

*I cannot imagine a modern industrialized state without a clear federal power to take the lead on standard setting, on PCBs, on pesticides, toxic substances, air pollution regulation and water pollution discharges.*¹⁴

2.12 It is equally clear to the Committee, however, that provincial governments will continue to have major environmental responsibilities, expressed in all forms from policy development to enforcement. Provincial jurisdiction over natural resources and municipal affairs makes these responsibilities inevitable and vital.

Conclusion 2:

Present responsibility for the environment in Canada rests clearly with all levels of government. During the last quarter of a century, the demands of one of the largest national ecosystems in the world have required substantial expansion of policies and action in regard to the environment by all jurisdictions.

B. Concurrency: Formal and Informal

2.13 All this points toward environmental jurisdiction that is concurrent, rather than one that is based on a division of powers. This seems to the Committee to be the most logical approach, yet we recognize that concurrent jurisdiction has its own difficulties.

(a) Although provision for concurrent jurisdiction exists in the present constitution, e.g. in regard to agriculture, the value of this has been reduced, or even nullified, by judicial interpretation. A series of judicial decisions between the 1930s and the 1950s severely limited the potential scope of the agriculture power.

[C]ourts have neutralized the federal agriculture power by defining its jurisdiction narrowly. . . Courts have interpreted this agriculture power in terms of the division of powers in sections 91 and 92. . .

*If the federal government can only produce legislation resembling other federal legislation, there is nothing unique about the contribution of concurrent power in agriculture.*¹⁵

The same author suggests that judicial decisions in other contexts offer more encouragement to concurrency in the environment¹⁶, but the proof of this would come only with further judicial decisions. It seems evident that concurrency is an awkward concept to accommodate in a constitution, like Canada's, that has historically emphasized the division of powers.

(b) It is undeniable also that provincial governments have been and remain jealous of their areas of jurisdiction. Concurrency, like the use of the spending power, can easily be seen as "creeping federalization", and resisted by the provinces as a matter of principle. The

¹⁴ Issue 9, p. 25.

¹⁵ Northey, p. 167.

¹⁶ Northey pp. 169-174.