

# **Enhancing Environmental Protection In The Canadian Constitution:**

## **Comments on the Federal Government's Constitutional Proposals**

by

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**Revised October 23, 1991**

### **EXECUTIVE SUMMARY**

1. West Coast Environmental Law Association applauds the federal government's proposed constitutional commitment to protection of the environment, and the Minister of Constitutional Affairs' statement that the government's intention is not to weaken the federal role in protecting the environment. A strong federal role in protecting the environment is of critical importance.

2. The proposals in this brief for strengthening the ability of the Constitution of Canada to foster protection of the environment are predicated on the recognition that the Canadian Constitution will not be complete until the legal relationship between Canada and Native peoples is resolved on a basis of mutual trust and respect.

3. This brief is offered in a spirit of cooperation with people from Quebec, Newfoundland, Nova Scotia, New Brunswick, Prince Edward Island, Ontario, Manitoba, Saskatchewan, Alberta, the Yukon and the Northwest Territories. We know they all want essentially the same as we do: satisfactory constitutional arrangements and protection of the environment we all love.

4. The proposals' failure to link a prosperous economy and human health with a sustainable environment is a glaring betrayal of Canada's Green Plan and must be rectified throughout the constitutional package.

5. The constitutional package should explicitly acknowledge the fundamental importance of maintaining and enhancing biodiversity, including the survival of threatened species, subspecies and their ecosystems.

6. The proposed recognition of a commitment to environmental protection should be bolstered by the inclusion of key environmental principles:

- the obligation to act to protect the environment,
- the precautionary principle,

- the polluter pays principle,
- prior environmental assessment, and
- opportunities for public participation.

7. Canadians want strong federal leadership in protecting the environment.

8. The federal government's constitutional authority to implement Canada's international environmental commitments should be explicitly entrenched in a modernized constitution.

9. Federal jurisdiction over the environmental aspects of tourism, forestry, mining, recreation, housing and municipal/urban affairs should not be diminished.

10. Federal-provincial cooperation is highly desirable, but any delegation of federal environmental authority to the provinces should be subject to strong federal leadership, accountability and opportunities for public participation.

11. The government's declaration that the environment is held in trust is highly significant and should be made legally enforceable.

12. Correspondingly, environmental rights should be enshrined in the Charter of Rights and Freedoms.

13. The proposed entrenchment of private property rights in the Charter would inhibit measures by government to protect the environment and should not be pursued.

## Part 1

### Introduction

West Coast Environmental Law Association<sup>1</sup>

Since 1974 the West Coast Environmental Law Association has provided legal services to members of the public who are concerned about threats to the environment. WCELA and the West Coast Environmental Law Research Foundation provide legal representation, promote law reform, conduct education and research, and maintain a library of environmental legal materials.

The primary focus of WCELA/RF is not on constitutional issues but on the 'basics' of environmental law: closing the gaps in the regulatory system, improving environmental standards and ensuring enforcement. But the current proposals to revamp Canada's constitution offer many opportunities -- and many potential pitfalls -- for strengthening environmental law Canada. We feel compelled to make a contribution to the public discussion at this crucial stage in Canada's history.

This brief is a starting point. It should be considered 'work in progress.' As we consult about these issues with others in British Columbia and from across Canada our ideas are evolving. Moreover, making useful constitutional proposals is more a matter of working toward consensus than of presenting the 'perfect' solution. Thus, we look forward to improving the recommendations in this brief in the future.

a firm foundation

As British Columbians committed to protecting our environment we are particularly aware that Native peoples in B.C. -- and throughout Canada -- have a history of what we would call 'protecting the environment' that greatly predates the arrival of the settlers who formed the country of Canada. The

proposals in this brief for strengthening the ability of the Constitution of Canada to foster protection of the environment are predicated on the recognition that the Canadian Constitution will not be complete until the legal relationship between Canada and Native peoples is resolved on a basis of mutual trust and respect.

joining together

We are Canadians whose home is in British Columbia and we bring this perspective to Canada's current constitutional discussions. We know from our extensive contacts with environmentally concerned residents of all of the other provinces and territories that they bring their own perspectives to these discussions. What we have heard from many people from Quebec is a particular sense of not being comfortable with the existing constitutional arrangements. This brief is offered in a spirit of cooperation with people from Quebec, Newfoundland, Nova Scotia, New Brunswick, Prince Edward Island, Ontario, Manitoba, Saskatchewan, Alberta, the Yukon and the Northwest Territories. We know they all want essentially the same as we do: satisfactory constitutional arrangements and protection of the environment we all love.

## **Part 2**

### **Environment on the Political Agenda**

#### A Constitutional Commitment to the Environment

It is often said that when the Fathers of Confederation drafted the terms of Canada's confederation in 1867 the environment was not mentioned because the term 'environment' was not used at that time. In 1991, however, it certainly cannot be said that the environment is an unknown concept. In fact, concern for protection of the environment is now a mainstream Canadian value.<sup>2</sup> The Canadian Council of Ministers of the Environment has stated:

Never before have people been as concerned about the state of the environment in which they live. And, unfortunately, never in history has there been as much reason for concern. We discover almost daily how much harm we have inflicted on the environment and how much needs to be done to preserve it for future generations.

Consequently, Canadians are making unprecedented demands on their government to preserve, protect and repair all aspects of the environment. Canada's federal, provincial and territorial governments are being asked to work together in addressing the large number of environmental issues being introduced to the public agenda. Canadians want their governments to make the environment a high priority on their political agendas ...<sup>3</sup>

Canadians are not alone in wanting to put environmental concerns on the political agenda. The World Commission on Environment and Development states:

When the century began, neither human numbers nor technology had the power to radically alter planetary systems. As the century closes, not only do vastly increased human numbers and their activities have that power, but major, unintended changes are occurring in the atmosphere, in soils, in waters, among plants and animals, and in the relationships among all of these. The rate of change is outstripping the ability of scientific disciplines and our current capabilities to assess and advise. It is frustrating the attempts of political and economic institutions, which evolved in a different, more fragmented world, to adapt and cope. It deeply worries many people who are seeking ways to place those concerns on the political agendas.<sup>4</sup>

Fortunately, environmental concerns are beginning to reach the Canadian political agenda. In introducing Canada's recently released Green Plan For A Healthy Environment,<sup>5</sup> Prime Minister Brian Mulroney stated:

Canada's natural environment has shaped the development of our character and spirit...The challenge we now face is to build upon our economic strengths in harmony with our environment, the basis of our health and prosperity.<sup>6</sup>

The Green Plan elaborates on the environmental problem:

[W]hile we have an economy that relies heavily on our environmental resources, there is growing evidence that we have not fully been meeting our environmental responsibilities.<sup>7</sup>

In the midst of the affluence we have created comes a worrisome concern: is it possible that we who are history's most affluent and technologically sophisticated society will not be able to maintain what we have for ourselves and our children? Have we reached the limit of the earth's ability to accommodate our aspirations?<sup>8</sup>

It comes as no surprise, therefore, that the federal government has put environmental problems on the agenda of Canada's current round of constitutional reforms. In discussing the pressures for reform of Canada's constitution, the government notes that:

Global forces are affecting the sovereignty of states and increasing their interdependence. Even the largest states are proving too small to cope alone with many of their economic, security and environmental problems.<sup>9</sup>

The government proposes enshrining constitutional recognition of the Canadians' environmental values by expressing in the proposed Canada Clause:

The Government of Canada proposes ... a Canada clause that acknowledges ... 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 ...<sup>10</sup>

### Need for Improvements

This proposal, 124 years after Confederation, 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.

Thus, we are pleased to note that the federal government has invited submissions from Canadians on ways to improve its constitutional proposals:

The process is open, not closed. The government's proposals are flexible, not final. We are at a new beginning, not an end, of constitutional discussions among Canadians.<sup>11</sup>

This brief is a response to that invitation. In Part 3 we address the key environmental principles that should be reflected in the constitution. In Part 4 we argue for a strong federal role in environmental protection and set out recommendations aimed at achieving that purpose. In Part 5 we discuss rights and responsibilities: recommending that the government's proposed environmental trust be made legally enforceable and that

environmental rights be added to the Charter of Rights and Freedoms. In Part 6 we examine and reject the government's brief suggestion that property rights be added to the Charter.

## Part 3

### Key Environmental Values

Environment, economy and health

The government's proposed recognition of environmental protection in the Canada Clause is a constitutional first for Canada. But the value of this initiative is drastically undermined by the government's conspicuous failure to link the well-being of Canadians and the often-repeated goal of economic prosperity with the need for ecological sustainability.

It is worth repeating the government's assessment of one of the pressures for constitutional reform, cited above:

Even the largest states are proving too small to cope alone with many of their economic, security and environmental problems.<sup>12</sup>

The connections between these problems were clearly summarized by the World Commission on Environment and Development:

Until recently, the planet was a large world in which human activities and their effects were neatly compartmentalized within nations, within sectors (energy, agricultural, trade), and within broad areas of concern (environmental, economic, social). These compartments have begun to dissolve. This applies in particular to the various global 'crises' that have seized public concern, particularly over the past decade. These are not separate crises: an environmental crisis, a development crisis, and energy crisis. They are all one.<sup>13</sup>

The Commission also stated:

The ability to choose policy paths that are sustainable requires that the ecological dimensions of policy be considered at the same time as the economic, trade, energy, agricultural, industrial and other dimensions -- on the same agendas and in the same national and international institutions. That is the chief institutional challenge of the 1990s.<sup>14</sup>

This recognition that economic and environmental issues are interdependent was adopted by the National Task Force on Environment and Economy,<sup>15</sup> whose 1987 report was endorsed by all of the First Ministers of Canada. The Task Force stated:

Our recommendations reflect the principles that we hold in common with the World Commission on Environment and Development (WCED). These include the fundamental belief that environmental and economic planning cannot proceed in separate spheres. Long-term economic growth depends on a healthy environment.<sup>16</sup>

The Task Force highlighted both the scope and necessity of integrating economic and environmental decision-making:

Complete integration of the environment and the economy would be a tall order in any country; it is made no easier by the complexities of the Canadian mosaic. We believe, however, that such integration is possible. In fact, we believe it is absolutely necessary.<sup>17</sup>

The Prime Minister emphasized this interdependence in his introduction to the Green Plan:

The Green Plan will help Canada be a country which is both economically prosperous and environmentally healthy.<sup>18</sup>

Yet, astonishingly, nowhere in the government's constitutional proposals except in the passage cited above are the economy and the environment even discussed in the same context, despite the fact that the economy and economic prosperity are raised on numerous occasions throughout the document. This glaring deficiency must be corrected. Canada cannot afford -- economically or environmentally -- to pay lipservice to the environment-economy linkage while at the same time proposing major constitutional changes regarding economic powers without mentioning the environmental consequences of the exercise of such powers.

Similarly, Canada's new constitution must explicitly acknowledge that the health of Canadians is predicated on a healthy environment. Canada's Green Plan makes this connection abundantly clear. In a Chapter entitled "Life's Three Essentials -- Clean Air, Water and Land," and subtitled "Our Health and the Environment are Inseparable," the federal government states:

Human health, the environment and the economy are inextricably linked. We humans arrive on Earth as individual beings, each with our own traits imprinted into our unique genetic structure. From the moment we enter the world, however, we exist not simply as individuals, but also as highly active parts of an ecosystem that is itself alive and finite. The health of that environment determines the health and safety not only of ourselves, but of our children, and of theirs, and of theirs to follow.

While our economic activities have contributed greatly to the development of society and the expansion of our populations, it is those same economic activities that are overloading much of the world's environment. Deforestation, pollution and the extinction of wildlife species are but a few of the well-known consequences of human activity. In turn, as the environment becomes less healthy, the health of individuals and the economy can be adversely affected...<sup>19</sup>

However, the impact of the environment on human health involves more than physical well-being. The spiritual, psychological, social and emotional health of individuals is affected by the health of the environment as well. This applies to both our natural environment and our day-to-day surroundings -- homes, workplaces, neighbourhoods and communities. Forest wastelands, polluted lakes and unbreathable air have a profound effect on the human psyche.

Human health is an important consideration in every environmental issue, from toxic substances and ozone depletion to waste management and the treatment of our renewable resources. To ensure long-term good health, Canadians need clean air, water and land.<sup>20</sup>

A report for the Canadian Council of Minister of the Environment found that:

[A]lmost nine in ten Canadians feel that their long term health already has been affected by pollution levels in their area. Three-quarters of our population feels that pollution is a major cause of cancer. Perhaps most alarmingly, eighty-five per cent of the population considers pollution problems already serious enough to threaten the very survival of the human race.<sup>21</sup>

It is clear that the environment, the economy and human health are inseparable, and this should be reflected in a modernized Canadian constitution.

## Recommendation

1. ENVIRONMENT, ECONOMY AND HEALTH. We recommend that the Government of Canada revise its constitutional proposals by explicitly acknowledging throughout the package the inseparable connection between protecting the environment and the goals of economic prosperity and human health.

biodiversity

Biodiversity "means the genetic variability within a particular species, the variability among all living species and the variability of the ecosystems they form."<sup>22</sup>

Biodiversity in the world today is under attack. The World Commission on Environment and Development states:

There is a growing scientific consensus that species are disappearing at rates never before witnessed on the planet.<sup>23</sup>

Habitat alteration and species extinction are not the only threat. The planet is also being impoverished by the loss of races and varieties within species. The variety of genetic riches inherent in one single species can be seen in the variability manifested in the many races of dogs, or the many specialized types of maize developed by the breeders.<sup>24</sup>

While extinction is a natural phenomenon, one particular species, homo sapiens, is significantly accelerating the rate at which species are disappearing. The Commission states:

Extinction has been a fact of life since life first emerged. The present few million species are the modern-day survivors of the estimated half-billion species that have ever existed. Almost all past extinctions have occurred by natural processes, but today human activities are overwhelmingly the main cause of extinctions.<sup>25</sup>

The United States Endangered Species Act states:

The Congress finds and declares that ... various species of fish, wildlife and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation ... [T]hese species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people.<sup>26</sup>

There are two basic reasons why people care about promoting biodiversity:

- self-interest (we need a wide gene pool and healthy ecosystems for our own benefit) or enlightened self-interest (we should respect even 'useless' species because someday they may turn out to be important to us); and
- morality (it is good to respect ecosystems and other species).

The self-interest rationale is well stated by the World Commission on Environment and Development:

Conservation of living natural resources -- plants, animals, and micro-organisms, and the non-living elements of the environment on which they depend -- is crucial for development... Species and their genetic materials promise to play an expanding role in development, and a powerful economic rationale is emerging to bolster the ethical, aesthetic, and scientific cases for preserving them ... Equally important are the vital life processes carried out by nature, including stabilization of climate, protection of watersheds and

soil, preservation of nurseries and breeding grounds, and so on. Conserving these processes cannot be divorced from conserving the individual species within natural ecosystems.<sup>27</sup>

Canadians can take pride in the fact that the non-selfish rationale for protecting biodiversity is illustrated by the history of the development of the Canadian Environmental Protection Act.<sup>28</sup> When the Act was first proposed, it referred throughout to "the environment on which human life and health depend." Legally, this stemmed from an effort to base the new law on the federal government's criminal law power<sup>29</sup> to protect human health. But in response to public pressure to widen the Act to protect the environment for its own sake -- not just for the sake of human health -- the proposed Act was amended. Its legal base was broadened to include the federal government's Peace, Order and Good Government power, and the Act is now explicitly an Act "respecting the protection of the environment and of human life and health."<sup>30</sup> The preamble now states:

It is thereby declared that the protection of the environment is essential to the well-being of Canada.<sup>31</sup>

It is crucial that a commitment to foster biodiversity be included as an integral part of the recognition of the importance of environmental protection in the constitution. The World Commission on Environment and Development states:

[B]efore science can focus on new ways to conserve species, policymakers and the general public for whom policy is made must grasp the size and the urgency of the threat.<sup>32</sup>

Unless appropriate management measures are taken over the longer term, at least one-quarter, possibly one-third, and conceivably a still larger share of species existing today could be lost<sup>33</sup> ... There is still time to save species and their ecosystems. It is an indispensable prerequisite for sustainable development. Our failure to do so will not be forgiven by future generations<sup>34</sup> ... A first priority is to establish the problem of disappearing species and threatened ecosystems on political agendas as a major resource issue.<sup>35</sup>

The Government of Canada agrees:

The federal government believes that protecting and enhancing Canada's natural heritage is of vital importance. Canada's rich biological diversity must be a major component of our legacy to future generations. It represents a significant portion of the world's biodiversity, provides millions of Canadians with highly valued recreational opportunities and forms the basis of many subsistence and recreation-based economies.<sup>36</sup>

The federal government also states:

Despite its importance, biodiversity continues to be threatened in Canada and around the world.<sup>37</sup> ... Biodiversity sustains life and produces the environmental wealth upon which our economy depends. As a signatory to the United Nations World Charter for Nature, Canada recognizes the inherent right of all species to exist.<sup>38</sup>

Promoting biodiversity is a fundamental component of protecting the environment and should be recognized as such in the constitution.

## **Recommendation**

2. BIODIVERSITY. We recommend that the Government of Canada incorporate into its constitutional proposals explicit acknowledgement of the intrinsic value of nature and the fundamental importance of maintaining and enhancing biodiversity, including the survival of threatened species, subspecies and their ecosystems.



## ENVIRONMENTAL principles

### Responsibility to Act

An important component of Canadians' commitment to protection of the environment is acknowledgement of a responsibility to take steps -- personally and collectively -- to achieve this shared goal. The Prime Minister stated in introducing Canada's Green Plan:

Every Canadian has a role to play in achieving this goal of sustainable development. When everyone contributes, everyone benefits.<sup>39</sup>

The Plan itself states:

The environment is everyone's responsibility.<sup>40</sup> ... The Green Plan recognizes that, while government have responsibility to provide leadership, only society as a whole can produce the changes we need to meet the economic and environmental challenges of the 1990s and beyond. This is a national challenge requiring the individual and collective efforts of all Canadians.<sup>41</sup>

This emphasis on both government leadership and participation by other segments of society was also highlighted by the National Task Force on Environment and Economy:

In a new era of environmentally sound economic development, a full partnership of governments, industry, non-government organizations and the general public must guide us through an integrated approach to environment and economy. Environmental organizations will continue to fulfill an important role as advocates for the environment. Governments and industry, however, must develop and assume new responsibilities to successfully integrate environmental considerations into economic planning.<sup>42</sup>

The Canadian Council of Ministers of the Environment has acknowledged the responsibility of all Canadians to take steps to protect the environment and has specifically committed each government to take such actions:

Whereas ... all Canadians, individually and collectively, share responsibility for the protection, conservation and enhancement of the environment for use by present and future generations; ...

Therefore, the Governments adopt the following principles to guide interjurisdictional cooperation:

### Action Commitment

Each order of government is committed to act on environmental matters within its areas of jurisdiction while respecting the jurisdiction of other governments.<sup>43</sup>

We recommend below that a revised Canadian constitution acknowledge that Canadians bear a personal and collective responsibility to protect the local, national and global environment.

### The Precautionary Principle

The traditional approach has been to allow the release of pollutants or other activities that may harm the environment until it is proven that a particular pollutant or activity is harmful to humans or the environment. This traditional approach has led directly to the environmental problems the world suffers today.

In contrast, a new approach -- the precautionary principle -- is gaining widespread acceptance.<sup>44</sup> Cameron and Abouchar define the precautionary principle as follows:

[T]he precautionary principle ensures that a substance or activity posing a threat to the environment is prevented from adversely affecting the environment, even if there is no conclusive scientific proof linking that particular substance or activity to environmental damage.<sup>45</sup>

The scientific basis for the precautionary principle is clear. Speaking about pollution from toxic chemicals, the Great Lakes Science Advisory Board has stated:

The current requirement for 'proof' of harm creates a situation that can resolve itself only through costly errors. One by one 'proof' of harm can never keep pace with the rates of introduction of chemicals.<sup>46</sup>

Gro Brundtland, Chair of the World Commission on Environment and Development, has stated:

I will add my strong support to those who say that we cannot delay action until all scientific facts are on the tables. We already know enough to start to act -- and to act more forcefully. We know the time it takes from decision through implementation to practical effects. We know that it costs more to repair environmental damage than to prevent it. If we err in our decisions affecting the future of our children and our planet, let us err on the side of caution.<sup>47</sup>

The precautionary principle has been adopted by the United Nations Environmental Programme (UNEP) Governing Council, and accepted by four major international declarations on the dumping of waste at sea. It was reaffirmed by the North Sea Conference and referred to in the Montreal Protocol on Substances that Deplete the Ozone Layer. Canada supported the inclusion of the precautionary principle in the Bergen Ministerial Declaration,<sup>48</sup> a Declaration endorsed by 34 countries:

In order to achieve sustainable development, policies must be based on the precautionary principle. Environmental measures must anticipate, prevent, and attack the causes of environmental degradation. Where there are threats of serious or irreversible damage, lack of scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.<sup>49</sup>

In the Green Plan, the federal government expressed the precautionary principle as follows:

The Government of Canada has adopted the following principles as the basis for its own efforts to secure a safe and healthy environment, and a sound and prosperous economy ... Respect for nature also implies an attitude of prudence. Human actions can wreak serious, irreversible damage on the environment. Yet deciding on an action, we rarely know all its environmental ramifications. Caution is therefore appropriate: we must be prepared to give nature the benefit of the doubt. We should err on the side of protecting the environment.<sup>50</sup>

The Federal Standing Committee on Environment has eloquently highlighted the importance of the precautionary approach in relation to responding to global warming. The cover of Part II of the "Our Changing Atmosphere" series states:

By the time scientists have all the answers to these questions, global climate change may have been driven by human society to the point where the answers are largely academic.<sup>51</sup>

Cameron and Abouchar note that:

The Treaty of Rome, the constituent instrument of the European Economic Community, now provides for preventative action by the Community for the purpose of environmental protection. Article 130r,

introduced by the Single European Act, requires that actions by the Community relating to the environment be based on the principle that preventative action should be taken ...<sup>52</sup>

The precautionary principle is a fundamental aspect of Canadians' shared respect for the environment and should be explicitly acknowledged in the Constitution of Canada.

#### The Polluter Pays Principle

Most Western countries including Canada have now adopted the 'polluter pays principle.'<sup>53</sup> The federal government's Canada's Green Plan for a Healthy Environment states this principle succinctly:

To encourage efficient use of resources, we must adopt the rule that the polluter or user pays. Whoever causes environmental degradation or resource depletion should bear the full cost.<sup>54</sup>

In Europe, the Single European Act requires that environmental actions by the European Economic Community "be based on the principle that ... polluters should pay for environmental damage."<sup>55</sup>

Assigning financial responsibility for actions that have adverse environmental consequences is a principle of obvious importance in our market-based society. People tend to waste things that are underpriced. Acknowledging Canada's commitment to the 'polluter pays' principle in the Constitution would provide an important addition to the Government's proposed recognition of a commitment to protecting the environment.

#### Prior Environmental Assessment

Mandatory environmental assessment of the potential adverse environmental consequences of proposed activities was first implemented on a major scale by the United States National Environmental Policy Act of 1969. Canada followed shortly afterward with the federal Environmental Assessment and Review Process in 1973.<sup>56</sup> This Process requires that:

[federal departments] shall, as early in the planning process as possible and before irrevocable decisions are taken, ensure that the environmental implications of all proposals ... are fully considered ...<sup>57</sup>

In introducing legislation to upgrade Canada's environmental assessment process in 1990, federal environment minister Robert de Cotret said that:

In essence, the concept of environmental assessment is no more complex than the age-old wisdom that 'an ounce of prevention is worth a pound of cure'. Good environmental assessment means good planning and good planning means good business and a better environment for all Canadians.<sup>58</sup>

The World Commission on Environment and Development's Experts Group on Environmental Law recommends that environmental assessment be enshrined among the "Legal Principles for Environmental Protection and Sustainable Development":

The ability to choose policy paths that are sustainable requires that the ecological dimensions of policy be considered at the same time as the economic, trade, energy, agricultural, industrial and other dimensions -- on the same agendas and in the same national and international institutions. That is the chief institutional challenge of the 1990s.<sup>59</sup>

We recommend below that this principle be adopted in a new Canadian constitution.

#### Public Participation

Public participation is a fundamental aspect of protecting the environment. Canada has strongly endorsed the legitimacy of public participation in governmental decision-making.

The federal Citizen's Code of Regulatory Fairness requires regulators to provide "adequate early notice of possible regulatory initiatives" and to "encourage and facilitate an opportunity for full consultation and participation by Canadians in the federal regulatory process."<sup>60</sup> In practice, federal environmental regulators usually do provide this notice and opportunity for comment. In addition, federal procedures require draft regulations to be published for public comment at least 30 days prior to finalization<sup>61</sup> and certain statutes, such as the Canadian Environmental Protection Act, require 60 days for public comment.<sup>62</sup>

The World Commission on Environment and Development emphasized the importance of public participation:

In its broadest sense, the strategy for sustainable development aims to promote harmony among human beings and between humanity and nature. In the specific context of the development and environment crises of the 1980s, which current national and international political and economic institutions have not and perhaps cannot overcome, the pursuit of sustainable development requires ... a political system that secures effective citizen participation in decision making ...<sup>63</sup>

The right of members of the public to participate in pollution prevention decision-making is of fundamental importance for five main reasons:

- Citizens have a democratic right to participate in decision-making affecting our common environment. They are simply not satisfied that regulators and polluters have done an adequate job of protecting the environment in the past.
- Members of the public have many constructive ideas and practical knowledge to contribute toward solving pollution problems.
- Changes in personal behavior are one critical element of preventing pollution, and people will learn why and how to make these changes through participating in solving pollution problems.
- Social justice demands that if certain citizens are asked to bear the risks of measures for the benefit of society as a whole -- such as when decisions are made regarding management of residual pollutants -- then they should have a full opportunity to participate in the decision-making.
- Administrative fairness necessitates that if the polluters are to be consulted on regulatory changes, then others who consider themselves affected should be consulted as well.

The Prime Minister has acknowledged the importance of public participation in environmental decision-making:

Canada's Green Plan for a healthy environment was developed in consultation with Canadians from all walks of life. ... The Green Plan expresses the Government's commitment to work with Canadians to manage our resources prudently and to encourage sensitive environmental decision-making.<sup>64</sup>

The Law Reform Commission of Canada has commented on the trend toward increasing opportunities for public participation in environmental decision-making:

At the legislative level, citizen participation had undergone a remarkable transition over the past 30 years, from virtually no statutory recognition of a role for the public in the 1960's legislation to express commitments to citizen involvement in virtually all stages of the process provided in the legislation introduced in 1987.<sup>65</sup>

Canada's democratic parliamentary system of government is characterized by a commitment to reasonable opportunities for public participation in governmental decision-making, and this should be explicitly recognized.

## **Recommendation**

3. ENVIRONMENTAL PRINCIPLES. We recommend that the Government of Canada incorporate into its constitutional proposals the following key environmental principles:

(1) that Canadians and their governments bear a personal and collective responsibility to protect the local, national and global environment, (2) that actions must be taken to protect the environment without waiting for conclusive proof of harm (the precautionary principle), (3) that whoever causes environmental degradation or resource depletion should bear the full cost (the polluter pays principle), (4) that a full assessment of the potential environmental consequences of proposed activities, policies and programs should be completed before irrevocable decisions are made, and (5) that reasonable opportunities for public participation in environmental decision-making by government is characteristic of Canada's democratic parliamentary system of government.

## **Part 4**

### **A Strong federal ENVIRONMENTAL role**

#### Need for Federal Leadership

We strongly support a strong federal role in protecting the environment. Potential overlap with the efforts of provincial governments should be minimized through the use of administrative arrangements, not by devolving federal environmental authority to the various provinces.

There are at least three reasons for a strong federal role in environmental protection. First, the environment is Canadians' national heritage. Every Canadian has a right to have that heritage protected. It follows that every Canadian has a right to reasonable protection of all of the Canadian environment, not merely the environment of the province in which he or she lives. It is important that the federal government set minimum environmental standards so that provinces are not tempted to compete among themselves to attract industry by cutting environmental standards.

The importance of retaining strong federal leadership in the setting of environmental standards is highlighted indirectly by the government's constitutional package itself. The government uses "non-harmonized regulation of environmental standards"<sup>66</sup> as an example of an unintentional impediment to interprovincial mobility.

Second, many environmental issues, even local environmental issues, have national, international or global aspects. The Green Plan notes:

While control over the source of the problem may still require local action, the policy direction is often determined at a regional, national or even global level.<sup>67</sup>

Third, the federal government has a wide variety of obligations in relation to international commitments, its ownership of vast tracts of land and its broad legislative jurisdictions which require it to contend with environmental problems. Canada's constitution must ensure that the federal government's ability to fulfill its responsibilities in this regard is not fettered by balkanization of environmental authority among the ten provinces.

The Green Plan acknowledges that:

... Canadians are demanding that their national government play an active leadership role on environmental issues.<sup>68</sup>

The Plan states that the federal government "must and will act to protect the environment in its own areas of jurisdiction."<sup>69</sup> It emphasizes cooperative arrangements between federal, provincial and territorial governments to meet the new demands on governments for enhanced environmental protection.<sup>70</sup>

We are reassured by the reported statement of Constitutional Affairs Minister Joe Clark that the government's proposed constitutional reforms will not affect its powers to protect the environment.<sup>71</sup> He stated:

If we were going to propose moving the environment we would have done so. We did not propose it because we don't intend to do that. We believe it is a field in which existing federal jurisdictions must be respected and must be maintained.<sup>72</sup>

In this Part we recommend codifying in the new Constitution an explicit federal authority to legislate regarding extraprovincial environmental degradation. We discuss the federal government's proposals to grant exclusive provincial jurisdiction over particular areas and recommend that federal environmental authority in these areas not be abdicated. We examine the federal proposals regarding interdelegation and recommend that in environmental areas any interdelegation be subject to a strong federal leadership role, accountability and opportunities for public participation. Lastly, we address the government's 'internal free trade' proposal and recommend that environmental standards be listed as an exception to the proposed provision against barriers to trade.

On a non-constitutional level, we note that a critically important practical step would be for the federal government to more fully utilize its existing constitutional authority to protect the environment. One example is the federal government's delay in releasing the long-promised package of regulations to control pollution from pulp and paper mills in Canada.

#### Enumerating a Federal Environmental Role

##### Opportunity to Clarify

As discussed above, the 1867 division of powers between the federal and provincial governments makes no mention of the environment. Until recently, it was thought that the federal government's legislative authority regarding the environment was limited to enumerated heads of power, such as Fisheries, Criminal Law (human health), Trade and Commerce, and Interprovincial Undertakings.<sup>73</sup>

In 1988, however, the Supreme Court of Canada upheld federal legislation regarding marine pollution on the basis of the federal government's residual authority, the Peace, Order and Good Government clause (POGG).<sup>74</sup> As discussed elsewhere above, the federal government relied on the POGG power to bolster its authority to adopt the Canadian Environmental Protection Act (CEPA), in relation to toxic contamination.

Currently, therefore, the federal government has considerable constitutional authority for environmental legislation. But none of these bases explicitly mention the environment. Even prior to the Crown Zellerbach case, Professor Dale Gibson concluded that there is a "high degree of uncertainty that shrouds so many features of [federal jurisdiction over the environment.]"<sup>75</sup> He observed that "there is a need for a number of constitutional amendments or judicial references designed to dispel some of these doubts, and to provide a better delineation of jurisdiction over environmental management."<sup>76</sup>

The uncertainty Professor Gibson refers to has been compounded by the recent ascendancy of the POGG power in relation to the environment.

The present process of reforming the Canadian constitution offers an unprecedented opportunity to clarify the federal government's legislative powers regarding the environment.

#### Environmental External Affairs Power

There are two important caveats to be borne in mind in the process of clarifying the federal environmental jurisdiction. First, 'environmental protection' is far too broad a subject to be given solely to either level of government. The subject must be specifically defined to limit it to a role appropriate for the federal government. Second, it would be impossible and undesirable to encompass all federal environmental jurisdiction in a single head of power.<sup>77</sup> The intention should be to enumerate a head of power that clearly describes one significant basis for federal environmental jurisdiction, leaving other federal environmental powers to other heads of power. With this environmental head of power the federal government could establish minimum environmental standards and the provinces would be free to establish more stringent requirements as their local needs and objectives warranted.

There are four main possibilities. First, the federal and provincial governments could be given concurrent jurisdiction over environmental protection. The two orders of government would work between themselves which local subjects should be left to the provinces alone. The main problem with this option is that it does not provide sufficient certainty regarding the practical limits of the federal role.

Second, the federal government could be given express authority to legislate regarding environmental problems that cross provincial borders. These are the problems that by nature are difficult for individual provinces to cope with adequately, and where there is the greatest need for federal leadership. The government's Constitutional Proposals describe the important role played by the federal government regarding inter-jurisdictional environmental problems such as acid rain pollution.<sup>78</sup> And in the context of interprovincial mobility the government notes the importance of the federal government having clear constitutional authority.<sup>79</sup> Exactly the same problem arises regarding interprovincial environmental degradation. The main problem with this option is that it would be difficult to determine whether a particular activity in a province was sufficiently linked to extraprovincial environmental degradation to be subject to federal control.

Third, specific national environmental problems could be listed, for example, global warming, atmospheric ozone depletion, toxic contamination, and biodiversity. The problem here is that new national environmental problems would not be covered without a constitutional amendment.

The fourth main option for enumerating a federal environmental head of power would be to grant the federal government the power to legislate as necessary to implement Canada's international environmental commitments. 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. In our view, this is the most attractive option. Canada is unusual among federal states in not having have an 'external affairs power': the

United States and Australia do. The federal government has succinctly expressed the importance of Canada having clear constitutional authority to allow it to take an effective part in international affairs, regarding Canada's internal market:

In an increasingly international environment, Canada may not be in a position to play as effective a role as desirable, as Canada is the only member country without a representative who can make decisions for the entire market.<sup>80</sup>

The same applies in the environmental area. Expressly enumerating federal authority regarding international environmental commitments would clarify the basis for strong federal involvement in developing what the federal-provincial Statement of Interjurisdictional Cooperation on Environmental Matters refers to as "a nationally consistent and high level of environmental quality for all Canadians."<sup>81</sup>

## Recommendation

4. ENVIRONMENTAL EXTERNAL AFFAIRS POWER. 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.

### Federal Environmental Responsibilities

Under the heading of "Serving Canadians Better" the federal government makes the following proposal:

The Government is committed to ensuring the preservation of Canada's existing research and development capacity and to maintaining Constitutional obligations for international and Native affairs. Within this framework, it is prepared to recognize the exclusive jurisdiction of the provinces in the following areas and to withdraw from these fields in a manner appropriate to each sector and respectful of the provinces' leadership:

- tourism
- forestry
- mining
- recreation
- housing
- municipal/urban affairs.<sup>82</sup>

Unfortunately, this proposal is strikingly unclear. None of the listed areas is an enumerated head of federal power. Presumably, all current federal activities in these areas are supported by existing federal heads of power.<sup>83</sup> For example, the federal government has adopted the Metal Mining Liquid Effluent Regulations<sup>84</sup> under the federal Fisheries Act<sup>85</sup> pursuant to the federal authority over Seacoast and Inland Fisheries. <sup>86</sup> Surely it would not be the federal government's intention to abandon these important pollution control regulations without even discussing how fish habitat would be protected in their absence. Yet what meaning is to be drawn from the phrase "withdraw from these fields"?

Similarly, regarding forestry, the roots of the federal Department of Forestry<sup>87</sup> can be traced back to 1899, when an office of Chief Inspector of Timber and Forestry was created in the Department of the Interior.<sup>88</sup> The Federal Standing Committee on Forestry and Fisheries describes the history of federal forestry as "troubled", a history "which tends to pay disrespect to the importance of the forest sector to Canada's economy and to our way and quality of life."<sup>89</sup> It concluded:

It is essential to the forests and to forestry that the full scope and potential for the federal Minister of Forestry be recognized and applied in the immediate years ahead. [emphasis in the original]<sup>90</sup>

In 1990, the Minister of Forestry reported to Parliament:

Forests are the bedrock of our economy and the source of much of our prosperity. They also filter the air we breathe and the water we drink ... Preliminary data for the year 1986 indicates that our forests sequestered as much carbon as emitted by our industrial activities. These studies underline the very important role that Canadian forests play in the well-being of our nation. By continuing to carefully balance the needs of the forest industry with the prudent management of our forest resource,



Canada contributes to the overall global effort to reduce the impact of carbon dioxide emissions. ... By practicing sustainable development and investing in both basic and applied research, our forests will be able to grow and develop in harmony with our environmental obligations. As custodians of 10% of the earth's forests, we willingly accept this international obligation. The Green Plan is a major undertaking by the government to protect the environment, and forestry initiatives are an integral part of this Plan.<sup>91</sup>

Does the government's reference to maintaining constitutional obligations for international affairs mean that it does not intend to abandon its involvement in the global warming aspects of forestry? Does the same apply regarding the government's statement about preserving Canada's existing research and development capacity, one of the primary functions of the Federal Department of Forestry?

We strongly support a vigorous, constitutionally-valid federal role in the environmental aspects of the above-listed areas of proposed exclusive provincial jurisdiction.

## **Recommendations**

5. RETAINING FEDERAL ENVIRONMENTAL AUTHORITY. We recommend that the Government of Canada revise its constitutional proposals by specifying that the federal government maintains its existing constitutional authority to legislate in relation to the environmental aspects of tourism, forestry, mining, recreation, housing and municipal/urban affairs.

### Prerequisites for InterDelegation

The federal government proposes a list of areas as "candidates for early discussion with the provinces for either administrative delegation and/or legislative delegation as appropriate in each individual case."<sup>92</sup> We are particularly concerned about the inclusion on this list of wildlife conservation and protection, transportation of dangerous goods, soil and water conservation.

Again, it is not clear what exactly is being proposed regarding these areas. There is already substantial federal/provincial coordination and cooperation in each of these areas. Presumably, the federal government cannot contemplate abdicating responsibility in these areas altogether. Wildlife conservation and protection involves, among other things, migratory and endangered species, which are national issues regarding which Canada has international obligations.<sup>93</sup> Transportation of dangerous goods involves interprovincial and international transport. Soil and water conservation involves agriculture, human health and exports among other federal powers. Again, whatever federal/provincial arrangements are made there is clear necessity for a strong federal role.

The federal government has also proposed discussing administrative delegation arrangements regarding inspection programs in fisheries, transportation and other areas. Regarding fisheries in particular, there are already a large number of somewhat complicated intergovernmental agreements delegating enforcement and/or administration of the Fisheries Act<sup>94</sup>. So it is not clear what exactly is being proposed.

While we are not opposed to -- in fact we would encourage -- inter-governmental arrangements designed to streamline environmental protection, there are three main considerations that such agreements must be required to meet. First, there must be strong federal leadership, so as to provide the "nationally consistent and high level of environmental quality" endorsed by the Canadian Council of Ministers of the Environment.<sup>95</sup>

Second, interdelegation agreements must provide for accountability. The government receiving delegated authority must be required to report to the delegating government and the public on the extent to which it has exercised and enforced its delegated authority.

Third, intergovernmental delegation agreements must provide for reasonable opportunities for public participation in decision-making. Too often, the conventional secrecy of federal-provincial relations has meant that federal-provincial initiatives, at least in the environmental area, are accompanied by less opportunity for public participation than

would be the case at either the provincial or the federal levels. It is refreshing to note that the federal government is proposing to loosen the traditional secrecy surrounding budget processes:

In sum, the budget processes could likely be opened considerably without impairing the fundamental needs of budget secrecy.<sup>96</sup>

The federal proposals regarding interdelegation should be revised to incorporate these three prerequisites.

## **Recommendation**

6. PRECONDITIONS FOR INTERDELEGATION. We recommend that the Government of Canada revise its constitutional proposals by specifying that the federal government will not delegate legislative or administrative authority regarding wildlife conservation and protection, transportation of dangerous goods, soil and water conservation, environmental inspection programs or other environmental matters unless it institutes mechanisms to ensure:

- (1) strong federal leadership, (2) accountability, and (3) reasonable provisions for public participation in decision-making.

### Environment and interprovincial MOBILITY

The federal government has proposed revising Section 121 of the Constitution of Canada to strengthen inter-provincial mobility and to prohibit federal or provincial governments from contravening the principle. Significantly, it also recognizes that "an absolute prohibition is neither feasible nor desirable,"<sup>97</sup> and proposes an exception to allow governments "to pursue legitimate policy goals to help alleviate regional imbalances."<sup>98</sup>

Environmental protection is also a legitimate policy goal that warrants exception from the proposed from the internal 'free trade' provisions. The federal and provincial governments are already actively promoting harmonization of environmental standards. Thus, the goal of minimizing internal trade barriers is already being pursued in the environmental protection sphere. But unless the federal government proposes taking over all environmental regulations -- which we do not recommend -- there must be room for individual provinces to meet provincial objectives by setting environmental standards in certain areas that are higher than the minimum standards set by the federal government.

## **Recommendations**

7. INTERPROVINCIAL MOBILITY. We recommend that the Government of Canada revise its constitutional proposals by adding environmental protection standards to the list of exceptions to the proposed constitutional provision (s.121) against barriers to inter-provincial mobility.

## **Part 5**

# **Rights and Responsibilities**

## Environmental trust

### Trust Declared

The Canadian environment is held in trust. Introducing the Green Plan, Prime Minister Brian Mulroney stated:

As Canadians, we are the trustees of a unique, beautiful and productive northern land.<sup>99</sup>

The Green Plan itself states:

Governments are trustees of the environment on behalf of the people.<sup>100</sup>

This echoes the National Task Force on Environment and Economy, which states:

Governments act as trustees of the resources we will pass on to future generations.<sup>101</sup>

The federal government has reiterated the trust declaration in its constitutional proposals:

The land itself [Canada], vast and beautiful, is a rich inheritance held in trust for future generations.<sup>102</sup>

While this declaration of an environmental trust is itself a very significant development, it risks being no more than rhetoric unless the trust is made enforceable. There are basically two ways in which that can be achieved, and both should be pursued in the reform of the Canadian constitution:

- formal declaration of an environmental trust with provisions for enforcement; and
- entrenchment of environmental rights.

### Origins of the Environmental Trust

A public trust regarding the environment has a long legal history. James Olson summarizes what is referred to as the public trust doctrine in the United States:

Fundamentally and conceptually the public trust doctrine stands as a procedural and substantive safeguard against the abuse of government decisions in the management of publicly owned natural resources (such as public lands or waters) or in the regulation of the uses of private property which are likely to impair rights of the public to such publicly owned natural resources. From its source in the Magna Carta to the United States Supreme Court's decision in *Illinois Central v. Illinois*,<sup>103</sup> the doctrine has stood as a constitutional restraint on the exercise of governmental powers which have resulted in impermissible, although often subtle, reallocations of distinct and valuable public rights for private uses which do not primarily promote primary public purposes. The doctrine remains as important a limitation today as it was a limitation on the land and seabed partnerships between monarchs and lords of England.<sup>104</sup> Properly viewed the doctrine is fundamental to the good order of our constitutional form of government as are restraints on taxation, co-mingling of public and private property and the exercise of police power. Indeed, in the absence of the public trust doctrine there is no constitutionally based equivalent that can restrain governmental abuses in the reallocation or impairment of air, water and other natural resources.<sup>105</sup>

### Defining the Trust

It is unlikely that a broad environmental trust exists already in Canadian common law.<sup>106</sup> Thus, if a clearly enforceable environmental trust is to be established in Canada it must be created by legislation or

constitutional amendment. Professor Constance Hunt has outlined four desirable components of such an initiative:

It would define in a general way what the 'public trust' consists of, including at least the public right to ensure the protection of particular defined resources from impairment or misuse. It would create a substantive right in the public at large to ensure compliance with the trust, as defined. It would outline the procedures to be followed in enforcing the substantive right. Finally, it would provide remedies in the event that a breach of the public trust could be established.<sup>107</sup>

To those four components of an environmental trust, we would add the desirability of specifying the fundamental principles as the starting point for subsequent judicial and legislative elaboration of the terms of the trust.

## **Recommendation**

8. ENVIRONMENTAL TRUST. We recommend that the Government of Canada revise its constitutional proposals by giving legal validity to the declaration of a constitutional trust regarding protection of the environment, specifying that:

(1) the trustees are the federal and provincial governments of Canada, (2) the beneficiaries of the trust are past, present and future generations of Canadians, (3) the trust may be enforced in appropriate circumstances by the courts upon the application of any resident(s) of Canada, (4) in enforcing the trust, the courts have broad authority to impose current and future obligations on governments and persons, (5) the terms of the trust include the key environmental principles set out in Recommendation 2, above.

### Environmental rights

The time has come to entrench Canadians' right to a healthy environment in Canada's Charter of Rights and Freedoms. The regulatory system for environmental protection established by legislation is and will remain the main governmental bulwark against environmental degradation. However, legislators are not infallible and citizens must have a constitutional basis for judicial review of governments' environmental protection decision-making.

The federal government's constitutional proposals are very clear that it is a problem that individuals do not have a right to challenge governments with respect to maintaining the principle of free mobility in Canada:

Nor do individuals have the right to challenge governments on a wide range of actions that are perceived to be inconsistent with the principle of free mobility in Canada.<sup>108</sup>

The government proposes a constitutional amendment to provide this right:

A revised section 121 in the Constitution would empower private parties (individuals as well as firms) to challenge, through the courts, the actions of governments that are inconsistent with the principle of free mobility within the internal market ...<sup>109</sup>

The rationale for this proposal applies equally to citizens' right to challenge governments' environmental protection measures. Providing such a right in the Canadian Constitution would be consistent with the recent trend among Canadian jurisdictions at the statutory level.

In 1990, the Legislative Assembly of the Northwest Territories adopted the Environmental Rights Act. The stated purpose of the Act is to "provide environmental rights for the people of the Northwest Territories."<sup>110</sup> The Act states:

WHEREAS the people of the Northwest Territories have the right to a healthy environment and a right to protect the integrity, biological diversity and productivity of ecosystems in the Northwest Territories ...111

The Act also allows a resident to bring an action in the Supreme Court against any person releasing any contaminant into the environment. By authorizing an action against private individuals it goes farther than our recommendation that the right to the health of the environment be enshrined in the Charter, which applies to the activities of governments only, not to the activities of private individuals.

The NWT Environmental Rights Act was followed in 1991 by the Yukon's new Environment Act. The Act provides that:

The people of the Yukon have the right to a healthful natural environment.112

The Act provides residents with a corresponding right of action against the Government of the Yukon or a private person.113

The Government of Ontario is moving toward adoption of a statutory `environmental bill of rights.' Following the report of a broadly-based advisory committee, a smaller committee has been struck recently to prepare draft language for such an Act.

The World Commission on Environment and Development's Experts Group on Environmental Law proposes an environment right as a "fundamental human right":

All human beings have the fundamental right to an environment adequate for their health and well-being.114

The Canadian Bar Association Committee on Sustainable Development in Canada proposed in their recommendations for federal environmental reform that:

The Government of Canada should adopt a long-term strategy to entrench the right to a healthy environment in the Canadian Constitution.115

In a recent document the Canadian Environmental Law Association has urged that "the Charter of Rights and Freedoms be amended to include a right to a healthful environment".116

The Content of the Right

Professor Dale Gibson has conducted the most detailed analysis of the entrenchment of environmental rights in the Canadian Constitution.117 He articulates two premises:

The most fundamental of these premises is my conviction that explicit entrenchment of environmental rights in the Canadian Constitution is desirable. There are undoubtedly inconveniences and risks involved whenever courts are given the power to override, in the interests of some paramount constitutional value, the decisions of democratically elected politicians. ... [However] I believe that experience with the Charter of Canadian Rights and Freedoms has demonstrated how legislative excesses can be restrained without unduly frustrating the democratic process.

A second assumption is that since no right can be absolute, but must yield in some circumstances to other inconsistent rights, or to necessity, any entrenched protection must be subject to either explicit or implicit qualifications ... such as Section 1118 of the Canadian Charter of Rights and Freedoms ...119

Gibson proposes inserting three sections into the Charter, arbitrarily numbered 15.1, 15.2 and 15.3:

Section 15.1 would establish basic rights to a beneficial environment, to its use and to its preservation, as well as defining the term "environment" and listing the purposes sought to be served by protecting the environment. Section 15.2 would impose an obligation on both the federal and provincial orders of government to make and enforce laws implementing these rights with respect to both the public and private sectors. Section 15.3 would establish the right, after an initial compliance period, to seek a judicial declaration as to the sufficiency of governmental compliance with this duty.<sup>120</sup>

The text of his proposed sections is as follows:

## Environmental Rights

### 15.1 (1) Right to Beneficial Environment

Everyone has the right to a beneficial environment, and to enjoy its use for recreational, aesthetic, historical, cultural, scientific and economic purposes, to the extent reasonably consistent with:

(a) the equivalent rights of others; (b) the health and safety of others; and (c) the preservation of a beneficial environment in accordance with subsection (2).

(2) Everyone has a right to the preservation of a beneficial environment, so as to ensure its future enjoyment for the uses set out in subsection (1). (3) For the purposes of this section, "environment" includes land, water, air and space, and the living things that inhabit them, as well as artificial structures and spaces that are beneficial to humans or to other components of the environment.

### 15.2 (1) Duty to Make and Enforce Environmental Laws

The Parliament and Government of Canada, and the Legislatures and Governments of the Provinces have the duty, within their respective areas of jurisdiction, to make and enforce laws and programs for the implementation of the rights set out in section 15.1.

### (2) Content of Laws

The laws and programs referred to in subsection (1) shall include, without restricting the generality thereof:

(i) the creation and maintenance of an environmental protection agency for each jurisdiction, responsible for determining minimum standards of environmental quality and preservation appropriate for each aspect of the environment, in each area of the jurisdiction, and to vary such standards, partially or wholly, temporarily or permanently, where the agency deems such variation to be advisable; (ii) the creation of effective measures to enforce such minimum standards within the jurisdiction; (iii) the right of everyone resident within the jurisdiction to be informed by the environmental protection agency, by means of appropriate public notice, of all pending determinations or variation of such minimum standards and allowing a reasonable time before each determination or variation is decided upon by the agency; and (iv) the right of everyone resident within the jurisdiction to make representations of fact, law, or policy to the environmental protection agency about any determination or variation of such minimum standards

### 15.3 Judicial Review

After this section and sections 15.1 and 15.2 have been in force for more than one year, everyone has the right, to apply under subsection 24(1) to a court of competent jurisdiction for a declaration

that the Parliament or the Government of Canada, or the Legislature or Government of a province, has failed to fulfil some or all of the duties imposed by section 15.2.<sup>121</sup>

It is our view that this language should be seriously considered as a starting point for the inclusion of environmental rights in the Canadian Constitution.

## **Recommendation**

9. ENVIRONMENTAL RIGHTS. We recommend that the Government of Canada revise its constitutional proposals by including entrenchment of environmental rights in the Charter of Rights and Freedoms.

## **Part 6**

# **PROPERTY RIGHTS**

### The Government's Proposal

One issue which bears some comment is the Government of Canada's proposal to constitutionally entrench property rights:

It is ... the view of the Government of Canada that the Canadian Charter of Rights and Freedoms should be amended to guarantee property rights.<sup>122</sup>

Property rights, at common law, include the right to injure and destroy property. Hence, in the context of the environment, this is not a proposal of minor significance. Yet, for all its significance, the above-noted statement represents the government's entire discussion of the issue. This is not sufficient information to support a proposal of this magnitude.

The force behind entrenching property rights appears to be a group of M.P.s lead by Garth Turner, Member of Parliament for Halton Peel.<sup>123</sup> Mr. Turner has stated that it is not the intention of the proposal to interfere with government's ability to deal with environmental problems.<sup>124</sup> Despite his intention, however, there is reason to believe that a simple, unqualified entrenched property right could have serious implications with respect to the implementation of environmental protection legislation.

### The Problem for Environmental Protection

Constitutional challenge to the substantive validity of laws in relation to land use planning, resource extraction and management, pollution prevention and control schemes, and pollution prosecutions may lead to the emasculation of controls in these areas.<sup>125</sup> The U.S. experience with entrenched property rights has shown that "for the law to be considered

valid, the burden and cost of the environmental law, or the diminution of value in the case of zoning laws, must be reasonable, and not in the court's view amount to confiscation".<sup>126</sup> The result, according to one study, has been:

[I]n a number of cases, some of recent origin, [the court] has declared laws restricting the use to which property might be put to, or laws regulating that use, as unconstitutional.<sup>127</sup>

## **Recommendation**

10. Property Rights. We recommend that the Government of Canada revise its constitutional proposals by eliminating the proposal to entrench property rights in the Canadian Charter of Rights and Freedoms.

### **End Table C.**

1. The authors are indebted to the dedicated staff and volunteers at WCELA, particularly David Mahony and Ellen Halliday for their research and comments, and Ryan So, Patrick Roy, Denice Regnier, Scott Parker, Allisa McDonald, Heleneide Bakhshi and Morgan Ashbridge for production assistance.

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67. *Supra*, note 5, p. 132.
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69. *Ibid.*
70. *Ibid.*
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74. *R. v. Crown Zellerbach Canada Ltd.* (1988), 84 NR 1 (S.O.E.).
75. *Supra*, note 73, p. 87.
76. *Ibid.*
77. *Ibid.*, states "It would be foolish, however, to believe that a high degree of certainty can ever be achieved in these matters."
78. *Supra*, note 66, p. 12.
79. *Ibid.*, p. 22.
80. *Ibid.*, p. 26.
81. *Supra*, note 43, p. 1.
82. *Supra*, note 9, p. 37.
83. It is conceivable that some federal activities within these areas are not supported by constitutional authority. If such cases exist they would likely be rare and would not seem to warrant such a prominent place in the government's constitutional proposals.
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91. Forestry Canada, The State of Forestry in Canada, 1990 Report to Parliament (Ottawa: Forestry Canada, 1991) p. 4.

92. Supra, note 9, p. 39.

93. According to Bowman and Harris, *Multilateral Treaties, Index and Current Status* (London: Butterworths 1984), Canada's international obligations regarding wildlife protection and conservation include: the Convention on Wetlands of International Importance Especially Waterfowl Habitat and 1982 Protocol (concluded 2 Feb 1971, in force 21 Dec 1975, Canada signed 15 Jan 1981, "... undertakes to promote the conservation of wetlands, particularly those to be included in a list as being of international importance in terms of ecology, botany, zoology, etc.", p. 346), the International Convention on International Trade in Endangered Species of Wild Fauna and Flora (concluded 3 Mar 1975, in force 1 July 1975, Canada signed 10 Apr 1975, "... seeks to prevent over-exploitation of endangered species through international trade ...", p. 371), the Convention for the Protection of the World Cultural and Natural Heritage (concluded 16 Nov 1972, in force 17 Dec 1975, Canada signed 23 July 1976, "... establishes a World Heritage Fund for the protection of the world's cultural (monuments, groups of buildings and sites) and natural (natural features of great natural beauty) heritage ..." p. 366), the Agreement on the Conservation of Polar Bears (concluded 15 Nov 1973, in force, 26 May 1976, Canada signed 16 Dec 1974 (with reservation), "... forbids, subject to certain exceptions, the taking of polar bears, and requires the parties to take action to protect their ecosystems ..." p. 174), the Convention on the Conservation of Antarctic Marine Living Resources (concluded 20 May 1980, in force 7 Apr 1981, Canada signed 1 Jul 1988, "... general obligations relating to the conservation of marine living resources of the Antarctic Sea ..." p. 454) and the Convention for the Conservation of Salmon in the North Atlantic Area (concluded 2 Mar 1982, in force, 1 Oct 1983, Canada signed 18 Mar 1982 (30 Sept. 83) "...establishes the North Atlantic Salmon Conservation Organization ..."

94. See R. Parisien, *The Fisheries Act Origins of Federal Delegation of Administrative Jurisdiction to the Provinces* (Deputy Minister of Environment Canada, Policy Planning & Research Service, 1971).

95. Supra, note 43, p. 1.

96. Supra, note 66, p. 35.

97. Ibid., p. 23.

98. Ibid.

99. Supra, note 5, Statement by the Prime Minister.

100. Ibid., p. 17.

101. Supra, note 15, p. 6.

102. Supra, note 9, p. v.

103. 146 U.S. 452 (1892). In *Illinois Central Railroad* the Supreme Court invalidated the legislative grant of Lake Michigan bottomlands along a portion of Chicago's shoreline for construction of a private railroad facility.

104. J. Olson, *Toward A Public Lands Ethic*, 56 *J. Urban L.*, 739 (1979).

105. J. Olson, *Michigan Environmental Law*, (Michigan: Neahawanta Press, 1981) p.143.

106. C. Hunt, "The Public Trust Doctrine in Canada", *Cases and Materials in Environmental Law Vol. 2* (Halifax: Dalhousie University Faculty of Law, 1988), p. 1063: "The public trust doctrine appears to have been argued only in one reported case in Canada, and it was soundly rejected".

107. Ibid., p. 1086.

108. Supra, note 66, p. 22.

109. Ibid., p. 23.

110. Bill 17, *Environmental Rights Act*, 7th Sess., 11th Leg. Northwest Territories, 1990 (assented to 11 June 1990), Statement of Purpose.

111. Ibid., Preamble.

112. Bill 20, *Environment Act*, 2nd Sess., 27th Leg. Yukon, 1991, (assented to 29 May 1991) s.6.

113. Ibid., s 8.

114. Supra, note 4, p. 348.

115. Report of the Canadian Bar Association Committee on Sustainable Development in Canada: Options for Law Reform (Ottawa: Canadian Bar Association, 1990), p. 27.

116. F. Gertler and T. Vigod, "Submission by the Canadian Environmental Law Association to the Select Committee on Ontario in Confederation: Environmental Protection in a New Constitution" (June 1991) [unpublished], p. 2-3.

117. D. Gibson, "Constitutional Entrenchment of Environmental Rights," in N. Duple, ed. *Le droit a la qualite de l'environnement: un droit en devenir, un droit a definir* (Quebec: Quebec/Amerique, 1988) pp. 281-282.

(See also W. Andrews, "The Environment and the Canadian Charter of Rights and Freedoms" in N. Duple, ed. *Le droit a la qualite de l'environnement: un droit en devenir, un droit a definir* (Quebec: Quebec/Amerique, 1988). Regarding a statutory environmental bill of rights, see M. Rankin, "An Environmental Bill of Rights for Ontario: Reflections and Recommendations, a Discussion Paper" (Toronto, 1991) [unpublished], J. Swaigen, ed. *Environmental Rights in Canada* (Toronto: Butterworths,

1981) and C. Stevenson, "A New Perspective on Environmental Rights After the Charter" (1983) 21 Osgoode Hall Law Journal 390.

118. Section 1 of the Canadian Charter of Rights and Freedoms states: "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits proscribed by law as can be demonstrably justified in a free and democratic society."

119. *Supra*, note 118, pp. 281-282.

120. *Ibid.*, p. 287.

121. *Ibid.*

122. *Supra*, note 9, p. 3.

123. "Property Rights Seen As Bargaining Ploy" *The Globe & Mail* (26 September 1991).

124. G. Turner, M.P. for Halton Peel, pers. comm. with L. Alexander, 26 September 1991.

125. See H. Poch, Memo to the Canadian Bar Association - Ontario and Quebec Councils re: Property Rights Entrenchment and Environmental Laws, May 24, 1984.

126. J. McBean, "The Implications of Entrenching Property Rights in Section 7 of the Charter of Rights", (1988) 26 *Alta.L.R.* 548, p. 577.

127. *Ibid.*

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End of Enhancing Environmental Protection In The Canadian Constitution