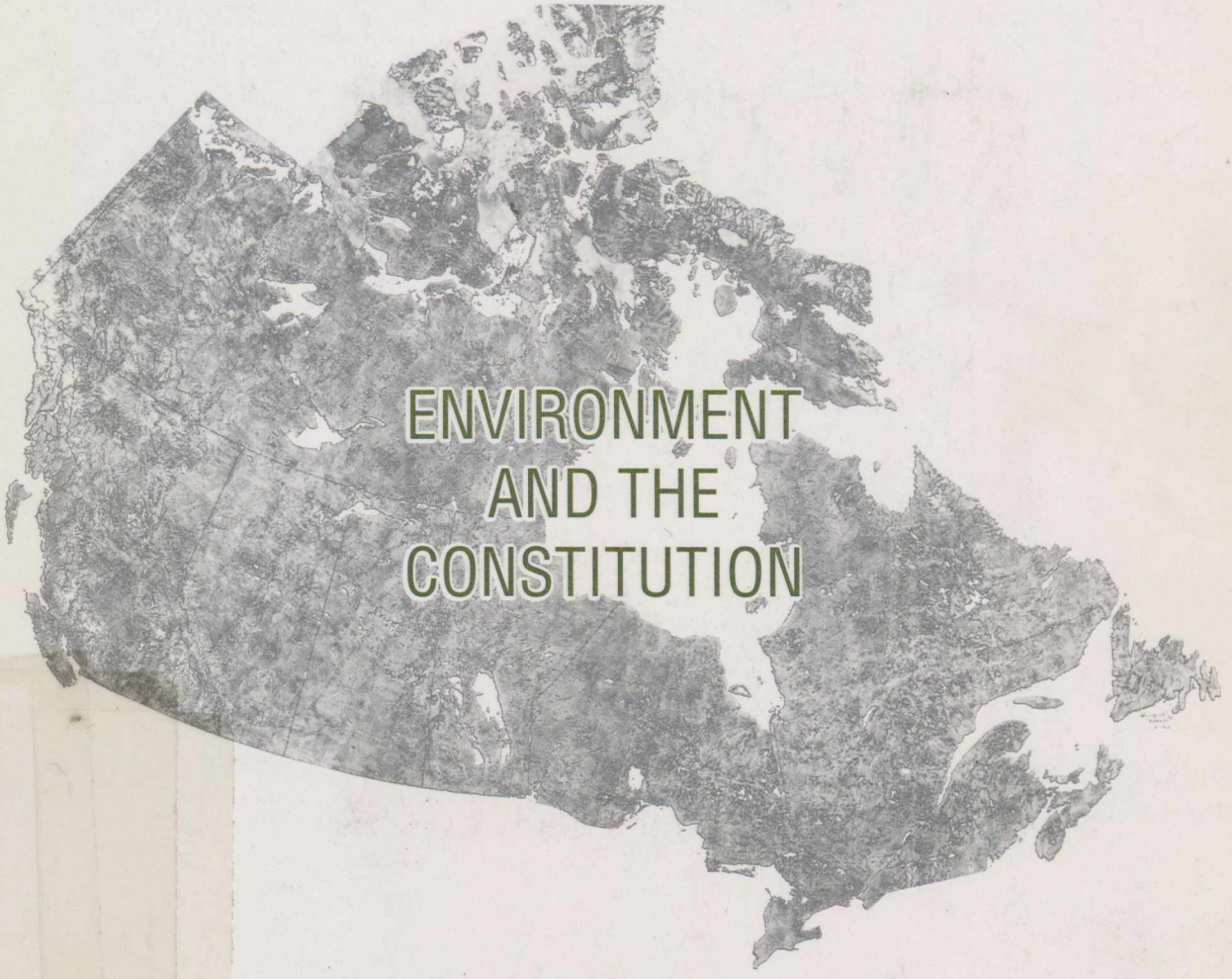
HOUSE OF COMMONS
CANADA

REPORT OF
THE STANDING COMMITTEE ON ENVIRONMENT



ENVIRONMENT AND THE CONSTITUTION

The Honourable David MacDonald, P.C., M.P.
Chairperson

MARCH 1992

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Chairperson: David MacDonald

CHAMBRE DES COMMUNES

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Le mercredi 26 février 1992

Président: David MacDonald

Minutes of Proceedings and Evidence of the Standing Committee on

Environment

Procès-verbaux et témoignages du Comité permanent de l'

Environnement

RESPECTING:

In accordance with its mandate under Standing Order 108(2), a study of environment and the Constitution

INCLUDING:

Second Report to the House

ENVIRONMENT AND THE CONSTITUTION

CONCERNANT:

Conformément au mandat que lui accorde l'article 108(2) du Règlement, une étude sur l'environnement et la Constitution

Y COMPRIS:

Le Deuxième rapport à la Chambre

L'ENVIRONNEMENT ET LA CONSTITUTION

Third Session of the Thirty-fourth Parliament, 1991-92

Troisième session de la trente-quatrième législature, 1991-1992

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The Standing Committee on Environment has the honour to present its

SECOND REPORT

In accordance with Standing Order 108(2), the Standing Committee on Environment undertook a Study on Environment and the Constitution.

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CHAPTER 1

THE CONTEXT OF THE STUDY

A. Introduction: The Changing Concept of "Environment"

1.1 Constitutional renewal and environmental protection are both vital to the future of Canada. The Committee therefore decided to study the division of powers on environmental issues, in the context of the current constitutional debate in Canada. Our decision to examine their relationship has been widely welcomed.

1.2 "Environment" is a word that has meant different things to different people at different times. Over the last 20 years in particular there has been a significant change and enlargement in meaning. The way we define the environment, and thereby identify those issues in which environmental considerations are relevant and important, may have profound implications for the constitutional and political future of Canada.

1.3 It is a truism that the Constitution Act of 1867 did not mention the environment. Some of our witnesses have noted that specific issues that we would now term environmental, such as fisheries and navigation, are specifically included in the 1867 division of powers.[1] However, it seems generally accepted that allocation of these specific powers is very different from recognition of the environment as an integrated whole.

1.4 Because the 1867 division of powers was relatively silent in this regard, it has sometimes been argued that many of our present environmental problems arise from, or have been intensified by, this omission. This led, it is claimed, to neglect of environmental issues by both federal and provincial governments until comparatively recently, and to continuing confusion and uncertainty in regard to which level of government is responsible for environmental action.

1.5 This debate has been renewed, in a modern form, by the appearance of the Government of Canada's proposals on political renewal, contained in *Shaping Canada's Future Together*. At least 10 of the 28 proposals appear to have significant implications for the environment. However, there is little direct reference to the environment in the proposals and this has evidently disturbed a number of individuals and groups. Some, including several witnesses, believe that the environment needs to be included, as a matter of urgency, in the explicit division of powers between federal and provincial governments. The reasons for this

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[1] See, for example, the written submission by Elizabeth May (Sierra Club):
It is often said that at the time of the drafting of the British North America Act, *no one considered the environment. It is often said, but it is not true. In fact, the 1867 version of environmental problems were already the subject of legislation. . .*
Ms. May recognized that the term 'environment' does not appear in either Sections 91 or 92 of the Act, but urged that:
Given that the major aspects of pollution control reflected in pre-Confederation pollution legislation related to navigation and fisheries, it is very significant that both these heads of power were granted to the federal government under section 91.

belief may be philosophical—the fundamental importance of environmental concerns to the future of Canada—but they may also reflect practical concern over what is perceived as a confused and conflicting pattern of actions by federal, provincial and other governments, in the absence of a clearly-defined allocation of responsibilities. Other witnesses have argued that there are good reasons why an explicit division or allocation of powers on environmental issues should not be attempted at this time. As will be seen below, the Committee generally agrees with this latter view.

1.6 Nevertheless, it seems clear that this is an appropriate time to consider the relevance of Canada's constitution, present and future, to environmental protection and environmental quality. To do this, we must begin by asking what the term "environment" now connotes, since this is central to our recommendations on how environmental concerns should be included in current constitutional reform.

1.7 At the risk of over-simplification, we suggest that 1972 marked a major change in perception, both in Canada and in the world as a whole. In Canada, 1972 saw the creation of Environment Canada, and, around that time, of environment ministries in all provinces. In a wider world, 1972 was the year of the United Nations Conference on the Human Environment in Stockholm, Sweden. These national and international events, however, reflected a deeper change in political philosophy and popular thinking. As Barbara Ward later observed,

> *Before Stockholm, people saw the environment. . . as something totally divorced from humanity. . . Stockholm recorded a fundamental shift in the emphasis of our environmental thinking. . .*
>
> *In the 1970s, after Stockholm, there was a growing realization of the basic and indestructible links between what humans do in one part of the world and what they do in another. This interconnectedness was one of the great insights of Stockholm, neatly summed up in the conference slogan "Only One Earth." There was a beginning of a sense of shared stewardship for our common planetary home.*[2]

1.8 One significant expression of this sense of interconnectedness was the adoption of the ecosystem principle in the U.S.A.-Canada Great Lakes Water Quality Agreement of 1978. The object of that Agreement is "to restore and maintain the chemical, physical and biological integrity of the waters of the Great Lakes Basin Ecosystem", and in the Agreement that ecosystem is defined as "the interacting components of air, land, water and living organisms, including humans" within the Great Lakes drainage basin.[3]

1.9 During the 1980s, a further significant step was taken, with the recognition that interconnectedness exists in time as well as in space: human actions may not merely have a global effect, they may alter irreversibly the environment that is inherited by future generations. This had long been recognized in terms of the depletion of non-renewable resources; in the 1980s it took on a new meaning in terms of global warming and the thinning

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[2] Foreword by Barbara Ward, in Eckholm, Erik P., *Down To Earth: Environment and Human Needs*, Toronto, MacLeod, 1982.

[3] 1978 Great Lakes Water Quality Agreement (as amended by protocol in 1987), Articles II and I(f).

of the ozone layer in the upper atmosphere.[4] From this expanded perception emerged the concept of sustainable development, the focus of the report of the World Commission on Environment and Development (the Brundtland Commission).[5]

Conclusion 1:

The Committee endorses the definition of sustainable development contained in the report of the World Commission on Environment and Development (the Brundtland Report): Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs.

1.10 In the last two decades, therefore, the concept of "environment" that is widely shared in Canada and throughout the world has expanded to include three vital elements:

- Environmental problems seldom or never exist in isolation. Water pollution, deforestation and similar issues are usually extremely complex in terms of both their cause and their solution. In the ecosystem of which humanity is an essential and major element, "everything is connected to everything else."

- Human ability to affect the environment in major ways, combined with the transfer and exchange mechanisms within the ecosystem, has led, especially during the second half of the 20th century, to a situation in which environmental problems exist at all scales from the local to the global. Action to avoid or solve such problems can normally be effective only if it takes place on comparable scales.

- The need for coordinated action on a continental or global scale has been heightened by the growing evidence of changes to the atmosphere and biosphere that are imminent and potentially irreversible.

The Committee is convinced that these characteristics of ecosystem interconnections, global scale, and potential irreversibility are fundamental to any review of environmental issues in relation to the division of powers among different levels of government in Canada.

B. The Present Division of Environmental Powers

1.11 Environmental powers exercised today by federal, provincial and territorial governments, and also by municipalities, are derived from the various related powers assigned to the federal government and the provinces under the Constitution Act, 1867, as amended in 1982. For the environment, the two most important federal heads of power, under section 91 of the Act, are the criminal law power and the "residual" power to make laws for the peace, order and good government of Canada. The federal government is also thought

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[4] See the Committee's reports on *Deadly Releases CFCs* (June 1990) and *Out of Balance: The Risks of Irreversible Climate Change* (March 1991).

[5] World Commission on Environment and Development, *Our Common Future*, New York, Oxford University Press, 1987, p. 43.

to possess an important source of authority in regard to the environment, although it has not been fully exercised, through its power to legislate in respect of trade and commerce. Other federal powers having a bearing on environmental matters include navigation and shipping; sea coast and inland fisheries; and "Indians, and Lands reserved for the Indians."

1.12 The federal government also derives environmental jurisdiction from its powers with respect to international or transboundary rivers, migratory species, relations with foreign governments, federal lands (including the Yukon and Northwest Territories), industries within the federal jurisdiction, and interprovincial and international transportation. In addition to these legislative powers, the federal government can influence the environment through the taxing power, the spending power, and the power to declare works to be "for the general advantage of Canada" (the "declaratory power").

1.13 Provincial governments derive jurisdiction in relation to the environment from their authority, under section 92 of the Constitution Act, over "property and civil rights in the province", as well as their powers in relation to the management and sale of public lands, local works and undertakings, powers of taxation, and "generally all matters of a merely local or private nature in the province." The 1982 Resource Amendment to the Constitution Act, Section 92A, granted the provinces exclusive power to legislate in relation to the development, conservation and management of their non-renewable resources. The provinces also have proprietary rights to all Crown lands within provincial boundaries, as well as property rights in virtually all on-shore resources.

1.14 The provinces have legislative responsibility for municipal governments, thereby enabling them to delegate to municipalities virtually any powers and duties assigned to them by the Constitution. Municipal governments do not have any constitutional standing, but derive their powers from the provinces. Municipal regulations, usually in the form of by-laws, often have a major effect on the environment, such as those dealing with zoning, construction, noise, water purification, sewage and garbage disposal. Like the federal government, provinces also have taxing and spending powers that are important for the environment.

1.15 Various witnesses who appeared before this Committee suggested that confusion is the most obvious result of the complex division of powers that exists, and they referred to the negative consequences of this confusion. The witness from the Mining Association of British Columbia claimed that

> *Resource users are confused as to which level of government has jurisdiction. Decisions are delayed through intergovernmental turf battles. Court intervention on jurisdictional issues is increasingly apparent. Crippling costs to the industry are resulting, and above all, the taxpayer is paying dearly for the overlap and inefficiencies.*[6]

[6] Issue 18, p. 8.

1.16 Other witnesses told the Committee that the public's ability to ensure effective environmental protection was hindered by the current constitutional division of powers. The Canadian Bar Association referred to the uneven enforcement of environmental laws that has sometimes been the result of delegation to the provinces of enforcement responsibilities under federal statutes. The same witness, and others, also suggested that

> *Canadians do not know who is responsible for what. They often do not know where to turn when they want to have legislation enforced.*[7]

1.17 Many witnesses felt that the federal government has access to more environmental protection power than it has exercised to date. In particular, the "peace, order and good government" provision was seen as a broad source of potential power, especially since the decision of the Supreme Court of Canada in *R. v. Crown Zellerbach*[8]. Federal regulation on marine pollution was upheld, even though it extended to regulation within provincial boundaries. Witnesses also suggested that the federal government could claim expanded environmental powers under its general trade and commerce power. In *General Motors v. City National Leasing*[9], the Supreme Court of Canada held that, where the provinces are unable to regulate together in an area, federal regulation will be upheld. This decision has confirmed the power of the federal government to claim jurisdiction in matters that transcend provincial boundaries.

1.18 Early in 1992, after the Committee had concluded its hearings and had adopted its conclusions and recommendations, the Supreme Court of Canada handed down its decision in the case of *Friends of the Oldman River Society v. Canada*. The Committee requested the Library of Parliament to consider the impact of this decision on the Committee's conclusions and recommendations; the Library's response is reproduced as Appendix A. The Committee notes in particular the concluding statement that:

> *The Oldman River decision is obviously a fundamentally important decision for environmental regulation in Canada, and it will undoubtedly have widespread implications. The decision does not, however, adversely affect any of the Committee's recommendations regarding the division of powers on environmental issues. If anything, it supports many of the Committee's conclusions, and may be of assistance in their implementation.*

However, the Committee has not itself yet had an opportunity to consider the implications of the *Oldman River* decision.

1.19 Our witnesses stressed, however, that environmental problems will be solved only by interjurisdictional cooperation and coordination. As the witness from the Rawson Academy of Aquatic Science put it,

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[7] Issue 16, p. 31.

[8] [1988] 1 S.C.R. 401.

[9] [1989] 1 S.C.R. 641.

If Canada is to meet successfully the environmental challenges it confronts, industry and the public must co-operate, not litigate, to find ecologically sound approaches. Turf wars among the myriad federal, provincial and municipal agencies concerned with the environment must cease. Partnerships among agencies and the public to meet shared environmental objectives must begin.[10]

C. The Committee's Approach to the Issue

1.20 This report is not limited to a review, from an environmental standpoint, of the Government's proposals in *Shaping Canada's Future Together*. Nor, however, is it a fundamental examination of how, in an ideal world, the Canadian constitution could best accommodate environmental and sustainable development needs. The Committee's recommendations take an evolutionary, not a revolutionary, approach to constitutional reform in regard to the environment, for three main reasons.

1.21 First, we believe that this reflects the present political reality. The environment is regarded as a major priority for action by both experts and the public. But the ability to act does not depend primarily on constitutional reform. In the context of the present constitutional debate, the environment does not have the same degree of urgency as issues such as the "distinct society" of Quebec, Senate reform, or aboriginal self-government.

1.22 Second, as suggested already (paras. 1.7 - 1.10), scientific and public understanding of the environment has changed and expanded considerably in recent decades, and there seems little reason to doubt that further change is inevitable. This point was made emphatically by Mr MacMillan (Minister of the Environment 1985-88):

[T]hings are so fast-changing and they are so complex that I doubt that in September 1991 we could take everything sufficiently into account to come up with a formula that will serve us well forever and a day. If things could change so much from when I left the portfolio to the present . . . can you imagine the changes that lie ahead? I venture to say that in the year 2000 somebody will be sitting here and reflecting on what was happening in 1991 and he or she will not be able to recognize what we are doing, so different will the world be at that point in the context of the environment.[11]

1.23 Lastly, there is good reason to believe that the existing constitutional situation has much to recommend it. This view was expressed by the present Minister of the Environment, who is in a good position to evaluate both the opportunities and the frustrations:

I believe the Canadian federal system has offered the single best system with the greatest possible flexibility for achieving our regional and individual goals. We will not, as a society, achieve sustainable development as a top-down, government-driven exercise. . . We must share responsibility for our environment.

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[10] Issue 12, p. 8.

[11] Issue 6, pp. 44-45.

> *I believe Canada has already shown how a federal state can achieve such co-ordination. I sincerely believe... and this goes beyond the life of this government—that we can be proud of the close working relationship that has developed between the federal and provincial governments on environmental issues.*[12]

Public opinion surveys, reported by the witness from The Environmental Monitor, indicate that the present situation is both recognized and endorsed by the public:

> *It's clear that Canadians are in support of the status quo on environment. They may want to tinker with it and they may be open to some tinkering, but clearly they don't want to throw their lot in with either just the federal or just the provincial level. They see the status quo as operating. They couldn't tell you who has what jurisdiction. They see both operating.*[13]

Several witnesses evidently preferred the existing situation to the environmental uncertainties that they perceived may be created by some of the constitutional changes proposed at present. For example, in their joint submission, the Canadian Environmental Law Association and Pollution Probe felt that "The present constitutional proposals . . . serve to confuse, rather than clarify, legislative authority to protect the environment." They recommended a clarification "to reflect substantial provincial autonomy over local matters and federal jurisdiction over extraprovincial and international matters... In the alternative we urge Parliament to maintain the status quo with respect to the division of powers."[14]

1.24 The Committee does, however, recognize that a substantial *prima facie* case can be made for more fundamental constitutional reform in regard to the environment. A Constitution that is preoccupied with the division of powers—with what one witness termed "the old federal-provincial football game"[15]—may be difficult to reconcile with an environmental and sustainable development context that demands recognition of complexity, ecosystem linkages, and the need for cooperation. Those inclined to this view might ask whether existing federal-provincial cooperation on the environment is facilitated by the constitution, or instead represents a successful effort to circumvent constitutional limitations. A recent review, from a legal standpoint, of recent federal environmental legislation and judicial interpretation concluded that

> *In Canada, constitutional law inhibits environmental laws because the jurisdictional picture dividing federal and provincial powers divides the environment into many different spheres. This division accords nicely with the point source approach to environmental problems, but it conflicts with the more sophisticated ecosystem approach... At this point, the constitution has won over the environment.*[16]

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[12] Issue 15, p. 8.

[13] Issue 6, p. 25.

[14] 'Environment and the Constitution', submission to the House of Commons Standing Committee on Environment by the Canadian Environmental Law Association and by Pollution Probe, section 4.3.

[15] Issue 13, p. 14.

[16] Northey, Rodney, 'Federalism and Comprehensive Environmental Reform: Seeing Beyond the Murky Medium', *Osgoode Hall Law Journal*, 29,1, 1989 (published 1991), pp. 127-81, at p. 179.

1.25 The Committee believes that it would not be feasible or useful to explore the case for fundamental reform at this time. However, we do not wish to suggest that this situation will continue indefinitely. It is evident to us that, on the long view, the environment and sustainable development are as crucial to the future of Canada as are the major items that are the focus of current constitutional proposals. If, during the next decade, the constitution appears to be a barrier to effective action on environment and sustainable development, fundamental reform will need to be considered.

CHAPTER 2

BASIC PRINCIPLES

A. Reconciling Shared Jurisdiction with Federal Leadership

2.1 One clear message to the Committee, conveyed in various forms by a number of witnesses, is that the Canadian public is "ahead" of its governments in terms of environmental thinking and the need for action. Meanwhile governments may themselves be ahead of the institutions and mechanisms available for effective action.

> *. . . Canadians are somewhat out in front of their institutions. They have been perceptually and in terms of concern levels for a long time, but they are now moving out in front of their institutions in terms of actions. . .*
>
> *Today Canadians identify individual Canadians as primarily responsible for environmental protection. . .*
>
> *People are less and less looking to the federal government to be primarily responsible for environmental protection. They never looked primarily to provincial governments for that . . .*
>
> *. . . Canadians see environment as a transboundary issue that requires huge resources to resolve, that requires partnerships; 24% of Canadians refused to point the finger at anyone. They insist that it is a shared responsibility. . . Canadians want everybody involved. They look to the federal government to bring everybody together, but they are less and less looking to the federal government and they are taking it on themselves. . .*
>
> *They are looking to the private sector to do what it does best, which is implement. They are not looking to governments to implement; they are looking to governments to ensure the implementation, to ensure that all actors are working together, and to ensure that if someone is not living up to that public trust, that individual or corporation is landed on with both feet.*[1]

2.2 There is therefore a strong feeling in the public mind that responsibility for the environment cannot sensibly be allocated to a single level of government. That view is shared by the Committee, and was also expressed very forcibly by the Minister of the Environment:

> *[W]e cannot compartmentalize our environment into neat jurisdictional boxes. In constitutional terms it means we cannot simply confine the environment to Parliament, or conversely to the provinces. Yet, some have suggested that environment should be a separate head of power in the Constitution, that the Constitution should confer the environment on just one level of jurisdiction.*

[1] Issue 6, pp. 9, 13-14, 20.

. . . I reject this suggestion totally. Such a proposal is simply not practical when you examine the range and extent of issues involved—protection of oceans and wildlife, acid rain, air quality, fisheries, global warming, municipal and industrial waste management, international relations—and the list goes on.[2]

2.3 This affirmation is very reassuring. However, the Committee also notes that the way in which the Government's proposals for political renewal were presented appears to have had the effect of generating widespread doubt in the environmental community about the Government's commitment to a strong federal role in environmental issues. This does not appear to be because the federal government was perceived to be unaware of environmental needs, but because the proposals contained in *Shaping Canada's Future Together* seemed to focus on the need to avoid unproductive federal-provincial dispute. This concern seems to have been reinforced by the perception, among some observers, that the federal government has in recent years avoided testing the limits of the powers that it now has on environmental matters.[3]

2.4 More specifically, the concern over the present proposals expressed by several witnesses seems to have arisen because several proposals for change seem either to neglect environmental considerations or even to threaten them. Witnesses expressed concern about the entrenchment of property rights, withdrawal of the federal government from some specified areas of environmental action, greater use of the power to delegate authority, elimination of the declaratory power, and other proposals. These objections are considered in more detail later in our report. Taken as a group, however, the Government's proposals appeared to several witnesses as having a potentially negative net effect on the Canadian environment. The only proposal that was clearly seen as positive by these witnesses was the inclusion of sustainable development in the "Canada clause". Even this, however, was questioned, on the grounds that its inclusion would be only symbolic, with no legal force.[4]

2.5 It now seems clear that some of these concerns (though not all of them) could have been minimized or avoided if the Government's proposals had provided more explicit recognition of environmental and sustainable needs. Witnesses such as the West Coast Environmental Law Association reported that they had been reassured by the statement of Constitutional Affairs Minister Joe Clark that environment "is a field in which existing federal jurisdictions must be respected and must be maintained."[5] Similarly, the Committee welcomed the strong statements about the federal environmental role made by the present Minister, and by one of his predecessors, Mr. MacMillan:

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[2] Issue 15, p. 7.

[3] See, for instance, the witness from the Canadian Bar Association:
If there's one frustration that those of us interested in environmental matters suffer it is that there has been a good deal of timidity on the part of the federal government in asserting its jurisdiction in environment. We suppose this is for fear of treading on provincial toes. (Issue 16, p. 31)

[4] Enhancing Environmental Protection in the Canadian Constitution: Comments on the Federal Government's Constitutional Proposals, Submission by the West Coast Environmental Law Association, at p. 5:
This proposal. . . is the first official federal recognition of the need to incorporate environmental protection in the Canadian constitution. We strongly support this initiative.
However, there are two basic problems with the federal proposal's environmental content. First, the government's environmental proposals have no ***legal*** *component. They are exclusively* ***symbolic****. Second, as symbolic statements they require considerable elaboration.*

[5] Ibid., at p. 20.

We are committed to maintaining a strong federal role in the environment and continuing to be a leader in achieving sustainable development, both nationally and internationally. [6]

My advice to you [the Committee] is that whatever course you take, whatever philosophical or ideological predisposition might be brought to bear on your own deliberations, you not lose sight of the fact that the federal authority cannot be compromised; it must be exercised. The issues are increasingly ones of planetary survival, whether the planet is going to be here in a generation or so. [7]

2.6 There should be no "soft centre" at the heart of the federal government's environmental policy and action. Though responsibility must inevitably be shared—with aboriginal groups, municipal governments, the private sector and individual Canadians as well as with provincial and territorial governments—environmental protection and the shift to sustainable development patterns will require all jurisdictions to exercise their environmental authority to the fullest extent possible.

2.7 When we seek to define in more detail the limits of the federal government's environmental powers, or to define the appropriate roles of each of the main participants in environmental action, we naturally begin with the traditional notion of provincial governments as best able to deal with local concerns, and the federal government as bearing the primary responsibility for environmental issues that have national or international dimensions. That view is evidently shared by the majority of witnesses, for example, Mr. Jack MacLeod, President and CEO of Shell Canada, and a member of the National Round Table on Environment and Economy:

I suggest that the model for evolution of Canada's shared jurisdictional environmental management that has served us relatively well to the present has been one that has recognized two basic values: first, that the provincial jurisdiction, being the closest to the community, is the most logical jurisdiction to exercise prime authority and accountability for environmental management related to developments within the communities of the province; and second, that management of environmental impacts related to developments within a province that in fact reach beyond provincial boundaries, whether to other provinces or to other countries, must be subject to the authority and accountability of the federal jurisdiction. [8]

This view was echoed by Pollution Probe and the Canadian Environmental Law Association (see para. 1.23).

2.8 Witnesses, however, recognized that in the contemporary world the distinction in principle may be hard to draw in practice. Mr. MacLeod:

I see it virtually impractical to think that any major project in any industrial sector should logically be left solely to the jurisdiction of the provinces. I think that the federal and the provincial jurisdiction, on a project by project basis, can work out and commit to accords what respective roles they play in regard to any single major project. . .

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[6] Issue 15, p. 6.

[7] Issue 6, p. 32.

[8] Issue 10, p. 6.

I guess you can say immediately that there will be very few projects that will not have implications that transcend the boundaries of the province and therefore there will be virtually shared jurisdictional implications on every major project. That is my view. [9]

Mr. MacLeod was echoed this time by the witness from the Assembly of First Nations:

We have to recognize that some of the jurisdiction is the same jurisdiction that has to be exercised between or among us all. Environmental concerns are certainly of that nature. We can't pretend that we can build a dam in Quebec or in northern British Columbia that doesn't affect people of the Maritimes, the Prairies, the Northwest Territories, the United States or the world. [10]

2.9 At a time when, at least in the opinion of some witnesses and other experts,[11] the federal government has been very cautious in the exercise of its authority, we were told that the opposite has been happening in the United States.

[W]ith the globalization of environmental concerns, transboundary pollution, the Canadian power to act to protect its environment is also the power to protect the United States environment, just as American actions affect your environment.

The United States is one of the most highly federalized environmental systems. We have had a creeping federalization of environmental law during the last 20 years.

. . . [L]et me emphasize that before the 1960s, environmental protection was a matter of state law. There was very little federal administration or action in the environmental protection field. In fact there were doubts as to whether the Congress of the United States could act to regulate water quality or air quality. There were very limited enforcement standards. [12]

2.10 However, this witness from the Environmental Law Institute in Washington, D.C. noted that "creeping federalization" had not inhibited action at state and local levels.

During the 1980s state environmental programs blossomed. State and local enforcement programs have become reality. . ..

State and local environmental law will be even more important in the 1990's. [13]

2.11 It is clear to the Committee, as it seems to be to virtually all our witnesses, that practically every aspect of modern life has an environmental dimension, and the transfer and exchange mechanisms in the ecosystem may rapidly extend environmental effects beyond local, provincial or even national boundaries. A strong central authority therefore seems unarguable. As Mr. Futrell summarized it,

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[9] Issue 10, pp. 8, 9.

[10] Issue 13, p. 16.

[11] See para. 2.3, footnote 3.

[12] Issue 9, p. 8.

[13] Issue 9A, pp. 7, 8.

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 environment[16], 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

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[14] Issue 9, p. 25.

[15] Northey, p. 167.

[16] Northey pp. 169-174.

Committee recognizes that, in the environment field in particular, ecosystem and similar considerations make it almost impossible to define the limits of environmental legislation. Emission limits, or other pollution controls, for example, may have potential effects in economic terms, or may threaten the viability of single-industry communities. Provincial (and other) opposition to federal legislation with such far-reaching implications may be inevitable and understandable.

(c) Finally, concurrent powers on environmental matters may seem likely to increase overlap, duplication, and conflict, especially in regulation and enforcement. Or the opposite may happen: in a situation where both levels of government have authority to act, neither may do so, in the hope that responsibility will be assumed (and the necessary resources provided) by the other.

2.14 These are real and formidable problems. No doubt they help to explain why Canada has maintained a constitution that emphasizes the division of powers rather than concurrency. Nevertheless, in the view of the Committee, concurrency is the most meaningful approach in terms of the needs of environment and sustainable development. We share the vision expressed by the witness from the Assembly of First Nations:

> *Let's start to anticipate the kinds of powers and jurisdictions that might be required in order to ensure that 100 years from now, we have protected the environment and we have made sure that our relationship to each other takes place on the basis of respect. . .*
>
> *We are going to have to abandon the old assumptions of constitutional discussions simply being a transfer of power between the federal or provincial jurisdictions. We should have a look at our Constitution from the point of view of dreaming what possibility does exist to produce the new relationships among us all that will produce a better country.*[17]

2.15 We note that although the public is rightly concerned to avoid governmental overlap and duplication, it simultaneously believes that concurrent jurisdiction over the environment is vital (see para. 1.23). This was also expressed very vividly in the evidence submitted by the Canadian Manufacturers' Association (CMA), which began by stressing the serious effects of overlap and duplication:

> *The sharing of jurisdiction for the environment has led to increasing overlap in regulatory requirements among federal, provincial and municipal levels of government. . . From the early 1970's this overlap in jurisdictional responsibilities for the environment has created confusion, uncertainty and unnecessary expenditure of scarce resources by the manufacturing sector and irritation among and between federal, provincial and municipal levels of government. . . In particular, the duplication of federal and provincial environmental assessment and review processes has been costly in terms of time delays in obtaining approvals for development proposals, the human resources required to prepare and present the necessary documentation to meet the environmental requirements for each level of government*

[17] Issue 13, p. 14.

and the accompanying financial costs. These irritants make it difficult for Canadian manufacturers to remain competitive when they are already burdened with high interest rates and new global economic challenges.[18]

2.16 The CMA, however, does not therefore argue for a greater degree of specificity in the division of powers to avoid overlap; instead it regards recent efforts to achieve federal-provincial harmonization of environmental action as encouraging concurrency.

> *The existing federal, provincial approach to environmental challenges does suggest support for the continuing concurrent operation of federal and provincial jurisdiction as it relates to the environment. . . If the concurrent jurisdictional approach was reinforced to also recognize a federal responsibility for setting national minimum standards it would go a long way to addressing the major irritants outlined in this submission. . .*
>
> *The [National Environmental Quality Committee of the CMA] wants to emphasize that in proposing the redesign of Canada's traditional constitutional model, which now ensures the occurrence of legislative overlap, and duplication, in environmental matters, to one which promotes and facilitates broadly concurrent federal and provincial operation of legislative powers and policies for addressing environmental protection and sustainable development practices, it does not suggest formal constitutional amendment. It does suggest the need for immediate political direction, consultation and thereafter formal action.*[19]

2.17 This recognition of the potential of concurrent powers is not universal. For example, the evidence submitted by the Mining Association of British Columbia recommends that

> *. . . the subject of the environment should be specifically referred to in the division of powers by assigning exclusive jurisdiction, to one or another government, [of] the various aspects that go to make up the sum total of the subject. This we call "the Segmentation of Constitutional Responsibilities".*[20]

For the reasons set out in para. 1.10, the Committee believes that attempts at segmentation, whether along the lines proposed by the Mining Association of British Columbia or on some other basis, would be inherently unsuccessful, and might well generate even more overlap and irritation than now exists.

2.18 What is the "model of concurrent operation of federal and provincial laws [that] is slowly emerging"?[21] The CMA suggests that

> *The statute and regulations dealing with the transportation of dangerous goods and the workplace hazardous materials information system are examples of coordinated complementary federal, provincial responses.*[22]

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[18] Submission from the National Environmental Quality Committee of the Canadian Manufacturers' Association, pp. 3-4.

[19] Ibid., pp. 18-19.

[20] Disentangling the Environmental Regulation Labyrinth, brief submitted by the Mining Association of British Columbia, p. 11.

[21] CMA submission, p. 11.

[22] Ibid., p. 11. See also Northey's comments on the transport of dangerous goods example, *op. cit.* at pp. 169-172.

The CMA also believes that the provisions for the regulation of toxic substances in the Canadian Environmental Protection Act include "modest recognition of concurrent rather than exclusive constitutional spheres."[23]

2.19 Other witnesses, notably the Minister of the Environment, have suggested that the focus for concurrent federal-provincial jurisdiction on environmental issues may increasingly be the Canadian Council of Ministers of the Environment (CCME).

> *Through the CCME, we are developing national standards that will provide a level playing field of regulatory requirements for industry and to help fulfil our international environmental obligations. . .*
>
> *It's a different structure from the one we usually find in federal-provincial fora, where all governments are there, they meet once a year, and there's a provincial government and federal government that chair. In the council, all governments are equal. . .*
>
> *Secondly, the council is structured in such a way that it has a secretariat that employs approximately 40 people. They produce policy, they produce studies, and there is a lot of interjurisdictional co-operation. From the little experience I have, it is unique in federal- provincial relations.*[24]

2.20 Similar enthusiasm for CCME was expressed by the Nova Scotia Minister of Environment, Mr. Leefe:

> *The Canadian Council of Ministers of the Environment. . . as a priority, is focusing on the harmonization of provincial/territorial legislation and the cooperative administration of programs such as environmental impact assessment. There are also a wide array of international environmental issues that require international commitments which can only be achieved through local or provincial action.*
>
> *The need for federal/provincial cooperation and coordination in the area of environment was never more clear, but we believe this cannot be achieved through constitutional change in the division of powers. To attempt to do this would be inconsistent with one of the fundamental principles of sustainable development, that being the integration of environmental concerns into all of our decision-making processes. Environment is not a line department function. . .*
>
> *To achieve this goal will require a lot of agreement with a lot of partners. Governments have a duty to provide protection of our natural environment, but we also have a duty to do so in a way that respects the importance of certainty and predictability to our economic sectors and in the most efficient and cost-effective manner.*

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[23] Ibid., p. 15.

[24] Issue 15, pp. 8, 15-16. The Minister also noted (p. 8) that federal-provincial cooperation on the environment had already generated 400 multilateral and bilateral agreements.

For the past year, I have had the honour of chairing the Canadian Council of Ministers of the Environment and believe that this organization has seized the challenges we face and will be able to provide an effective forum for addressing all jurisdictional matters relating to Canada's environment.[25]

Conclusion 3:

Effective recognition and understanding of environmental problems, and cooperative and coordinated policies, actions and enforcement measures among all jurisidictions, are more necessary at present than a new division of environmental powers.

Recommendation 4:

The Committee recommends that the environment be regarded as an area of shared jurisdiction, in which concurrency and partnership are the appropriate and effective bases for governmental action.

C. Partnerships Between and Beyond Governments

2.21 "A lot of agreement with a lot of partners". It is clear to the Committee, as it evidently is also to the CCME and the public, that effective environmental action involves partnerships between governments and other stakeholders—those who have a stake in the environment. Several witnesses expressed the hope that the national, provincial and territorial Round Tables that have been created in recent years will play a continuing and important role in developing such partnerships.

It has certainly been a process that has worked to build consensus and vision and in working with sustainable development because they are charged with how do you implement sustainable development to develop strategies in that way? We are in fact getting clear about a new paradigm, one that integrates these things rather than simply balances them, these things being environment and economy. It is a very promising process for building an enabling framework.[26]

2.22 One of the clearest illustrations of the fact that environmental and sustainable development considerations extend far beyond "the old federal-provincial football game" has been the influence of aboriginal rights on the Committee's investigation. In part, this was due to the inclusion of aboriginal self-government as a key element of the Government's proposals in *Shaping Canada's Future Together*. The Committee also realizes that any discussion of current and future environmental powers in Canada must recognize that

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[25] Letter from John G. Leefe to the Chair of the Standing Committee dated 22 October 1991. See also the comments on the CCME made by Mr. MacMillan (Issue 6, p. 47) and by Mr. MacLeod (Issue 10, p. 7).

[26] Issue 10, p. 24. See also Mr. MacLeod (Issue 10, pp. 5-6); and Mr. McCready (Issue 10, pp. 37-38). The Canadian Manufacturers' Association (Submission, p. 7) believes that the Round Tables can only make a meaningful input to environmental decision-making if the present separate Round Tables become better coordinated with one another.

spiritually, socially and economically the environment is vital to aboriginal peoples. Self-government is potentially an opportunity for aboriginal peoples to restore and develop the sustainable relationship with the environment that was characteristic before external immigration and paternalism. As the witness from Inuit Tapirisat expressed it,

> *We have lived in the Northwest Territories, in northern Quebec and Labrador, for thousands of years and have come to see ourselves as the custodians of those vast lands. Our custodianship is based upon the fundamental beliefs about how humans should relate to the land. . .*
>
> *Foremost among those beliefs is the respect for the land, the sea and all the living things that occupy the land and the sea. From this flows other principles concerning how and when to use the resources of our land and how to ensure its welfare for future generations. For Inuit, this approach to the environment arises out of life-and-death issues, not some fine-sounding, abstract philosophy. It has enabled our people to survive and flourish in an environment that seems daunting to many outsiders.*[27]

2.23 The legal basis, character and timing of aboriginal self-government are beyond the scope of this Committee. The potential impact of self-government on the environment is however a significant factor in our consideration of future environmental powers. Stated in the simplest form, it will create the need for new partnerships and new relationships, which will need to be developed as carefully as any traditional federal-provincial relationship.

> *Let me be a little bit more specific about the kinds of environmental powers we are talking about in relation to self-government. To Inuit, management of the environment means much more than control over administrative processes, such as environmental impact assessments and reviews. For us, environmental management must encompass a whole range of powers and responsibilities necessary to safeguard the lands and resources of our homelands. . .*
>
> *Based on our past experience in negotiations with Canadian governments, we do not expect to achieve easily the power-sharing models that we feel are necessary. But regardless of how these negotiations on environmental jurisdictions turn out, there is for us an essential condition that must be met. No transfer of governmental powers over the environment, whether they are bilateral or not, is acceptable without Inuit consent.*[28]

2.24 The representatives of both Inuit and Indian organizations who appeared as witnesses went out of their way to emphasize that self-government would provide the opportunity for realistic partnerships, not increased separation of aboriginal peoples from the rest of Canada, and they also renewed their commitment to development, provided that development is sustainable.[29] Chief Wilson envisioned the desired relationship as it might develop in relation to his own people on Vancouver Island:

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[27] Issue 8, p. 5.

[28] Issue 8, pp. 6-7.

[29] Issue 13A, pp. 5-7; Issue 8, pp. 25-26.

We would have exclusive jurisdiction over certain areas, shared jurisdiction in regard to environment and other resources, and a way of dealing with the federal government and provincial government as equals. That doesn't mean our resources would be equal or our jurisdiction would be equal, but. . . you don't assume that you have the right to make decisions for me. . .

When I say exclusivity, don't interpret that as balkanization or somehow isolation. . .

. . . I look forward, when the aboriginal title grievance is negotiated to our satisfaction in the Kwawkewlth-speaking area, to having a relationship to the municipal corporations within our jurisdictions, to the regional district, especially in terms of sewage, infrastructure and environmental considerations, a relationship to the provincial government that's clearly defined, and a relationship to the country that is defined by our negotiations. It is as huge as that.[30]

2.25 The Committee recognizes that there are differences in the approach to aboriginal self-government, and its linkage to land claims, among the main aboriginal groups in Canada. The Committee also understands that, in addition to self-government within aboriginal lands, the aboriginal groups see a need to share in the management of those environmental elements that affect them but extend far beyond the limits of these lands (e.g. wildlife management or the control of sources of air pollution affecting aboriginal lands). It is clear to the Committee, as it is also clear to the aboriginal organizations that appeared as witnesses, that the development of appropriate partnerships and management systems will be neither easy nor swift. It is also clear, however, that a principal objective of these organizations is sustainable development, for Canada as well as for areas of aboriginal self-government in Canada. The Committee believes that the achievement of aboriginal self-government could provide a significant opportunity for progress towards environmental protection and sustainable development in Canada.

Recommendation 5:

The Committee recommends that aboriginal self-government be regarded as an opportunity and an obligation to pursue the protection of the environment and the adoption of sustainable development patterns.

2.26 If effective environmental partnerships are to be developed, they must clearly include municipal governments, which so often represent the "front-line" of environmental action—in air pollution control, solid waste reduction, sewage treatment and many other tasks. The Mayor of Toronto expressed the need for an altered and improved relationship with the senior levels of government to enable partnership and cooperation on the environment.

Local governments would love to talk to the federal government, would love to talk to the federal and provincial governments around a table, but it has been a no-no for some time now. . .

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[30] Issue 13, pp. 18, 25.

> *. . . [T]here needs at least to be a dialogue—I don't see any problem with that—even informal dialogue, so that we are meshing together our energies and our efforts and our resources to do the best we can to overcome environmental degradation. I think that way Canada can make a much better contribution to the saving of this planet, and can set strong leadership. Let's not go off in different directions; let's work together at doing this. . .*
>
> *. . . It is an absurd way to go about using our resources most efficiently and effectively on any issue, not just on the environment but on a lot of other issues as well that cross over the borders between the different levels of government.*[31]

2.27 It is therefore clear to the Committee that the "status quo" that is widely supported (para. 1.23) is far from being a "static quo". Powers in regard to the environment are widely shared at present, among federal, provincial and municipal governments, the private sector and individual Canadians. The prospect of significant powers being exercised by aboriginal groups seems imminent. Concurrency is already a reality, even if in a different form to that in which the term is normally used by constitutional lawyers. Mechanisms are evolving or being strengthened to develop partnership and cooperation among those who share this power. Additional mechanisms for dialogue and concerted action are demanded and are likely to be needed during the 1990s.

2.28 It is this sense of creative dynamism that causes the Committee to avoid recommending at this time significant changes in the formal division of powers in regard to the environment. Growing recognition of the complexities imposed by ecosystem relationships, the global character of so many environmental problems, and the logical consequences of a sustainable development approach all point towards a very wide diffusion of environmental power, and to growing cooperation among the diverse holders of that power. Echoing Mr. MacMillan (para. 1.22 above) we can anticipate that what is happening in 1991 may be unrecognizable a decade from now, "so different at that point will the world be in the context of the environment".

D. Environmental Union: The Integration of Environment and Economy in Sustainable Development

2.29 It appears to the Committee that this sense of dynamism and of the need to provide for the integration of environmental concerns throughout Canadian economy and society is inadequately recognized in the Government's proposals in *Shaping Canada's Future Together*. This has evidently given rise to concern among some of the witnesses who appeared before us, especially in regard to the proposals on the economic union. For example, witnesses from the Rawson Academy for Aquatic Science and the Canadian Bar Association both argued, from their different perspectives, that if the economic union needs a strengthened role for the federal government, the same is true for what they regard as the environmental union that is also Canada.

> *[E]nvironmental and economic policy are inextricably intertwined. Thus, Canada cannot have an effective economic union if environmental rules are balkanized. . .*

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[31] Issue 14, pp. 20-21.

[W]e do not believe that an economic union can succeed without an environmental union. In a country such as Canada, where provincial and ecological boundaries do not coincide, the federal government already has a clear role to play on transboundary issues both internationally and domestically.[32]

It would appear. . . that the driving forces behind the current. . . proposal is that, one, Canada is essentially a common economic space, not, for instance, an ecological union or a common land space or a common natural space. Second, the driving principle of federalism should be efficiency in the economic or accounting sense.

Those are some elements, some aspects perhaps, of what federalism is about. But federalism is not about the division of powers, to see who can have the most powers or have the most political credibility, or even necessarily doing things in the most efficient way. It is about delivering good government, protecting the rights of citizens, protecting land and protecting the environment.[33]

2.30 It may well be that the concern expressed by these and other witnesses has arisen because *Shaping Canada's Future Together* does not clearly reflect, in its proposals on the economic union, the basic principle of sustainable development, to which the federal and other governments in Canada are committed: that economic and environmental planning must be integrated and inseparable. For our witnesses, and for the Committee, a major objective of the political renewal envisaged by the Government should be to encourage the adoption of sustainable development patterns. We recommend, therefore, that this be made explicit in the proposals on economic union.

Recommendation 6:

The Committee recommends that the proposals for political renewal recognize explicitly that our common but varied environment unites Canada, just as our common but varied economy unites us. Economy and environment are inextricably intertwined. Specifically, the Committee recommends explicit recognition in the proposals that:

- **Canada has a major responsibility to contribute to planetary survival, arising from the vast range, distinctive character, and fragility of its natural environments.**
- **Human activities in the contemporary economy and society generate environmental problems on all spatial scales from the very local to the global; through ecological linkages and transfer mechanisms these problems frequently increase in significance, and in some cases threaten irreversible change.**
- **Consequently, the adoption of sustainable development patterns is essential for both Canada's prosperity and the protection of the environment.**

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[32] Issue 12, p. 9-10.

[33] Issue 16, p. 27.

E. Overlap and Duplication?

2.31 We noted earlier (para. 2.20) that the form of concurrent jurisdiction over the environment that is now developing may provide opportunities for harmonization of legislation and regulation, and for cooperative administration of programs. To many people, however, the principle of concurrent jurisdiction, and the growing number of bodies with environmental powers, may seem a prescription for overlap, duplication, confusion and waste of resources.

2.32 The problem of overlap was described by one of our witnesses as one of the "age-old controversies about what the nature of Canadian federalism is."[34] Reducing overlap and duplication is the *raison d'être* of the proposals on "Streamlining Government" in *Shaping Canada's Future Together*. Many witnesses felt that the current constitutional division of powers had caused frequent overlap and duplication of regulatory powers, which generated "unnecessary and burdensome costs" to industry, could "choke off new investment, may even force mine and plant closures, destroy some communities and harm Canada's balance of payments".[35] It was primarily in order to find a way out of what it saw as a "regulatory labyrinth"[36] that the Mining Association of British Columbia recommended the segmentation of constitutional authority (see para. 2.17 above).

2.33 On the other hand, other witnesses suggested that when more than one level of government is involved in a particular environmental field, their activities may be complementary rather than overlapping. For example, the Mining Association of Canada, while welcoming efforts at harmonization and streamlining, recommended strongly that the federal government retain relevant expertise, so that federal policies would remain sensitive to the needs of the mining industry, even though the bulk of the legislation affecting the industry is provincial.[37] Commenting on the situation in British Columbia, the witness from the West Coast Environmental Law Association suggested that

> *. . . although there are many areas in which both sets of [federal and provincial] environment legislators are dealing with the same fields, the amazing thing is that they are not duplicating each other's efforts, because the areas are so large and they have such small staffs that they are beavering away on their own tasks quite independent of each other.*
>
> *A far bigger problem than duplication is the fact that they do not know what each other is doing. . . What they have to do, and what they are beginning to do, is co-ordinate their activities more, because the job is far bigger than both levels of government.*[38]

2.34 The Committee has no doubt that many valid examples could be found of overlap and duplication on environmental management in Canada. These seem to be particularly acute, at the present time, in regard to the requirements and mechanisms for environmental impact

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[34] Issue 16, p. 46.

[35] Issue 18, p. 9.

[36] Submission, p. 2.

[37] Environmental Issues and Constitutional Reform, Submission from the Mining Association of Canada, pp. 3-5.

[38] Issue 13, pp. 54-55.

assessments. It was on impact assessments that many of our witnesses focused their comments, and it is clear to the Committee that the lack of a coordinated approach by federal and provincial governments to environmental impact assessment is not merely time-consuming and onerous on all the parties involved but is also counter-productive in terms of environment and sustainable development needs.

2.35 On other aspects, the evidence, as we have suggested, is less clear-cut. Reflecting on his own long experience in the petroleum industry, Mr. MacLeod (Shell Canada) commented that

> *We, industry, have spoken out a lot over the years about the difficulties within Canada of the playing-field not being level, overlapping jurisdictions, and multiple standard requirements, and I have participated in some of that complaining. I am not going to try to speak for any other industry; but in hindsight, when I sit down and ask myself what real problems it has caused, how difficult it has been to operate in the face of that de facto as opposed to in anticipation of the horrors, we have not had many problems. Governments, through shared jurisdictional framework in regard to the environment, have worked things out.*[39]

2.36 The Minister of the Environment went even further:

> *[A] certain amount of overlap is a reality, given the multifaceted interdisciplinary nature of our environment.*
>
> *I know some people are, by nature, shocked by the idea that there may be overlap, and they read into it waste every time there is. . . But there is also another side to the coin of overlap. . . In some cases overlap may even be helpful to developing the process.*
>
> *I think if there is one area in which we want to look at the overlap problem with those eyes also, the environment is one of them.*[40]

2.37 There is no substitute in the environmental field for concurrency and cooperation among all those with environmental powers. That is not merely the belief of this Committee; it was also the conclusion reached twenty years ago, before federal or provincial environment ministries were established, by Mr. Jim MacNeill. He had been invited by the federal government to consider how environmental issues might best be accommodated within the context of proposals for constitutional reform that were then being negotiated. Two decades later, the only significant change that appears necessary to his conclusion is the recognition that environmental action in Canada requires much more than federal-provincial cooperation. That apart, his findings seem undeniable and as relevant now as then.

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[39] Issue 10, p. 18.

[40] Issue 15, p. 9. See also the witness from the Environmental Law Institute (Issue 9, p. 30):

> *Having just one person in charge and delegating authority has led to some unhappy consequences in other societies. Your system and our system are systems of mutual adjustment that coax areas of the civil society to come along with a lot of jawboning and bargaining. . .*
>
> *I have come to the conclusion that redundancy, dispersed power and enforced bargaining are really the better path to wise decision-making.*

Effective management strategies . . . necessarily concern both orders of government. This appears to be an almost inescapable conclusion from the foregoing analysis. It flows not only from the fact that environment problems are dominated by spillovers. It flows also from four characteristics that stand out in each part of the analysis: ecological interdependence; physical interdependence; problem interdependence; hence, jurisdictional interdependence. The overriding corollary of this, of course, is intergovernmental cooperation, at all levels and in all possible forms. It is difficult, if not impossible, to visualize any political or institutional structure, or any system of powers, that would reduce the importance of such cooperation or that would work without it.[41]

Recommendation 7:

The Committee recommends that present trends, both formal and informal, towards concurrent environmental jurisdiction be encouraged and strengthened. In particular, the Committee recommends:

- **strengthened formal and informal mechanisms for consultation and cooperation among governments in Canada;**
- **harmonization of existing and proposed regulations and actions to protect the environment and promote sustainable development, based on high national standards and the opportunity for individual jurisdictions to adopt still more stringent measures;**
- **other measures to avoid unnecessary overlap and duplication, and to promote collaboration and the adoption of joint policies, programs and projects;**
- **development of links and consultation mechamisms with other relevant jurisdictions, including international institutions, municipal governments, and the institutions of aboriginal self-government, as the latter are established;**
- **action to give greater public awareness and understanding of, and access to, national and international coordination mechanisms concerned with the environment and sustainable development.**

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[41] MacNeill, J.W. *Environmental Management*, Ottawa, Information Canada, 1971, p. 175.

CHAPTER 3

SPECIFIC ISSUES AND RECOMMENDATIONS

A. In Regard to the Role of the Federal Government

3.1 *Federal leadership*. Almost without exception, and whatever their backgrounds and perspectives, the witnesses before the Committee asserted the need for continued federal leadership on environment and sustainable development.[1] Several witnesses urged either an extension of the federal government's powers to establish national environmental standards, or the use of latent powers that the witnesses believed already exist at the federal level. Other witnesses saw in the proposals set out in *Shaping Canada's Future Together* indications that the federal government was prepared to relinquish powers which the witnesses regarded as essential if federal leadership is to be effective.

3.2 The Committee is impressed by the unanimity and the convergence of views on federal leadership. For example, Pollution Probe and the Canadian Environmental Law Association argued that

> *Given that a clear federal role in environmental matters is necessary, it must be recognized that Parliament will likely require its entire arsenal of jurisdictional powers to play this role fully. Specifically, we are referring to the full residual power, the declaratory power, the "general" power under trade and commerce, and the spending power.*[2]

From the industry side, TransCanada Pipelines Ltd.'s position is that

> *Federal authority over the environment should be dominant to provide uniform regulation across the country in respect of environmental processes as well as pollution controls.*[3]

Similarly, the mining industry expressed concern at the indications that the federal government would withdraw from mining (and other fields of jurisdiction). Meanwhile different legal witnesses were concerned at what they saw as a contradiction in the Government's proposals, and the possible adverse signal that this might give to courts dealing

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[1] The main exceptions may have been the Canadian Electrical Association and the Mining Association of British Columbia (MABC). The former explicitly endorses a primary role for provincial governments on environmental matters. Though not explicit on this point, MABC's proposals would probably reduce substantially the federal government's role on environmental matters within Canada.

[2] *Environment and the Constitution*, pp. 25-26.

[3] Submission of TransCanada Pipelines Ltd., p. 5.

with environmental matters.[4] Aboriginal organizations were understandably concerned about any potential weakening of powers, including environmental powers, by the Crown with which they had negotiated earlier treaties and with which they anticipated much more comprehensive negotiation in the near future.[5]

3.3 When witnesses were pressed on the specific elements in the Government's proposals, it appeared that some of the items did not generate real concern in themselves; what mattered more to the witnesses was the cumulative effect of the total package. Those[6] who were inclined to oppose the elimination of the declaratory power (section 92(10)(c) of the Constitution Act 1867) were probably aware that it had seldom been used in recent years. On environment-related fields such as forestry and mining, it was recognized that the federal interest is at present a very limited one. Nevertheless, several witnesses found the phraseology in the Government's proposals obscure, and therefore troubling.[7]

3.4 Similar concern about the vagueness of the Government's proposals was expressed in regard to the areas proposed for administrative and/or legislative delegation, including wildlife conservation and protection and soil and water conservation. As a witness from the Canadian Bar Association expressed it,

> *When we see streamlining proposals such as this, the question is, is this good-faith streamlining or is it passing the buck?*[8]

It must also be recognized that, in the eyes of many observers, past experience with administrative delegation in the environmental field does not encourage further action of this kind. Mr MacMillan, with ministerial experience, was explicit:

> *The record of provincial governments in this country in the environmental field is appalling, when the federal government has devolved or delegated some of its authority, especially for enforcement, to the provinces, as it did, for example, vis-à-vis section 33 of the Fisheries Act.*[9]

There may be no objection to the principle of delegation—it may indeed represent a very sensible way to improve the environment—but witnesses insist that delegation should be accompanied by a provision for reporting by the jurisdiction to which the powers are delegated, and delegation should be revokable if it fails to achieve the desired objective.[10]

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4 Issue 16, p. 25. See also Issue 13, pp. 45-49.

5 See, for example, Issue 13, pp. 4-37. See also Issue 13A, p. 9:
"Our treaty and aboriginal rights are being placed in jeopardy by developments which do not respect the environment."

6 For example, Ms Barbara Rutherford, Canadian Environmental Law Association, Issue 17, p. 12.

7 See, for instance, Issue 13, pp. 50-51, and *Environment and the Constitution* (Pollution Probe and CELA), section 4.1.3.

8 Issue 16, p. 43.

9 Issue 6, p. 33-34. See also Issue 13, p. 54.

10 The WCELA brief demands, as a condition of delegation by the federal government, (1) strong federal leadership, (2) accountability, and (3) reasonable provisions for public participation in decision-making. (p. 27)

Recommendation 8:

The Committee recommends that the proposals for political renewal in regard to the recognition of areas of provincial jurisdiction, and in regard to streamlining government, include specific and unambiguous statements so as to ensure that these proposals are compatible with a strong federal commitment and capacity in regard to environment and sustainable development, and with the exercise of appropriate federal jurisdiction in all the areas identified in the Government's proposals.

Recommendation 9:

The Committee recommends that proposals on administrative and legislative delegation related to the environment require provisions in the enabling agreements to ensure:

- **regular and public reporting to the legislature of the delegating authority by the jurisdiction to which the powers are delegated;**
- **revocation of the delegated powers if, in the opinion of the legislature of the delegating jurisdiction, the powers are not being effectively exercised by the jurisdiction to which powers have been delegated;**
- **full public information, and opportunity for individuals and groups to comment and make representations on the implementation of the administrative or legislative provisions at any time.**

3.5 The Committee believes that, from an environmental standpoint, it may be desirable to reconsider the proposal that the federal government relinquish its power, under Section 92(10)(c), to assume federal authority by declaring works to be "for the general advantage of Canada." This "declaratory power" has not been used for several decades, and it is clear from *Shaping Canada's Future Together* that its continued existence is seen by the federal government as a potential irritant in federal-provincial relations. This may be so, but unlike other general powers, such as "peace, order and good government", it is not a legislative power but one that could enable the federal government to act quickly in an emergency. In the context of cooperation and partnerships that we see developing in the environmental field, it may be that the declaratory power would enable a rapid response to an unexpected environmental crisis, in which the federal government's use of the power would be encouraged and endorsed by other levels of government.

Recommendation 10:

The Committee recommends that the significance of the "declaratory power" be clarified with respect to the ability of the federal government to maintain and enhance environmental quality and to promote sustainable development, prior to any changes to Section 92(10)(c) of the Constitution.

3.6 As discussed below, there was less uncertainty, and clear opposition, to both restrictions on the use for environmental purposes of the federal residual power ("peace, order and good government") and to the proposal to entrench property rights in the Constitution.

3.7 In summary, federal leadership on the environment is seen as a major requirement by most of our witnesses, and needs to begin with a clarification of the Government's attitude to the environment vis-à-vis its proposals for political renewal. As some witnesses observed, the government's proposals need to be subjected to an environmental impact assessment. We recommend that this clarification include at least three elements:

(a) A reiteration and amplification of the brief statement by the Minister for Constitutional Affairs, that the environment "is a field in which existing federal jurisdictions must be respected and must be maintained."

(b) Greater specificity on the nature of those proposals that directly or indirectly appear to affect the environment. These include the residual power, areas for federal withdrawal, areas proposed for delegation, property rights, and possibly also aboriginal self-government. Reassurance on safeguards and accountability is particularly important.

(c) Recognition, in the context of the proposals on economic union, that economic and environmental decision-making are "inextricably intertwined".

3.8 *Implementation of International Agreements*. Special concern was expressed by several witnesses about the federal government's lack of a "treaty power", i.e. the power to act within Canada to meet international treaty obligations. Section 132 of the Constitution Act 1867 gave this power to the Parliament of Canada; however a 1937 judicial decision[11] held that this power did not extend to treaties entered into by Canada itself, in contrast to those, prior to the 1931 Statute of Westminster, that Canada inherited from Britain or that were negotiated on Canada's behalf by the imperial government. The ruling has not prevented Canada from acquiring or complying with such international obligations; however, when compliance involves provincial jurisdiction, cooperation with provincial governments is normally required.

3.9 This situation differs markedly from that in the United States, where, we were told, under Article 6 of the U.S. Constitution, a treaty ratified by the U.S. Senate becomes

> *the supreme law of the land. . . and the judges in every State shall be bound thereby, anything in the constitutional laws of any State to the contrary notwithstanding.*[12]

3.10 In *Shaping Canada's Future Together*, the treaty power is not addressed directly. However, in his statement to the Committee, the Minister of the Environment expressed the belief that the increased cooperation and coordination sought in the proposals

> *. . .would allow the Government of Canada to play a leading role in the management of transboundary environmental issues, both within Canada and internationally, and to negotiate international environmental treaties and agreements on behalf of Canada with the confidence our commitments can be fulfilled.*[13]

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[11] A.G. Can. v. A.G. Ont. [1937] 1 D.L.R. 58 (P.C.)

[12] Issue 9, p. 13.

[13] Issue 15, p. 12.

3.11 Several witnesses nevertheless evidently believe that this absence of a treaty power represents a real weakness in the Canadian system, one that is particularly important in an environmental context.[14] There is, however, a diversity of views on how this gap should be filled. The West Coast Environmental Law Association recommended the creation of a specific external affairs power on environmental matters:

> *We recommend that the Government of Canada revise its constitutional proposals by expressly enumerating a federal power to legislate as necessary to implement Canada's international environmental commitments.*[15]

The WCELA recognizes that "This would require a mechanism to assure the provinces of an opportunity to participate in the formulation of Canada's negotiating position regarding such commitments."[16] It is not clear to the Committee how feasible such "special treatment" for environmental commitments would be; as the WCELA itself recognizes,[17] international trade commitments suffer from a similar disability and may have a similar claim to such an external affairs power.

3.12 In the view of a witness from the Canadian Bar Association the problem, though a serious one, should not be addressed through a constitutional amendment.[18] Mr Fairley urged instead that deliberate use should be made of powers that the federal government already possesses.

> *I think that there is a very good argument, a good principled argument, that peace, order and good government for the nation is a mandate for implementing international obligations that are clearly of a kind that have a national dimension to them. . .*
>
> *If the federal government wants to take the bull by the horns, it could test it. There have been opportunities to do it. The Justice Department has steadfastly, probably under Cabinet directives, avoided ever doing that.*
>
> *The general trade and commerce power, the resuscitation of that, is another rubric that could be used. . . to have a new principled interpretation of what federal legislative powers should be in relation to international obligations.*[19]

3.13 This issue clearly extends far beyond environmental concerns and the Committee is in no position to prescribe its own solution. However the Committee agrees that ensuring the implementation of international environmental commitments is a real and urgent need. Without it, Canada's negotiating position is unnecessarily constrained by what the federal government believes would be acceptable to all affected provinces; Canada's credibility on the international scene may be called into question; and major opportunities to protect and

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[14] See, for example, Issue 16, pp. 24-25.

[15] *Enhancing Environment Protection in the Canadian Constitution. . .*, p. 23.

[16] *Ibid.*, pp. 22-23.

[17] *Ibid.*, p. 23.

[18] Issue 16, p. 38.

[19] Issue 16, p. 36.

improve the Canadian environment may be missed or diminished. It seems clear that Canada will be hard pressed to fulfil the international environmental commitments that it has made in recent years (e.g. in regard to the atmosphere or the Great Lakes). The Government of Canada should not be in the position of having to plead that a failure to fulfil a commitment was due to its lack of environmental authority. It may be that this issue could be considered productively within the framework of the Canadian Council of Ministers of the Environment. Be that as it may, we recommend that the Government of Canada address the general question of the treaty power in its revised constitutional proposals, because of its significance for environment and sustainable development in Canada.

Recommendation 11:

The Committee recommends that the proposals for political renewal include explicit recognition of the need for a power to ensure that Canada's international commitments to improve the national and global environment, and to promote sustainable development, can be implemented effectively and expeditiously. The Committee recommends the creation of a formal consultation mechanism in regard to the exercise of this power, particularly for Canadian jurisdictions with relevant powers. The Committee also recommends that this so-called 'treaty power' should include major international agreements that do not have the status of treaties.

3.14 *Peace, Order and Good Government.* This residual power of the federal government, under section 91 of the Constitution Act, is in present circumstances a main foundation for the federal government's environmental powers. As we were told by a former Minister of the Environment,

> *When we devised, for example, the Canadian Environmental Protection Act, we were advised by the lawyers seconded to us by the Department of Justice and by our internal legal experts that we would be on very shaky constitutional and legal grounds to the extent that we strayed in weaving our legislation away from, principally, the peace order and good government provisions of the Constitution and the federal criminal law power having to do with health, life and safety.*[20]

As discussed earlier (para. 1.17), the peace, order and good government ("POGG") power was further expanded, as a source of federal jurisdiction in environmental matters, by the *Crown Zellerbach* decision in 1988.

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[20] Issue 6, p. 32.

3.15 Many other witnesses, when stressing the importance of a strong federal role in environmental legislation, expressed particular concern about the Government's proposal to restrict the use of the POGG power.[21] Witnesses suggested that, if the federal spending power is to be limited in the manner proposed by the Government, the POGG power may take on even greater importance as a basis of federal authority.

3.16 It is not clear to the Committee what the practical consequences to federal environmental powers of the Government's proposal on the residual power would be.[22] Nor is it clear why the Government found it necessary or desirable to make this proposal, which would "transfer to the provinces authority for non-national matters not specifically assigned to the federal government under the Constitution or by virtue of court decisions." It is the Committee's understanding that, under the test set out by the Supreme Court of Canada in *R. v. Crown Zellerbach*, non-national matters would not fall within the federal government's authority in any event.[23] If this is so, the Committee recommends that the Government reconsider its proposal on the Federal Residual Power, on the grounds that the proposal has little constitutional significance, but may indicate politically a weakening of federal leadership that would be very undesirable in regard to the environment.

Recommendation 12:

The Committee recommends that the proposals for political renewal recognize that the federal residual power ('peace, order and good government') is one of the basic foundations for federal action to protect the environment and promote sustainable development. This power should in no way be diminished in its ability to deal with environmental needs.

3.17 *Data Collection, Monitoring, Research and Public Information.* At the core of the arguments for federal leadership, a "level playing field", and an environmental union is the belief, expressed frequently by witnesses, that the federal government must have the power and capacity to set national standards in regard to the environment. Capacity to act involves knowledge: data collection and analysis, monitoring and research. Similar knowledge needs exist in regard to Canada's international environmental negotiations. As the witness from the Rawson Academy of Aquatic Science told us

> *The federal government is the one institution that has invested the most in Canada in developing the knowledge that is required for policy-making in the environmental field. This is a priceless asset that needs to be nurtured. . .*

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[21] *Shaping Canada's Future Together*, p. 36.

[22] Mr Andrews, the witness from the West Coast Environmental Law Association, expressed the view that, on an initial reading, the federal power with respect to national concerns would not be affected by the Government's proposals. He went on:
It strikes me the main concern with this proposal is on the political side; that is, to the extent which removing some of the federal government's residual powers may reflect a political move away from a stronger federal role. On that, I would simply answer with the political importance of a strong federal role in protecting the environment. (Issue 13, p. 46)

[23] See Northey, pp. 140-144.

[C]learly, when we're looking at issues such as global warming or the loss of bio-diversity or acid rain, any action we take has be based on sound, credible research. This is an area where the federal government should continue to play a leadership role.[24]

3.18 The witness from the public opinion survey The Environmental Monitor also emphasized the need for the federal government to increase its activity in regard to public information and education on the environment. He pointed to the great gap between concern and understanding that exists.

> *In terms of specific understanding of what issues are priorities, let alone what factors will improve those issues, that's where Canadians are some of the first to say they don't understand that. Our data shows very graphically when we ask, in open-ended kinds of ways, what is the primary cause of global warming, that ozone depletion is identified as the prime reason for global warming. . . Only 14% identify the use of fossil fuels.*
>
> *How can you go forward with good public policy with gaping perceptual problems like that? Hence, that is a good example why our data suggests, very strongly, that the federal government has probably a unique and certainly justifiable role in adult public education in Canada around these issues.*[25]

3.19 The Committee welcomes the statement, in *Shaping Canada's Future Together*, that "The government is committed to ensuring the preservation of Canada's existing research and development capacity".[26] We note, however, that this has not prevented several witnesses from expressing concern on just this point, since the statement appears in the context of Government proposals to withdraw from fields in which research, data collection and monitoring are at present the principal fields of federal government activity.[27] If the concern arises solely from incorrect interpretation of a section of the Government's proposals that has been ambiguously drafted, the Committee believes that clarification on this point would be widely welcomed.

3.20 More fundamentally, however, the Committee believes strongly that readily-available environmental data and information, and better public access to the policy development and action by governments on environment and sustainable development are essential. These become even more crucial if, as recommended earlier in this report, concurrent jurisdiction and partnerships are to be the basis of environmental policy and action in Canada. It seems clear to the Committee that adequate data and information are not available, to governments or to the public. Similarly, the activities of bodies, such as the CCME and the national and provincial Round Tables on Environment and Economy that have actual or potential roles in building cooperation and partnerships, are little known to the public or, indeed, to anyone other than those directly involved in them. The mechanisms of environmental management in Canada need to be much more transparent than they are at present.

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[24] Issue 12, p. 25.

[25] Issue 6, p. 19.

[26] p. 37.

[27] See for example, the submission from the Mining Association of Canada, pp. 3-4.

Conclusion 13:

Environmental protection and the adoption of sustainable development patterns involve the whole population. At present, public access to data and information on environmental issues, and to related governmental activities (including intergovernmental liaison mechanisms) is quite inadequate. The Committee's recommendations in regard to the division of powers all take as a prerequisite the need for greater public access to environmental information and greater public participation in environmental action by governments.

Recommendation 14:

The Committee recommends that the proposals for political renewal include measures to enable Canadians to participate effectively in, and hold accountable, the institutions of government at all levels, in order to fulfil objectives for a healthful environment and sustainable development.

B. Other Aspects

3.21 *Property Rights*. Witnesses before the Committee expressed considerable concern about the potentially negative implications for the environment of the proposed entrenchment of property rights in the Canadian Charter of Rights and Freedoms.[28] The current proposal to entrench such a right provides no definition of property, no location for such a right within the Charter, and no draft wording for such a provision. Witnesses therefore had some difficulty in addressing themselves in detail to this item. The character of their concern, and the extent to which it is shared by many witnesses are, however, clear enough.

3.22 Many witnesses opposed the entrenchment of property rights because such a provision could impede the ability of governments in Canada to develop and implement environmental measures. All the witnesses from the environmental community took this view, as did most others. Some witnesses, while opposed in principle to entrenchment of property rights, proposed measures through which negative environmental effects of such a change could be reduced.

3.23 A witness from the Canadian Bar Association advised the Committee that unqualified entrenchment of property rights would interfere with the ability of all levels of government to implement environmental protection legislation.

> *That is because many environmental controls are attached or implemented by way of laws relating to land use, zoning and planning, natural resource extraction and management and so forth.*[29]

The fact that such rights are subject to reasonable limits, pursuant to section 1 of the Charter, did not reassure the witness, because the determination of what is a reasonable limit depends on judicial interpretation. As another expert legal witness commented,

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[28] *Shaping Canada's Future Together*, p. 3.

[29] Issue 16, p. 28.

Actions by government that have anything to do with property would come under increasing scrutiny, and there are two bases for the concern. One is that at the end of the day courts would actually strike down the governmental initiatives that were aimed at protecting the environment. The other is that there would be court challenges and years of court battles over government action to protect the environment, based on such a Charter right. It could be years or even decades before we know the extent to which the courts will draw the line in order to protect government's ability to deal with environmental problems. That is why we call it the "chilling effect".[30]

3.24 The President of Inuit Tapirisat of Canada advised the Committee that her organization is concerned that resource development corporations may use constitutionally-guaranteed property rights to challenge certain aspects of aboriginal title to land. Chief Wilson, representing the Assembly of First Nations, also opposed the entrenchment of property rights in the Charter. He indicated to the Committee that a right to property may run "right in the face of regulations that are designed to protect that property."[31]

3.25 Although a substantial number of other countries have entrenched property rights in their national constitutions, witnesses who appeared before the Committee were only able to speak to the American experience. Some[32] felt that the experience with the provision protecting property rights in the United States Constitution should reassure Canadians, because Americans have nevertheless developed an environmental protection that is in many respects more stringent and more effective than Canada's. Other witnesses however cited American experience as an indication of the ways in which property rights can interfere with government efforts to protect the environment.

3.26 According to Mr Futrell of the Environmental Law Institute in Washington, D.C., the U.S. Supreme Court has never struck down a regulation made by the federal Environmental Protection Agency as being a violation of the property right.[33] At the state government level, however,

The federal private property clause can sometimes trump state actions and state efforts to protect the environment.[34]

He suggested that the "takings clause" (the property rights provision in the Bill of Rights) can have a chilling effect:

This clause does not necessarily undermine environmental regulation; however, in a number of state legislatures, especially in the south and mountain west, it has been used as a powerful argument to stymie legislation in committee. It has tremendous prestige.[35]

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[30] Issue 13, p. 48.

[31] Issue 13, p. 29.

[32] See, for example, the comments by the Minister of the Environment, Issue 15, p. 11.

[33] Issue 9, p. 23.

[34] Issue 9, p. 10.

[35] Issue 9, p. 13.

Witnesses were unable to provide the Committee with examples of the way that entrenchment of property rights might have a beneficial effect on the environment.[36]

3.27 Many witnesses felt that property rights are already adequately protected in Canada by existing legislation. The witness from the West Coast Environmental Law Association advised us that, at common law,

> *. . . the courts already interpret statutes in such a way as to give the benefit of any interpretation doubts to the holders of private property.*[37]

Similarly Mr. Muldoon, of Pollution Probe, suggested that

> *I think it's fair to say that property rights are probably one of the oldest, most established, and certainly one of the more complex regimes of our law.*[38]

3.28 Several witnesses were concerned that, if property rights are to be entrenched, there should be explicit wording in the provision to ensure that such rights do not affect the ability of governments to protect the environment. Others felt that, if property rights were entrenched, it "becomes essential that counterbalancing environmental rights must also be entrenched."[39]

3.29 The Committee is aware that, in the larger context of the constitutional debate, other concerns are being expressed about the property rights proposal. The Committee, like our witnesses, focused only on the potential implications for the environment. Members held sharply different opinions concerning the potential consequences for the environment of the proposal to amend the Canadian Charter of Rights and Freedoms to guarantee property rights. One view was that environmental protection is already adequately guaranteed by Section 1 of the Charter, by case law, and by the potential for using the "notwithstanding" clause. This opinion held that the inclusion of property rights in the Charter presents no threat to the environment. Some other members of the Committee did not share this conviction. They took the view that there is good reason to believe that efforts to maintain or enhance the quality of the environment, or to promote sustainable development, could be impugned or substantially obstructed by the entrenchment of property rights, and that therefore this proposal should be withdrawn. Several members also expressed the view that property rights in Canada are already adequately safeguarded by legislation and case law, and that no obvious need for a constitutional amendment has been demonstrated.

Recommendation 15:

The Committee recommends that, if any amendment were made to the Canadian Charter of Rights and Freedoms to guarantee property rights, it be clearly stated in the wording of the guarantee that maintenance and enhancement of the quality of the environment and the promotion of sustainable development shall take precedence.

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[36] The witness from the Sierra Club (Ms. Elizabeth May) did express the belief that "in some instances . . . a Charter-entrenched property right might help to protect the environment". However, she opposed inclusion of the property right (or environmental rights) in the Charter, on the grounds that entrenching property rights would lead to "great confusion, a bonanza for lawyers". (Issue 17, p. 33).

[37] Issue 13, p. 48.

[38] Issue 17, p. 9.

[39] Issue 12, p. 8.

3.30 *Environmental Rights*. Witnesses before this Committee welcomed the Government's proposal to create a "Canada clause" in the body of the Constitution that would include

> *. . . a commitment to the objective of sustainable development in recognition of the importance of the land, the air and the water and our responsibility to preserve and protect the environment for future generations.*[40]

However, some witnesses cautioned that the provisions in the Canada clause would be of symbolic value only, and that there is therefore a need for some legal backing for the principles.[41] In order to give legal force to the environmental commitment, several witnesses recommended that environmental rights be enshrined in the Canadian Charter on Rights and Freedoms. Some of our witnesses have recommended wording of such a right.[42] Inclusion of environmental rights was urged on several grounds:

> *First, environmental rights would be a clear step toward mandating the requirement of the full integration of environmental quality into decision-making of government in the private sector. It would also have educational value whereby private and public sector actors would more likely take all environmental norms and issues more seriously.*
>
> *Third, environmental rights would recognize the inherent value of the environment and natural resources for their own sake. . .*
>
> *Fourthly, environmental rights empower people to protect the environment that sustains them.*[43]

The same witness noted that about 20 countries now have express or implied rights to a healthful environment in their national constitutions, and that environmental rights are gaining international recognition.[44] Some provincial and territorial jurisdictions in Canada have enacted or are considering environmental rights legislation (Yukon Territory, Northwest Territories, Ontario).

3.31 The Committee was impressed by the recommendation from Mr. Futrell (Environment Law Institute) that, where possible, constitutions in common law countries should be silent on specific issues such as the environment, in order to keep legislative options open and reduce the area for judicial interpretation.[45] However, witnesses from the Canadian Bar Association (CBA) advised us that there would be no real risk of lack of governmental accountability or flexibility if environmental rights were given constitutional protection. The

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[40] *Shaping Canada's Future Together*, pp. 9-10.

[41] See, for example, Issue 13, p. 39.

[42] See, for example, *Enhancing Environmental Protection in the Canadian Constitution* (WCELA), pp. 32-34.

[43] Issue 17, p. 6.

[44] *Environment and the Constitution* (Pollution Probe and CELA), Appendix D.

[45] Issue 9, pp. 18-19.

CBA suggested that there is often a "dialogue" between the courts and the legislatures on such matters, so that legislatures can amend the law if they do not agree with the courts' interpretations.[46]

3.32 All the witnesses who raised the subject of entrenching environmental rights in the Charter were convinced that the arguments for such rights became even more compelling in the face of a decision to entrench property rights. This reflects the apprehension that courts called on to apply the property rights provision would otherwise have to interpret it in a context that gave insufficient guidance as to its intended effect on existing environmental protection legislation. A right to environmental quality could assist the courts by indicating where the balance is to be struck between private property rights and legislative efforts to protect the environment.

3.33 *Beyond considerations of constitutional reform and the division of powers.* Although the Committee was left in no doubt, during its study, of the vital environmental significance of federal leadership, intergovernmental cooperation, environmental rights and other similar features needed in the working of the Canadian constitution, it also recognizes that much of the task of protecting and improving the Canadian environment, and adopting sustainable development patterns, is undertaken by individual Canadians, the private sector, and in the marketplace. Industry witnesses such as Mr. McCready (TransAlta) urged on governments the need to establish realistic costs and prices, so that environmental resources could be valued more highly than is normal at present. Harmonizing the labyrinth of regulations does more than ease the task of business and industry; it increases the likelihood that the regulations will be obeyed and enforced. And as the witness from The Environmental Monitor pointed out, individual Canadians are not merely concerned about the environment; they see themselves as primarily responsible for acting on that concern. The recommendations that we have made in this report are of more than intrinsic importance; they are designed to assist the governmental framework of Canada in its enabling role, facilitating environmental action that goes far beyond the capacity of the governments themselves.

[46] Issue 16, pp. 28-29.

LIST OF CONCLUSIONS AND RECOMMENDATIONS

Conclusion 1:

The Committee endorses the definition of sustainable development contained in the report of the World Commission on Environment and Development (the Brundtland Report): Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs.

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.

Conclusion 3:

Effective recognition and understanding of environmental problems, and cooperative and coordinated policies, actions and enforcement measures among all jurisidictions, are more necessary at present than a new division of environmental powers.

Recommendation 4:

The Committee recommends that the environment be regarded as an area of shared jurisdiction, in which concurrency and partnership are the appropriate and effective bases for governmental action.

Recommendation 5:

The Committee recommends that aboriginal self-government be regarded as an opportunity and an obligation to pursue the protection of the environment and the adoption of sustainable development patterns.

Recommendation 6:

The Committee recommends that the proposals for political renewal recognize explicitly that our common but varied environment unites Canada, just as our common but varied economy unites us. Economy and environment are inextricably intertwined. Specifically, the Committee recommends explicit recognition in the proposals that:

- Canada has a major responsibility to contribute to planetary survival, arising from the vast range, distinctive character, and fragility of its natural environments.

- Human activities in the contemporary economy and society generate environmental problems on all spatial scales from the very local to the global; through ecological linkages and transfer mechanisms these problems frequently increase in significance, and in some cases threaten irreversible change.

- Consequently, the adoption of sustainable development patterns is essential for both Canada's prosperity and the protection of the environment.

Recommendation 7:

The Committee recommends that present trends, both formal and informal, towards concurrent environmental jurisdiction be encouraged and strengthened. In particular, the Committee recommends:

- strengthened formal and informal mechanisms for consultation and cooperation among governments in Canada;

- harmonization of existing and proposed regulations and actions to protect the environment and promote sustainable development, based on high national standards and the opportunity for individual jurisdictions to adopt still more stringent measures;

- other measures to avoid unnecessary overlap and duplication, and to promote collaboration and the adoption of joint policies, programs and projects;

- development of links and consultation mechamisms with other relevant jurisdictions, including international institutions, municipal governments, and the institutions of aboriginal self-government, as the latter are established;

- action to give greater public awareness and understanding of, and access to, national and international coordination mechanisms concerned with the environment and sustainable development.

Recommendation 8:

The Committee recommends that the proposals for political renewal in regard to the recognition of areas of provincial jurisdiction, and in regard to streamlining government, include specific and unambiguous statements so as to ensure that these proposals are compatible with a strong federal commitment and capacity in regard to environment and sustainable development, and with the exercise of appropriate federal jurisdiction in all the areas identified in the Government's proposals.

Recommendation 9:

The Committee recommends that proposals on administrative and legislative delegation related to the environment require provisions in the enabling agreements to ensure:

- regular and public reporting to the legislature of the delegating authority by the jurisdiction to which the powers are delegated;
- revocation of the delegated powers if, in the opinion of the legislature of the delegating jurisdiction, the powers are not being effectively exercised by the jurisdiction to which powers have been delegated;
- full public information, and opportunity for individuals and groups to comment and make representations on the implementation of the administrative or legislative provisions at any time.

Recommendation 10:

The Committee recommends that the significance of the "declaratory power" be clarified with respect to the ability of the federal government to maintain and enhance environmental quality and to promote sustainable development, prior to any changes to Section 92(10)(c) of the Constitution.

Recommendation 11:

The Committee recommends that the proposals for political renewal include explicit recognition of the need for a power to ensure that Canada's international commitments to improve the national and global environment, and to promote sustainable development, can be implemented effectively and expeditiously. The Committee recommends the creation of a formal consultation mechanism in regard to the exercise of this power, particularly for Canadian jurisdictions with relevant powers. The Committee also recommends that this so-called 'treaty power' should include major international agreements that do not have the status of treaties.

Recommendation 12:

The Committee recommends that the proposals for political renewal recognize that the federal residual power ('peace, order and good government') is one of the basic foundations for federal action to protect the environment and promote sustainable development. This power should in no way be diminished in its ability to deal with environmental needs.

Conclusion 13:

Environmental protection and the adoption of sustainable development patterns involve the whole population. At present, public access to data and information on environmental issues, and to related governmental activities (including

intergovernmental liaison mechanisms) is quite inadequate. The Committee's recommendations in regard to the division of powers all take as a prerequisite the need for greater public access to environmental information and greater public participation in environmental action by governments.

Recommendation 14:

The Committee recommends that the proposals for political renewal include measures to enable Canadians to participate effectively in, and hold accountable, the institutions of government at all levels, in order to fulfil objectives for a healthful environment and sustainable development.

Recommendation 15:

The Committee recommends that, if any amendment were made to the Canadian Charter of Rights and Freedoms to guarantee property rights, it be clearly stated in the wording of the guarantee that maintenance and enhancement of the quality of the environment and the promotion of sustainable development shall take precedence.

THE IMPACT OF THE OLDMAN RIVER DECISION ON THE RECOMMENDATIONS OF THE COMMITTEE'S STUDY ON THE DIVISION OF POWERS ON ENVIRONMENTAL ISSUES

PREPARED FOR THE HOUSE OF COMMONS STANDING COMMITTEE ON ENVIRONMENT

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27 January 1992

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APPENDIX A

The Impact of The Oldman River Decision on the Recommendations of the Committee's Study on the Division of Powers on Environmental Issues[1]

INTRODUCTION

In a judgment handed down on 23 January 1992 in the case of *Friends of the Oldman River Society v. Canada,* the Supreme Court of Canada ruled that, under the terms of the federal Environment Assessment and Review Process Guidelines Order, the federal Minister of Transport was required to conduct an environmental impact assessment with respect to Alberta's Oldman River dam project.[2]

Apart from any impact this decision may have on the Oldman River dam project itself, it is significant because the Court, although divided eight to one on the actual disposition of the case, was unanimous in upholding the constitutional validity of the federal Guidelines Order (hereinafter the "Guidelines"). The Court also unanimously confirmed that the Guidelines were binding and mandatory in nature, such that, in all cases to which they applied, the federal government was legally obliged to comply with them and conduct an environmental impact assessment, as prescribed.

It should be stressed that the Court's ruling was largely confined to an analysis of the Guidelines in their existing form. These Guidelines, however, may soon be replaced by new measures. Indeed, Bill C-13, the Canadian Environmental Assessment Act, is currently before the House of Commons, at the stage of third reading. As the measures proposed in Bill C-13 differ materially from those contained in the Guidelines, not all of the Court's findings will therefore remain relevant, if this proposed legislation is enacted.

There are, however, at least two aspects of the judgment that are likely to retain their significance in the years to come and become the yardstick by which environmental initiatives are likely to be judged. The first has to do with the Court's liberal interpretation of what comprises the "environment" and "environmental quality". The second deals with the Court's assessment of how far each level of government can go in enacting measures relating to the environment, while still remaining faithful to the constitutional division of powers.

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[1] This appendix was prepared by the Library of Parliament, at the request of the Committee. The Library compared the Oldman River decision with the Committee's written presentation to the Special Joint Committee on a Renewed Canada. References to pages in "the Committee's report" in this appendix are therefore references to page numbers in that presentation, not to the text of the present report *Environment and the Constitution.* However, references to Conclusions and Recommendations of the Committee have been changed to conform with the numbering used in *Environment and the Constitution.*

[2] Although acknowledging that the project was all but complete at this stage, the majority of the Court nevertheless felt that the Guidelines should be complied with, as there might still be time for mitigative measures to be taken to ameliorate any adverse environmental effects the dam might have on areas of federal jurisdiction. In an unusual move, the majority of the Court also awarded costs on a solicitor-client to the respondent Friends of the Oldman River Society.

This paper is divided into two parts. The first part outlines some of the Supreme Court of Canada's key rulings in the Oldman River case. Since the existing Guidelines may soon be superseded, the emphasis in this part will be placed on the constitutional issues dealt with by the Court, rather than on those issues that are largely specific to the Guidelines. The second part discusses what implications this case may have with respect to the Committee's proposed recommendations, as set out in its report, The Committee's Study of the Division of Powers on Environmental Issues.

PART 1: THE COURT'S FINDINGS

A. The Statutory Validity of the Guidelines

The Court first upheld the statutory validity of the Guidelines, and confirmed their binding and mandatory nature. It found that, despite their title, the Guidelines were not purely administrative directives, as contended by the government of Alberta. Rather, they had the force of law, and were enforceable as such in the courts, since under their enabling legislation—i.e., section 6 of the Department of the Environment Act—the Guidelines had to be formally enacted by "order", with the approval of cabinet.

The Court also disagreed with Alberta's contention that, by calling for socio-economic considerations to be taken into consideration by the relevant decision makers, the Guidelines far exceeded the authority conferred under the above-noted Act to establish guidelines for the purposes of carrying out the Minister's duties related to "environmental quality". Characterizing Alberta's interpretation of "environmental quality" as "unduly myopic," since it was limited to biophysical elements alone, the Court emphasized that the "environment" was a diffuse subject-matter, and stated that, subject to the constitutional imperatives, consideration of such things as the potential consequences for a community's livelihood, health and other social matters engendered by environmental change was surely an integral part to decision-making on matters affecting environmental quality.

Finally, the Court was unconvinced by the argument advanced by both the federal government and the government of Alberta that, by requiring the decision maker to take environmental factors into consideration, the Guidelines were inconsistent with, and therefore had to yield to, the requirements set out under the Navigable Waters Protection Act, which were limited exclusively to considerations pertaining to marine navigation. In rejecting this argument, the Court held that the duties imposed under the Guidelines were not in any way in conflict with those prescribed under the Act. Rather, the former were to be regarded as supplemental to the latter, and the Minister could not escape his obligations under the Guidelines by resorting to an excessively narrow interpretation of the authority conferred upon him under the Act.

B. Applicability of the Guidelines Order and Crown Immunity

The second series of issues considered by the Court involved a determination on which projects or undertakings were in fact subject to the Guidelines, such as to "engage the process", i.e., the environmental impact assessment and review process.

Noting that the Guidelines were not restricted to "new federal projects, programs and activities", and stating that the process was not engaged every time a project had an environmental effect on an area of federal jurisdiction, the Court held that, in order for the process to be engaged within the meaning of the Guidelines, there first had to be a "proposal" which required "an initiative, undertaking or activity for which the Government of Canada has a decision making responsibility". In the Court's view, such a "decision making responsibility" existed wherever, by the terms of a federal statute enacted under the authority of section 91 of the Constitution Act, 1867, there was a legal duty or responsibility to act in relation to the proposal. If an "affirmative regulatory duty" was found to exist under relevant federal legislation, it was then a matter of identifying the "initiating department" assigned the task of performing the duty, and of deeming this entity the "decision making authority" for the proposal, thereby triggering the application of the Act.

Having regard to the foregoing interpretation, the Court held that, in this particular case, the Minister of Transport had the requisite "affirmative regulatory duty" to act under the Navigable Waters Protection Act, for, by the terms of this statute, his approval was required for any work that might substantially interfere with navigation. By contrast, the Court held that the Minister of Fisheries fell short of having the requisite "affirmative duty to act" since, under the Fisheries Act, he only possessed a "limited ad hoc legislative power."

The Court went on to hold, however, that once the process had been triggered, as was the case here in light of the duties vested in the Minister of Transport under the Navigable Waters Protection Act, the scope of the assessment to be conducted was not restricted to the Minister's immediate area of responsibility. Rather, as the initiating department, the Minister was required by the terms of the Guidelines to make an assessment of the environmental effect of the project on all other relevant areas of federal jurisdiction.

A majority of the Court accordingly ordered the Minister of Transport to conduct the requisite environmental impact assessment, not only as regards any effect the dam might have on the navigability of the Oldman River, but also the effect it might have on other areas of federal jurisdiction that were relevant in this case, such as fisheries, Indians and Indian lands.

While concurring with the majority of the Court on its interpretation of the application and scope of the Guidelines, Mister Justice Stevenson, in a dissenting opinion, did not agree that the Minister of Transport should be ordered to conduct the review in this particular case. Having regard to the doctrine of "crown immunity", he stated that the province of Alberta, as a Crown entity, was not bound by the terms of the Navigable Waters Protection Act, and was not, therefore, obliged to obtain the approval of the Minister of Transport. As a result, the Minister did not have the requisite affirmative duty to act in this case, and could not, therefore, be an initiating department. Consequently, a writ of mandamus could not be issued against him.

This opinion was not shared by the other members of the Court. Noting that the provinces were among those bodies that were likely to engage in projects that might interfere with navigation, the majority of the Court stated that the province, while not expressly bound under the Act, was implicitly bound, as to hold otherwise would mean that the provinces could undermine the integrity of essential navigational networks in Canadian waters, thereby effectively emasculating the legislative purpose of the Act.

C. Constitutional Validity of the Guidelines

The last issue decided by the Court was whether the Guidelines were so sweeping as to offend the provinces' exclusive areas of jurisdiction under section 92 and 92A of theConstitution Act, 1867.

In this regard, the province of Alberta argued that the Guidelines were overbroad, for they purported to give to the federal government general authority over the environment in such a way as to trench on the province's exclusive legislative domain. In the province's view, Parliament did not have the constitutional authority to regulate the environmental effects of matters largely within the control of a province; in particular, it was incompetent to deal with the environmental effects of provincial works such as the Oldman River dam. The province of Saskatchewan, in turn, characterized the Guidelines as a "constitutional Trojan Horse" that enabled the federal government, on the pretext of some narrow ground of federal jurisdiction, to conduct a far ranging inquiry into matters exclusively within provincial jurisdiction.

The Court was unanimous in upholding the constitutional validity of the Guidelines. Recognizing that the "environment" was not an independent matter of legislation assigned to either level of government under the Constitution Act, 1867, and describing it as an "abstruse" matter that did not comfortably fit within the existing division of powers without considerable overlap and uncertainty, the Court stated that, in its generic sense, the environment encompassed the "physical, economic and social environment" and touched several heads of power assigned to the respective levels of government.

It went on to hold that the solution to the problem was first to look at the catalogue of powers under the Constitution Act, 1867 and to consider how these might be employed to meet or avoid environmental concerns. When viewed in this manner, the Court stated, it could be seen that both levels of government, in the exercise of their respective legislative powers, could affect the environment, either by acting or not acting. It stressed, however, that while both levels of government could act in relation to the environment, the exercise of legislative power had to be linked to an appropriate head of power, adding that, since the nature of the various heads of power differed under the Constitution Act, 1867, the extent to which environmental concerns could be taken into account in the exercise of a power might vary from one power to the next.

In the Court's view, Alberta's effort to characterize a work, such as the Oldman River dam, as a "provincial project" or an undertaking "primarily subject to provincial regulation" was not particularly helpful in sorting out the respective levels of constitutional authority. What was important, the Court held, was to determine whether either level of government could legislate. While local projects would generally fall within provincial responsibility, federal participation could be required if, as in this case, the project impinged upon an area of federal jurisdiction. The Court further held that, in enacting legislation in a given area, it was sufficient that the legislative body legislate on that subject. The practical purpose that inspired the legislation and the implications this body had to consider in making its decision were another matter. Absent a colourable purpose or a lack of bona fides, the Court held that these considerations would not detract from the fundamental nature of the legislation.

Warning against the dangers of falling into the conceptual trap of thinking of the environment as an extraneous matter in making legislative choices or administrative decisions, the Court further stated that the environment was comprised of all that was around us and, as such, had to be a part of what actuated many decisions of any moment. It held that environmental impact assessment was, in its simplest form, a planning tool that was now generally regarded as an integral component of sound decision making and, as a planning tool, it had both an information-gathering and decision-making component that provided the decision maker with an objective basis for granting or denying approval for a proposed development.

In the Court's view, the Guidelines did not attempt to regulate the environmental effects of matters within the control of the province, but merely made environmental impact assessment an essential component of federal decision making. The Court emphasized, however, that, because of its "auxiliary" nature, environmental impact assessment could affect only matters that were truly in relation to an institution or activity that was otherwise within federal legislative jurisdiction.

For the purposes of constitutional analysis, the Court stated that the Guidelines could be broken down into two fundamental components. The first component was their substantive aspect, which called for an environmental impact review to be conducted to facilitate decision making under the federal head of power through which a proposal was regulated. This component of the Guidelines could be sustained on the basis that it was legislation in relation to the relevant subject matters listed under section 91 of the Constitution Act, 1867. The second component was procedural or organizational in nature, in that it dealt with coordinating the process of assessment, which could touch upon several areas of responsibility. Stating that this component of the Guidelines had as its object the regulation of the institutions and agencies of the federal government as to the manner in which they were to discharge their functions, the Court held that this facet was unquestionably within the jurisdiction of Parliament, either as an adjunct of the particular powers involved or, in any event, it was justified under the residuary power regarding peace, order and good government.

Underscoring that the Guidelines essentially constituted an information-gathering process in furtherance of a decision-making function within federal jurisdiction, and that the decision maker was not bound by any recommendations that might be made pursuant to the review, the Court ultimately declared that the Guidelines were intra vires Parliament. It held that, in pith and substance, they were nothing more than an instrument that regulated the manner in which federal institutions were to administer their functions and duties. Consequently, they were nothing more than an adjunct of the federal legislative powers affected. In any event, the Court held that they fell within the purely residuary aspect of the "Peace, Order and good Government" power under section 91 of the Constitution Act, 1867. It added that any intrusion into provincial matters was merely incidental to the pith and substance of the legislation.

PART II: IMPLICATIONS FOR THE RECOMMENDATIONS OF THE COMMITTEE ON THE DIVISION OF POWERS ON ENVIRONMENTAL ISSUES

A. General

As the above discussion illustrates, the Supreme Court's decision will have major implications for environmental assessments, but it does not primarily or directly concern or impact on the division of legislative powers. The Committee's brief to the Special Joint Committee on a Renewed Canada focuses on this latter issue. Accordingly, it is not affected in any significant way by the judgment. Nevertheless, the following comments may be of some assistance to members of the Committee.

In paragraph 4, reference is made to Bill C-13, the Canadian Environmental Assessment Act. It is noted that in recent years "there has been disagreement about the respective roles of federal and provincial governments in regard to environmental assessments of major development proposals." The Oldman River decision is the classic example of this, and goes some way towards resolving the conflict.

The Committee also notes that "the prospect of new legislative arrangements explains why the Standing Committee did not, in its study and in its findings, focus on the issue of environmental assessment to the extent that it would have done in the absence of such legislation." As a result, the decision's impact insofar as the Committee's recommendations are concerned is also lessened.

It is possible that an additional comment could be added to the effect that the Committee's study was conducted and its recommendations made prior to the handing down of the Oldman River decision by the Supreme Court of Canada, and that the full implications of this decision have not yet been determined or incorporated into the report.

B. Recommendations

Conclusion 1 deals with the concept of sustainable development and is unaffected by the decision. (Since the Supreme Court adopted a very broad definition of "environment," this would appear, if anything, to support the Committee's position.)

Conclusion 2 states that the "present responsibility for the environment in Canada rests clearly with all levels of government." This point is developed in the commentary. Mr. Justice La Forest of the Supreme Court says the same thing: "I agree that the Constitution Act, 1867 has not assigned the matter of 'environment' sui generis to either the provinces or Parliament. The environment, as understood in its generic sense, encompasses the physical, economic and social environment touching several of the heads of power assigned to the respective levels of government." (p. 62) He also notes that the environment is a "diffuse subject."

The Oldman River decision supports the view that all levels of government have constitutional responsibility and authority for environmental issues. It gives the federal government the power to deal with the environmental aspects of federal powers, and,

conversely, the provinces the power to deal with the environment insofar as provincial legislative powers are concerned. The description of the present jurisdictional responsibility remains accurate. (In the sense that the Supreme Court seems to find that the EARP Guidelines are supportable in part under the residual power to make laws for the peace, order and good government of Canada, the statement in the last paragraph on page 5 is strengthened.)

In Conclusion 3, the Committee urges cooperation among jurisdictions, rather than a new division of powers. It is stated that "practically every aspect of modern life has an environmental dimension," and this is certainly consistent with the Court's judgment. A comment is also made to the effect that "the need for a strong central authority . . . seems unarguable." The Oldman River decision, by upholding the federal government's power and responsibility to conduct environmental impact assessments regarding areas of federal jurisdiction (at least if a federal decision is involved), would appear to buttress this statement. The decision clarifies some of the uncertainty that previously existed in this area.

The Supreme Court decision does not remove or reduce any provincial jurisdiction or power over environmental matters. The decision in fact gives weight to the concept of shared or concurrent jurisdiction, and could provide further impetus for "mechanisms . . . to develop partnership and cooperation." Since the federal government is required (in certain cases) to become involved, there will be a desire to avoid duplication or overlap by establishing joint environmental assessments and other systems.

The Nova Scotia Minister of the Environment is quoted (p. 7): "Environment is not a line department function. . ." This is entirely consistent with the Oldman River judgment, in which the environment is seen as an overarching concern, that permeates all of the legislative heads of power, and is ancillary to them rather than being a distinct or separate one.

Conclusion 13 deals with public access and involvement. There is nothing in the decision that affects this. (If anything, by authorizing federal environmental assessments, the decision could permit greater public participation, but this is an indirect result.)

Recommendation 4 is an important one: it urges that the environment be regarded as an area of shared jurisdiction, in which concurrency and partnership are the appropriate and effective bases for governmental action. As noted above, there is nothing in the Supreme Court judgment that is inconsistent with this proposal, and, in fact, the decision may provide additional support for such an approach. If the decision had rejected the idea of a federal role in such projects as the Oldman River dam, this would have weakened Ottawa's claims in environmental matters, and diminished the potential for partnership. As it is, the federal government is now in a position to argue that it must be involved in environmental matters. Mr. Justice La Forest's view of the environment as a "diffuse subject" means that both the federal and provincial levels of government have responsibilities and should work together.

It is important to appreciate that the Oldman River decision does not emasculate provincial powers over the environment. As mentioned earlier, the Attorney General for Saskatchewan characterized the EARP Guidelines as a "Trojan horse," enabling the federal government to conduct a far-ranging inquiry into matters that are exclusively within provincial jurisdiction.

The Court rejected this argument, noting that the Guidelines cannot be used "as a colourable device to invade areas of provincial jurisdiction which are unconnected to the relevant heads of federal power." (p. 72)

Under Recommendation 7, reference is made to the concern that the current constitutional division of powers causes frequent overlap and duplication of regulatory powers. It is unlikely that short of giving responsibility for the environment exclusively to one level of government or the other this can be constitutionally solved. It is a matter for negotiation and resolution at the political and administrative levels. The Oldman River decision appears to leave open the potential for some duplication and overlap, but it does not otherwise seem to affect the recommendation. As is also noted in the Report, joint or shared jurisdiction can also lead to complementary activities. The federal government is responsible for ensuring environmental assessments of areas of federal legislative power, and the provincial governments for those of provincial power.

The balance of the Committee's recommendations pertain quite specifically to the federal government's proposals for political renewal and do not appear to be adversely affected by the Oldman River decision. A number of points, however, can be made.

In Recommendation 8, which deals with the transfer or delegation of powers by the federal government to the provinces, the Committee notes that there is widespread doubt in the environmental community about the government's commitment to a strong federal role in environmental issues. This involves fundamentally a political judgment; insofar as the Supreme Court's decision strengthens Ottawa's hand, by unequivocally stating that it has jurisdiction over the environmental aspects of federal legislative powers, it should assist the federal government in its discussions with the provinces.

Recommendation 9 deals with proposals on administrative and legislative delegation. The Oldman River decision would appear to provide authority for the federal government to assume jurisdiction over environmental aspects of its constitutional legislative powers. Thus, one could argue that even if such powers are delegated, the ultimate environmental responsibility remains with Ottawa.

Recommendation 12 involves the federal residual power, and argues that it is one of the basic foundations for federal action to protect the environment and promote sustainable development, while Recommendation 10 deals with the "declaratory power." There does not appear to be anything in the Oldman River decision that would contradict these.

C. Conclusion

Mr. Justice La Forest says in his judgment: "It must be recognized that the environment is not an independent matter of legislation under the Constitution Act, 1867 and that it is a constitutionally abstruse matter which does not comfortably fit within the existing division of powers without considerable overlap and uncertainty. . . . [I]n exercising their respective legislative powers, both levels of government may affect the environment, either by acting or not acting." (pp. 63-64)

The Oldman River decision is obviously a fundamentally important decision for environmental regulation in Canada, and it will undoubtedly have widespread implications. The decision does not, however, adversely affect any of the Committee's recommendations regarding the division of powers on environmental issues. If anything, it supports many of the Committee's conclusions, and may be of assistance in their implementation.

APPENDIX B

LIST OF WITNESSES

Organizations and Individuals	Date	Issue
The Environmental Monitor and Synergistics Consulting Limited: Doug Miller, President.	September 26, 1991	6
The Canadian Consulate in Boston: The Honourable Tom MacMillan, P.C., Consul General.	September 26, 1991	6
The Native Council of Canada: Dan Smith, President.	October 1, 1991	7
The Inuit Tapirisat of Canada: Rosemarie Kuptana, President; Wendy Moss, Constitutional Advisor; Joe Otokiak, Executive Assistant.	October 3, 1991	8
The Environmental Law Institute, Washington: J. William Futrell, President.	October 8, 1991	9
Shell Canada: Jack MacLeod, President and Chief Executive Officer.	October 10, 1991	10
TransAlta Utilities: Ken McCready, President and Chief Executive Officer	October 10, 1991	10
The Rawson Academy of Aquatic Science: François Bregha, Director of Policy; Andrew Hamilton, Director of Special Projects.	October 23, 1991	12
The Assembly of First Nations: Chief Bill Wilson, Political Secretary.	October 24, 1991	13
The West Coast Environmental Law Association: William J. Andrews, Executive Director.	October 24, 1991	13

Organizations and Individuals	Date	Issue
The City of Toronto: Art Eggleton, Mayor; Robert Gale, Manager of the Environmental Protection Office, Public Health Department.	October 30, 1991	14
The Department of Environment: The Honourable Jean Charest, P.C., M.P., Minister of Environment; Karen Brown, Vice-president Policy and Regulatory Affairs, Federal Environmental Assessment Review Office.	October 31, 1991	15
The Canadian Bar Association: Melina Buckley, Associate Director Legislation and Law Reform; H. Scott Fairley, Chairman of Constitutional Law; Franklin Gertler, Chairman of Environmental Law; Brad Morse, Treasurer Native Justice.	November 5, 1991	16
The Canadian Environmental Law Association: Barbara Rutherford, Legal Counsel.	November 6, 1991	17
Pollution Probe: Paul Muldoon, Director of Programs.	November 6, 1991	17
The Sierra Club of Canada: Elizabeth May, National Representative.	November 6, 1991	17
The Mining Association of Canada: Keith Hendrick, Chairman and Chairman of Noranda Minerals Inc.; George Miller, President.	November 7, 1991	18
The Mining Association of British Columbia: Tom Waterland, President and Chief Executive Officer; Melvin H. Smith, Public Policy Consultant.	November 7, 1991	18

Organizations and Individuals	Date	Issue
The Canadian Electrical Association: Carole Burnham, Director of the Environment, Ontario Hydro; John Poirier, Solicitor, Nova Scotia Power; Hans Konow, Vice-President of Public Affairs; Lorne March, Director of the Environment, B.C. Hydro.	November 7, 1991	18
TransCanada Pipelines: Gerald J. Maier, President and Chief Executive Officer; John R. Jenkins, Consultant.	November 7, 1991	18
The Canadian Manufacturers' Association: Paul N. Summers, Chairman, National Environmental Quality Committee; Dorren C. Henley, Director, Environmental Affairs.	November 7, 1991	18

Request for a Government Response

Your Committee requests that the Government table a comprehensive response to this Report within 150 days of its tabling, in accordance with the provisions of Standing Order 109.

A copy of the relevant Minutes of Proceedings and Evidence (*Issues Nos. 4, 6, 7, 8, 9, 10, 12, 13, 14, 15, 16, 17, 18, 19, 21, 22, 23, 24, 26, 28, 29 and 30)* which includes this report is tabled.

Respectfully submitted,

DAVID MacDONALD,
Chairperson

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