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Federalism, the Environment and the Charter in Canada

Dayna Nadine Scott*

Abstract. This Chapter reviews the key jurisprudential developments in relation to the division of powers in Canada, exploring how the shared jurisdiction over the “environment” created by sections 91 and 92 of the Constitution has historically and continues to shape environmental law and policy. In addition to this federal-provincial struggle, the chapter considers the current trend towards local regulation of environmental matters according to the principle of ‘subsidiarity’, and the growing recognition of the ‘inherent jurisdiction’ of Indigenous peoples. The contemporary dynamics are explored through two critical policy case studies highlighting barriers to environmental justice: safe drinking water on reserves, and climate change mitigation. The review reveals that Canada’s Constitutional framework, while not solely responsible, has contributed to our collective failure to achieve a coordinated and effective set of environmental laws and policies, which translates to unequal distribution of environmental benefits and burdens on the ground. Finally, recent movements to overcome these weaknesses are explored, including recent Charter litigation attempting to define “environmental rights” in Canada, and other attempts to establish a constitutional right to a healthy environment.

Key words: environmental law, federalism, division-of-powers, POGG, environmental justice, inherent jurisdiction, constitutional litigation

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To understand environmental law in Canada is to come to terms with a complex and contested jurisdictional struggle often characterized as a ‘tug of war’ between federal and provincial orders of government.¹ The jurisdictional struggle is performed in legal and policy arenas, but its effects are felt most acutely on the ground as the environmental and health impacts unevenly affecting Canadians in their daily lives. While these struggles cannot be uniformly characterized as contests to fill nor vacate jurisdictional space, it is obvious that they have contributed to a collective failure to enact an effective and coordinated system of environmental law and regulation in Canada.² Contemporary movements for environmental justice, foregrounding how ordinary people experience environmental benefits and burdens, and how they are distributed, are increasingly turning to the *Canadian Charter of Rights and Freedoms* to challenge the inadequacy of this regime. Activists are claiming entitlements to clean air and clean water for everyone, and demanding that governments recognize a right to a healthy environment for all. Despite its shortcomings, the campaign for environmental rights in Canada has the potential to bring constitutional litigation about the environment out from the technical doldrums and into everyday politics – and this is a good thing.

This Chapter reviews the key jurisprudential developments in relation to the division of powers, including the current trend towards local regulation of environmental matters according to the principle of ‘subsidiarity’, and the growing recognition of the ‘inherent jurisdiction’ of Indigenous peoples. I illustrate the contemporary dynamics by exploring two critical policy case studies from the perspective of barriers

¹ See for example, Kathryn Harrison, *Passing the Buck: Federalism and Canadian Environmental Policy* (UBC Press 1996); Meinhard Doelle and Chris Tollefson, *Environmental Law: Cases and Materials* (2nd edn, Carswell 2013).

² Lynda Collins and Heather McLeod-Kilmurray, *The Canadian Law of Toxic Torts* (Canada Law Book 2014): the question now is whether governments must step in to fill the breach, citing *British Columbia v Canadian Forest Products Ltd* 2004 SCC 38 at para 81, 240 DLR (4th) 1. The federal “retreat” from its historical role in areas of environmental protection began in the early 2000s and intensified when the Harper government achieved a majority in 2011. See for example, G. Bruce Doern, Graeme Auld & Christopher Stoney, *Green-lite: Complexity in Fifty Years of Canadian Environmental Policy, Governance, and Democracy* (McGill-Queens University Press 2015).

to environmental justice: safe drinking water on reserves, and climate change mitigation. Finally, I explore some promising Charter litigation motivated by environmental justice concerns and evaluate the utility of constitutionalizing “environmental rights” in Canada.

The Constitutional Contours of Canadian Environmental Law & Policy

Canada’s Constitution, which formally includes the *Constitution Act, 1867*,³ the *Constitution Act, 1982*,⁴ the *Canadian Charter of Rights and Freedoms*,⁵ and the body of jurisprudence that flows from their interpretation, exerts powerful control over the operation of Canadian environmental law, the practice of environmental policy-making, and thus the prospects for attaining environmental justice. Specifically, the federal division of powers laid out in sections 91 and 92 of the *Constitution Act, 1867* is at the core of Canadian debates and controversies over environmental issues, from litigation through to political struggle. This is often attributed to the fact that the powers distributed between the federal Parliament and the provincial legislatures in sections 91 and 92 at the time of Confederation did not, understandably, include the words “the environment”. Thus, we are without a clearly delineated and distinct subject-matter of regulation allocated to a single level of government, making a definitive articulation of environmental regulatory jurisdiction a perennial challenge.

The environment is thus a matter of “shared” jurisdiction in Canada, which is to say, it is always already contested -- legally, socially and politically -- with ecological and environmental health consequences. This is not to say that these consequences could be erased with a clear division of powers or singular jurisdiction in charge of regulating “the environment”; it is to emphasize that the particular contours of the legal and political mobilizations needed to achieve change are structured by the constitutional

³ *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5.

⁴ *Canada Act 1982* (UK), 1982, c 11.

⁵ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

configuration. While several commentators attribute Canada's 'inefficient' and largely inadequate patchwork of environmental laws to this situation of shared jurisdiction⁶, it is also clear that much of this contestation is productive and appropriately politicizes questions of environmental justice.⁷

The Constitutional Division of Powers

The division of powers laid out in sections 91 and 92 of the *Constitution Act, 1867* is the starting point for determining legislative authority with respect to the environment, as it is for other policy areas. The failure of sections 91 and 92 of the *Constitution Act, 1867* to explicitly name and allocate legislative power over "the environment", as mentioned, is a defining and enduring feature of Canadian environmental law and policy.⁸ In addition to the federal, provincial and municipal authorities, the jurisdiction of Indigenous Peoples over the environment is increasingly recognized in Canada, not only through self-government arrangements established in land claims negotiations, but also as exercises of inherent jurisdiction.⁹

Sources of Federal Authority

⁶ See for example, Jamie Benidickson, 'The Constitutional Allocation of Environmental Responsibility and Interjurisdictional Coordination' in J. Benedickson, *Environmental Law* (4th edn, Irwin Law 2013).

⁷ *ibid*; Neil Hawke, 'Canadian Federalism and Environmental Protection' (2002) 14:2 J Envtl L 185; Irene Henriques and Perry Sadorky, 'Voluntary Environment Programs: A Canadian Perspective' (2008) 36:1 Policy Stud J 143; Melody Hessing, Michael Howlett, and Tracy Summerville, *Canadian Natural Resource and Environmental Policy: political economy and public policy* (2nd edn, UBC Press 2005); James Salzman and Barton H Thompson Jr, 'Perspectives of Environmental Law and Policy' in J. Salzman & B.H. Thompson, *Environmental Law and Policy* (3rd edn, Foundation Press 2010).

⁸ Jamie Benidickson, 'The Constitutional Allocation of Environmental Responsibility and Interjurisdictional Coordination' in J. Benedickson, *Environmental Law* (4th edn, Irwin Law 2013).

⁹ Canada, Environment and Climate Change Canada, *Shared Responsibility* (7 January 2016) < www.ec.gc.ca/eau-water/default.asp?lang=En&n=035F6173-1 > accessed 10 May 2016; Kent McNeil, *Emerging Justice? Essays on Indigenous Rights in Canada and Australia* (Native Law Centre 2001) 161-355; Canada, Indigenous and Northern Affairs Canada, *The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* (15 September 2010) <www.aadnc-aandc.gc.ca/eng/1100100031843/1100100031844> accessed May 10 2016; Lorne Sossin, "Indigenous Self-Government and the Future of Administrative Law" (2012) 45 UBC Law Review 595.

Section 91 of the *Constitution Act, 1867* enumerates the legislative powers of the Parliament of Canada. The following listed subject matters form the basis for the exercise of federal jurisdiction over the environment: federally-owned property (91(1A)); sea coast and inland fisheries (91(12)); navigation and shipping (91(10)); the criminal law (91(27)); and Indians and lands reserved for Indians (91(24)).¹⁰ Two of Canada's earliest environmental laws were created when the federal Parliament exercised its law-making powers under these sections. First, the *Navigable Waters Protection Act*,¹¹ which received Royal Assent in 1882 (and was only recently substantially 'watered down' in 2012), was enacted on the basis of the federal Parliament's authority to regulate navigation under section 91(10). Second, in 1868, the federal Parliament introduced the *Fisheries Act*, which contained explicit provisions for the protection of fish and fish habitat. This instance of more direct regulation of environmental matters is derived from the federal Parliament's right to regulate sea coast and inland fisheries under section 91(12).

Canada's authority to make criminal law, enumerated in section 91(27), is another avenue by which the federal Parliament has more recently shaped environmental regulation. The seminal 1997 Supreme Court of Canada (SCC) decision in *R v. Hydro-Québec*¹² upheld the constitutionality of the federal *Canadian Environmental Protection Act (CEPA)* as a valid exercise of the federal government's criminal law power.¹³ The court held that *CEPA* had a legitimate public purpose in providing protection for environmental and human health, and was therefore constitutional as per the federal Parliament's power to make laws relating to criminal matters. According to the majority's reasons, the federal use of the criminal law power in *CEPA* was justified because it constituted an attempt to implement *prohibitions coupled with penalties* for the purpose of preventing harm to human health, making it analogous to the

¹⁰ The residual 'peace, order and good government' (POGG) power, grounded in the opening paragraph of section 91, is also a significant source of federal jurisdiction in relation to the environment, as described below.

¹¹ *Navigable Waters Protection Act*, RSC 1985, c N-22.

¹² *R v Hydro Quebec* [1997] 3 SCR 213, 151 DLR (4th) 32.

¹³ LaForest J., writing for the 5 judges in majority, stresses that the POGG power (discussed in more detail below) would also provide a valid grounding for federal Parliamentary action with respect to environmental protection, in certain circumstances.

criminal law. This was the case even though the *CEPA* was recognized to contain a very elaborate regulatory apparatus for assessing and managing the risks posed by toxic substances. As schemes become even more “regulatory” in nature, moving beyond the traditional command-and-control form, “deployment of the criminal law power becomes more controversial”.¹⁴

Federal laws based on powers to regulate, for example, trade and commerce (s. 92(2)) or taxation (s. 92(3)), may be similarly utilized to support federal legislation that touches on environmental issues within those subject matters even if that legislation incidentally touches on provincial matters.¹⁵ These heads of power offer a more conceptual means of justifying the exercise of federal law-making but nonetheless have the potential to contribute to a more holistic and expansive federal role in regulating for environmental protection.¹⁶

Finally, the federal Parliament’s residual power to make laws consistent with “Peace, Order, and good Government”, as per the opening paragraph of section 91, opens further space for environmental regulation under certain conditions.¹⁷ Reaching all the way back to the Judicial Committee of the Privy Council, the jurisprudence established that where the subject matter of the legislation is such that it “goes beyond” local or private concerns then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order and good government of Canada, though it may in another aspect touch

¹⁴ Meinhard Doelle and Chris Tollefson, *Environmental Law: Cases and Materials* (2nd edn, Carswell 2013) 168.

¹⁵ This approach to constitutional analysis of law was reiterated in *Reference Re: Assisted Human Reproduction Act* 2010 SCC 61 at para 32, 327 DLR (4th) 257, where the court explains that “the doctrine of pith and substance permits either level of government to enact laws that have “substantial impact on matters outside its jurisdiction”: P W Hogg, *Constitutional Law of Canada* (5th edn, Carswell 2012) 15-19. The provincial and federal orders of government may make laws that incidentally touch on issues outside of their jurisdiction as long as the dominant purpose of the law falls within one of its listed heads of power.

¹⁶ Kathryn Harrison, ‘The Constitutional Framework: Constraints and Opportunities’ in K. Harrison, *Passing the Buck: Federalism and Canadian Environmental Policy* (UBC Press 1996) 39.

¹⁷ Because it was recognized that all powers could not be expressly conferred, a “residual” power was given to the federal Parliament so as to arrive at an exhaustive distribution. This should not be confused with ‘paramountcy’ which holds that in cases of inconsistencies or conflict between federal and provincial laws, federal laws will prevail. Otherwise, the powers should be conceived as “coordinate”, that is neither level of government is intended to be superior to the other or to be able to control the exercise of the others’ legitimate authority to legislate within their spheres.

on matters specifically reserved to the provincial legislatures”.¹⁸ This became the basis for a constitutional doctrine known as “national dimension” or “national concern” which was later vigorously applied by the SCC to justify federal legislative action over environmental matters, only attracting limits in the 1970s and 80s.¹⁹ It is now well-established that the peace, order and good government power (“the POGG power”) has both a national concern branch and an emergency branch, giving the federal Parliament the authority to legislate with respect to quickly emerging threats. Eventually, in a case about whether the federal *Ocean Dumping Control Act* was properly within Parliament’s jurisdiction, the SCC held that in order to qualify under the national dimension test a matter would have to have a “singleness, distinctiveness and indivisibility”.²⁰ The majority of the court explained that international commitments and the inability of provinces to effectively regulate waters beyond their borders meant that marine pollution must be a matter of national concern. Further, it was held that the subject-matter of the legislation was sufficiently defined so as not to produce a boundless incursion on provincial jurisdiction. Each of these factors remains an important consideration in division of powers jurisprudence: international treaty commitments; provincial “inability”, and effect on provincial powers.²¹

By way of further example, federal jurisdiction to regulate in areas of environmental protection was again upheld in *R v. J.D. Irving Ltd*²², a 2008 challenge to the constitutionality of the *Migratory Birds*

¹⁸ *Ontario (Attorney General) v Canada Temperance Federation* [1946] AC 193 [7], 2 DLR 1 (JCPC).

¹⁹ See, for example, *R. v. Fowler*, [1980] 2 S.C.R. 213 and the Crown Zellerbach decision of the Supreme Court of Canada in 1988, discussed below.

²⁰ *R v Crown Zellerbach Canada Ltd* [1988] 1 SCR 401 [33], 49 DLR (4th) 161.

²¹ With respect to the effect on provincial powers, *Friends of the Oldman River Society v Canada (Minister of Transport)* [1992] 1 SCR 3 at paras 63-64, 88 DLR (4th) 1, held that federal environmental assessment is valid because “environment” is “amorphous and all-encompassing” and lacks the necessary definition to be categorized as a head of power under section 91 or 92. The environment could not be treated as a unique head of power in any federalist government “because no system in which one government was so powerful would be federal”. For distinctiveness and indivisibility “what seems to be required is that federal legislation be aimed at a matter that has defined boundaries, so that recognizing this matter as being subject to POGG will not unduly interfere with or negate existing provincial regulatory powers”. Patrick J Monahan and Byron Shaw, ‘Peace, Order, and Good Government (POGG) Power’ in P. Monahan and B. Shaw, *Constitutional Law* (Irwin Hall 2013) at 276.

²² *R v JD Irving Ltd* 2008 37 CELR (3d) 200, PL Cumming Prov J (NB Prov Ct).

Convention Act (MBCA).²³ The MBCA was enacted in 1917 in accordance with the Migratory Birds Convention signed by the British Crown on behalf of Canada with the United States.²⁴ At the time, the MBCA was enacted under section 132 of the *Constitution Act (1867)* which granted authority to the federal government to implement treaties signed by Britain as law. In *Irving*, the appellants argued that their actions, which resulted in the disturbance of several great blue herons and the destruction of their nest, were not unlawful because the MBCA was *ultra vires* the federal Parliament.²⁵ More specifically, counsel for J.D. Irving Ltd. argued that the Act was essentially hunting legislation, which falls under provincial jurisdiction over property and civil rights. In contrast, the Court held that the MBCA must be interpreted more broadly as environmental legislation, noting that it was initially created in accordance with section 132 of the *Constitution Act (1867)* (giving the federal government sole authority to enter into treaties with other countries) and that it can now be justified by the federal POGG power. The idea that the federal Parliament holds a stand-alone treaty-implementation power was rejected by the Privy Council in the *Labour Conventions* case of 1937. This holding has generated copious critique in the years since and many commentators speculate that a modern challenge to a statute enacted on the basis of implementing a treaty could succeed.²⁶

The constitutional distinction between Canadian provinces and territories represents another interesting consideration in relation to the division of powers. Where provinces have jurisdiction over the enumerated grounds in section 92 of the *Constitution Act, 1867* in their own right, the territories exercise powers delegated to them by Parliament.²⁷ The Northwest Territories Devolution Agreement, which came

²³ *Migratory Birds Convention Act*, 1994 SC, c 22.

²⁴ Environment and Climate Change Canada, 'Acts and Regulations' (*Government of Canada*, 25 April 2016), <www.ec.gc.ca/ap-pa/default.asp?lang=En&n=86E31D77-1> accessed 12 May 2016.

²⁵ A law that is *ultra vires* is one that is outside the jurisdiction of the enacting government. For example, a law is *ultra vires* provincial jurisdiction if it relates to a head of power attributed to the federal Parliament.

²⁶ See for example, Stewart Elgie, "Kyoto, the constitution, and carbon trading: waking a sleeping BNA bear (or two)" (2008) 13:1 *Review of Constitutional Studies* 67.

²⁷ The territorial governments of the Yukon, the Northwest Territories, and Nunavut exercise delegated jurisdiction acquired from the federal Parliament by legislation.

into effect April 1st, 2014, shifted this highly centralized concentration of power as it gave the Northwest Territories jurisdiction to manage and develop its own land and resources akin to what the provinces exercise via section 92(A). This devolution, which took more than a decade to negotiate, gives people in the north the ability to make decisions about things that affect them the most, including with respects to lands and resources, and therefore some aspects of environmental protection.

Sources of Provincial Authority Regarding the Environment

Section 92 of the *Constitution Act, 1867* enumerates the matters in regard to which the provinces may make laws. It contains some heads of power that provide clear mandates to create environmental legislation, as well as others that present broad opportunities for regulation. Specifically, section 92(A), which was introduced with the 1982 slate of constitutional amendments, allocates jurisdiction to the provinces regarding the “development, conservation and management of [...] natural resources” as well as “sites and facilities [...] for the generation and production of electrical energy”.²⁸ The powers allocated under section 92(A) have allowed provincial legislatures to regulate primary resource industries, such as forestry and mining, which have significant consequences for environmental integrity.

Prior to the 1982 amendment the provinces enjoyed a solid constitutional foundation for environmental law-making, though jurisdiction was more arbitrary. While provincial environmental legislation found constitutional backing from section 92(13) “Property and Civil Rights”; 92(10) “Local works and Undertakings”; 92(16) “Matters of a local or private nature”; and 92(5) “The management of land and timber resources”, the broad interpretations that were given to “property and civil rights” in early jurisprudence meant that a large share of what we would call “environmental law” across the country has been enacted under that source of authority.²⁹ The provinces are also constitutionally empowered to delegate aspects of their jurisdiction to municipalities by legislation, and this has opened up avenues for

²⁸ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 at s 92(A).

²⁹ Peter W Hogg, *Constitutional Law of Canada*, Student Edition (Carswell, 2015) 5-13.

municipalities to step into the realm of environmental policy-making in many respects, as discussed below.

Further, since much of the public land in Canada is under provincial ownership, provincial policy thus naturally has significant capacity to influence environmental protection.³⁰ For example, Ontario's Greenbelt Plan is a piece of provincial developmental policy that directly addresses environmental concerns with its prevention of fragmentation, protection of environmental heritage, and preservation of rural interests.³¹ The regulatory regime for environmental assessment in Canada is also influenced by the fact that most Crown land in Canada is under control of the provinces. However, prior to the radical amendments to the *Canadian Environmental Assessment Act* in 2012, environmental assessment was a field to which we could point for examples of "cooperative federalism" in action. Coordination between provincial and federal environmental assessments was aimed at making two separate assessments under distinct provincial and federal legislative schemes work together to obtain the information required.³² In more recent constructions, notions of cooperation and coordination in this field have been recast as "costly duplication".³³ Now, under the 2012 Act, "substitution and equivalency" is the name of the

³⁰ Barry C Field and Nancy D. Olewiler, 'Environmental Policy and Institutions in Canada' in *Environmental Economics* (3rd edn, McGraw Hill 1997).

³¹ Ministry of Municipal Affairs and Housing, *Ontario's Proposed Greenbelt Plan* (May 2016), <<http://www.mah.gov.on.ca/Page13783.aspx>>

³² An Act to implement certain provisions of the budget tabled in Parliament on March 29, 2012 and other measures HC Bill (First Session, 41st Parliament) Chapter 19 at 51 para 32. Canada, Canadian Environmental Assessment Agency and Ministry of Environment, *Federal/Provincial Environmental Assessment Coordination in Ontario* (June 2007) <www.ceaa-acee.gc.ca/ED4330AB-54FD-448B-B523-38B00187D618/Federal_Provincial_Guide_6260e.pdf> accessed 13 May 2015.

³³ Canada, Canadian Environmental Assessment Agency, *Frequently Asked Questions* (20 November 2015) <www.ceaa.gc.ca/default.asp?lang=en&n=CE87904C-1#ws0BF9A0BD> accessed 13 May 2016.

game;³⁴ provincial processes for assessment can be substituted for federal ones, even in situations where the provincial assessment allows for a narrower scope and fewer opportunities for public involvement.³⁵

Finally, municipalities draw power to regulate with respect to environmental matters from acts of provincial legislatures that delegate powers to pass by-laws, and specify the limits of those powers. The SCC made clear in its *Spraytech* decision of 2001 that it would interpret those powers purposively, as it does in constitutional litigation, so as to ensure that municipalities can deal effectively with emerging environmental and public health issues.³⁶ At the same time however, as “creatures of the province”, municipalities cannot have delegated to them powers that are outside provincial jurisdiction.³⁷ In *Spraytech*, the SCC found that a municipal by-law seeking to limit the use of cosmetic pesticides according to the “precautionary principle” was valid and within the scope of the municipality’s powers over public health and welfare. The Court also outlined a principle of “subsidiarity” which holds that “law-making and implementation are often best achieved at a level of government that is not only effective, but also closest to the citizens affected...”.³⁸ As Neil Craik explains, the principle of subsidiarity is now well-established and is a factor in the “determination of whether a matter ought to be considered to fall within the exclusive confines of a particular head of power, or whether the activity, in fact, has a double aspect”.³⁹

³⁴ *ibid.* See for example, Robert B. Gibson, Meinhard Doelle, A. John Sinclair, “Fulfilling the Promise: Basic Components of Next Generation Environmental Assessment” (2016) *Journal of Environmental Law & Practice*, forthcoming.

³⁵ Mark Winfield, “A New Era of Environmental Governance in Canada: Better Decisions Regarding Infrastructure and Resource Development Projects”, Metcalf Foundation, May 2016, online: http://metcalffoundation.com/wp-content/uploads/2016/05/Metcalf_Green-Prosperity-Papers_Era-of-Governance_final_web.pdf

³⁶ *114945 Canada Ltée (Spraytech, société d’arrosage) v Hudson (Town)* 2001 SCC 40, 200 DLR (4th) 419.

³⁷ For a discussion of the origins of the persistent idea that municipalities are mere “creatures of the province”, see Ron Levi and Mariana Valverde, (2006) “Freedom of the City: Canadian Cities and the Quest for Governmental Status” 44:3 *Osgoode Hall Law Journal* 409.

³⁸ *ibid* [3].

³⁹ Craik above (n), at 20. Thus far, the principle has only been applied in support of a finding of shared jurisdiction, not to dictate provincial over federal authority.

The idea of subsidiarity is in tension with the notion that environmental governance in Canada is undergoing a constant “rescaling”⁴⁰ in response to changing ecological and political circumstances. As an example, the vacating of regulatory space by the federal government that characterized the Harper government years, and has been the subject of much critique especially in the field of environmental assessment, might also be seen as an *assertion* of jurisdiction. In other words, the aims of “responsible resource development” that shaped the regulatory retreat also imposed norms, such as a priority on “timely decisions”, into areas of conventional provincial jurisdiction as an example.⁴¹

Inherent Jurisdiction of Indigenous Peoples

The recognition of “existing Aboriginal and treaty rights” in section 35(1) incorporates into our constitutional framework the affirmation and protection of Indigenous peoples’ inherent right to govern themselves and their territories according to certain judicially-defined terms.⁴² This right arguably includes Indigenous peoples’ jurisdiction over environmental management throughout their traditional territories. We are seeing an escalation in the frequency and profile of assertions of such inherent jurisdiction by Indigenous communities across the country in recent years.⁴³ As an example, there are

⁴⁰ G Bruce Doern, Graeme Auld, & Christopher Stoney, *Green-lite: Complexity in Fifty Years of Canadian Environmental Policy* (McGill-Queen’s University Press 2015) at 349.

⁴¹ See Mark Winfield, *ibid.*

⁴² Although, with respect to upholding the inherent Aboriginal right of self-government, Canadian Courts require Indigenous rights claimants to bring evidence regarding specific activities as “elements of practices integral to their distinctive culture” (see *R. v. Pamajewon*, [1996] S.C.J. No. 20), the federal government recognizes the existence of a broad inherent right of self-government (see *Renewing the Comprehensive Lands Claims Policy*, September 2014, online at https://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ-LDC/STAGING/texte-text/ldc_ccl_renewing_land_claims_policy_2014_1408643594856_eng.pdf). See also K. McNeil, “Challenging Legislative Infringements of the Inherent Aboriginal Right of Self-Government” (2003) 22 *Windsor Yearbook of Access to Justice* 329. According to McNeil, “This jurisdiction is concurrent with federal and provincial powers in relation to the matter such that Aboriginal nations can proceed to establish “self-government capacity and to extend the exercise of their jurisdiction into new areas at their own pace and in accordance with their own needs and priorities” at 8.

⁴³ As an example, see the Notice of Assertion presented by the Chiefs of Ontario to the Premier of Ontario on July 11, 2014. It states: “By this Notice of Assertion, the First Nations whose territories and lands are within the boundaries of the [Province of Ontario], give formal notice to the Province of Ontario and Canada, to other governments, to resource users and developers, to neighbours and the general public that First Nations inherent and Treaty rights are currently and will continue to be asserted over traditional and historical territory, and ancestral lands.”, online: http://www.chiefs-of-ontario.org/sites/default/files/news_files/NOTICE-1.pdf

now several regulatory processes designed by Indigenous peoples in Canada in relation to environmental approvals and permits for resource extraction, with different degrees of articulation depending on the community and the context. These exercises of inherent jurisdiction institute processes incorporating elements of Indigenous worldviews, standards of legitimacy and values.⁴⁴ Within them, Indigenous laws and traditions for stewardship are being used by Indigenous peoples to structure regulatory mechanisms and exercise jurisdiction in relation to the environment. Reflection and dialogue over the necessary reconciliation of Indigenous jurisdiction over the environment protected by s. 35(1) – whether this jurisdiction is delineated under a self-government agreement, a treaty or land claim agreement, delineated judicially, or has yet to be delineated at all – with the division of powers over the environment under sections 91 and 92 of the Constitution is an area of environmental law that will call for increased analysis over the coming years as more cases and implementation scenarios come to light.

The complex overlap of jurisdictional authorities and the collision of political and ecological factors in determining the most appropriate governance structure is illustrated below through the example of drinking water regulation on First Nations reserves.

CASE STUDY: Kashechewan First Nation Water Crisis

Indigenous communities in Canada face major challenges in accessing clean and safe drinking water.

“First Nations homes are 90 times more likely to be without running water than the homes of other Canadians”,⁴⁵ and boil-water advisories, which are widespread, often last years if not generations. In the Northern Ontario community of Neskantaga First Nation, a boil-water advisory has been in place for 20 years and Shoal Lake 40, a First Nations community on the Manitoba-Ontario border, has been under a

⁴⁴ John Borrows, “Stewardship and the First Nations Governance Act” (2003-2004) 29 Queen’s Law Journal 103. See also the Chapter in this Handbook by Patrick Macklem regarding aboriginal rights including aboriginal title.

⁴⁵ Kaitlyn Mitchell and Zachary D’Onofrio, ‘Environmental Injustice and Racism in Canada’ (2016) 29 J Env’tl L & Prac 305 at 324.

boil-water advisory for 17 years.⁴⁶ These conditions raise serious physical and psychological health risks, and present an obvious example of enduring environmental injustice.⁴⁷

It is generally accepted that provincial and territorial governments in Canada are responsible for ensuring access to safe and clean drinking water as a function of their authority to regulate for public health. This is accomplished mostly through delegation of responsibility for water treatment and distribution to local municipalities by legislation. A critical exception to this general rule exists in relation to federal lands and institutions, including First Nations reserves, over which legislative authority rests with the federal government under section 91(24). Thus, the provision of safe drinking water on reserves is said to be a shared responsibility between First Nation band councils, and several federal departments including Indian and Northern Affairs Canada which provides funding for the construction and maintenance of water services, Health Canada (HC) which oversees monitoring of water supplies, and Environment and Climate Change Canada which has responsibility for source water protection. On this official account, band councils are responsible for the “design, construction, operation and maintenance of [their] water systems” and are expected to contribute 20% of the costs.⁴⁸

On 14 October 2005, nearly 1000 people from the Kashechewan First Nation, a remote, fly-in community on the shores of James Bay in Northern Ontario, were evacuated because their community’s

⁴⁶ To add insult to injury, Shoal Lake 40 is also “without an all-weather road due to an aqueduct constructed to carry water to Winnipeg because the city’s drinking water source is in Shoal Lake 40’s traditional territory” Mitchell and d’Onofrio, ‘Environmental Injustice and Racism in Canada’ (2016) 29 J Envtl L & Prac 305 at 325. In March 2016, the City of Winnipeg and the federal government committed to funding an all-weather road into Shoal Lake, but debates over the cost continue: CBC News, “Officials formally announce Manitoba reserve to get its ‘Freedom Road’”, June 11, 2016: <http://www.cbc.ca/news/canada/manitoba/shoal-lake-first-nation-freedom-road-cost-1.3630363>.

⁴⁷ Nathalie J Chalifour, ‘Environmental Discrimination and the *Charter*’s Equality Guarantee: The Case of Drinking Water for First Nations Living on Reserves’ (2013) 43 *REG* 183; Constance MacIntosh, ‘Testing the Waters: Jurisdictional and Policy Aspects of the Continuing Failure to Remedy Drinking Water on First Nations Reserves’ (2007) 39 *Ottawa Law Rev* 6.

⁴⁸ Tonina Simeone, *Safe Drinking Water in First Nations Communities* (Library of Parliament 08-43-E, 28 May 2010) 2.

drinking water was contaminated by *E. coli*.⁴⁹ The alert was sounded by Health Canada, who reported that the Kashechewan drinking water supply had tested positive for the deadly bacteria. Residents already knew something was wrong: many were suffering from diarrhea and painful stomach cramps, or skin conditions such as scabies and impetigo.⁵⁰ The crisis managed to catch the attention of the mainstream media and photos showing children covered in rashes and scabs provoked shock and anger across the country. The general public was being urged to understand the issue as one of mismanagement that stemmed from confusion over jurisdiction between the federal and provincial governments.⁵¹

There was plenty of room for confusion: the federal government had been testing the water for contaminants; they had also shipped over \$250,000 worth of bottled water into Kashechewan by that point.⁵² Many traced the *E. coli* contamination to the federal government's refusal a decade earlier to heed the community's concerns with respect to the location of the water treatment plant, built downstream of the sewage lagoon in a place where seasonal flooding is expected. Training of operators for the treatment plant, also a responsibility of the federal government, seems to have been inadequate, exacerbating the health effects as chlorine was routinely fed into the system to deal with bacterial contamination.

⁴⁹ CBC News in Review, 'Toxic Water: the Kashechewan Story' (December 2005) <https://media.curio.ca/filer_public/f8/4e/f84e2dd8-76c5-4fbf-b9b7-b9d053b4ac2f/kashechewan.pdf> accessed 10 May 2016.

⁵⁰ The relationship of the skin conditions to the bacterial contamination is contested. In a more recent flare-up of the ongoing crisis, experts argued that the chronic skin conditions should be attributed to the very poor housing stock on the reserve, rather than to water contamination. Jane Philpott, 'Statement from Jane Philpott, Minister of Health, on the situation in Kashechewan' (*Government of Canada*, 24 March 2016) <<http://news.gc.ca/web/article-en.do?nid=1042399&tp=980>> accessed 12 May 2016; John Dehaas, "'Social emergency": Kashechewan skin problems blamed on poverty, overcrowding' (*CTV News*, 23 March 2016) <www.ctvnews.ca/canada/social-emergency-kashechewan-skin-problems-blamed-on-poverty-overcrowding-1.2830199> accessed 13 May 2016.

⁵¹ Mike Krebs, 'The Crisis in Kashechewan: Water Contamination Exposes Canada's Brutal Policies Against Indigenous People' (*Socialist Voice*, 23 November 2005): <http://www.socialistvoice.ca/?p=75>

⁵² *ibid.*

Understandably, then, the Ontario government “pointed the finger” at Ottawa⁵³. But Ottawa fired back, noting that drinking water safety and public health were under provincial jurisdiction. And in fact, on 25 October 2005, after 11 days of so-called confusion over which government should act, the Ontario Minister of Aboriginal Affairs, calling Ottawa “missing in action”, ordered the community’s emergency evacuation. A staggering 50 per cent of the population was airlifted to surrounding cities and towns at the province’s expense.⁵⁴

The Institute on Governance has said drinking water in Canada presents a “governance problem of major complexity”⁵⁵ and allocates at least some of the blame to the lack of an “effective legislative base”.⁵⁶ In making the argument that the lack of access to safe drinking water on many First Nations' reserves is a violation of the right to equality under s. 15(1), Nathalie Chalifour states that the main challenge is “the fact that there is no single law which categorically excludes First Nations reserve communities from ... protection. Instead, there is a national network of laws which provides clean drinking water to all Canadians ... with one glaring exception: Aboriginal peoples living on reserves”.⁵⁷

⁵³ Lawrence Solomon, ‘Kashechewan woes boil down the leadership’ (*National Post*, 5 November 2006) <<https://urbanrenaissance.probeinternational.org/2006/11/05/kashechewan-woes-boil-down-leadership/>> accessed 12 May 2016; Karen Howlett, ‘Ontario orders survey of water on reserves’ (*Globe and Mail*, 1 November 2005) <www.theglobeandmail.com/news/national/ontario-orders-survey-of-water-on-reserves/article1130351/> accessed 12 May 2016; ‘Aboriginals must wrest healthcare control from Ottawa mandarins’ (*National Review of Medicine*, 15 November 2015) <www.nationalreviewofmedicine.com/issue/2005/11_15/2_editorial_19.html> accessed 12 May 2016.

⁵⁴ CBC News, ‘Ottawa “missing in action” over reserve’s bad water: McGuinty’ (26 October 2005) <www.cbc.ca/news/canada/ottawa-missing-in-action-over-reserve-s-bad-water-mcguinty-1.533290> accessed 13 May 2016.

⁵⁵ Institute on Governance, *Safe Water for First Nations Communities: Learning the Lessons from Walkerton* (15 September 2002) at 9.

⁵⁶ *ibid* at 1; Canada, Office of the Auditor General, ‘Chapter 5: Drinking Water in First Nation Communities’ in *Report of the Commissioner of the Environment and Sustainable Development to the House of Commons* (September 2005) at 10.

⁵⁷ Nathalie J Chalifour, ‘Environment Discrimination and the Charter’s Equality Guarantee: The Case of First Nations’ Drinking Water’ (2013) 43 *REG* 183 at 188. In the aftermath of the tragedy that occurred in Walkerton, Ontario, the Walkerton Inquiry (an independent commission charged with investigating the events and circumstances that allowed the contamination to occur), along with the Honourable Dennis R. O’Connor, published a very detailed two-part report. Both parts of the Report can be accessed online at www.archives.gov.on.ca/en/e_records/walkerton/. Following the events in Walkerton, the Ontario provincial government passed the *Safe Drinking Water Act, 2002*, SO 2002, c 32 to address the legal and policy-related issues blamed for facilitating the tragedy.

Cooperative Federalism

Sometimes the federalism debates have the effect of reinforcing the idea of clean lines of demarcation, or “watertight compartments”, between the responsibilities of the central and regional authorities.⁵⁸ But as the drinking water example demonstrates, and as Peter Hogg has remarked, “modern governmental involvement in social and economic matters has produced policies which require constant interaction” between officials at various levels of government, and often a high degree of cooperation.⁵⁹ In fact, for these complex and persistent policy problems, we are seeing an increasing reliance on mechanisms which can foster relationships between executives of the central, regional governments and Aboriginal governments, and which call out for more formalized collaborations.⁶⁰ One of these mechanisms is the joint federal-provincial-territorial committee that produces the Guidelines for Canadian Drinking Water Quality⁶¹; another is the First Minister’s Conference, which entails periodic face-to-face meetings between the Prime Minister and all provincial and territorial leaders.⁶² An area which this tool has recently been employed to deal with is another intractable policy problem, pressing environmental issue and a “constitutional puzzle”: climate change.⁶³

CASE STUDY: Climate Change Mitigation in Canada

Many observers would agree that Canada’s “divided environmental house” is standing in the way of a coordinated greenhouse gas (GHG) reduction strategy, and thus hampering efforts to mitigate climate

⁵⁸ See for example, Richard Simeon & Amy Nugent, “Parliamentary Canada and Intergovernmental Canada: Exploring the Tensions” in Herman Bakvis & Grace Skogstad, eds, *Canadian Federalism*, Don Mills: Oxford University Press, 2012.

⁵⁹ Peter W Hogg, ‘Constitutional Law of Canada, 2015 Student Edition’ (Carswell, 2015) at 5-4.

⁶⁰ See for example, Patricia Hania, “Uncharted Waters: Applying the Lens of New Governance Theory to the Practice of Water Source Protection in Ontario” (2013) 24(2) *Journal of Environmental Law & Practice* 177.

⁶¹ Health Canada, Federal-Provincial-Territorial Committee on Drinking Water (CDW), <http://hc-sc.gc.ca/ewh-semt/water-eau/drink-potab/fpt/index-eng.php>.

⁶² AFN.

⁶³ Allan Hutchinson, ‘Climate Change: A Constitutional Puzzle’ (*Globe & Mail Opinion*, 27 April 2016) <www.theglobeandmail.com/opinion/climate-change-a-constitutional-puzzle/article29764807/> accessed 12 May 2015.

change and to live up to our international commitments, most recently instantiated in the *Paris Accord*.⁶⁴

Several commentators have called climate change “the most significant policy challenge” facing the Canadian federation.⁶⁵ While there is no clear delineation of authority over international affairs within the Constitution, such authority has over time been conferred on the executive branch of the federal government.⁶⁶ As such, Canada’s agreement to the *Paris Accord* is generally consistent with the principle that the federal Crown administers and is responsible for implementing commitments made by treaty.⁶⁷

In 2005, when Parliament added 6 GHGs to Schedule 1 under *CEPA*, it was taken as an indication that the federal order of government intended to exercise jurisdiction to regulate industrial emissions as part of a climate change mitigation strategy. In 2012, the federal government followed up with regulations to control CO₂ emissions from coal-fired utilities⁶⁸, and then later for the transportation sector.⁶⁹

Regulations that would apply to the oil and gas sector, however, were promised but never delivered. The Harper government’s allegiance to the oil and gas sectors led to years of stalling, and the lack of an effective federal plan for curbing GHG emissions became an obvious gap in Canadian environmental policy.⁷⁰

⁶⁴ Thomas Posyniak, ‘A constitutional foundation for a greenhouse gas reduction policy’, *Policy Options* (1 November 2010) <policyoptions.irpp.org/magazines/afghanistan/a-constitutional-foundation-for-a-greenhouse-gas-reduction-policy/> accessed 13 May 2016; see also Nathalie Chalifour, “Climate Federalism - Parliament’s Ample Constitutional Authority to Regulate GHG Emissions” (2016) University of Ottawa Working Paper Series: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2775370##.

⁶⁵ *ibid.*

⁶⁶ Laura Barnett, *Canada’s Approach to the Treaty-Making Process* (Library of Parliament 2008-45-E, 14 November 2008, revised 6 November 2012) 1.

⁶⁷ Elgie, above (note 26).

⁶⁸ Reduction of Carbon Dioxide Emissions from Coal-fired Generation of Electricity Regulations, SOR/2012-167.

⁶⁹ Heavy Duty Vehicle and Engine Greenhouse Gas Emission Regulations, SOR/2013-24. These regulations are presumably justified according to the federal authority over international and interprovincial trade and commerce, since they deal with emissions standards for imported engines and vehicles that cross provincial borders.

⁷⁰ Shawn McCarthy, ‘Harper calls climate regulations on oil and gas sector ‘crazy economic policy’, *The Globe and Mail* (9 December 2014) <www.theglobeandmail.com/news/politics/harper-it-would-be-crazy-to-impose-climate-regulations-on-oil-industry/article22014508/> accessed 12 May 2016.

Hopes were renewed in March 2016 when the new Liberal Prime Minister called a First Ministers' Conference to focus on climate change.⁷¹ This was in the wake of statements at the Paris Climate Conference in late 2015 that the federal government wished to move forward with the support of the provinces.⁷² Crucially, the provinces each came to the Conference with varying degrees of commitment to addressing climate change, and a range of different approaches and existing programs in place.⁷³ Despite media reports that the Prime Minister intended to achieve a national price on carbon (either through a carbon tax or a cap-and-trade scheme), little in the way of concrete commitments came out of the Conference: the First Ministers agreed merely that the transition to a low carbon economy should be "adapted to each province's and territory's specific circumstances".⁷⁴ The matter flared up again in the House of Commons in October 2016 when the Prime Minister apparently surprised the provinces with the announcement that the federal government would step in and impose a price on carbon if the provinces did not institute one by 2018— either by carbon tax or a "cap-and-trade" emissions trading model.⁷⁵

⁷¹ Canada, Canadian Intergovernmental Conference Secretariat, *Vancouver Declaration on clean growth and climate change* (3 March 2016) <https://news.gov.bc.ca/files/Vancouver_Declaration_clean_Growth_Climate_Change.pdf> accessed 28 April 28 2016.

⁷² Gary Mason, 'Are the provinces ready for Trudeau's climate plan?' *Globe & Mail* (December 4, 2015) <<http://www.theglobeandmail.com/opinion/are-the-provinces-ready-for-trudeaus-climate-plan/article27585585/>>.

⁷³ As an example, British Columbia has instituted a carbon tax, and Alberta has announced plans to implement one; Quebec, Ontario and Manitoba have opted for an emissions trading system (to be harmonised with California's); Ontario also has a Feed-in-tariff program. Links to individual provincial approaches to climate change policy can be located online: <www.climatechange.gc.ca/default.asp?lang=en&n=64778DD5-1>. One commentator calls it a "bewildering patchwork of inconsistent and incompatible regulations" (Robert MacNeil and Matthew Paterson, "This changes everything: Canadian Climate Policy and the 2015 Election" (2016) 25(3) *Environmental Politics* 553at 556).

⁷⁴ Outputs included the "pan-Canadian framework on clean growth and climate change" and the "Canadian Energy Strategy". CBC News, 'Trudeau, premiers agree to climate plan framework, but no specifics on carbon pricing' (3 March 2016) <<http://www.cbc.ca/news/politics/first-ministers-premiers-trudeau-1.3474380>> accessed 28 April 2016.

⁷⁵ Kathleen Harris, "Justin Trudeau gives provinces until 2018 to adopt carbon price plan", *The Globe and Mail*, Oct.3, 2016, <http://www.cbc.ca/news/politics/canada-trudeau-climate-change-1.3788825>.

Speaking strictly from a legal perspective, both levels of government have broad powers of taxation; either or both could institute a carbon tax.⁷⁶ The provincial jurisdiction over industry and commerce could easily justify regulations addressing GHG emissions from industrial development, such as mining, oil and gas or energy generation, including an emissions trading scheme.⁷⁷ But there is also a strong argument for “provincial inability” to effectively regulate GHGs, as climate change presents almost the quintessential border-crossing problem, with GHG emissions having a global effect, rather than localized impacts.⁷⁸ Despite the fact that the industrial facilities that emit GHGs often have serious adverse environmental health impacts on local communities, climate change itself is undoubtedly beyond the ability of any one jurisdiction to manage effectively. This is true at the international level as well, of course, but under the *Paris Accord* nation states have been tasked with meeting “Nationally Determined Contributions” (NDCs) for which the federal government is accountable.⁷⁹ This would lend weight to an argument that the federal government holds authority under its residual power, with climate change constituting a “matter of national concern”.

In fact, most commentators agree that there is “ample authority” for Parliament to act under the national concern branch of the POGG power.⁸⁰ While it is possible that entrenched regional differences, combined with significant economic interests, could prompt constitutional litigation, it is clear that the chief

⁷⁶ Nathalie Chalifour, “Climate Federalism - Parliament’s Ample Constitutional Authority to Regulate GHG Emissions” (2016) University of Ottawa Working Paper Series: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2775370##.

⁷⁷ Alexis Bélanger, “Canadian Federalism in the Context of Combating Climate Change” (2011) 20(1) Constitutional Forum 21 at 25: “The leadership shown to date by the provinces on the climate change front illustrates their ability to lead the way in combating climate change, based on powers attributed to them by the Constitution.”

⁷⁸ Elgie, above (note 26).

⁷⁹ Canada, Environment and Climate Change Canada, *Canada’s Second Biennial Report on Climate Change* (10 February 2016) <www.ec.gc.ca/GES-GHG/default.asp?lang=En&n=02D095CB-1> accessed 13 May 2016.

⁸⁰ Nathalie Chalifour, “Climate Federalism - Parliament’s Ample Constitutional Authority to Regulate GHG Emissions” (2016) University of Ottawa Working Paper Series; Thomas Posyniak, ‘A constitutional foundation for a greenhouse gas reduction policy’ *Policy Options* (1 November 2010) <policyoptions.irpp.org/magazines/afghanistan/a-constitutional-foundation-for-a-greenhouse-gas-reduction-policy/> accessed 13 May 2016; Elgie, above (note 26); Bélanger, above (note 77).

obstacles are political. One such obstacle, of course, is the continued economic reliance on the fossil fuel industry.⁸¹ Still, while economic actors will continue to try to achieve their aims of slowing or stopping costly regulations by direct lobbying and political influence, the courts are always in the background of these negotiations and constitutional litigation remains an option. In this sense, the jurisprudence on the division of powers provides a powerful bargaining chip.⁸²

Getting Past the Division of Powers Problem

As illustrated through these examples, conventional analysis is that this situation of shared jurisdiction prevents effective, decisive legislative action on pressing environmental issues.⁸³ Accordingly, for a period through the 1990s, the solution to the complex and overlapping authorities to regulate with respect to environmental matters in Canada became a project of “harmonization”.⁸⁴ To be sure, there are plenty of examples in which the lack of a clear legislative mandate falling to one identifiable level of government has exacerbated problems on the ground for people struggling to achieve environmental justice in Canadian communities. Most of the jurisprudence on the division of powers in the environmental context has arisen from situations in which the applicant is seeking to challenge a legislative enactment as *ultra vires* because it creates compliance burdens for industry. In the context of the recent federal retreat from

⁸¹ Robert MacNeil and Matthew Paterson, “This changes everything: Canadian Climate Policy and the 2015 Election” (2016) 25(3) *Environmental Politics* 553.

⁸² Allan Hutchinson, ‘Climate Change: A Constitutional Puzzle’, *The Globe & Mail Opinion* (27 April 2016) <www.theglobeandmail.com/opinion/climate-change-a-constitutional-puzzle/article29764807/> accessed 12 May 2015.

⁸³ Kathryn Harrison, *Passing the Buck: Federalism and Canadian Environmental Policy* (UBC Press 1996); F L Morton, ‘The Constitutional Division of Powers with Respect to the Environment in Canada’ in Kenneth M. Holland, F L Morgan, and Brian Galligan (eds), *Federalism and the Environment: Environmental Policymaking in Australia, Canada, and the United States* (Greenwood Press 1996); Jamie Benidickson, ‘The Constitutional Allocation of Environmental Responsibility and Interjurisdictional Coordination’ in J. Benedickson, *Environmental Law* (4th edn, Irwin Law 2013).

⁸⁴ Canada, Standing Committee on Environment and Sustainable Development, *Harmonization and Environmental Protection: An Analysis of the Harmonization Initiative of the Canadian Council of Ministers of the Environment* (HC December 1997) <www.parl.gc.ca/HousePublications/Publication.aspx?DocId=1031507&Language=E&Mode=1&Parl=36&Ses=1> accessed 13 May 2016.

environmental regulation, however, we have seen provincial legislatures attempt to fill the void in some cases. Where these regimes are seen as too lax, they may be challenged by environmentalists or First Nations (on other grounds) as *ultra vires* the province.⁸⁵ More often, however, the ability of each level of government to deny that they hold legislative authority results in a “jurisdictional wasteland”: certain areas where assuming jurisdiction entails direct financial costs, lost resource revenues or indirect political costs, into which governments are reluctant to take legislative steps. With respect to safe drinking water on reserves, and the regulation of greenhouse gas emissions, this dynamic has contributed to on-the-ground needs and demands not being met, and compromised environmental integrity. In other words, federalism in Canada sometimes produces a “jurisdictional tug of war” that governments are trying to lose, rather than win. Often, the dispute is really about who is going to pay. The problem is not actually a technical failure, but an enduring political one.

Politicization of environmental law is an aim of the environmental justice movement.⁸⁶ While these activists may engage in strategic litigation, they often prefer to achieve their aims through other tactics.⁸⁷ Demands include access to clean air and clean water for everyone, regardless of race, income, indigeneity, gender or location. In recent years, the Canadian Charter of Rights and Freedoms has provided a focal point for organizing around environmental justice in Canada, especially by members of Indigenous communities.

⁸⁵ See *Morton v British Columbia (Minister of Agriculture and Lands)* 2010 BCSC 100 – “Section 26(2)(a) of Fisheries Act (note: provincial statute), ss. 1(h) and 2(1) of Farm Practices Protection (Right to Farm) Act, and Aquaculture Regulation were found to be **ultra vires** provincial Crown with respect to finfish and to apply only to cultivation of marine plants — Finfish Aquaculture Waste Control Regulation was found to be **ultra vires** provincial Crown in its entirety and invalid”; See also *Grassy Narrows First Nation v. Ontario (Natural Resources)*, 2014 SCC 48, [2014] 2 S.C.R. 447.

⁸⁶ Cheryl Teelucksingh and Andil Gosine, 2008 *Environmental Justice and Racism in Canada*, Emond Montgomery. Toronto.

⁸⁷ See Cole, Luke W & Sheila R Foster. *From the Ground Up: Environmental Racism and the Rise of the Environmental Justice Movement* (New York: New York University Press, 2001). As a recent Canadian example, consider the Idle No More movement: Adam J. Barker, “A Direct Act of Resurgence, a Direct Act of Sovereignty”: Reflections on Idle No More, Indigenous Activism, and Canadian Settler Colonialism” (2014) *Globalizations*. <http://dx.doi.org/10.1080/14747731.2014.971531>.

The Canadian Charter of Rights and Freedoms

An innovative judicial review application was filed by two members of the Aamjiwnaang First Nation in 2012 that inspired environmental justice activists across Canada. The application was ultimately withdrawn, but its legacy lives on in the way its demands for what the *Charter* should guarantee hit a nerve across the country.⁸⁸ The Charter rights enshrined in section 7, the right to life, liberty and security of the person, and section 15, the right to equality, created the foundation for Ada Lockridge and Ron Plain’s application for judicial review, which became known as the “Chemical Valley Charter challenge”.⁸⁹ The application questioned the constitutionality of permits granted to Suncor, which operates a refinery in the petrochemical cluster near Sarnia, Ontario. The industrial emissions from Sarnia’s Chemical Valley, with several refineries and heavy industries accounting for approximately 40 percent of Canada’s chemical production, flow downwind towards the Aamjiwnaang First Nation reserve.⁹⁰ The high air pollution burden in Aamjiwnaang and the devastating environmental health impacts on the community have been well documented.⁹¹ In the judicial review, Lockridge and Plain contended that the decision by Ontario’s Ministry of Environment to allow Suncor to increase its emissions, without proper consideration for the cumulative effects from all industrial emissions in the

⁸⁸ The application has been recently withdrawn, with the claimants’ counsel, Ecojustice, indicating that Ontario is now taking steps towards addressing the issues raised by Ron and Ada’s application. EcoJustice, ‘Changing course in Chemical Valley’ (25 April 2016) <www.ecojustice.ca/changing-course-chemical-valley/> accessed 13 May 2016.

⁸⁹ *Lockridge v Ontario (Director, Ministry of the Environment)* 2012 ONSC 2316, 350 DLR (4th) 720 (Div Ct).

⁹⁰ Ecojustice, ‘Defending the Rights of Chemical Valley residents - Charter Challenge’ (7 April 2016) <www.ecojustice.ca/case/defending-the-rights-of-chemical-valley-residents-charter-challenge/> accessed 13 May 2016.

⁹¹ Ecojustice, ‘Exposing Canada’s Chemical Valley: An Investigation of Cumulative Air Pollution Emissions in the Sarnia, Ontario Area’ (October 2007) <www.environmentalhealthnews.org/ehs/news/2012/2007-study.pdf> accessed 13 May 2016; Constanze A Mackenzie, Ada Lockridge, and Margaret Keith, ‘Declining Sex Ratio in a First Nation Community’ (2005) 113:10 *Environmental Health Perspectives* 1295; Environmental Commissioner of Ontario, ‘MOE Continues to Fail the Aamjiwnaang First Nation’ in *Managing New Challenges: Annual Report 2013/2014* (October 2014) 114-115; World Health Organization, ‘Urban Outdoor Air Pollution Database’ <www.who.int/phe/health_topics/outdoorair/databases/cities-2011/en/> accessed 13 May 2016; CBC News, ‘First Nations exposed to pollutants in “chemical valley”’ (24 November 2013) <www.cbc.ca/news/canada/windsor/first-nations-exposed-to-pollutants-in-chemical-valley-1.2438724> accessed 13 May 2015.

area, violates their Charter rights.⁹² They argued that the decisions and practices of the Ministry contribute to exceedingly high levels of emissions that threaten their health and force them to confront risks and trade-offs that non-Indigenous Canadians do not face, engaging the Charter's equality guarantee. This is in line with persuasive accounts by leading environmental law scholars such as Collins, Boyd and Chalifour, who argue that section 7 is "available to strike down laws that allow pollution at levels that interfere with human health and well-being".⁹³

The SCC has, for over a decade, been placing consistent emphasis on environmental protection as a central value in Canadian society.⁹⁴ This, in combination with the expansive jurisprudence interpreting section 7, gives rise to considerable optimism.⁹⁵ Courts have held that section 7 means that the state must not unreasonably increase one's risk of death, interfere with people's right to make important decisions, or threaten bodily integrity, and that people have a right to be free from state-imposed psychological and emotional stress.⁹⁶ The current statement of the 'purpose' of section 7 emphasizes that "the sanctity of life is one of our most fundamental societal values" and that "[s]ection 7 is rooted in a profound respect for the value of human life."⁹⁷ As Chalifour asks: "What is more essential to human life than the ability to breathe clean air and drink safe water, and to keep harmful toxins out of our bodies?"⁹⁸

One concern with using section 7 to deal with questions of environmental injustice, however, is that it is not explicitly aimed at, nor particularly well-equipped for, tackling disproportionate burdens or

⁹² *Lockridge v Ontario (Director, Ministry of the Environment)*, 2012 ONSC 2316 at para 1, 350 DLR (4th) 720 (Div Ct).

⁹³ Chalifour, above (n 77), at 103. See also Lynda Collins, 'An Ecologically Literate Reading of the Charter' (2008) 26 Windsor Rev Legal Soc Issues 7; David R Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions Human Rights, and the Environment* (UBC Press 2011).

⁹⁴ *Friends of the Oldman River Society v Canada (Minister of Transport)* [1992] 1 SCR 3, 88 DLR (4th) 1; *R v Crown Zellerbach Canada Ltd* [1988] 1 SCR 401, 49 DLR (4th) 161; *Canada (Procureure générale) c Hydro-Québec*, (sub nom *R v Hydro-Québec*) [1997] 3 SCR 213, 151 DLR (4th) 32; *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)* [2001] 2 SCR 241, 200 DLR (4th) 419.

⁹⁵ See for example, Avnish Nanda, 'Heavy Oil Processing in Peace River, Alberta: A Case Study on the Scope of Section 7 of the Charter in the Environmental Realm' (2015) 27 JELP 109.

⁹⁶ *Chaoulli v Quebec (AG)* 2005 SCC 35, 254 DLR (4th) 577; *Carter v Canada (AG)* 2015 SCC 5, 384 DLR (4th) 14; *R v Morgentaler* [1988] 1 SCR 30 at 32, 44 DLR (4th) 385.

⁹⁷ *Carter v Canada (AG)* 2015 SCC 5, 384 DLR (4th) 14.

⁹⁸ Above (n 77) at 104.

addressing environmental inequities.⁹⁹ But, as Chalifour notes, the SCC jurisprudence repeatedly emphasizes the importance of the *Charter's* equality guarantee and its influence on the interpretation of *all Charter* rights, including section 7.

An upcoming test of this formula has been recently launched by the Grassy Narrows First Nation in northwestern Ontario. After decades of struggle trying to protect their homelands from the incursions and impacts brought by industrial logging, this application argues that the government's forest management plan will cause existing methylmercury (that was dumped in the English-Wabigoon river system in 1960 by a pulp and paper mill in Dryden, Ontario) to be released from soil into waters across their territory.¹⁰⁰ Specifically, the First Nation claims a violation of their section 7 rights to life, liberty, and the security of person as a result of illness from the mercury contamination of food sources relied upon by its members, as well as their section 15 rights to equality on the basis that the plan will disproportionately affect the health of the First Nations people who rely on fish from local waters as a primary source of food.¹⁰¹

The combination of section 7 and section 15 seems to accord well with the aims of the environmental justice movement, which strives to ensure that individuals and communities from marginalized groups are not burdened with greater environmental risks and harms, and that members of marginalized communities are able to participate fully and meaningfully in environmental decision-making.¹⁰² If and how these *Charter* challenges will impact environmental regulation in Canada is yet to be seen, however.¹⁰³ The

⁹⁹ This is in part because the jurisprudence has not imposed a positive obligation on states to be proactive in this regard.

¹⁰⁰ Jody Porter, 'Mercury contamination at Grassy Narrows First Nation will get worse with logging, deputy chief says' (*CBC News*, 17 June 2015) <www.cbc.ca/news/canada/thunder-bay/mercury-contamination-at-grassy-narrows-first-nation-will-get-worse-with-logging-deputy-chief-says-1.3115932> accessed 13 May 2016.

¹⁰¹ *Grassy Narrows First Nation v Ontario*, (1 September 2015), Toronto, Ont Div Ct, 446/15 (Notice of Application).

¹⁰² Chalifour, above (n 77) at 105.

¹⁰³ John Borrows has argued that environmental degradation in traditional territories could also violate the guarantee of religious freedom in section 2A of the *Charter*: "Proponents could show that [First Nations] spiritual beliefs concerning the Earth are holistic, deeply held, linked to their self-definition and fulfillment, and foster a connection

skepticism of environmental justice activists towards litigation strategies is well-founded: litigation favours repeat players and parties with deep-pockets. It can draw attention away from local concerns and channel disputes into pre-formed legal boxes. It can muffle the voices of activists in favour of legal and scientific ‘experts’ etc.¹⁰⁴ Nonetheless, these cases are ground-breaking examples of how the Charter is being called on to remedy pressing matters of environmental injustice, and they illustrate how contemporary movements strategically navigate these obstacles. While there is no way in established constitutional jurisprudence to challenge the failure of a government to fill a legislative void, these cases illustrate how the Charter can be used to challenge governments that regulate in an area in the manner by which they do so creates unfairness in environmental burdens.

A Constitutional Right to a Healthy Environment?

Several scholars, most prominently David Boyd, have put forward the idea in recent years that constitutional reform is needed to formally enshrine a “right to a healthy environment” in Canada.¹⁰⁵ Recognizing that constitutional amendment is a long and complicated process that would require significant political will across the country¹⁰⁶, these advocates have put together a compelling list of reasons for why it might be worth the trouble. David Boyd and Lynda Collins have demonstrated that industrialized countries that recognize environmental rights have better environmental records than Canada, including stronger enforcement of environmental laws, and more citizen involvement in

with the subject of their faith”, thus meeting the definition of religious belief under s. 2(a). John Borrows, *Canada’s Indigenous Constitution* (University of Toronto Press 2010) 253.

¹⁰⁴ See for example, Scott L. Cummings and Ingrid V. Eagly, “A Critical Reflection on Law and Organizing” (2001) 48 *UCLA LAW REVIEW* 443.

¹⁰⁵ David R Boyd, *The Right to a Healthy Environment: Revitalizing Canada’s Constitution* (UBC Press 2012).

¹⁰⁶ Requires the agreement of Parliament and 2/3 of the legislatures of the provinces equalling 50% of the population of the provinces. As Benoît Pelletier explains in the Chapter in this Handbook regarding constitutional amendment in Canada, The federal Act Respecting Constitutional Amendments adds further legislated hurdles.

environmental decision-making.¹⁰⁷ Further, there are material consequences for Canadians: our poor environmental record translates into thousands of premature deaths and millions of preventable illnesses.¹⁰⁸

Worse, these environmental burdens are not borne equally. Disproportionate pollution burdens affect low income, racialized and marginalized communities in Canada, and often, within those communities, women, children, and people with disabilities are also likely to bear more than their fair share of the impacts. As Mitchell and D’Onofrio note, a right to a healthy environment would recognize the “human right to an environment that is adequate for health and well-being”.¹⁰⁹ It would not, as its critics contend, “guarantee a pristine environment free from chemicals or pollution”, but instead, would highlight the vital role of the environment in the “promotion of human dignity and welfare”.¹¹⁰ Now, as Boyd and Collins have shown, in “at least 20 of the more than 100 countries with a constitutional right to a healthy environment, this right was first recognized by courts before being enshrined in the country's constitution”.¹¹¹ In fact, a “human right to live in a healthy environment” is supported by 181 of the 193 countries belonging to the United Nations”, meaning Canada is one of only 12 countries that have not recognized this right.

The greatest strike against the argument for constitutionalizing a right to a health environment might be that it will effect little practical change: it is hard to imagine how achieving this language through a constitutional amendment could immediately improve the drinking water

¹⁰⁷ *ibid* at 107-121; David R Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (UBC Press 2011); Lynda M Collins, ‘Safeguarding the Longue Durée: Environmental Rights in the Canadian Constitution’ (2015) 71 SCLR (2d) 519.

¹⁰⁸ *ibid*.

¹⁰⁹ Kaitlyn Mitchell and Zachary D’Onofrio, ‘Environmental Injustice and Racism in Canada’ (2016) 29 J Envtl L & Prac 305 at 334.

¹¹⁰ *ibid*.

¹¹¹ *ibid* at 337 citing David R Boyd, ‘The Implicit Right to Live in a Healthy Environment’ (2011) 20 RECIEL 171 at 172.

situation on reserves for example, or clear the roadblocks to effective GHG emission reductions. The right to water enshrined in South Africa's post-apartheid constitution, as an example, could not overcome the persistent, race-based inequities in water distribution in that country.¹¹² But, on a concrete level, advocates for this approach argue that a constitutional right to a healthy environment may result in judicial application of the "standstill" principle, or principle of non-regression in the environmental law context.¹¹³ Emerging from the human rights law context, and with echoes of the debate in South Africa, this principle is based on the idea of "progressive realization". In other words, it would mean that existing environmental laws are to be treated as a baseline or floor -- they could be strengthened, but not weakened. As Mitchell and D'Onofrio note: "This principle takes on heightened significance in Canada where, in recent years, we have seen many key federal and provincial environmental laws rolled back. Given that the trend toward environmental deregulation has in many instances had a disproportionate impact on Aboriginal peoples in particular, the non-regression doctrine could be an additional tool to promote environmental justice and equity".¹¹⁴

There are various potential sources of environmental rights.¹¹⁵ First, we may find them embedded in the existing rights explicitly stated within the *Charter*, as explored above. Lynda Collins argues that this requires an "ecologically literate" reading of the constitutional documents, which reveals that high quality environmental conditions are necessary for full enjoyment of our existing rights; or, in other words, that

¹¹² See for example, Bond, P. and J. Dugard (2008) "The Case of Johannesburg Water: What Really Happened at the Pre-paid 'Parish Pump'" 12(1) *Law, Democracy and Development* 1; Bakker, K. (2007) 'The "Commons" Versus the "Commodity": Alter-globalization, Anti-privatization and the Human Right to Water in the Global South' 39(3) *Antipode* 430.

¹¹³ *ibid* at 335.

¹¹⁴ *ibid* at 337.

¹¹⁵ Lynda M Collins, 'Safeguarding the Longue Durée: Environmental Rights in the Canadian Constitution' (2015) 71 *SCLR* (2d) 519.

protection of the environment is required for the protection of people.¹¹⁶ Second, according to Collins, the same ecologically literate reading of the Constitution may reveal a more robust free-standing right to a healthy environment. This view asserts that understanding environmental rights as a derivative of existing human rights is fundamentally backward; that is, instead environmental rights should be seen as primary. Indeed, the SCC has alluded to a deeply entrenched free-standing environmental right by emphasizing the importance of intergenerational equity and the precautionary principle in cases that engage s. 35 and s. 7 of the Charter.¹¹⁷

Finally, as Collins argues, section 35 of the Constitution recognizes and affirms the existence of ‘Aboriginal environmental rights’. The argument is that Aboriginal and treaty rights to hunt, fish and trap, to carry out integral spiritual and cultural practices, and to self-govern (among others) are “meaningless” without protection of the ecosystems that support them.¹¹⁸ And further, Aboriginal title appears to encompass an even broader right to conservation of the subject lands: the SCC decision in *Tsilhqot’in Nation v British Columbia* held that even the title-holders themselves must respect environmental quality and maintain the “benefit of the land” for future generations.¹¹⁹

¹¹⁶ Lynda M Collins, ‘An Ecologically Literate Reading of the *Canadian Charter of Rights and Freedoms*’ (2009) 26 Windsor Rev Legal Soc Issues 7 at 8. See also Lynda M Collins, ‘The United Nations, Human Rights and the Environment’ in Louis Kotze and Anna Grear (eds), *Research Handbook on Human Rights and the Environment* (Edward Elgar 2015).

¹¹⁷ Collins, *supra* note 89.

¹¹⁸ Lynda M Collins and Meghan Murtha, ‘Indigenous Environmental Rights in Canada: the Right to Conservation Implicit in Treaty and Aboriginal Rights to Hunt, Fish and Trap’ (2010) 47 Alta L Rev 959 at 970, 984; John Borrows, ‘Living Law on a Living Earth’ in Moon (ed.) *Law and Religious Pluralism in Canada* (UBC Press 2008); Theresa A McClenaghan, ‘Why Should Aboriginal Peoples Exercise Governance over Environmental Issues?’ (2002) 51 UNBLJ 211 at 220-222. See also Randy Kapashesit and Murray Klippenstein, ‘Aboriginal Group Rights and Environmental Protection’ (1991) 36 McGill LJ 925 at 957; John Borrows, *Canada’s Indigenous Constitution* (University of Toronto Press 2010); John Borrows, ‘Living Between Water and Rocks: First Nations, Environmental Planning, and Democracy’ (1997) 47 UTLJ 417; L Little Bear, ‘Relationship of Aboriginal People to the Land and the Aboriginal Perspective on Aboriginal Title’ in CD-ROM: *For Seven Generations: An Information Legacy of the Royal Commission on Aboriginal Peoples* (Minister of Supply & Services 1996); James (Sakej) Youngblood Henderson, Marjorie L Benson, and Isobel M Findlay, *Aboriginal Tenure in the Constitution of Canada* (Carswell 2000) at 410-420, 256; Patrick Macklem, ‘The Impact of Treaty 9 on Natural Resource Development in Northern Ontario’ in Michael Asch (ed), *Aboriginal and Treaty Rights in Canada* (UBC Press 1997); *R v Nikal* [1996] 1 SCR 1013 at para 94, 133 DLR (4th) 658.

¹¹⁹ *Tsilhqot’in Nation v British Columbia* 2014 SCC 44 at para 15, 374 DLR (4th) 1.

Conclusion

Despite the sense that we have experienced in Canada an “overt federal resiling from environmental law”¹²⁰ over recent years, it is important to keep in mind also that jurisdiction over the environment is a perennial contestation that cannot be uniformly characterized as a contest to fill nor vacate jurisdictional space, nor is it always straight-forward to determine the jurisdictional balance that would produce optimal results in terms of achieving environmental justice. I have argued in this Chapter that a politicization of these questions is appropriate and necessary, and thus I welcome the way that new movements for environmental justice have been turning increasingly to the *Canadian Charter of Rights and Freedoms* to challenge the inadequacy of environmental law and regulation in Canada. Activists are claiming entitlements to clean air and clean water for everyone, and demanding that governments recognize a fundamental human right to a healthy environment for all. Despite all they are up against, these campaigns have the potential to draw constitutional debates over authority to regulate the environment out of the exclusive domain of lawyers and into everyday politics – and this is a good thing.

¹²⁰ Deborah Curran, “Water Law as a Watershed Endeavour: Federal Inactivity as an Opportunity for Local initiative” (2015) 28 JELP 53.