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A New Division of Powers for Canada

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A NEW DIVISION OF POWERS FOR CANADA

Patrick Monahan, Lynda Covello, and Nicola Smith

BACKGROUND STUDIES

OF THE YORK UNIVERSITY CONSTITUTIONAL REFORM PROJECT

STUDY NO. 8

CENTRE FOR PUBLIC LAW AND PUBLIC POLICY

This study questions the desire to totally rewrite the division of powers so as to "modernize" the Canadian constitution. Far from being outdated, the current division of powers in Canada is both flexible and adaptable to changing needs and circumstances. Monahan, Covello, and Smith demonstrate that the overlapping of jurisdiction is inevitable in a country such as Canada. Any attempt to recreate a set of "watertight compartments," emphasizing exclusive jurisdictions, is doomed to failure. The authors set out and defend a different conception than that put forward by the 1991 proposals of the federal government. Theirs is based on the idea that the chief challenge for governments in Canada is to devise ways of managing and coordinating joint action to deal with pressing social, economic, and political problems.

Patrick Monahan is Director of the York University Centre for Public Law and Public Policy and an Associate Professor, Osgoode Hall Law School of York University. Lynda Covello is Director of Research, York University Constitutional Reform Project, York University Centre for Public Law and Public Policy. Nicola Smith is a member of the Class of 1993, Osgoode Hall Law School of York University.

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THE YORK UNIVERSITY
CONSTITUTIONAL REFORM PROJECT

This publication is part of the Centre's latest project, the York University Constitutional Reform Project. The Project studied the legal issues surrounding Québec sovereignty, Ontario's interests in the current constitutional discussions, and the federal proposals released in September of 1991. A comprehensive eight-month study by researchers at the Centre, meetings and conferences with eighteen distinguished academics from York University and the University of Toronto, and individual studies by distinguished academics and professionals throughout Canada culminated in the publication of eleven Background Studies and a Final Report. The Final Report, *An Agenda For Constitutional Reform*, is written by Patrick Monahan, Director of the Centre, and Lynda Covello, Coordinator and Director of Research for the Project. The Report puts forward and discusses forty-eight recommendations on constitutional reform. The publications are listed on the inside of the back cover.

A NEW DIVISION OF POWERS FOR CANADA

Patrick Monahan, Lynda Covello, and Nicola Smith

Background studies
~~FINAL REPORT~~
OF THE YORK UNIVERSITY CONSTITUTIONAL REFORM PROJECT

STUDY NO. 8

York University Centre for Public Law and Public Policy
North York, Ontario
1992

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A New Division of Powers for Canada
Patrick Monahan, Lynda Covello, and Nicola Smith

Study No. 8
Background Studies of the York University Constitutional Reform Project

This Background Study was published simultaneously with the Final Report and the ten other Background Studies of the Project. The inside of the back cover lists the publications, and explains how to order them.

ISBN 1-895274-07-9
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Copy-edited by Craig J. Penney
Designed and typeset by S. Joseph Grmovsek and Craig J. Penney
Cover design by Rossitza Skortcheva Penney
Printed by Becker Associates, Concord, Ontario

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PART I: INTRODUCTION

During the Meech Lake round of constitutional negotiations, the division of powers between the federal and provincial governments was not a major item of discussion. Indeed, the only direct amendment to the division of powers in Meech Lake was in relation to the field of immigration, already an area of shared jurisdiction under the *Constitution Act, 1867*.[1] In the wake of the failure of Meech, however, the issue of the division of powers has emerged as a major focus of debate within the province of Québec. The Report of the Allaire Committee, published in January of 1991, argues that there must be a profound decentralization of powers in favour of the provinces if Canadian federalism is to meet the challenges of the 1990s.[2] One justification set out in the Allaire Report is that decentralization in favour of the provinces is needed in order to protect the political autonomy of Québec. However, a recurring theme throughout the Allaire Report is that decentralization is the key to responding to the inefficiency and irresponsibility of the current Canadian federal system.

According to the Allaire Report, the major problem with Canadian federalism is that it is inefficient and unable to respond to the changing international environment. Canadian federalism is said to be characterized by "costly and sterile overlapping jurisdiction" and based on "centralizing practices dictated by an inflexible will to standardize public services to the utmost and the pursuit of grand so-called

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[1] Of course, the distinct society clause would have indirectly affected the interpretation of the division of powers. However, the effects of the clause were limited by the stipulation that there could be no derogation from the legislative powers of Parliament or of any of the provinces. See section 2(4) of the Meech Lake Accord, proposing a new section 2 for the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3 (formerly *British North America Act, 1867*).

[2] See *A Québec Free to Choose* (Montreal: Québec Liberal Party Policy Paper, 29 January 1991) [hereinafter Allaire Report].

'national' policies."[3] Throughout the Western world, the Report observes, the role of the state is changing; Canada seems unable to follow suit, its political structure "cut off from the new international and political realities."[4] The Report argues that there is an urgent need for radical constitutional change in order to put the economy and public finances in Canada back on track. The main objective of this constitutional change should be a rewriting of the division of powers to clarify the responsibilities of both orders of government and to enhance the role of the provinces.

The Government of Canada, in its recent constitutional proposals,[5] seems to be of two minds on the benefits of the Allaire approach. On the one hand, the *Federal Proposals* suggest that it is impossible to create a set of "watertight compartments," separating federal and provincial legislative jurisdictions. The "growing complexity of society" means that it is not possible to "allocate all functions perfectly to different levels of government."[6] This indicates that there must inevitably be areas of overlap and concurrency involving the federal and provincial governments: in these areas, both levels of government must develop mechanisms to work together in the pursuit of common objectives.

Yet, while the federal proposals acknowledge the inevitability of overlapping federal and provincial jurisdictions, there is also the suggestion that this type of overlap is costly and disruptive and therefore ought to be minimized. The federal proposals suggest that governments must "better respect the division of responsibilities" in the constitution in order to "serve Canadians better and to avoid costly and disruptive overlap and duplication."[7] The proposals note that concern with overlap and duplication in government programs and regulations dates at least as far back as the 1937 Rowell-Sirois Commission. While there has been some progress in reducing unnecessary overlap, the federal government suggests that there remains

[3] *Ibid.* at 4.
[4] *Ibid.*
[5] See *Shaping Canada's Future Together: Proposals* (Ottawa: Minister of Supply and Services, 1991) [hereinafter *Federal Proposals*].
[6] *Ibid* at 37.
[7] *Ibid.* at 33.

significant room for improvement. Some of the suggestions made by the federal government include the following:

- because certain jurisdictions are not formally defined in the constitution, the constitution might be amended to make the roles and responsibilities of the federal and provincial governments in these areas explicit;
- in areas where both levels of government are active, the different roles and responsibilities of each level can be clarified through bilateral agreements; and
- these bilateral agreements can be entrenched in the constitution to "guarantee their permanence."

These principles are reflected in the specific proposals advanced by the federal government. The federal government proposes to recognize the exclusive jurisdiction of the provinces in a number of areas[8] and to withdraw from these fields "in a manner appropriate to each sector and respectful of the provinces' leadership."[9] The federal government also proposes to "streamline" the way in which government services are delivered to Canadians, primarily through delegating program delivery responsibility to the provinces. This streamlining of program delivery would be designed to eliminate unnecessary overlap and duplication in a number of areas,[10] thereby reducing the costs of government to Canadians.

Thus, the proposals of the federal government display a certain ambivalence in terms of the preferred approach to the division of powers. On the one hand, there is a clear recognition that it is impossible to neatly separate out federal and provincial roles and responsibilities. On this basis, the challenge is framed in terms of

[8] The areas are tourism, forestry, mining, recreation, housing, and municipal/urban affairs. See *ibid.* at 36-37.
[9] *Ibid* at 37.
[10] The "candidates for streamlining" include the following: drug prosecutions, wildlife conservation and protection, transportation of dangerous goods, soil and water conservation, ferry services, small craft harbours, some aspects of financial sector regulation, some aspects of bankruptcy law, some aspects of unfair trade practices, and inspection programs.

creating mechanisms of coordination and harmonization permitting joint action by both levels of government simultaneously. On the other hand, the federal proposals also take up the approach advanced in the Allaire Report, with its emphasis on reducing overlap and duplication between the two levels of government. This second approach suggests that the challenge is to clarify, to the greatest extent possible, the dividing line between federal and provincial roles and then to respect the lines that are drawn.

The second approach — the "Allaire approach" — has dominated discussions of federalism in Canada since 1867. This approach speaks the language of centralization and decentralization. Its organizing concept is the idea of "exclusive jurisdiction." The focus of this approach is the measurement of the relative scope of the "exclusive jurisdictions" of the federal and provincial governments. A further focus of the approach is the identification of "encroachments" by one level of government on the exclusive jurisdictions reserved to the other. Moreover, the different levels of government are seen as competitors rather than as conciliators; each level of government competes with the other for greater space, resources, and public favour. Perhaps the most articulate defence of this traditional way of thinking about federalism was that written by Albert Breton some years ago.[11]

In our view, this is an unhelpful and inaccurate way of thinking about the division of powers in Canada today. The very concept of "exclusive jurisdictions" — which lies at the heart of traditional thinking about federalism — no longer has any meaningful relationship to the way in which government currently operates in Canada. Both levels of government are active across the whole range of policy fields, whether the issue be one of social policy or economic policy. The idea that this overlap in jurisdiction could be reduced in any significant way is, in our view, simply fanciful. The effort to reduce overlapping jurisdiction fails to take account of the multifaceted nature of contemporary social and economic problems and of the appropriate government response to those problems. Policy issues in the

[11] See A. Breton, "Supplementary Statement" in *Report of the Royal Commission on the Economic Union and Development Prospects for Canada*, vol. 3 (Ottawa: Minister of Supply and Services Canada, 1985) 485 [hereinafter *Macdonald Report*].

contemporary political environment display a complexity which simply precludes any attempt to pigeonhole a single policy field as exclusively "local" versus "national." Increasingly, each policy field has local, national and even international aspects and implications. In such a context, to allocate responsibility for such policy fields to one level of government to the exclusion of all others is to ignore the multifaceted character of the underlying social problem.

Instead of continuing to focus on reducing overlap and duplication, we propose a new way of thinking about the division of powers in Canada. On this new way of thinking (an approach which is itself implicit in the *Federal Proposals*), the existence of overlapping jurisdiction is assumed to be both necessary and inevitable. The focus of analysis is not on reducing this overlap but on managing it properly. In particular, the challenge is to develop mechanisms which permit joint action by both levels of government so that all aspects of a particular social problem can be addressed simultaneously.

This approach to the division of powers is itself reflected in certain aspects of the *Federal Proposals*. We have already noted the references in the proposals to the idea that overlapping jurisdiction is an inevitable feature of Canadian federalism. Even more significant are the proposals advanced by the federal government for the management of the economic union. The federal government recognizes that the management of the economic union is a joint affair; both the federal and provincial governments have major roles to play if the free movement of the factors of production throughout the Canadian economic union is to be improved. This means that the success of future efforts to enhance the functioning of the economic union will depend upon the establishment of effective means for governments to work together.[12] In order to achieve this goal, Ottawa proposes to establish a Council of the Federation, composed of federal, provincial and territorial governments. The objective of the Council would be to "improve the management of the interdependence of government actions inherent in our federal system."[13]

[12] *Federal Proposals*, *supra*, note 5 at 41.
[13] *Ibid.* at 42.

Thus, the approach which we are advocating — an approach which focuses on joint action and coordination of policy rather than on disentanglement — is itself clearly reflected in the federal government discussion of the economic union. However, when Ottawa puts forward its specific proposals in this area, it returns to the language and methodology of the more traditional approach. It proposes to create a new "exclusive power" of the federal Parliament to make laws in relation to the efficient functioning of the economic union. This new power, set out in the proposed section 91A, seems to ignore the entire discussion which has preceded it. While the "exclusive power" of Parliament is to be subject to provincial approval in the Council of the Federation, the power is expressed as belonging to Parliament alone. The concept of joint action and co-responsibility is not incorporated fully into the framework which is proposed.

In this sense, the recent *Federal Proposals* on the division of powers display a very deep ambivalence about the purposes which federalism is to serve in Canada. The federal proposals make repeated references to the need to reduce overlap and duplication and about the necessity of respecting jurisdictional lines. These references reflect the traditional model of federalism, a model premised on "exclusive" spheres of jurisdiction allocated to different levels of government. But there are also hints and suggestions of a newer approach, an approach which emphasizes co-responsibility rather than exclusive jurisdictions, and which seeks to promote cooperation rather than competition. However, this new approach is never openly defended, nor do the specific proposals which are presented give effect to its underlying assumptions.

This paper is an attempt to articulate and defend what we regard as a conceptually distinct and coherent way of thinking about federalism in Canada. The core idea underlying the approach which we advance is that of shared responsibility and joint action. On this view, federalism is the site for accommodation and coordination between different levels of government. This emphasis on coordination and joint action can be contrasted with a traditional emphasis upon exclusive jurisdictions and upon competition between different orders of government.

This vision of intergovernmental relationships is, we suggest, far more likely to equip Canada to deal with the "harsh international

realities" which so preoccupied the authors of the Allaire Report. The co-management approach which we defend is the same approach which underlies recent European moves towards greater political and economic integration. In other words, what we are suggesting is that Canada build on the emerging experience in other contexts, rather than ignore that experience.

Moreover, it is misleading to describe this approach as novel or original. Indeed, one of the points which we seek to emphasize is that this co-management approach reflects the current reality of intergovernmental relationships in this country. While media and public attention is typically focused on areas of controversy or disagreement, the vast bulk of federal-provincial interactions is conducted on an entirely different footing. There are extensive mechanisms of coordination and consultation that are already built into the system and that permit it to function effectively.

We believe that one of the problems with recent discussions of the division of powers is that they have proceeded at an overly abstract and general level. We regard it as extremely unhelpful to discuss these issues in terms of generalities such as the need for "decentralization" versus "centralization." Any proposals for constitutional change must be based upon a detailed, concrete, and practical analysis of the actual operation of the division of powers in a particular field. Only through such careful and practical study is it possible to come to a conclusion whether or not formal constitutional change is required. It is for this reason that the bulk of this paper is structured around a case study of the field of the environment. The case study attempts to describe the current roles and responsibilities of the federal and provincial governments in the environmental field; it is an example of the division of powers in action. We describe the extent to which there is overlapping jurisdiction between the federal and provincial governments, examine the reasons for this state of affairs, and test the practical effects of formal constitutional change.

We have selected the field of the environment for particular attention, not only because it is an issue that is assuming increasing importance and prominence in recent years but, more importantly, because there have been a number of recent suggestions for constitutional amendments which would directly or indirectly affect constitutional jurisdiction over the environment. The Allaire Report

recommends the recognition of "the environment" as an area of exclusive provincial jurisdiction. The *Federal Proposals* do not endorse this type of amendment directly; however, a number of the federal proposals would indirectly affect current federal authority in relation to environmental matters.[14] In light of this support for decentralization in this important area, we believe that it is timely to engage in a close examination of the manner in which jurisdiction over the environment is currently exercised.

① The first section of the paper provides an overview of the manner in which the division of powers has evolved in Canada in the recent past. The emphasis here is on the lack of connection between the formal division of powers in the *Constitution Act, 1867* and the manner ② in which government actually operates today. The second section of the paper attempts to illustrate these general observations through a close analysis of federal and provincial jurisdiction in relation to the ③ environment. The third and final section of the paper attempts to draw out the conclusions and implications of this analysis for the current efforts to reform the division of powers in Canada. Particular attention is paid to the *Federal Proposals* on the division of powers, which would have significant implications in terms of the future role of the federal government in relation to environmental matters. Examining the direction in which these proposals appear to be heading, the analysis suggests that there is both considerable ambiguity and some cause for concern.

[14] See *supra*, note 5, particularly the proposals to transfer part of the federal residual power to the provinces (proposal no. 22); the proposal to abolish the declaratory power (proposal no. 23); the proposal to recognize exclusive provincial jurisdiction in the fields of tourism, forestry and mining (proposal no. 24); and the proposal to streamline government programs in the fields of wildlife conservation, transportation of dangerous goods, soil and water conservation, and inspection programs (proposal no. 26).

PART II: FROM WATERTIGHT COMPARTMENTS TO SHARED RESPONSIBILITY

The original conception of the division of powers in Canada was premised on the idea that each level of government would exercise exclusive jurisdiction over a series of "watertight compartments." It is well known that this description no longer applies to Canadian federalism. Instead, overlapping of jurisdiction and functional concurrency have become the norm. In most important areas of public policy, both levels of government are active and have a range of policy instruments at their disposal.[15]

There are a variety of reasons for this, but one of the most important is the fact that the categories in the *Constitution Act, 1867* omit reference to many of the most important functions of modern government. While the 1867 *Act* sets out an extensive list of powers for each level of government, these lists were drafted at a time when the conception and role of government was much more limited. Thus, the lists of powers in the 1867 *Act* do not mirror the complexity or the expanse of the contemporary roles of government. The categories in sections 91 and 92 simply do not mention explicitly many of the most significant aspects of contemporary government in Canada.

An illustration of this can be found by comparing the lists of powers set out in the Allaire Report with those set out in the 1867 *Act*. The Allaire Report sets out a list of twenty-two powers which it states should be under the full sovereignty of the province of Québec. Significantly, over two-thirds of these powers are not mentioned at all

[15] For a general discussion which makes these points, see G. Stevenson, "The Division of Powers in Canada: Evolution and Structure," and J. Whyte, "Constitutional Aspects of Economic Development Policy," in R. Simeon, ed., *The Division of Powers and Public Policy* (Toronto: University of Toronto Press, 1985).

in the 1867 *Act*. Of the twenty-two exclusive Québec powers identified in the Allaire Report, only municipal affairs, education, natural resources, agriculture, industry and commerce, and public security are even mentioned in the 1867 *Act*. The other sixteen powers, including the environment, regional development, research and development, culture, health, social affairs, and housing are not referred to explicitly in either section 91 or section 92 of the 1867 *Act*. They are, instead, categories which reflect our contemporary understanding of what government does, categories which simply have no counterpart in the 1867 *Act*.

In this sense, the phrase "division of powers" is somewhat misleading; the 1867 *Act*, in fact, does not formally and explicitly divide many of the most important functions of modern government. Provincial Ministries of Health, for example, consume by far the largest proportion of all provincial tax dollars. Yet, the division of powers set out in the *Constitution Act, 1867* makes no explicit reference to legislative responsibility for health care. This has permitted a high degree of flexibility in the evolution of the division of powers; as new areas of government responsibility emerge, the absence of a specific allocation of responsibility in the field will typically permit intervention by either level of government.

Thus, the fact that the categories in the 1867 *Act* do not mention many of the important contemporary aspects of public policy has permitted a high degree of functional concurrency. In this sense, it is simply wrong for governments in Canada to complain that they lack "jurisdiction." With relatively few exceptions (these exceptions involve judicially-imposed limitations on federal regulation over the economy),[16] "jurisdiction" as such is not a problem under the Canadian constitution. Either level of government has sufficient constitutional authority to intervene in virtually any policy area that is deemed to be of significance in the 1990s. The suggestion that the division of powers needs to be comprehensively rewritten in order to

[16] It should be noted that the most recent judicial interpretations of the federal authority over trade and commerce, and over matters of "national concern" have given a broader role to Parliament. For an extended analysis, see R. Howse, *Economic Union, Social Justice, and Constitutional Reform: Towards a High But Level Playing Field* (North York: York University Centre For Public Law and Public Policy, 1992).

"transfer jurisdiction," either to the provinces or to the federal government, is simply unfounded. Indeed, it is precisely because of the flexibility inherent in the current division of powers that the country is able to operate under a set of categories drafted one hundred and twenty-five years ago. As new social, political, or economic problems have arisen, both levels of government have been able to adapt and respond to these new challenges. This is one of the great virtues of the 1867 *Act*, and a key explanation for its political durability.

To further illustrate the plasticity of the 1867 division of powers, consider again the list of twenty-two exclusive provincial powers identified in the Allaire Report. While only six of these categories are even mentioned in the *Constitution Act, 1867*, the provinces are *de facto* active in twenty-one of the twenty-two fields of jurisdiction. In fact, the only area that is not now under provincial authority — unemployment insurance — would be subject to exclusive provincial jurisdiction but for a constitutional amendment in 1940. Unemployment insurance was not mentioned in the 1867 *Act*, but the Privy Council determined in the 1930s that it fell within provincial responsibility for "property and civil rights." The federal government, likewise, is also active in virtually all of the twenty-two policy areas identified in the Allaire Report as appropriate for exclusive provincial jurisdiction. In most of these areas (including culture, housing, education, recreation and sports, health, tourism, regional development, and the environment) federal involvement is based on the exercise of the spending power. The federal ability to directly regulate many of these areas has been hampered by a very narrow judicial interpretation of the federal authority over trade and commerce.[17]

An emerging critique of this structure is that such a permissive system is inefficient — it leads to too much overlapping of jurisdiction, too much government, and is too costly to the taxpayer. This appears to be the underlying critique mounted by the Allaire Report. The Report argues that the Canadian federal system is too expensive and that costs could be reduced by constitutionally limiting the role of the

[17] See, however, the comments of Howse, *ibid.*, who argues that recent judicial interpretations have opened the door for more extensive direct federal regulation.

federal government. The Report would reduce the fields of overlapping jurisdiction and restore some form of compartmentalization to the formal division of powers, largely by eliminating any federal presence in a wide range of policy areas.[18]

Is the case for reducing overlap and duplication a plausible one? In the Introduction to this paper, we suggested that any attempt to restore watertight compartments would be unwise and unworkable. We turn now to the examination of a concrete field of jurisdiction — the regulation of the environment — to examine this issue more closely.

[18] As an aside, it is significant that the Allaire approach would not increase the jurisdiction of the provinces to any great degree since the provinces are already active in most of the areas that the Allaire approach would reserve to them.

PART III: THE CONSTITUTION AND THE ENVIRONMENT

Neither section 91 nor section 92 of the *Constitution Act, 1867* makes any explicit reference to the environment as a subject matter of legislation. However, both levels of government can claim legitimate jurisdiction in this field and both have been increasingly active in passing environmental legislation and regulations in recent years.

What is important to recognize is that this legislative and regulatory activity, by both levels of government, is not based on any single provision or section of the 1867 *Act*. Instead, jurisdiction over the environment is said to flow from a whole series of different provisions and heads of legislative authority. This is an important observation. What it illustrates is that any attempt to define a new head of power over the environment would have very profound impacts across a whole range of policy fields. Depending on which level of government was granted authority over the environment, a whole series of other sources of legislative authority might be indirectly affected. Moreover, it would be very difficult to predict in advance what the precise nature of these effects might be. It would make the drafting of any such constitutional amendment an exceedingly difficult and complex undertaking.

Consider first the various sources of federal jurisdiction over the environment. It would appear that there are at least eight different heads of legislative authority in section 91 which, directly or indirectly, grant authority to Parliament to regulate the environment.

The first of these is the provision for peace order and good government (POGG), set out in the opening words of section 91. The POGG power is thought to have three distinct branches, the first dealing with national emergencies, the second with matters of national concern, and the third with matters not specifically enumerated to the provinces (*i.e.*, the "residual" power). The emergency power is clearly available to deal with environmental hazards of some scope, including oil and

chemical spills on the order of the Exxon Valdez oil spill off the Pacific coast, and the Mississauga train derailment. However, many environmental problems are incremental and must be dealt with before reaching proportions that would justify (in a legal sense) invoking this extraordinary remedy.

It is also clear that environmental legislation may be justified under the national-concern branch of the POGG power as a matter in which uniformity of law is essential, as well as under the "purely residual" branch of POGG. This view has been articulated and refined by the Supreme Court of Canada in *Interprovincial Co-operatives Limited and Dryden Chemicals Limited* v. *R.*[19] and *R* v. *Crown Zellerbach.*[20]

In *Interprovincial Co-operatives*, the court held that jurisdiction to regulate pollution of interprovincial waters was vested in the federal government under Parliament's residual power. At issue in that case was provincial legislation giving the province the right to recover compensation for damage caused to commercial fisheries in the province by contaminants dumped into rivers flowing into Manitoba at points outside of the province. The contentious part of the legislation, which was declared *ultra vires* by the Court, was a provision stating that a valid permit issued by the relevant external authority to dump the contaminants into the water at that place would not constitute a defence in Manitoba. The Court found that this was an attempt to legislate in an area of exclusively federal jurisdiction, analogizing it to the power over interprovincial trade and transportation. The Court held that the control of pollution that affects more than one province is clearly a matter that falls within federal jurisdiction.

This principle was carried one step further in the recent *Crown Zellerbach* case. Under the *Ocean Dumping Control Act*,[21] the federal Parliament had purported to regulate marine pollution in the territorial sea as well as in the internal salt waters of Canada, which are usually considered subject to provincial jurisdiction. The dumping which had

[19] [1976] 1 S.C.R. 477 [hereinafter *Interprovincial Cooperatives*].

[20] [1988] 1 S.C.R. 401, 49 D.L.R. (4th) 161 [hereinafter *Crown Zellerbach* cited to S.C.R.].

[21] R.S.C. 1985, c. O-2.

given rise to the litigation in the case had taken place in waters off the B.C. coast but wholly within boundaries of the province. Justice Le Dain, writing for the majority, indicated that marine pollution, because of its predominantly extraprovincial as well as international character and implications, is clearly a matter of concern to Canada as a whole. The question for the Court in *Crown Zellerbach* was whether the control of pollution by the dumping of substances in marine waters, including provincial marine waters, was a "single, indivisible matter, distinct from the control of pollution by the dumping of substances in other provincial waters."[22] Justice Le Dain concluded that marine pollution was a separate and distinct matter and thus subject to federal regulation. This had the effect of extending federal authority to the control of dumping which occurs entirely within the borders of a single province, without any necessity of demonstrating that the substance has crossed provincial borders.

This definition of the national-concern branch of the POGG power would appear to grant to the federal government much of the power it would need to fulfil its international obligations with respect to environmental protection as they evolve, as well as to grant it jurisdiction to deal effectively with domestic environmental concerns which manifest a transboundary character.

There are a variety of other sources of federal legislative authority over environmental matters. Section 91(1A), the Public Property power, has been judicially interpreted as giving the federal government jurisdiction over coastal waters outside provincial boundaries, and would include the power to control pollution in Canadian waters. This section also gives the federal government control over activities on federal public land, which comprises some of the forestry industry, although most of it falls within provincial jurisdiction, as discussed below. The federal government also owns national parks, military reserves, and publicly-owned land in the Territories.

Section 91(3), Taxation, can be used to implement a system of deterrents and incentives by imposing higher taxes on polluters, and giving deductions for desirable environmental behaviour. These powers may be a way of reaching mining and manufacturing industries, which

[22] *Supra*, note 20 at 436.

are, for the most part, not explicitly included in federal jurisdiction. However, the taxing power can also be used to enact a comprehensive scheme of incentives, involving increased taxes or deductions, to encourage environmentally sensitive behaviour on the part of any sector of industry or the public.

Section 91(27), the Criminal Law, which may be used to prohibit activities dangerous to health, may be used to prohibit activities which cause environmental harm. However, the exercise of criminal jurisdiction is limited to establishing the simple prohibition-and-penalty type of regulatory structure. This has been criticized by environmental analysts as unsophisticated and inefficient.[23]

Section 91(12), Fisheries, provides power to regulate the environment of fish. This power has been interpreted as authorizing federal regulation of any activity which might cause harm to fish, including water pollution.[24] The fisheries power also authorizes a federal role in relation to any project which might be shown to cause harm to fish, such as certain large dam projects or river diversions.[25]

Section 91(10), Navigation and Shipping, may be used to regulate the activities of ships. This gives some power to regulate pollution due to shipping activities, although it is not an unencumbered environmental protection power. With respect to hydro-electric power, a dam is also subject to federal jurisdiction *vis-à-vis* its effect on the navigability of waters it affects.[26]

[23] See G.B. Doern, "Regulations and Market Approaches: The Essential Environmental Partnership" in Doern, ed., *Getting it Green: Case studies in Canadian Environmental Regulation* (Toronto: C.D. Howe Institute, 1990) at 1.

[24] See *Fowler* v. *The Queen*, [1980] 2 S.C.R. 213, where it was decided that a section of the federal *Fisheries Act*, that prohibited the deposit of logging debris "into any water frequented by fish," was *ultra vires* because it did not specify that the debris deposited must be harmful to fisheries; see also, *Northwest Falling Contractors* v. *The Queen*, [1980] 2 S.C.R. 292, where the Court upheld a section of the same *Act* that prohibited the deposit of any "deleterious substance" into fish habitat, on the basis that the language of the section made the crucial link between the proscribed activity and harm to fisheries. See also, the discussion in P. Hogg, *Constitutional Law of Canada*, 2d ed. (Carswell, Toronto, 1985) at 594-95.

[25] *Smith* v.*Ont. and Min. Power Co.* (1918), 44 O.L.R. 43 (Ont. A.D.); and *Re Waters and Water Powers*, [1929] S.C.R. 200 at 226; see also, Hogg, *ibid.* at 596.

[26] See Hogg, *ibid.*

Federal jurisdiction also extends to the activities of particular industries. This would include aviation (opening words of section 91), interprovincial and international transportation and communication (section 92(10)(a)) and nuclear power (section 92(10)(c) power to declare works for the general advantage of Canada). Since all of these activities have potential environmental impacts, federal jurisdiction in these fields will include a power to regulate and control such effects.

Section 91(24) confers federal jurisdiction over "Indians and lands reserved for Indians." The second branch of this power enables the government to administer and control these lands, although it does not "own" them, in the sense of holding the underlying title.[27] It is therefore arguable that it could pass environmental protection legislation pursuant to this power. For example, the federal power in section 91(24) has been relied on as a basis for federal authority over the Oldman River Dam project in the province of Alberta; this project is said to have a significant and direct impact on a nearby Indian Reserve.

In summary, there is wide scope for federal legislation to deal with environmental concerns and issues. This federal authority flows from a number of different specific sources of authority in section 91 of the *Constitution Act, 1867*. At the same time, the provincial legislatures also have very extensive regulatory authority in relation to environmental matters.

Perhaps the most important source of provincial authority in this regard is section 92(13), the power over Property and Civil Rights. As noted by Professor Hogg, this power "authorizes the regulation of land use and most aspects of mining, manufacturing and other business activity, including the regulation of emissions that could pollute the environment."[28] This power, combined with section 92(8), Municipal Institutions, also authorizes municipal regulation of much local activity that affects the environment; for example, water treatment, land-use planning, waste management, air pollution and noise control. It is the provincial power over property and civil rights which is the main

[27] See Hogg, *ibid.* at 554 and 573, where he states that it resides in the provincial Crowns, but query whether there is not also an argument that it is in the Aboriginal peoples themselves.

[28] Hogg, *ibid.* at 599.

source of constitutional authority for a wide range of legislation enacted by the provinces.

Provincial jurisdiction in relation to the environment is also derived from a number of other sources. These include the following.

- Section 92(10), which gives the provinces jurisdiction over "local works and undertakings," which would include such things as dams, hydro-electric generating stations, and power distribution systems within the province. Nuclear power, however, has been declared a federal matter.[29]
- Section 92(5), which gives the provinces the power to control activities on provincial public lands, which encompasses much of the mining and lumbering industries. This is an especially important power over environmental issues when one considers that thirty-five per cent of Canada is covered by forest, and that we are the world's largest exporter of forest products.[30]
- Section 92(2), the Taxation power, can be used to tax the consumption of products that cause pollution, such as gasoline, and to exempt products that reduce pollution, such as insulation.[31]
- Section 92A, the 1982 "Resource Amendment," granted powers to the provinces in the areas of non-renewable

[29] See Hogg, *ibid.* at 585. Note that, if current federal proposals are adopted, the declaratory power will be abolished. See *Federal Proposals, supra,*, note 5, especially proposal no. 28. The forthcoming third edition of Professor Hogg's text will correct the statement that the power was last used to declare nuclear power a federal matter in 1945. The power was used again in 1967 in the *Cape Breton Development Corporation Act*, S.C. 1967-68 c. 6, s. 35; and, in fact, as recently as 1987 in the *Teleglobe Canada Reorganization and Divestiture Act*, S.C. 1987, c. 12, s. 9. (Conversation with Professor Hogg, October 1991). Note also that, in the Cape Breton *Act*, the provinces consented to the declaration, and note that the Supreme Court of Canada has held that all telecommunications are of federal jurisdiction in *Alberta Government Telephones* v. *Canadian Radio-Television and Telecommunications Commission*, [1989] 2 S.C.R. 225.

[30] See R. Fashler & A. Thompson, "Constitutional Change and the Forest Industry" in S. Beck & I. Bernier, eds, *Canada and the New Constitution: The Unfinished Agenda*, vol. 2 (Montreal: Institute for Research on Public Policy, 1983) at 55.

[31] See Hogg, *supra*, note 24 at 599.

resources and forestry. This power includes the right to make laws for the conservation and management of non-renewable natural resources, forestry resources, and sites for the generation of electrical energy. The reference to "conservation and management" in section 92A would clearly encompass environmental regulations informed by the principles of sustainable development and public trust.[32]

A. *The Regulatory Framework*[33]

Given the wide scope of legislative jurisdiction available to both levels of government under the constitution, it is not surprising that both Ottawa and the provinces have enacted very far-reaching environmental regulations. Moreover, the scope and extent of the regulation by both levels of government has been expanding dramatically in the past decade, in response to increasing public concern over the environment, which has consistently been regarded as one of the primary concerns of Canadians in recent years.

Commentators in the field of environmental law argue that there have been two distinct generations of environmental regulation in Canada.[34] The first generation, passed in the early 1970s, was primarily concerned with the control of waste and waste management. It proceeded on the basis of a sectoral approach, enacting regulations which applied to specific activities or industries, without any attempt at a comprehensive approach to environmental issues. The second generation of environmental regulation, which began to emerge in the 1980s, had a different focus. Here, the regulation is comprehensive rather than sectoral; it is focused on the control of persistent toxic or

[32] The next section discusses these concepts.

[33] This section draws heavily on the description and commentary set out in C. Hunt, Resources and Environmental Law (Paper prepared for the Conference "Toward the 21st Century: Canadian/Australian Legal Perspectives," York University Centre for Public Law and Public Policy, 23 June 1991) [unpublished].

[34] See A.R. Lucas, "The Harmonization of Federal and Provincial Environmental Policies: The Changing Legal and Policy Framework" in J.O. Saunders, ed., *Managing Natural Resources in a Federal State* (Toronto/Calgary/Vancouver: Carswell, 1986).

environmentally harmful substances over the total lifespan of those substances; and it is informed by the concepts of "sustainable development" and public trust.

A good illustration of the evolution of environmental regulation is provided by the emerging federal legislation in this field, culminating in the enactment of the *Canadian Environmental Protection Act*[35] in 1988. By the early 1980s, the federal government had enacted a whole variety of environmental legislation directed at particular sectors or activities with potential environmental impacts. These included the *Arctic Waters Pollution Act*,[36] the *Canada Shipping Act*,[37] the *Fisheries Act*,[38] and the *Transportation of Dangerous Goods Act*.[39] However, by the mid-1980s, the disadvantages of reliance upon an exclusively sectoral approach were becoming increasingly obvious to most commentators in this field. The main criticisms included the fact that the environmental philosophy of different government departments might be inconsistent or conflicting; this could lead to different standards being applicable in different contexts or even conflicts between the holders of rights granted under different statutes.[40]

The widespread recognition of the deficiencies of the existing patchwork scheme of regulation led to the enactment of the *CEPA* in 1988. While this statute did not effect a complete consolidation of all federal environmental legislation,[41] it did consolidate a number of existing federal laws dealing with clean air and water. It also introduced a variety of new measures, including a regulatory scheme for toxic substances and a procedure for citizen-initiated complaints and inquiries. The enforcement provisions of the legislation were also important, including the right of a citizen to sue for an injunction in certain cases, penalties against corporate directors as well as against offenders, and a Ministerial power to issue emergency orders.

[35] R.S.C. 1985 (4th Supp.), c. 16 [hereinafter *CEPA*].
[36] R.S.C. 1985, c. A-12.
[37] R.S.C. 1985, c. S-9.
[38] R.S.C. 1985, c. F-14.
[39] R.S.C. 1985, c. T-19.
[40] See Hunt, *supra*, note 33 at 16.
[41] For example, the *Fisheries Act*, *supra*, note 38, remained outside the scope of the *CEPA*.

The other major development at the federal level in recent years has been the increasing importance of the process of federal environmental impact assessment (EIA). For many years, the EIA at the federal level was conducted in an informal and discretionary manner, according to guidelines that had an uncertain legal status. However, the legal scope and effect of these guidelines has been dramatically expanded by a combination of judicial and political decisions in recent years. This in turn has prompted legal challenges, initiated by the provinces, to the constitutional validity of the federal EIA procedures in relation to a number of high profile, politically-sensitive construction projects. The increasing public profile that has become attached to the whole issue has placed additional pressure on the federal government to further expand its involvement in all aspects of environmental assessment, which has traditionally been seen as a matter of exclusive provincial responsibility.

The existing federal policy in relation to environmental assessment is set out in the Environmental Assessment and Review Process Guidelines Order (EARP).[42] These guidelines are currently under attack as constitutionally invalid by provincial governments in the *Oldman River Dam* case, argued before the Supreme Court of Canada in the spring of 1991.[43] The EARP is administered by the Federal Environmental Assessment Review Office (FEARO), and is conducted as part of the planning process for federal government projects or for projects to be undertaken on federal lands. Originally regarded as informal and legally unenforceable, the EARP has been criticized as "too discretionary and lacking in rigour, standardization and enforceability,"[44] chiefly because it purports to leave the decision to conduct an environmental impact assessment to the federal department initiating a proposal. However, the legal status of the EARP

[42] Approved by Order in council P.C. 1984-2132 of 21 June 1984, and registered as SOR/84-467.
[43] *Friends of the Oldman River Society* v. *Minister of Transport of Alberta* (1989), 70 A.L.R. (2d) 289, appeal to S.C.C. argued spring 1991 (Just before this study went to the printer, the Supreme Court of Canada ruled against the provinces.); see also, *Canadian Wildlife Federation Inc.* v. *Minister of the Environment* (1989), 3 C.E.L.R. (N.S.) 287.
[44] See R.G. Connelly, The Canadian Environmental Assessment and Review Process (Summer Lunch Pail Series, Environmental Law, The Canadian Institute, 1991) at 17. Mr. Connelly is an official of the FEARO.

has been significantly broadened by recent Federal Court decisions in the *Rafferty-Alameda*,[45] and *Oldman River Dam* cases.[46] As a result of these decisions, the EARP is now seen as a legally enforceable regulation binding on the Crown,[47] and applicable to "a major proportion of projects, especially large ones, across the country."[48] The Order has been "super-added" to all federal legislation, and must be implemented even where the responsible federal Minister has chosen not to exercise authority over a particular project.[49]

With the courts in effect forcing the federal government to assume a larger presence in this field, Ottawa has responded by indicating that it intends to establish new environmental assessment guidelines in statutory form. Bill C-13, the proposed *Canadian Environmental Assessment Act* (CEAA)[50] will replace the Environmental Assessment and Review Process Guidelines Order. The new legislation is seen as the "cornerstone" of federal reform of the EIA process, and a clear improvement over the existing Guidelines Order in terms of public access and accessibility, clarity of rules, and coordination with other jurisdictions and levels of government.[51]

In providing for the establishment and use of joint federal-provincial environmental impact assessment panels,[52] the proposed *Act* attempts to address the current problem of overlapping jurisdiction in this politically- and economically-sensitive area. This mechanism could potentially avoid in the future such situations as the Oldman River Dam,[53] the Rafferty-Alameda Dam,[54] and the Great Whale Dam[55]

[45] *Association of Stop Construction of Rafferty-Alameda Project Inc.* v. *Sask. (Minister of Environment and Public Safety) and Souis Basin Development Authority* (1988), 68 Sask. R. 52 (Q.B.); *Wilkinson* v. *Rafferty-Alameda Board of Inquiry* (1987), 64 Sask. R. 170 (Q.B.); *Association of Stop Rafferty-Alameda Project Inc.* v. *Swan* (1988), Sask. SJ 292 (Q.B.); *Canadian Wildlife Federation* v. *Minister of the Environment and Saskatchewan Water Corp. (Intervenor)*, [1990] 1 F.C. 595.

[46] See the cases cited, *supra*, note 43; see also, Connelly, *supra*, note 44 at 3-8.

[47] See Connelly, *ibid.* at 6.

[48] *Ibid.* at 7.

[49] *Ibid.*

[50] Bill C-13, *An Act To Establish a Federal Environmental Assessment Act*, 3d Sess., 34th Parl., 1991 (originally tabled on 18 June 1990 as Bill C-78).

[51] See generally, Connelly, *supra*, note 44.

[52] *Supra*, note 50, ss 8 and 37(1)(b).

[53] See *supra*, note 43.

[54] See the cases cited, *supra*, note 45.

projects, in which federal and provincial lack of coordination on environmental impact assessment procedures has led to costly delays in construction, possible increased environmental damage, administrative confusion, and expensive and lengthy litigation.

What is clear, however, is that the federal government has now entered this field in a major way and does not intend to abandon it to the provinces. It can be expected that this new federal role will be expanded even further in the future, in response to increasing public awareness and concern over environmental issues. This expanded federal presence will proceed regardless of the current litigation which is before the courts. Whatever the outcome of this litigation, the federal government has now become too committed to this field to simply move back to the more modest role it exercised in the early 1980s.

While the federal government has played an increasingly-important role in terms of the environment in recent years, this has not in any way led to diminished provincial regulation. Indeed, if anything, the provinces have been expanding in the same direction as has the federal government, consolidating and expanding their environmental regulations. For example, the Ontario *Environmental Protection Act*[56] and regulations set out a comprehensive series of controls for all manner of activities which cause environmental harm, and contain statutory requirements for waste reduction and recycling. Environmental assessment at the provincial level has also been expanded and made more rigorous in recent years. All ten provinces now have some sort of environmental impact review procedure, whether under specific EIA legislation (Nfld, Que., Ont., Sask., B.C.), general environmental protection legislation (N.S., Alta), or simply departmental policy (Man., N.B., P.E.I.).[57] The procedures in all jurisdictions are similar, involving preliminary assessment of proposals, which may lead to the preparation of a formal environmental impact

[55] *James Bay Crees* v. *Canada* (12 October 1990) (F.C.T.D.) [unreported].

[56] R.S.O. 1990, c. E. 19.

[57] Report Prepared (by the IBI Group) for the Research Division, Royal Commission On National Passenger Transportation, Intercity Passenger Transportation Policy Framework, Provincial Economic and Safety Legislation Review, Doc. no. RES 90-03 (October 1990) 39 [unpublished].

statement or report, which is then reviewed by one or both of government and the public to determine whether the project is acceptable.[58] Recommendations are then made, and, if the project goes forward, it is monitored to ensure compliance with all relevant restrictions.[59]

Application of the provincial standards is, like the federal process, restricted to projects which are by and large in the public sector.[60] Private projects can be brought in only under specific circumstances.[61] Provinces differ in their definitions of which proposals are to be included or excluded, their treatment of public and private sector projects, and the way in which undertakings are exempted from review. Most define the term "undertaking" as a project which alters the physical environment, although some have expanded the notion to include policies and plans.[62] The provinces all have formal mechanisms for the exemption of specific undertakings.

[58] The level of public input provided for also varies among jurisdictions. Some leave it entirely to the discretion of the Minister, while others have specific requirements in place.

[59] See *supra*, note 57.

[60] In Ontario, for example, the *Environmental Assessment Act*, R.S.O. 1990, c. E. 18, ss 1 and 3, applies to all public sector undertakings unless excluded by an exemption order from the Minister of the Environment or by regulation.

[61] In Ontario, private sector proposals must be specifically designated by regulation in order to be included, although, "[i]n March, 1988, the Minister indicated that all new proposals, public or private, for landfilling and/or incineration of municipal waste would be governed by the *Act*." See A.D. Levy, The Ontario Environmental Assessment Process: An Overview (Summer Lunch Pail Series, Environmental Law, The Canadian Institute, 1991) at 3 [unpublished]. The same article also notes that Ontario is involved in reforming its process, through studies and recommendations carried out by the Environmental Assessment Task Force (formerly the Environmental Assessment Program Improvement Project).

[62] Ontario's *Environmental Assessment Act*, *supra*, note 60, defines the term in section 1 to include enterprises, activities, proposals, plans, and programs.

B. *The Management of Overlapping Jurisdiction*

What this review indicates is that the claims of both levels of government to intervene in the field of the environment have been expanding in recent years. This has created potential and actual conflict between governments, with different and inconsistent standards being applied to particular projects or individuals. As noted above, the most obvious conflicts have occurred in relation to the environmental assessment process.

However, the existence of these problems should not be taken as an indication that intergovernmental relations in this field are generally conflictual. In fact, the opposite seems to be the case. There have been a variety of mechanisms developed over the years to attempt to harmonize standards and ensure a coordinated approach to environmental regulation.

This emphasis on coordination and harmonization of standards is evidenced throughout the federal Green Plan, released in 1990. The Green Plan announced a commitment to federal involvement in environmental issues of an unprecedented scope; yet, at the same time, it sought to allay provincial fears of jurisdictional conflicts with an equal commitment to federal-provincial cooperation in this area. In discussing the federal-provincial-territorial relationship in this issue-area, the document stresses the need for cooperative efforts to deal with environmental problems.[63] As examples of the type of cooperation envisaged, it points to the recently-established provincial and national Round Tables on Environment and Economy, as well as the Canadian Council of Ministers of the Environment (CCME) (formerly the Canadian Council of Resource and Environment Ministers). This Council is an established body of federal and provincial ministers which has functioned to provide both a forum for new ideas and a mechanism for intergovernmental consultation and contact since the early 1970s.[64]

The CCME has produced an impressive series of joint environmental plans and initiatives involving both levels of government.[65] These include the National Packaging Protocol, the

[63] *Canada's Green Plan* (Ottawa: Minister of Supply and Services, 1990) at 132.

[64] See Lucas, *supra*, note 34 at 33 and 48.

[65] For description and commentary on the various accords and agreements referred

Canadian Acid Rain Control Program, the National Wildlife Policy, and the National Contaminated Sites Remediation Program. Other agreements dealing with particular provinces or groups of provinces and the federal government include the Prairie Provinces Water Agreement (which regulates prairie water resource allotments); the Canada-Ontario Great Lakes Water Quality Agreement (which authorizes the International Joint Commission to study, monitor, and seek ways to improve water quality in the Great Lakes); and the Atlantic Accord (which deals with management of offshore oil and gas resources in Atlantic Canada).

Other agreements have dealt with forestry management and clean up of hazardous waste sites, control and reduction of acid-rain causing emissions, habitat protection for migratory species, and joint management of inter-jurisdictional river basins. Implementation of these agreements is often delegated to a joint board or agency. Harmonized federal-provincial standards have also been achieved through parallel federal-provincial legislation, involving such matters as offshore petroleum resources,[66] standards for ambient air quality,[67] and standards for discharges into water.[68]

The recent *CEPA* clearly emphasizes the need for joint action by both levels of government. Of great interest in this context are the "equivalency" provisions, which allow provinces to operate their own regulatory regimes for certain parts of the statute.[69] Numerous

to in the text, see generally Lucas, *ibid.*, and Hunt, *supra*, note 33.

[66] See C. Hunt, *The Offshore Petroleum Regimes of Canada and Australia* (Calgary: Canadian Institute for Resource Law, 1989).

[67] See Fisheries and Environment Canada, *Criteria for National Air Quality Objectives*, Federal-Provincial Committee on Air Pollution (November 1986).

[68] Such as those developed by a federal-provincial-industry task force and enacted under the regulations to the *Fisheries Act*, *supra*, note 38.

[69] Section 34(6) of the *CEPA*, *supra*, note 35, states that, where a province has in force provisions that are equivalent to a regulation made under section 34(1) (which sets out the subjects for regulation under the Act), a declaration may be made that the regulation does not apply in that province. The phrase "equivalent to" is not defined in the *CEPA*, but it must be agreed to in writing by the federal Minister and the government of the affected province. This will permit a degree of flexibility in the application of the concept from province to province. A declaration of equivalency is also available in respect of provisions dealing with investigation of alleged offenses, and, for these, the provincial provisions need only be "similar" to sections 108 and 110.

sections provide for consultation of the provinces before making decisions.[70] The *Act* also empowers the federal government to delegate administration to the provinces,[71] and establishes a federal-provincial advisory committee.[72]

These various accords and processes suggest that the image of the federal and provincial governments competing for "environmental turf" is somewhat misleading. While there have certainly been important and continuing points of friction, the overall record has been characterized by extensive cooperation leading to tangible results in terms of harmonized standards. There are numerous well-developed mechanisms and institutions, most notably the CCME, which have smoothed conflict and developed joint solutions to environmental problems.

Yet, the issue which arises is whether all this overlapping and concurrency is somehow inefficient or wasteful. Is the presence of both levels of government in the environmental field really necessary or productive? Should not there be some effort to "streamline" the manner in which environmental regulation is devised and administered?

The answer to these questions depends upon an understanding of the nature of the environmental problem facing the world community. There is a developing consensus within the environmental community that environmental concerns are at one and the same time local, national and international. As such, the active and coordinated involvement of all levels of government, including municipal, regional, provincial, national and international, is essential in order to respond to these various dimensions of this public policy concern. The idea that a single level of government should be regarded as possessing "exclusive" or even primary jurisdiction for environmental problems is simply unknown in the contemporary environmental literature. The challenge is not to divide up the "environmental pie" between levels of government or agencies, but to ensure a coordinated response to a world-wide problem which touches all inhabitants of the globe. We

[70] See *CEPA*, *supra*, note 35, ss 6, 7(2), 8, 9, 35(4), 61, and 99.

[71] *Ibid.*, s. 98.

[72] *Ibid.*, s. 6.

turn now to a brief review of the current international consensus on the nature of the environmental issue.

C. *The Global Context of Environmental Concerns*

It is an emerging international consensus, as we approach the 21st century, that attitudes toward and practices concerning our natural environment must be significantly changed if we are to survive as a civilization and a planet. The World Commission on Environment and Development reported in 1987 that a number of disturbing environmental trends "threaten to radically alter the planet,"[73] rendering it increasingly-more difficult for industrialized nations to maintain their energy-hungry lifestyles, and for developing nations to pull themselves out of the debilitating cycle of poverty and debt.

These problems are not isolated or confined to a single nation, region, or hemisphere: they affect us all. The increasing size of the human population coupled with the massive effects of our technologies are creating dramatic and destructive consequences in planet-wide ecological systems. Major environmental disasters which have already been set in motion include the following:

> Each year another 6 million hectares of productive dryland turns into worthless desert. Over three decades, this would amount to an area roughly as large as Saudi Arabia. More than 11 million hectares of forests are destroyed yearly, and this, over three decades, would equal an area about the size of India. Much of this forest is converted to low-grade farmland unable to support the farmers who settle it. In Europe, acid precipitation kills forests and lakes and damages the artistic and architectural heritage of nations; it may have acidified vast tracts of soil beyond reasonable hope of repair. The burning of fossil fuels puts into the atmosphere carbon dioxide, which is causing gradual global warming. This "greenhouse effect" may by early next century have increased average global temperatures enough to shift agricultural production areas, raise sea levels to flood coastal cities, and disrupt national economies. Other industrial gases threaten to deplete the planet's protective ozone shield to such an extent that the number of human and animal cancers would rise sharply and the oceans' food chain would be disrupted.[74]

[73] *Our Common Future/World Commission on Environment and Development*, (Oxford/New York: University Press, 1987) [hereinafter Brundtland Report].

The chief cause of these disastrous environmental effects is economic development and activity which are based on "the use of increasing amounts of raw materials, energy, chemicals, and synthetics and on the creation of pollution that is not adequately accounted for in figuring the cost of production processes."[75]

It is often said that responsible handling of environmental problems requires thinking globally and acting locally. As the Brundtland Report makes clear, this is not a series of isolated problems, but a single, common crisis which all nations and individuals must face together:

> National boundaries have become so porous that traditional distinctions between matters of local, national, and international significance have become blurred. Ecosystems do not respect national boundaries. Water pollution moves through shared rivers, lakes, and seas. The atmosphere carries air pollution over vast distances. Major accidents — particularly those at nuclear reactors or at plants or warehouses containing toxic materials — can have widespread regional effects.[76]

For instance, a factory sitting on a river near a small town in northern Ontario has the potential to do environmental damage at many levels of jurisdiction. Emissions from the plant into the air might not only pose a health risk to local residents, but could easily be borne on air currents into a neighbouring province or country, degrading air quality in that region as well. Effluents dumped into the river could harm local fish habitat, could cause damage to local species of marine life and the other life forms which rely on them for sustenance (including humans), and could travel downriver into lakes, other rivers, and eventually into the ocean itself.

There is the further risk of damage to agricultural lands in river basins and deltas from deposits of toxic substances left behind by the water in its journey. Hazardous substances could also leak or be deposited into the soil at the site of the factory, leaching into the

[74] *Ibid.* at 3-4.
[75] *Ibid.* at 28.
[76] *Ibid.* at 38.

groundwater and contaminating local water supplies and agrarian land. Alternatively, these substances could be swept up by air currents to be deposited far away and work their way into the food chain in an entirely different region, as happened with the "losh" fish in the MacKenzie River in the Northwest Territories.[77]

The Brundtland Report concluded that much of the problem of dealing with environmental issues was structural. In most governments, responsibility for clean-up or protection of the environment is separated from responsibility for those policies or activities which actually cause the environmental degradation or destruction. Thus, environmental ministries and institutions "often have little or no control over destruction caused by agricultural, industrial, urban development, forestry and transportation policies and practices."[78]

The Brundtland Report argued that a new approach was required, emphasizing both that all nations must cooperate on an international level, and that environmental concerns must be taken into consideration at the early stages of developmental planning. The focus must be on "sustainable development," a strategy aimed at meeting the needs of the present without compromising the ability to meet the needs of the future. The Report makes it clear that the issues to be addressed cannot be separated into discrete compartments, but that "[e]cology and economy are becoming ever more interwoven — locally, regionally, nationally, and globally — into a seamless net of causes and effects."[79]

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[77] About four years ago, the Dene, in their annual losh harvest, noticed the colour of the fish livers had changed. This important food source was found to be contaminated by toxaphene, a chemical sprayed on cotton fields in the Southern United States. Banned since the 1970s, after being determined to be a health hazard, toxaphene residues were carried on air and water currents to the Mackenzie River, and became concentrated in the food chain. See *Canada's Green Plan*, *supra*, note 63 at 50.

[78] Brundtland Report, *supra*, note 73 at 39.

[79] *Ibid.* at 5.

PART IV: IMPLICATIONS AND CHALLENGES

What implications emerge from this analysis in terms of the way in which the constitution ought to deal with the environment? Further, what assessment can be made of the proposals which the federal government has made in terms of the division of powers and the environment in the *Federal Proposals*? Finally, what conclusions does this analysis suggest in terms of a general approach to the division of powers in Canadian federalism?

The first conclusion is obvious from the analysis of the previous part but should be restated here. The major public policy challenge in terms of the environment is to improve the capacity of governments at all levels to respond jointly to environmental harm. The Brundtland Report's instruction to "think globally and act locally" captures this challenge. While environmental problems are a global concern, and require national and international strategies, many of the immediate responses must come at a local level. In this sense, municipal and regional governments have a key role to play (as part of a coordinated strategy involving other governments) in preventing environmental harm.

The second conclusion flows from the first. It would be wasteful and counter-productive to focus energy on dividing up jurisdiction over the environment between different levels of government. Jurisdictional "turf wars" between government are wasteful and unnecessary. They mistakenly assume that a single level of government has the capacity to deal exclusively with what is properly the concern of all governments. The idea that we should devote our energy to drawing jurisdictional lines in the constitutional sand is unheard of in the contemporary environmental literature.

Thirdly, if an exclusive power over the environment were to be recognized in the constitution (as the Allaire Report recommended), the effects of this amendment would be unpredictable and probably

counter-productive. As we noted above, there is no single head of power which serves as the basis for either federal or provincial legislation in relation to the environment. Thus, if an exclusive provincial power over the environment were recognized, it could indirectly limit or restrict a whole range of other sources of federal legislative jurisdiction. There are numerous examples of these types of impacts. We have already noted that the federal government currently has the power to enact tax measures whose purpose is to encourage environmentally-responsible behaviour. However, if the provinces were granted an exclusive power in relation to the environment, such federal tax measures might be ruled unconstitutional. The "pith and substance" of tax measures with an environmental purpose might be seen by the courts as being in relation to the new provincial power over the environment. Similar sorts of judicially-imposed restrictions might be placed on a whole series of other federal powers, ranging from the federal residual power, to the power over fisheries, to the power over navigation and shipping. It would be impossible to predict with any certainty how the courts would interpret the relationship between the new exclusive provincial power over the environment and the existing federal powers in this wide range of areas.

Given these three conclusions, what assessment can be offered of the proposals for constitutional change advanced by the federal government in relation to the division of powers, many of which deal with environmental matters?

As indicated in the introduction to this paper, the general philosophy underlying the federal proposals in relation to the division of powers flows from the idea of disentanglement. The federal government refers approvingly to the need to streamline government and the idea that "governments must respect the [constitutional] division of responsibilities."[80] Thus, in terms of certain jurisdictions or powers which are not now formally defined in the constitution, the federal government proposes to amend the constitution so as to make the roles and responsibilities of each level of government explicit.[81] In

[80] *Federal Proposals*, *supra*, note 5 at 37.

[81] See, *e.g.*, *ibid.*, proposal no. 24, "Recognizing Areas of Provincial Jurisdiction," in which the exclusive jurisdiction of the provinces over tourism, forestry, mining, recreation, housing and municipal/urban affairs is to be constitutionally recognized.

other cases, the federal government proposes to clarify the existing roles of the different levels of government through bilateral agreements so as to "guarantee their permanence."[82] Certain other federal powers with particular relevance for the environment, including the residual power and the declaratory power, are to be restricted or abolished.

In our opinion, this exercise of jurisdictional line-drawing is not only unproductive, but also potentially harmful. Rather than reinforce and enhance existing mechanisms, which permit joint, cooperative action involving all governments (and which have produced very considerable results in the environmental field), the *Federal Proposals* proceed in an entirely different direction. The recurring preoccupation is with drawing lines between the roles of the federal and provincial governments and then entrenching those lines in the constitution.

There are at least two problems with this approach. The first is that, in attempting to define and then constitutionally entrench "existing" powers, one may fall victim to the "law of unintended effects." The "law of unintended effects" refers to the proposition that any constitutional amendment is likely to produce impacts that were unforeseen at the time of enactment. We have already pointed out this problem in terms of explicitly recognizing an exclusive power over the environment in the constitution. The provinces are already active in the field of the environment, even though this is not explicitly set out in the constitution. However, the moment you try to make this existing provincial power explicit, you run the risk of indirectly limiting a host of other federal powers in ways which cannot be predicted in advance.

Consider a second example of the law of unintended effects, this time in relation to the federal proposal to transfer to the provinces that part of the federal residual power which relates to matters that are not specifically assigned in the constitution. The federal government makes it plain that it proposes to retain authority to deal with national emergencies and with matters of national dimensions.[83] The national-

[82] See *ibid.*, proposal no. 26, "Candidates for Streamlining," in which the federal government proposes to delegate to the provinces program delivery responsibilities in a number of areas, including: wildlife conservation and protection, transportation of dangerous goods, soil and water conservation and inspection programs.

[83] These distinctions were reviewed in Part III in the context of the discussion of the

dimensions branch of the residual power has been of growing significance in recent years, and has been the subject of extensive comment by the Supreme Court of Canada.[84] By contrast, the purely-residual branch of the POGG clause has not played a particularly-important role in the past decade. In this sense, it might be supposed that there is no difficulty in principle with transferring this part of the POGG power to the provinces. The provinces already possess a residual power, in section 92(16), over matters of a local or private nature in the province.

The problem is whether a constitutional amendment along these lines would achieve the desired result. The complicating factor is that the dividing line between the different branches of the POGG power is not always entirely clear. For example, while federal jurisdiction over offshore minerals off the coast of British Columbia is based to some extent on the national-concern branch of the POGG power, jurisdiction over the Newfoundland Offshore is apparently founded on the purely-residual branch of the same power.[85] Thus, a constitutional amendment designed to transfer one branch of this federal power to the provinces may produce confusion and additional litigation over these previously-settled matters. The manner in which the courts would interpret any proposed amendment could not be authoritatively predicted in advance. The end result might be to transfer more power to the provinces than was originally intended.

However, assume that the amendment could be drafted so as to avoid any unintended effects. There is still a second difficulty which would arise. This difficulty is that the federal proposals seem designed to reduce flexibility and the capacity for innovation on the part of government. The idea is to agree upon the existing division of responsibilities, write it down in a text or an agreement, and then entrench the arrangement in the constitution. This approach is justified on the basis that it will "guarantee the permanence" of the arrangement.[86]

existing constitutional framework in relation to the environment.

[84] See *Crown Zellerbach*, *supra*, note 20.

[85] Contrast *Re Offshore Mineral Rights of B.C.*, [1967] S.C.R 792 at 817 with *Re Newfoundland Continental Shelf*, [1984] 1 S.C.R. 86 at 127.

[86] *Federal Proposals*, *supra*, note 5 at 33.

This approach is almost certain to make it more difficult for governments to respond to emerging social problems in the future. The environment is a prime example of the difficulty. As we noted earlier, we are only now beginning to understand the full scope and magnitude of the environmental problem which the planet is facing. In the years and decades ahead, we are likely to confront a whole series of new environmental challenges that are simply unknown at the present time. Thus, the idea that governments should attempt to entrench existing roles and responsibilities in the constitution so as to "guarantee their permanence" seems entirely the wrong approach. What is needed are mechanisms which expand flexibility rather than restrict it, so that governments will be capable of moving effectively to combat future environmental degradation.

These comments should not be seen as resisting in any way the devices of intergovernmental agreements and accords, which are advocated in the *Federal Proposals*. As we suggested in our review of the environmental field, accords and agreements have been a key vehicle for developing joint strategies involving both levels of governments. We are simply suggesting that the notion of attempting to disentangle government through agreement — thereby restoring the original watertight compartments of the *Constitution Act, 1867* — is unfounded and ought to be rejected.

The approach which we advocate is one that moves away from the idea of creating or restoring "exclusive jurisdictions." The idea of allocating exclusive powers to particular levels of government may have been appropriate in the nineteenth century-era of limited government. However, in an age when governments are increasingly intervening in all areas of social life, the issue no longer can be framed in terms of drawing bright lines between the respective roles of the different levels of government.

There are two overriding principles which ought to guide any revision to the division of powers. The first is that any changes ought to permit greater flexibility in the manner in which governments can respond to social problems, rather than restrict or limit that flexibility. The second is that federalism should be seen as the site for accommodation and joint action, rather than as a system devoted to drawing fixed constitutional lines. We should spend less time worrying

about centralization versus decentralization and more about the need to devise joint strategies and mechanisms of co-management.

Ironically, the actual practice and operation of Canadian federalism already proceeds on the basis of these two principles. One of the key advantages of the existing division of powers is its flexibility. Because the categories in sections 91 and 92 of the *Constitution Act, 1867* fail to explicitly divide many of the important functions of contemporary government, the current system is characterized by extensive functional concurrency. This has permitted a whole range of flexible devices and arrangements to be created that have enabled Canadian governments to respond to changing circumstances.

This flexibility in the current division of powers is reflected in the extensive "asymmetry" which has been permitted in dealings between the federal government and individual provinces. Because the formal constitution is silent as to so many emerging policy areas, it has been possible for the federal government and the provinces to provide for important variations in the arrangements applicable to each of the provinces. In particular, these informal arrangements have permitted a wide degree of asymmetry between the position of Québec and that of the other provinces.[87] There are numerous well-known examples of these asymmetrical arrangements, including the following.

- While Québec has its own Québec Pension Plan, the other provinces use the Canada Pension Plan.
- Québec is the only province that participates in the process for selecting immigrants and for their settlement in the province; in other provinces this is a responsibility of the federal government.
- In the field of taxation, Ontario, Québec and Alberta do not participate in the corporate income tax collection agreements; Québec does not participate in the personal income tax collection agreements.

[87] This discussion draws on the analysis presented in D. Milne, "Equality or Asymmetry: Why Choose?" in R. Watts & D. Brown, eds, *Options for a New Canada* (Toronto: University of Toronto Press, 1991).

- Ontario and Québec run their own provincial police forces while the other provinces enter into contracts for policing with the RCMP.
- In the field of financial institutions, Ontario, Québec, B.C. and Alberta supervise their own provincially incorporated institutions; other provinces delegate supervision to federal regulators.

In all of these cases, there is no requirement of uniformity across all provincial jurisdictions. Through devices such as "opting out" and special administrative agreements, programs in the various provinces are tailored to meet the needs of the residents of those provinces. Because these arrangements are not formally recognized in the constitution, they do not appear to raise any of the concerns that are often associated with the idea of "special status."

Thus the current division of powers is already characterized by a high degree of flexibility. The same can be said in terms of the other principle which we identified above — the principle of co-management and joint responsibility for the division of powers.

This was made clear in our discussion of constitutional authority in relation to the environment. Despite occasional areas of conflict and discord, the federal and provincial governments have been largely successful in managing the extensive concurrency which exists in the field of the environment. Mechanisms for joint action — such as the Canadian Council of Ministers of the Environment — are well established and have produced impressive results. The difficulty is that this reality is not reflected in the way in which these issues are presented in popular discussions and in the media. In these popular contexts, the preoccupation is with conflict and controversy. Thus, over the summer of 1991, there was vast media coverage devoted to the conflict between Ottawa and Québec over the environmental assessment for the proposed Great Whale project in northern Québec. This coverage created the impression that the current constitutional jurisdiction over the environment was not working and needed to be fundamentally rewritten.

Yet, this impression is entirely misleading. On the whole, the federal and provincial governments have worked well together in

undertaking joint action to respond to environmental challenges. The problem we face, in other words, is political rather than constitutional. While we need to find a way to make the existing division of powers work better, we also need to find a way to inform Canadians about the manner in which the existing constitution is actually operating.

It should be noted that at least some of the proposals advanced by the federal government in the *Federal Proposals* reflect the two principles which we advance here. Of particular importance in this regard is the proposal to permit delegation of legislative powers between governments.[88]

There is a long history of proposals to permit delegations of powers directly between governments. The Fulton-Favreau amendment proposal of 1964 would have inserted a power of inter-delegation in the constitution. More recently, the Royal Commission on the Economic Union and Development Prospects for Canada (the Macdonald Commission) recommended a constitutional amendment to permit legislative as well as administrative delegation of powers.[89] A similar proposal was endorsed by the Beaudoin-Edwards Committee examining the constitutional amending formula this past spring.[90]

Such an interdelegation power would appear to represent a positive contribution to our existing constitutional framework. The chief advantage of an interdelegation power is that it permits greater flexibility in the way in which governments respond to social problems. Particular provinces could be granted authority to deal with issues that were of special concern to that individual province, without the federal government having to vacate the field entirely. This type of flexibility is especially important, as was noted earlier, in terms of fashioning arrangements that are responsive to the particular needs of the province of Québec.

[88] *Federal Proposals*, *supra*, note 5, proposal no. 25.

[89] See *Macdonald Report*, vol. 3, *supra*, note 11 at 257.

[90] See Report of the Special Joint Committee of the Senate and the House of Commons, *The Process for Amending the Constitution of Canada* (20 June 1991) at 29.

PART V: CONCLUSION

There have been recurring suggestions in recent decades that Canada needs to totally rewrite the division of powers set out in sections 91 and 92 of the *Constitution Act, 1867*. How, it is sometimes asked, can a modern country function on the basis of categories which were devised one hundred and twenty-five years ago?

We suggest that there is little basis for supposing that any such comprehensive rewrite of the division of powers is either necessary or desirable. We reject the idea of attempting to restore a set of watertight compartments dividing federal from provincial responsibility. Such an exercise would be futile and counter-productive. The great virtue of the existing division of powers is its permissive and flexible character. The attempt to restore or to create watertight compartments would not only fail, but it would reduce the flexibility which has been the key to the success of the 1867 scheme.

We propose two overriding principles which ought to guide any revisions to the division of powers. The first is that any changes ought to permit greater flexibility in the manner in which governments can respond to social problems, rather than restrict or limit that flexibility. The second is that federalism should be seen as the site for accommodation and joint action by different levels of government. The challenge is to find institutions and mechanisms that can manage concurrency more effectively, rather than to eliminate duplication and overlap.

These principles may be seen as modest, perhaps too modest, by those proposing a total revision to the Canadian constitution. To those favouring comprehensive change we simply observe that such attempts have rarely been successful in the past, here or elsewhere. The best road to constitutional change in this country remains the road of incrementalism, rather than that of total restructuring. Our current, continuing preoccupation with the constitution has led many to ignore or to lose sight of the lessons of our past. We believe, however, that

if this country is to survive the current constitutional debate intact, it will do so only by remembering what has worked in the past and by building on that experience, rather than by falsely supposing that the answer to our current dilemma is to be found through major constitutional change.

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