces consent to its application; secondly, it only applies to the original three common law provinces. These restrictions explain why the power has not been considered significant.

<sup>95</sup> The "mutual modification" interpretation of the Canadian constitution compels a court to exclude from federal control any matter within a provincial domain like property and civil rights: see W.R. Lederman, "Classification of Laws and the *British North American Act*" in W.R. Lederman, ed., *The Courts and the Canadian Constitution* (Toronto: McClelland and

Canadian federalism is not simply textual, but it is strongly supported by Canadian constitutional jurisprudence.<sup>96</sup>

The jurisdictional reading of Canadian federalism also limits provincial environmental reforms. These limits include geographic limits: while provinces have wide powers over local problems, they must avoid laws which extend into interprovincial or international areas of transportation, commerce, or resource flow.<sup>97</sup> While this limit affects their ability to regulate the environmental impacts of moving targets — vehicles, commercial goods, and resources — the provinces may regulate these concerns where they regulate intraprovincial and interprovincial subjects equally.<sup>98</sup> Yet provinces also face jurisdictional restrictions. First, they must respect fiscal limits on environmental control. Their inability to issue indirect taxes<sup>99</sup> limits their ability to create charging schemes; and their inability to issue licences for any purpose<sup>100</sup> limits their ability to licence environmental purposes. Secondly, provinces are limited in the types of offences and penalties they may create, since only the

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Stewart, 1964) 177 at 192. This interpretation also gives no hint of Quebec's special interests in the field of property and civil rights: limits judged respectful of Quebec's civil law tradition apply to other provinces.

<sup>96</sup> See also Dickson, J.'s minority opinion in *A.G. Canada v. C.N. Transportation Ltd*, [1983] 2 S.C.R. 206, 3 D.L.R. (4th) 16 [hereinafter *C.N. Transportation* cited to D.L.R.] where he describes jurisdictional federalism in the relationship between the criminal law power and the power over the administration of justice. He suggests that some federal statutes may only be enforced by the provinces, while others would have federal enforcement.

<sup>97</sup> See, for example, *Interprovincial Cooperatives*, *supra*, note 60.

<sup>98</sup> See *T.N.T. Canada Inc. v. Ontario* (1986), 1 C.E.L.R. (N.S.) 109 (Ont. C.A.).

<sup>99</sup> *Supra*, note 8, s. 92(2). However, it may be possible for provinces to use their licensing powers to overcome this restriction: see B. Laskin, *Canadian Constitutional Law* (Toronto: Carswell, 1969) at 766.

<sup>100</sup> *Constitution Act, 1867*, *supra*, note 8, s. 92(9). This power limits provinces to issuing licences for the purpose of raising revenue. Commentators like Laskin have suggested that licences may be issued also under ss 92(13) and (16): *ibid.* at 765. However, courts appear to recognize only the inclusion of a licensing power under section 92(16) for matters of intraprovincial trade where the licence relates to raising revenue or the cost of administering a regulatory regime: see *Shannon v. Lower Mainland Dairy Products Bd*, [1938] A.C. 708, [1938] 4 D.L.R. 81 (P.C.).

federal government may legislate criminal law.<sup>101</sup> Jurisdictional federalism therefore produces a difficult result. It creates a system of joint dependency over the environment. Neither level of government has sufficient authority to enact comprehensive environmental regulation.

This unsatisfactory consequence of jurisdictional federalism suggests a need to re-examine the basic doctrines of Canadian federalism. This re-examination may begin with the constitution itself. For instance, it is possible to read into the constitution a federal-provincial relationship that gives greater power to the federal side. Beyond the three general federal powers of criminal law, trade and commerce, and POGG, the federal government possesses various constitutional trump cards. Three deserve attention. In the first place, the federal government has major powers over public finances.<sup>102</sup> Secondly, the federal government can declare any work or undertaking to be exclusively federal.<sup>103</sup> This power specifically trumps provincial powers over local works and undertakings<sup>104</sup> and local and private matters.<sup>105</sup> Thirdly, although it has not used this power recently,<sup>106</sup> the federal government has the power to disallow any provincial legislation.<sup>107</sup> Cumulatively, these powers suggest that

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<sup>101</sup> The courts, not considering any environmental law to be predominantly a question of morality, have put it exclusively within criminal law. For their part, however, the provinces have avoided the use of criminal remedies like medium or long-term jail sentences for environmental offences.

<sup>102</sup> See notes 145-59 and the accompanying text for discussion on the federal spending and taxation powers.

<sup>103</sup> *Supra*, note 8, s. 92(10). For use of this power, see K. Hanssen, "The Federal Declaratory Power under the *British North America Act*" (1968) 3 Man. L. J. 87. See also *infra*, note 140.

<sup>104</sup> *Supra*, note 8, s. 92(10).

<sup>105</sup> *Ibid.*, s. 92(16).

<sup>106</sup> For discussion of this power, see *Re Disallowance and Reservation*, [1938] S.C.R. 71, Hogg, *supra*, note 80 at 90, and K.C. Wheare, *Federal Government*, 4th ed. (Westport: Greenwood Press, 1980) at 224-25.

<sup>107</sup> *Supra*, note 8, s. 90.

the federal government has a very broad supervisory jurisdiction.<sup>108</sup> However, one must relate these powers to Canadian constitutional jurisprudence.

## 2. Principles and counter-principles: Patrick Monahan's work on Canadian federalism

A centralist reading of the Canadian Constitution is not common. It conflicts with the notion of federalism as a compact of equality between the two levels of Canadian government,<sup>109</sup> where equality means separate but equal. To understand how this view of equality has influenced Canadian federalism, one should turn to Patrick Monahan's recent work on the history of Canadian federalism.<sup>110</sup>

Monahan examines Canadian federalism as a dialectical development. The dialectical side to his work comes through his emphasis on principles and counter-principles, or more simply, through emphasis on competing paradigms.<sup>111</sup> Monahan distinguishes two eras of federalism, each era dominated by a different paradigm. The first era has the ideals of legal formalism as its dominant paradigm. According to these ideals, the task of judicial decision-making reduces to analyzing the constitutional document: decision-making is strictly a textual exercise, giving rise to right answers. This era of legal interpretation shows a strong convergence between legal positivism and scientific positivism. Law is a question

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<sup>108</sup> So significant are the formal powers possessed by the federal government that constitutional experts like Wheare, *supra*, note 106 at 17-20, did not regard Canada's structure as a genuine federalism.

<sup>109</sup> See *Reference Re The Initiative and Referendum Act*, [1919] A.C. 935 at 942 (P.C.); *Edwards v. A.G. Canada*, [1930] A.C. 124 (P.C.), and L.P. Pigeon, "The Meaning of Provincial Autonomy" in Lederman, ed., *supra*, note 95, 35 at 36.

<sup>110</sup> *Supra*, note 10.

<sup>111</sup> Monahan, *ibid.* at n. 6 and 9, borrows these terms from the work of Roberto Unger. However, at other times, Monahan uses the term paradigm to describe the types of Canadian federalism. I think the term paradigm better suits this usage. Principles are what judges explicitly discuss in their judgments. What Monahan describes are not reducible to particular cases: they are generalizations defining groups of cases.

of objective truth, not values.<sup>112</sup> The constitutional text provides clear rights of absolute entitlement: there is no living interaction. Formalism gave rise to exclusive categories of legislative jurisdiction: if a matter fell within provincial jurisdiction, it could not fall within federal jurisdiction.<sup>113</sup>

Yet the era was marked also by a competing paradigm, which is less explicit.<sup>114</sup> This paradigm assumed that constitutional interpretation was a practical matter, not a question of ultimate truth. Constitutional interpretation involved balancing federal and provincial interests.<sup>115</sup> There was no need for exclusive categories of legislative jurisdiction; benefits could result from each side controlling different aspects of a matter.

In the second era of Canadian federalism, the dialectic reversed itself.<sup>116</sup> What was the dominant paradigm retreated into the background, while the minority paradigm became the majority viewpoint, with one twist: Monahan considers the second model to adhere to utilitarianism, not pragmatism.<sup>117</sup> Here, Monahan follows an argument provided by W.R. Lederman in the 1950s.<sup>118</sup> Lederman recommended that the courts retreat from their formal

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<sup>112</sup> *Ibid.* at 55.

<sup>113</sup> This is the mutual modification approach to constitutional interpretation: see *supra*, note 95.

<sup>114</sup> Monahan, *supra*, note 10 at 59.

<sup>115</sup> *Ibid.* at 59.

<sup>116</sup> *Ibid.* at 56.

<sup>117</sup> *Ibid.* at 65. While these two philosophies have some similarities, utilitarianism is a more radical position for courts than pragmatism. Pragmatism calls for courts to adopt a result-oriented approach to legal reasoning, but it does not prevent reliance on past doctrines to build current decisions. By contrast, utilitarian reasoning encourages the complete abandonment of the past in favour of a calculus providing *the greatest good for the greatest number*. This calculation seems to leave little legitimacy for judicial decision-making since legislators seem better able to make this determination.

<sup>118</sup> *Ibid.* at 64 n. 65. See Lederman, *supra*, note 95 at 177-99.

analysis and adopt a more realistic<sup>119</sup> assessment of federalism issues. Monahan focuses on the utilitarian aspect of this realism.<sup>120</sup>

Monahan's utilitarian emphasis overstates his case. The Supreme Court of Canada has never affirmed utilitarian reasoning or utility as a constitutional value.<sup>121</sup> The closest doctrine to utilitarianism used by the Supreme Court is the national concern doctrine of POGG. This doctrine appears to make any matter federal if that matter is in the interest of the country as a whole. But even this doctrine is not strongly utilitarian. National concerns do not include concerns like inflation or the environment where the concern is simply a collection of provincial powers under a new heading. Secondly, the test for national concerns limits some utilitarian features in order to respect provincial autonomy. Therefore, utilitarianism continues to lack clear judicial support.<sup>122</sup>

### 3. Functionalism and geographical federalism in Canada

That Monahan's second model does not fit with Canadian jurisprudence does not, however, undermine his insight that federalism follows certain paradigms. It simply forces one to re-examine the tradition for alternative paradigms. One option is to examine the relationship between utilitarianism and functionalism. Unlike utilitarianism, functionalism has received explicit judicial endorsement in federalism matters.<sup>123</sup> However, functionalism can

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<sup>119</sup> This term covers both pragmatism and utilitarianism. Legal Realism in the United States has been described as both pragmatic and sociological jurisprudence. Lederman adopts aspects of both positions: he supports the utilitarian "sociological jurisprudence," *ibid.* at 189-90; and he supports pragmatism's results orientation within the system of precedent, *ibid.* at 190.

<sup>120</sup> Monahan, *supra*, note 10 at 65.

<sup>121</sup> Lederman, *supra*, note 95 at 189, mentioned no cases in support of this point. Though Monahan cites Laskin's scholarship to support his point, *ibid.* at n. 72, Laskin's judicial work admits no support for this view.

<sup>122</sup> Note that Monahan thinks both doctrines are coherent only under a utilitarian vision of federalism: *supra*, note 10 at 72-73.

<sup>123</sup> See *Bell Canada v. Quebec (Commission de la Santé de la Sécurité du travail)* (1988), 51 D.L.R. (4th) 161 (S.C.C.) [hereinafter *Bell Canada*]. See also D. Reaume, "The Judicial

work at many levels, so it is not always clear what these judicial endorsements amount to. Functionalism has a place as a supplement to the traditional, mutual modification approach to constitutional classification. In this limited role, functionalism leads a court to ask whether a legal distinction is usefully implemented. Here, functionalism adds values like administrative efficiency to constitutional decision-making. Equally, it makes social science research relevant to constitutional law without undermining precedent.

What about functionalism on a larger scale? Traditionally, states have served certain basic functions regarding the economy, police, and culture. However, it is difficult to describe the Canadian state along these lines. This type of functionalism does not clarify the division of powers between the two levels of government because each level possesses powers over each function.<sup>124</sup> However, functionalism is not restricted to these three categories. Indeed, it may apply to the very basis of federalism: the view that two governments possessing the full complement of state powers is better than one. To take a functional view of this division of powers, one need not turn directly to economic and cultural divisions, only to the different regions covered by each level of government. Here, functionalism suggests that the larger government concerns itself with those matters which affect the whole and the smaller governments concern themselves with those matters having a local impact.

This view of functionalism leads Canadian federalism towards "regional assessment," an assessment of whether a reform is most suited to provincial or federal geographic scope. Regional assessment resembles the American approach to federalism.<sup>125</sup> Yet one can also find a strand of Canadian jurisprudence adopting regional assessment. The basis of regional assessment in Canada

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Philosophy of Bora Laskin" (1985) 35 U.T.L.J. 438, and W. R. Lederman, *Continuing Canadian Constitution Dilemmas* (Toronto: Butterworths, 1981) c. 23 at 388.

<sup>124</sup> See Garth Stevenson, "Federalism and the Political Economy of the Canadian State" in L. Panitch, ed., *The Canadian State: Political Economy and Political Power* (Toronto: University of Toronto Press, 1977) at 71-100.

<sup>125</sup> See notes 87-93 and the accompanying text.



consists of the powers supporting geographic federalism. While jurisdictional federalism focuses on section 92(13) of the constitution, geographic federalism focuses on POGG and section 92(16). In section 92(16), the provinces assert general authority over matters of a local and private nature. When this provincial authority over local and private matters is considered in relation to the federal POGG power over national concerns, the primary colours of regional assessment appear.

Regional assessment should not be described as the true colour of Canadian federalism. The Canadian constitution is so centred in specifics that general interpretations must pick and choose between emphases. My assertion is that the provincial powers include another general power alongside the widely acknowledged power over property and civil rights. Strong support for this alternative vision of provincial powers is found in Rand J.'s judgment in *Reference Re The Farm Products Marketing Act*,<sup>126</sup> and Beetz J.'s judgment in *A.G. Canada v. Dupond*.<sup>127</sup> Moreover, several other judgments play a supporting role.<sup>128</sup> Justice Rand's judgment in *Reference Re Farm Products* provides a regional vision of Canadian federalism through a two-stage argument. The case involved a dispute over Ontario marketing legislation, with the federal government asserting jurisdiction over interprovincial trade and commerce. The first stage of Rand J.'s argument tried to neutralize the property and civil rights power of the provinces by emphasizing section 94 of the *Constitution Act, 1867*, the federal

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<sup>126</sup> [1957] S.C.R. 198, 7 D.L.R. (2d) 257 [hereinafter *Reference Re Farm Products* cited to D.L.R.].

<sup>127</sup> [1978] 2 S.C.R. 770, 84 D.L.R. (3d) 420 [hereinafter *Dupond* cited to D.L.R.].

<sup>128</sup> See, for example, Beetz J.'s judgment in *Anti-Inflation Reference*, *supra*, note 56, Pigeon J.'s judgment in *Interprovincial Cooperatives*, *supra*, note 60, and Laskin J.'s dissenting judgments favouring the enclave theory in *Construction Montcalm v. Minimum Wage Commission*, [1978] 1 S.C.R. 754, and in *Cardinal v. A.G. Alberta*, [1974] S.C.R. 695 [hereinafter *Cardinal*]. Beetz J.'s judgment in *Bell Canada*, *supra*, note 123, has recently revived many of the principles of the enclave theory exempting federally regulated undertaking from provincial laws. Since this case involved provincial occupational health and safety law, it has relevance for the application of provincial environmental regulation to federally-regulated activities. *Bell Canada* exempts federal undertakings from any provincial orders (since they are, by their nature, not general in application) and any laws affecting the management of the undertaking. Such laws include laws substituting for "normal" management decisions such as working conditions and the operation of a facility.

power to unify the property and civil rights of all the common law provinces. This federal power meant that property and civil rights was not wholly outside federal jurisdiction. It was therefore insufficient for a province to assert that any matter involving property and civil rights was provincial in essence.<sup>129</sup> The second stage of Rand J.'s argument set out section 92(16) as the basis of provincial authority over intraprovincial trade. This allowed Justice Rand to balance the judicial concern for provincial autonomy with a functional concern for commercial integration.

Beetz J.'s judgment in *Dupond*<sup>130</sup> articulated this vision of regional authority in relation to the federal power over criminal law. *Dupond* concerned municipal by-laws enacted by the City of Montreal that limited the rights of assembly in the city. The case raised important issues regarding the status of fundamental freedoms under the division of powers. The federal government argued that fundamental freedoms were an exclusive part of the federal criminal law power, only to be abridged by federal authority. Chief Justice Laskin supported this view in dissent.<sup>131</sup> Justice Beetz received the support of the majority for his view that municipalities had jurisdiction under a provincial delegation of authority over local and private matters.<sup>132</sup>

Reliance on regional assessment to deal with comprehensive environmental regulation like the *CEPA* places the debate on federalism on a simpler footing. The murkiness of Canadian federalism derives from judicial reliance on the section 92(13) power over property and civil rights. Courts and constitutional commentators describe this power as the general provincial power,

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<sup>129</sup> However, Justice Rand ignores that section 94 of the *Constitution Act, 1867*, *supra*, note 8, does not apply to Quebec.

<sup>130</sup> *Supra*, note 127.

<sup>131</sup> Laskin C.J. even goes further: "The only local or private aspect is ... the territorial ambit of the By-law ... and this has never been a test of constitutional validity," *Dupond*, *supra*, note 127 at 423. Yet elsewhere Laskin was a strong supporter of a territorial theory known as the enclave theory: see note 128.

<sup>132</sup> Beetz J. provides an extremely strong reading of the territorial basis of provincial jurisdiction. He finds the other provincial powers, including property and civil rights, simply illustrative of this general provincial power: see *Dupond*, *supra*, note 127 at 436.

not the power over local and private matters.<sup>133</sup> However, the analysis of matters into the categories of property and civil rights versus trade and commerce, for example, leaves a court with an apples and oranges kind of problem. There is no clear basis on which to judge the fit of the legislation into either category. By contrast, regional assessment emphasizes similarly based powers. A further aspect of regional assessment is its scope to analyze several levels of conflict. In most instances, regional assessment would analyze conflicts between the federal POGG power and the provincial power over local and private matters.<sup>134</sup> This would apply to general federal proposals as well as federal efforts to implement treaties.<sup>135</sup> However, regional assessment would also help analyze conflicts between laws for federal laws and provincial laws of general application. Here, the provincial side would argue for uniformity, the federal side for the local autonomy.<sup>136</sup>

Regional assessment still allows courts considerable flexibility. It remains consistent with the doctrine of severability, for example.<sup>137</sup> Severability would allow a court to uphold a federal

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<sup>133</sup> See K. Swinton, "Comment: *A.G. Canada v. Dupond*" (1979) 57 Can. Bar Rev. 326 at 330.

<sup>134</sup> To appreciate the impact of section 92(16), examine the current extensions of the *CEPA* into local and private matters. Currently, the *CEPA* encompasses, for example, local practices involving the use, storage, transportation, and disposal of toxic substances. It sets out no provision restricting it from the regulation of local service stations, dry cleaning operations, and paint stores. Additionally, it appears capable of extending to all disposal plants – regulating their construction, maintenance, and inspection. Further, the *Act* extends into local and private matters with respect to the provincial power over municipal government. The *Act* appears to cover urban waste disposal over toxins where, to this point, municipal governments have had major responsibilities over solid waste disposal (and provinces have controlled toxic waste disposal: see *The Municipal Act*, R.S.O. 1980, c. 302, ss 210(83)-(86) and *The Environmental Protection Act*, R.S.O. 1980, c. 141, s. 136(4), R.R.O. 1980, Reg. 309).

<sup>135</sup> This vision of federalism also holds promise for the incorporation of international environmental laws. The geographic basis of federalism makes it easier to assess the pith and substance of treaty implementation: see *Employment and Social Insurance Reference*, *supra*, note 60.

<sup>136</sup> To relate regional assessment to the tradition of constitutional jurisprudence, one should include not just the national concern doctrine, but also the enclave theory and the "occupied field" theory. While Justice Laskin claimed in *Dupond*, *supra*, note 127, that geography has never been a basis of federalism, he applied the "enclave" theory to native lands and federal works and undertakings in *Cardinal*, *supra*, note 128.

<sup>137</sup> See Hogg, *supra*, note 79.

scheme, while restricting its entry into local and private matters. In the context of cradle-to-grave regulation, this doctrine could help establish the reach of federal legislation. A court may decide that some aspects of the *CEPA* or some regulations are unconstitutional without striking down the whole scheme.

The second element of judicial flexibility not affected by regional assessment are the concurrency and paramountcy doctrines. A court could hold to an exclusive view of federal and provincial matters, thus limiting the scope of concurrency and paramountcy. However, a court could also hold that there is broad overlap between national and provincial matters, and rely on the various paramountcy tests to determine particular results.<sup>138</sup>

Regional assessment is also compatible with other elements of the Canadian constitution. Its use is not restricted to environmental matters. It may apply to economic matters where questions arise on the characterization of problems as interprovincial or intraprovincial.<sup>139</sup> It may also allow greater flexibility in distinguishing between the needs for cultural protection and economic integration. Whereas the current reliance on the property and civil rights power extends to all provinces the cultural protection which Quebec needs, a future reliance on regional assessment may promote a more limited scope for the property and civil rights power. This scope would have more specific regard for Quebec's needs.

Therefore, regional assessment provides the first image of law as conversation. It fits within the conversational model of constitutional discourse not only because it places debate on a more rational footing, but also because it does not fit within an absolute rights framework. A court's determination of a particular issue as local or national does not permanently handcuff either level of government. Governments could marshal new facts or argue alternative circumstances to support changes to their respective positions. Moreover, regional assessment may be kept in line with

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<sup>138</sup> Paramountcy and concurrency will be discussed below. See notes 178-81 and the accompanying text.

<sup>139</sup> This point may receive La Forest J.'s rebuke that it uses a fight on the environmental plane to take up a "war that was lost on the economic plane in the Canadian new deal cases," *Crown Zellerbach, supra*, note 53 at 49.

the judicial model of historical prudence so that the question of which level of government may best implement certain reforms could be answered with regard to Canadian history. The advantage of the regional test, however, is that it is not limited to tradition. It does not lose its value when one confronts a social concern like pollution or the environment that has suddenly assumed huge importance. Equally, regional assessment may give new life to old powers.<sup>140</sup>

The principal limitation of regional assessment is that it suggests a major shift in the balance of power towards the federal side.<sup>141</sup> Under the current approach, the property and civil rights power has controlled federal powers. Although regional assessment suggests that the federal government may enter any field in the national interest, several factors mitigate. First, regional assessment would be placed in a context where courts are familiar with federal tactics and where the courts have provided unilateral limits<sup>142</sup> on federal powers, limits like the current POGG principles. Secondly, in comparison to the majority judgment in *Crown Zellerbach*, regional assessment may provoke courts to more thoroughly analyze the factual basis for the federal action. For example, any examination of the national dimensions of the *CEPA* should depend on some factual background dealing with small generators and the flow of toxic chemicals across provincial boundaries.<sup>143</sup> Thirdly, unless the courts return to a hard line position on the exclusiveness of constitutional powers, the provinces could continue to exercise broad jurisdiction over provincial problems, limited only by conflicts with federal initiatives.

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<sup>140</sup> Regional assessment brings new importance to the federal power to declare a work or undertaking in the national interest: *Constitution Act, 1867*, *supra*, note 8, s. 92(10)(c). In the current constitutional framework, this power has lacked frequent use. This should remind us that the current constitutional paradigm also fails to describe the "full" constitution. Note that the section 92(10)(c) power brings the review of federalism closer to the reasoning process of the *Charter*. Regional assessment places section 92(10)(c) in the same relation to judicial decisions as section 33 stands in relation to section 1 and the various rights under the *Charter*. Both powers may trump judicial decisions. See also note 103.

<sup>141</sup> Note, however, that *Dupond*, *supra*, note 127, shows an increase in provincial powers.

<sup>142</sup> By unilateral limits, I mean court-imposed limits that apply to the federal powers without reference to any particular provincial powers.

<sup>143</sup> See *supra*, note 35, for the small generators exemption, and Lucas, *supra*, note 2, at 366 for the extra-provincial aspect of persistent wastes.

In addition to increased flexibility in the interpretation of the Canadian constitution, regional assessment moves legal decision-making more in line with modern social and economic policy-making. Although policy-makers acknowledge the cultural demands of Quebec, they cannot be expected to distinguish much else apart from regional and national interests. Therefore, it is these basic, non-legal considerations which ground the kinds of legislation now being proposed by Canadian governments. By relating the legal tradition of federalism to modern policy-making, and by insisting that legislation depend upon a rational connection to social and economic facts, the legitimacy of constitutional decision-making can only improve.

B. *Dialogue with the Provinces: Federal-Provincial Cooperation and Comprehensive Environmental Regulation*

The second image of law as conversation is federal-provincial dialogue. This dialogue moves away from the exclusively legal discussion of the previous section to link judicial decisions on federalism with administrative arrangements between the two levels of government. This section focuses on the ways the federal government may overcome its constitutional limitations by implementing comprehensive environmental schemes through cooperative arrangements with the provinces. It explores three basic models of cooperative federalism.<sup>144</sup>

1. Model one: cooperation and the federal spending power

Today, one of the most controversial federal practices for surmounting constitutional limitations is the use of the federal spending power.<sup>145</sup> This controversy hampers the use of the most

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<sup>144</sup> See J.R. Mallory, "The Five Faces of Federalism" in J.P. Meekison, ed., *Canadian Federalism: Myth or Reality?*, 2d ed. (Toronto: Methuen, 1971) 55 at 61.

<sup>145</sup> This power derives from section 91(1A), *supra*, note 8, the power over public debt and property. See generally N. Finkelstein, ed., *Laskin's Constitutional Law*, vol. 2, 5th ed. (Toronto: Carswell, 1986) at 782-89.

extensive federal mechanism of cooperation in Canadian history. Until recently, the spending power was regarded as one of the few areas of Canadian federalism where federal power was virtually unlimited.<sup>146</sup> Judicial decisions maintained the spending power as one exception to the trend of weakening national power in favour of provincial interests. For example, according to the Privy Council in *Employment and Social Insurance Reference*, the spending power was the logical consequence of the federal government's ability to raise money by any means of taxation under section 91(3). However such revenue is raised, the federal government has full discretion on ways to spend it.<sup>147</sup> This broad power has had great influence on federal-provincial cooperation: it has meant that the federal government could fund any program including programs within provincial powers. With medicare, for example, the federal spending power has allowed poorer provinces to provide a higher level of health care.

So characterized, the spending power has two applications to environmental regulation. It allows the federal government to subsidize certain environmental activities; and it allows the federal government to regulate provincial environmental regulation where provinces need federal financial support. Both approaches show some promise for the *CEPA*.

Examples of the first use of the spending power are the federal subsidies for pollution control.<sup>148</sup> But the federal government could go further by tying environmental considerations into all activities benefiting from federal funding, such as the federal programs for regional economic development. Without debating their legitimacy,<sup>149</sup> environmentalists could nevertheless suggest that these grants should incorporate environmental controls. This

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<sup>146</sup> See G.V. La Forest, *The Allocation of Taxing Power Under the Constitution* (Toronto: Canadian Tax Foundation, 1967) c. 31-35.

<sup>147</sup> See Finkelstein, *supra*, note 145 at 63, and Hogg, *supra*, note 79 at 127.

<sup>148</sup> See *supra*, note 59. Note also the U.S. example of grants dealing with hazardous waste problems: see the *U.S. Federal Resource Conservation and Recovery Act*, *supra*, note 7, §§ 6984-86.

<sup>149</sup> See A. Careless, *Initiative and Response: The Adaptation of Canadian Federalism to Regional Economic Development* (Kingston: McGill-Queen's University Press, 1977) at 204-12.

extension would be compatible with the emphasis of the *CEPA* on increased environmental control over federal crown activities.<sup>150</sup>

Historically, the second use of the federal spending power has been very significant. Under this heading falls the practice of conditional grants: federal money is granted to a province on the condition that it satisfy federal rules. Although conditional grants threaten federalism, they are constitutional.<sup>151</sup> Moreover, they are widespread: conditional grants have gone hand-in-hand with the development of the Canadian welfare state.<sup>152</sup>

Conditional grants related to cradle-to-grave regulation could create federal controls in several areas of provincial jurisdiction. In standard setting, conditional grants could be used to ensure uniform environmental standards. Equally, such grants could apply to enforcement practices of the provinces — again, to ensure provincial uniformity and avoid pollution havens. However, politics and not law make it unlikely that conditional grants would be used for the *CEPA*. Recent trends in federal-provincial relations suggest that conditional grants are in decline.<sup>153</sup> Their decline is partly because they have ignored the basic condition of federalism, that the country has various regions with different demands.<sup>154</sup> Provinces reject the

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<sup>150</sup> This suggestion also ties in with the recent Federal Court decisions on the Federal Environmental Assessment Review Process [hereinafter *EARP*]: see *Cdn. Wildlife Federation v. Canada (Minister of the Environment)* (1989), 4 C.E.L.R. (N.S.) 1 (F.C.A.). Enterprises receiving federal monies are within section 6(c) of the *Federal Environmental Assessment and Review Process Guidelines Order*, SOR/84-467. A similar provision exists in section 5(b) of the new federal reform: Bill C-78, *An Act to Establish a Federal Assessment Process*, 2d Sess., 34th Parl., 1990 (first reading 18 June 1990). However, the *CEPA* may only extend to this area if its definition of federal works and undertakings is amended in line with the *EARP* definition. Currently, the *CEPA* does not extend to federally funded works and undertakings.

<sup>151</sup> See K. Hanssen, "The Constitutionality of Conditional Grant Legislation" (1967) 2 *Man. L.J.* 191. Note also that conditional grants exist in the U.S. system of federalism: see R.B. Stewart, "Pyramids of Sacrifice: Problems of Federalism in Mandating State Implementation of National Environmental Policy" (1977) 86 *Yale L.J.* 1196 at 1250-62.

<sup>152</sup> See K. Banting, *The Welfare State and Canadian Federalism* (Kingston: McGill-Queen's University Press, 1987) at 172-73.

<sup>153</sup> See D.V. Smiley, *Canada In Question: Federalism in the Eighties*, 3d ed. (Toronto: McGraw-Hill Ryerson, 1980) at 178.

<sup>154</sup> For an examination of problems associated with the federal spending power, see A. Petter, "Federalism and the Myth of the Federal Spending Power" (1989) 68 *Can. Bar Rev.* 448.



notion that the central government best appreciates the needs of each region.

The federal spending power is also significantly limited by the federal power to raise money. In short, the federal government may not raise monies for provincial purposes.<sup>155</sup> This limits the federal government's ability to directly match taxes and expenditures.<sup>156</sup> This limitation applies to any superfund spending program where waste disposal sites are local and private matters.<sup>157</sup> This limitation on the federal taxing power influences the way the federal government uses the spending power: it drops the ideas of matching and special taxes. Instead, it funds all of its spending power schemes using monies drawn from general tax monies. Both current uses of the spending power rely on this type of funding.

These restrictions on the federal spending power are difficult to criticize within the perspective of federalism as dialogue. The spending power entrenches a hierarchical image of federal-provincial relations — a hierarchy where the federal government ranks supreme and may dictate terms to the provinces. Within this theory of law, other more balanced forms of federal-provincial cooperation hold greater promise for tackling environmental problems in a comprehensive way.

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<sup>155</sup> This limitation is not expressly stated in the constitution; indeed, the constitution implies that the federal government may raise money for any purpose by any means of taxation, while provinces may only raise money by direct taxation for provincial purposes. Where concurrency is assumed, there is no federal exclusion from provincial tax powers. On an exclusive view of constitutional powers, the constitution suggests that only the federal government may raise money by indirect taxation for provincial purposes. No court case has limited the federal authority in this area, however, the Privy Council considered this type of federal tax unlikely in *Caron v. R.*, [1924] 4 D.L.R. 1005. On the other hand, some legal commentators have suggested that the provinces may fill this field of indirect taxation for provincial purposes through section 92(16), but they have yet to receive judicial support: see Laskin, *supra*, note 94 at 670, referring to Kennedy and Wells.

<sup>156</sup> This type of matching exists in the United States in the "superfund" governing the sites of toxic chemicals' disposal. See the CERCLA, *supra*, note 60.

<sup>157</sup> As local and private, such sites are under exclusive provincial control. Therefore, taxes to fund such sites would be taxes for provincial purposes and therefore outside federal powers. Reliance on the POGG power for this proposal would be difficult because of the "provincial inability" requirement. However, one option is the federal power to declare such disposal sites to be works for the general advantage of Canada under section 92(10)(c). This power could support a national system of dumpsites, transfer stations, and incinerators.

## 2. Model two: cooperation and federal-provincial concurrency

The second model of Canadian cooperative federalism arises in areas where federal and provincial powers are concurrent. Here, federal and provincial involvement are equally legitimate: both levels of government may pass valid legislation. Concurrency arises in two ways: through the constitution itself and through judicial decisions. Environmental law has examples of each type.

### a) *Agricultural concurrency and the regulation of pesticides*

The constitution clearly provides for concurrent jurisdiction in the areas of immigration and agriculture.<sup>158</sup> On the assumption that concurrency in agriculture has placed pesticidal regulation within federal powers, this concurrency has importance for environmentalists. Before examining the validity of this assumption, one ought to study the form of Canadian pesticidal regulation.

Canadian pesticidal laws show federal-provincial cooperation along the "separate but equal" model. Each level of government focuses on different aspects of pesticidal regulation<sup>159</sup> and each performs a different function. The federal government focuses on pesticide registration;<sup>160</sup> the provincial governments focus on pesticide use.<sup>161</sup> Together, the two government schemes provide the earliest Canadian attempt at comprehensive environmental regulation.

Because the pesticidal scheme suggests comprehensiveness, one ought to appreciate the role of concurrent jurisdiction in the scheme. If the scheme is completely dependent upon concurrent

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<sup>158</sup> *Supra*, note 8, s. 95.

<sup>159</sup> Law Reform Commission of Canada, *Pesticides in Canada: An Examination of Federal Law and Policy* by J.F. Castrilli & T. Vigod (Ottawa: The Commission, 1987) at 40.

<sup>160</sup> See *Pest Control Products Act*, R.S.C. 1985, c. P-9.

<sup>161</sup> Ontario, for example, has enacted the *Pesticides Act*, R.S.O. 1980, c. 376. However, note that pesticide usage may have an interprovincial aspect requiring federal regulation: see *Interprovincial Cooperatives*, *supra*, note 53, and section 54(1) of the *CEPA*, *supra*, note 3, which covers this aspect of pesticide control.

jurisdiction, it supports the view that jurisdictional federalism needs to be replaced by a federalism of greater concurrency. Although there is no jurisprudence on the constitutional basis of the pesticidal schemes,<sup>162</sup> jurisprudence on the agriculture power provides some assistance. The latter shows that the courts define that power cautiously.<sup>163</sup> Mirroring their interpretation of the federal power over trade and commerce, courts have neutralized the federal agriculture power by defining its jurisdiction narrowly. Although section 95 explicitly provides federal powers over interprovincial and intraprovincial matters, and although the section emphasizes federal paramountcy, the courts have denied the federal government this scope. Courts have interpreted this agriculture power in terms of the division of powers in sections 91 and 92. The courts' practice in defining the agriculture power provides an explanation for the scope of the federal pesticide legislation. Federal laws for pesticidal registration resemble the federal law for food and drug registration, another federal responsibility.<sup>164</sup>

If this judicial practice defines the pesticide scheme, however, the constitutional provision of concurrency is not helpful to either level of government. The normal division of powers relies on exclusiveness, not concurrency. If the federal government can only produce legislation resembling other federal legislation, there is nothing unique about the contribution of concurrent power in agriculture. Moreover, if the exclusiveness of powers, and not concurrency, divides the federal and provincial functions over agriculture, these divisions in the pesticidal schemes have less to do with rational consensus between the two levels of government and more to do with the traditional spheres of influence. The federal government would not control pesticide registration simply because the provinces agree that it is more effective; nor would provinces control pesticide usage because of federal recognition of provincial

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<sup>162</sup> Castrilli & Vigod, *supra*, note 159 at 40 notes that in *Re Forest Protection Limited and Guerin* (1978), 7 C.E.L.R. 93 (N.B.Q.B.) a constitutional argument was raised and dropped.

<sup>163</sup> See Gibson, *supra*, note 1 at 67.

<sup>164</sup> The food and drug law relies, however, on the very narrow criminal law power: see *Standard Sausage*, *supra*, note 43. The other possible source of regulatory power is POGG: see notes 42-45 and the accompanying text.

efficiencies. A lack of policy agreement also detracts from any presumption that Canadian pesticidal regulation follows a scheme. Instead, one should presume that each government deals with only that part of the problem familiar to it; no one deals with the whole.

This reliance on the traditional division of powers to define the agriculture power does have a hidden benefit for the federal government. It allows the federal government to regulate all pesticides, whether they are agricultural pesticides or, for example, pesticides related to forest production.<sup>165</sup> The only peculiarity is that the Minister of Agriculture regulates all pesticides and related products, including forest herbicides.<sup>166</sup>

An understanding of Canadian pesticide regulation is helpful to understanding comprehensive environmental reform like cradle-to-grave regulation. Powers divided between the two levels of government in pesticide regulation are entirely claimed by the federal government in the cradle-to-grave scheme of the *CEPA*. While, the federal regulation of pesticides limits itself to the registration of pesticides, and allows the provinces to regulate particular uses, the federal cradle-to-grave scheme regulates both the general registration and the particular uses of toxic chemicals.<sup>167</sup> This broad view of federal powers is controversial because the federal power over pesticides may formally rely on the plenary constitutional power that the federal government has over agriculture. If the courts have restricted the federal agriculture power by bringing it in line with the powers accorded the federal government under the normal division of powers, how can these same "normal" powers give the federal government a jurisdiction in toxic chemicals that it lacks for pesticides? An examination of

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<sup>165</sup> The fact that the development, conservation and management of forest resources was specifically mentioned in section 92A of the *Constitution Act, 1867*, *supra*, note 8, suggests that forestry does not come under the agriculture power of its section 95.

<sup>166</sup> The *CEPA* does nothing to change this situation. The only potential role available for *CEPA* in pesticides is regulation of the situation judged federal in *Interprovincial Cooperatives*, *supra*, note 60. See *supra*, note 161, for the potential role of the *CEPA* in pesticide regulation.

<sup>167</sup> For example, the Ontario *Pesticides Act*, *supra*, note 161, regulates the licensing of pesticides, the persons using pesticides, and the disposal of pesticides. All three of these aspects are within the federal scheme of cradle-to-grave regulation: see the *CEPA*, *supra*, note 3, s. 34(1).

the pesticide regime suggests therefore that the federal government lacks power over the "grave-side" regulation of toxins. Without this scope, however, the federal regulation is no longer comprehensive regulation: it shares one of the major shortcomings of its predecessor, the *ECA*. Thus, either the analogy between pesticides and toxic chemicals is constitutionally unsound, or the cradle-to-grave regulation of toxic chemicals requires joint federal-provincial legislation.

One way of disputing the analogy between pesticides and toxic substances is to distinguish between the types of concurrency. If pesticides lie within the agriculture power, pesticidal regulation exists within a concurrency formally declared in the constitution. In this context, pesticidal regulation simply follows the Privy Council policy that Canada involves a "separate but equal" compact between two levels of government. Without assigning limits to the federal agriculture power, the provincial power could be nonexistent.<sup>168</sup> The constitution, however, allows for other types of concurrency beyond that provided for agriculture.

b) *Transportation concurrency and regulation of dangerous goods*

For environmentalists assessing the scope for comprehensive environmental regulation in Canada, the federal-provincial scheme governing the transportation of dangerous goods provides another example of concurrency. The scheme for dangerous goods differs from the complete separation of functions present in the pesticidal regime. It links concurrency with geographic distinctness. Relying on the constitutional distinction between interprovincial and intraprovincial works and undertakings, the scheme for dangerous goods assumes that the federal government has exclusive authority over interprovincial transportation while the provincial governments

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<sup>168</sup> The application of the normal concurrency and paramountcy doctrines to section 95 of the *Constitution Act, supra*, note 8, would give the federal government broad, supervisory jurisdiction. Provincial jurisdiction would extend only to those areas not regulated by the federal government.

have authority over intraprovincial transportation.<sup>169</sup> Because this scheme revolves around geographic distinctions, it offers some insight into the combination of geographic federalism with government administrative practices in Canada.

Legislation for dangerous goods arose in response to several serious incidents, including a major train derailment in Mississauga, Ontario and a chemical spill on a northern Ontario highway.<sup>170</sup> This system relies on both levels of government enacting legislation in their sphere of authority towards a common goal. The federal government enacted the *Transportation of Dangerous Goods Act*.<sup>171</sup> The provinces were expected to enact provincial legislation and have now done so.<sup>172</sup>

Within the scheme for the *TDGA*, the federal government also addressed an issue not covered in the pesticide scheme: uniformity. Because the pesticidal powers are separated into registration and use, Canadians have no guarantee that all provinces will provide legislation on pesticidal use. This absence detracts from the comprehensiveness of the scheme. The scheme for the *TDGA* tries to remedy this problem. To ensure that it is comprehensive for all parts of Canada, the federal legislation claims to govern all transportation in the absence of a provincial law.<sup>173</sup> But the constitution gives the province power over intraprovincial highway

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<sup>169</sup> This distinction works for trucking: see *A.G. Ontario v. Winner*, [1954] A.C. 541 (P.C.). In the other major transportation areas, the federal government has augmented its "natural" constitutional power through special powers. While the *Constitution Act, 1867* gave the federal government power over shipping under section 91(10), the federal government took control of railways in Canada through the declaratory power of section 92(10)(c) and of air transportation in Canada through POGG as explained in *Re Regulation and Control of Aeronautics in Canada*, [1932] A.C. 54, [1932] 1 D.L.R. 58 (P.C.).

<sup>170</sup> See E.M. Vomberg, "Regulating the Transportation of Dangerous Goods" (1983) 21 *Alta. L. Rev.* 488.

<sup>171</sup> R.S.C. 1985, c. T-19 [hereinafter *TDGA*].

<sup>172</sup> P.M. Bird & D.J. Rappont, *State of the Environment, 1986* (Ottawa: Environment Canada, 1986) at 237 lists the provinces of Alberta, Ontario, Quebec, Nova Scotia, and the Northwest Territories as having their own schemes. Now, all of the provinces have enacted legislation. In Ontario, see the *Dangerous Goods Transportation Act, 1981* S.O. 1981, c. 69.

<sup>173</sup> If there is no provincial legislation after twelve months, the federal legislation applies inside the province as if it were provincial legislation: *TDGA, supra*, note 171, s. 32(4). The constitutionality of this provision is discussed briefly by Vomberg, *supra*, note 170 at n. 173ff.

transportation,<sup>174</sup> and it gives the federal government powers over transportation only as they relate to interprovincial works and undertakings. Thus, can the federal government make good on the claim made by the *TDGA*?

It appears that the only way that the federal government may enter the field of the intraprovincial transportation of dangerous goods is through the national concern doctrine of POGG. Although the legislation preceded the test formulation in *Crown Zellerbach*, the federal legislation appears capable of satisfying it.<sup>175</sup> First, the field of dangerous goods possesses distinctness and autonomy to distinguish it from general transportation regulation. Secondly, the legislation acknowledges a provincial presence in the regulation of dangerous goods. However, the *TDGA* does raise some difficulty with its paramountcy provisions. The *Act* is far from allowing any provincial effort to pre-empt the federal legislation. Instead, provincial law pre-empts federal occupation of intraprovincial transportation only where there is federal-provincial agreement.<sup>176</sup>

The *TDGA* therefore provides two types of important assistance to environmentalists looking at comprehensive regulation in Canada. First, it suggests that constitutional concurrency need not threaten provincial autonomy. Concurrency in transportation does not mean the federal government will take over the field. The *TDGA* preserves provincial power without adopting the functional separation in the pesticidal scheme between registration and use. Therefore, the effort in the *CEPA* to regulate both toxic chemical

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<sup>174</sup> *Provincial Secretary of P.E.I. v. Egan*, [1941] S.C.R. 396, [1941] 3 D.L.R. 305 [hereinafter *Egan* cited to D.L.R.].

<sup>175</sup> See *Crown Zellerbach*, *supra*, note 53. Although the failure to regulate intra-provincially may not have extra-provincial impact, the federal government may argue that such a failure can result in spills which pollute the environment beyond a province's boundaries. But this situation, similar to that in *Interprovincial Cooperatives*, *supra*, note 60, only justifies the regulation of extraprovincial pollution, not intraprovincial trucking.

<sup>176</sup> Absent an agreement, the federal transport Minister retains the discretion to seek cabinet proclamation of the *TDGA* for intra-provincial transportation where efforts to reach an agreement have not been reasonable: *supra*, note 171, s. 33(4). This provision may be constitutional in light of POGG. The courts have acknowledged federal efforts to cooperate where the provinces have used delaying tactics in the case of *Munro v. National Capital Commission*, [1966] S.C.R. 663, 57 D.L.R. (2d) 753 [hereinafter *Munro* cited to D.L.R.].

registration and use may not fall outside constitutional limits. Secondly, the *TDGA* suggests that the national concern doctrine in *POGG* may allow comprehensive environmental regulation.

Unfortunately, the use of the national concern doctrine in the *TDGA* does not resemble its use in the *CEPA*. While the *TDGA* relies on several already-established federal powers over transportation, the cradle-to-grave regulation in the *CEPA* enters new federal ground in environmental regulation. The cradle-to-grave regulation in the *CEPA* depends on *POGG* to enter the field of toxic chemicals, not just to ensure uniformity. Secondly, in contrast to the distinctiveness of dangerous goods within the field of transportation law, the focus of the *CEPA* on toxic chemicals appears to lack distinctiveness within the environmental field; indeed, since the *CEPA* may eventually apply to hundreds of chemicals, it may occupy the whole field of environmental regulation in Canada. Therefore, the absence in the *CEPA* of an equivalency test similar to that of the *TDGA* seems constitutionally unsound.

c) *Concurrency and paramountcy in environmental regulation*

Concurrency analysis is not complete without examining the constitutional principle which is the logical consequence of concurrency: paramountcy. Paramountcy does not arise in an exclusive reading of the legislative powers because there is no overlap. If insurance is a matter of property and civil rights, then it is not part of trade and commerce, for example. However, where a court decides that each level of government has powers over a matter, it must decide which power shall prevail. Here, courts have not played around with functional possibilities. They have not provided a paramountcy ranking by distinguishing the relative importance of federal or provincial powers. In a case of conflict, the paramountcy doctrine in Canada asserts that the valid federal legislation is paramount.



Courts have adhered to two paramountcy standards. The first standard involves the concept of an "occupied field."<sup>177</sup> Wherever the federal government claims authority, the province must keep out. Over time, however, the courts have retreated from this version of paramountcy. It gave too much to the federal authority. The second standard provides a more restrictive concept of paramountcy.<sup>178</sup> It requires conflict between the legislation or regulations of the federal and provincial governments for paramountcy to arise. Here, conflict means contradiction. Valid provincial legislation is operative unless it compels an individual to do something that the federal legislation prohibits or limits. Recently, however, the Supreme Court of Canada applied a new paramountcy principle which restored part of the occupied field concept. In *Bank of Montreal v. Hall*,<sup>179</sup> the court denied the application of provincial law where it conflicted with the *purpose* of federal legislation. It is unclear how this hybrid principle applies to other conflicts within federalism.<sup>180</sup>

The *CEPA* has explicitly incorporated the limited paramountcy principle as part of the regulation of toxic chemicals.<sup>181</sup> The *CEPA*

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<sup>177</sup> See *Home Insurance Co. and U.S. Fidelity and Guarantee Co. v. Lindal and Beattie*, [1934] 1 D.L.R. 497 (S.C.C.), and *McKay v. R.* (1965), 53 D.L.R. (2d) 532 (S.C.C.).

<sup>178</sup> See *Multiple Access v. McCutcheon* (1982), 138 D.L.R. (3d) 1 (S.C.C.).

<sup>179</sup> [1990] 1 S.C.R. 121 [hereinafter *Hall*]; also Finkelstein, *supra*, note 145 at 290, indicates a notion of the occupied field that was held in *Bisailon v. Keable*, [1983] 2 S.C.R. 60.

<sup>180</sup> In the environmental law context, this case has two applications. First, where a provincial environmental statute affects an activity regulated under a federal statute, it suggests that the federal scheme may be deemed to occupy a field if its main purpose conflicts with an environmental purpose. For example, agriculture laws having the purpose of promoting farming may occupy the farming field from environmental laws. Secondly, *Hall, ibid.*, suggests that in the environmental field, provincial environmental laws will apply to federally regulated activities only where the provincial environmental purposes do not conflict with federal environmental purposes. Thus, an argument exists that if the federal government set a standard or provided a scheme which balanced economic factors with health or environmental factors, provincial laws setting tougher environmental standards would not apply because their purpose conflicts with the federal purpose.

<sup>181</sup> In this respect, the *CEPA* adopts an approach first seen with American federal environmental legislation. Most American federal environmental legislation contains a provision allowing state legislation to count as paramount where it provides a harsher standard than the federal legislation: see, for example, the *Resource Conservation and Recovery Act*,

allows provincial standards where they are substantially similar or tougher than the comparable federal standards.<sup>182</sup> As yet, this innovation lacks judicial approval. However, given the analogies between this approach and the earlier approaches in the field of highway traffic safety,<sup>183</sup> judicial disapproval is unlikely.

### 3. Model three: cooperation and administrative delegation

The third model of cooperation is concurrency with joint administration. This is achieved by delegating one government's authority to an administrative authority controlled by the other level of government. Delegation has long been part of the administrative practice of authorizing administrators to make ministerial decisions. If the delegation occurs within one level of government, there is no issue of federalism.<sup>184</sup> The difficulties arise where the delegation affects the federal division of powers. These may occur through the delegation of the administrative, judicial, executive, or legislative powers. Delegation raises three questions: what is legitimate by law; what can be agreed to by the respective governments; and what is best for the administration of a particular scheme?

Under the general legal principles of delegation, neither level of government may delegate legislative powers to the other.<sup>185</sup> However, the courts have gradually weakened this principle by authorizing the delegation of administrative and executive powers which resemble legislative delegations.<sup>186</sup> Today, the only significant

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*supra*, note 7, § 6929.

<sup>182</sup> *Supra*, note 3, s. 34(6). Also see the 1989 amendments to the *CEPA*, *supra*, note 78, which require federal-provincial consultation before any regulations are put in place.

<sup>183</sup> See *Egan*, *supra*, note 174, *O'Grady v. Sparling*, [1960] S.C.R. 804, 25 D.L.R. (2d) 145, and *Reference Re s. 92(4) of the Vehicles Act, 1957 (Sask.)*, [1958] S.C.R. 608, 15 D.L.R. (2d) 255.

<sup>184</sup> See Finkelstein, vol. 1, *supra*, note 145 at 42-46, relying on *Hodge v. R.* (1883), 9 A.C. 117 (P.C.).

<sup>185</sup> See *A.G. Nova Scotia v. A.G. Canada*, [1951] S.C.R. 31, [1950] 4 D.L.R. 369.

<sup>186</sup> The legitimacy of executive delegation is affirmed in the majority decision of the Supreme Court of Canada in *C.N. Transportation*, *supra*, note 96. Administrative delegations

legal restriction on the delegation power is the prohibition of judicial delegation.<sup>187</sup>

The liberalization of the delegation powers leaves governments considering the delegation of environmental authority free to decide two issues: the scope of the decision and the type of decision-maker. The legal powers most central to the administration of a cradle-to-grave scheme in Canada are the federal power over international and interprovincial trade and commerce, and the provincial powers over intraprovincial trade and property and civil rights.<sup>188</sup> The trade powers complement each other, since any joint board would require both. The provincial power over property and civil rights would assist the administration of a general compensation scheme for human injury or the clean up of disposal sites.<sup>189</sup>

The second question to consider is the type of decision-maker. Governments created administrative boards because they thought these boards could distinguish between political and expert decision-making. Where a decision was said to require mostly scientific expertise, whether the expertise was in social science or pure science, then it appeared best to delegate the matter to a board. However, where a decision involved political interest balancing, then it appeared best to leave the decision-maker

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were affirmed by a majority of the Court in *Egg Marketing Reference*, *supra*, note 79.

<sup>187</sup> *McEnvoy v. A.G. New Brunswick*, [1983] 1 S.C.R. 704.

<sup>188</sup> Other powers which might be involved are: the federal taxing power, s. 91(3), *supra*, note 8; and, if possible, the federal power to create superior courts as provided in section 96 and in the cases of *Texaco Canada Ltd v. Clean Environment Commission*, [1977] 6 W.W.R. 70 (Man. Q.B.) and *Concerned Citizens of B.C. v. Capital Regional District*, [1980] 6 W.W.R. 193 (B.C. S.C.), *aff'd* [1981] 1 W.W.R. 359, 25 B.C.L.R. 273 (C.A.) regarding provincial restrictions on the powers given to environmental boards; also see *Massey-Ferguson Indust. Ltd v. Saskatchewan*, [1981] 2 S.C.R. 413, 127 D.L.R. (3d) 513 where a compensation board was judged part of a regulatory scheme not equivalent to a section 96 court. Some provisions necessary to the scheme would appear to be sustainable by various powers possessed by either level: for example, the regulation of disposal sites could be sustained by section 92(10)(c) or 92(16).

<sup>189</sup> Compensation schemes were found within provincial jurisdiction in *Interprovincial Cooperatives*, *supra*, note 60. Equally, they were ruled outside general federal jurisdiction in the *Employment and Social Insurance Reference*, *supra*, note 60. There are some exceptions to this prohibition at the federal level, but these are limited schemes tied to specific federal powers, not general powers. Moreover, none of these schemes has the scale of a toxic waste clean-up scheme.

political. Experience has shown that where expert decision-makers have been used for political decision-making, the phenomenon of agency capture appears. Agency capture exists when a public regulatory body ceases to regulate for the public interest, and instead regulates for the benefit of the interests under regulation.<sup>190</sup>

Once a government has decided the scope of the decision and the type of decision, it remains to decide the direction of the delegation. It has three options: delegating federal authority to a provincial authority; delegating provincial authority to a federal authority; or mutually delegating authority to an independent authority.

To date, the most extensive Canadian schemes involving delegated authority are agricultural marketing schemes. The *Egg Marketing Board Reference* decision outlines the constitutional basis for such sophisticated delegation schemes.<sup>191</sup> Egg marketing involves the joint delegation of federal and provincial trade powers to expert bodies within a two-tiered administrative scheme. The first tier is a board regulating all intraprovincial egg production; the second tier is a board regulating all interprovincial trade, setting quotas for each province. Canadian governments have created these boards because they judged agricultural marketing decisions to depend more on expertise than politics. Marketing decisions require long-term forecasting and consistent behaviour; political interest balancing would disrupt this long-term stability. Equally, the delegations have not unduly limited government action. The delegations involve discrete powers of limited scope, whereas agricultural marketing boards regulate only a limited number of products.

Regardless of which option the federal government took for the comprehensive regulation of toxic substances, it would have Canadian precedents. However, given the scale of toxic chemicals

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<sup>190</sup> For a critical assessment of this theory in American administrations, see P. Sabatier, "Social Movements and Regulatory Agencies: Toward a More Adequate - and Less Pessimistic - Theory of 'Clientele Capture'" (1975) 6 *Policy Sciences* 301. In Sabatier's analysis, the key to avoiding capture is the existence of a public constituency that is supportive of aggressive regulation (like the Consumers' Association of Canada for the CRTC).

<sup>191</sup> *Supra*, note 79.

contamination and the complexity of comprehensive control, the two-tiered system of control employed for agricultural marketing is preferable to single-tiered control by one government. The local tier could control disposal standards including their supervision and enforcement. It could also have the power to set economic incentives for pollution control, provide compensation for the clean-up of sites, and supervise waste reduction and management programs. The federal tier could regulate interprovincial trade and disposal and supervise the provincial programs.

Unfortunately, Canadian governments apparently have not accepted that environmental regulation is an expert function more than a political function. Virtually all environmental regulation has remained under ministerial discretion, even where cooperative schemes are in place.<sup>192</sup> This approach does not meet current regulatory needs: environmental regulation requires expert examination and analysis, and a decision-maker with a long-term focus and consistency. Moreover, the regulatory experience of Canada and the United States does not support ministerial supervision of the environment. The American experience with the Environmental Protection Agency<sup>193</sup> is useful to Canada. Unlike most American federal agencies, the EPA was placed under executive supervision by American legislators to try and avoid agency capture. However, the Reagan years of federal executive control over the EPA suggest that greater not lesser distance from the federal executive would be beneficial to environmental protection.<sup>194</sup> Moreover, observers of American commissions now doubt that agency capture always occurs in the American experience. Canadian experience suggests similar grounds of scepticism toward the theory of agency capture. In Canada, important regulatory bodies like the CRTC, for example, do not appear to be captured despite many years of existence. By contrast, Canadian ministers traditionally have reduced environmental control to private negotiations with industry. This

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<sup>192</sup> One notable exception is the delegation of environmental assessment in Ontario to the Environmental Assessment Board: *Environmental Assessment Act*, R.S.O. 1980, c. 140.

<sup>193</sup> Hereinafter EPA.

<sup>194</sup> See J.J. Florio, "Congress As Reluctant Regulator: Hazardous Waste Policy in the 1980s" (1986) 3 *Yale J. of Legis.* 351.

alliance has often explicitly excluded the public.<sup>195</sup> These reasons suggest that the EPA model of executive control is not appropriate for Environment Canada.<sup>196</sup>

Moreover, current problems with ministerial supervision are not simply political, they are also bureaucratic. Experience suggests that Canada may lack federal administrative bodies over the environment because of bureaucratic self-interest. Bureaucracies support ministerial control over agency control: ministerial control maintains bureaucratic powers.<sup>197</sup> This scepticism about bureaucracies is not simply speculative. Bureaucratic interests have already influenced many decisions about the scope of *CEPA*,<sup>198</sup> and there is no reason to think their influence on *CEPA* will diminish.

#### IV. CONCLUSION

Progress in environmental law must be two sided: one cannot have progress in environmental thinking without similar progress in law. In Canada, we have clear progress in environmental thinking when cradle-to-grave coverage replaces point-source coverage. Cradle-to-grave coverage of the flow of

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<sup>195</sup> See Schrecker, *supra*, note 45 at 16-23.

<sup>196</sup> A further reason why the American EPA is an inappropriate model for Environment Canada is the contrast between Canadian and American federalism. The EPA possesses more comprehensive powers over the American environment than Environment Canada has over the Canadian environment. The EPA may rely on the almost unlimited power over interstate commerce to implement environmental policies: see *supra*, notes 87-93. The EPA does not run into jurisdictional difficulties.

<sup>197</sup> Bureaucratic support for a divided state is revealed in a study of the federal administration of trucking in Canada. See R.J. Schultz, *Federalism, Bureaucracy, and Public Policy: The Politics of Highway Transport Regulation* (Montreal: McGill-Queen's University Press, 1980). In 1967, the federal government tried to reform Canadian transportation law. The reform called for all transport regulation to be administered by the Canadian Transport Commission. However, the reform failed when both federal and provincial bureaucracies made no efforts to assist a policy which took affairs out of their hands and put it in the hands of an independent agency.

<sup>198</sup> Bureaucratic problems explain why the *CEPA* has residual jurisdiction over toxic chemicals instead of supervisory jurisdiction: see *supra*, note 37. More recently, further bureaucratic infighting has slowed other federal environmental reforms: see "Federal Environment Plan Bogs Down" *The Globe and Mail* (2 February 1990) A1 and A9.

chemicals through the human and natural environment means that ecology and not just physics impacts on environmental regulation. This advance in thinking should be greeted with open arms.

Unfortunately, the environmental influence on environmental law can conflict with the legal influence on environmental law. In Canada, constitutional law inhibits environmental laws because the jurisdictional picture dividing federal and provincial powers divides the environment into many different spheres. This division accords nicely with the point source approach to environmental problems, but it conflicts with the more sophisticated ecosystem approach. This conflict has two resolutions. At this point, the constitution has won over the environment. The federal government has changed the original cradle-to-grave proposal to lessen its effect on the provinces. This move directly affects one piece of legislation, but it also affects most future environmental action at the federal level.

Cradle-to-grave regulation is only the start of ecosystem concern in law. Government still has to bring the ecosystem together with sustainable economic development. Canadian environmental regulation lacks economic incentives to reduce waste; it lacks compensation schemes to clean up existing waste problems; and it lacks complete public accountability to ensure that governments and businesses strike sustainable bargains. These initiatives need a national not a local dimension. If cradle-to-grave control cannot be implemented, how can these more extensive programs be implemented?

This paper describes two approaches to current constitutional restrictions: one approach tackles the legal doctrines of federalism. By this approach, environmentalists would seek to alter the image of Canadian federalism, shifting it from a multi-faceted jurisdictional federalism to a geographical federalism. With geographical federalism, the provinces would deal with local environmental problems and the federal government would deal with national environmental problems.

The second approach to mitigating the constitutional restrictions hindering the federal government involves enhancing administrative arrangements with the provinces. Here, environmentalists would push the federal government to create a federal-provincial scheme which would encompass ecosystem

concerns. The federal government has several powers capable of directing such an initiative. First, the federal government could use the spending power to provide uniform administration and enforcement of comprehensive environmental regulation across Canada. Equally, it could use this power to link regional economic development to environmental performance. Secondly, 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.<sup>199</sup> Federal responsibility for this area could encourage provinces to assist the federal government in thoroughly controlling the remaining aspects of a comprehensive cradle-to-grave scheme. Thirdly, the federal government could urge the creation of an extensive federal-provincial scheme of expert environmental boards. These boards could administer the various industry-government agreements characterizing environmental law; they could tackle the relationship between the costs for clean-up and compliance and the revenues from taxes or charges; and they could enhance environmental uniformity across the country by taking many environmental issues out of the hands of politicians and political bureaucracies. Administrative strategies like these would put some pressure on provinces to respond positively.

Both levels of reform seem appropriate to the enactment of comprehensive environmental reforms. Regional assessment may put the reforms on a more rational constitutional footing; cooperation is always necessary to regulate local and national environmental problems in a consistent way.

Yet the murky medium of Canadian federalism will not clear on its own. Law is not a self-moving force. Environmentalists have moved the law to a greater comprehension of environmental issues. To attain a sustainable state of affairs, however, environmentalists will need to do more than simply change the system from the outside. They must learn the constraints inside the system. These constraints involve the legal doctrine of federalism. At present, federalism is a dark hole in the grey matter of law. No one should expect the greening of this darkness. But environmentalists can enlighten this darkness by learning the history and the future

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<sup>199</sup> Relying on section 92(10)(c), *supra*, note 8: also see *supra*, notes 103 and 157.



possibilities of Canadian federalism. These efforts would help ensure that future negotiations on federalism consider the full range of environmental concerns.

