

BATTLEGROUND ENVIRONMENT:

Webinar 2 – March 21, 2023

- *GHGs*
- *Toxic Substances*



Environmental
Law Centre

Throughout Canada's history, the settler/colonial legal system has facilitated past and ongoing marginalization of Indigenous peoples in Canada. This includes our Constitutional documents and the way that they divide constitutional jurisdiction primarily between our federal and provincial governments leaving out the option for Indigenous Nations to be considered on an equal constitutional footing. As we consider these documents, we must acknowledge how the history of these laws, and their ongoing impacts, affect the First Nations, Métis, and Inuit Peoples who first made these 'jurisdictions' home. The ELC recognizes that environmental and natural resources laws, Indigenous rights and reconciliation are connected. For today, we specifically acknowledge that we are presenting this webinar from Treaty 6 territory - the traditional and ancestral territory of the Cree, Dene, Blackfoot, Saulteaux, Nakota Sioux and Métis Nation.



Environmental
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An aerial photograph of a dense forest, showing a variety of green trees and a narrow path or stream cutting through the center. The text is overlaid on the image in white, bold font.

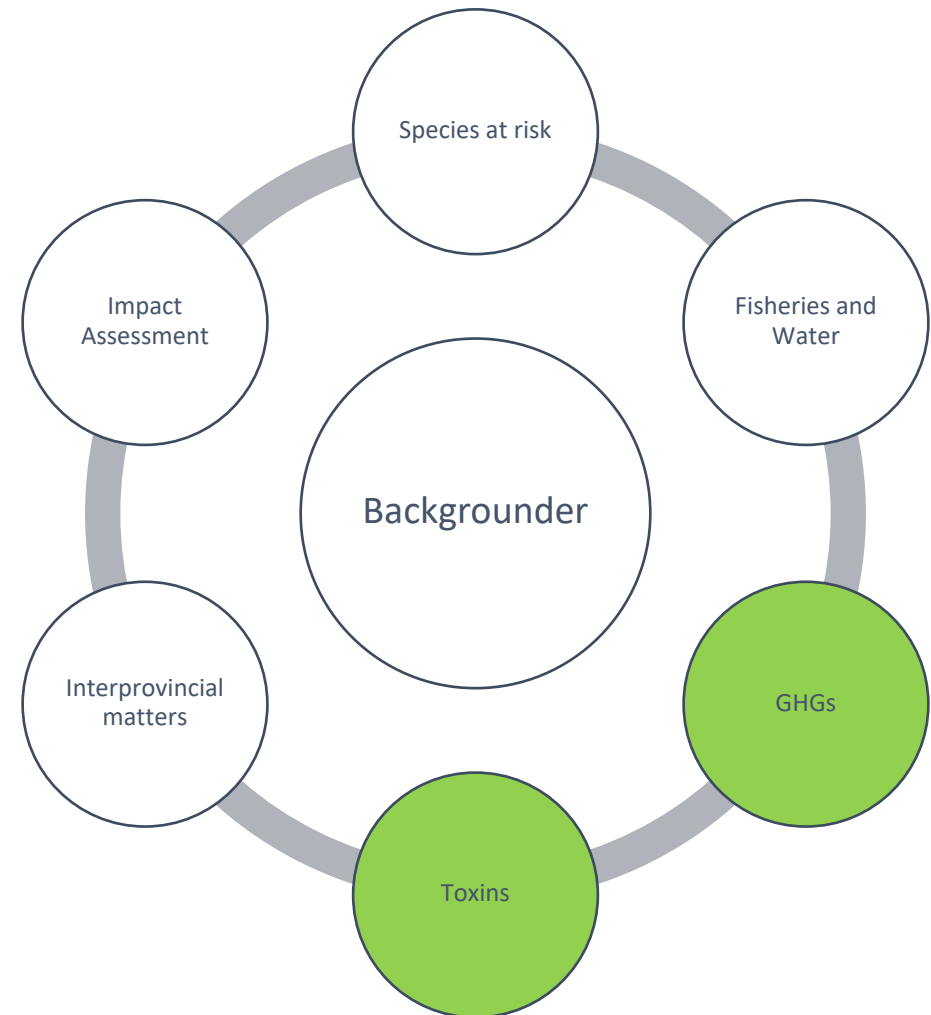
The Environmental Law Centre (ELC) has been seeking strong and effective environmental laws since 1982.

Our vision is a society where our laws secure an environment that sustains current and future generations and supports ecosystem health

The Environment & the Constitution Series

The Series

1. Backgrounder to the Canadian Constitution
2. 6 subject matter reports
3. A report exploring interaction of provincial environmental law and regulation with Aboriginal and Treaty rights.



PRESENTATION OUTLINE

Brief Background

Important
Constitutional
Sections

GHGs

Toxins

A Brief History of the Canadian Constitution

The first iteration of our Constitutional documents was passed on July 1, 1867 with the *British North America Act*



The *Natural Resources Transfer Agreement (Act)* came about in 1930 and elevated the relevance of provincial laws for environmental and resource management

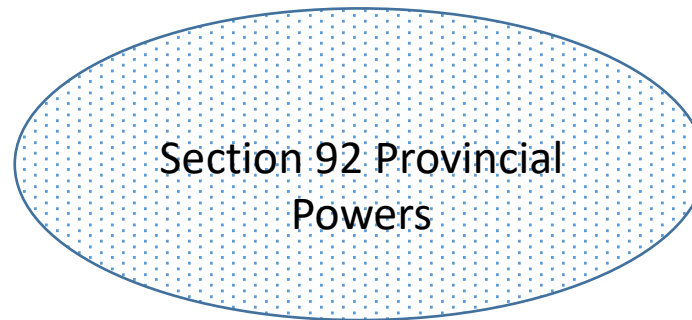
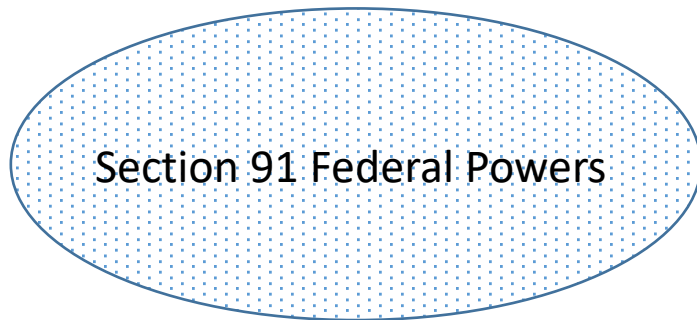


The last major amendment to the Constitution was done in 1982 was completed with the patriation of our constitutional documents, addition of Indigenous rights, creation of the Charter, and inclusion of the amending formulae

The Constitution has remained the supreme law of the land throughout

The Division of Powers

The *Constitution Act, 1867*, sets out a federal system with control divided amongst two levels of government – the federal parliament and provincial governments, each with the jurisdiction to “exclusively” legislate over the enumerated matters



Important Constitutional Provisions: GHGs

Federal jurisdiction may be situated under the following heads of power:

Section 91 POGG

Section 91(27)
Criminal Law

Section 91(2) Trade
and Commerce

Important Constitutional Provisions: GHGs

At the provincial level there is clear jurisdiction over GHGs including in:

Section 92(10)
local works &
undertakings

Section 92(16)
generally all
matters of a
merely local or
private Nature

Section 92(13)
property and civil
rights

Section 92A laws
respecting non-
renewable natural
resources, forestry
resources and
electrical energy

Important Constitutional Provisions: Toxic Substances & Pollution

Federal Powers

Section 91 POGG
power

Section 91(10)
navigation &
shipping

Section 91(12)
sea coast and
inland fisheries

Section 91(27)
criminal law

An underwater photograph showing a variety of marine life, including several fish and a crab, swimming in clear blue water. The scene is heavily polluted with plastic debris, including a large white plastic bag, a black plastic bottle, and various pieces of white and yellow plastic. The pollution is concentrated in the upper left and center of the frame, while the lower right shows clearer water with more marine life.

Important Constitutional Provisions: Toxic Substances & Pollution

Provincial Jurisdiction

Section 92(10) local
works & undertakings

Section 92(13)
property and civil
rights

Section 92(16)
generally all matters of
a merely local or
private Nature

Section 92(5) public
lands

Section 92A laws
respecting non-
renewable natural
resources, forestry
resources and
electrical energy

Federal Jurisdiction over GHGs: GGPPA



Part 1: Fuel charge applied at the point of purchase and becomes the price on carbon



Part 2: Output-Based Pricing System for industrial GHG emissions*

***does not apply in AB**

Reference re GGPPA

SCC found the GGPPA to be constitutional under POGG's national concern branch. Pith and substance of the GGPPA is "establishing minimum national standards of GHG price stringency to reduce GHG emissions"

Refined the test for the national concern branch in 3 steps:

1. Is the subject matter of the legislation something of concern to the nation as a whole?
2. Does the subject matter have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern?
 - a. Is the matter specific and identifiable in such a way so as to distinguish it from provincial matters?
 - b. Is it something the provinces are able to deal with themselves?
3. Would recognizing the subject matter as a national concern have an impact on provincial jurisdiction that is reconcilable with the balance of power?

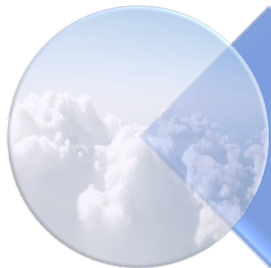
Federal Jurisdiction over GHGs: CEPA



Classification of GHG emissions as toxic substances under CEPA



GHGs were added to the List of Toxic Substances in 2005



Federal jurisdiction could be upheld under the criminal law power – see *R v Hydro-Quebec* and *Syncrude v Canada*

Canadian Net-Zero Emissions Accountability Act

- Goal of **Net-Zero Emissions by 2050**
- Milestones along the path to net-zero begin in 2030 with targets increasing every 5 years
- Canada has released the '2030 Emissions Reduction Plan: Canada's Next Steps for Clean Air and a Strong Economy' which includes a proposed cap on oil and gas emissions...

Proposed Oil and Gas Emissions Cap

Two options:

1. the development of a cap-and-trade system under the *Canadian Environmental Protection Act, 1999*; and
2. the modification of existing carbon pollution pricing systems under the *Greenhouse Gas Pollution Pricing Act*.

BUT is a cap and trade program constitutional?

It is clear that the regulation of GHG emissions, including through a cap and trade program, would properly fall within provincial constitutional heads of power but what about federal?

Three options

**POGG Power
National Concern
Branch**

**Criminal Law Power
Found in existing CEPA
provisions**

**Trade and Commerce
Less likely option**

International Climate Treaties

Until 1926, section 132 of the *British North America Act* gave the federal government the authority to implement treaties signed by the United Kingdom on Canada's behalf – 'empire treaties'.

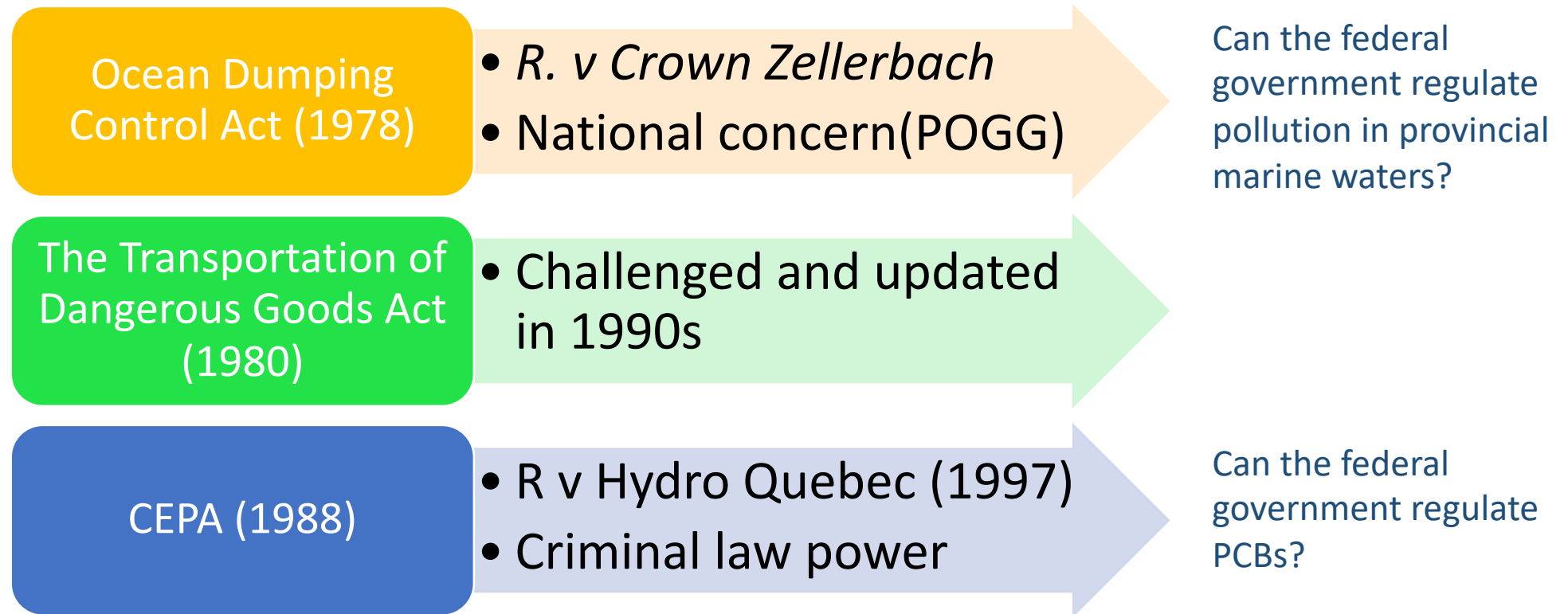
However, the SCC has made it clear that the signing of an international treaty by the federal government is not sufficient to move the content of the treaty into federal jurisdiction.

Provincial Jurisdiction over GHGs

- While Part 1 of the GGPPA (the fuel charge) applies in Alberta, the Output-Based Pricing Scheme from Part 2 does not. Instead, Alberta has implemented a provincial equivalent with the *Technology Innovation and Emissions Reduction Regulation* (TIER).
- Applies to “large facilities” which are defined as a facility “that has direct emissions of 100 000 CO₂e tonnes or more in 2016 or a subsequent year.”
- TIER-regulated facilities can choose to adhere to either a high-performance benchmark as set out in Schedule 2 for specific emission types or to a facility-specific benchmark which assigns a benchmark based on historical emissions.

Plastic Rapt: The constitutional last straw?

- The evolving federal role in pollution and toxic substances



Current Regulatory Aspects

Provincial (EPEA)

Regulates polluting activities (pollution and hazardous and non-hazardous waste)

Administrative Orders

Includes regs re
Waste/Hazardous Waste

Extended Producer Responsibility

Federal CEPA 1999

Regulation of evaluating and listing toxic substances

Regulates toxic substances

Virtual elimination of
persistent/bioaccumulating substances

Federal-Provincial Cooperation

CEPA Equivalency Agreements

- Cooperative agreement can be instituted if an instrument which achieves the same environmental outcome as a CEPA regulation exists at the provincial level (applying to pulp and paper effluent, methane from oil and gas)

Transport of Dangerous Goods

- Dangerous goods that are transported within Alberta are regulated by the *Dangerous Goods Transportation and Handling Act* which mirrors the federal Act and accompanying regulations
- Similarly, the *Release Reporting Regulation* under EPEA is tied to the federal regime

Recent Federal Actions

Microbeads in Toiletries Regulation

'Plastic Manufactured Items' added to the Schedule 1 List of Toxic Substances

Single-use Plastics Prohibition Regulations

- Manufacture and import of select single-use plastics is limited.

Responsible Plastic Use Coalition

Judicial reviews

- Quashing the decision to add “plastic manufactured items” to Schedule 1 List of Toxic Substances. (based in part on constitutional grounds – over breadth and not supported by science)
- Single use plastics regulation
- Alberta intervened on this matter which was heard on March 7-9 at the Federal Court.
- "The test for toxicity is not satisfied by proving that a single bottle cap poses a risk to a single animal," says a legal brief filed on behalf of the plastics industry. (CBC news March 7, 2023, Canada's single-use plastic ban faces its first legal test)



Politics / Local News



Alberta joins court challenge against feds listing plastics as toxic

Dylan Short

Published Sep 08, 2022 • 3 minute read

Join the conversation



Alberta Premier Jason Kenny speaks in Calgary on Thursday, September 8, 2022. Jim Wells/Postmedia

Current Battleground: the last straw?

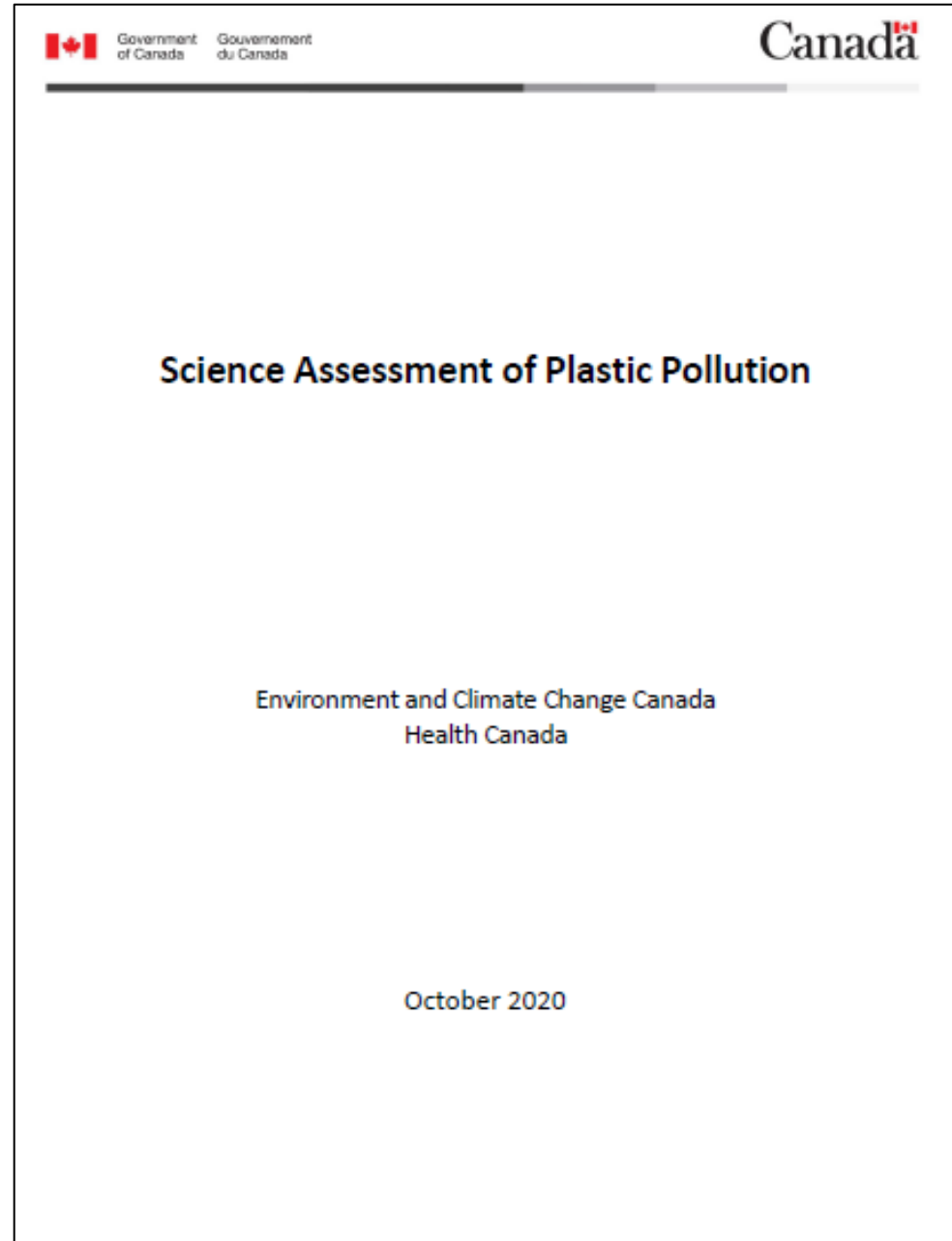
- Criminal law powers – how far does it extend?
 1. legitimate public purpose
 - protection of the environment
 2. Prohibition vs. regulation
 - a tailored prohibition (i.e. a regulation) is valid
- In Hydro Quebec = Regulating “PCBs” supported by an “impressive array of scientific studies at both the national and international level”.
- PCBs may be clear but what about single use plastics?
- Section 64 of CEPA
- a substance is toxic if it is entering or may enter the environment in a quantity or concentration or under conditions that
 - (a) have or may have an immediate or long-term harmful effect on the environment or its biological diversity;
 - (b) constitute or may constitute a danger to the environment on which life depends; or
 - (c) constitute or may constitute a danger in Canada to human life or health.

The last straw?

- “Current scientific evidence confirms that plastic pollution is ubiquitous in the environment, and that macroplastic pollution poses an ecological hazard, including physical harm, to some animals and their habitat.... In order to develop risk management measures under CEPA to address the potential ecological risks associated with certain plastic manufactured items, the ministers recommended that the Administrator in Council make an order adding “plastic manufactured items” to Schedule 1 to the Act (the List of Toxic Substances).
 - Regulatory Impact Analysis Statement, Order Adding a Toxic Substance to Schedule 1 to the Canadian Environmental Protection Act, 1999: SOR/2021-86
<https://canadagazette.gc.ca/rp-pr/p2/2021/2021-05-12/html/sor-dors86-eng.html>

Effects?

- Current understanding is on known physical effects, primarily marine (and macroplastics)
- Also additives and related chemicals can have potential impacts
- Impacts on soil and related ecosystems is the subject of additional research



Court's Key Consideration

- Is the Criminal Law power focused on humans or chemical toxicity?
Or is criminal law rightly about non-human entities?
- What level of scientific rigour justifies a criminal prohibition?
- Overly broad application?
- La Forest J.
 - “criminal law is not frozen in time”
 - “Humanity’s interest in the environment surely extends beyond its own life and health.”
- If the relevant factor is harm, the path or nature of harm should not matter

Anderson, Philip J., Sarah Warrack, Victoria Langen, Jonathan K. Challis, Mark L. Hanson, and Michael D. Rennie. "Microplastic contamination in lake Winnipeg, Canada." *Environmental pollution* 225 (2017): 223-231.

Bujaczek, Taylor, Sheldon Kolter, David Locky, and Matthew S. Ross. "Characterization of microplastics and anthropogenic fibers in surface waters of the North Saskatchewan River, Alberta, Canada." *Facets* 6, no. 1 (2021): 26-43.

- Microplastics were found in all samples, ranging in concentration from 4.6 to 88.3 particles·m⁻³ (mean = 26.2 ± 18.4 particles·m⁻³). Fibers were the dominant morphology recovered, and most were of anthropogenic origin and chemically identified as dyed cotton or polyester by Raman microspectroscopy. The majority of fragments were identified as polyethylene or polypropylene. No upstream to downstream differences were found in concentration, size distribution, or morphological composition suggesting nonpoint sources of microplastics to the river

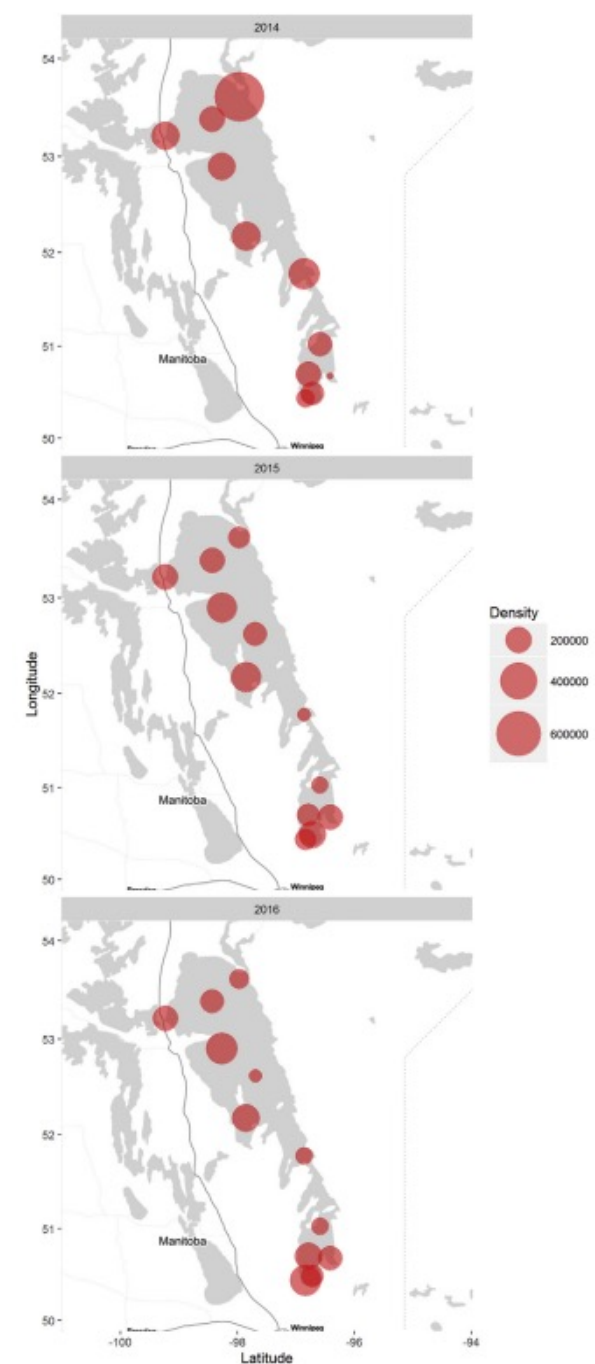


Fig. 2. Spatial distribution of microplastic density (number of particles/km²) across sampling stations between 2014 and 2016 on Lake Winnipeg, Manitoba. Samples were

Questions?

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Photos courtesy
of Unsplash

NEXT UP: Impact Assessment and Interprovincial Matters