THE ENVIRONMENT AND THE CONSTITUTION SERIES

BATTLEGROUND ENVIRONMENT:

Deconstructing Environmental Jurisdiction under the Canadian Constitution

BACKGROUNDER TO AN ELC REPORT SERIES

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ABOUT THESE REPORTS

The Canadian Constitution is the supreme law of the land. This means that not only do all other pieces of legislation need to ensure that they are in line with the Constitution, but it also restrains government action and jurisdiction. In this series of reports, we look at our Constitutional documents and how they relate to environmental law.

These reports will be divided into three main parts, the first part will provide a background to our Constitution and a summary of some of the important sections and constitutional doctrines that relate to environmental issues. Part two will be composed of six subject matter focused reports, each on a different topic including:

1. Species at Risk;
2. Water & Fisheries;
3. Greenhouse Gases;
4. Toxins;
5. Interprovincial Matters; and
6. Environmental/Impact Assessment.

Finally, part three will explore the interaction of environmental regulation with Aboriginal and treaty rights.

A Note on Language: Parts one and two will not include any substantive discussion of Aboriginal Law but will make reference to the same when necessary. As such, we must recognize a few important terms as set out in our accompanying report "The Intersection of Environmental Law and Indigenous Rights." Firstly, we recognize that the term "Indian" is considered by many Indigenous people to be inappropriate but as it is used within the settler legal system, we use this term where it is used by the settler legal system (albeit with reluctance). Otherwise, we will use the terms Indigenous, First Nations, Métis or Inuit as required by context. Secondly, the phrase "aboriginal law" is used when discussing the settler legal system as it applies to Indigenous Peoples and their rights. Finally, the phrase "Indigenous law" is used when discussing the legal traditions, customs and practices of First Nations, Métis, and Inuit peoples.

We will also refer to different portions of the Constitution. As we discuss below, the Constitution of Canada has been through many iterations. In light of this, we will use the names *Constitution Act, 1867* and *Constitution Act, 1982* to specify which version we are referring to. If we refer only to the constitution, the specific document is not necessary and instead we are referring to constitutional doctrines in general.

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INTRODUCTION

There is no direct reference to the environment in the Constitution, so establishing where environmental law fits has been an ongoing challenge for both levels of government and the courts. The framers of the Constitution would likely not have considered the same aspects of the environment as we would today.

Regardless, because of the lack of direct allocation of jurisdiction over the environment, regulation of the environment has been divided amongst both levels of government – the federal Parliament and the provinces. How and when this jurisdiction can be relied upon is not always clear. Further, this lack of clarity has resulted in conflict and, at times, a jurisdictional vacuum where neither level of government is legislating to the full boundaries of their jurisdiction. There may also be concurrent jurisdiction which means that both levels of government have jurisdiction to legislate over different aspects of a single issue. In this report we will focus on some of these gaps and how they impact upon the environment.

As this report moves through discussion of the role of the Constitution in environmental matters, two interpretative doctrines should be kept in mind: the living tree doctrine and the concept of constitutional supremacy. To begin, we will move through a history of the Constitution and the doctrine of the division of powers which will underscore these documents.

The Living Tree Doctrine

In light of the long history of our Constitution, courts (and governments) have often been called upon to interpret and update the original text. To do this, and to interpret this document through the lens of a modern age, the doctrine of the living tree has been integral.

The living tree doctrine was first identified in the 1929 Privy Council decision in *Edwards v Canada* more commonly known as the 'Persons Case'.[1] At the time, the Privy Council of the United Kingdom was the highest court in the land. The issue before the Court was "whether the words 'qualified persons' in [section 24 of the BNA Act] included women, and consequently whether women are eligible to be summoned to and become members of the Senate of Canada."[2] In coming to their conclusion that women **were** eligible to become members of the Senate, the Privy Council held that "[t]he BNA Act planted in Canada is a living tree capable of growth and expansion within its natural limits."[3] They explained that the duty of the Court was to "give [the Act] a large and liberal interpretation."[4] This doctrine was upheld by the Supreme Court of Canada in the *Reference re Same Sex Marriage* where the Court found that "[t]he 'frozen concepts' reasoning runs contrary to one of the most fundamental principles of Canadian constitutional interpretation: that our Constitution is a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life."[5]

It is within this interpretive doctrine of a living tree that all other constitutional doctrines and interpretation must be situated. The Constitution and its provisions are not fixed in time and are able to grow and adapt as required.

Constitutional Supremacy

In Canada, since the patriation of the Constitution in 1982, the law of the *Constitution Act, 1982* was deemed as "the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."[6] This means that governments are constrained by the provisions of the Constitution and courts can overturn law that is deemed to be inconsistent with the text of the Constitution.[7]

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[1] *Edwards v Canada (AG),* 1929 UKPC 86.

[2] *Ibid* at 98.

[3] *Ibid* at 106-107.

[4] *Ibid* at 107.

[5] *Reference re Same-Sex Marriage,* 2004 SCC 79 at para 22.

[6] *Constitution Act, 1982,* being Schedule B to the *Canada Act, 1982* (UK), 1982, c 11, s 52(1) [*Constitution Act, 1982*].

[7] In the decision of *R v Therens,* [1985] 1 SCR 613 at 638, Justice Le Dain found that the Charter "is part of the supreme law of Canada and that any law that is inconsistent with its provisions is to the extent of such inconsistency of no force and effect." Similarly, in *Hunter v Southam Inc.,* [1984] 2 SCR 145 at 148, Justice Dixon (as he then was) begins the judgment of the Court stating "[t]he Constitution of Canada, which includes the *Canadian Charter of Rights and Freedoms,* is the supreme law of Canada. Any law inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect. Section 52(1) of the *Constitution Act, 1982* so mandates."

A History of our Constitution

On July 1, 1867, the first iteration of a constitutional document was passed. This was the *British North America Act* ("BNA Act"), the founding document for the Dominion of Canada.[8] It was not Canadian but was instead an act passed by the Parliament of the United Kingdom. The BNA Act united the separate territories in what is now Canada into one single dominion – the confederation of Canada. It also set out the division of powers and the structure of the government of Canada and eventually became known as the *Constitution Act, 1867*.[9] At this time, Canada was a "self-governing British colony" and any major changes to the Constitution would require action by the Parliament of the United Kingdom.[10] As such, the highest court in the land was the Privy Council of the United Kingdom.

The next step in Canada's progress towards constitutional independence was the 1931 *Statute of Westminster*.[11] This was an act of the British Parliament that "granted to Dominions full legal autonomy except in those areas where they chose not to take advantage of that autonomy."[12] This included more Canadian authority to make decisions in the realm of foreign policy and to start making decisions that did not necessarily accord with the British. However, it did not result in repatriation of the Canadian Constitution. This reservation was found in section 7 and read "Nothing in this Act [the Statute of Westminster] shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts, 1867 to 1930, or any order, rule or regulation made thereunder."[13]

Full autonomy would not come until 1982 with the patriation of the Canadian Constitution. This process transferred control of the Constitution from the British Parliament to the Canadian government. This was also when the Constitution was updated to include the amending formulae and the *Charter of Rights and Freedoms.* The Constitution was now known as the *Constitution Act, 1982.*

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[8] *British North America Act,* 1867 (UK), 30 & 31 V1, n 5.

[9] *Constitution Act, 1867* (UK), 30 & 32 Vict, c 3, reprinted in RSC 1985, App II, No 5.

[10] Government of Canada, "The Canadian Constitution" (1 Sep 2021) online: https://www.justice.gc.ca/eng/csj-sjc/just/05.html.

[11] *Statute of Westminster,* 1931 (UK), 22 & 23 GEO V, c 4, s 2 [*Statute of Westminster*].

[12] Government of Canada, "Why, in 1931, Canada chose not to exercise its full autonomy as provided for under the Statute of Westminster" *Intergovernmental Affairs* online: https://www.canada.ca/en/intergovernmental-affairs/services/federation/statute-westminster.html.

[13] *Statute of Westminster, supra* note 11, s 7.

1982 – Today: Changing the Constitution since Patriation

The last major change to the Constitution happened in 1982 with the patriation[14] of our Constitutional documents, addition of Indigenous rights, creation of the Charter, and other important changes. Since that occasion, focus has been on the interpretation of these provisions and on further division of powers interpretation. The following section will highlight some of the academic debate regarding whether or not the Constitution has been amended (albeit less formally) since its patriation in 1982. To begin, we will highlight some of the amending formulae, as they were drafted for the *Constitution Act, 1982.*

The Amending Formula – the 7/50 rule

Section 38(1) of the *Constitution Act, 1982* is the "General procedure for amending Constitution of Canada" colloquially known as the 7/50 rule.[15] This section states:[16]

> "38(1) An amendment to the Constitution of Canada may be made by proclamation issued by the Governor General under the Great Seal of Canada where so authorized by
>
> (a) Resolutions of the Senate and House of Commons; and
> (b) Resolutions of the legislative assemblies of at least two-thirds of the provinces that have, in the aggregate, according to the then latest general census, at least fifty per cent of the population of all the provinces."

The formula set out in this section must be followed if amendments are proposed to any of the following:[17]

(a) the principle of proportionate representation of the provinces in the House of Commons prescribed by the Constitution of Canada;
(b) the powers of the Senate and the method of selecting Senators;
(c) the number of members by which a province is entitled to be represented in the Senate and the residence qualifications of Senators;
(d) the Supreme Court of Canada – subject to section 41(d);
(e) the extension of existing provinces into the territories; and
(f) notwithstanding any other law or practice, the establishment of new provinces.

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[14] "Patriation is a Canadian term that describes the transformation of Canada's Constitution from an act of the British Parliament to an independent Canadian Constitution that was amendable by Canada. The word itself is taken from repatriation meaning to return something to its own country" – For further discussion see: Centre for Constitutional Studies, "Patriation" (4 Jul 2019) online: https://www.constitutionalstudies.ca/2019/07/patriation/#:~:text=%E2%80%9CPatriation%E2%80%9D%20is%20a%20Canadian%20term,something%20to%20its%20own%20country..

[15] *Constitution Act, 1982, supra* note 6, s 38(1).

[16] *Ibid*, s 38(1).

[17] *Constitution Act, 1982, supra* note 6, s 42(1).

Certain topics require an even higher degree of unanimity. The *Constitution Act, 1982* sets out that an amendment to the Constitution will require the unanimous consent of all provinces, along with resolutions of the Senate and House of Commons if the changes involve:[18]

(a) the office of the [King], the Governor General and the Lieutenant Governor of a province;
(b) the right of a province to a number of members in the House of Commons not less than the number of Senators by which the province is entitled to be represented at the time this Part comes into force;
(c) subject to section 43, the use of the English or French language;
(d) the composition of the Supreme Court of Canada; and
(e) an amendment to this part.

In 1983, a Constitutional amendment under the 7/50 rule was successful. This process amended paragraph 25(b) of the *Constitution Act, 1982* to read "any rights or freedoms that now exist by way of land claims agreements or may be so acquired" and section 35 was amended to add:

> "(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.
>
> (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons."

Since this achievement, further reliance on the 7/50 rule has faltered - as the failed Meech Lake Accord in 1987 and Charlottetown Accord in 1990 highlight. In fact, Judge Patrick Monahan and Professor Jamie Cameron argue that since 1982, changes to the Constitution have been informal and even go so far as to argue that under the current formula and within our current political and legal climate, amending the Constitution is impossible.[19] This is relevant to environmental law because the addition of a right to a healthy environment whether in the Charter or elsewhere, would likely require the use of the 7/50 rule.[20]

For example, Professor Emmett Macfarlane argues that changes to the Constitution have been limited to informal changes since 1983.[21] He contends that reliance on unwritten constitutional principles has allowed the courts to make changes to the Constitution through the incorporation of unwritten constitutional principles into caselaw, meaning that the Courts are the only branch of government that have the ability to make changes to our constitutional documents.[22]

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[18] *Ibid*, s 41.

[19] Jamie Cameron & Patrick Monahan, "Impacts of Meech Lake & Charlottetown" (Presentation delivered at the Legacies of Patriation Conference, 21 Apr 2022) [unpublished].

[20] We consider this idea in more depth in our section on "The Canadian Charter of Rights and Freedoms and the Constitution" below.

[21] Emmett Macfarlane, "Constitutional Amendment Panel" (Presentation delivered at the Legacies of Patriation Conference, 22 Apr 2022) [unpublished].

[22] *Ibid*.

The Lesser-Known Amending Options

While the 7/50 rule applies to major changes to the Constitution, other amending formulae are set out in sections 43, 44, and 45 of the *Constitution Act, 1982*.

Section 43 applies to provisions that relate to some but not all provinces. In the event of such a proposal, including proposed changes to boundaries between provinces and any amendment to any provision that relates to the use of the English or French language within a province, the change can be made upon a resolution of the Senate, House of Commons, and the legislative assembly of each province to which the amendment applies.[23] Section 44 states that amendments to either the federal executive, the Senate, or the House of Commons can be made exclusively by a Parliamentary resolution, subject to the topics set out in sections 41 and 42 and section 45 specifies that amendments to the 'constitution of a province' can be made exclusively by the respective provincial legislature.[24]

The Amending Formula in the 21st Century: Current Examples

While no changes have been made under the 7/50 rule, other amending formulae have been cited in proposed changes. Below we will examine two of these Constitutional updates.

The first was initiated by Quebec in *An Act Respecting French, the Official and Common Language of Quebec* with a number of provisions regarding the use of the French language in the province. [25] This provincial Act purports to add two major clauses to the *Constitution Act, 1867* – the first states that "Quebecers form a nation" and the second that "French shall be the only official language of Quebec. It is also the common language of the Quebec nation."[26] The Act suggests that these clauses be included after section 90 of the *Constitution Act* and purports to do so unilaterally, relying on section 45 of the *Constitution Act, 1982*.[27] This would be the first attempt by a province to amend the Canadian Constitution through provincial legislation.[28] As Ian Peach notes, section 45 reads "subject to section 41, the legislature of each province may exclusively make laws amending the constitution of the province" however, it makes no reference to the Canadian Constitution.[29] Professor Emmett Macfarlane argues that the first clause should properly trigger the 7/50 rule, arguing that "it imposes recognition of a contested

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[23] *Constitution Act, 1982, supra* note 6, s 43.

[24] *Ibid*, ss 44 & 45.

[25] *An Act respecting French, the official and common language of Quebec,* SQ 2022, c 14 [*An Act respecting French*]; Ian Peach, "Quebec Bill 96 - Time For a Primer on Amending the Constitution" 2021 30-3 *Constitutional Forum* at 2 [Peach].

[26] *An Act respecting French, supra* note 25, s 159.

[27] Peach, *supra* note 25 at 2.

[28] *Ibid* at 2.

[29] *Constitution Act, 1982, supra* note 6, s 45; Peach, *supra* note 25 at 3.

fact on the rest of the federation."[30] Further, both Professor Macfarlane and Ian Peach argue that the second provision is more properly amended under section 43.[31] In fact, a change to the official languages in New Brunswick was made under section 43 of the *Constitution Act, 1982* in 1993 and can be found in section 16.1.[32]

The second change came out of Saskatchewan when in 2022, the province triggered section 43 of the *Constitution Act, 1982* to amend *The Saskatchewan Act*.[33] This began when the Saskatchewan legislature unanimously passed a motion "in favour of amending the Constitution as it related to *The Saskatchewan Act* to provide certainty regarding Canadian Pacific Rail's taxation requirements."[34] From there, the proposed amendment moved on to the House of Commons and the Senate, where it was approved at both levels.[35]

The Three Branches of Government

As we highlighted above, the country of Canada began as a British colony, inheriting a three-branch system of government with an executive, legislative, and judicial branch.

Executive Branch

Canada is a constitutional monarchy which means that the monarch, represented by the Governor General at the federal level and lieutenant governors at the provincial level, retain symbolic power over the executive branch of government. Section 9 of the *Constitution Act, 1867* states that the "Executive Government and Authority of and over Canada is hereby declared to continue and be vested in the [King]."[36] At the provincial level, the powers and details of the lieutenant governor are set out in sections 58 to 68 of the *Constitution Act, 1867*.[37]

In practice, the executive branch of the government is comprised of the Prime Minister who advises the Governor General on how they may proceed with executive matters. As we discuss in our section on the unwritten constitution below, the role of the Prime Minister is not included

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30 Emmett Macfarlane, "Quebec's attempt to unilaterally amend the Canadian Constitution won't fly" (14 May 2021) *Policy Options* online: https://policyoptions.irpp.org/magazines/may-2021/quebecs-attempt-to-unilaterally-amend-the-canadian-constitution-wont-fly/.

31 *Ibid*; Peach, *supra* note 25 at 3.

32 Constitution Amendment, 1993 (New Brunswick), SI/93-54, (1993) C Gaz II, 1588.

33 *The Saskatchewan Act, 1905,* 4-5 Edw. VII, c 42.

34 Carly Rathwell, "Saskatchewan's Proposed Amendments to the Constitution of Canada Proceed to Senate" (9 Feb 2022) *News Release – Government of Saskatchewan* online: https://www.saskatchewan.ca/government/news-and-media/2022/february/09/saskatchewans-proposed-amendments-to-the-constitution-of-canada-proceed-to-senate.

35 House of Commons, *Journals,* 44th Leg, 1st Sess, No 27 (9 Feb 2022) at 380; Senate, *Notice Paper*, 44th Leg, 1st Sess, No 32, (5 Apr 2022) at 21.

36 *Constitution Act, 1867, supra* note 9, s 9.

37 *Ibid*, ss 58-68.

in the text of the Constitution and is instead protected as a constitutional convention. The *Constitution Act, 1867* also creates a "Privy Council for Canada", the federal Cabinet, who "aid and advise in the Government of Canada."[38]

Legislative Branch

The legislative branch is again set out in the *Constitution Act, 1867* as consisting of "the [King], an Upper House styled the Senate, and the House of Commons."[39] Details regarding the make-up and members of both the Senate and House of Commons are set out in sections 21 to 52 of the *Constitution Act, 1867*. At the provincial level, the *Constitution Act, 1867* establishes the provincial legislature.

The role of the federal and provincial legislative branches is to make laws for their respective jurisdictions. The Constitution establishes the jurisdiction of the legislative branches in sections 91 and 92 (the "division of powers").

Judicial Branch

The judicial branch is the court system, responsible for interpreting and applying the law, including the Constitution. In Alberta, there are three levels of court – the Provincial Court, the Court of King's Bench, and the Court of Appeal. Each level of Court can hear matters that fall within their jurisdiction. The Court of King's Bench and the Court of Appeal are superior courts that derive their jurisdiction from the *Constitution Act, 1867*.[40] This is in contrast with the Provincial Court which derives its jurisdiction from statute.[41]

At the federal level there is the Federal Court of Canada (which has a trial and appellate level), and the Tax Court. The Federal Court of Canada is Canada's national trial court, hearing disputes that involve federal jurisdiction, including environmental matters. It derives its jurisdiction from the *Federal Courts Act*.[42]

Finally, the Supreme Court of Canada is the final court of appeal for Canada.

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[38] *Ibid*, s 11.

[39] *Ibid*, s 17.

[40] *Constitution Act, 1867*, *supra* note 9, s 96.

[41] *Provincial Court Act,* RSA 2000, c P-31.

[42] *Federal Courts Act,* RSC 1985, c F-7.

Division of Powers

While the branches of government as set out in the Constitution were adopted from the British system, the Canadian division of powers is somewhat of a departure. In Canada, we have a federal system with the *Constitution Act, 1867* dividing constitutional jurisdiction between two levels of government – provincial governments who would have the jurisdiction to legislate over matters set out in section 92 and the federal government with jurisdiction over section 91 matters. In the 2009 decision of *Consolidated Fastfrate Inc. v Western Canada Council of Teamsters*, Justice Rothstein (as he then was) reiterated that "the division of powers in ss. 91 to 95 of the *Constitution Act, 1867* form the bedrock of our federal system."[43]

Municipalities are not a constitutionally recognized level of government. Instead, municipalities are derived by statute and receive their power through the constitutional jurisdiction of the provinces. In Alberta this is done primarily through the *Municipal Government Act.*

Alastair Lucas, citing Daniel Elezar, defines federalism as "a form of political organization created by bargain that distributes power between central and regional governments and recognizes and protects the authority and integrity of each government."[44] According to the division of powers, each level of government has the jurisdiction to legislate on their respective subject matters. If they try to pass a law on a subject matter that falls outside of their jurisdiction it can be declared unconstitutional and *ultra vires*. To facilitate this division of powers, the *Constitution Act, 1867* in sections 91 (federal powers) and 92 (provincial powers) sets out the responsibilities assigned to the two levels of government. Issues arise; however, because the categories set out in the *Constitution Act, 1867* are not exclusive of all possible legislative topics and are broad, which can result in both levels of government passing overlapping pieces of legislation. Certain concurrent powers or areas of law are exercisable by both levels of government. In those cases, the courts may be called upon to distinguish whether a law is intruding upon the other level of government's jurisdiction or whether both laws can exist side by side.

There is also no direct reference to the environment in the Constitution. Co-author Brenda Heelan Powell suggests that this may not have been because the government did not consider the environment at the time but rather that "the areas most affected by pollution in 1867", specifically fisheries and navigation, were in fact "assigned to the federal government."[45] Our understanding of the environment has since expanded. Practically, this has resulted in environmental laws at both the federal and provincial level.

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[43] *Consolidated Fastfrate Inc. v Western Canada Council of Teamsters*, 2009 SCC 53 at para 29 [*Consolidated Fastfrate*].

[44] Alastair R. Lucas, "Can Provincial Governments Stop Interprovincial Pipelines?" (4 June 2021) *Canadian Institute of Resources Law Occasional Paper #74* at 3 [Lucas].

[45] Brenda Heelan Powell, "Environmental Assessment & the Canadian Constitution: Substitution and Equivalency" (2014) *Environmental Law Centre* at 10.

As mentioned above, the original version of federalism also left out Indigenous nations and governments across Canada. While not recognized in the same way as the provincial and federal levels of government, First Nations treaties and section 35 of the *Constitution Act, 1982* create "constitutionally protected governance rights."[46] Indigenous rights and the constitution are the subject of Part 3 of this report.

Constitutional Sections

The division of powers, as envisioned by the drafters of the Constitution is set out primarily in sections 91 and 92 of the *Constitution Act, 1867*. Below, we describe some of the provisions relevant to environmental law and from there, go on to explain how the courts have interpreted the same.

Enumerated Sections 91 & 92

Section 91: Federal Powers

Legislative authority is granted to the Parliament of Canada through the enumerated subsections of section 91. Some of the subsections most relevant to the environment include "trade and commerce," "sea coast and inland fisheries," "Indians and Lands reserved for the Indians," the "Criminal Law," and "such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces."[47] Further, section 91 establishes what is referred to as the 'residual power' as the federal government may "make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces." We consider the trade and commerce, criminal law, and residual federal power, and their relationship to environmental law, next.

Section 91(2): The Trade and Commerce Provision

While trade and commerce may not appear to be relevant to environmental law, it has often been raised as an option to support the constitutional validity of federal laws. For example, while the *Greenhouse Gas Pollution Pricing Act* was upheld under the peace, order, and good government provision, the trade and commerce section has been suggested as an option to

[46] Lucas, *supra* note 44 at 4.

[47] *Constitution Act, 1867, supra* note 9, ss 91(2), (12), (24), (27) & (29).

uphold emissions pricing at the federal level.[48] These details will be discussed in more depth in our report on greenhouse gas emissions but for now, we will describe the provision in brief.

The test for a valid provision under the trade and commerce power is set out in the SCC decision *General Motors of Canada Ltd.* v *City National Leasing*.[49] In this decision, the SCC sets out a five-step test that "form[s] the basis of the test for valid legislation under the general branch of the trade and commerce power."[50] The five steps are:[51]

1) the legislation must be part of a general regulatory scheme;
2) the scheme must be monitored by the continuing oversight of a regulatory agency;
3) the legislation must be concerned with trade as a whole rather than with a particular industry;
4) the legislation should be of a nature that the provinces jointly or severally would be constitutionally incapable of enacting; and
5) the failure to include one or more provinces or localities in a legislative scheme would jeopardize the successful operation of the scheme in other parts of the country.

While the trade and commerce section has not yet been used to uphold environmental legislation in Canada, Professor Andrew Leach argues that "policies targeting pollution… would meet the first two indicia of the General Motors test" and that this "is broadly supported in scholarship."[52] He argues that "any regime primarily intended to reduce emissions would satisfy a more formal test for the first two hurdles."[53] However, he goes on to note that meeting criteria 3 would "present a more daunting challenge" arguing that it is less clear "what constitutes trade as a whole" and that it will require reconciling "whether the regulation of GHGs constitutes the regulation of a single commodity, or of activities largely within one sector or region."[54]

Section 91(27): the Criminal Law Provision

The criminal law power in section 91(27) has been confirmed by the SCC as applicable to environmental matters. The leading SCC decision in this regard is *R v Hydro-Quebec* which considered the constitutionality of the regulation of toxic substances under the *Canadian Environmental Protection Act*.[55] The respondent, Hydro-Quebec was charged with breaching an Interim Order under the Act and challenged the charges claiming that they were *ultra vires* Parliament and were encroaching on provincial jurisdiction.[56] The Court found that the issue was whether Part II of the CEPA "which empowers the federal Ministers of Health and of the

[48] Andrew Leach, "Environmental Policy is Economic Policy: Climate Change Policy and the General Trade and Commerce Power," 2021 52-2 *Ottawa Law Review* 97 at 97.

[49] *General Motors of Canada Ltd.* v *City National Leasing*, [1989] 1 SCR 641 [*General Motors*].

[50] Leach *supra* note 48 at 123.

[51] *General Motors, supra* note 49.

[52] Leach *supra* note 48 at 126.

[53] *Ibid* at 127.

[54] *Ibid* at 129.

[55] *R v Hydro-Quebec,* [1997] 3 SCR 213 [*R v Hydro-Quebec*].

[56] *Ibid* at para 1.

Environment to determine what substances are toxic and to prohibit the introduction of such substances into the environment except in accordance with specified terms and conditions, falls within the constitutional power of Parliament."[57] In their decision, the majority confirmed that Parliament has the power to legislate over "the criminal law in its widest sense."[58] They also found that the federal government has the discretion "to determine the extent of blameworthiness that it wishes to attach to a criminal prohibition."[59]

The majority goes on to state that the protection of a clean environment is a public purpose sufficient to support a criminal prohibition.[60] Justice La Forest (as he then was) wrote that "while many environmental issues could be criminally sanctioned in terms of protection of human life or health, I cannot accept that the criminal law is limited to that" because "stewardship of the environment is a fundamental value of our society and [Parliament] may use its criminal law power to underline that value."[61] The criminal law power is also distinguished from the national concern doctrine. While the national concern doctrine assigns full power to regulate an area to Parliament, the criminal law power uses discrete prohibitions to prevent evils falling within a broad purpose.[62] However, it is limited and cannot "colourably invade areas of exclusively provincial legislative competence."[63] Read more about this decision in our report on toxic substances.

Later, the Federal Court in their 2014 decision *Syncrude Canada Ltd. v Canada (Attorney General)* reiterated that a valid exercise of the criminal law power requires (1) a prohibition (2) backed by a penalty (3) with a criminal purpose.[64] The Court also confirmed that "protection of the environment is itself a valid criminal law purpose."[65] Stewart Elgie notes that the criminal law places restrictions on the tools available to the federal government, enabling the government to address broad subject matters but only with prohibitory tools.[66]

Other sections that relate to environmental law include:

- Section 91(10): Navigation and Shipping;
- Section 91(12): Sea Coast & Inland Fisheries; and
- Section 91(24): Indians and Lands reserved for the Indians.

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[57] *Ibid* at para 87.

[58] *Ibid* at para 119.

[59] *Ibid* at para 120.

[60] *Ibid* at para 123.

[61] *Ibid* at para 127.

[62] *Ibid* at para 128.

[63] *Ibid* at para 121.

[64] *Syncrude Canada Ltd. v Canada (Attorney General)*, 2014 FC 776 at para 58.

[65] *Ibid* at para 77.

[66] Stewart Elgie, "Kyoto, The Constitution, and Carbon Trading" (2007) 13:1 Rev of Const Studies 67 at 104 [Elgie].

In addition to these sections, residual power is allocated to the federal government through the peace, order, and good government clause ("POGG"). Neil Hawke highlights that this "residual jurisdiction is triggered on those occasions when the federal government is able to establish that a subject transaction or other activity would frustrate its pre-eminent jurisdiction under the constitution."[67]

Residual Federal Powers: The Peace, Order, and Good Government Clause

Section 91 of the *Constitution Act, 1867* sets out the legislative authority of the Parliament of Canada, including the authority to legislate over enumerated classes and to legislate for peace, order, and good government ("POGG"). The POGG provision assigns the federal government with residual power applying to matters "not coming with the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces."[68] Over time, unallocated powers such as control over aeronautics, radio, and official languages have been classified as falling under federal control. Further, through the lens of having "national dimensions" certain matters, including those originally of a local nature and under provincial power can, through changed circumstances, become subject to federal jurisdiction.[69] Stewart Elgie describes the POGG power has "placing a vertical limit on Parliament's power, limiting the breadth of subject matter but allowing for a wide range of tools."[70]

Professor Peter Hogg explains that the POGG power can be divided into three branches:[71]

- The emergency branch allows the federal government to pass legislation in the event of an emergency; however, the legislation must be time limited and can only last as long as the emergency it was intended to manage.[72]
- The gap branch authorizes the federal government to legislate over any subject matter that does not fall under one of the headings in sections 91 or 92 and usually applies to subject matter that is recognized by the *Constitution Act, 1867* but which was left out of the list.[73]
- The national concern branch allows the federal government to legislate over any subject that becomes a concern to the nation as a whole and that requires a coordinated federal response. The national concern doctrine can apply to matters that were not considered at the time of Confederation and matters that may have originally been a matter of a

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[67] Neil Hawke, "Canadian Federalism and Environmental Protection" (2002) 14:2 J Envtl L 185 at 188 [Hawke].

[68] *Constitution Act, 1867, supra* note 9, s 91.

[69] W.H. McConnell & Richard Foot, "Constitution Act, 1867" (30 Jan 2015) *The Canadian Encyclopedia* online: https://www.thecanadianencyclopedia.ca/en/article/constitution-act-1867; Gerald A. Beaudoin & Jon Tattrie, "Constitutional Law" (6 Jul 2015) *The Canadian Encyclopedia* online: https://www.thecanadianencyclopedia.ca/en/article/constitutional-law.

[70] Elgie, *supra* note 66 at 104.

[71] Peter W. Hogg, *Constitutional Law of Canada*, vol 1, 5th ed loose-leaf (Scarborough, Ont: Carswell, 2007), ch 17 at 5.

[72] *Ibid* at 27.

[73] *Ibid* 17 at 7.

local or private nature and have since become a matter of national concern.[74] Some examples have included aviation, the national capital region, marine pollution, and minimum pricing standards for greenhouse gas emissions.[75] We consider the national concern in more detail next.

The National Concern Doctrine

The national concern branch is the most expansive branch of the POGG power and the test to determine if a matter is properly considered a national concern was set out in two Supreme Court of Canada decisions: *R v Crown Zellerbach* and the *Reference re Greenhouse Gas Pollution Pricing Act*.[76] In *Crown Zellerbach,* the SCC first outlined the criteria for the national concern branch of POGG writing:

> "For a matter to qualify as a matter of national concern in either sense it must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the *Constitution.*"[77]

Further, to determine if a matter is distinguished from a matter of provincial concern, the Court found that it is "relevant to consider what would be the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the intra-provincial aspects of the matter."[78] This test was confirmed in *Hydro-Quebec* when La Forest J acknowledged that a "discrete area of environmental legislative power" can form a matter of national concern if it meets the criteria set out above.[79] However, it was not until 2021 in the *Reference re Greenhouse Gas Pollution Pricing Act* that the criteria was revisited and clarified. In this decision, the SCC began by clarifying that the national concern doctrine criteria must evaluate the 'matter' of the statute or its 'pith and substance' rather than the legislation itself.[80] The Court goes through a three-step test.

First, the court asks a threshold question, considering "whether the matter is of sufficient concern to Canada as a whole to warrant consideration under the doctrine."[81] They note that this step ensures "that the national concern doctrine cannot be invoked too lightly" and if this burden is met, the analysis can proceed.[82]

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[74] *R v Crown Zellerbach Canada Ltd*, [1988] 1 SCR 401 at para 33 [*Crown Zellerbach*].

[75] *Johannesson v West St Paul*, [1952] SCR 292; *Munro v National Capital Commission*, [1966] SCR 663; *Crown Zellerbach, supra* note 74; *Reference re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 [*Reference re GGPPA*].

[76] *Crown Zellerbach, supra* note 74; *Reference re GGPPA*, *supra* note 75.

[77] *Crown Zellerbach*, *supra* note 74 at para 33.

[78] *Crown Zellerbach, supra* note 74 at para 33.

[79] *R v Hydro-Quebec, supra* note 55 at paras 115-116 as cited in *Reference re GGPPA, supra* note 75 at para 108.

[80] *Reference re GGPPA, supra* note 75 at para 115.

[81] *Ibid* at para 142.

[82] *Ibid* at paras 143 & 144.

The second step looks at whether the matter has a "singleness, distinctiveness and indivisibility" which the Court explains in two parts:[83]

- a focus on the prevention of federal overreach requiring that jurisdiction is found "only over a specific and identifiable matter that is qualitatively different from matters of provincial concern"; and
- that federal jurisdiction should only exist if there is evidence of provincial inability to address the matter whether jointly or severally because the failure of one province to cooperate would prevent the others from succeeding and a province's failure would have grave extraprovincial consequences.

In the third and final step the Court must determine whether the scale of impact of the proposed matter of national concern is reconcilable with the division of powers, reaffirming *Crown Zellerbach*.[84] We provide a more fulsome discussion of this decision in our forthcoming report on GHG emissions.

In the *Reference re GGPPA,* the SCC also confirmed how the POGG power, particularly the national concern doctrine interacts with other constitutional doctrines in particular the doctrines of interjurisdictional immunity and the double aspect doctrine, both described further in our section 'Testing the Division of Powers.' The Court held that "interjurisdictional immunity does not automatically apply to matters of national concern."[85] They go so far as to say that the modern approach to interjurisdictional immunity which focuses on cooperative federalism "would not apply to a newly identified matter of national concern."[86] The Court also confirmed "the double aspect doctrine can apply in cases in which the federal government has jurisdiction on the basis of the national concern doctrine."[87] They reiterate the ability to use the double aspect doctrine with respect to POGG and the national concern doctrine upholds the modern approach to jurisdictional analysis, that of "flexibility and a degree of overlapping jurisdiction."[88]

Section 92: Provincial Powers

Similarly, provincial heads of power are set out in section 92 of the *Constitution Act, 1867*. Section 92 lists subjects of exclusive provincial jurisdiction including the management and sale of public lands and the timber and wood located on the same lands, local works and undertakings, property and civil rights, and generally all matters of a local or private nature.[89] In addition, section 92A assigns the provinces the power to "exclusively make laws in relation to (a) exploration for non-renewable natural resources in the province; (b) development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom; and (c)

[83] *Ibid* at para 146.

[84] *Ibid* at para 165.

[85] *Reference re GGPPA, supra* note 75 at para 124.

[86] *Ibid* at para 124.

[87] *Ibid* at para 126.

[88] *Ibid* at para 126.

[89] *Constitution Act, 1867, supra* note 9, ss 92(5), (10), (13) & (16).

development, conservation and management of sites and facilities in the province for the generation and production of electrical energy."[90] This section was added in 1982 during the repatriation of the Canadian Constitution and we consider it briefly below.

Section 92A

Section 92A is made up of six subsections as follows:

> 92A(1) In each province, the legislature may exclusively make laws in relation to[91]
>
> (a) exploration for non-renewable natural resources in the province;
> (b) development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom; and
> (c) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy
>
> (2) In each province, the legislature may make laws in relation to the export from the province to another part of Canada of the primary production from non-renewable natural resources and forestry resources in the province and the production from facilities in the province for the generation of electrical energy, but such laws may not authorize or provide for discrimination in prices or in supplies exported to another part of Canada.
>
> (3) Nothing in subsection (2) derogates from the authority of Parliament to enact laws in relation to the matters referred to in that subsection and, where such a law of Parliament and a law of a province conflict, the law of Parliament prevails to the extent of the conflict.[92]
>
> (4) In each province, the legislature may make laws in relation to the raising of money by any mode or system of taxation in respect of
>
> (a) non-renewable natural resources and forestry resources in the province and the primary production therefrom, and
> (b) sites and facilities in the province for the generation of electrical energy and the production therefrom,
>
> whether or not such production is exported in whole or in part from the province, but such laws may not authorize or provide for taxation that differentiates between

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[90] *Constitution Act, 1867*, *supra* note 9, s 92A.

[91] In the 1984 decision *Reference re Newfoundland Continental Shelf*, the Supreme Court of Canada confirmed that this jurisdiction does not extend beyond provincial borders finding that the "right to explore and exploit" the mineral and other natural resources of the seabed and subsoil of the continental shelf offshore Newfoundland and the legislative jurisdiction to make laws in this regard resides with the federal government not the province. The Court confirmed that section 92A is restricted to within provincial borders. To read more see *Reference re Newfoundland Continental Shelf,* [1984] 1 SCR 86.

[92] Professors Nigel Bankes and Andrew Leach argue that subsections (2) and (3) "combine to offer a province a limited concurrent power to make laws in relation to the export from that province to another province, or provinces, of the primary production of natural resources" making it clear no discrimination cannot occur against other provinces but question whether "a province can exercise a price or supply preference in favour of itself." See Nigel Bankes & Andrew Leach, "Preparing for a Midlife Crisis: Section 92A at 40" (10 Nov 2022) 60:4 *Alta L Rev* at 24.

> production exported to another part of Canada and production not exported from the province.
>
> (5) The expression *primary production* has the meaning assigned by the Sixth Schedule.[93]
>
> (6) Nothing in subsections (1) to (5) derogates from any powers or rights that a legislature or government of a province had immediately before the coming into force of this section.

Section 92A is a particularly important provision for the provinces as it assigns them control over natural resources. Brendan Downey and his co-authors describe section 92A as granting the provinces "exclusive authority over the development, conservation and management of their non-renewable natural resources and forestry resources and the generation of electricity, concurrent authority over domestic exports of the primary production of non-renewable natural and forestry resources; and concurrent authority over the taxation of non-renewable natural and forestry resources and the generation of electricity."[94] They also note, despite the addition of this section, "provincial suspicion of federal regulation of natural resource development never fully dissipated" which can be seen in ongoing litigation, some of which is discussed in our accompanying reports.[95]

Section 92A(2) also specifies "in each province, the legislature may make laws in relation to the export from the province to another part of Canada of the primary production from non-renewable natural resources and forestry resources in the province and the production from facilities in the province for the generation of electrical energy, but such laws may not authorize or provide for discrimination in prices or in supplies exported to another part of Canada."[96] Nevertheless, in the event that one of the laws established under section 92A(2) conflicts with a federal law, "the law of Parliament prevails to the extent of the conflict."[97]

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[93] The Sixth Schedule states that "production from a non-renewable natural resource is primary production therefrom if (i) it is in the form in which it exists upon its recovery or severance from its natural state, or (ii) it is a product resulting from processing or refining the resource, and is not a manufactured product or a product resulting from refining crude oil, refining upgraded heavy crude oil, refining gases or liquids derived from coal or refining a synthetic equivalent of crude oil; and production from a forestry resource is primary production therefrom if it consists of sawlogs, poles, lumber, wood chips, sawdust or any other primary wood product, or wood pulp, and is not a product manufactured from wood.

[94] Brendan Downey et al., "Federalism in the Patch: Canada's Energy Industry and the Constitutional Division of Powers" (2020) 58:2 Alta L Rev 273 at 278 [Downey].

[95] *Ibid* at 278.

[96] *Constitution Act, 1867*, *supra* note 9, s 92A.

[97] *Ibid,* s 92A(3).

Other Division of Powers Provisions

In addition to sections 91 and 92, the following provisions also set out certain division of power rules.

Section 95 sets up a regime of concurrent jurisdiction for agriculture wherein provinces may make laws in relation to agriculture and the Parliament of Canada may make laws from time to time in relation to agriculture in all or any of the provinces.[98] Provincial laws with respect to agriculture shall have effect in the province so long as they are not repugnant to the federal act.[99]

Section 109 states "all lands, mines, minerals, and royalties belonging to the several Provinces of Canada … and all Sums then due or payable for such Lands, Mines, Minerals, or Royalties, shall belong to the several Provinces…"[100]

Section 132 enables the "Parliament and Government of Canada [to] have all Powers necessary or proper for performing the Obligations of Canada or of any Province thereof, as Part of the British Empire, towards Foreign Countries, arising under Treaties between the Empire and such Foreign Countries."[101] This is known as the treaty-making power and was originally applicable to the British Empire and their ability to enter into treaties with foreign powers and it seems from jurisprudence that it has not been constitutionally allocated to the federal government.

Natural Resources Transfer Agreement

Long before section 92A was added to the *Constitution Act, 1982*, the *Natural Resources Transfer Agreement (NRTA)* allocated jurisdiction over natural resources to prairie provinces, including Alberta.[102] We consider this provincial jurisdiction below.

The Act

The *Alberta Natural Resources Act* came into force in 1930 and is comprised of a memorandum of agreement, the NRTA, between the Government of the Dominion of Canada and the Government of the Province of Alberta.[103] The preamble provides a summary of the Act's purpose:

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[98] *Ibid,* s 95.

[99] *Ibid*, s 95.

[100] *Ibid*, s 109.

[101] *Ibid*, s 132.

[102] *Alberta Natural Resources Act*, SC 1930 c 3.

[103] *Ibid*, Sched.

> "And Whereas it is desirable that the Province should be placed in a position of equality with the other provinces of Confederation with respect to the administration and control of its natural resources as from its entrance into Confederation in 1905."

To achieve this purpose, the NRTA transferred "the interest of the Crown in all Crown lands, mines, minerals (precious and base) and royalties derived therefrom within the Province and the interest of the Crown in the waters and water-powers within the Province… and all sums due or payable for such lands, mines, minerals, or royalties … to the Province."[104] The repeal of section 4 of the *Dominion Water Power Act* also transferred water rights to the province.[105]

Despite this transition, some control remained with the federal government – most of which we still see today. For example, control over inland and sea-coast fisheries, as well as control over Indian reserves, remained with the federal Parliament – although the Act did transfer all other fishery rights to the province.[106] It also specified that national parks "shall continue to be vested in and administered by the Government of Canada as national parks."[107]

The NRTA has also had important impacts on Aboriginal rights with respect to fishing, hunting, and trapping. Section 12 ensured rights to hunt and fish for "support and subsistence" of Indigenous peoples remained, despite provincial control over laws respecting game. This section required the province to assure rights of "hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access."[108] According to Brian Calliou, section 12 of the NRTA was the "first instrument to provide constitutional protection for First Nations' right to hunt"; however, it was limited by narrow interpretations in later judicial decisions.[109] Calliou looks at the history of treaty negotiations and, in particular, game laws and the criminalization of Indigenous traditional hunting practices finding that these game laws culminated in section 12 of the NRTA.[110] Considering the broader nature of treaty negotiations, Calliou traces the history of these regulations and argues that section 12 is an example of a "delegation of federal authority to the provinces to legislate over First Nations."[111] He also highlights that Indigenous peoples were not involved in the negotiation of the NRTA, despite its power over them.[112]

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[104] *Ibid*, s 1.

[105] *Ibid*, s 8.

[106] *Ibid,* Sched, ss 9 & 10.

[107] *Ibid*, Sched, s 14.

[108] *Ibid*, Sched, s 12.

[109] Brian Calliou, "Natural Resources Transfer Agreements, the Transfer of Authority, and the Promise to Protect the First Nations' Right to a Traditional Livelihood: A Critical Legal History" (2007) 12:2 Rev Const Stud 173 at 174.

[110] *Ibid* at 180.

[111] *Ibid* at 198.

[112] *Ibid* at 200.

The Alberta *Natural Resources Act*: An Evolution

Since 1930 and the transfer of jurisdiction over natural resources from the federal government to the Western provinces, Alberta has fought for increased control over these same resources. Susan Blackman and her co-authors provide a history of the fight for control over natural resources management, pointing out that almost immediately after the *Alberta Natural Resources Act* was passed, the province of Alberta established the Turner Valley Conservation Board which would eventually become the Alberta Energy Regulator.[113]

Blackman et al. argue this provincial advocacy eventually morphed into debates over constitutional repatriation when "Alberta and Saskatchewan took the lead through the 1970s in pressing the issue of legislative authority over natural resources at constitutional negotiations. Both provinces put forward a list of requirements, although it was Saskatchewan that first put forward [the provision that would eventually become] s. 92A."[114] They identify five issues that made up the major discussions with respect to section 92A:[115]

1. "The definition of natural resources;
2. The definition of primary producers;
3. Federal jurisdiction over trade and commerce in relation to natural resources;
4. Provincial access to indirect taxation of natural resources; and
5. The federal government's power to declare works and undertakings in relation to resources to be for the general advantage of Canada."

Alberta continues to assert its constitutional jurisdiction over natural resources including through litigation such as the *Reference re Greenhouse Gas Pollution Pricing Act* and the *Reference re Impact Assessment Act*.[116] Both are discussed in more depth in our forthcoming reports.

Testing the Division of Powers

There are three approaches to test a piece of legislation on division of powers grounds: whether a piece of legislation is constitutionally valid (validity), and whether, in a given circumstance a valid provincial law or provision is constitutionally inoperable or inapplicable (i.e., operability and applicability.[117] We consider each in turn.

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[113] Susan Blackman et al., "The Evolution of Federal/Provincial Relations in Natural Resources Management" (1994) 32:3 Alta L Rev 511 at 513.

[114] *Ibid* at 521-522.

[115] *Ibid* at 522.

[116] *Reference re GGPPA, supra* note 75; *Reference re Impact Assessment Act*, 2022 ABCA 165.

[117] *Canadian Western Bank v Alberta*, 2007 SCC 22 at paras 76-77 [*CWB v AB*].

Validity

The test for validity considers whether the legislation was properly enacted in relation to a 'matter' falling validly within the appropriate head of power. If the law is enacted in relation to a matter that comes within the enacting level of government's jurisdiction, it will be considered *intra vires*. If not, it will be considered *ultra vires* and will be declared of no force and effect.

Pith & Substance

The first part in a test for validity is the pith and substance test. This is a two-part test used by the courts to determine if a piece of legislation has been validly enacted under an assigned head of power.

Step one asks the courts to characterize the "pith and substance" of the law which is an identification of what the law is about – its core subject matter.[118] To do this, the court must look at the purpose and legal effect of the law – whether through the preamble, purpose clauses, Hansard, or legislative debates.[119] Determining the pith and substance can rely on both intrinsic evidence (the text of the legislation) and extrinsic evidence.[120]

Step two requires the court to determine whether the core subject matter falls under a head of power assigned to the government that passed the law in question.[121] To do this, the courts rely on the list of subjects assigned to both levels of government as set out in sections 91 and 92 of the *Constitution Act, 1867.* If there is no clear head of power, the courts can look to the residual power assigned to the federal government – the POGG power.

Double Aspect Doctrine

There is also room for a law to validly fall under both federal and provincial jurisdiction. In the 1883 decision in *Hodge v The Queen*, the Privy Council found "…subjects which in one aspect and for one purpose fall within s.92, may in another aspect and for another purpose fall within s.91." This is known as the double aspect doctrine.

This doctrine has been upheld in the years since with the Supreme Court of Canada recognizing "that both Parliament and the provincial legislatures can adopt valid legislation on a single subject depending on the perspective from which the legislation is considered."[122] The double aspect doctrine recognizes that, in practice, "most significant legislative matters cannot be reduced to one discrete subject."[123] Most recently, the SCC applied the double aspect doctrine in the *Reference re Greenhouse Gas Pollution Pricing Act*. The majority found that the double

[118] *Ibid* at para 26.

[119] *Ibid* at para 27.

[120] See generally: *R v Morgentaler,* [1993] 3 SCR 463 at 483-483 & 499-505.

[121] *CWB v AB*, *supra* note 117 para 26.

[122] *Ibid* at para 30.

[123] Downey, *supra* note 94 at 282.

aspect doctrine can apply "in cases where the federal government has jurisdiction on the basis of the national concern doctrine, but whether or not it does apply will vary from case to case."[124]

Ancillary Powers Doctrine

If the constitutional challenge involves only one part of a piece of legislation, the ancillary powers doctrine may apply. This doctrine is an extension of the pith and substance test and provides "that a law may validly intrude into the jurisdiction of another level of government if the intruding portion of the law is necessarily incidental and tightly integrated into a broader scheme that is itself, in pith and substance, valid."[125] It can be used in cases where the impugned section is part of a larger legislative scheme and if the provision and the larger legislative scheme are closely integrated, it is likely the law will be considered necessarily incidental.

The test for the ancillary powers doctrine is set out in the SCC decision of *General Motors v City National Leasing* where the Court established the following three-part test:[126]

1. Does the impugned provision encroach on the other jurisdiction's powers?
2. Is the Act valid?
3. Can the provision be found valid by reason of sufficient integration into the Act?

This test was elaborated on in the 2010 decision of *Quebec (Attorney General) v Lacombe* where Chief Justice McLachlin (as she then was) specified that the pith and substance test was essential and that the ancillary powers doctrine only applies to "legislation that, in pith and substance, falls outside the jurisdiction of its enacting body."[127]

Operability

Once validity has been established, the next step in a division of powers analysis looks at operability. Operability considers two overlapping laws, usually a valid federal law and a valid provincial law and considers whether there is a conflict between the two. If a conflict is identified, the doctrine of paramountcy steps in to render the provincial law inoperable.

Doctrine of Paramountcy

The doctrine of paramountcy states that in the event both a province and the federal government enact laws covering the same or a similar subject, and there is a conflict, the federal law stands. As stated by the SCC "when the operational effects of provincial legislation are incompatible with federal legislation, the federal legislation must prevail and the provincial legislation is rendered inoperative to the extent of the incompatibility."[128] While it is clear that the federal law prevails, as Professor Peter Hogg stated "it is the meaning of conflict or

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[124] *Reference re GGPPA, supra* note 75 at para 126.

[125] Downey, *supra* note 94 at 282.

[126] *General Motors, supra* note 49 at 673, 677 & 683.

[127] *Quebec (Attorney General) v Lacombe,* 2010 SCC 38 at para 38.

[128] *CWB v AB*, *supra* note 117 at 69.

inconsistency… that has proved most troublesome."[129] In *Multiple Access v McCutcheon,* Justice Dickson writing for the majority clarified this definition stating:[130]

> "In principle, there would seem to be no good reasons to speak of paramountcy and preclusion except where there is actual conflict in operation as where one enactment says yes and the other says no; the same citizens are being told to do inconsistent things; compliance with one is defiance of the other."

Hogg argues that this statement clearly finds "that only an express contradiction between two laws – where "compliance with one is defiance of the other" – would suffice to trigger the paramountcy doctrine."[131] This is known as the express contradiction test. Later, the SCC identified the frustration-of-federal purpose test as a subset of the express contradiction test. Hogg describes the test as requiring "the courts to interpret the federal law to determine what the federal purpose is, and then to determine whether the provincial law would have the effect of frustrating the federal purpose."[132] If so, the provincial law is inoperative. The doctrine of paramountcy is limited by the requirement for Courts "to make a judgment as to whether the two laws can indeed live together" without, as Hogg says, an objective measure therefore resulting in unpredictable outcomes.[133]

Applicability

Finally, applicability can test individual legislative provisions. For example, while the legislation as a whole may be valid, the law's application may be read down so as not to infringe upon matters that lie at the core of the other level of government's jurisdiction. This is known as the doctrine of interjurisdictional immunity.

Doctrine of Interjurisdictional Immunity

The doctrine of interjurisdictional immunity recognizes that the division of powers is based on an "allocation of exclusive powers" meaning that subjects are intended to fall within the jurisdiction of one level of government rather than concurrently.[134] This doctrine "seeks to avoid, when possible, situations of concurrency of powers."[135] Interjurisdictional immunity can work to "immunize certain entities" from otherwise valid laws and can be solved by reading down a

[129] Peter W. Hogg, "Paramountcy and Tobacco" (2006) 34:11 *The Supreme Court L Rev: Osgoode's Annual Constitutional Cases Conference* 335 at 335 [Hogg, "Paramountcy and Tobacco"].

[130] *Multiple Access v McCutcheon,* [1982] 2 SCR 161 at para 191 [*Multiple Access*].

[131] Hogg, "Paramountcy and Tobacco", *supra* note 129 at 339.

[132] *Ibid* at 340.

[133] *Ibid* at 342.

[134] *CWB v AB*, *supra* note 117 at para 32.

[135] *Ibid* at para 34.

section of legislation.[136] However, it is limited and should not provide sweeping powers.[137] This was clear from the 2019 decision of *Desgagnés Transport Inc. v. Wärtsilä Canada Inc.* in which the SCC argues that "[i]nterjurisdictional immunity should not be the first recourse in a division of powers dispute — a broad application of interjurisdictional immunity is inconsistent with the notion of flexible federalism and fails to account for the fact that overlapping powers are unavoidable."[138] In this case, the SCC upheld the test for doctrine of interjurisdictional immunity as follows:[139]

1. The impugned provision must trench on the core of an exclusive head of power under the *Constitution Act, 1867*; and
2. The effect of the overlap must impair the exercise of the core of the head of power.

As is the case with most constitutional analysis, the doctrine of cooperative federalism underlines much of the analysis.

Constitutional Doctrines, Provincial Powers, and Claims of Constitutional Overreach

Constitutional doctrines have been used to uphold federal laws but do the principles apply in the same way for provincial jurisdiction? Before considering this question specifically, it may be helpful to understand what is known as the doctrine of cooperative federalism.

The doctrine of cooperative federalism is a modern interpretation which "urges courts to adopt constitutional interpretations which favour, where possible, the ordinary operation of statutes enacted by both levels of government."[140] Professors Eric Adams and Andrew Leach argue "we should think of overlapping legislative powers as more than unavoidable; they are the best way to ensure full democratic participation by the different national and provincial constituencies with a stake in the subject matter at issue."[141] This doctrine has also been supported in case law. For example, in 2010, Justice Abella stated that "[t]oday's constitutional landscape is painted with the brush of co-operative federalism."[142] This doctrine is important for provincial jurisdiction because it purports to value the jurisdictional silos of both levels of government. Justice Rothstein (as he then was), held in the *Fastfrate* decision that "the preference for diversity of regulatory authority … should be respected" and in the end he found that federal jurisdiction should be treated "as the exception, rather than the rule."[143]

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[136] Downey, *supra* note 94 at 284.

[137] *CWB v AB*, *supra* note 117 at para 38.

[138] *Desgagnés Transport Inc. v Wärtsilä Canada Inc.*, 2019 SCC 58 at 237.

[139] *Ibid* at para 93.

[140] Andrew Leach and Eric M. Adams, "Seeing Double: Peace, Order, and Good Government, and the Impact of Federal Greenhouse Emissions Legislation on Provincial Jurisdiction," 2020 29-1 *Constitutional Forum* 1 at 9.

[141] *Ibid* at 9.

[142] *NIL/TU,O Child and Family Services Society v BC Government and Service Employee's Union*, 2010 SCC 45 at para 42.

[143] *Consolidated Fastfrate Inc. supra* note 43 at paras 39 & 44.

Another way to consider this concept is the principle of equal autonomy. Equal autonomy "generates a symmetrical application of basic principles of interpretation (such as the living tree, pith and substance, double aspect and ancillary powers doctrine) to both federal and provincial heads of power."[144] As Bruce Ryder notes, there are examples of equal autonomy being relied upon at the level of the Supreme Court including in the dissent of Justice Iacobucci (as he then was) in the 1993 decision of *Ontario Hydro v Ontario (Labour Relations Board)*.[145] However, while dissents may be persuasive, they are not law.

Despite these concepts, there is also clear caselaw that supports federal jurisdictional paramountcy in the event of a jurisdictional conflict between the two levels of government.[146] Thus, we know that the doctrine of paramountcy provides the federal government with priority rights over the provincial heads of power. This report focuses in part on how changes to our provincial laws can help to improve harmonization and alignment of provincial and federal regulatory systems as they relate to the environment. In other instances, this harmonization will mean recognizing federal jurisdiction over environmental outcomes and protection and working within this framework.

One of the doctrines that does apply to provincial jurisdiction is the double aspect doctrine. In the SCC decision of *Multiple Access v McCutcheon,* the SCC found that the province could regulate insider trading through their constitutional jurisdiction over property and civil rights while the federal government could do so through the POGG power.[147]

What about the doctrine of interjurisdictional immunity?

In the decision *Canadian Western Bank v Alberta,* the SCC held that while the doctrine of interjurisdictional immunity could technically be reciprocal, applying to protect both federal and provincial heads of power, the "jurisprudential application of the doctrine has produced somewhat asymmetrical results" in favour of federal powers.[148] The Court cites a few of their own decisions where the doctrine has been applied to protect provincial provisions but notes that there has been limited "doctrinal discussion."[149] See the SCC decision in *Labatt Breweries of Canada Ltd v Attorney General of Canada* for an example of the Supreme Court reading down a federal provision for its infringement into provincial law.[150]

Functionally; therefore, interjurisdictional immunity applies primarily to federal heads of power. For example, in the decision *Canada (Attorney General) v PHS Community Services Society*,

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[144] Bruce Ryder, "Equal Autonomy in Canadian Federalism: The Continuing Search for Balance in the Interpretation of the Division of Powers" (2011) 54:20 *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 565 at 575 [Ryder].

[145] *Ontario Hydro v Ontario (Labour Relations Board)*, [1993] 3 SCR 327; Ryder, *supra* note 144 at 576.

[146] See for example *Law Society of British Columbia v Mangat,* 2001 SCC 67.

[147] *Multiple Access, supra* note 130 at 162.

[148] *CWB v AB*, *supra* note 117 at para 35.

[149] *Ibid* at para 35.

[150] *Labatt Breweries of Canada Ltd v Attorney General of Canada* (1979), [1980] 1 SCR 914 at 946-47; see also: *Public Service Alliance of Canada v Canada*, 2006 SCC 29; *Singbeil v Hansen* (1985), 63 BCLR 332 (CA) at 339; and *Dominion Stores Ltd v The Queen* (1979), [1980] 1 SCR 844 at 863.

the SCC considers whether interjurisdictional immunity applies to provincial jurisdiction over healthcare.[151] The BCCA accepted that "decisions about what treatment may be offered in provincial health facilities lie at the core of the provincial jurisdiction in the area of health care, and are therefore protected from federal intrusions by the doctrine of interjurisdictional immunity."[152] However, the SCC did not find that interjurisdictional immunity applied to a broad head of power like healthcare, holding that the "premise of fixed watertight cores is in tension with the evolution of Canadian constitutional interpretation towards the more flexible concepts of double aspect and cooperative federalism."[153] Professors Nigel Bankes and Andrew Leach argue that Chief Justice McLachlin (as she then was) outlined three reasons why interjurisdictional immunity could not be applied to provincial jurisdiction over healthcare:[154]

1. it was a novel argument "especially in light of the Court's expressed reluctance to expand the scope of IJI";
2. it was difficult to identify the "core of an exclusively provincial power"; and
3. to manage the risk of "creating a legislative vacuum."

It seems; therefore, that while constitutional doctrines can be used to uphold provincial jurisdiction, there is more jurisprudence to support federal jurisdictional protection. Further as Bankes and Leach suggest in their analysis of the ABCA opinion in *Reference re Impact Assessment Act* (examined in depth in our forthcoming report on environmental assessment) "any attempt to rely on IJI in the context of resource development… would face formidable challenges."[155] It is not a stretch to suggest that this challenge is not limited to resource development but also extends to other areas of environmental protection.

The doctrine of interjurisdictional immunity has also been raised in the context of Indigenous rights, sections 35 and 91(24) of the Constitution, and provincial laws of general application. In *Tsilhqot'in*, the SCC considered whether provincial laws of general application apply to land held under Aboriginal title.[156] The SCC stated that, as a general rule, provinces have authority to regulate land use within the province whether held by the Crown, private owners or by holders of Aboriginal title. However, provincial power to regulate land held under Aboriginal title is limited in two ways: (1) by section 35 which requires a compelling and substantial government objective for abridging rights flowing from Aboriginal title; and (2) by section 91(24) which grants exclusive federal authority in some situations. The SCC stated:

> "Provincial laws of general application, including the [B.C.] *Forest Act*, should apply unless they are unreasonable, impose a hardship or deny the title holders their preferred

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[151] *Canada (Attorney General) v PHS Community Services Society,* 2011 SCC 44 [*Canada v PHS*].

[152] *Ibid* at para 57.

[153] *Ibid* at para 70.

[154] Nigel Bankes & Andrew Leach, "The Rhetoric of Property and Immunity in the Majority Opinion in the *Impact Assessment Reference*" (June 8, 2022) *ABlawg* online: https://ablawg.ca/2022/06/08/the-rhetoric-of-property-and-immunity-in-the-majority-opinion-in-the-impact-assessment-reference/ citing *Canada v PHS, supra* note 151.

[155] *Ibid*.

[156] *Tsilhqot'in Nation v British Columbia,* 2014 SCC 44 at para 100 [*Tsilhqot'in*].

> means of exercising their rights, and such restrictions cannot be justified pursuant to the justification framework outlined above [i.e., *Sparrow* and *Delgamuukw*]."[157]

The SCC also stated that there is no role for the application of the doctrine of interjurisdictional immunity or the idea that Aboriginal rights are at the core of the federal power under section 91(24). This is because Aboriginal rights act as a limit on both federal and provincial powers and have nothing to do with whether something lies at the core of the federal government's powers.[158] In another decision, the SCC stated that the "doctrine of interjurisdictional immunity does not preclude the Province from justifiably infringing treaty rights."[159]

Fitting the Environment into a Division of Powers Analysis

We have made clear in the preceding sections that there is no direct reference to the 'environment' in our Constitution. Justice La Forest (as he then was) recognized this, stating in *Friends of the Oldman River Society v Canada (Minister of Transport)* that,[160]

> "the *Constitution Act, 1867* has not assigned the matter of the 'environment' *sui generis* to either the provinces or Parliament. The environment, as understood in its generic sense, encompasses the physical, economic and social environment touching several of the heads of power assigned to the respective levels of government."

The SCC has also highlighted that "the environment is not, as such, a subject matter of legislation under the *Constitution Act, 1867*" and "[r]ather, it is a diffuse subject that cuts across many different areas of constitutional responsibility, some federal, some provincial."[161] This has meant that successive governments and court decisions have had to wedge environmental concepts into this limited document.

On one hand, this flexibility is necessary because the environment is a complex and diffuse subject matter that requires regulation from the local to the national level. On the other hand, as Brendan Downey and his co-authors note, due to "the flexibility and discretion that contemporary Canadian federalism affords judges, it is no surprise that on the basis of substantially similar legal arguments" multiple opinions on the jurisdiction of a specific environmental law can be achieved.[162] They highlight that when the provinces of Ontario, Saskatchewan, and Alberta brought references regarding the *Greenhouse Gas Pollution Pricing Act* to their respective Courts of Appeal, the decisions "resulted in eight appellate judges ruling in favour of the law, seven ruling against, nine different articulations of the pith and substance of

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[157] *Tsilhqot'in*, *supra* note 156 at para 151; *R. v Sparrow,* [1990] 1 SCR 1075; *Delgamuukw v British Columbia,* [1997] 3 SCR 1010.

[158] *Tsilhqot'in*, *supra* note 156 at paras 141 and 142.

[159] *Grassy Narrows v Ontario (Natural Resources)*, [2014] 2 SCR 447 at para 53.

[160] *Friends of the Oldman River Society v Canada (Minister of Transport),* [1992] 1 SCR 3 at para 63.

[161] *R v Hydro-Quebec, supra* note 55 at para 112.

[162] Downey, *supra* note 94 at 288.

the Act, and eight opinions on its constitutionality."[163] Although the SCC eventually put out a final ruling on the matter, finding the Act constitutional and reiterating the relevant tests, these appellate level decisions can highlight the many constitutional options. Brendan Downey and his co-authors go so far as to say that "federalism lacks the tools necessary to both satisfactorily answer the increasingly complex questions that arise from overlapping environmental jurisdiction and resolve the divergent regional interests."[164]

Regardless, the courts are responsible for ensuring that neither level of government oversteps its role.[165] As Neil Hawke aptly explains, this presents two main issues: first "the need to identify constitutional competence from a variety of different sources of constitutional powers" and second "the need to adopt pragmatic practices as between the levels of government in order to facilitate a working model of environmental protection."[166]

The Canadian Charter of Rights and Freedoms and the Environment

In Canada, the 1982 repatriation of our Constitution came with a major update to our constitutional documents, the creation of the *Canadian Charter of Rights and Freedoms* ("the Charter").[167] The Charter became part 1 of the *Constitution Act, 1982* protecting the rights of any person in Canada, subject to certain exceptions.[168] According to section 1 of the Charter, rights are guaranteed under the Charter subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[169] This means that the rights prescribed in the Charter are not absolute and can "be limited to protect other rights of important national values."[170] The test to determine whether an action or law that would otherwise constitute an infringement of a Charter right can be saved by section 1 is known as the Oakes test.[171]

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[163] *Ibid* at 288.

[164] *Ibid* at 289.

[165] Patrick J. Monahan & Byron Shaw, *Constitutional Law* 3d ed (Toronto: Irwin Law, 2013) at 10.

[166] Hawke, *supra* note 67 at 187.

[167] *Canadian Charter of Rights and Freedoms,* Part 1 of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

[168] Some exceptions include section 3 the right to vote and section 6 the right to enter, remain in and leave Canada.

[169] *Charter*, *supra* note 167 at s 1.

[170] Government of Canada, "Guide to the Canadian Charter of Rights and Freedoms" at Part II online: https://www.canada.ca/en/canadian-heritage/services/how-rights-protected/guide-canadian-charter-rights-freedoms.html [Government of Canada, "Guide to the Canadian Charter of Rights and Freedoms"].

[171] We describe the Oakes test in full below.

Charter rights can be divided into 6 sections as follows:

1. Fundamental freedoms (section 2);
2. Democratic rights (sections 3-5);
3. Mobility rights (section 6);
4. Legal rights (sections 7-14);
5. Equality rights (section 15); and
6. Language rights (sections 16-22).

If someone "believes his or her rights or freedoms under the Charter have been violated by any level of government" they can go to court to ask for a remedy.[172] This is important to consider because the Charter applies to both federal and provincial governments and in turn to municipalities. This is separate and apart from the division of powers set out in the *Constitution Act, 1867*.

In the event that a person believes their rights and freedoms have been infringed upon, they must first demonstrate which Charter right or freedom has been violated. Once established, the government at issue has the opportunity to show that the limit is reasonable under section 1 of the Charter. However, if the infringement is not reasonable, the court can grant a remedy. In many cases, this may look like a requirement to change the law or declare the law otherwise invalid.

Notably, there is no right to a healthy environment or to specific environmental quality (such as potable water) under the Charter and instead many existing environmental Charter challenges have been brought under sections 7 or 15. Section 7 guarantees that "everyone has the right to life, liberty and security of the person and the right not be deprived thereof except in accordance with the principles of fundamental justice" and section 15 guarantees that "every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." We consider caselaw of this sort below. However, to begin, we highlight the proposition that environmental protection would be better served if Canadians had the right to a healthy environment.

The Charter & Environmental Protection

The *Canadian Charter of Rights and Freedoms* (the "Charter"), our second constitutional document, is also missing any direct reference to the environment.[173] Dr. David Boyd, the Special Rapporteur on human rights and the environment at the United Nations is Canada's pre-eminent advocate for the inclusion of the right to a healthy environment in the *Charter* and has written extensively on how this could be accomplished and why we should make it a priority.

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[172] *Charter, supra* note 167, s 24(1); Government of Canada, "Guide to the Canadian Charter of Rights and Freedoms", *supra* note 170 at Part II.

[173] *Constitution Act, 1982*, *supra* note 6.

He outlines six reasons why Canada needs to improve its focus on the environment, in part through constitutional change. His arguments include:

1. In a comparison of environmental performance, Canada is ranked low in comparison to peer countries.[174] In fact, in 2016 the Conference Board of Canada ranked Canada 14th out of 16 similar countries on 9 indicators of environmental performance.[175]
2. The health impacts of a poor environment are significant, including premature deaths from air pollution.[176]
3. The lack of environmental protection in the Constitution has been discussed for over 100 years and Boyd argues that it is high time to make these changes.[177]
4. There is an important connection between Indigenous legal systems, culture, and the environment and the addition of a right to a healthy environment may be one step towards further reconciliation and towards the recognition of Indigenous legal systems in our settler Canadian law.[178]
5. Canada is a holdout in this regard and many countries around the world have implemented a right to a healthy environment in their Constitution and many have had success in this regard.[179]
6. This is a popular idea and that the majority of Canadians are supportive of such a change.[180]

Boyd sees this as a major missed opportunity and he cites three specific ways that the right to a healthy environment could be incorporated into Canadian law:[181]

1. amending the *Charter*;
2. through litigation; and
3. through a judicial reference.

We will explore each in more depth below.

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[174] David R. Boyd, "The Constitutional Right to a Healthy Environment" (28 February 2013) *LawNow* online: http://www.lawnow.org/right-to-healthy-environment [Boyd].

[175] Conference Board of Canada, Press Release, "D" Grade for Canada on New Environment Report Card" (21 April 2016) online: http://www.conferenceboard.ca/press/newsrelease/16-04-21/%E2%80%9Cd%E2%80%9D_grade_for_canada_on_new_environment_report_card.aspx.

[176] Boyd, *supra* note 174.

[177] *Ibid.*

[178] *Ibid.*

[179] *Ibid*.

[180] *Ibid*; Colin P. Stevenson, "A New Perspective on Environmental Rights after the Charter" (1983) 21;3 Osgoode Hall LJ 390 at 397.

[181] David R. Boyd, *The Right to a Healthy Environment: Revitalizing Canada's Constitution* (Vancouver: UBC Press, 2012) at 171 [Boyd, Right to a Healthy Environment].

Incorporating the Environment into our Charter

Direct Amendment

Boyd argues that the best way to guarantee the right to a healthy environment would be through a direct amendment to the *Constitution Act, 1982*. However, he also acknowledges that proposed amendments under the 7/50 rule since 1983, including changes to the Charter, have failed.[182] Therefore, if a direct amendment is the chosen path, Boyd suggests three specific options – clarification of section 7 of the Charter to include the right to a healthy environment (litigation to push for this option has begun), a standalone provision in the Charter, or a detailed *Charter of Environmental Rights and Responsibilities* to be added as a new part of our constitutional documents.[183]

At the time of patriation, there was advocacy that pushed for the inclusion of the environment in the proposed constitutional text. Specifically, the Canadian Environmental Law Association submitted a brief to Parliament putting forward a section which would read "the right of the individual to environmental quality and environmentally sound planning."[184] Unfortunately, this proposal was rejected and no other provision of this sort has been added since.

Litigation

Litigation is the second option and, in fact, litigation of this type has started in Canada. David Boyd highlights sections 7 and 15 of the Charter as two of the most promising provisions and in light of the lack of constitutional right to a healthy environment, groups and individuals across Canada have begun working to expand these existing constitutional provisions to include environmental rights.

Section 7 of the Charter provides that "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."[185] A claimant seeking to establish a violation of section 7 must show that they have suffered a deprivation of life, liberty or security of the person and that such deprivation was not in accordance with the principles of fundamental justice.[186] Protection of environmental rights would require an expanded interpretation of the wording of section 7.

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[182] *Ibid* at 174.

[183] *Ibid* at 175.

[184] Toby Vigod & John Swaigen, "Brief to the Joint-Senate/House of Commons Committee on the Constitution of Canada Bill C-60" (29 September 1978) Canadian Environmental Law Association online: https://cela.andornot.com/archives/media/docs/FONDS%20CELA/SOUS-FONDS%20Publications/SERIES%20Other/FILE%20CELA%20briefs%20and%20responses%20to%20government%20consultations%20Other/ITEM%20Brief%20on%20Bill%20C-60/Brief%20on%20Bill%20C-60.pdf.

[185] *The Constitution Act, 1982*, *supra* note 6, s 7.

[186] Kyra Leuschen, "Climate Change Litigation in Canada: Environnement Jeunesse v Canada" (5 Mar 2019) *Environmental Law Centre* online: https://elc.ab.ca/climate-change-litigation-in-canada-environnement-jeunesse-v-canada/#_edn2 [Leuschen].

However, we do have jurisprudence which suggests that Charter provisions can be expanded including in *Re BC Motor Vehicle Act* when Justice Lamar said if "the *Charter* is to have the possibility of growth and adjustment over time care must be taken to ensure historical materials, such as the Minutes of Proceedings and Evidence of the Special Joint Committee, do not stunt its growth."[187] However, the Courts have not yet done so.

On the other hand, the courts have held that government action that facilitates or knowingly permits a third party to violate a person's life, liberty or security of the person, may still violate section 7 of the *Charter.*[188] To succeed in such a claim, the claimant must demonstrate a "sufficiently" causal connection between government action (or perhaps inaction) and the alleged violation.[189] Canadian caselaw has also suggested that human health impacts from environmental causes may be covered under section 7.[190] However, this section is not violated unless "the deprivation of life, liberty, or security of the person is inconsistent with the principles of justice."[191]

Section 15 provides that "[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability."[192] It is not a means to assert a general right to a healthy or clean environment – instead, it requires a comparison between the claimants and another group, as well as evidence of discrimination. A claimant seeking to establish a violation of section 15(1) must prove they experienced differential treatment that (1) originates from a law or government action and results in the loss of a benefit or the imposition of a burden; (2) is based on an enumerated ground (or something analogous); and (3) results in discrimination.[193] Thus far, litigation seeking to establish environmental rights has focused on discrimination based on age and race – see our section on Charter Caselaw below for examples.

It is unclear whether the Charter could create a positive environmental obligation; however, in the decision of Gosselin v Quebec (Attorney General), Chief Justice McLachlin (as she then was) stated "I leave open the possibility that a positive obligation to sustain life, liberty, or security of person may be made out in special circumstances."[194] Despite this statement, when

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[187] *Re BC Motor Vehicle Act*, [1985] 2 SCR 486 at para 53 as cited in Colin Feasby, David DeVlieger & Matthew Huys, "Climate Change and the Right to a Healthy Environment in the Canadian Constitution" (2020) 58:2 Alta L Rev 213 at 234 [Feasby et al.].

[188] Lynda M. Collins, "An Ecologically Literate Reading of the *Canadian Charter of Rights and Freedoms*" (2009) 26 Windsor Review of Legal and Social Issues 7 at 32 [Lynda M. Collins].

[189] *Ibid* at 32.

[190] Nickie Vlavianos, "The Intersection of Human Rights Law and Environmental Law", March 23-24, 2012 at 7 [Vlavianos].

[191] Leuschen, *supra* note 186.

[192] *Constitution Act, 1982*, *supra* note 6, s 15.

[193] Vlavianos, *supra* note 190 at 19; Leuschen, *supra* note 186.

[194] *Gosselin v Quebec (Attorney General), 2002 SCC 82 as quoted in* Lynda M. Collins, *supra* note 188 at 33.

given the opportunity to establish a positive Charter right in this decision, the SCC did not do so.[195]

The Oakes Test

If a Charter challenge under section 7 or 15 makes its way to a hearing on its merits and an infringement of rights is found, the next step is an analysis of the Oakes Test coming from the SCC decision in *R v Oakes.*[196] This test applies section 1 of the Charter which specifically "guarantees the rights and freedoms set out in it subject **only** to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society [emphasis added]."[197] In their decision, the SCC set out a two part test that the government can use as a defence to a Charter infringement:

1. Is the objective pressing and substantial? Specifically, the Court said that "the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve must be of sufficient importance to warrant overriding a constitutionally protected right or freedom;"[198]
2. Are the means chosen reasonable and demonstrably justified? To answer this question the Court set out a three-part proportionately test:[199]

    a. Are the measures adopted carefully designed to achieve the objective in question?
    b. Do the means, even if rationally connected to the objective, impair the right or freedom in question as little as possible?
    c. Is there proportionately between the effects of the measures which are responsible for limiting the Charter right or freedom and the objective which has been identified as of sufficient importance?

If both parts of the test are satisfied, the Court may find that the imposition is 'saved'. As the Centre for Constitutional Studies aptly put it, "[t]he test provides a mechanism for the courts to balance, on the one hand, the government's ability to achieve its goals and, on the other, the protection of individual rights."[200] However, if the test is not satisfied, the infringement is deemed as unallowable and the Court can find that the alleged Charter right has been unjustifiably infringed.

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[195] *Gosselin v Quebec (Attorney General), 2002 SCC 82 as quoted in* Feasby, et al., *supra* note 187 at 242.

[196] *R v Oakes,* 1 SCR 103 [*Oakes*].

[197] *Charter, supra* note 167, s 1.

[198] *Oakes, supra* note 196 at para 69.

[199] *Ibid* at para 70.

[200] Centre for Constitutional Studies, "Key Terms: Oakes Test" (4 July 2019) online: https://www.constitutionalstudies.ca/2019/07/oakes-test/.

The Notwithstanding Clause

Section 33 of the *Charter of Rights and Freedoms* is known as the 'notwithstanding clause' and reads "Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act of a provision thereof shall operate notwithstanding a provision included in section 2 of sections 7 to 15 of this Charter."[201] This section enables a provincial or federal government to protect a law that would otherwise be found to violate the Charter. It enables the government to 'opt out' of certain Charter protections, albeit with exceptions.

However, certain sections of the Charter including democratic rights (sections 3-5), mobility rights (section 6), language rights (sections 16-22), minority language education rights (section 23), and the guaranteed equality of men and women (section 28) are exempt from the notwithstanding clause.[202]

Charter Caselaw in Canada

Charter litigation has been commenced a number of times in Canada and while none of these files have yet been successful on the merits, they may represent a shift in possible options for constitutional protection of the environment.

Class certification is the first step required in a class action lawsuit. In Alberta, the *Class Proceedings Act* sets out factors for a class including:

(a) The pleadings disclose a cause of action;
(b) There is an identifiable class of 2 or more persons;
(c) The claims of the prospective class members raise a common issue, whether or not the common issue predominates over issues affecting only individual prospective class members;
(d) A class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues; and
(e) There is a person eligible to be appointed as representative plaintiff.

If these factors are not met, the Court can decertify a class and require the claim be commenced in another manner.

Environnement Jeunesse v Canada

Environnement Jeunesse v Canada ("ENJEU") was a class action lawsuit filed on behalf of Quebec citizens aged 35 and under.[203] In their claim, ENJEU alleged that the Government of Canada failed to take sufficient action to reduce GHG emissions in the face of climate change and failed to protect the fundamental rights of Quebec youth under the Charter.[204] In part,

[201] *Charter, supra* note 167, s 33(1).

[202] Marc-Andre Roy & Laurence Brousseau, "The Notwithstanding Clause of the Charter" (7 May 2018) *Parliamentary Information and Research Service* online: https://lop.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/BackgroundPapers/PDF/2018-17-e.pdf.

[203] *Environnement Jeunesse v Canada* (26 Nov 2018) Montreal, 500-06, QC SCJ [*ENJEU v Canada (QC)*].

[204] I. Peritz, "Quebec group sues federal government over climate change", The Globe and Mail, November 26, 2018, online: https://www.theglobeandmail.com/canada/article-quebec-group-sues-federal-government-over-climate-change/.

ENJEU relied on Canada's failure to meet its international climate commitments in their argument that it is also failing in its obligations to protect its citizens.[205]

Specific to the Charter, the claimants alleged that their section 7 rights were violated by the adoption of inadequate GHG emission targets at the federal level and sought various declaratory judgments and punitive damages, including a declaration that Canada has violated the section 7 rights of the class members. ENJEU also argued that the class members experience differential treatment on the basis of age, which is an enumerated ground under section 15 of the Charter. Specifically, they argued that future impacts of climate change will have a more significant impact on them due to their age.

This case proceeded to a certification hearing in 2019 and the Court found that while the Charter claims were, on their face, justiciable, the class was not appropriate and refused to certify the class.[206] On July 28, 2022, the SCC dismissed ENJEU's application for leave to appeal which meant the case could not proceed as a class action as filed.[207]

La Rose v Canada

La Rose v Canada was a lawsuit filed on behalf of a group of young people claiming that the federal government had infringed their rights under sections 7 and 15 of the Charter.[208] The plaintiffs alleged that the actions undertaken by the government to manage and prevent climate change were grossly insufficient by:[209]

- causing, contributing to, and allowing a level of GHG emissions incompatible with a Stable Climate System;
- adopting GHG emissions targets that are inconsistent with what is necessary to avoid dangerous climate change and restore a Stable Climate System;
- failing to meet their own GHG emissions targets; and
- actively participating in and supporting the fossil fuel industry.

The Government of Canada conceded that climate change is an issue but that the matter raised by the plaintiffs is not justiciable because it does not deal with any one particular piece of federal legislation and in making this argument successfully brought an application to strike the claim.[210] If a claim is found to be non-justiciable it means that it is a question that "a court is institutionally incapable of answering, or that is not susceptible to the judicial process."[211] This may occur

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[205] Leuschen, *supra* note 186.

[206] *ENJEU v Canada (QC), supra* note 203.

[207] *Environnement Jeunesse v Canada (Attorney General),* 2022 SCC No 40042.

[208] *Cecelia La Rose v Canada* [2019] Statement of Claim at the Federal Court at para 6 online: http://davidsuzuki.org/wp-content/uploads/2019/10/Statement-of-Claim-2019-10-25-FILED.pdf. Note that they also made arguments with regard to the public trust doctrine.

[209] *Ibid* at para 5.

[210] *La Rose v Canada*, 2020 FC 1008 at para 101 [*La Rose v Canada*]; Jon Hernandez, "Ottawa argues youth-led climate change lawsuit too broad to be tried in court" (30 September 2020) *CBC News* online: https://www.cbc.ca/news/canada/british-columbia/climate-change-lawsuit-1.5744518.

[211] Gerald J. Kennedy & Lorne Sossin, "Justiciability, Access to Justice and the Development of Constitutional Law in Canada" (2017) 45 Fed L Rev 707 at 708.

because “the dispute has been allocated to another body such as Parliament to resolve or because the matter is not yet ripe or already moot.”[212] A finding of non-justiciability effectively stops the litigation in its tracks – as it did here.

In striking the claim, the Court found the Charter claims to be non-justiciable and found, as well, that neither the section 7 nor section 15 claims constituted reasonable causes of action. In relation to the question of justiciability, the Court observed that there are “some questions that are so political that the Courts are incapable or unsuited to deal with them.”[213] Specifically, the Court found that questions of public policy approaches or approaches to issues of significant societal concern would fall under this banner. To be reviewable, policy issues, including Charter claims would need to be translated into a specific law or state action.[214] The Court did note the importance of managing climate change but found that the “Court cannot circumvent its constitutional boundaries of the subject matter pleaded on the sole basis that the issue in question is one of societal importance, no matter how critical climate change is and will be to Canadians’ health and well-being, which is acknowledged.”[215]

Dini Ze’ Lho’imggin et al v Her Majesty the Queen in Right of Canada

A Charter claim was also filed at the federal court by Dini Ze’ Lho’imggin et al (“the Plaintiff”) on behalf of two Wet’suwet’en House groups.[216] In their claim, the Plaintiff argued that “Canada’s policy objectives for the reduction of greenhouse gas [GHG] emissions by 2030 are insufficient” and argued that this violates their rights under sections 7 and 15 of the Charter.[217] They also alleged that “Canada has breached its duty under section 91 of the *Constitution Act, 1867* by not ensuring low GHG emissions under the peace, order and good government powers” and failing to adhere to the international agreements that had been ratified at the federal level, thereby violating the constitutional rights of the plaintiff.[218] As Feasby et al. point out, this claim is different than the *Environnement Jeunesse* and *La Rose* cases because “it puts Indigenous concerns at the forefront rather than in a supporting role” and “portrays climate change as part of an ongoing narrative of colonial oppression.”[219]

In making their Charter claims, the Plaintiff highlighted multiple impacts including health impacts, such as an increased risk of premature death; violation of their right to security due to an increased risk of injury; and a denial to younger generations of equal protection and benefit under the law due to high GHG emitting current and future projects.[220] They sought a number of relief such as declarations of a common law and constitutional duty to act to keep global

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[212] *Ibid* at 709.

[213] *La Rose v Canada*, *supra* note 210 at para 40.

[214] *Ibid* at para 40.

[215] *Ibid* at para 48.

[216] *Dini Ze’ Lho’imggin et al v Her Majesty the Queen in Right of Canada*, 2020 FC 1059 [*Dini Ze’ Lho’imggin*].

[217] *Ibid* at para 4.

[218] *Ibid* at para 5.

[219] Feasby, et al., *supra* note 187 at 225.

[220] *Dini Ze’ Lho’imggin, supra* note 216 at paras 12 & 14.

warming between 1.5 and 2˚C; a constitutional duty not to infringe upon future Wet'suwet'en members' section 15 rights; orders to manage GHG emissions on a national level; and the creation of an annual carbon budget, among others.[221]

In their decision, the Court identified three issues:

- is the claim justiciable;
- does the Statement of Claim disclose a reasonable cause of action; and
- are the remedies sought legally available?[222]

With respect to the issue of justiciability, the Court found that while the POGG powers enable the federal government to enact laws to manage climate change and GHG emissions, there "is nothing in the law that suggests that it imposes a duty on the government" to act.[223] In other words, POGG does not create a positive obligation. The Court goes further to find that a treaty is only given effect though the domestic law-making process and that the "existence of an article in a treaty ratified by Canada does not automatically transform that article into a principle of fundamental justice."[224] To summarize, "there cannot be a positive duty imposed by international obligations on the peace, order and good government of Canada."[225]

Moving on to the Charter claims, the Court found that because the Plaintiffs did not cite any specific laws or provisions that they assert violate their rights, the sufficient legal elements have not been met or "there is no impugned law or action to make a comparison necessary to do an analysis under section 1."[226]

With regard to the issue of justiciability, the Court concluded that the "matter is not justiciable as it is the realm of the other two branches of government …beyond the reach of judicial interference."[227] They cited the Federal Court in the matter of *Friends of the Earth v Canada (Governor in Council)* in which that Court held that compliance with Canada's Kyoto commitments should be considered as "subject matter of which is mostly not amenable or suited to judicial scrutiny."[228]

The Court came to two major conclusions, the first being that "the issue of climate change, while undoubtedly important, is inherently political, not legal, and is of the realm of the executive and legislative branches of government" and the second, that there is no "legal duty to legislate based on section 91 of the Constitution Act, 1867."[229]

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[221] *Ibid* at para 15.

[222] *Ibid* at para 16.

[223] *Ibid* at para 36.

[224] *Ibid* at para 45 citing *Kazemi Estate v Islamic Republic of Iran,* 2014 SCC 62 at 149.

[225] *Ibid* at para 46.

[226] *Ibid* at paras 50 & 55.

[227] *Ibid* at para 72.

[228] *Ibid* at para 76 citing *Friends of the Earth v Canada (Governor in Council)*, 2008 FC 1183.

[229] *Ibid* at paras 77 & 84.

Mathur et al v Ontario

The case of *Mathur et al v Ontario* was filed following the Ontario government's release of the 2030 GHG Reduction Target set by the *Cap and Trade Cancellation Act* and the province's 'A Made-in Ontario Environment Plan.'[230] These provincial decisions resulted in a change in the targets for the reduction of GHG emissions in Ontario. In particular, the new target was a reduction of GHG emissions by 30% below 2005 levels by 2030 which was down from the previous reduction of 37% from 1990 levels in the same time frame.[231] The plaintiffs considered this target to be 'dangerously inadequate.'[232] In response, they launched a lawsuit arguing that this decision violates their rights under sections 7 and 15 of the Charter and "ask the Court to order Ontario to set a science-based GHG reduction target that will limit global warming to below 1.5°C above pre-industrial temperatures."[233] They sought "declaratory and mandatory orders relating to Ontario's Target and Plan for the reduction of greenhouse gas emissions in the province by the year 2030."[234]

The relief sought includes declarations that:[235]

- the new target violates the rights of Ontario youth and future generations under sections 7 and 15 of the *Canadian Charter of Rights and Freedoms;*
- the new target violates the unwritten constitutional principle that governments are prohibited from engaging in conduct that will, or reasonably could be expected to, result in future harm, suffering, or death of a significant number of its own citizens;
- section 7 of the Charter includes the right to a stable climate system; and
- sections 3(1) and/or 16 of the *Cap and Trade Cancellation Act,* which repealed the previous *Climate Change Act* and allowed for the imposition of more lenient targets, violate sections 7 and 15 of the Charter.

Finally, they requested that Ontario set a science-based GHG reduction target consistent with Ontario's share of the minimum level of GHG reductions necessary to limit global warming below 1.5 degrees Celsius above pre-industrial temperatures or, in the alternative, well below 2 degrees Celsius and an order directing Ontario to revise its plan.[236]

The province of Ontario responded with a motion to strike the action which was heard by the Superior Court of Justice of Ontario in 2020.[237] In their decision, the Court found that Ontario's line of reasoning that "the province is not constitutionally obliged to take positive steps to

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[230] *Cap and Trade Cancellation Act, 2018,* SO 2018, c 13, s 3(1); Government of Ontario, "A Made in Ontario Environment Plan" online: https://www.ontario.ca/page/made-in-ontario-environment-plan.

[231] Government of Ontario, "Archived – Climate Change Action Plan" (2017) online: https://www.ontario.ca/page/climate-change-action-plan; Government of Ontario, "Climate change" (24 October 2019) online: https://www.ontario.ca/page/climate-change.

[232] Ecojustice, "*Mathur et al v Her Majesty in Right of Ontario*: Overview of Notice of Application" online: https://ecojustice.ca/wp-content/uploads/2019/11/Overview-of-Notice-of-Application.pdf?x64512.

[233] *Ibid*.

[234] *Mathur v Ontario,* 2020 ONSC 6918 at para 29.

[235] *Ibid* at para 31.

[236] *Ibid* at para 31.

[237] *Ibid*. Read more at: Rebecca Kauffman, "Climate Litigation in Canada – An Update" (24 Nov 2020) *Environmental Law Centre* online: https://elc.ab.ca/climate-litigation-in-canada-an-update/.

redress the future harms of climate change" was not clear at that stage of proceedings.[238] They conclude that a 'motion to strike is not the appropriate forum to make judicial findings on the complex issue of positive obligations."[239] With a finding that the Application has some reasonable prospect of success, the Court enabled Mathur to move on to a hearing on the merits.[240] This was heard in September 2022, with a decision forthcoming.

Judicial Reference

Finally, the third option Boyd suggests for extending Charter protection to include environmental rights is a judicial reference.[241] Both levels of government can instigate a judicial reference by asking the courts to weigh in on a hypothetical legal question "in the absence of a dispute between parties."[242] If initiated by the federal government a reference question would go straight to the SCC.[243] Specifically, Boyd suggests three hypothetical reference questions that could be put before the Court in a reference on the right to a healthy environment:[244]

- "Does section 7 of the *Charter* include an implicit right to live in a healthy environment as part of the right to life, liberty, and security of the person?
- Does the presence of mercury, PCBs, or other contaminants of concern found in the blood, fat, or other body tissue of Canadians violate section 7 of the *Charter?*
- Do Canadian governments have a constitutional duty to ensure clean air, safe water, and other elements of a healthy environment?"

Once a reference question is submitted, the Court returns with an advisory opinion. As noted by Boyd, these opinions are not binding but often impact upon government action.[245]

Environmental Justice

The Charter, particularly sections 7 and 15, have also been cited as means to fight environmental racism.[246] Environmental racism is defined, in part, as "the intentional siting of hazardous waste sites, landfills, incinerators and polluting industries in areas inhabited mainly by Black, Latinos, Indigenous Peoples, Asians, migrant farm workers, and low-income

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[238] *Ibid* at para 225.

[239] *Ibid* at para 227.

[240] *Ibid* at para 237.

[241] Boyd, *The Right to a Healthy Environment, supra* note 181 at 185.

[242] *Ibid* at 185.

[243] *Ibid* at 186.

[244] *Ibid* at 188.

[245] Centre for Constitutional Studies, "Key Terms: Reference Question" (4 Jul 2019) online: https://www.constitutionalstudies.ca/2019/07/reference-question/.

[246] Nathalie Chalifour argues that section 15 may be a better way to advocate for environmental justice because section 15 is intended to redress discriminatory treatment; the evidentiary burden for section 15 is lower than for section 7; and it is relatively uncharted territory perhaps enabling more unique arguments. See Nathalie Chalifour, "Environmental Justice and the Charter: Do environmental injustices infringe sections 7 and 15 of the *Charter*?" (2015) 28 J Env L & Prac 89 at 4 [Chalifour].

people."[247] As Nathalie Chalifour points out, it also incorporates "[c]oncerns about th[e] inequitable distribution of environmental harms and benefits."[248] Environmental justice seeks to eliminate these racist structures. One way to improve access to environmental justice may be through the incorporation of a right to a healthy environment in the Charter.

Environmental justice may also benefit from a focus on cooperative federalism. Nathalie Chalifour highlights that "the retrenchment of federal environmental law risks disproportionately affecting those who are already disadvantaged, contributing to environmental injustice."[249] This suggests the importance of upholding a cooperative federalism model in which both levels of government are enforcing their constitutional jurisdiction to its full capacity.

The Unwritten Constitution

While the text of the Constitution is well-known, Canada's constitutional framework is also comprised of an unwritten constitution. In the *Reference re Secession of Quebec* the SCC states plainly "the Constitution is more than a written text."[250] Justice Rowe writes that "this unwritten constitution consists of conventions – rules by which authority conferred by the Constitution is exercised in practice" and "underlying principles that describe the constitutional arrangements that are a necessary and implied complement to those set out in the written constitution."[251] Both the written and unwritten portions of the constitutional framework are critical to the framework as a whole, as the SCC states in the *Reference re Secession of Quebec* when the Court finds that:[252]

> "these supporting principles and rules, which include constitutional conventions and the workings of Parliament, are a necessary part of our Constitution because problems or situations may arise which are not expressly dealt with by the text of the Constitution."

It is clear from Supreme Court jurisprudence that the Constitution extends beyond the text but there is disagreement on the interpretation of this unwritten constitution. In fact, in one of the most recent SCC decisions to consider the unwritten constitution, *Toronto (City) v Ontario (Attorney General),* the majority and the dissenting Justices in the 5-4 decision differed in their interpretation of the practical impact of the unwritten constitution.[253] This decision looked at the

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[247] Dr. Benjamin F. Charles Jr., "Toxic Wastes and Race in the United States: A National Report on the Racial and Socio-Economic Characteristics of Communities with Hazardous Waste Sites" (1987) Commission for Racial Justice United Church of Christ at xiii online: https://d3n8a8pro7vhmx.cloudfront.net/unitedchurchofchrist/legacy_url/13567/toxwrace87.pdf?1418439935.

[248] Chalifour, *supra* note 246 at 5.

[249] *Ibid* at 2.

[250] *Reference re Secession of Quebec,* [1998] 2 SCR 217 at 220 [*Reference re Secession*].

[251] Malcolm Rowe & Nicolas Deplanche, "Canada's Unwritten Constitutional Order: Conventions and Structural Analysis" (2020) 98:3 Can B Rev 430 at 431 – 432 [Rowe & Deplanche].

[252] *Reference re Secession, supra* note 250 at 240.

[253] *Toronto (City) v Ontario (Attorney General),* 2021 SCC 34.

Ontario *Better Local Government Act* which allowed the provincial government to cut the municipal wards in the City of Toronto from 47 to 25, months before the election was to take place and on the same date as the candidate registration deadline.[254] The issues before the Court were whether the Act limited the freedom of expression of voters and/or candidates from participating in the municipal election and "whether the unwritten constitutional principle of democracy can be applied, either to narrow provincial legislative authority over municipal institutions or to require effective representation in those institutions, so as to invalidate the Act?"[255]

In their decision, the majority found that the Ontario legislation was constitutionally valid and that it did not violate the section 2(b) rights to freedom of expression in the Charter. The Majority held that because section 3 of the Charter, which sets out democratic rights, did not include municipalities, there was "no open question of constitutional interpretation."[256] They find that "despite their value as interpretive aids, unwritten constitutional principles cannot be used as bases for invalidating legislation."[257] The dissenting justices disagreed, finding "that unwritten principles may be used to invalidate legislation if a case arises where legislation elides the reach of any express constitutional provision but is fundamentally at odds with our Constitution's 'internal architecture' or 'basic constitutional structure'" and argues that the majority's "decision to foreclose the possibility that unwritten principles be used to invalidate legislation on all circumstances… is imprudent."[258]

Despite this dissent, this decision seems to limit the interpretive use of our unwritten constitutional principles. However, they are still worth understanding. As such, we describe the unwritten constitution, as well as its relationship with environmental law, below. We begin by differentiating between unwritten constitutional principles and unwritten constitutional conventions.

Unwritten Constitutional Principles

Chief Justice McLachlin (as she then was) defined unwritten constitutional principles as those "unwritten norms that are essential to a nation's history, identity, values and legal system."[259] In Canada, these principles include: parliamentary sovereignty, federalism, democracy, constitutionalism, the rule of law, the separation of powers, judicial independence, the protection

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[254] *Ibid* at para 7.

[255] *Ibid* at para 13.

[256] *Ibid* at para 81.

[257] *Ibid* at para 84.

[258] *Ibid* at para 170.

[259] Right Honourable Beverley McLachlin, "Unwritten Constitutional Principles: What is Going On?" *Supreme Court of Canada Speeches* online: https://www.scc-csc.ca/judges-juges/spe-dis/bm-2005-12-01-eng.aspx.

of minorities, parliamentary privilege, the honour of the Crown, the duty to consult, and the doctrine of paramountcy.[260]

Unwritten principles can be used in the interpretation of the constitutional text and, in that instance, may help guide enforceable obligations. The SCC highlights this, finding that "[t]hose principles must inform our overall appreciation of the constitutional rights and obligations."[261] An example of this is the division of powers in sections 91 and 92 of the *Constitution Act*, *1867*, two written provisions which place the principle of federalism at the heart of the constitutional text.[262]

Going further, the SCC holds that unwritten constitutional principles are "a sort of baseline against which the framers of our Constitution, and subsequently, our elected representatives under it, have always operated. It is perhaps for this reason that [they were] not explicitly identified in the text of the *Constitution Act, 1867* itself. To have done so may have appeared redundant, even silly, to the framers."[263]

Unwritten Constitutional Conventions

While similar, unwritten constitutional conventions are separate from unwritten constitutional principles. They differ as Justice Rowe puts it, in two fundamental ways, in:[264]

a) "their relationship with the text of the Constitution; and
b) their normative power."

Specifically, conventions interact with the written Constitution in three main ways:[265]

1. They can render certain provisions of the written Constitution inoperative in practice;
2. They can vary the operation of provisions of the written Constitution; and
3. They can operate independently of the rules set out in constitutional instruments.

While, as the name states, they are unwritten, they do hold weight at all levels of government. For example, at the executive level, the workings of the office of the Prime Minister take the form of unwritten constitutional conventions.[266] Further, while conventions may not be enforceable by the courts, they are justiciable.[267]

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[260] Vanessa A. MacDonnell, "Rethinking the Invisible Constitution: How Unwritten Constitutional Principles Shape Political Decision-Making" (2019) 65:2 McGill LJ 175 online: https://lawjournal.mcgill.ca/article/rethinking-the-invisible-constitution-how-unwritten-constitutional-principles-shape-political-decision-making/ [MacDonnell].

[261] *Reference re Secession, supra* note 250 at 220.

[262] Rowe & Deplanche, *supra* note 251 at 445.

[263] *Reference re Secession, supra* note 250 at 253; MacDonnell, *supra* note 260.

[264] Rowe & Deplanche, *supra* note 251 at 442.

[265] *Ibid* at 442-443.

[266] *Ibid* at 431.

[267] *Ibid* at 444.

The Unwritten Constitution & Environmental Law

While the unwritten constitution has an impact on law as a whole, certain principles and conventions will have a greater role to play in environmental law. For example, the principle of federalism has been a focus of this report as a whole. In the *Reference re Secession of Quebec*, the SCC confirmed their previous finding from the *Patriation Reference* that federalism "runs through the political and legal systems of Canada."[268] The division of powers between the federal and provincial governments has been the subject of debate in multiple environmental law decisions in large part because there is no written reference to the environment in our Constitution.

Another relevant principle is that of constitutionalism which finds that the Constitution is the supreme law of the land and all government action must comply. Constitutionalism also requires an analysis of whether individual pieces of legislation abide by the text of the Constitution – an analysis which occurs on a regular basis in the realm of environmental law. On the other hand, parliamentary sovereignty is a constitutional principle that enables the Parliament and provincial legislatures to make or unmake any laws that fall within their constitutional boundaries.

One benefit of unwritten principles and conventions is that they can expand to fit our future goals and, in fact, many scholars have proposed constitutional principles that relate to environmental law.

Future Unwritten Principles

A number of scholars have put forward principles that they argue should be incorporated into our unwritten constitution, some of which are outlined below.

Ecological Sustainability

Lynda Collins has put forward the proposal that we should recognize the principle of ecological sustainability as an unwritten constitutional principle.[269] She defines ecological sustainability as "the long-term viability or well-being of ecological systems, including human communities."[270] She argues that ecological sustainability "militates in favour of upholding environmental legislation where there is even a slight jurisdictional toe-hold for the relevant level of government."[271] She even goes so far as to say that ecological sustainability "could clarify the

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[268] *Reference re Secession, supra* note 250 at 251; *Re: Resolution to amend the Constitution*, [1981] 1 SCR 753 at 905-909.

[269] For more of Lynda Collins' work on the constitution and environmental law see: Lynda Collins, *The Ecological Constitution: Reframing Environmental Law* 4th ed (Abingdon, UK: Routledge, 2021) at 2 and Dayna Nadine Scott, "The Ecological Constitution: Reframing Environmental Law by Lynda Collins" (2022) 53-2 *Ottawa L Rev* 293.

[270] Lynda Collins, "The Unwritten Constitutional Principle of Ecological Sustainability: A Solution to the Pipelines Puzzle" (2019) 70 UNBLJ 30 at 38 [Lynda Collins, The Unwritten Constitutional Principle of Ecological Sustainability].

[271] Lynda Collins, "Symposium: The Unwritten Constitutional Principle of Ecological Sustainability: A Lodestar for Canadian Environmental Law?" (5 June 2019) *IACL-AIDC Blog* online: https://blog-iacl-aidc.org/2019-

limits of discretionary environmental decision-making, assist courts in interpreting environmental legislation, provide important context for division of powers arguments in environmental cases, facilitate a respectful relationship with Indigenous legal orders in Canada, and complement rights-based approaches to environmental protection under the Charter."[272]

Quoting Collins, Mari Galloway argues that the recognition of such a principle "could affect both the formation of environmental policy and the courts' approach to its application, statutory interpretation, and division of powers question."[273]

The Public Trust Doctrine in Canada

Harry Wruck proposes a Canadian public trust doctrine.[274] He defines the public trust doctrine as: "a legal mechanism that can be used to require governments to hold and protect vital natural resources for the benefit of present and future generations."[275] Mari Galloway notes that Wruck has also argued that the lack of express environmental protections in the written text of the Constitution represents a fundamental gap in the written text, which could be remedied by the recognition of the public trust doctrine as an unwritten constitutional principle.[276] The SCC seemed to echo some support for this in *British Columbia v Canadian Forest Products Ltd. (Canfor)* when they held that "the notion that there are public rights in the environment that reside in the Crown has deep roots in the common law."[277]

The invocation of the public trust doctrine has occurred in the past in the courts in an effort to ensure effective government stewardship of public resources (parks, water, forests), but as of yet the doctrine has not been adopted in Canada.

Substantive Equality

A third principle comes from Patricia Hughes who proposes the incorporation of the unwritten constitutional principle of substantive equality.[278] Substantive equality is different from formal equality, specifically "formal equality insists that differences be ignored while substantive equality insists that where appropriate differences be taken into account."[279] Hughes argues that "a substantive equality foundational principle would serve a different constitutional purpose than

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posts/2019/6/5/symposium-the-unwritten-constitutional-principle-of-ecological-sustainability-a-lodestar-for-canadian-environmental-law.

[272] Lynda Collins, The Unwritten Constitutional Principle of Ecological Sustainability, *supra* note 270 at 32.

[273] Mari Galloway, "The Unwritten Constitutional Principles and Environmental Justice: A New Way Forward?" (2021) 52-2 Ottawa Law Review at 15 [Galloway].

[274] Harry J. Wruck, "The Time Has Arrived for a Canadian Public Trust Doctrine Based Upon the Unwritten Constitution" (2020) 10:2 George Washington J Energy & Envtl L 67 [Wruck].

[275] *Ibid* at 68.

[276] Galloway, *supra* note 273 at 20; Wruck, *supra* note 274 at 78.

[277] *British Columbia v Canadian Forest Products Ltd (Canfor)*, 2004 SCC 38 at para 74.

[278] Patricia Hughes, "Recognizing Substantive Equality as a Foundation Constitutional Principle" (1999) 22:2 Dal LJ 5.

[279] *Ibid* at 27.

its corresponding express guarantee in the written constitution."[280] This is largely because "[a]s a fundamental constitutional principle, it applies to the actions of courts and governments, regardless of whether their actions fall within the confines or the relevant express constitutional guarantees."[281]

Substantive equality will also build upon formal equality. While it is essential that legal equality underly our legal system, it "fails to acknowledge that law affects people differently."[282] In Mari Galloway's report she notes that Hughes also argues that substantive equality would align with the goals of environmental justice, for example, substantive equality "could provide a strong basis for how the unequal distribution of environmental benefits and harms could ground subsequent constitutional analyses such as a claim under section 7 or 15."[283]

Indigenous Peoples Relationship to the Land

John Borrows proposes that "the SCC should recognize that Indigenous peoples' relationship to the land, its resources, and other peoples could be considered one of the organizing features of Canada's unwritten constitution."[284] Mari Galloway highlights that this principle would expand the rights of Indigenous peoples beyond the text of the Constitution, broadening these rights to recognize the nation-to-nation relationship and connection to the land and environment.[285]

Principle of Non-Regression

The principle of non-regression is defined by Lynda Collins and David Boyd as "a prohibition on state acts or omissions that result in degradation in the environment (e.g. air quality, water quality, biodiversity) or in laws designed to protect the environment."[286] They argue that regression could take many forms including "withdrawing from environmental treaties", "removing procedural environmental safeguards" or the "lowering of emissions standards."[287] It embraces the idea that existing environmental laws form a baseline standard of environmental protection.[288]

In other words, once an environmental standard has been achieved in law, it cannot be rolled back. In the case of *Mathur v Ontario* (summarized in our section on Charter litigation above) the principle of non-regression is relevant to their argument that the lower target for future GHG

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280 *Ibid* at 28.

281 *Ibid* at 29.

282 *Ibid* at 33.

283 Galloway, *supra* note 273 at 22.

284 John Borrows, *Freedom and Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016) at 106.

285 Galloway, *supra* note 273 at 24.

286 Lynda M. Collins & David R. Boyd, "Non-Regression and the Charter Right to a Healthy Environment" (2016) 29 J of Env L & Prac 285 at 294 [Collins & Boyd].

287 *Ibid* at 294.

288 Brenda Heelan Powell, "Environmental Rights in Alberta: An Annotated Environmental Bill of Rights for Alberta" (1 March 2018) *Environmental Law Centre* at 12; David Boyd, "Elements of an Effective Environmental Bill of Rights" (2015) 27(3) J. Env. L. & Prac. 201; Collins & Boyd, *supra* note 286.

emissions in the province of Ontario would be unacceptable because it sets a less stringent approach to GHGs than that which was in place previously.

CONCLUSION

While this report has not provided a fulsome explanation of all the constitutional trials and tribulations that affect Canadian law, many of the doctrines and ideas mentioned throughout will be highlighted in our accompanying report on Indigenous rights and the Constitution as well as in our topic specific reports. We will also refer back to some of these background concepts throughout these accompanying documents.

In particular, the division of powers as set out in sections 91 and 92 of the *Constitution Act, 1867* will be considered in each topical report. Many of the environmental decisions at the SCC consider a disagreement over whose jurisdiction it is to regulate a particular area of the environment. As such, a fallback on certain doctrines like the doctrine of paramountcy or on past interpretations of broad sections like the residual peace, order and good government provision in section 91 will be necessary.