

## THE ENVIRONMENT

## SHAPING CANADA'S FUTURE TOGETHER or A DOOMED ATTEMPT TO ESCAPE FROM REALITY

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From space, we see a small and fragile ball dominated not by human activity and edifice but by a pattern of clouds, oceans, greenery, and soils. Humanity's inability to fit its doings into that pattern is changing planetary systems, fundamentally. Many such changes are accompanied by life-threatening hazards. This new reality, from which there is no escape, must be recognized — and managed.

This quote is taken from page 1 of *Our Common Future*,<sup>1</sup> the 1987 report of the World Commission on Environment and Development. This Commission spent five years synthesizing the ideas of thousands of people from around the world in order to prepare their report: a document of nearly 400 pages which explains and illustrates the links between environmental degradation and current development patterns. Its conclusions may be summarized as follows: that we must change our current patterns of development and integrate environmental concerns into every sector of our political and economic institutions, or risk the very survival of life on earth. This new pattern of development — sustainable development — requires that the "ecological dimensions of policy be considered at the same time as the economic, trade, energy, agricultural, and other dimensions."<sup>2</sup> Every time. Starting now.

The Canadian federal government has stated publicly that it wholeheartedly endorses sustainable development. Indeed, as part of the new federal proposals for constitutional reform, our government has suggested that sustainable development is one of the fundamental characteristics of Canada and one of the underlying values of Canadian society.<sup>3</sup> It is hard to imagine a policy proposal of greater significance than the amendment of our constitution, so, of course, one might expect that the environmental implications of these proposals would be carefully considered — given the reality that sustainable development is a prerequisite for survival and that it will require "far-reaching changes to produce trade, capital and technology flows that are more equitable and better synchronized to environmental imperatives."<sup>4</sup> Yet an examination of the federal constitutional proposals reveals little by way of environmental protection and much that is environmentally dangerous, leaving one to wonder whether the drafters of the document have ever even read the World Commission report. Sustainable development does not mean sustaining current development levels or patterns, or putting economic prosperity first.

In 1990 a special committee of environmental law experts submitted a report to the Canadian Bar Association.<sup>5</sup> The Committee's mandate was to identify "key national and international law reform issues and

(make) recommendations to promote sustainable development in Canada."<sup>6</sup> Its report suggested federal leadership was "urgently required" and 197 recommendations were made for federal environmental law reform.<sup>7</sup> To give a few examples, it was suggested that the federal government:

- adopt a comprehensive national environmental agenda
- establish minimum national environmental standards
- expand the federal environmental impact assessment (EIA) process to include all new and existing initiatives, including policy, planning, expenditures, regulatory activities, permit practices and cost-shared programs
- provide citizens with environmental rights, including constitutional rights to a healthy environment
- develop legislation on solid waste management
- increase regulation of toxic substances and move toward both pollution prevention (not control) and zero discharge standards
- increase regulation of pesticides
- develop alternative energy sources
- develop strict marine pollution controls including coastal management programmes
- prohibit water diversions for export
- increase regulatory activity over pulp mills, forest harvesting and silviculture
- increase control over fisheries and endangered species management
- generally, increase the legislative and regulatory role relating to environmental protection including enforcement and compliance.

I would like to review briefly some of the specific proposals for constitutional reform to determine whether the federal government is heeding this advice about how to achieve sustainable development. I will limit my discussion to the proposals relating to the division of powers, including legislative inter-delegation.<sup>8</sup> As an aside, I should make clear my underlying premise that federal — provincial jurisdictional arguments ought not to be considered a justifiable excuse for government inaction in relation to environmental concerns, given that what is at stake is the "survival of the planet."<sup>9</sup>

First, the federal government is "prepared to recognize the exclusive jurisdiction of the provinces" in relation to tourism, forestry, mining, recreation, housing

and municipal/urban affairs. Under the existing constitutional regime the provinces already exercise primary jurisdiction in these areas due to their powers over 'public lands,' 'municipal institutions,' 'property and civil rights' and 'development, conservation and management of non-renewable natural resources and forestry.' So one might say that this is an empty proposal which means nothing from an environmental viewpoint.

Yet all of these areas have major environmental impacts. It may mean *something* to give 'exclusive' jurisdiction over forestry to the provinces, rather than their existing power to enact laws regarding 'development, conservation and management.' For example, how would this affect federal laws regulating pulp mill discharges into watercourses? Are pulp mill discharges part of 'forestry'? If so, would the federal laws become more vulnerable to challenge or, generally, lose the source of their constitutional validity?

If we give *exclusive* jurisdiction to the provinces, what happens to the impetus for developing national standards or a national forestry policy? What happens to the recommended increased role of the federal government in relation to harvesting and silviculture operations? Where is the increased federal role in environmental impact assessment? Can we continue to hold the federal government partially accountable for the way our forests are managed? Perhaps this subtle tinkering with legislative jurisdiction does nothing to the *status quo* but, if it does, it is hard to determine exactly what its effect is. Currently, the federal government can influence forest management via its use of the spending power and its 'trade and commerce,' 'peace, order and good government' (POGG) and 'fisheries' jurisdictions. Could provincial jurisdiction over all of 'forestry' result in a redefinition of the scope of such powers? Certainly, the proposal does nothing to clarify the extent of federal jurisdiction, and may in and of itself stifle federal initiative, particularly initiative which involves unilateral federal action.

One of the other constitutional reform proposals is to limit conditional transfers and the exercise of the federal spending power in areas of 'exclusive' provincial jurisdiction (unless 7 + 50 provincial approval<sup>10</sup> is obtained). By increasing the list of 'exclusive' provincial powers in environmentally-relevant subject areas, there is no doubt that in these areas the federal role in influencing policy through conditional grants and shared-cost programs could be inhibited. Environmental initiatives are usually costly and impeding the use of the federal spending power not only limits federal influence, but leaves provinces — including poor provinces — to try to pick up the tab. With more provincial control, but less federal money, some provinces simply could not proceed

with better environmental protection even if they wished to do so. While bilateral arrangements are still possible, at some point a number of bilateral agreements become a nation-wide program and open to scrutiny if the 7 + 50 standard is not met. Conversely, nation-wide shared cost programs are never initiated without substantial provincial agreement, so we may have another meaningless amendment which does not change the *status quo* in any readily definable way.

Second, we have two proposals designed to alter federal legislative jurisdiction which are relevant to environmental protection: the addition of s. 91A (power to manage the economic union) and 'clarification' of the federal residual power (POGG).

In relation to POGG, the federal government intends to retain its jurisdiction over national matters and emergencies, while transferring to the provinces authority for non-national matters unless specifically assigned to the federal Parliament in the constitution or by the courts. Environmental problems change over time and past experience shows that they frequently move from local matters to problems with regional, national or international implications. Under both the existing POGG clause and the new proposal, once a matter is 'national' in scope, the federal government can assume jurisdiction. Is this more meaningless tinkering? Or could it have adverse implications for issues such as the federal role in an expanded EIA process? What does this do to the recommended federal action in relation to solid waste management, including municipal waste? What about national enforcement and compliance standards for all environmental laws? At a minimum, nothing has been done which would help citizens, government or the courts decide when an issue has reached a 'national' dimension so as to justify federal intervention. Continued uncertainty about how to tell when a matter is 'national' means that nothing has been done to either encourage federal leadership, or discourage the use of jurisdictional arguments as an excuse for inaction.

Section 91A is designed to create a new federal power to manage the 'economic union', subject to 7 + 50 provincial approval; provincial ability to 'opt out' is also suggested. Given the links between economic matters and environmental issues this provision has enormous environmental implications. Undoubtedly, this could limit unilateral federal initiatives under the general trade and commerce power and thus might inhibit the expansion of federal EIA or the introduction of new measures in relation to fisheries, forestry, water export and other resource developments. Again, we see a provision which has the potential to stifle unilateral federal initiatives which might be environmentally advantageous. In addition, there is nothing in the proposal, or the mandate of the proposed Council of the

Federation which would oversee its use, which requires the government to consider the environmental impacts of economic decision-making.

Finally, there is the proposal for legislative inter-delegation. This, effectively, permits bilateral federal-provincial agreement to delegate legislative authority between levels of government over any issue which seems politically desirable, regardless of whether it is environmentally desirable. This circumvents the need for future constitutional amendments to transfer legislative powers, including powers over the environment. EIA is the obvious candidate for transfer to the provinces, given that Conservative House Leader Harvie Andre was reported to have said that the federal government "wants to leave the provinces as the primary decision-makers on developments that don't cross provincial boundaries" and specifically expressed concern over duplication of environmental review processes.<sup>11</sup> Areas targeted by the federal government for 'streamlining', probably under the proposed inter-delegation power, include wildlife conservation, transportation of dangerous goods, soil and water conservation, and inspection programs in areas such as fisheries.

Again, one might say that nothing is done here that could not be done by administrative inter-delegation under the current constitution although, arguably, a legislative inter-delegation is more cumbersome to repeal. Presumably inter-delegation could be used to *add* to federal environmental powers so that sustainable development goals could be reached. Yet, viewed in concert with the previous provisions and in light of the current federal government's not-so-hidden agenda as expressed by the House Leader, it seems that *provinces* are given an increased role while the federal government gets to save substantial sums of money — money it would otherwise need to spend on the enormously expensive implementation of sustainable development. If provinces overexploit resources or cannot take effective action due to the costs involved in environmental protection, the federal government may have a nice excuse for inaction (it's now a provincial responsibility). Thus, these proposals seem to be in direct opposition to the recommended and "urgently required" federal leadership in environmental issues.

To summarize, I would say that the new constitutional reform proposals do not involve a radical change to the existing division of powers. That is a major flaw. Nothing has been done to clarify environmental jurisdiction. Nothing has been done to expand federal jurisdiction to permit a national environmental agenda to be implemented. The option of express concurrent jurisdiction has not been explored. If anything, some of the measures may well dampen federal initiative and provide further excuses for inaction.

My primary suggestion in relation to the constitutional reform proposals is this: we should do a full environmental impact assessment of the entire reform package. Only in this way can we fully explore in advance what the environmental implications of this proposal might be and integrate environmental considerations into our decision-making as required by our "commitment to the objective of sustainable development." In addition, we must consider amending the proposal to ensure that environmental jurisdiction is clarified, to eliminate disincentives to decisive government action, to consider the merits of particular changes (such as requiring an EIA before permitting legislative interdelegation) and to consider the inclusion of a constitutionally-protected right to a healthy environment.

Life on earth may be in jeopardy if we cannot change our development patterns and become environmentally responsible. This is reality according to the World Commission on Environment and Development. We must stop parroting their words in a "Canada clause" that has all the substance of Santa Claus. Canadians deserve some action now. The citizens of this country need to tell our federal government to quit trying to escape from reality and get started on the job of *truly* shaping Canada's future together.

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1. World Commission on Environment and Development, *Our Common Future* (Oxford: Oxford University Press, 1987).

2. *Ibid.* at 39.

3. *Shaping Canada's Future Together: Proposals* (Ottawa: Minister of Supply and Services, 1991) at 9-10, proposes that the "Canada clause" in s. 2 of the Constitution entrench 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."

4. WCED, *supra* note 1, at 41.

5. *Sustainable Development in Canada: Options for Law Reform* (Ottawa: CBA, 1990)

6. *Ibid.* at (i).

7. *Ibid.* at 27-54.

8. There are several other provisions in the constitutional proposals of environmental concern. For example, the proposed property rights clause in the Charter raises concerns about the validity of environmental standards that restrict certain uses of private property. Also, the proposed common market clause (s. 121) might invalidate any environmental standards that could be construed as trade barriers.

9. WCED, *supra* note 1, at 23.

10. Approval of at least 7 of 10 provinces representing at least 50% of the Canadian population.

11. M. Tait, "Environment Under Review" *Calgary Herald* (28 September 1991).