
What Ever Happened to Canadian Environmental Law?

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This Article examines the history of Canadian environmental law to explain why it has become a laggard in both legal reform and environmental performance. Canadian environmental law has long been of interest to scholars worldwide, yet its record is often poorly understood. The Article contrasts recent developments with the seemingly progressive initiatives of the 1970s, and analyzes these trends in light of their political, economic, and governance context, as well as the wider critiques of environmental law. It argues that there is considerable room for Canadian governments to adopt more robust methods of environmental law, including following pioneering reforms advanced in other countries. However, even with such steps, further environmental degradation might not be averted unless Canadians are prepared to accept more fundamental changes to their economic systems and social values.

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INTRODUCTION

During the 1970s and 1980s, Canada was known internationally for its leadership in environmental law reform and progressive stance on environmental matters.¹ Trail-blazing accomplishments such as the Berger Inquiry into the Mackenzie Valley Pipeline, the Ontario Environmental Assessment Board, “round tables” on environment and economy, and comprehensive land claims agreements with Aboriginal peoples impressed policy makers and scholars worldwide. Indeed, Canada was known as an environmental law “exporter,” setting precedents for other countries and taking a leadership role in international environmental diplomacy. Reinforcing this reputation was Canada’s image as a largely unspoiled wilderness, boasting 24 percent of the world’s wetlands, 10 percent of its forests (including more than half of its intact forest landscapes), 7 percent of its fresh water, its longest coastline, and some of its most striking natural landscapes.²

But Canada’s reputation has waned in recent decades.³ It is now a laggard in both policy innovation and environmental performance, known for inaction and obstruction on such issues as climate change. Scholarship on Canadian environmental law in international journals has

1. See *Concern Expressed in Europe about Canada's Environmental Decline*, EARTHVISION ENVTL. NEWS, Feb. 15, 2001, available at <http://www.hartford-hwp.com/archives/44/210.html>.

2. See TREASURY BD. OF CAN., CANADA’S PERFORMANCE 2004, at 110 (2004); GLOBAL FOREST WATCH, CANADA’S LARGE INTACT FOREST LANDSCAPES 2 (2006).

3. See CANADIAN ENVIRONMENTAL POLICY AND POLITICS: PROSPECTS FOR LEADERSHIP AND INNOVATION (Deborah Vannijnatten & Robert Boardman eds., 3d ed. 2009); DAVID R. BOYD, UNNATURAL LAW: RETHINKING CANADIAN ENVIRONMENTAL LAW AND POLICY (2003); Laura Telford et al., *Canada's First Green Provincial Report Card*, 27 CORP. KNIGHTS 40 (2009).

become much more critical.⁴ Environmental law courses in non-Canadian universities now typically study Canada, if at all, only as an historical example.⁵ Of the environmental law innovations that have occurred in Canada in recent years, most borrow foreign precedents.

Some of the same trends are evident in other jurisdictions such as Australia, where the political commitment to addressing climate change and other environmental issues languished under the Howard Government of 1996–2007.⁶ Likewise, in the United States the environmental agenda faced indifference or hostility from Republican administrations starting with Ronald Reagan in 1980 and culminating with George W. Bush.⁷ By contrast, environmental law reform has enjoyed a renaissance in the European Union over the past two decades.⁸

Even in innovative jurisdictions, a large gap is growing between current environmental performance and ecological sustainability. The countries with the best environmental records are not necessarily those with the most sophisticated environmental laws; rather, they include nations that have rejected industrial capitalism (Cuba, for example) or pursued different development policies (such as Costa Rica).⁹ But according to Professor William Rees, co-pioneer of “ecological footprint” analysis, nearly every country is living beyond its means: “the world’s average human eco-footprint is about 2.3 ha, even though there are only 1.9 ha of productive land and water per person on Earth.”¹⁰ In 2005, the Board of the Millennium Ecosystem Assessment warned that “human activity is putting such strain on the natural functions of the Earth that the ability of the planet’s ecosystems to sustain future generations can no

4. See, e.g., Simon Marsden, *Why is Legislative EA Ineffective in Canada, and How Can It Be Enhanced?*, 18 INT’L IMPACT ASSESSMENT REV. 241 (1998); Loren Cass, *A Climate of Obstinacy: Symbolic Politics in Australian and Canadian Policy*, 21 CAMBRIDGE REV. INT’L AFF. 465 (2008); Duncan MacLellan, *Shifting from the Traditional to the New Political Agenda: The Changing Nature of Federal-Provincial Environmental Relations*, 25 AM. REV. CAN. STUD. 323 (1995); Barry G. Rabe, *Beyond Kyoto: Climate Change Policy in Multilevel Governance Systems*, 20 GOVERNANCE 423 (2007); Kathryn Harrison, *The Road Not Taken: Climate Change Policy in Canada and the United States*, 7 GLOBAL ENVTL. POL. 92 (2007).

5. See, e.g., 2010 Course Handbook Listing Comparative Environmental Law, MACQUARIE UNIVERSITY, <http://www.handbook.mq.edu.au/2010/Units/PGUnit/LAW853> (last updated Apr. 28, 2010); *Course Listing: Comparative Environmental Law*, NAT’L UNIV. SINGAPORE (Oct. 19, 2010), http://law.nus.edu.sg/student_matters/course_listing/courses_desc.asp?MC=LL4013&Sem=2.

6. See Peter Christoff, *Policy Autism or Double-edged Dismissiveness? Australia’s Climate Policy under the Howard Government*, 17 GLOBAL CHANGE, PEACE & SECURITY 29 (2005).

7. See Patrick Parenteau, *Anything Industry Wants: Environmental Policy under Bush II*, 14 DUKE ENVTL. L. & POL’Y F. 363 (2004).

8. See generally MARIA LEE, *EU ENVIRONMENTAL LAW: CHALLENGES, CHANGE AND DECISION-MAKING* (2005).

9. See Daniel D. Moran et al., *Measuring Sustainable Development—Nation by Nation*, 64 ECOLOGICAL ECON. 470 (2008); *Environmental Performance Index 2010*, YALE UNIV., <http://epi.yale.edu> (last visited Mar. 20, 2010).

10. William Rees, *A Blot on the Land*, 421 NATURE 898, 898 (2003).

longer be taken for granted.”¹¹ Innumerable other international studies have echoed this view, including the International Union for the Conservation of Nature’s annual Red List of Threatened Species,¹² and United Nations Environment Programme’s periodic *Global Environment Outlook* reports.¹³

Something is badly wrong, and a deeper critique of environmental law and policy is needed. The aim of this Article is to provide such a critique of Canada’s situation. The Article does not offer blueprints for change, although it will help readers to understand the roadblocks to reform. Dwelling neither on fine details, nor abstruse theories, this Article paints a mid-level picture of the decline of environmental law in Canada.

It is difficult to evaluate the success or failure of environmental law and to measure national environmental performance. This Article does not rest its judgements on a systematic attempt to quantify Canada’s environmental record, although relevant studies are cited to corroborate the argument. It focuses instead on developments in Canada’s legal and policy frameworks as a proxy for the shifting importance attached to environmental reform. It canvasses selected developments at all levels of government in Canada: federal, provincial, and municipal.

Part I analyzes the challenges facing environmental law in general, focusing on three issues: political economy, instrument choice, and policy frameworks. Part II turns to Canada, tracing the seemingly halcyon days of the birth and growth of modern environmental law in Canada. Part III examines its retreat and stagnation during the 1990s. Part IV explains the decline of Canadian environmental law by reference to electoral politics, perceived jurisdictional constraints arising from federalism, the continuing dominance of primary industries, and the lasting impact of neoliberal ideology. Part V considers the significance of some recent innovations. The Conclusion offers some parting thoughts on the current state of Canadian environmental law, and a glimpse into its potential future. Although our purpose is primarily to explain problems rather than to propose solutions, we hope to shed light on potential pathways for environmental law reform in Canada.

11. MILLENNIUM ECOSYSTEM ASSESSMENT, LIVING BEYOND OUR MEANS: NATURAL ASSETS AND HUMAN WELL-BEING, STATEMENT FROM THE BOARD 5 (2005).

12. See *News Release: Why is Biodiversity in Crisis?*, IUCN RED LIST OF THREATENED SPECIES (Sept. 3, 2010), <http://www.iucnredlist.org/news/biodiversity-crisis> (last visited Oct. 13, 2010) (reporting that “the escalating extinction crisis shows that the diversity of nature cannot support the current pressure that humanity is placing on the planet”).

13. See, e.g., U.N. ENV’T PROGRAMME, GLOBAL ENVIRONMENT OUTLOOK GEO-4: ENVIRONMENT FOR DEVELOPMENT 6 (2007); *Global Environment Outlook*, U.N. ENV’T PROGRAMME, <http://www.unep.org/geo> (last visited Oct. 13, 2010).

I. A DAMP SQUIB: THE LIMITS OF ENVIRONMENTAL LAW

Before turning to Canada, we canvas some critiques of environmental law in general. This will help us to evaluate whether Canada's mediocre record reflects unique factors or is a local manifestation of broader trends.

In many respects, environmental law can be considered a damp squib.¹⁴ Many environmental problems have worsened despite the vast ensemble of regulations introduced in most countries in recent decades. We continue to edge closer to the precipice of an anthropogenic collapse in planetary ecological systems. Species are disappearing up to one thousand times faster than they did in pre-human times.¹⁵ Atmospheric carbon dioxide is at its highest level in some 650,000 years, and rising rapidly.¹⁶ Coinciding with these trends is the soaring human population and rampant economic growth; in the twentieth century the world's population quadrupled and the world economy grew by a factor of thirteen.¹⁷

The mismatch between environmental law's ubiquity and its relative impotence requires analysis of underlying structural problems. Three themes help to explain the failings of environmental law: its political-economic context, its methods of regulation, and its policy framework.

A. *The Political Economy of Environmental Law*

Read any newspaper or listen to radio and television, in Canada or abroad, and you will soon notice remarks by politicians or corporate executives claiming that our well-being depends on maintaining economic growth.¹⁸ Despite its crushing burden on the biosphere, economic growth remains the pre-eminent goal of virtually all nations worldwide. Canada

14. A "damp squib" is anything that fails to meet expectations.

15. See Juliet Jowit, *Humans Driving Extinction Faster than Species Can Evolve*, *Say Experts*, *GUARDIAN*, Mar. 7, 2010, available at <http://www.guardian.co.uk/environment/2010/mar/07/extinction-species-evolve>; see also *EXTINCTION RATES 10–22* (John Lawton & Robert May eds., 1995).

16. See INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *CLIMATE CHANGE 2007: SYNTHESIS REPORT 37* (2007); Gary Gardner & Thomas Prugh, *Seeding the Sustainable Economy*, in *WORLD WATCH INST., STATE OF THE WORLD 2008*, at 3 (2008).

17. See J.R. MCNEILL, *SOMETHING NEW UNDER THE SUN: AN ENVIRONMENTAL HISTORY OF THE TWENTIETH-CENTURY WORLD* 360 (2000).

18. See, e.g., G-20 Toronto Summit Declaration, para. 9, June 26–27, 2010, available at <http://canadainternational.gc.ca/g20/summit-sommet/2010/toronto-declaration-toronto.aspx?lang=eng> (last visited Oct. 15, 2010) ("Increasing global growth . . . is the most important step we can take in improving the lives of all of our citizens. . . ."); Hon. Iona Campagnolo, Lieutenant Governor, British Columbia, Speech at the Opening of the Parliament of British Columbia: Speech from the Throne (Feb. 12, 2002), available at <http://www.leg.bc.ca/37th3rd/4-8-37-3.htm> (last visited Oct. 14, 2010) ("Economic growth is the bedrock for prosperity. . . . It is the vital base for stability and opportunity in every community. . . .").

is no exception. In *The Cancer Stage of Capitalism*, Professor John McMurtry analogizes this economic surge to a malignant tumour.¹⁹ As many ecological economists have pointed out, infinite economic growth is impossible in a finite world.²⁰

The economic trends are truly staggering and have continued seemingly unabated despite the expansion of environmental law during this period, driven substantially by the consumer economy.²¹ Worldwide consumer expenditure during the last century rose from US\$1.5 trillion in 1900 to US\$24 trillion in 1998.²² Likewise, international trade in goods and services soared from US\$50 billion in 1870 to US\$8043 billion in 2005.²³ Both trends have vastly outstripped the already extraordinary growth in human numbers from some 1.6 billion in 1900 to 6 billion in 2000.

These trends are not simply an expression of some basic human urge for greater material prosperity, but reflect the power of those with a vested interest in continued growth and profit-making. This situation restrains environmental law, as it does many forms of regulation, because the political fortunes of states hinge on their success as economic managers. In a socially heterogeneous and discordant world, where disagreement over many values is rife, the capitalist state can hardly govern on the basis of any putative moral consensus.²⁴ Rather, driven by the imperatives of national housekeeping, the state acts as *parens patriae* with responsibility to sustain economic growth.²⁵

Yet because economic activity can produce politically contentious environmental impacts, the state must reconcile the antagonistic imperatives of curbing the worst pollution while allowing market actors enough freedom to create economic growth.²⁶ Unresolved contradictions between these imperatives have prompted major disputes over forestry, nuclear power, and mining.²⁷ With globalization and increasing trade

19. See generally JOHN MCMURTRY, *THE CANCER STAGE OF CAPITALISM* (1999).

20. See, e.g., HERMAN E. DALY & JOHN B. COBB, JR., *FOR THE COMMON GOOD: REDIRECTING THE ECONOMY TOWARD COMMUNITY, THE ENVIRONMENT, AND A SUSTAINABLE FUTURE* (1994); HERMAN E. DALY, *ECOLOGICAL ECONOMICS AND THE ECOLOGY OF ECONOMICS: ESSAYS OF CRITICISM* (1999); PETER A. VICTOR, *MANAGING WITHOUT GROWTH: SLOWER BY DESIGN, NOT DISASTER* (2008).

21. See Mark Sagoff, *Do We Consume Too Much?*, *ATLANTIC MONTHLY*, June 1997, at 80.

22. See U.N. DEV. PROGRAMME, *HUMAN DEVELOPMENT REPORT 1998*, at 1 (1998).

23. Expressed in constant 1990 dollar values. See WORLD TRADE ORG., *WORLD TRADE REPORT 2007*, at 244 (2007); see also WILLIAM J. BERNSTEIN, *A SPLENDID EXCHANGE: HOW TRADE SHAPED THE WORLD* (2008).

24. See ARISTOTLE, *THE POLITICS 197-98* (T.A. Sinclair trans., 1981).

25. See HANNAH ARENDT, *THE HUMAN CONDITION* 28-29, 38 (1957).

26. See K.J. Walker, *The State in Environmental Management: The Ecological Dimension*, 37 *POL. STUD.* 25, 26 (1989); Charles Lindblom, *The Market as Prison*, 44 *J. POL.* 324, 325-26 (1982).

27. E.g., ROBERT FALKNER, *BUSINESS POWER AND CONFLICT IN INTERNATIONAL ENVIRONMENTAL POLITICS* (2009); IAN WATSON, *FIGHTING OVER THE FORESTS* (1990); David

competition, corporations have gained unparalleled leverage over states, and often prevail in such disputes. For example, the economic clout of the oil and gas industry in Alberta gives it significant policy influence in the province.²⁸ Likewise, Ontario's massive automotive industry has been able to limit environmental regulation.²⁹

Governments have sought to manage such contradictions and the attendant challenges to their legitimacy by devolving authority to market actors.³⁰ Since the 1980s, they have privatized public services and assets and liberalized market controls in the hope of reducing the regulatory burden on industry and creating more opportunities to harness market efficiencies.³¹ This strategy, however, carries its own risks, as illustrated by the global financial crisis of 2008–09 where lack of regulation resulted in short-term trading and speculation that became divorced from real economic value.

The global financial crisis of 2008–09 led governments worldwide to intervene to restore market stability in a way not seen since the Great Depression.³² By contrast, the looming crisis of climate change prompted only a lukewarm political accord in Copenhagen in 2009.³³ The function of environmental law, therefore, remains limited to mitigating the worst effects of the dominant model of economic development rather than fundamentally challenging or transforming it. It is rare for a major project, especially one that promises many jobs and other economic benefits, to be vetoed in the name of environmental protection. As will be shown later, this perceived tension between environmental protection and economic growth has been particularly salient in Canada because of the continuing primacy of extractive industries in its economy.

Meyer, *Protest Cycles and Political Process: American Peace Movements in the Nuclear Age*, 46 POL. RES. Q. 451 (1993).

28. See Norah A. MacKendrick & Debra J. Davidson, *State-Capital Relations in Voluntary Environmental Improvement*, 55 CURRENT SOCIOLOGY 674, 682–84 (2007).

29. See Julie Larsen & Steven Peck, *Making Change*, 27 ALTERNATIVES J. 17, 19–20 (2001).

30. See Robert W. Poole, Jr., *Privatizing Essential Services*, in MARKET LIBERALISM: A PARADIGM FOR THE 21ST CENTURY 205, 205 (David Boaz & Edward H. Crane eds., 1993).

31. The literature is massive. See, e.g., OLIVER LETWIN, *PRIVATISING THE WORLD: A STUDY OF INTERNATIONAL PRIVATISATION IN THEORY AND PRACTICE* (1988); BERNARDO BORTOLOTTI & DOMENICO SINISCALCO, *THE CHALLENGES OF PRIVATIZATION: AN INTERNATIONAL ANALYSIS* (2004).

32. See *Adding Up the Government's Total Bailout Tab*, N.Y. TIMES, Feb. 4, 2009, <http://www.nytimes.com/interactive/2009/02/04/business/20090205-bailout-totals-graphic.html>; *Canada's Economic Action Plan*, GOV'T OF CAN., <http://www.actionplan.gc.ca> (last visited Oct. 14, 2010).

33. See *Copenhagen Accord Climate Pledges Too Weak: UN*, REUTERS, Mar. 31, 2010, available at <http://www.reuters.com/article/idUSTRE62U13M20100331>.

B. The Instruments of Environmental Law

The effectiveness of environmental law is blunted not only by its political and economic context but also its *methods* of regulation. The rise of modern environmental law in Western countries was closely associated with the norms and institutions of the welfare state, including reliance on instruments of public ownership and prescriptive standards.³⁴ While these techniques helped mitigate such acute pollution problems as water pollution and lead in gasoline, their suitability for resolving complex environmental issues has been disputed since the early 1980s.³⁵ The main elements of the critique are familiar: the conventional techniques of “command and control” regulation are too rigid, complex, burdensome, costly, inefficient, adversarial, and ineffective; they stifle entrepreneurial innovation, eliminate jobs, and hinder competitiveness, in return for diminishing environmental benefits; and they are prone to industry capture.³⁶ Their proliferation resulted in a dense maze of legal controls whose effectiveness is increasingly outweighed by their administrative costs and economic burden, so that ultimately the whole system threatens to grind to a halt or collapse under its own weight.³⁷ According to one influential account, “[t]he present regulatory system wastes tens of billions of dollars every year, misdirects resources, stifles innovation, and spawns massive and often counterproductive litigation.”³⁸

It is doubtful whether this grim picture of environmental regulation ever corresponded faithfully to reality, particularly outside the United States where it originated. It was certainly not an accurate depiction of Canadian environmental law, which was and remains characterized by a consultative style in which environmental rules were developed and enforced in a largely non-coercive way via closed-door, bilateral negotiations between government and industry.³⁹ In addition, the volume and stringency of Canada’s environmental regulations were dwarfed by those of the United States. Canadian environmental legislation featured a

34. See Cass Sunstein, *Paradoxes of the Regulatory State*, 57 U. CHI. L. REV. 407 (1990); Michael Moran, *Understanding the Regulatory State*, 32 BRITISH J. POL. SCI. 391 (2002).

35. See, e.g., PETER C. YEAGER, *THE LIMITS OF LAW: THE PUBLIC REGULATION OF PRIVATE POLLUTION* (1991).

36. See, e.g., Carolyn Abbott, *Environmental Command Regulation*, in ENVIRONMENTAL LAW FOR SUSTAINABILITY: A READER 61, 76–85 (Benjamin J. Richardson & Stepan Wood eds., 2006).

37. See Gunther Teubner, *Juridification: Concepts, Aspects, Limits, Solutions*, in A READER ON REGULATION 389, 398 (Robert Baldwin, Colin Scott & Christopher Hood eds., 1998).

38. Bruce A. Ackerman & Richard B. Stewart, *Reforming Environmental Law*, 37 STAN. L. REV. 1333, 1333 (1985).

39. See Michael Howlett, *Policy Instruments and Implementation Styles: The Evolution of Instrument Choice in Canadian Environmental Policy*, in CANADIAN ENVIRONMENTAL POLICY: CONTEXT AND CASES 25, 25 (Deborah VanNijnatten & Robert Boardman eds., 2002).

high degree of administrative discretion, and standards were often facility-specific rather than uniform. Regulators relied heavily on industry self-monitoring and voluntarism.⁴⁰ American-style adversarial legalism was unheard of: prosecutions were rare, penalties were small, and citizen-initiated litigation almost unknown due to restrictive standing rules, the risk of large adverse cost awards, the lack of statutory citizen suit provisions, and judicial deference to governments.

Canadian business groups and conservative politicians nevertheless embraced this narrative almost as vehemently as their American counterparts, complaining of unnecessary, burdensome, and duplicative environmental regulation while vowing to cut “red tape.”⁴¹ Outside Canada, governments of various political stripes reacted to this narrative by experimenting with a range of techniques to align regulation better with market dynamics.⁴² Legal theorists have characterized such responses in various ways, including “reflexive law,”⁴³ “smart regulation,”⁴⁴ “responsive regulation,”⁴⁵ and “post-regulatory governance.”⁴⁶ Canadian federal and provincial governments, however, have had almost no appetite for such experimentation.⁴⁷

These innovations in environmental law have tended to shift responsibility for addressing environmental problems from the public sector to the market or civil society. They have involved a preference for legal arrangements that are “less heavy-handed, and more responsive to the demands and possibilities of their context.”⁴⁸ The instruments of environmental governance have thus diversified to include more market-friendly policy mechanisms, including economic incentives, contractual agreements with industry, and even outright delegation of governmental

40. See BOYD, *supra* note 3, at 248–50.

41. See, e.g., Red Tape Reduction Act, S.O., c. 18 (1998) (Can.).

42. See, e.g., DAVID OSBORNE & TED GAEBLER, *REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR* (1992); U.S. WHITE HOUSE, *REINVENTING ENVIRONMENTAL REGULATION* (1995), available at <http://govinfo.library.unt.edu/npr/library/rsreport/251a.html>; VOLUNTARY APPROACHES IN ENVIRONMENTAL POLICY (Carlo Carraro and François Lévêque eds., 1999).

43. See GUNTHER TEUBNER, *LAW AS AN AUTOPOIETIC SYSTEM* 37–38 (1993).

44. See NEIL GUNNINGHAM & PETER GRABOSKY, *SMART REGULATION: DESIGNING ENVIRONMENTAL POLICY* (1998).

45. See IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* (1992).

46. See Colin Scott, *Regulation in the Age of Governance: The Rise of the Post Regulatory State*, in *THE POLITICS OF REGULATION: INSTITUTIONS AND REGULATORY REFORMS FOR THE AGE OF GOVERNANCE* 145 (Jacint Jordana & David Levi-Faur eds., 2004).

47. See *infra* Part III.B.

48. Jenny Steele & Tim Jewell, *Law in Environmental Decision-Making*, in *LAW IN ENVIRONMENTAL DECISION-MAKING: NATIONAL, EUROPEAN, AND INTERNATIONAL PERSPECTIVES* 1, 14 (Tim Jewell & Jenny Steele eds., 1998).

responsibilities through industry-initiated codes of conduct.⁴⁹ This trend also occurred in international environmental law, as in the Kyoto Protocol's so-called "flexibility mechanisms."⁵⁰

Their success is debatable. Giving business too much discretion can enable corporations to shirk responsibilities and leave costly environmental problems unresolved.⁵¹ The recent implosion of global financial markets and spate of corporate scandals show the social costs that can arise when markets are off the leash.⁵² Furthermore, market-based governance simply cannot function without detailed regulation; tradable pollution allowances, such as the European Union's Emissions Trading Scheme of 2005,⁵³ require extensive legal rules for their effective operation.⁵⁴

This oscillation between state- and market-based methods of governance while environmental conditions continue to decline points to an institutionally unsustainable path for environmental law. Historian Joseph Tainter explains that societies tend to respond to their problems—environmental, social, or economic—by investing in ever more complex solutions.⁵⁵ Confronted with mounting environmental stresses we often prescribe more detailed rules, devise new technologies, and commit greater financial resources. Initially, such investments can yield concrete results; for example, in its early years between the late 1950s and mid-1970s, environmental law provided some immediate tangible benefits, such as ridding cities of much of their smog.⁵⁶ Later experimentation with market-based methods of environmental law in an

49. See Daniel A. Farber, *Taking Slippage Seriously: Noncompliance and Creative Compliance in Environmental Law*, 23 HARV. ENVTL. L. REV. 297, 305–11 (1999); Alastair Iles, *Adaptive Management: Making Environmental Law and Policy More Dynamic, Experimentalist and Learning*, 13 ENVTL. & PLAN. L.J. 288 (1996); ENVIRONMENTAL CONTRACTS: COMPARATIVE APPROACHES TO REGULATORY INNOVATION IN THE UNITED STATES AND EUROPE (Eric W. Orts & Kurt Deketelaere eds., 2001).

50. See Kyoto Protocol to the United Nations Framework Convention on Climate Change, arts. 4, 6, 12, 17, Dec. 10, 1997, 37 I.L.M. 22 (defining four mechanisms for flexibility in fulfilling developed countries' emission limitation and reduction commitments: joint implementation (art. 6), emissions trading (art. 17), the Clean Development Mechanism (art. 12), and "bubbles" (art.4)).

51. See, e.g., Stepan Wood, *Voluntary Environmental Codes and Sustainability*, in ENVIRONMENTAL LAW FOR SUSTAINABILITY, *supra* note 36, at 229.

52. See James Crotty, *Structural Causes of the Global Financial Crisis: A Critical Assessment of the "New Financial Architecture"*, 33 CAMBRIDGE J. ECON. 563 (2009).

53. See EU CLIMATE CHANGE POLICY: THE CHALLENGE OF NEW REGULATORY INITIATIVES (Marjan Peeters & Kurt Deketelaere eds., 2006).

54. See Cass R. Sunstein, *Administrative Substance*, 3 DUKE L.J. 607, 608 n.5 (1991); Catherine Redgwell, *Privatisation and Environmental Regulation: Some General Observations* 15 J. ENERGY & NAT. RES. L. 33, 36 (1997).

55. See JOSEPH TAINTER, *THE COLLAPSE OF COMPLEX SOCIETIES* 37 (1988).

56. See, e.g., GARRET NAGLE, *HAZARDS* 117 (1998) (discussing English Clean Air Act, 1956, 4 & 5 Eliz. 2, which helped to reduce the sources of the smog that had killed hundreds of Londoners in the years immediately preceding its passage).

attempt to reduce the complexity and costs of administrative regulation has produced mixed results because many economic instruments such as environmental taxes and tradable pollution allowances require an extensive regulatory apparatus to be implemented effectively.⁵⁷ Yet, Professor Tainter argues, such investments in complexity yield ever more meagre results to the point where the remedial costs become unsustainable to society.⁵⁸ This is because societies respond first with measures that are the simplest and yield the biggest return, resorting only later to more complex and expensive solutions. Over time, when the costs of more complexity outweigh the benefits, the mounting pressure can precipitate societal collapse. Historical evidence suggests that environmental mismanagement proved ruinous to some older civilizations.⁵⁹

This is also the situation we face today: environmental law has picked much of the low-hanging fruit, but faces a new generation of more difficult challenges such as toxic chemicals in the food chain and global warming. These will likely require much more complex responses. The United Kingdom's *Stern Review* of 2007 calculated that climate change if left unabated will, by the middle of this century, cut world gross domestic product (GDP) by between 5 and 20 percent annually, but by only 1 percent if we act now.⁶⁰ Other commentators predict even higher costs of inaction.⁶¹

Unless an entirely different economic and political system carrying a lower ecological burden can be designed, environmental law will continue to face ever-diminishing returns. Even when its instruments of governance have been revamped in the search for more efficient ways to

57. See Jacint Jordana & David Levi-Faur, *The Politics of Regulation in the Age of Governance*, in *THE POLITICS OF REGULATION: INSTITUTIONS AND REGULATORY REFORMS FOR THE AGE OF GOVERNANCE*, *supra* note 46, at 1 (noting that deregulation, privatization and the use of market-based instruments have often, paradoxically, been accompanied by a substantial increase in the volume and scope of regulation).

58. See TAINTER, *supra* note 55, at 92, 115, 122.

59. Environmental mismanagement, as manifested for example by poorly designed laws, should also ultimately be viewed as a result of political, economic, and cultural factors, which Professor Jared Diamond examines in a series of case studies including Easter Island, the Maya people, and Haiti. See generally JARED DIAMOND, *COLLAPSE: HOW SOCIETIES CHOOSE TO FAIL OR SUCCEED* (2005).

60. See NICHOLAS STERN, *STERN REVIEW ON THE ECONOMICS OF CLIMATE CHANGE* vi (2007), available at http://webarchive.nationalarchives.gov.uk/+http://www.hm-treasury.gov.uk/d/Summary_of_Conclusions.pdf.

61. See GEORGE MONBIOT, *HEAT: HOW TO STOP THE PLANET BURNING* 6–9 (2005) (discussing ecological and economic costs of climate change); TIMOTHY FLANNERY, *THE WEATHER MAKERS* 233–38 (2006) (discussing costs and benefits of climate change mitigation); THOMAS HOMER-DIXON, *THE UPSIDE OF DOWN: CATASTROPHE AND RENEWAL AND THE RENEWAL OF CIVILISATION* 77–100, 219–23 (2006) (discussing rising costs and diminishing returns from our economic model in light of declining fossil fuel reserves and the absence of easy alternatives).

solve environmental damage, it leaves unchanged the very system that generates such damage. This brings us to the third important aspect of modern environmental law: its policy frameworks to integrate economic and environmental concerns in support of sustainable development.

C. Sustainability: The Policy Context of Environmental Law

Since the late 1980s, “sustainability”—or “sustainable development” in its most common formulation—has emerged as the most influential norm in environmental policy making worldwide. It is formally recognized in countless international environmental treaties, national environmental plans, and legislation.⁶² It aims to reconcile the habits of unfettered economic exploitation of the biosphere with the reality that all life, including humankind, depends on healthy ecosystems. Several principles under this rubric have been enunciated by policy makers, notably the precautionary principle and inter-generational equity.⁶³ The sustainability discourse has inspired a move toward more principled and strategic approaches to environmental policy in Canada and other Western states, in contrast to the previous more fragmented and tentative approaches.

The ambiguity and open-endedness of the concept of sustainability allow it to be embraced by numerous actors with divergent objectives.⁶⁴ Its broader potential implications, including a radical restructuring of capitalism⁶⁵ and an emphasis on biosphere ethics in environmental policy,⁶⁶ have mostly been marginalized by business and political elites which have promoted the notion that the creative and innovative side of

62. See MARIE-CLAIRE CORDONIER SEGGER & ASHFAQ KHALFAN, *SUSTAINABLE DEVELOPMENT LAW: PRINCIPLES, PRACTICES, AND PROSPECTS* (2004); Stepan Wood, *Sustainability in International Law*, in UNESCO ENCYCLOPEDIA OF LIFE SUPPORT SYSTEMS (2003), <http://www.eolss.net>; RICHARD L. REVESZ, PHILIPPE SANDS & RICHARD B. STEWART, *ENVIRONMENTAL LAW, THE ECONOMY AND SUSTAINABLE DEVELOPMENT: THE UNITED STATES, THE EUROPEAN UNION AND THE INTERNATIONAL COMMUNITY* (2000); John Dembach, *Sustainable Development as a Framework for National Governance*, 49 CASE W. RES. L. REV. 1 (1998).

63. See, e.g., Jaye Ellis & Stepan Wood, *International Environmental Law*, in ENVIRONMENTAL LAW FOR SUSTAINABILITY 343, 361–64, 373, 376–78 (Benjamin J. Richardson & Stepan Wood eds., 2006).

64. See Andrew Basiago, *Methods of Defining ‘Sustainability’*, 3 SUSTAINABLE DEV. 109, 111–19 (1995).

65. See HERMAN E. DALY, *STEADY STATE ECONOMICS* (2d ed. 1991); Mick Common & Charles Perrings, *Towards an Ecological Economics of Sustainability*, 6 ECOLOGICAL ECON. 7 (1992).

66. See KLAUS BOSSELMANN, *THE PRINCIPLE OF SUSTAINABILITY: TRANSFORMING LAW AND GOVERNANCE* (2008).

capitalism can find solutions to protect the environment while growing the economy.⁶⁷

Known as “ecological modernization,” this branch of the sustainability discourse reframes the ethical and political dilemmas of industrialization as technical and managerial challenges.⁶⁸ It has been particularly influential in Japan and the European Union, but less evident in Canada.⁶⁹ Ecological modernization posits that environmental degradation can be resolved through a framework of industrial modernity, harnessing innovative technologies, business acumen, and managerial creativity.⁷⁰ Consequently, green companies should benefit financially by gaining competitive advantages, building new markets, and improving production efficiency.⁷¹ This “business case” for sustainability has become a very influential driver of corporate social responsibility, increasingly displacing an earlier emphasis on ethically-motivated change.⁷²

Thus, while the sustainability discourse initially promised a new approach to development that assimilated ecological principles, its legacy has been muted, incremental, and reformist. Markets continue to enjoy significant autonomy as trusted agents of progress, while states have embellished their environmental laws with the rhetoric of sustainable development that leave largely undisturbed many routine controls and procedures.

As will be shown in the following Parts of this Article, all of the issues canvassed above help explain the rise and decline of environmental law in Canada. The extraordinary growth in its environmental laws in the 1970s marked a period of exuberant confidence in the ability of states to solve environmental problems through enlightened regulation. Later, Canada’s increasingly mangled environmental regulations reflected the effects of neoliberal deregulation, fiscal restraint, and corporate

67. On the potential symbiosis of environmental and economic concerns, see Michael E. Porter & Claas van der Linde, *Green and Competitive: Ending the Stalemate*, 73 HARV. BUS. REV. 120 (1995).

68. See Mikael Skou Andersen & Ilmo Massa, *Ecological Modernisation—Origins, Dilemmas and Future Directions*, 2 J. ENVTL. POL’Y & PLAN. 337 (2000); MAARTEN A. HAJER, *THE POLITICS OF ENVIRONMENTAL DISCOURSE: ECOLOGICAL MODERNISATION AND THE POLICY PROCESS* 3 (1995).

69. See Hajime Nishimura, *The Greening of Japanese Industry*, in *BUSINESS AND THE ENVIRONMENT* 21 (Michael D. Rogers ed., 1995); *GOVERNING THE ENVIRONMENT: POLITICS, POLICY AND ORGANIZATION IN THE NORDIC COUNTRIES* (Peter Christensen ed., 1996).

70. See generally JOSEPH HUBER, *NEW TECHNOLOGIES AND ENVIRONMENTAL INNOVATION* (2004).

71. E.g., WORLD BUSINESS COUNCIL FOR SUSTAINABLE DEV. & U.N. ENV’T PROGRAMME, *CLEANER PRODUCTION AND ECO-EFFICIENCY, COMPLEMENTARY APPROACHES TO SUSTAINABLE DEVELOPMENT* 3 (1998).

72. See John Elkington, *Towards the Sustainable Corporation: Win-Win-Win Business Strategies for Sustainable Development*, 36 CAL. MGMT. REV. 90, 91 (1994).

influence. The sustainability discourse has also been influential in Canadian law-making, though it too has not resolved the contradictions in environmental governance nor reversed Canada's environmental decline.

II. THE HALCYON DAYS OF CANADIAN ENVIRONMENTAL LAW

A. *Building an Environmental Law System*

There was a time when there was a much greater public faith in the transformative capacity of politics to solve environmental problems. The late 1960s and early 1970s were heady days for environmental law advocacy in Canada and some other countries.⁷³ Through legislative reform, lobbying, and other strategies, environmentalists believed that they could use the organs of the state as a means to solve the mounting pollution, resource depletion, and other environmental problems of industrial capitalism.⁷⁴ Legislation had, of course, been availed earlier to manage the environment, but primarily as a regulatory tool to facilitate the "orderly" exploitation of natural resources.⁷⁵ The common law had also played a role, but it was limited by its constricted focus on safeguarding private property rights.⁷⁶ The emergence of a *system* of environmental law began only in the late 1960s, when a more liberal political climate in Western societies, coupled with greater economic prosperity and improved scientific understanding of humanity's ecological impacts, created the conditions for heightened public awareness and demand for action on environmental deterioration.⁷⁷ In many parts of the world, especially among developing countries, these trends transpired much later.

Many of the basic features of environmental law that we know today are traceable to innovations in this period. Milestones such as environmental impact assessment legislation,⁷⁸ endangered species protection laws,⁷⁹ and specialist environmental agencies and courts⁸⁰ were

73. See William Rodgers, *The Most Creative Moments in the History of Environmental Law: "The Whats"*, 2000 U. ILL. L. REV. 1.

74. See generally JOSEPH L. SAX, *DEFENDING THE ENVIRONMENT: A HANDBOOK FOR CITIZEN ACTION* (1971). For a Canadian perspective, see D. Paul Emond, *Are We There Yet? Reflections on the Success of the Environmental Law Movement in Ontario*, 46 OSGOODE HALL L.J. 219, 219–25 (2008).

75. ROBYN ECKERSLEY, *ENVIRONMENTALISM AND POLITICAL THEORY: TOWARD AN ECOCENTRIC APPROACH* 35–36 (1992).

76. See generally *ENVIRONMENTAL PROTECTION AND THE COMMON LAW* (John Lowry & Rod Edmunds eds., 2000).

77. Zygmunt J.B. Plater, *From the Beginning, A Fundamental Shift of Paradigms: A Theory and Short History of Environmental Law*, 27 LOY. L.A. L. REV. 981 (1994).

78. See, e.g., National Environmental Policy Act, 42 U.S.C. §§ 4321–4347 (1969).

79. See, e.g., Endangered Species Act, 16 U.S.C. §§ 1531–1544 (1973).

among the flurry of reforms in an era where many were optimistic about the ability of the state to solve environmental challenges. Some of these reforms were initiated, or evolved to an advanced form, in Canada. Their progenitors were planted in the late 1940s. In Ontario, the development of a more coherent framework for land use and watershed planning was stimulated by the Conservation Authorities Act of 1946⁸¹ and the Planning Act of 1946.⁸² Pollution began to be addressed more systematically in the 1950s, particularly through the creation of specialized agencies. A leading example was the creation in 1956 of the Ontario Water Resources Commission with the mandate to reduce industrial pollution, along with the oversight of sewage disposal and drinking water treatment.⁸³

Pollution of the Great Lakes also fostered a growing national and international dimension to environmental controls in Canada; in 1964, the Canadian and U.S. governments asked the International Joint Commission to study pollution and water levels in the Great Lakes.⁸⁴ Its recommendations led to the 1972 bilateral Great Lakes Water Quality Agreement,⁸⁵ which was superseded by a new agreement in 1978⁸⁶ and extended by supplementary protocols in 1983 and 1987.⁸⁷ The 1972 Agreement was one of the earliest international agreements to adopt an ecosystem approach, setting an ambitious and still unrealized goal of zero discharge of persistent toxic substances into the Great Lakes Basin ecosystem.⁸⁸ Canada and the United States would continue to cooperate on other environmental issues, such as negotiating the 1991 Canada-U.S. Air Quality Agreement to control acid rain pollution.⁸⁹

80. See, e.g., Land and Environment Court Act, 1979, N.S.W. Stat. 204 (Austl.) (establishing environmental agencies and courts in New South Wales, Australia).

81. R.S.O. 1990, c. C.27.

82. R.S.O. 1990, c. P.13.

83. See DOUGLAS MACDONALD, *BUSINESS AND ENVIRONMENTAL POLITICS IN CANADA* 70 (2007).

84. See Don Piper, *A Significant Docket for the International Joint Commission*, 59 AM. J. INT'L L. 593, 593 (1965). The International Joint Commission was established by the Boundary Waters Treaty, U.S.-U.K., Jan. 11, 1909, 36 Stat. 2448, to help prevent and resolve disputes between Canada and the United States over the use of boundary waters and other transboundary issues. See ANNUAL REPORT FOR 2008: BOUNDARY WATERS TREATY CENTENNIAL EDITION 2 (2009).

85. Great Lakes Water Quality Agreement, U.S.-Can., Apr. 15, 1972, 23.1 U.S.T. 301.

86. Agreement between Canada and the United States of America on Great Lakes Water Quality, 1978, U.S.-Can., Nov. 22, 1978, 30 U.S.T. 1383.

87. Protocol Amending the 1978 Agreement between the United States of America and Canada on Great Lakes Water Quality, as Amended on October 16, 1983, U.S.-Can., Nov. 18, 1987, T.I.A.S. No. 11551; Agreement Amending the Agreement of November 22, 1978 and Supplementing Annex 3, U.S.-Can., Oct. 16, 1983, T.I.A.S. 10798.

88. Great Lakes Water Quality Agreement, *supra* note 85, art. II & Annex 12, art. 2.

89. Agreement Between the Government of the United States of America and the Government of Canada on Air Quality, Mar. 13, 1991, U.S.-Can., T.I.A.S. No. 11783.

Pollution was certainly not the only concern. Although Canada had set aside natural areas for recreation since the 1885 creation of Banff National Park, it was not until much later that national parks began to be conceived as “wilderness” areas to be protected for posterity. Only by the mid-1960s had sufficient pressure emerged to expand the parks system with the aim of protecting all representative ecosystems. Amid plans for intensification of development in Jasper and Banff, the National and Provincial Parks Association was founded with the goal of redirecting park management away from economic to conservation goals.⁹⁰ The provinces were also expanding their nature conservation laws during this period, and in 1971 Ontario passed Canada’s first endangered species protection law,⁹¹ modelled after the U.S. Endangered Species Act.⁹²

A defining moment in the move towards an actual *system* of environmental protection was Prime Minister Pierre Trudeau’s 1969 *Throne Speech* promoting five new environmental statutes, most of which would later be merged into the Canadian Environmental Protection Act of 1988.⁹³ The Canada Water Act was adopted shortly afterwards in 1970, introducing pollution control regulations that arose partly in response to pressure from community groups such as Pollution Probe.⁹⁴ In 1971, the Trudeau government created a special department, known today as Environment Canada, and passed the Clean Air Act.⁹⁵ The federal Fisheries Act was also transformed into a powerful anti-pollution statute in this period by amending it to protect fish habitat and prevent water pollution.⁹⁶ Several provinces also showed leadership: Ontario enacted its Environmental Protection Act and created a ministry of the environment, while Alberta created a department of the environment and enacted the

90. See Alan MacEachern, *Changing Ecologies: Preservation in Four National Parks, 1935-1965*, in CANADIAN ENVIRONMENTAL HISTORY: ESSENTIAL READINGS 361, 379 (David Freeland Duke ed. 2006).

91. Endangered Species Act, R.S.O. 1990, c. E.15, *repealed by* Endangered Species Act of 2007, S.O. 2007, c. 6.

92. Endangered Species Conservation Act of 1969, 83 Stat. 275, 16 U.S.C. § 668aa(c), *repealed by* Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (2006).

93. R.S.C. 1985, c. 16 (supp. 4) (in force June 30, 1988) (incorporating the Clean Air Act, Environmental Contaminants Act and Ocean Dumping Act, among others), *repealed by* Canadian Environmental Protection Act of 1999, S.C. 1999, c. 33; see MACDONALD, *supra* note 83, at 71.

94. Canada Water Act, R.S.C. 1985, c. C-11; see *Who We Are: Highlights of Past Accomplishments*, POLLUTION PROBE, <http://www.pollutionprobe.org/Whoweare/Milestones2.htm> (last visited Sept. 4, 2010).

95. See MACDONALD, *supra* note 83, at 71; Clean Air Act, S.C.1970-71-72, c. 47, *repealed by* Canadian Environmental Protection Act of 1988, R.S.C. 1985, c. 16 (supp. 4).

96. An Act to Amend the Fisheries Act and to Amend the Criminal Code in Consequence Thereof, R.S.C. 1985, c. F-14.

Clean Air Act and Clean Water Act.⁹⁷ In 1973, the federal government introduced the Environmental Assessment Review Process, the first of many assessment rules,⁹⁸ which was soon followed by provincial initiatives such as Ontario's Environmental Assessment Act of 1975.⁹⁹

Concomitantly to these initiatives, networks of environmental lawyers emerged that would later play crucial roles as advocates, watchdogs, and commentators of Canadian developments. The Canadian Environmental Law Association and the Canadian Environmental Law and Research Foundation were both founded in 1970.¹⁰⁰ Similar groups sprang up in Alberta and British Columbia. The development of this niche environmental lawyer community was crucial in providing focused pressure for adoption of specific reforms and improved implementation.¹⁰¹

This period was not without setbacks and delays. Lengthy waits in implementing new environmental statutes occurred in some instances,¹⁰² Ontario's new controls on pollution spills,¹⁰³ enacted in the late 1970s, were not proclaimed in force until 1985, following a change of government. Fiscal constraints also limited the expansion of environmental agencies, and Environment Canada incurred budget cuts.¹⁰⁴ And, foreshadowing later major constraints to federal leadership, the Trudeau Government prevaricated at times in the face of provincial or industry resistance to economically costly environmental regulation.¹⁰⁵

While many of these trends were not unique to Canada, some were. A shift in Canadian law was underway during this period relating to recognition of Aboriginal rights, with wider environmental ramifications.¹⁰⁶ The trigger was the Supreme Court of Canada's

97. Environmental Protection Act, R.S.O. 1990, c. E.19; Clean Air Act, S.A. 1971, c. 16 (Alta.); Clean Water Act, S.A. 1971, c. 17 (Alta.); see HENRY C. KLASSEN, *A BUSINESS HISTORY OF ALBERTA* 308 (1999) (discussing the Alberta legislation).

98. See ENVIRONMENTAL MANAGEMENT IN PRACTICE: INSTRUMENTS FOR ENVIRONMENTAL MANAGEMENT 189 (Bhaskar Nath et al. eds., 2002).

99. Environmental Assessment Act, R.S.O. 1990, c. E.18; see MACDONALD, *supra* note 83, at 71.

100. See *About CIELAP: History*, CANADIAN INST. FOR ENVTL. LAW AND POLICY, <http://www.cielap.org/history.php> (last visited Sept. 4, 2010).

101. Emond, *supra* note 74, at 222.

102. See THOMAS RIDEOUT, ENVIRONMENTAL LAW, REGULATORY REGIMES AND ECOSYSTEM MANAGEMENT: A REALITY CHECK 12 (1997).

103. See Environmental Protection Act, R.S.O. 1990, c. E.19, pt. X.

104. See Glen Toner, *Contesting the Green: Canadian Environmental Policy at the Turn of the Century*, in ENVIRONMENTAL POLICY AND POLITICS IN INDUSTRIALIZED COUNTRIES 71, 76 (Uday Desai ed., 2002).

105. *Id.* at 76–77.

106. While Indigenous minorities in Australia, New Zealand, and the United States were also gaining better recognition of their rights during the 1970s, the trend was much more pronounced in Canadian law. Paul L.A.H. Chartrand, *The "Race" for Recognition: Toward a Policy of Recognition of Aboriginal Peoples in Canada*, in ABORIGINAL TITLE AND

landmark judgement in the *Calder* case of 1973, which recognized Aboriginal title to land.¹⁰⁷ To stem the resulting legal claims and the attendant disputes over hydropower, forestry, and other developments on Indigenous lands,¹⁰⁸ Canada drafted the Comprehensive Land Claims Policy,¹⁰⁹ which provided a much more sophisticated model than the flawed settlement negotiated by the U.S. government with Alaska Natives in the early 1970s. It not only gave a framework to negotiate Indigenous claims, but fashioned new regimes for regional environmental governance.¹¹⁰ Eventually covering vast tracts of northern Canada, the policy provided a world class model for participatory, bi-cultural environmental governance. The Policy was innovative in several respects; it led to negotiated agreements that established complex wildlife and natural resource management institutions which incorporated Aboriginal values and knowledge, involved local Aboriginal people in decision making, as well, allowed agreements to be later renegotiated if necessary to allow Aboriginal parties to secure additional benefits and rights as circumstances changed.¹¹¹

Another Canadian innovation also relating to Aboriginal peoples was the use of public inquiries as a means of community participation and dialogue. In 1974 the federal government established the Berger Inquiry to review plans to build an oil and gas pipeline through the Mackenzie Valley, in western Canada.¹¹² Headed by Justice Thomas Berger, whose commission gave him considerable flexibility, the inquiry pioneered innovative techniques to ensure that all stakeholders, especially indigenous communities, would have a say. For example, Berger established a fund to support any group that desired to participate in the inquiry but lacked the financial means to do so. Berger also held hearings in the affected communities, and improvised informal procedures to improve the inquiry's accessibility.¹¹³

The Berger report endorsed several themes that remain central to environmental law, including the idea of ecological limits to economic

INDIGENOUS PEOPLES: CANADA, AUSTRALIA, AND NEW ZEALAND 125 (Louis A. Knafla & Haijo Westra eds., 2010); Kent McNeil, *The Sources and Content of Indigenous Land Rights in Australia and Canada: A Critical Comparison*, in *ABORIGINAL TITLE AND INDIGENOUS PEOPLES: CANADA, AUSTRALIA, AND NEW ZEALAND*, *supra*, at 146.

107. *Calder v. British Columbia (Att'y Gen.)*, [1973] S.C.R. 313.

108. One prominent example was the James Bay Dam, in Quebec. See SEAN MCCUTCHEON, *ELECTRIC RIVERS: THE STORY OF THE JAMES BAY PROJECT* (1991).

109. See DEP'T OF INDIAN AFFAIRS AND N. DEV., *STATEMENT ON CLAIMS OF INDIAN AND INUIT PEOPLE* (1973).

110. See BENJAMIN J. RICHARDSON, DONNA CRAIG & BEN BOER, *REGIONAL AGREEMENTS FOR INDIGENOUS LANDS AND CULTURES IN CANADA* 3-4 (1995).

111. *Id.* at 56-58 (discussing the example of the Inuvialuit Agreement).

112. See THOMAS BERGER, *NORTHERN FRONTIER, NORTHERN HOMETOWN: THE REPORT OF THE MACKENZIE VALLEY PIPELINE INQUIRY* (1985).

113. *Id.*

growth, the realization that some places may need total protection against development, the need to consider cumulative impacts, the need for caution in the face of uncertainty, and the importance of informed consent of affected aboriginal peoples.¹¹⁴ The report's recommended moratorium on the pipeline stayed in place for two decades, until the proposal was resurrected with widespread support from affected First Nations. Berger's approach today remains a benchmark for the public inquiry model, setting a precedent that countries such as Australia and New Zealand have followed in areas of Indigenous affairs and environmental policy.

Aside from these developments related to Aboriginal rights and public inquiries, however, Canada did little to earn its reputation as an environmental law innovator during this early period. On the contrary, Canada was and still is much more of an importer than an exporter of environmental law reform. As in many other fields, American law and policy were the main influences on Canadian environmental law. From environmental impact assessment to endangered species protection, environmental rights, and environmental clean-up liability, Canadian law and policy emulated American precedents, often in watered-down forms and often after delays measured in decades.¹¹⁵

As Professor David Boyd points out, this pattern of policy emulation is a double-edged sword, benefiting environmental protection in areas where American standards are higher but holding back progress where the United States is a laggard.¹¹⁶ Ironically, Canada continues to emulate American environmental law even as evidence of its failure to solve environmental problems mounts. The fundamental problem with the American and Canadian approaches is that they address symptoms rather than root causes of environmental degradation.¹¹⁷ Thus, despite the development of numerous environmental laws in the halcyon days of Canadian environmental law, Canada's reputation as an early environmental law pioneer does not stand up to careful scrutiny.

B. *Second Generation Reforms*

Although the intensity of environmental law reform in Canada has never matched the first wave of activity in the 1970s, some spurts of reform continued to build upon earlier initiatives and to address new

114. *Id.*

115. See BOYD, *supra* note 3, at 225; see also *supra* Part I.B. Among these influential American statutes, see, e.g., National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370f (2006); Endangered Species Act, 1973, 16 U.S.C. §§ 1531–1544 (2006); Comprehensive Environmental Response, Compensation, and Liability Act, 1980, 42 U.S.C. §§ 9601–9675 (2006).

116. See BOYD, *supra* note 3, at 225.

117. *Id.* at 276.

challenges. Through the 1980s, the environmental movement in Canada, as elsewhere, became a significant political force.¹¹⁸ Its salience peaked in the late 1980s in the lead-up to the historic Earth Summit of 1992.¹¹⁹ But this period also displayed some emerging stresses in Canadian environmental law, including federal-provincial tensions and the economic cost of reforms, which eventually would result in major policy shifts and retreats.

Federal leadership was evident in some areas. Canada strengthened standards for environmental assessment of proposed developments. In 1984, the federal government promulgated a rule requiring environmental assessments of all projects involving federal lands, approvals, or funding.¹²⁰ Another significant federal milestone was the 1988 amendments of the Canada National Parks Act, mandating maintenance of “ecological integrity” in park management.¹²¹ These reforms spawned a massive expansion of Canada’s protected areas, in which some 38 million ha were added, raising the area under protection from 2.95 percent of Canada’s landmass in 1989 to 6.84 percent in 2000.¹²²

The 1980s also saw a new emphasis on robust and independent enforcement of environmental laws. Ontario led the way, establishing a separate inspections and enforcement branch within its environment ministry.¹²³ Inspections increased in frequency and significant fines and penalties began to be handed out to the worst polluters. A groundbreaking 1980 Yukon court decision recognized that “pollution offences must be approached as crimes, not as morally blameless technical

118. See Robert Paehlke, *The Environmental Movement in Canada*, in CANADIAN ENVIRONMENTAL POLICY AND POLITICS: PROSPECTS FOR LEADERSHIP AND INNOVATION, *supra* note 3, ch. 1.

119. Also known as the United Nations Conference on Environment and Development. According to national polls, the number of Canadians who perceived harm to the environment to be a “very serious” issue declined from an all-time high of 77 percent in 1990 to 63 percent by April 1992. See KATHRYN HARRISON, PASSING THE BUCK: FEDERALISM AND CANADIAN ENVIRONMENTAL POLICY 117 (1996).

120. Environmental Assessment and Review Process Guidelines Order, SOR/1984-467. Federal officials did not take the Order was not taken seriously, however, until the courts declared it legally binding in 1989. See *Canadian Wildlife Fed’n Inc. v. Canada (Minister of the Env’t)*, [1989] 3 F.C. 309 (Trial Div.), *aff’d*, (1989), 99 N.R. 72 (C.A.).

121. An Act to Amend the National Parks Act and to Amend An Act to Amend the National Parks Act, S.C. 1988, c. 48, s. 4 (adding s. 5(1.2) (“Maintenance of ecological integrity through the protection of natural resources shall be the first priority when considering park zoning and visitor use in a management plan.”)), *repealed by* Canada National Parks Act, S.C. 2000, c. 32 (enacting a broader ecological integrity clause, s. 8(2) (“Maintenance or restoration of ecological integrity, through the protection of natural resources and natural processes, shall be the first priority of the Minister when considering all aspects of the management of parks.”)).

122. See Philip Dearden & Jessica Dempsey, *Protected Areas in Canada: Decade of Change*, 48 CANADIAN GEOGRAPHER 225, 226 (2004).

123. See *Front-line Environmental Officers Protecting Our Environment*, ONT. MINISTRY OF THE ENV’T, <http://www.ene.gov.on.ca/en/enviroforce/protection/officers.php> (last visited Sept. 4, 2010).

breaches of a regulatory standard,”¹²⁴ reflecting a change in the way environmental violations were perceived in Canadian society.

Although environmental rights were not included in the new Charter of Rights and Freedoms in 1982,¹²⁵ the constitutional entrenchment of human rights intensified demands for increased public participation and access to information in environmental decision making. However, it was not until the early 1990s—some twenty years after similar laws were passed in the United States—that Canadian jurisdictions began to enact environmental bills of rights to create more systematic frameworks for public participation, access to information, and access to justice on environmental matters.¹²⁶ The Northwest Territories were the first to do so, in 1990,¹²⁷ followed by the Yukon¹²⁸ and Ontario.¹²⁹ The federal Canadian Environmental Protection Act of 1999 also introduced public notice, comment, and citizen suit provisions.¹³⁰ Public access to information was strengthened by a National Pollutant Release Inventory in 1992, modelled after the U.S. Toxics Release Inventory.¹³¹ The early 1990s also saw the enactment of federal limits on the release of dioxins from pulp and paper mills, one of the most successful environmental regulations in Canadian history.¹³²

Tempering these successes were several other prominent regulatory directions that emerged in Canadian environmental policy in the 1990s, as governmental agencies faced tightening budgets and pressure to streamline or downsize operations. Under the influence of the “New Public Management” philosophy, Canadian governments initiated public sector reforms that hit environmental departments particularly hard.¹³³

124. R. v. United Keno Hill Mines, [1980] 1 Y.R. 299, para.10 (Can. Yukon Terr. Ct.).

125. Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.).

126. See Elaine L. Hughes & David Iyalomhe, *Substantive Environmental Rights in Canada*, 30 OTTAWA L. REV. 229, 234 (1998–99).

127. See Environmental Rights Act, R.S.N.W.T. 1988, c.83 (supp.).

128. See Environment Act, S.Y. 1991, c. 5.

129. See Environmental Bill of Rights, S.O. 1993, c. 28.

130. S.C. 1999, c. 33, pt. 2.

131. See Canadian Environmental Protection Act of 1999, S.C. 1999, c. 33, s. 48 (establishing the inventory); *National Pollutant Release Inventory*, ENV'T CAN., <http://www.ec.gc.ca/inrp-npri/default.asp?lang=En&n=4A577BB9-1> (last visited Sept. 4, 2010).

132. See Pulp and Paper Mill Effluent Chlorinated Dioxins and Furans Regulations, SOR/1992-267; Jerry V. DeMarco & Toby Vigod, *Smarter Regulation: The Case for Enforcement and Transparency*, 17 J. ENVTL. L. & PRAC. 85, 95 (2007) (reporting on the regulations' effectiveness); *Implementing Sustainable Practices in the Pulp and Paper Industry: A 10-Year Path to Success*, ENV'T CAN. (June 6, 2003), http://www.ec.gc.ca/media_archive/press/2003/030606_b_e.htm; C.E. Luthe, *Progress in Reducing Dioxins and AOX: A Canadian Perspective*, 36 CHEMOSPHERE 225 (1998) (reporting 99 percent reduction in discharges of dioxins from Canadian pulp mills).

133. See PETER AUCOIN, *THE NEW PUBLIC MANAGEMENT: CANADA IN COMPARATIVE PERSPECTIVE* 8–16, 198–202 (1996).

“New Public Management” was a label used to describe a program for public sector reform based on the application of private sector management philosophies and techniques to the public sector.¹³⁴ Key features of these reforms included massive budget and program cuts, use of private sector management techniques, a “client-service” orientation to regulated industries, cost-benefit analysis of proposed regulations, and increased reliance on non-legislative tools and private-sector standards.¹³⁵ These changes were accompanied by a reduced federal role in environmental regulation, harmonization of allegedly duplicative provincial and federal regulation, and an increased role for the provinces in the negotiation and implementation of international agreements and the setting of Canadian international environmental priorities.¹³⁶

Alongside these cutbacks, the same period saw efforts to improve integration of environmental and economic policy making, particularly in the upper echelons of government. Measures to facilitate such integration included environmental analysis of policy proposals and legislation across different government portfolios, establishment of national and provincial “round tables” on environment and economy, preparation of sustainable development plans for natural resource sectors, creation of a federal Commissioner of the Environment and Sustainable Development, and concomitant requirements of federal departments to prepare sustainable development strategies.¹³⁷ These reforms were paralleled in provincial governments, such as the establishment in 1993 of an Environmental Commissioner of Ontario.¹³⁸ While seemingly impressive, these efforts towards a “whole-of-government” approach to furthering sustainability tended to be much less effective in practice.

Most notable among the disappointing results was the Progressive Conservative federal government’s much vaunted 1990 *Green Plan*—one of the earliest national sustainable development plans.¹³⁹ The *Green Plan* promised C\$3 billion of federal spending on environmental protection over five years, but with a decline in public attention to environmental issues after the Earth Summit and the election of a deficit-slaying Liberal government in 1993, the *Green Plan* lost political support and 70 percent

134. See JAN-ERIK LANE, *NEW PUBLIC MANAGEMENT* (2000); KATE McLAUGHLIN, *NEW PUBLIC MANAGEMENT: CURRENT TRENDS AND FUTURE PROSPECTS* (2002).

135. *Id.*

136. On these themes, see generally Howlett, *supra* note 39; Kathryn Harrison, *Federal-Provincial Relations and the Environment: Unilateralism, Collaboration, and Rationalization*, in *CANADIAN ENVIRONMENTAL POLICY: CONTEXT AND CASES*, *supra* note 39, at 123.

137. See BOYD, *supra* note 3, at 214, 297.

138. Environmental Bill of Rights, S.O. 1993, c. 28, s. 49; see generally ENVTL. COMM’R OF ONT. (Oct. 14, 2010), <http://www.eco.on.ca>.

139. See ENV’T CAN., *CANADA’S GREEN PLAN FOR A HEALTHY ENVIRONMENT* (1990).

of this money was never allocated.¹⁴⁰ Notwithstanding this lack of funding, the *Green Plan* itself was a disappointment, having more to do with spending than with creating lasting institutional change.¹⁴¹

More successful were the institutional mechanisms established to foster federal-provincial cooperation, research, and dialogue on national environmental challenges. The Canadian Council of Resource and Environment Ministers, comprised of federal and provincial cabinet ministers, established the National Task Force on Environment and Economy in 1986 “to initiate dialogue on environment-economy integration among” Canadian governmental, business, and community stakeholders and to help reconcile conflicts concerning natural resource industries.¹⁴² Illustrative of Canada’s lingering capacity to inspire environmental law reform, the example set by the task force influenced other countries, such as Australia, which in 1989 established the Resource Assessment Commission with a similar mandate.¹⁴³

International law provided another impetus for domestic action during this period, and was arguably a seminal factor in postponing Canada’s policy stagnation. While a distinct corpus of international law relating to the environment emerged in the early 1970s, it was not until the late 1980s that a more comprehensive global framework for cooperation on environmental matters emerged. Initiatives such as the World Commission on Environment and Development, established in 1983, and the 1992 United Nations Conference on Environment and Development (UNCED) were instrumental to this shift. Many international environmental conventions ratified by Canada would ultimately lead to changes in domestic legislation, but the process was painfully slow: it was, for example, thirty years after the signing of the CITES convention¹⁴⁴ and more than ten years after the Convention on Biological Diversity¹⁴⁵ before Canada enacted comprehensive federal

140. See BOYD, *supra* note 3, at 104 (noting, however, that this failure was due to recession, not decline in public attention); see also Robert Gale, *Canada’s Green Plan*, in NATIONALE UMWELTPLÄNE IN AUSGEWÄHLTEN INDUSTRIELÄNDERN 97 (1997) (criticizing Canada’s *Green Plan*, *supra* note 139).

141. RICHARD TARASOFSKY, CANADA’S PROGRESS IN ADDRESSING THE STRATEGIC IMPERITIVE SET OUT IN “OUR COMMON FUTURE” 4–5 (2007), available at http://www.iisd.org/pdf/2007/facing_canada_progress.pdf.

142. See NAT’L TASK FORCE ON ENV’T AND ECON., PROGRESS REPORT OF THE NATIONAL TASK FORCE ON ENVIRONMENT AND ECONOMY 1 (1988).

143. *Resource Assessment Commission Act*, 1989 (Cth), No. 94, s 5. However, the Commission was dissolved in 1992 as a cost-cutting measure. See Benjamin J. Richardson & Ben Boer, *Contribution of Public Inquiries to Environmental Assessment*, 2 AUSTRALASIAN J. ENVTL. MGMT. 90, 92 (1995).

144. Convention on International Trade in Endangered Species of Wild Flora and Fauna, March 3, 1973, 27.2 U.S.T. 1087, 1976 U.N.T.S. 244.

145. Convention on Biological Diversity, June 5, 1992, S. EXEC. DOC. 103-30, 31 I.L.M. 818.

endangered species legislation.¹⁴⁶ Parallel to such legislative steps, principles of international environmental law also began to inform Canadian court decisions.¹⁴⁷

Canada owes its international reputation for leadership in environmental policy in large part to its role in global environmental negotiations, rather than to its actual accomplishments in domestic environmental regulation.¹⁴⁸ Canadian diplomat Maurice Strong chaired both the 1972 Stockholm and 1992 UNCED conferences, receiving praise for his diplomatic skills.¹⁴⁹ Canada played an important role in numerous international environmental negotiations, including the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer¹⁵⁰ and the 2001 Stockholm Convention on Persistent Organic Pollutants.¹⁵¹ In 1993, former federal Assistant Deputy Minister of the Environment Elizabeth Dowdeswell was appointed the Executive Director of United Nations Environment Programme.¹⁵² Another prominent Canadian on the world stage was Jim MacNeill, a former environmental advisor to Prime Minister Trudeau. MacNeill was General Secretary of World Commission on Environment and Development and coauthored its famous final report.¹⁵³ In the non-governmental sector, Canadian Paul Watson co-founded Greenpeace in Vancouver in 1971 and later established the Sea Shepherd Conservation Society.¹⁵⁴ Together, these and other Canadians have played a seminal role in representing Canada as a “green” nation on the world stage.¹⁵⁵

Parallel to these international dimensions has been another seminal movement, concerning private sector involvement in environmental governance.¹⁵⁶ This trend is a product of a constellation of pressures,

146. Species at Risk Act, S.C. 2002, c. 29.

147. See Elizabeth Brandon, *Does International Law Mean Anything in Canadian Courts?*, 11 J. ENVTL. L. & PRAC. 399 (2001).

148. See generally Robert Boardman, *Milk-and-Potatoes Environmentalism: Canada and the Turbulent World of International Law*, in CANADIAN ENVIRONMENTAL POLICY: CONTEXT AND CASES, *supra* note 39, at 190.

149. See Maurice Strong, *Beyond Rio: Prospects and Portents*, 4 COL. J. INT'L ENVTL. L. & POL'Y 21 (1993).

150. Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, S. TREATY DOC. NO. 100-10, 26 I.L.M. 1541.

151. Stockholm Convention on Persistent Organic Pollutants, May 22, 2001, 40 I.L.M. 532.

152. See *Who's Who of Women and the Environment: Elizabeth Dowdeswell*, UNITED NATIONS ENV'T PROGRAMME, http://www.unep.org/women_env/w_details.asp?w_id=223 (last visited Sept. 3, 2010).

153. See WORLD COMM'N ON ENV'T AND DEV., OUR COMMON FUTURE (1987).

154. See Julie Cohen, *Warrior of the Waves*, 74 GEOGRAPHICAL 54, 55-56 (2002).

155. Robert Paehlke, *Environmentalism in One Country: Canadian Environmental Policy in an Era of Globalization*, 28 POL'Y STUD. J. 160, 163 (2005).

156. See Leigh Hancher & Michael Moran, *Organizing Regulatory Space*, in CAPITALISM, CULTURE AND ECONOMIC REGULATION 271 (Leigh Hancher & Michael Moran eds., 1989);

including disillusionment with the effectiveness of environmental regulation, the influence of business over the regulatory process, and greater appreciation that improved corporate environmental performance can be financially beneficial to business. Private sector engagement in Canadian environmental governance has grown substantially since the 1970s.¹⁵⁷ Much of it has involved the propagation of voluntary codes of conduct.¹⁵⁸ Perhaps the best example of Canadian industry leadership is Responsible Care. Launched in 1985 by the Canadian Chemical Producer's Association, and now established as a best practice standard worldwide, Responsible Care aims to have participating firms "continuously improve their health, safety and environmental performance, and to communicate with stakeholders about their products and processes."¹⁵⁹ Although Responsible Care is among the best known corporate environmental codes, as with most examples of industry standards, it remains vulnerable to perfunctory compliance and perpetuating business-as-usual behaviour because of the lack of credible sanctions against laggards.¹⁶⁰ The Canadian mining industry, which has a huge environmental impact both within and beyond Canada, has also developed its own environmental standards.¹⁶¹ It has also pioneered the negotiation of "impact and benefit agreements" with Aboriginal communities particularly affected by mining developments.¹⁶² Notwithstanding these individual examples of leadership, Canadian businesses, like Canadian governments, are more importers than exporters of environmental governance innovations, pushed by foreign head offices, customers, and international trade associations to adopt global environmental standards such as the Global Reporting Initiative and ISO 14001.¹⁶³

P.N. Grabosky, *Green Markets: Environmental Regulation by the Private Sector*, 16 L. & POL'Y 419 (1994).

157. See Douglas MacDonald, *The Business Response to Environmentalism*, in CANADIAN ENVIRONMENTAL POLICY: CONTEXT AND CASES, *supra* note 39, at 66.

158. See Wood, *supra* note 51.

159. RESPONSIBLE CARE, <http://www.responsiblecare.org> (last visited Oct. 4, 2010).

160. See Andrew King & Michael Lenox, *Industry Self-regulation Without Sanctions: The Chemical Industry's Responsible Care Program*, 43 ACADEMY MGMT. J. 698 (2000).

161. See MINING ASS'N OF CAN., TOWARDS SUSTAINABLE MINING GUIDING PRINCIPLES (2004), available at http://www.mining.ca/www/Towards_Sustaining_Mining/Guiding_Principles/Guiding_Principles.php.

162. See STEVEN A. KENNETT, A GUIDE TO IMPACT AND BENEFITS AGREEMENTS (1999).

163. See STEPHEN CLARKSON & STEPAN WOOD, A PERILOUS IMBALANCE: THE GLOBALIZATION OF CANADIAN LAW AND GOVERNANCE 234 (2010). The Global Reporting Initiative is the world's leading voluntary framework for sustainability reporting. See GLOBAL REPORTING INITIATIVE, <http://www.globalreporting.org> (last visited Oct. 15, 2010). ISO 14001 is the world's leading voluntary standard for environmental management systems. See *ISO 14000 Essentials*, INT'L ORG. FOR STANDARDIZATION, http://www.iso.org/iso/iso_catalogue/management_and_leadership_standards/environmental_management/iso_14000_essentials.htm (last visited Oct. 15, 2010).

Despite these ongoing institutional reforms and realignments, it would be misleading to conclude that Canada was on the brink of achieving sustainability. Quite simply, the underlying ecological pressures have continued to intensify. Canada's population grew between 1 and 2 percent annually from 1970 to 1995, increasing from 21.3 million to 29.4 million.¹⁶⁴ Its gross domestic product more than doubled in the same period, from US\$276.9 billion to US\$592.1 billion in constant (2000) dollars.¹⁶⁵ Canadian environmental law had no demonstrable effect on either of these trends. Energy use, a key marker of a society's overall environmental burden, rose in Canada from approximately 6476 kilograms of oil equivalent per capita in 1970 to 7866 in 1995, a 21.5 percent increase.¹⁶⁶

Not only were the plethora of reforms unable to halt the incremental pressures on Canada's environment, they were vulnerable to revision if they were perceived as incongruous with the dominant economic interests.¹⁶⁷ Environmental law prospered in Canada largely to the extent it was perceived as compatible with a growing economy, such as being able to reduce "waste" and inefficiency or to create new markets for environmentally-conscious consumers and businesses. Only in relation to Indigenous peoples and their land claims did lawmakers truly encounter concerted pressure for an alternative and more ecologically sustainable model of development.¹⁶⁸

III. PARADISE DEFERRED

A. *An Unsustainable Environmental Record*

The combination of factors that enabled environmental awareness and institutional reforms to flourish in Canada during the 1970s and 1980s had collapsed by the early 1990s. While the trend was not unique to Canada,¹⁶⁹ the decline there was particularly steep.¹⁷⁰ According to a 1995

164. *World Bank Data by Country: Canada*, WORLD BANK, <http://data.worldbank.org/country/canada> (last visited Oct. 15, 2010); see also *Population and Growth Components (1851-2001 Censuses)*, STATISTICS CANADA, <http://www40.statcan.gc.ca/101/cst01/DEMO03-eng.htm> (last visited Oct. 15, 2010).

165. *World Bank Data by Country: Canada*, WORLD BANK, <http://data.worldbank.org/country/canada> (last visited Oct. 15, 2010); see also *World Economic Outlook Databases*, INT'L MONETARY FUND, <http://www.imf.org/external/ns/cs.aspx?id=28> (last visited Oct. 15, 2010).

166. *World Bank Data by Country: Canada*, WORLD BANK, <http://data.worldbank.org/country/canada> (last visited Oct. 15, 2010).

167. See *infra* Parts IV.B-C.

168. See Benjamin J. Richardson, *The Ties that Bind: Indigenous Peoples and Environmental Governance*, in *INDIGENOUS PEOPLES AND THE LAW: COMPARATIVE AND CRITICAL PERSPECTIVES* 337, 363-65 (Benjamin J. Richardson, Shin Imai & Kent McNeil eds., 2009).

169. See Stephen Crook & Jan Pakulski, *Shades of Green: Public Opinion on Environmental Issues in Australia*, 30 *AUSTL. J. POL. SCI.* 39 (1995); JANE KELSEY, *ECONOMIC*

review of Canada's environmental performance by the Organisation for Economic Co-operation and Development (OECD), the country faced three main challenges: "difficulties in translating the concept [of sustainable development] into practical changes in economic decisions and practices and in economic signals; consumption and production patterns, which are often intensive in their use of natural resources; and increased concerns regarding the economy, employment and public deficits, which tend to reduce the prominence of environmental matters."¹⁷¹ Because of these and other circumstances, Canada's record on many environmental indicators deteriorated both absolutely and relatively to its peers.

While some notorious examples point to failures in specific policy contexts, such as the spectacular collapse of the Atlantic cod fishery in 1993,¹⁷² other research documents a more systemic drift towards unsustainability in Canada. According to a 2001 report by the University of Victoria, Canada's environmental performance is among the worst of any industrialized country.¹⁷³ Canada ranked twenty-eighth out of twenty-nine countries on twenty-five environmental indicators, outdone only by the United States. In particular, Canada ranked among the bottom three nations on nine indicators, including per capita greenhouse gas (GHG) emissions, sulphur dioxide emissions, carbon monoxide pollution, water consumption, energy consumption, and generation of nuclear waste. Canada again fared badly in a 2005 survey, ranking 28th out of 30 OECD countries in terms of overall environmental performance.¹⁷⁴ Further, according to Professor Mark Winfield, "what improvements that have been seen, such as reductions in the levels of emissions that cause acid rain, can be almost entirely attributed to the residual effects of more ambitious initiatives undertaken during the last major wave of public concern for the environment, now nearly twenty years ago, rather than the impact of any recent initiatives."¹⁷⁵

FUNDAMENTALISM: THE NEW ZEALAND EXPERIMENT – A WORLD MODEL FOR STRUCTURAL ADJUSTMENT? (1996).

170. See BOYD, *supra* note 3, *passim*; THE INTEGRITY GAP: CANADA'S ENVIRONMENTAL POLICY AND INSTITUTIONS (Eugene Lee & Anthony Perl eds., 2004).

171. ORG. FOR ECON. COOPERATION & DEV., OECD ENVIRONMENTAL PERFORMANCE REVIEWS: CANADA 2 (1995).

172. See Ransom A. Myers, Jeffrey A. Hutchings & Nicholas J. Barrowman, *Why Do Fish Stocks Collapse? The Example of Cod in Atlantic Canada*, 7 *ECOLOGICAL APPLICATIONS* 91 (1997).

173. See DAVID BOYD, CANADA VS. THE OECD: AN ENVIRONMENTAL COMPARISON (2001), available at <http://www.environmentalindicators.com>.

174. See THOMAS I. GUNTON ET AL., THE MAPLE LEAF IN THE OECD: CANADA'S PROGRESS TOWARD SUSTAINABILITY 6 (2005), available at <http://www.davidsuzuki.org/publications/reports/2005/the-maple-leaf-in-the-oecd-comparing-progress-toward-sustainability>.

175. Mark S. Winfield, *An Unimaginative People: Instrumental Choice in Canadian Environmental Law and Policy*, 71 *SASK. L. REV.* 79, 80–81 (2008).

One environmental indicator on which Canada appears to perform comparatively well is biodiversity conservation. Its percentage of extinct or endangered species is small compared with other countries. Over approximately the past two-hundred years, Canada has experienced eleven vertebrate fauna extinctions, compared to forty-two in Australia and eighteen in New Zealand, and a far smaller proportion of its species are currently endangered.¹⁷⁶ However, this record owes largely to Canada's geography rather than better management of wildlife; Canada is part of a large continent accustomed to species movement and greater resilience, unlike island countries such as Australia and New Zealand where species isolated from other regions evolved highly specialized characteristics that made them more vulnerable to threats such as competition from alien species.¹⁷⁷

One aspect of Canada's environmental dossier where there can be no fudging the record is climate change. With about 0.5 percent of the global population, Canada belches out nearly 2 percent of the world's GHG emissions.¹⁷⁸ Canada's emissions leapt by 32 percent from 1990 to 2005; yet by ratifying the Kyoto Protocol, it had agreed to cut its emissions by 6 percent below 1990 levels by 2012.¹⁷⁹ On a per capita basis, Canadians emitted 22.6 tonnes of GHG emission (as carbon dioxide equivalent) in 2005, almost double the average of 12.4 tonnes per capita among its developed country peers, and second only to Australia.¹⁸⁰ A 2006 study ranked Canada second-to-last in a comparison of climate change policies in fifty-six industrialized and newly industrialized countries.¹⁸¹ Finally, a 2009 report issued by the World Wildlife Fund and

176. See COMM. ON THE STATUS OF ENDANGERED SPECIES IN CAN., SUMMARY OF COSEWIC ASSESSMENT RESULTS AS OF APRIL 2010 (2010), available at http://www.cosewic.gc.ca/rpts/Full_List_Species.htm; AUSTRALIAN GOV'T, ASSESSMENT OF AUSTRALIA'S TERRESTRIAL BIODIVERSITY 2008, at 80 (2009), available at <http://www.environment.gov.au/biodiversity/publications/terrestrial-assessment/index.html>; ROD HITCHMOUGH, LEIGH BULL & PAM CROMARTY, NEW ZEALAND THREAT CLASSIFICATION SYSTEM LISTS 2005, at 23 (2007).

177. See TIM FLANNERY, THE FUTURE EATERS: AN ECOLOGICAL HISTORY OF THE AUSTRALASIAN LANDS AND PEOPLE 61-62, 237-41, 353, 356, 382, 387 (1994).

178. See *Canada's Greenhouse-Gas Emissions Rose Sharply Between 1990 and 2005: Study*, CBC NEWS (Apr. 22, 2008), <http://www.cbc.ca/technology/story/2008/04/22/tech-canada-greenhouse.html>.

179. See *Environment: GHG Emissions Per Capita*, CONFERENCE BD. OF CANADA (Oct. 2008), <http://www.conferenceboard.ca/hcp/details/environment/greenhouse-gas-emissions.aspx> (last visited Sept. 4, 2010).

180. See *id.*

181. See Press Release, Climate Action Network Canada, Government of Canada Next to Bottom of the Class in Fighting Climate Change (Nov. 13, 2006), available at <http://www.climateactionnetwork.ca/e/news/2006/nairobi-2006-11-13.html>.

insurance giant Allianz placed Canada last among the G8 countries for performance in addressing climate change.¹⁸²

B. An Environmental Law Backwater

Few would have predicted twenty years ago that Canada would become such an environmental laggard. The 1990s began with great promise, with the unveiling of the *Green Plan*, Canada's active international involvement, and the high public support expressed for environmentally responsible policies. Before evaluating the causes of this decline in Canada's environmental record, it is useful to examine some of its regulatory and policy symptoms and compare the Canadian experience with the direction other countries took.

One of the most significant symptoms of decline is that Canadian environmental law has increasingly lacked the cornucopia of policy instruments found in comparable jurisdictions. Many Canadian regulators have remained hinged to a simplistic conceptualization of policy instrument choice as a binary choice between "command-and-control" regulation and voluntary action.¹⁸³ Other possibilities that have been adopted in many countries, such as ecological tax reform,¹⁸⁴ extended producer responsibility,¹⁸⁵ and tradable pollution allowances,¹⁸⁶ have lingered on the fringes of policy making in Canada. Although there have been some recent innovations at a provincial level, such as adoption of modest carbon taxes in Quebec and British Columbia in 2007 and 2008 respectively, these steps were inspired by foreign examples. Canada may be "innovating," but, to a greater extent than earlier periods, more of the inspiration comes from abroad.

The reticence of Canada's lawmakers to use economic instruments is one of the most notable lacunae in its environmental law. In many jurisdictions, especially in the European Union, such instruments have been deployed in diverse areas of environmental policy to create financial incentives for improved corporate behaviour.¹⁸⁷ The OECD advised

182. See Catherine Porter, *Canada Dead Last on Green List*, TORONTO STAR, July 1, 2009, <http://www.thestar.com/News/Canada/article/659218>.

183. See BOYD, *supra* note 3, at 248.

184. See, e.g., Stefan Speck, *The Design of Carbon and Broad-Based Energy Taxes in European Countries*, 10 VT. J. ENVTL. L. 31 (2008); Simon Dresner et al., *Social and Political Responses to Ecological Tax Reform in Europe: An Introduction to the Special Issue*, 34 ENERGY POL'Y 895 (2006).

185. See, e.g., Noah Sachs, *Planning the Funeral at the Birth: Extended Producer Responsibility in the European Union and the United States*, 30 HARV. ENVTL. L. REV. 51 (2006).

186. James Salzman & J.B. Ruhl, *Currencies and the Commodification of Environmental Law*, 53 STAN. L. REV. 607 (2000); Richard Schmalensee et al., *An Interim Evaluation of Sulfur Dioxide Emissions Trading*, 12 J. ECON. PERSP. 53 (1998).

187. On international practice, see ENVIRONMENTAL INSTRUMENTS AND INSTITUTIONS (Thomas H. Tietenberg, Kenneth Button & Peter Nijkamp eds., 1999); NICHOLAS A. ASHFORD

Canada as early as 1995 to be more ambitious with economic instruments.¹⁸⁸ Some ad hoc initiatives have since occurred, such as an amendment of the Income Tax Act in 1996 to encourage landowners to donate ecologically significant land for conservation.¹⁸⁹ Recent federal initiatives on climate change also dabble with economic incentives, but mainly in the form of subsidies for clean energy technology.¹⁹⁰ More radical alternatives, such as ecological tax reform, as proposed in the 2008 federal election by the Liberals and Greens,¹⁹¹ have been shunned by the current Conservative government and were abandoned by the Liberals after losing the election.¹⁹²

Both the Liberals and Conservatives—Canada's two major national political parties—share blame for Canada's intransigence on climate change policy. The former Liberal governments of Jean Chrétien and Paul Martin, while publicly keen on the Kyoto Protocol, were very slow to develop climate change policies and failed to implement any significant measures before they lost office in 2006.¹⁹³ The subsequent Conservative government of Stephen Harper has been overtly hostile to action on climate change. While it has introduced some soft measures, including the C\$1 billion Green Infrastructure Fund to support projects such as public transit, the government effectively disavowed Kyoto.¹⁹⁴ And, as explained later in this Article, it has sought to avoid meaningful compliance with

& CHARLES C. CALDART, ENVIRONMENTAL LAW, POLICY, AND ECONOMICS: RECLAIMING THE ENVIRONMENTAL AGENDA (2008); 5 CRITICAL ISSUES IN ENVIRONMENTAL TAXATION: INTERNATIONAL COMPARATIVE PERSPECTIVES (Nathalie Chalifour et al. eds., 2008). Regarding Canada's weak use of economic instruments, see Wiktor Adamowicz, *Reflections on Environmental Policy in Canada*, 55 CANADIAN J. AGRIC. ECON. 1, 1 (2007).

188. See ORG. FOR ECON. COOPERATION & DEV., *supra* note 171, at 7.

189. See An Act to Amend the Income Tax Act, the Excise Act, the Excise Tax Act, the Office of the Superintendent of Financial Institutions Act, the Old Age Security Act and the Canada Shipping Act, S.C. 1996, c. 21, s. 20; Stepan Wood, *Canada's "Forgotten Forests": Or, How Ottawa Is Failing Local Communities and the World in Peri-Urban Forest Protection*, 14 J. ENVTL. L. & PRAC. 217, 243 (2004); Toner, *supra* note 104, at 106.

190. See *Canada's Domestic Action*, GOV'T CANADA (Oct. 15, 2010), <http://www.climatechange.gc.ca/default.asp?lang=En&n=4FE85A4C-1>.

191. See LIBERAL PARTY OF CAN., *THE GREEN SHIFT: BUILDING A CANADIAN ECONOMY FOR THE 21ST CENTURY* (2008) (part of the party's 2008 federal election platform); GREEN PARTY OF CAN., *LOOKING FORWARD: A FRESH PERSPECTIVE ON CANADA'S FUTURE* (2008) (2008 federal election platform).

192. See *A Plan for the Economy vs. Proposals for Financial Disaster*, CONSERVATIVE PARTY OF CAN. (Oct. 7, 2008), <http://www.conservative.ca/policy/plan> (describing the party's 2008 federal election platform); Les Whittington, *Dion's Carbon Tax Plan Was a Vote Loser, Ignatieff Says*, TORONTO STAR, Feb. 28, 2009, at A8 (describing new federal Liberal leader's rejection of predecessor's proposed carbon tax).

193. See Cass, *supra* note 4, at 474–75.

194. See *Harper's Letter Dismisses Kyoto as 'Socialist Scheme'*, CBC NEWS (Jan. 30, 2007), <http://www.cbc.ca/canada/story/2007/01/30/harper-kyoto.html>; *Green Infrastructure Fund*, INFRASTRUCTURE CAN. (May 27, 2009), <http://www.buildingcanada-chantierscanada.gc.ca/media/news-nouvelles/2009/gif-fiv-eng.html>.

the Kyoto Protocol Implementation Act, 2007, sponsored by the Opposition Parties.¹⁹⁵

Although Canada has an international reputation for respecting human rights and promoting citizen participation in public affairs, even here some retreat is evident. One example is access to environmental information. The Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, drafted by the UN Economic Commission for Europe in 1998,¹⁹⁶ spawned the creation of pollutant emission inventory systems throughout much of Europe. Canada was once in the vanguard in this area, having established a National Pollutant Release Inventory in 1992, second only to the United States to do so.¹⁹⁷ Today, Canada has declined to ratify the Aarhus Convention and its supplementary 2003 protocol on pollutant release registers.¹⁹⁸

In addition to legislative inaction, Canada's poor record also owes to its failure to implement existing laws. One instance is a landmark provision in the amended Canada National Parks Act which made ecological integrity the "first priority" in all decisions affecting park management.¹⁹⁹ Despite this statutory mandate, subsequent parks management, dominated by the traditional "parks for people" ethos, has struggled to fulfill this goal.²⁰⁰ Parks Canada's practices have been challenged, but in virtually all cases the courts have deferred to its judgment. For example, in May 2001 the Minister of Canadian Heritage, on behalf of Parks Canada, authorized construction of a winter road through Wood Buffalo National Park.²⁰¹ The Federal Court rejected the arguments of the Canadian Parks and Wilderness Society that the Minister had failed to comply with the Canada National Parks Act's ecological integrity requirement. Judge Gibson reasoned that the Act "requires a delicate balancing of conflicting interests which include the

195. S.C. 2007, c. 30.

196. See Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, June 25, 1998, 2161 U.N.T.S. 447.

197. The United States established a Toxics Release Inventory in 1988. See Emergency Planning & Community Right-to-Know Act of 1986, 42 U.S.C. § 11001-11050; *Toxics Release Inventory Program*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/tri> (last visited Oct. 15, 2010).

198. See Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, June 25, 1998, 2161 U.N.T.S. 447; Draft Protocol on Pollutant Release and Transfer Registers to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, *opened for signature* May 21, 2003, available at <http://www.unece.org/env/pp/e-mop.htm>.

199. See S.C. 2000, c. 32, s. 8(2).

200. See Shaun Fluker, *Ecological Integrity in Canada's National Parks: The False Promise of Law*, 29 WINDSOR REV. LEGAL & SOC. ISSUES 89 (2010).

201. See Canadian Parks and Wilderness Soc'y v. Canada (Minister of Canadian Heritage), [2002] 2 F.C. D-8 (Trial Div.), *aff'd*, [2003] 4 F.C. 672.

benefit and enjoyment of those living in, and in close proximity to, Wood Buffalo National Park . . . [and] does not require that ecological integrity be the ‘determinative factor.’”²⁰²

Meanwhile, other countries have embraced reform, in turn setting precedents to guide Canada—in contrast to earlier times when Canada pioneered some best practices. Over the past decade, California and Germany, for instance, have adopted various incentive measures and regulatory standards to promote energy efficiency and uptake of renewable energies.²⁰³ Ontario’s recent “green energy” statutory reforms, including a feed-in tariff system to support renewable energy production, were inspired by these examples.²⁰⁴ Not all precedents have been positive, however. The United States, nearly always a significant influence on Canadian environmental regulation,²⁰⁵ is also setting the bar low on climate change policy: the Harper government insists that it will deal with climate change only in a manner consistent with American efforts.²⁰⁶

Further evidence of Canada’s trailing performance is in the area of pollution regulation.²⁰⁷ The U.S. Environmental Protection Agency’s Project XL substituted traditional emission controls designed and mandated by government with a pollution control regime determined between government, the regulated entity, and other stakeholders.²⁰⁸ Its Performance Track program offered regulatory and other benefits to hundreds of companies and public sector facilities that had environmental management systems in place and adopted ambitious beyond-compliance environmental performance targets.²⁰⁹ Meanwhile, the Australian state of Victoria pioneered another approach to regulatory flexibility, allowing companies to prepare an “environmental improvement” plan as a partial alternative to environmental licensing systems.²¹⁰

Some Canadian governments have begun to adopt their own schemes for regulatory flexibility, such as Ontario’s Environmental

202. *Id.* paras. 52–53.

203. See Kevin S. Golden, *Senate Bill 1078: The Renewable Portfolio Standard – California Asserts Its Renewable Energy Leadership*, 30 *ECOLOGY L.Q.* 693 (2003); Rolf Wüstenhagen & Michael Bilharz, *Green Energy Market Development in Germany: Effective Public Policy and Emerging Customer Demand*, 34 *ENERGY POL’Y* 1681 (2006).

204. See Green Energy Act, S.O. 2009, c. 12.

205. See George Hoberg, *Sleeping with an Elephant: The American Influence on Canadian Environmental Regulation*, 11 *J. PUB. POL’Y* 107 (1991). One earlier example of such influence was environmental impact assessment law. See Toner, *supra* note 104, at 93.

206. Gloria Galloway & Nathan Vanderklippe, *Canada Ties New Emissions-Cuts Targets to U.S. Goals*, *GLOBE & MAIL*, Feb. 1, 2010, at A6.

207. See Abbott, *supra* note 36, at 89–90.

208. See Regulatory Reinvention (XL) Pilot Projects, 60 *Fed. Reg.* 27,282, 27,287 (May 23, 1995).

209. See U.S. ENVTL. PROT. AGENCY, OFFICE OF POLICY, ECON. & INNOVATION, *PERFORMANCE TRACK FINAL PROGRESS REPORT* (2009).

210. See ENV’T PROT. AUTH. VICT., *GUIDELINES FOR THE PREPARATION OF ENVIRONMENT IMPROVEMENT PLANS 1* (2002).

Leaders Program, introduced in 2002.²¹¹ Some of these initiatives reflect the New Public Management model of administration.²¹² One example, cited by Professor Winfield, is the Ontario Ministry of Natural Resources' restructuring in the late 1990s of its compliance inspection system for forestry operations into a "partnership" with the logging industry.²¹³ The majority of the Ministry's inspectors were retrenched, and replaced by a model of self-inspection by the logging companies. Similar arrangements were established in other natural resource sectors in the province, including for mining and fisheries management.²¹⁴ Their effectiveness in identifying and reporting non-compliance has been questioned.²¹⁵ The very notion of "regulatory flexibility" has attracted criticism as a return to a "bipartite bargaining" model of policy making, privileging the state and industry while marginalizing community involvement and public accountability.²¹⁶

Another example of the New Public Management model is the delegation of public service delivery to arms-length agencies. This trend, pioneered in the United Kingdom and New Zealand, was inspired by the idea that government should "steer," not "row."²¹⁷ In practice, however, these agencies have limited accountability and are often run by the regulated industries themselves. "Rather than 'steering,'" wrote Professor Winfield and others of an Ontario example, "the government provided the boat, but largely left the authority to define its own course and speed."²¹⁸ These concerns were borne out in many people's minds in 2008 when a massive explosion destroyed a propane storage facility regulated by the Technical Standards and Safety Authority, resulting in two deaths.²¹⁹ According to Professor Winfield, this tragedy highlighted several shortcomings of such arms-length regulatory agencies, including a lack of transparency, limited public accountability, and risk of capture by

211. See *Ontario's Environmental Leaders: Benefits of the Program*, ONT.: MINISTRY OF THE ENV'T, <http://www.ene.gov.on.ca/en/general/oel/benefits.php> (last modified June 23, 2009).

212. See Winfield, *supra* note 175, at 85; see also *NEW PUBLIC MANAGEMENT AND PUBLIC ADMINISTRATION IN CANADA* (Mohamed Charih & Arthur Daniels eds., 1997).

213. See Mark Winfield, *Alternative Service Delivery in the Natural Resources Sector: An Examination of Ontario's Forestry Compliance Self-inspection System*, 48 CAN. PUB. ADMIN. 552, 552 (2005).

214. *Id.* at 554.

215. *Id.*

216. George Hoberg, *Environmental Policy: Alternative Styles*, in *GOVERNING CANADA: INSTITUTIONS AND PUBLIC POLICY* 307, 314 (Michael Atkinson ed., 1993).

217. DAVID OSBORNE & TED GAEBLER, *REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR* 25 (1993).

218. Mark S. Winfield, David Whorley & Shelley Beth Kaufman, *Public Safety in Private Hands: A Study of Ontario's Technical Standards and Safety Authority*, 45 CAN. PUB. ADMIN. 24, 34 (2002).

219. See Mark Winfield, *Public Safety in Private Hands: Rethinking the TSSA Model*, TORONTO STAR, Aug. 29, 2008, available at <http://www.thestar.com/comment/article/487433>.

regulated industries.²²⁰ More fundamentally, this case exposed the falsity of the claim that governments can simply “steer” while allowing regulated industries to “row,” because the supposedly “operational” functions of approvals and inspections are in practice “crucial sources of information about what is happening in the real world that influence the formulation of policy.”²²¹ Despite these problems, some Canadian governments continue to float the idea of adopting a similar model for environmental regulation.²²²

The financial economy is another domain where Canada is a legal backwater. A new international frontier of environmental law reform is socially responsible investment, which can provide a means of encouraging lenders and investors to discriminate among companies based on their sustainability performance.²²³ Since the early 2000s, several European countries and Australia have introduced regulations requiring pension funds and other types of financial institutions to disclose their policies for taking into account social, environmental, and ethical matters in investment decisions.²²⁴ Public sector pension funds in Norway, Sweden, and New Zealand have even been mandated by legislation to invest ethically and responsibly.²²⁵ Economic incentives to stimulate socially responsible investment (SRI) have also been adopted in some jurisdictions; the leading example, the Netherlands’ Green Project Directive of 1995,²²⁶ has greatly spurred the Dutch SRI market.²²⁷

Canada has largely shunned such ideas. Calls to reform the statutory mandate of the Canada Pension Plan have been rejected, and an opposition private member’s bill in 2001, modeled on Britain’s law

220. *See id.*

221. *See id.*

222. *See* Bill 68, Open for Business Act of 2010 (2d Sess., 39th Leg., Ontario, 59 Eliz. II), sched. 7; Modernizing Environmental Approvals, ONT. MINISTRY OF THE ENV’T, <http://www.ene.gov.on.ca/en/business/mofa/index.php> (last visited Oct. 6, 2010).

223. *See* BENJAMIN J. RICHARDSON, SOCIALLY RESPONSIBLE INVESTMENT LAW: REGULATING THE UNSEEN POLLUTERS (2008).

224. *See* Benjamin J. Richardson, *Pensions Law Reform and Environmental Policy: A New Role for Institutional Investors?*, 3 J. INT’L FIN. MARKETS: L. & REG. 159, 162–66 (2002).

225. *See* U.N. ENV’T PROGRAMME FINANCE INITIATIVE (UNEPFI) & UK SOCIAL INVESTMENT FORUM, RESPONSIBLE INVESTMENT IN FOCUS: HOW LEADING PUBLIC PENSION FUNDS ARE MEETING THE CHALLENGE 14–16, 46–48 (2007); New Zealand Superannuation and Retirement Income Act 2001, No. 84, s. 58.

226. The scheme was revamped and extended in 2002 and 2005. *See Regeling groenprojecten buitenland* [Regulation on Green Projects Abroad], STAATSCOURANT (Neth.), Jan. 2, 2002, at 31; *Regeling groenprojecten* [Regulation on Green Projects], STAATSCOURANT (Neth.), July 11, 2005, at 131.

227. *See* SUSTAINABLE PROFIT: AN OVERVIEW OF THE ENVIRONMENTAL BENEFITS GENERATED BY THE GREEN FUNDS SCHEME 6–7 (2002), available at http://www.senternovem.nl/mmfiles/sustainable_profit_tcm24-196677.pdf.

providing for disclosure of SRI policies, failed to pass.²²⁸ Another example is the Ontario Securities Commission's rejection in January 2010 of proposed new regulations to enhance corporate environmental reporting.²²⁹ Even Canada's National Round Table on the Environment and Economy, often an advocate for innovation, recommended in its 2007 report on this subject that "we do not see the need for increased regulation, increased taxation, or increased interference in the normal value-creating activities of Canadian businesses."²³⁰ Instead, just a few modest steps have been taken. An archaic rule prohibiting shareholders from filing resolutions directed towards "promoting general economic, political, racial, religious, social or similar causes" was finally removed from the federal corporations law in 2001.²³¹ And in 2002, the federal government passed a public disclosure regulation, against the wishes of banks, requiring them to publish an annual "public accountability statement" describing their contribution to the Canadian economy and society.²³² These changes are relatively insignificant compared to moves by other countries,²³³ and reflect the limits of Canada's once-lauded innovation.

The foregoing is not a comprehensive account of Canada's slide into an environmental law backwater, but indicates a general trend. Although it has been shown that some comparable jurisdictions continue to pioneer environmental law reform, this should not imply that they have put their economies on a sustainable footing. Far from it; all countries are struggling to achieve effective legal and policy responses to worsening environmental conditions. However, even with that caveat, Canada has tended to perform worse.

228. See Bill C-394, An Act to Amend the Pension Benefits Standards Act of 1985 (Sept. 20, 2001). The bill was modeled on the UK precedent by its requirement that pension funds disclose whether or not they have an investment policy for addressing social and ethical issues, but (also as in the UK) the pension funds were not required to adopt a policy for SRI.

229. See Doug Watt, *Ontario Regulator Backs Off on ESG Rules*, SRI MONITOR (Jan. 14, 2010, 11:16 AM), <http://srimonitor.blogspot.com/2010/01/ontario-regulator-backs-off-on-esg.html>.

230. NAT'L ROUND TABLE ON THE ENV'T & ECON., CAPITAL MARKETS AND SUSTAINABILITY: INVESTING IN A SUSTAINABLE FUTURE: STATE OF THE DEBATE REPORT 3 (2007).

231. Canada Business Corporations Act, R.S.C. 1985, s. 137(5), amended by S.C. 2001, c. 14, s. 59.

232. Public Accountability Statements (Banks, Insurance Companies, Trust and Loan Companies) Regulations, SOR/2002-133. The regulations were imposed in the context of a wave of mergers in the banking industry that raised concerns about an unhealthy concentration of power among a few large lenders. See MURRAY COOKE, BANKING ON MERGERS: FINANCIAL POWER VERSUS THE PUBLIC INTEREST 36-37 (2005).

233. For comparison of SRI-related legal reforms in other jurisdictions, see RICHARDSON, *supra* note 223, at 303-75.

IV. REASONS FOR CANADA'S ENVIRONMENTAL LAW DECLINE

Canada's apparent decline as an environmental law leader can be explained partly by acknowledging that Canada was never quite the innovator it was reputed to be. Yet even accepting this deflated reputation, it experienced a genuine stagnation of environmental law reform in the 1990s. Several factors contributed to this situation.²³⁴ The effects of globalization on Canada, as a trade-oriented commodity exporter, were increasingly significant, limiting the scope for environmental policies that would hinder extractive industries and other economic sectors that Canadian policy makers wished to be internationally competitive.²³⁵ While the domestic mining and forestry sector have staggered under the effects of globalization, its obstructive influence on environmental policy persisted as governments continued to tie their fortunes to those of the industries on which Canada's economy had long depended.

The cyclical nature of public concern for the environment was another salient factor, having emerged strongly in the 1970s and peaking in the late 1980s, after which it declined sharply. The tensions in Canada's federal system, epitomized by the narrowly defeated Quebec sovereignty referendum in 1995, led federal authorities to be less assertive in environmental affairs.²³⁶ Concurrently, the growing influence of neo-liberal philosophy in Canadian public policy curbed state activism except to reinforce market forces.²³⁷ Neo-liberalism was embraced to varying degrees by federal and provincial governments of all political stripes. Budgets of environment and natural resources departments were cut by some 30 to 60 percent as governments slashed deficits.²³⁸ Another obstacle to government action during this period was the "first past the post" (FPTP) electoral system, in which the candidate with the most votes wins each riding, while the other candidates' votes count for nothing electorally. This system limits representation of smaller, environmental and social justice-oriented parties in provincial and federal legislatures even when they capture a substantial share of the popular vote.

234. See Paehlke, *supra* note 155 (discussing reasons for decline of Canadian environmental law and policy); Winfield, *supra* note 175, at 79–80 (ditto).

235. See *infra* Part IV.C.

236. See Mark Winfield, *Policy Instruments in Canadian Environmental Policy*, in CANADIAN ENVIRONMENTAL POLICY AND POLITICS 46, 56 (Deborah L. VanNijnatten and Robert Boardman eds., 2009).

237. See David Clark, *Neoliberalism and Public Service Reform: Canada in Comparative Perspective*, 35 CAN. J. POL. SCI. 771 (2002); Anita Kranjc, *Whither Ontario's Environment: Neo-Conservatism and the Decline of the Ministry of the Environment*, 26 CAN PUB. POL. 111 (2000).

238. See BOYD, *supra* note 3, at 239–40.

In this section we canvas four of these influences on contemporary Canadian environmental law: federal-provincial relations, neo-liberal ideology, Canada's resource-based economy, and electoral politics.

A. *Federalism and Environmental Policy*

Environmental regulation faces hurdles in federal systems that are largely absent in unitary states. One order of government must often overcome resistance at the other level to achieve environmental protection goals.²³⁹ In the Canadian case, the primary obstacle to national leadership on the environment is a lack of political will on the part of successive federal governments rather than constitutionally imposed jurisdictional constraints.²⁴⁰ The provinces' power to legislate in relation to the environment is admittedly broad, given their constitutional jurisdiction over mines, minerals, forestry, electricity, non-federal public lands, municipal institutions, property, civil rights, and matters of a local or private nature.²⁴¹ The federal government nonetheless enjoys substantial environmental regulatory competence due to its constitutional powers over fisheries, shipping, navigation, criminal law, federal lands and "undertakings," Aboriginal lands and peoples, trade and commerce, taxing and spending, and matters of demonstrated national concern or emergency.²⁴²

The Supreme Court of Canada has repeatedly affirmed a substantial role for the federal government in environmental regulation, calling environmental protection a fundamental value of Canadian society and a major challenge requiring action by all levels of government.²⁴³ It has confirmed that environmental protection cuts across many areas of federal and provincial jurisdiction²⁴⁴ and that governments at all levels—

239. Taking action to cut GHG emissions is one prominent example. See Gordon Smith & David Victor, *Beyond Kyoto*, in *HARD CHOICES: CLIMATE CHANGE IN CANADA* 215, 221 (Harold Coward & Andrew J. Weaver eds., 2004); DAVID SUZUKI FOUNDATION, *PROVINCIAL POWER PLAY: BREAKING AWAY FROM FEDERAL INACTION ON CLIMATE CHANGE* (2008).

240. See BOYD, *supra* note 3, at 92–93; Shi-Ling Hsu & Robin Elliot, *Regulating Greenhouse Gases in Canada: Constitutional and Policy Dimensions*, 54 MCGILL L.J. 463, 472–74 (2009).

241. See Constitution Act, 1867, 30 & 31 Vict., c. 3, §§ 92, 92A, 109 (U.K.), reprinted in R.S.C. 1985, app. II, no. 5 (Can.).

242. See *id.* § 91; Steven Kennett, *Federal Environmental Jurisdiction after Oldman*, 31 MCGILL L.J. 180, 197 (1992). "Federal undertakings" include enterprises, organizations, projects, and activities of the federal government itself or under federal jurisdiction. PATRICK MONAHAN, *CONSTITUTIONAL LAW* 359 (3d ed. 2006).

243. See, e.g., *British Columbia v. Canadian Forest Prods. Ltd.*, [2004] 2 S.C.R. 74, para. 7; *114957 Canada Ltée (Spraytech, Société d'Arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241, para. 1; *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213, para. 85; *Ontario v. Canadian Pac. Ltd.*, [1995] 2 S.C.R. 1031, para. 55.

244. See, e.g., *Friends of the Oldman River Soc'y v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3; *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213; *Imperial Oil Ltd. v. Quebec (Minister of the Environment)*, [2003] S.C.R. 624; *British Columbia v. Canadian Forest Prods. Ltd.*, [2004] 2 S.C.R. 74.

including municipalities—may exercise leadership so long as they respect constitutional constraints.²⁴⁵ Thus, in the 1980s, the Court upheld a federal law prohibiting the deposit of polluting substances into water frequented by fish as a valid exercise of the fisheries power,²⁴⁶ and a federal marine pollution statute as a matter of “national concern.”²⁴⁷ In both cases the result was to give the federal government substantial power to regulate not just marine but land-based activities taking place entirely within provincial territory and involving otherwise provincially regulated industries. In the 1990s the Court confirmed the applicability of federal environmental assessment law to a hydroelectric dam built in Alberta as a valid exercise of the federal power over navigation,²⁴⁸ and upheld Ottawa’s landmark toxic substances legislation under the federal criminal law power.²⁴⁹ The effect of the latter case was to confirm that the federal government may use its criminal law power to create complicated environmental regulatory schemes, so long as they exhibit the “prohibition-coupled-with-penalty” character of criminal law.²⁵⁰

The federal government also derives some environmental regulatory power from its exclusive jurisdiction over “Indians, and Lands reserved for Indians.”²⁵¹ While Aboriginal rights are constitutionally protected under section 35(1) of the Constitution Act of 1982,²⁵² the Supreme Court has affirmed that Ottawa may regulate and infringe those rights subject to certain requirements of consultation and justification.²⁵³ Canada has enacted a variety of measures governing land use and environmental protection on Aboriginal territory, such as the First Nations Land Management Act of 1999²⁵⁴ and the comprehensive land claims agreements.²⁵⁵ Conversely, the provinces’ authority to enact environmental laws over lands subject to Aboriginal legal interests is severely limited.²⁵⁶ Therefore, although it would appear at first glance that the provinces take precedence over Ottawa in many environmental

245. See 114957 *Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 40.

246. See *R. v. Nw. Falling Contractors Ltd.*, [1980] 2 S.C.R. 292.

247. *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401.

248. See *Friends of the Oldman River Soc’y*, [1992] 1 S.C.R. 3.

249. See *Hydro-Québec*, [1997] 3 S.C.R. 213.

250. Hsu & Elliot, *supra* note 240, at 491–93.

251. Constitution Act, 1867, 30 & 31 Vict. c. 3, § 91(24) (U.K.).

252. Constitution Act, 1982, s. 35(1), *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.).

253. See *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.

254. S.C. 1999, c. 24.

255. See John Merritt & Terry Fenge, *Nunavut Land Claims Settlement: Emerging Issues in Law and Public Administration*, 15 *QUEEN'S L.J.* 255 (1990).

256. See *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511; *Tsilhqot'in Nation v. British Columbia*, [2007] B.C.S.C. 1700 (Can. B.C.).

issues, the powers left to the national government in the federal structure give it significant leeway to pass environmental laws.

The constitutional division of powers is also relevant to the implementation of international environmental treaties. Whereas the federal government has exclusive jurisdiction to make treaties, it does not have exclusive power to implement them, unlike the Australian federal government which can give effect domestically to most international treaties it ratifies by virtue of its “external affairs” constitutional power.²⁵⁷ In Canada, treaties must be implemented by the level of government having jurisdiction over their subject-matter, often requiring legislation by all ten provinces.²⁵⁸ Ottawa sometimes works around this constraint by making “federal state” reservations to treaties, or claiming that existing legislation is sufficient to implement new treaties.²⁵⁹ But ultimately, within their jurisdictional spheres the provincial governments have control over how effectively Canada’s international treaty obligations are fulfilled.

In sum, while jurisdictional constraints are real, the Constitution provides room for both federal and provincial leadership in environmental policy. The pattern has however been one of federal deference, with an emphasis on cooperation and harmonization. The Canada-Wide Accord on Environmental Harmonization,²⁶⁰ concluded in 1998 amidst widespread yet dubious complaints of unnecessary duplication of federal and provincial legislation, put the provinces firmly in the driver’s seat and barred the federal government from acting whenever a province is designated the “lead” authority.²⁶¹ The Canadian Environmental Protection Act of 1999 and the Canadian Environmental Assessment Act also contemplate a role for the provinces if they have equivalent standards.²⁶² Such concessions can give provincial governments the final say on how strict environmental assessments will be,²⁶³ allowing the federal government to delegate environmental responsibilities to the provinces.

257. AUSTRALIAN CONSTITUTION s 51.

258. See PAUL MULDOON, AN INTRODUCTION TO ENVIRONMENTAL LAW AND POLICY IN CANADA 21 (2009).

259. See Joanna Harrington, *Redressing the Democratic Deficit in Treaty-Making: (Re-) Establishing a Role for Parliament*, 50 MCGILL L.J. 465, 483 (2005); Brandon, *supra* note 147, at 405.

260. CANADIAN COUNCIL OF MINISTERS OF THE ENV’T, A CANADA-WIDE ACCORD ON ENVIRONMENTAL HARMONIZATION (1998), available at http://www.ccme.ca/assets/pdf/accord_harmonization_e.pdf (last visited Oct. 13, 2010).

261. See Marcia Valiante, *Legal Foundations of Canadian Environmental Policy: Underlining Our Values in a Shifting Landscape*, in CANADIAN ENVIRONMENTAL POLICY: CONTEXT AND CASES, *supra* note 39, at 3, 8.

262. Canadian Environmental Protection Act of 1999, S.C. 1999, c. 33 s. 4(1)(b.2); Canadian Environmental Assessment Act, S.C. 1992, c. 37 s. 54(1).

263. See MELODY HESSING, MICHAEL HOWLETT & TRACY SUMMERVILLE, CANADIAN NATURAL RESOURCE AND ENVIRONMENTAL POLICY 205 (2005).

The results differ substantially. While some provinces have enacted equivalent or stronger environmental rules, such as Nova Scotia's ambitious Environmental Goals and Sustainable Prosperity Act of 2007,²⁶⁴ others have taken advantage of Ottawa's timidity to keep their own laws weak.²⁶⁵ For example, Alberta's environmental assessment regulations exempt oil and gas exploration,²⁶⁶ and in Newfoundland and Labrador the process only applies at the discretion of the minister.²⁶⁷ Environmental organizations have criticized federal-provincial harmonization for all these reasons.²⁶⁸

This pattern of cooperation and federal devolution is occasionally punctuated by competitive episodes in which federal or provincial governments raise environmental standards in response to public agitation, but this is usually followed by relatively long periods of collaboration and downward harmonization.²⁶⁹ Ironically, the assumption that duplication of federal and provincial regulation is always bad persists among Canadian policy makers despite mounting evidence that some degree of regulatory redundancy is critical to protect against environmental and public health dangers such as drinking water contamination.²⁷⁰ In any event we are left with a situation where willing provinces, such as Nova Scotia, can take a leadership role, while others, such as Alberta, may take advantage of jurisdictional ambiguity to stymie both provincial and federal efforts.

B. *Neo-Liberalism and Deregulation*

Neo-liberalism, which calls for the restriction of state intervention except to liberate and strengthen market forces,²⁷¹ was and remains another seminal influence on Canadian environmental law. After its initial electoral successes in the United Kingdom and United States in the early 1980s, it gained traction in Canada with the federal election of 1988,

264. S.N.S. 2007, c. 7.

265. See HESSING, *supra* note 263, at 206.

266. See Environmental Assessment (Mandatory and Exempted Activities) Regulation, A. Reg. 111/93, sched. 2(d)–(e).

267. See Environmental Protection Act, S.N.L. 2002, c. E-14.2, pt. X.

268. See Paehlke, *supra* note 155, at 173; Canadian Env'tl. Law Ass'n v. Canada (Minister of Env't), [1999] 3 F.C. 564 (Trial Div.), *aff'd* [2000] 4 F.C. D-6 (C.A.) (dismissing application for declaration that Canada-Wide Accord on Environmental Harmonization invalid).

269. See Nancy Olewiler, *Environmental Policy in Canada: Harmonized at the Bottom?*, in RACING TO THE BOTTOM? PROVINCIAL INTERDEPENDENCE IN THE CANADIAN FEDERATION 113, 140 (Kathryn Harrison ed., 2006).

270. See, e.g., DENNIS R. O'CONNOR, REPORT OF THE WALKERTON INQUIRY, PART TWO: A STRATEGY FOR SAFE DRINKING WATER 71–78 (2002) (recommending a multi-barrier approach to drinking water safety).

271. Simon Lee & Stephen McBride, *Introduction: Neo-Liberalism, State Power and Global Governance in the Twenty-First Century*, in NEO-LIBERALISM, STATE POWER AND GLOBAL GOVERNANCE 1, 6 (Simon Lee & Stephen McBride eds., 2003),

which Prime Minister Brian Mulroney's Progressive Conservatives won on a platform of free trade with the United States and neo-liberal restructuring of the Canadian state.²⁷² The 1990s saw the election of radically neo-liberal governments in Alberta and Ontario. Although less extreme in rhetoric, the deficit-slaying, budget-cutting federal Liberal government of 1993–2006 also embraced key elements of the neo-liberal agenda. Among the strongest proponents of this agenda are public choice theorists,²⁷³ who proposed the notion of government failure as an ideological counterpoint to the rhetoric of "market failure."²⁷⁴ Public choice analysts apply the logic of microeconomics to politics, concluding that whereas self-interest has a benign effect in the marketplace, it has a corrupting influence on governmental decision making.²⁷⁵ Neo-liberalism suggests we can avoid these problems of agency capture and rent-seeking by shifting management and sometimes ownership of resources and services beyond elected representatives and administrators.²⁷⁶ Environmental regulation has thus become a major target of neo-liberal criticism.²⁷⁷

Several factors contributed to neo-liberalism's strong resonance in Canada, including the backlash against Prime Minister Pierre Trudeau's 1980 effort to "Canadianize" the largely U.S.-controlled oil and gas industry, two severe recessions, ballooning public deficits, major Canadian business groups' embrace of free trade as their only hope, and a major public inquiry's conclusion that the Canadian welfare state was bloated and broken.²⁷⁸ By the 1990s, when governmental "red tape" and wasteful spending became demonized as barriers to economic prosperity, national and provincial environment ministries were severely purged.²⁷⁹

272. See CLARKSON & WOOD, *supra* note 163, at 69.

273. Among the various strands of public choice theory, see Richard Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. 353 (1974); Charles Rowley, *Public Choice and the Economic Analysis of Law*, in LAW AND ECONOMICS 155 (Nicholas Mercurio ed., 1989). The "Chicago" strand of public choice theory, associated with Posner, explains regulation in terms of supply and demand for political outcomes, while the "Virginia" school, associated with Rowley, offers an institutional analysis, focusing on the mechanics of democratic political markets.

274. See Richard Nelson, *Roles of Government in a Mixed Economy*, 6 J. POL. ANAL. & MGMT. 541, 542, 556 (1987) (noting that "government is subject to its own set of constraints and limitations").

275. See generally JAMES BUCHANAN & GORDON TULLOCK, *CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* (1962); WILLIAM NISKANEN, *BUREAUCRACY: SERVANT OR MASTER?* (1973).

276. See DANIEL FARBER & PHILIP FRICKEY, *LAW AND PUBLIC CHOICE* 67–69 (1991).

277. See *CUTTING GREEN TAPE: TOXIC POLLUTANTS, ENVIRONMENTAL REGULATION AND THE LAW* (Richard Stroup, Roger Meiners & Kip Viscusi eds., 2000); TERRY ANDERSON & DONALD LEAL, *FREE MARKET ENVIRONMENTALISM* (1991) (arguing that detailed environmental regulations administered by bureaucratic agencies tend to be inefficient, costly, and sometimes even ineffective at improving environmental conditions).

278. CLARKSON & WOOD, *supra* note 163, at 66–67.

279. *Id.* at 195.

In Ontario, the Ministry of the Environment under the Conservative government of Mike Harris suffered a calamitous drop in annual funding from \$550 million in 1994 to \$223 million by 2000.²⁸⁰ This led to the closure or curtailment of many programs, reduced environmental monitoring and enforcement, and significant staff cuts. Staffing levels at Ontario's Ministry of Natural Resources were slashed from 6639 in 1995 to 3380 in 2000.²⁸¹ The provincial government also "downloaded" various responsibilities, such as for water and sewage services, to municipalities that lacked the resources to assume effective custody.²⁸² In 1999, the independent Environmental Commissioner of Ontario concluded in her annual report that the "evidence of the deterioration of the province's environmental protection standards is widespread."²⁸³ This situation was not unique to Ontario; between 1992 and 1997 Alberta reportedly cut 30 percent of its environmental portfolio budget, while Newfoundland cut its budget by nearly 60 percent.²⁸⁴ Even with the election of an apparently more environmentally-minded Liberal government in Ontario 2003, these funding shortfalls have yet to be recovered. In 2007 the Environmental Commissioner of Ontario released a special report on the legacy of earlier cuts,²⁸⁵ and noted elsewhere that "the need to rebuild the expertise and resources available to" these ministries has "become a matter of urgency."²⁸⁶

These cuts did not come without costs. One of the tragic consequences of these reductions and other deregulatory measures was the contamination of the water supply of the town of Walkerton, Ontario, by *E. coli* in May 2000, which resulted in the deaths of seven people and illness of a further 2500.²⁸⁷ For similar reasons, a drinking water

280. See Karen Clark, *The Top 10 Things Wrong with Environmental Protection under the Common Sense Revolution*, 25 INTERVENOR 3 (2000).

281. See *id.*

282. See Municipal Water and Sewage Transfer Act, S.O. 1997, c. 6.

283. See BOYD, *supra* note 3, at 241.

284. David McLaren, *A Briefing on the Harmonization Accord*, 23 INTERVENOR (1998), available at <http://www.cela.ca/article/canadian-environmental-protection-act-1999-first-cepa-review/briefing-harmonization-accord>.

285. See ENVTL. COMM'R OF ONT., *DOING LESS WITH LESS: HOW SHORTFALLS IN BUDGET, STAFFING AND IN-HOUSE EXPERTISE ARE HAMPERING THE EFFECTIVENESS OF MOE AND MNR* (2007).

286. ENVTL. COMM'R OF ONT., *GETTING TO K(NO)W: ANNUAL REPORT 2007-2008*, at 74 (2007).

287. The resulting public inquiry concluded that funding cuts to drinking water monitoring programs and lack of follow-up by environment ministry officials were principal causes of the contamination. See DENNIS R. O'CONNOR, *REPORT OF THE WALKERTON INQUIRY, PART ONE: THE EVENTS OF MAY 2000 AND RELATED ISSUES* 34-35 (2002); see also Scott Prudham, *Poisoning the Well: Neoliberalism and the Contamination of Municipal Water in Walkerton, Ontario*, 35 GEOFORUM 343 (2004).

contamination outbreak occurred in North Battleford, Saskatchewan in 2001, leaving some 7000 people ill and leading to a lengthy class action.²⁸⁸

At the federal level, cuts were made to environmental programs under both Liberal and Conservative governments. They began as early as the mid-1980s under the Conservative Mulroney Government.²⁸⁹ The Chrétien Liberals later slashed Environment Canada's budget by almost one-third between 1995 and 1997.²⁹⁰ Under Prime Minister Harper, the budgets for the Environmental Monitoring and Assessment Network, the Migratory Bird Program and the National Wildlife Areas have been slashed and climate change research programs terminated.²⁹¹ Although in 2009 the Harper Government established a "green infrastructure" fund to support projects such as new public transit, its response to the economic downturn has mainly been to reduce environmental requirements for some projects, such as energy developments.²⁹²

One might think that embrace of the neo-liberal agenda, with its emphasis on less reliance on government bureaucracy and more use of market forces, would lead to greater reliance on economic policy instruments as a means of environmental law. In principle, the creation of markets for environmental goods and services, such as through tradable pollution allowances and removal of market-distorting subsidies for environmentally burdensome sectors such as the forestry and petroleum industries, would seem to dovetail with policies designed to harness market forces.²⁹³ As we have seen, however, the provincial and federal governments that embraced neo-liberalism most strongly favoured "voluntary" approaches to environmental management and continued to lavish subsidies on polluting sectors such as mining and petroleum rather than use economic disincentives to stimulate change.²⁹⁴

288. See *Talks Underway to End Tainted Water Lawsuit*, CBC NEWS (May 19, 2009), <http://www.cbc.ca/canada/saskatchewan/story/2009/05/19/north-battleford-water-lawsuit-123.html>.

289. See HARRISON, *supra* note 119, at 98.

290. See STEPHEN CLARKSON, *UNCLE SAM AND US: GLOBALIZATION, NEOCONSERVATISM AND THE CANADIAN STATE* 340 (2002).

291. See *Environment Canada Budget Cuts Threaten Wildlife Programs*, CBC NEWS (Sept. 19, 2007), http://www.cbc.ca/news/yourview/2007/09/environment_canada_budget_cuts.html; *Tories Plan Cuts to Climate Change Programs*, CBC NEWS (Apr. 5, 2006), <http://www.cbc.ca/canada/story/2006/04/05/climate-change060405.html>.

292. See Press Release, *Infrastructure Canada, Canada Launches \$1-billion Green Infrastructure Fund* (May 29, 2009), available at <http://www.buildingcanada-chantierscanada.gc.ca/media/news-nouvelles/2009/20090529whitehorse-eng.html>; Elizabeth May, *Stephen Harper Budget Worsens Ecological, Fiscal, Democratic Deficits*, STRAIGHT.COM (May 5, 2010), available at <http://www.straight.com/article-296471/vancouver/elizabeth-may-stephen-harper-budget-worsens-ecological-fiscal-democratic-deficits>.

293. See Robert Hahn & Robert Stavins, *Economic Incentives for Environmental Protection: Integrating Theory and Practice*, 82 AM. ECON. REV. 464-65 (1992).

294. See Winfield, *supra* note 175, at 87-88.

The promotion of voluntary approaches and public-private partnerships in Canada tended to become an excuse for business-as-usual. One example is the 1995 *National Action Program on Climate Change*, in which Canada identified “implementation of voluntary actions” as a key component of the *Program’s* plan for meeting the country’s international commitments.²⁹⁵ These actions, such as voluntary commitments made by major GHG emitters, were unsuccessful.²⁹⁶ The federal government’s voluntary Accelerated Reduction and Elimination of Toxics program was criticized for similar reasons.²⁹⁷ In other contexts, reliance on voluntary measures even contributed to environmental disasters, most notably Walkerton’s contaminated drinking water tragedy.²⁹⁸

While neo-liberalism has been in retreat in recent years due to its politically unacceptable outcomes and economic impacts, including the global financial crisis of 2008,²⁹⁹ Canadian governments’ preference for minimal market regulation lingers. Policy making remains dominated by economic considerations of promoting employment, consumer spending, and international trade. In this framework, the environmental policies most likely to win political support are those compatible with these values. Thus, the Ontario McGuinty Government’s ambitious Green Energy and Green Economy Act of 2009³⁰⁰ was unveiled largely on the premise that the forecast surge in investment in clean and renewable energy would pay substantial economic dividends.³⁰¹ Of course, there is nothing inherently objectionable to seeking prosperity while protecting the environment—that, after all, is the goal of sustainable development. But it is risky to make protection of the environment hinge solely on

295. ENV’T CAN., NATIONAL ACTION PROGRAM ON CLIMATE CHANGE, *passim* (1995).

296. See Nic Rivers & Mark Jaccard, *Canada’s Efforts Towards Greenhouse Gas Emission Reduction: A Case Study on the Limits of Voluntary Action and Subsidies*, 23 INT’L J. GLOBAL ENERGY ISSUES 307 (2005); MATTHEW BRAMLEY, THE CASE FOR KYOTO: THE FAILURE OF VOLUNTARY CORPORATE ACTION 1 (2002).

297. See Kathryn Harrison, *Talking With the Donkey: Cooperative Approaches to Environmental Protection*, 2 J. INDUSTRIAL ECOLOGY 51 (1999); Deborah L. VanNijnatten, *The ARET Challenge*, in VOLUNTARY INITIATIVES AND THE NEW POLITICS OF CORPORATE GREENING 91 (Robert B. Gibson ed., 1999).

298. See O’Connor, *supra* note 287, at 390 (discussing, for example, the problems of reliance on voluntary guidelines for reporting adverse drinking water test results).

299. See David M. Kotz, *The Financial and Economic Crisis of 2008: A Systemic Crisis of Neoliberal Capitalism*, 41 REV. RADICAL POL. ECON. 305 (2008).

300. S.O. 2009, c. 12.

301. See Ontario’s Green Energy Act: Our Path to a Green Economy and a Cleaner Environment, MINISTRY OF ENERGY AND INFRASTRUCTURE, <http://www.mei.gov.on.ca/en/energy/gea> (last visited Sept. 20, 2010).

perceived economic benefits when many environmental values cannot be priced in a market economy.³⁰²

C. *The Primacy of Primary Industries*

A further reason for the stagnation of Canadian environmental law is the distinctive structure of its economy. Primary industries, including agriculture, forestry, mining, oil, and gas, have long been a bulwark of Canada's economy and continue to be "very effective at shaping the public policy agenda" around themselves.³⁰³ Despite the rhetoric from business and political elites about turning Canada into a "knowledge-based economy" anchored on financial services, higher education, science, and technology development,³⁰⁴ the Canadian economy still relies heavily on these "old" industries.

These industries are more influential than their contribution to GDP would suggest. In 2007, shortly before the recent economic downturn, Canada's mining, oil, and gas sector contributed only 4.8 percent of national GDP; and agriculture, forestry, fisheries and hunting 2.2 percent, compared to 20 percent from the financial sector.³⁰⁵ The disproportionate influence of extractive industries comes instead from its high concentration in western Canada. Oil, gas, mining, and related resources-based industries contributed 24.6 percent of Alberta's GDP in 2003, nearly identical to its relative value in 1971.³⁰⁶ However, in British Columbia, the forestry industry's share of provincial GDP declined from 11 percent to 6 percent between 1990 and 2008, a trend which ultimately may diminish this industry's political influence in a province whose economy has long been dominated by the natural resources sector.³⁰⁷

The primary sector is also very important to Canada's international trade. In 2008, agriculture comprised 8.3 percent of the value of Canada's exports, while energy contributed 25.6 percent, forestry 5.2 percent and

302. See Frank Dietz & Jan van der Straaten, *Economic Theories and the Necessary Integration of Ecological Insights*, in *THE POLITICS OF NATURE: EXPLORATIONS IN GREEN POLITICAL THEORY* 118, 123 (Andrew Dobson & Paul Lucardie eds., 1993).

303. Winfield, *supra* note 175, at 88.

304. For background, see Richard Harris, *The Knowledge-based Economy: Intellectual Origins and New Economic Perspectives*, 3 *INT'L J. MGMT. REVS.* 21 (2001).

305. See STATISTICS CAN., *CANADA YEAR BOOK 2008*, at 109 (2008).

306. See PEMBINA INSTITUTE, *ECONOMIC DIVERSITY IN ALBERTA: HOW MUCH? 2* (2004), available at http://pubs.pembina.org/reports/02.Economic_Diversity.pdf (containing figures covering "resource based industries," which are defined to include petroleum, mining, forestry, and agriculture).

307. See BCSTATS, *BUSINESS INDICATORS: BRITISH COLUMBIA'S ECONOMY: THEN AND NOW 3* (2008), available at <http://www.bcstats.gov.bc.ca/pubs/bcbi/bcbi0812.pdf> (last visited Apr. 6, 2010).

mining 11.2 percent.³⁰⁸ The sector overall thus supplied at least half of Canada's export earnings. Their significance is even more pronounced in some provinces: in 2008, 40.3 percent of Alberta's exports were crude petroleum, and an additional 25.6 percent were gas and gas liquids.³⁰⁹ Only for Ontario and Quebec do resource exports constitute less than 50 percent of total exports.³¹⁰

Canada's continuing dependence on primary industries limits the political feasibility of environmental regulations, such as GHG emission controls, that could reduce the international competitiveness of businesses. While Canadian manufacturers are generally less carbon intensive than the international average, as they rely on hydroelectric and nuclear energy, Canadian extractive industries tend to be above the international average in terms of carbon intensity.³¹¹ A study by the C.D. Howe Institute found that a common carbon price across countries would therefore likely have "significant negative effects" on extractive industries in Canada.³¹² The result of this economic dependence is a system encouraging "rapid, opportunistic extraction" while inhibiting systemic, long term, and large-scale environmental management.³¹³ In some cases governments actually lag behind industry in implementing innovative environmental reforms, while marginalizing environmental non-governmental organizations in public policy making.³¹⁴

On the other hand, Canada's preoccupation with international competitiveness may make it vulnerable to countervailing pressure to improve environmental standards when its major trading partners raise their environmental standards.³¹⁵ Historically, Canadian regulators have felt pressure to conform to U.S. standards in areas such as drug and food

308. See *Exports of Goods on a Balance-of-Payments Basis, by Product*, STATISTICS CAN., <http://www40.statcan.ca/l01/cst01/gblec04-eng.htm> (last visited Sept. 29, 2010). Percentages are calculated by authors.

309. See GOV'T OF ALTA., HIGHLIGHTS OF THE ALBERTA ECONOMY 2009, at 9 (2009). In monetary terms, the amounts were C\$47.8 billion and C\$30.4 billion respectively, out of total exports in 2008 worth approximately C\$118 billion. *Id.*

310. See Adam Wellstead, *The (Post) Staples Economy and the (Post) Staples State in Historical Perspective*, 1 CAN. POL. SCI. REV. 8, 14 (2007).

311. See Chris Bataille, Benjamin Dachis & Nic Rivers, *Pricing Greenhouse Gas Emissions: The Impact on Canada's Competitiveness*, 280 C.D. HOWE INST. COMMENTARY 1, 3 (2009).

312. *Id.* For further discussion about Canadian climate policy and its economic costs, see Alastair Lucas, *Mythology, Fantasy and Federalism: Canadian Climate Change Policy and Law*, 20 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 41 (2007).

313. See Debra Davidson & Norah MacKendrick, *State-Capital Relations in Voluntary Environmental Improvement*, 55 CURRENT SOCIOLOGY 674, 683 (2007).

314. See *id.* at 684.

315. See generally Steven Bernstein & Benjamin Cashore, *The Influence of Globalization and Internationalization on Domestic Policy Change*, in POWER IN THE GLOBAL ERA: GROUNDING GLOBALIZATION 110 (Theodore H. Cohn, Stephen McBride & John Wiseman eds., 2000).

safety given the considerable trade between these jurisdictions.³¹⁶ While the North American Free Trade Agreement's environmental provisions exert little direct pressure on Canadian regulators,³¹⁷ direct pressure from the United States can matter. For example, President Obama has spoken out against using energy from "dirty" sources,³¹⁸ California has signed an agreement limiting oil imports from carbon-intensive sources,³¹⁹ and one-thousand U.S. city mayors have agreed not to import oil from Alberta's tar sands.³²⁰ Canada recently announced that it would bring its new vehicle fuel efficiency standards in line with U.S. federal standards.³²¹ International pressure therefore can have positive impacts on Canada's environmental standards.

While Canada is not the only Western nation to rely economically on its primary sector to such an extent—perhaps Australia is the only other state to have suffered environmentally as much as Canada has from such economic dependence³²²—this economic dependence has been a significant cause of Canada's weak environmental record.

D. Electoral Politics and Public Opinion

The Canadian governments' prevarication or intransigence on the environment also reflects both the cyclical nature of public concern for the environment and the tendency for electoral politics to blunt environmentalist voices. Federal and provincial willingness to be proactive on environmental issues varies with the level of public concern about the environment.³²³ However, public opinion is not always an accurate bellwether for the direction of Canadian environmental law because the electoral system makes it difficult to translate public concern into a reliable political force for action.

316. See George Hoberg, *Governing the Environment: Comparing Canada and the United States*, in DEGREES OF FREEDOM: CANADA AND THE UNITED STATES IN A CHANGING WORLD 341, 381 (Keith G. Banting, George Hoberg & Richard Simeon eds., 1997).

317. See PIERRE-MARC JOHNSON AND ANDRÉ BEAULIEU, *THE ENVIRONMENT AND NAFTA: UNDERSTANDING AND IMPLEMENTING THE NEW CONTINENTAL LAW* 111–12 (1996).

318. Nicola Jones, *Obama May Be Tough on Canada's Tar Sands*, NATURE NEWS (Feb. 13, 2009), <http://www.nature.com/news/2009/090213/full/news.2009.103.html>.

319. Terry Macalister, *Oil Groups Mount Legal Challenge to Schwarzenegger's Tar Sands Ban*, GUARDIAN (Feb. 14, 2010), <http://www.guardian.co.uk/business/2010/feb/14/oil-sands-ban-legal-challenge>.

320. See Anna Hopper, *A Crude Reality: Canada's Oil Sands and Pollution*, 30 HARV. INT'L REV. 9, 9 (2008).

321. See *Canada, U.S. Tighten Rules on Vehicle Emissions: Aim to Cut Greenhouse Gases 25% in Six Years*, TORONTO STAR, April 2, 2010, at A8.

322. See DAVID C. MERCER, *A QUESTION OF BALANCE: NATURAL RESOURCE CONFLICT IN AUSTRALIA* 58–60, 206–69, 270–312 (3d ed. 2000).

323. See Harrison, *supra* note 136, at 133–34.

According to public opinion polls, Canadians are among the staunchest environmentalists in the world.³²⁴ A 2007 poll suggested that public interest in the environment was as high as in the halcyon days of the early 1970s.³²⁵ The level of support over the past forty years appears to be stronger than in comparable jurisdictions.³²⁶ Professor Paehlke attributes these apparently strong environmental values among Canadians to the country's relatively vast areas of wilderness and the fact that the environment has been a seminal influence in Canada's art, literature, and other cultural domains.³²⁷ In terms of what Canadians think of their own governments' performance, a 2007 survey from Environics showed that they were generally critical of Ottawa's record on environmental issues, with 39 percent saying the government was doing a poor job and 41 percent believing it had done "only [a] fair job."³²⁸

While these high levels of public concern imply "strong expectations of government action,"³²⁹ they have not necessarily translated into strong environmental protection law. Of course, feeling concerned about the environment is not the same as being well informed. Professor Kathryn Harrison observes, for instance, that despite the importance of Canada's ratification of the Kyoto Protocol, only about half of the Canadians surveyed in 2003 were aware of this decision.³³⁰

Still, there is a general sense that Canadians still care deeply for the environment. The growth of the Greens in Canada, particularly since 2000 at the federal level and in Ontario and British Columbia, perhaps indicates a structural shift in public opinion with the presence of a political party dedicated to keeping the spotlight on environmental issues. However, the Greens have yet to elect a single member to a provincial legislature or federal Parliament.³³¹ This gap between public concern and political action is partly a result of both the structure of party politics and the electoral system that governs parliamentary representation. As in

324. See BOYD, *supra* note 3, at 4.

325. See Campbell Clark, *Saving the Environment Overtakes Stamping Out Corruption*, GLOBE & MAIL, July 19, 2007, at A13.

326. Canadians tend to be voice greater environmental concern than Americans, according to surveys. See, e.g., *Canadians and Americans Call for More Action on the Environment*, Angus Reid Public Opinion (July 19, 2010), <http://www.angus-reid.com/polls/43139/canadians-and-americans-call-for-more-action-on-the-environment2>.

327. See Paehlke, *supra* note 155, at 161.

328. *Canadians are Critical of the Country's Environmental Performance*, ENVIRONICS (Apr. 11, 2007, 4:40 PM), http://erg.environics.net/media_room/default.asp?aID=632.

329. Winfield, *supra* note 175, at 79.

330. See Kathryn Harrison, *The Road not Taken: Climate Change Policy in Canada and the United States*, 7 GLOBAL ENVTL. POL. 92, 94 (2007).

331. In 2008, a sitting Member of Parliament, Blair Wilson, joined the federal Green Party but was defeated in the 2008 federal election. See *Green Party to Announce its First Member of Parliament*, CBC NEWS (Aug. 30, 2008, 7:57 PM), <http://www.cbc.ca/canada/story/2008/08/30/green-party.html>. For a summary of the 2008 election results, see <http://www.sfu.ca/~ahheard/elections/results.html>.

many other Western liberal-democratic systems, electoral contests in Canada at all levels have become effectively reduced to a sparse choice between two or three established political parties, each of which seeks to become a “catch-all party” appealing to the widest number of voters through broadly cast and vaguely defined platforms built on a predictable menu of policies relating primarily to economic managerial competency.³³² The 2008 Canadian federal election was seemingly unusual in the decision by one of the major parties, the Liberals, to campaign for a “Green Shift” which would have included a carbon tax and other ecological fiscal reforms.³³³ Yet Liberal leader Stéphane Dion did such a poor job convincing the public and his own party of this platform that both he and the platform were dropped unceremoniously after Harper’s Conservatives won reelection.³³⁴

The bias that this political system creates against accommodating interest groups advocating specific issues including environmental matters is reinforced by Canada’s FPTP electoral system, which leads frequently to situations where the composition of the legislature does not reflect the popular vote.³³⁵ Proportional representation systems, which more directly reflect the total vote composition across ridings, tend to be more responsive to environmental concerns.³³⁶ This is because “winner-take-all” systems such as Canada’s FPTP respond most to median voters and less to small parties, like the Greens, whose support tends to be dispersed. In the 2008 Canadian election, the Green Party received 6.8 percent of the popular vote but won no seats, while the Bloc Québécois (whose voter base is restricted to Québec) won 50 seats (out of 308) with 10 percent of the popular vote.³³⁷ The FPTP system also prevails in the provinces. Recent popular referenda in British Columbia and Ontario to switch to proportional representation were defeated handily, partly due to lacklustre support from the very governments that sponsored them.³³⁸

332. On this phenomenon generally, see CLAUS OFFE, *CONTRADICTIONS OF THE WELFARE STATE* 185–86 (1984).

333. See Chris Boutet, *Key Election Issues: Environment and the “Green Shift”*, NATIONAL POST (Sept. 7, 2008, 8:30 AM), <http://network.nationalpost.com/NP/blogs/posted/archive/2008/09/07/key-election-issues-environment-and-the-green-shift.aspx>.

334. See Whittington, *supra* note 192.

335. See Louis Massicotte, *Canada: Sticking to First-Past-the-Post, for the Time Being*, in *THE POLITICS OF ELECTORAL SYSTEMS* 99, 103 (Michael Gallagher & Paul Mitchell eds., 2005).

336. See Kathryn Harrison & Lisa M. Sundstrom, *The Comparative Politics of Climate Change*, 7 GLOBAL ENVTL. POL. 1, 9 (2007).

337. See *40th General Election* (2008), ELECTIONS CANADA (Apr. 1, 2010), http://enr.elections.ca/National_e.aspx.

338. See Stephanie Levitz, *B.C. Voters Reject New Electoral System in Second Referendum*, CANADIAN PRESS (May 13, 2009); Colin Perkel, *Electoral Reform Down But Not Out After Ont. Referendum Failure: Experts*, CANADIAN PRESS (Oct. 11, 2007); Colin Perkel, *Critics Assail Elections Ontario, McGuinly for Lack of Referendum Awareness*, CANADIAN PRESS (Oct. 3, 2007).

Consider, by contrast, the fortunes of the Green Party in New Zealand, which has had a proportional representation system since 1993. The Greens won 6.72 percent of the national vote in the 2008 parliamentary election, translating into 9 seats in the 122 seat parliament.³³⁹ With a similar electoral system in Germany, the Green Party won 10.27 percent of the popular vote in the 2009 election, acquiring 68 seats in the 662 seat Bundestag.³⁴⁰ It is no coincidence that some of the most progressive environmental law reforms in recent decades have come from these two jurisdictions.³⁴¹

Another ballot structure, used in many Australian legislative assemblies, is preferential voting, in which voters rank a list of candidates in order of preference.³⁴² If no candidate wins an absolute majority, the candidate with the fewest votes is excluded and his or her votes are transferred to the other candidates according to the second preferences indicated by voters on the ballot papers. This process continues until one candidate has a majority of total votes cast. While this system has not led to the kind of parliamentary representation for the Green Party in Australia found in New Zealand or Germany (except in the Australian Senate, which uses proportional representation),³⁴³ preferential voting has allowed the Greens to influence the policies of the major parties by directing how its members should rank competing candidates when voting.³⁴⁴

We can thus conclude that while environmental law around the world has been hindered by the obstacles discussed in Part I of this Article, it faces additional constraints in Canada because of its electoral system.

339. See *General Election 2008 – Official Results*, ELECTIONS NEW ZEALAND (Apr. 1, 2010), <http://www.elections.org.nz/news/2008-election-official-results.html>.

340. See *Final Result of the Election to the German Bundestag 2009*, FED'L RETURNING OFFICER (Apr. 1, 2010), http://www.bundeswahlleiter.de/en/bundestagswahlen/BTW_BUND_09/ergebnisse/bundesergebnisse/index.html.

341. These include Germany's Erneuerbare-Energien-Gesetz EEG [Act Revising the Legislation on Renewable Energy Sources in the Electricity Sector and Amending Related Provisions], 2008, available at http://www.erneuerbare-energien.de/files/pdfs/allgemein/application/pdf/eeg_2009_en.pdf, and New Zealand's Climate Change Response Act, 2002, no. 40, available at <http://www.legislation.govt.nz/act/public/2002/0040/latest/DLM158584.html>.

342. See *Electoral Systems—Preferential Voting Systems*, ELECTORAL COUNCIL OF AUSTRALIA (July 25, 2010), http://www.eca.gov.au/systems/single/by_category/preferential.htm.

343. Unusually, however, in the 2010 federal election the Greens gained a pivotal seat in the House of Representatives, in Australia's first "hung" parliament since 1940. See Alison Rourke, *Australian PM Julia Gillard Signs Pact with Greens*, GUARDIAN (September 1, 2010), <http://www.guardian.co.uk/world/2010/sep/01/julia-gillard-australia-greens-deal>.

344. See Campbell Sharman, Anthony M. Sayers & Narelle Miragliotta, *Trading Party Preferences: The Australian Experience of Preferential Voting*, 21 ELECTORAL STUDIES 543, 549 (2002).

V. HINTS OF A RENAISSANCE?

Despite Canada's patchy record over the past two decades, some bright spots have emerged in recent years that may hint at a renaissance. Because of Canada's federal constitutional structure, and economic and geographical diversity, some significant disparities can arise in the nature of environmental law across the country.³⁴⁵ It is unclear yet whether some of the recent innovations, to be discussed in this section, herald a turning point in environmental law in Canada. Several factors have coalesced to strengthen the prospects for reform, including growing international pressure and popular demand for action on global warming and biodiversity,³⁴⁶ and increasing recognition of the indispensability of healthy ecosystems to economic prosperity.³⁴⁷ All of these innovations have, however, encountered stiff resistance or lacklustre implementation, making it difficult to discern an overall trend.

A. Institutionalizing Sustainability

The lexicon of environmental law reform in Canada is increasingly dominated by references to "sustainability" or "sustainable development." As noted earlier, ostensibly it has become the guiding norm of environmental law making worldwide, most prominently in New Zealand's Resource Management Act of 1991³⁴⁸ and the Swedish Environmental Code of 1999.³⁴⁹ While no government in Canada has gone as far as these examples in terms of legislating overarching and enforceable statutory goals of sustainable development for governmental decision makers, efforts to institutionalize sustainability have occurred since the late 1980s and have regained momentum recently.

Although it has garnered little media attention to date, Canada's new Federal Sustainable Development Act of 2008,³⁵⁰ sponsored by the Opposition, is potentially significant. Introduced partly to correct some of the flaws in the 1995 reforms that established the Commissioner of the Environment and Sustainable Development and required departments to prepare sustainable development plans,³⁵¹ the 2008 Act requires the federal government to create and implement a government-wide

345. See Neil Hawke, *Canadian Federalism and Environmental Protection*, 14 J. ENVTL. L. 185, 193–95 (2002).

346. See MILLENNIUM ECOSYSTEM ASSESSMENT, *supra* note 11, at 13–15.

347. See, e.g., STERN, *supra* note 60, at 122–42.

348. Resource Management Act, 1991, No. 69, available at <http://www.legislation.govt.nz/act/public/1991/0069/latest/DLM230265.html>.

349. Swedish Environmental Code, 1999, available at <http://www.sweden.gov.se/sb/d/2023/a/22847>.

350. S.C. 2008, c. 33.

351. See ENV'T CAN., SUSTAINABLE DEVELOPMENT STRATEGIES: EVOLUTION OF THE FEDERAL APPROACH (2001).

sustainability strategy, including scientifically-measurable sustainability targets, and to regularly evaluate and report on the environmental consequences of its actions.³⁵² This law was, however, forced on an unwilling Prime Minister Harper who has demonstrated unusual hostility toward both environmental protection and government accountability. Its prospects for serious implementation on his watch are dim.

This legislation builds on several similar provincial laws. One of the first was Manitoba's Sustainable Development Act of 1997,³⁵³ which has as its stated purpose: "To create a framework through which sustainable development will be implemented in the provincial public sector and promoted in private industry and in society generally."³⁵⁴ The Act's "Principles and Guidelines of Sustainable Development" provide an unusually high level of specificity regarding what "sustainable development" means,³⁵⁵ and its implementation is supported by an advisory Round Table on the Environment and the Economy.

On paper, sustainability is now an obligatory feature of almost all environmental laws and policies in Canada. Nova Scotia's Environmental Goals and Sustainable Prosperity Act of 2007, for example, enumerates twenty-one long-term environmental purposes of the province, ranging from reduced air emissions to greater reliance on renewable energy, and states that the long-term environmental and economic objective of Nova Scotia is to "fully integrate environmental sustainability and economic prosperity."³⁵⁶ The language of sustainability has also permeated a range of sectoral legislation, such as Ontario's Crown Forest Sustainability Act of 1994.³⁵⁷ It also appears in strategic policies and plans, including Québec's *Government Sustainable Development Strategy 2008–2013*,³⁵⁸ to give effect to the province's ambitious Sustainable Development Act of 2006³⁵⁹ and British Columbia's *Water Sustainability Action Plan* of 2004.³⁶⁰ Manitoba's Sustainable Development Act of 1998 makes provision for a sustainable development code of practice, green financial management guidelines, and green procurement guidelines throughout the provincial

352. See S.C. 2008, c. 33, s. 9.

353. S.M. 1997, c. 61; see also John Krowina, *Manitoba's Sustainable Development Act*, 25 MANITOBA L.J. 385 (1998).

354. S.M. 1997, c. 61, s. 2.

355. See S.M. 1997, c. 61, sched. A–B.

356. S.N.S. 2007, c. 7, s. 4(2); see John Brazner, *Legislating Sustainability: Nova Scotia's New Law Marries Environmental Sustainability and Economic Prosperity*, 34 ALTERNATIVES J. 16 (2008).

357. S.O. 1994, c. 25.

358. GOV'T OF QUE., *GOVERNMENT SUSTAINABLE DEVELOPMENT STRATEGY 2008–2013* (2007).

359. R.S.Q. 2006, c. D-8.

360. B.C. WATER AND WASTE ASSOC., *WATER SUSTAINABILITY ACTION PLAN* (2004).

government.³⁶¹ Again, all of these laws face serious obstacles to implementation.

One area in which we see genuine innovation is in the field of environmental impact assessment. Several federal environmental assessment review panels have adopted a “sustainability assessment” framework.³⁶² Instead of a narrow focus on mitigating “significant adverse environmental effects,” this framework asks whether a proposed project will make a net positive contribution to sustainability. While it has only been used in a handful of cases, the rate of rejection of projects under this framework (two of five) is vastly higher than under the conventional approach (likely less than 1 percent), suggesting that it may represent a genuinely new, ecologically and culturally protective paradigm of impact assessment. There are already indications, however, that this will lead proponents and governments to squash this innovation in its infancy.³⁶³

B. With or Without You: Provincial Initiatives on Climate Change

In the face of federal government inaction on climate change, other actors have taken the initiative. One significant example of federal inaction was Canada’s failure to take action to fulfill its obligations under the Kyoto Protocol. This came despite federal Opposition parties taking advantage of Prime Minister Harper’s minority position in Parliament to pass the Kyoto Protocol Implementation Act in 2007 requiring Ottawa to publish a plan specifying how Canada would meet its GHG emission reduction obligations under the Kyoto Protocol.³⁶⁴ The law also required the government to enact regulations by a specific date to give effect to its obligations under the Kyoto Protocol.³⁶⁵ This legislation appears to be unique in the world.

Sadly, the plan the government published in response to the law simply rehashed its pre-existing policies, which were designed explicitly not to comply with Kyoto.³⁶⁶ The National Round Table on the Environment and Economy confirmed that the plan was incapable of

361. S.M. 1998, c. S270, s. 12(2).

362. These include the Voisey’s Bay (1997), Red Hill (1999), Kemess North (2007), White’s Point (2007) and MacKenzie Gas (2010) review panels. See Robert B. Gibson, *Favouring the Higher Test: Contribution to Sustainability as the Central Criterion for Reviews and Decisions under the Canadian Environmental Assessment Act*, 10 J. ENVTL. L. & PRAC. 39 (2000); Alberto Fonseca & Robert Gibson, *Application Denied*, 34 ALTERNATIVES J. 10 (2008); JOINT REVIEW PANEL FOR THE MACKENZIE GAS PROJECT, FOUNDATION FOR A SUSTAINABLE NORTHERN FUTURE (2010).

363. See Fonseca & Gibson, *supra* note 362, at 12.

364. S.C. 2007, c. 30.

365. *Id.* s. 7(1).

366. GOV’T OF CAN., A CLIMATE CHANGE PLAN FOR THE PURPOSES OF THE KYOTO PROTOCOL IMPLEMENTATION ACT (2008), available at http://www.ec.gc.ca/doc/ed-es/p_124/CC-Plan-2008_eng.pdf

fulfilling Canada's Kyoto commitments.³⁶⁷ The government published no regulations, draft or final, by the prescribed deadlines. The federal courts rejected an application for judicial review of this defiance of Parliament on the ground that it raised non-justiciable political questions.³⁶⁸ Leave to appeal to the Supreme Court of Canada was refused in March 2010,³⁶⁹ shutting the door on this effort to hold the government judicially accountable for its violation of apparently non-discretionary statutory mandates while confirming the Canadian courts' extreme deference to the executive on controversial environmental issues. This stands in stark contrast to American appellate courts, which found complicated climate change disputes to be justiciable around the same time.³⁷⁰

Real action on GHG emissions reductions and promotion of green energy has therefore been left to the provinces.³⁷¹ Québec introduced North America's first (modest) carbon tax in 2007,³⁷² followed by a more substantial tax in British Columbia in 2008. British Columbia's tax was part of an ambitious package of climate change-related policies including tougher-than-Kyoto GHG reduction targets, a cap-and-trade system, a carbon-neutral electricity generation system, one hundred percent carbon capture and storage for coal-fired power plants, and adoption of California's low carbon fuel and GHG tailpipe emission standards.³⁷³ Ontario and Quebec have also enacted cap-and-trade legislation.³⁷⁴ Some smaller provinces have also enacted measures; Manitoba, for example, enacted the Climate Change and Emissions Reductions Act,³⁷⁵ which aims to reduce GHG emissions to 6 percent below 1990 levels by 2012—a target consistent with Canada's Kyoto obligations³⁷⁶ and exceeding what

367. RESPONSE OF THE NATIONAL ROUND TABLE ON THE ENVIRONMENT AND THE ECONOMY TO ITS OBLIGATIONS UNDER THE KYOTO PROTOCOL IMPLEMENTATION ACT § 7.0 (2009), available at <http://www.nrtee-trnee.com/eng/publications/KPIA-2009/Transmittal-Letter-KPIA-NRTEE-Response-2009-eng.php>.

368. See *Friends of the Earth v. Canada (Minister of the Environment)* (2008), [2009] 3 F.C.R. 201 *aff'd*, [2009] F.C.A. 297 (Can. C.A.).

369. Sup. Ct. Canada, No. 33469 (Mar. 25, 2010).

370. See, e.g., *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309 (2d Cir. 2009); *Comer v. Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009).

371. See DAVID SUZUKI FOUNDATION, *supra* note 239, at 1–3.

372. *Quebec to Collect Nation's First Carbon Tax*, CBC NEWS (June 7, 2007), <http://www.cbc.ca/canada/montreal/story/2007/06/07/carbon-tax.html>.

373. See, e.g., Greenhouse Gas Reduction Targets Act, S.B.C. 2007, c. 42; Greenhouse Gas Reduction (Cap and Trade) Act, S.B.C. 2008, c. 32.

374. See, e.g., Environmental Protection Amendment Act (Greenhouse Gas Emissions Trading) of 2009, S.O. 2009, c. 27; Act to Amend Environmental Quality Act and Other Legislative Provisions in Relation to Climate Change, S.Q. 2009, c. 33.

375. S.M. 2008, c. 17, s. 3(1).

376. Canada is required to reduce her average annual greenhouse gas emissions during the period 2008–12 to 6 percent below their level in 1990. See *Kyoto Protocol*, UNITED NATIONS FRAMEWORK ON CLIMATE CHANGE SECRETARIAT, available at https://unfccc.int/kyoto_protocol/items/3145.php.

the Harper Government has endorsed.³⁷⁷ Recently, Ontario took the national lead in renewable energy promotion with its Green Energy and Green Economy Act of 2009,³⁷⁸ which streamlines approvals and introduces a wide range of economic incentives for green energy, including German-inspired feed-in tariffs. Following a trend evident in other areas of Canadian environmental policy,³⁷⁹ several provinces have joined U.S. states in the Western Climate Initiative and Regional Greenhouse Gas Initiative, or have signed memoranda of understanding on climate change with each other or with individual states.³⁸⁰ While these provinces are setting the pace nationally, most of their initiatives are modelled after reforms pioneered elsewhere.

Not all provincial initiatives should be regarded as progressive. For example, Alberta's Climate Change and Emissions Management Act,³⁸¹ which aims to reduce emissions relative to provincial GDP through "energy intensity" targets for controlled sectors, is predicted to allow emissions to rise 33 percent above 1990 levels by 2020.³⁸²

C. *Municipal Environmental Governance*

Some of the most practical reforms are occurring in municipal governance. Historically a backwater for environmental policy,³⁸³ many municipalities across Canada are adopting vibrant plans, bylaws, and other measures to protect urban vegetation, improve waste management, curb suburban sprawl, and take other initiatives commonly associated

377. *Backgrounder: Harper Government's January 2010 Greenhouse Gas Target*, GREENPEACE (Feb. 1, 2010), http://www.greenpeace.org/canada/en/recent/ottawa_wrong_climate_change/backgrounder_harper_2010_gas_target.

378. S.O. 2009, c. 12.

379. For example, the Great Lakes Charter of 1985 and the Great Lakes-St. Lawrence River Basin Sustainable Water Resources Agreement of 2005, signed by the governors of the eight states bordering the Great Lakes and the premiers of Ontario and Québec. See COUNCIL OF GREAT LAKES GOVERNORS, <http://www.cglg.org> (last visited Jan. 30, 2010). For the text of the Great Lakes Charter, see <http://www.cglg.org/projects/water/docs/GreatLakesCharter.pdf>. For the text of the Great Lakes-St. Lawrence River Basin Sustainable Water Resources Agreement, see <http://www.mnr.gov.on.ca/stdprodconsume/groups/lr/@mnr/@water/documents/document/200040.pdf>.

380. See, e.g., *Provincial and State Partner Contacts*, W. CLIMATE INITIATIVE <http://www.westernclimateinitiative.org/wci-partners> (last visited Oct. 2, 2010); Memorandum between the Province of Ontario and the State of California for Collaboration on Climate Change and Energy Efficiency (May 30, 2007), available at http://gov.ca.gov/pdf/press/53007_Ontario_MOU.pdf.

381. S.A. 2003, c. C-16.7.

382. See DAVID SUZUKI FOUNDATION, ALL OVER THE MAP: A COMPARISON OF PROVINCIAL CLIMATE CHANGE PLANS 12 (2005).

383. See generally JOHN SEWELL, THE SHAPE OF THE CITY: TORONTO STRUGGLES WITH MODERN PLANNING (1993).

with the “smart growth” movement.³⁸⁴ The Supreme Court’s landmark decision in the *Spraytech* case of 2001,³⁸⁵ which affirmed broad municipal jurisdiction to regulate environmental matters in their localities, greatly emboldened local governments. For example, many municipalities, including Toronto and Halifax, have passed bylaws banning or restricting non-essential pesticide use.³⁸⁶ Many Canadian cities have also joined a global coalition of municipalities committed to advancing local action on climate change. The Vancouver City Council in 2005 adopted its own climate change plan which contains “climate protection targets,” such as requiring all new buildings to be carbon neutral by 2020.³⁸⁷ Toronto was one of the first North American cities to develop a climate change adaptation plan, in 2008.³⁸⁸

Other smart growth reforms have come from provincial legislation. Ontario has been particularly ambitious, enacting in 2005 the Greenbelt Act³⁸⁹ and Places to Grow Act.³⁹⁰ The former—enacted, ironically, around the time that leading American greenbelt zones like those in Portland, Oregon were being reduced³⁹¹—provides permanent protection to much of the agricultural lands and other countryside surrounding the sprawling Greater Toronto area, while the latter enables a more coordinated approach to concentrating urban growth and economic activity in a few high-density regional hubs. Greenbelt reforms have been applied to some other Canadian cities, such as Calgary and Ottawa, although not with the same stringency.³⁹²

While Canadian cities and other municipalities are a long way from being paragons of sustainability, the inertia of previous decades when

384. See Don Alexander & Ray Tomalty, *Smart Growth and Sustainable Development: Challenges, Solutions and Policy Directions*, 7 LOCAL ENV'T 397 (2002); BOHDAN ONYSCHUK, MICHAEL KOVECEVIC & PETER NIKOLAKATKOS, SMART GROWTH IN NORTH AMERICA: NEW WAYS TO CREATE LIVABLE COMMUNITIES (2001).

385. See 114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town), [2001] S.C.R. 241.

386. See *Pesticide Timeline*, CBC NEWS (May 21, 2004), <http://www.cbc.ca/news/background/pesticides/timeline.html>; see, e.g., TORONTO, CAN., BY-LAW NO. 456-2003, available at http://www.toronto.ca/health/hphe/pdf/pesticide_law0456.pdf; HALIFAX, CAN., BY-LAW NO. P-800, available at <http://www.halifax.ca/legislation/bylaws/hrm/blp-800.pdf>.

387. See CITY OF VANCOUVER, VANCOUVER'S CLIMATE LEADERSHIP 4 (2009).

388. See CITY OF TORONTO, AHEAD OF THE STORM: PREPARING TORONTO FOR CLIMATE CHANGE (2008).

389. S.O. 2005, c. 1.

390. S.O. 2005, c. 13.

391. CANADIAN INST. FOR ENVTL. LAW & POL'Y, ONTARIO'S GREENBELT IN AN INTERNATIONAL CONTEXT 18 (2008), available at <http://www.cielap.org/pdf/GreenbeltInternationalContext.pdf> (discussing recent enlargement of Portland's urban development boundary at the expense of the greenbelt).

392. See James Taylor, Cecelia Paine & John FitzGibbon, *From Greenbelt to Greenways: Four Canadian Case Studies*, 33 LANDSCAPE & URBAN PLAN. 47 (1995).

local governments subsidized suburban sprawl and prioritized the private car is being actively questioned.

D. Indigenous Rights and the Environment

Perhaps the best aspect of Canada's environmental performance still relates to Indigenous peoples. Since the constitutional recognition and protection for Aboriginal rights in the Constitution Act of 1982,³⁹³ many environmental management decisions have had to take into account the legal interests of Indigenous stakeholders.³⁹⁴ The federal and provincial governments no longer can extinguish Aboriginal title to land or customary rights to hunt and fish, and any infringement of those rights must meet due process requirements including a duty to consult with affected First Nations. For example, in the *Wood Buffalo* litigation the Supreme Court halted construction of a winter road through the park because the Crown had failed to consult with the Mikisew Cree, whose treaty rights had not been respected.³⁹⁵

Pursuant to the *Comprehensive Land Claims Policy*³⁹⁶ adopted in the 1970s, approximately twenty agreements have been negotiated between Canadian governments and First Nations and Inuit peoples to deal with outstanding Aboriginal rights. Many of these agreements, such as the Inuvialuit and Nunavut Agreements, contain substantial provisions for natural resource management, environmental protection, and participation of local communities in decision-making processes.³⁹⁷ Further, since 1999, groups governed by the colonial-era Indian Act³⁹⁸ have had the opportunity to opt out of its archaic land management provisions³⁹⁹ by negotiating agreements with the federal Ministry of Indian Affairs.⁴⁰⁰ The First Nations Land Management Act of 1999⁴⁰¹

393. See Section 35(1), the Act being Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11.

394. See Graham White, *Aboriginal People and Environmental Regulation*, in CANADIAN ENVIRONMENTAL POLICY AND POLITICS: PROSPECTS FOR LEADERSHIP AND INNOVATION, *supra* note 3, at 87; Annie Booth & Norman Skelton, *First Nations Access and Rights to Resources*, in RESOURCE AND ENVIRONMENTAL MANAGEMENT IN CANADA: ADDRESSING CONFLICT AND UNCERTAINTY 80 (Bruce Mitchell ed., 2004).

395. See *Mikisew Cree First Nation v. Canada* (Minister of Canadian Heritage), [2005] S.C.R. 388.

396. *Comprehensive Claims Policy*, INDIAN & N. AFFAIRS CAN., <http://www.ainc-inac.gc.ca/ai/scr/nt/edu/bzz/nls/ccp/index-eng.asp>.

397. See Jennifer Dalton, *Aboriginal Title and Self-Government in Canada: What is the True Scope of Comprehensive Land Claims Agreements?*, 22 WINDSOR REV. LEGAL & SOCIAL ISSUES 29 (2006).

398. An Act to Amend and Consolidate the Laws Respecting Indians. S.C. 1876, c. 18.

399. *Id.* ss. 18(1), 57, 58, 74(1) (lacking modern land use planning standards, and giving the responsible Canadian government Minister significant discretionary authority over land use management in Indian reserves).

400. FIRST NATIONS LAND ADVISORY BD., FRAMEWORK AGREEMENT ON FIRST NATIONS LAND MANAGEMENT: QUESTIONS AND ANSWERS (2003), available at <http://www.fafnlm.com/documents/FAQ%20English.pdf>.

allows such groups to negotiate a new land code that is more sympathetic to community needs. These and other initiatives have undoubtedly enhanced the Indigenous voice in environmental decisions. And because such peoples often seek to protect rather than unsustainably exploit their traditional lands,⁴⁰² these reforms have strengthened the scope for environmental protection in areas subject to Indigenous rights and interests.

Yet, it would be naïve to conclude sanguinely on this aspect of Canada's record. Like many of the other examples of a potential resurgence in Canadian environmental law, flaws persist. Indigenous groups remain frustrated by the lack of respect for their rights in many cases.⁴⁰³ Litigation continues against some governments' prevarication on settling land claims, particularly in British Columbia,⁴⁰⁴ and opposition to some mining and forestry companies persist, such as in Ontario's Grassy Narrows community.⁴⁰⁵ The shallowness of the political commitment of the current federal government to address outstanding grievances is perhaps clearest from its initial rejection of the UN Declaration on the Rights of Indigenous Peoples of 2007,⁴⁰⁶ and very belated signing on November 12, 2010. Even Australia, with a poorer record in this area, has endorsed the Declaration.⁴⁰⁷

CONCLUSION

This Article has illuminated the political, economic, and legal factors that have shaped the rise and fall of Canadian environmental law. While virtually all countries are experiencing sharp environmental decline and are struggling to design or implement effective legislative and policy responses, Canada's record is among the worst. Its performance is all the more disappointing given that at one time it was widely admired for its progressiveness in dealing with environmental issues. The depth of

401. See First Nations Land Management Act, S.C. 1999, c. 24.

402. See, e.g., Richardson, *supra* note 168, at 340–43, 349 (noting, however, that some Indigenous peoples have been implicated in environmentally unsustainable practices, at 344–48).

403. See generally ABORIGINAL AND TREATY RIGHTS IN CANADA: ESSAYS ON LAW, EQUALITY AND RESPECT FOR DIFFERENCE (Michael Asch ed., 1997).

404. See, e.g., *Tsilhqot'in Nation v. British Columbia*, [2007] B.C.S.C. 1700 (Can. B.C.) (where the Tsilhqot'in people sought declarations of their aboriginal land title to the contested area, and declarations of aboriginal rights to hunt and trap and to trade in animal pelts).

405. See FREE GRASSY NARROWS (Feb. 13, 2010), <http://www.freegrassy.org>.

406. See General Assembly Adopts Declaration on Rights of Indigenous Peoples, UN DEP'T OF PUB. INFO. (Sept. 13, 2007), <http://www.un.org/News/Press/docs/2007/ga10612.doc.htm>; Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007). The Canadian Government signed the Declaration with certain qualifications and on the understanding that it is legally not binding: John Ibbitson, *Ottawa Endorses UN Native-Rights Declaration*, GLOBE & MAIL, Nov. 13, 2010, at A13.

407. See *Experts Hail Australia's Backing of UN Declaration of Indigenous Peoples' Rights*, UN NEWS CENTRE (April 3, 2009), <http://www.un.org/apps/news/story.asp?NewsID=30382>.

decline in Canada would be more obvious were it not for the country's relatively small population and abundant natural resources. But its per capita "eco-footprint" is a high seven hectares per person, placing it seventh among all nations.⁴⁰⁸ This is both unsustainable and inequitable.

Although an extensive literature has mapped the weaknesses of environmental law generally, to understand fully Canada's circumstances requires additional analysis of the interplay of specific domestic political, economic, and legal issues. Federal-provincial relations, the political influence of neo-liberalism, the economic primacy of extractive industries, and an electoral system that can be unresponsive to public environmental concerns are all salient factors that have hindered environmental law reform in Canada. While some of these factors are present in comparable jurisdictions, all are applicable to Canada. It is this combination of circumstances that ultimately explains why Canada is a laggard. Some recent innovations, such as in the areas of Indigenous rights, municipal governance, and institutionalization of sustainability, give hope that some of the factors that have hindered reform may be losing sway. But it is premature to rejoice.

Ultimately, what is most frustrating about Canada's poor environmental record is not that it has failed to be an innovator, but that it has failed even to borrow sufficiently the many successful precedents in other countries. Improved legal tools to tackle problems such as climate change and loss of biodiversity are emerging. If Canada lacks the ingenuity to devise its own solutions, at the very least it should import solutions pioneered elsewhere. It has failed to do so. The real problem therefore is not the lack of legal tools but a domestic failure of policy imagination.⁴⁰⁹

The Article has identified some significant road-blocks to reform. International and domestic pressure for reform is bound to continue, given that widespread environmental degradation in Canada persists.⁴¹⁰ But even if Canada is able to remove some of the present hindrances, such as by adopting proportional representation and reducing its dependence on environmentally-burdensome extractive industries, it would probably only slow rather than halt environmental decline. More progressive environmental laws might ensue, building on the recent emerging "renaissance," but the underlying negative trends would probably persist. Sustainability in Canada, as elsewhere, will likely only arise if people are prepared to choose fundamentally different goals for their society, including a fundamentally different economic model in

408. See WORLD WILDLIFE FUND, LIVING PLANET REPORT 2008, at 14 (2009).

409. Winfield, *supra* note 175.

410. For a recent overview, see THOMAS GUNTON & K.S. CALBICK, THE MAPLE LEAF IN THE OECD: CANADA'S ENVIRONMENTAL PERFORMANCE 23 (2010).

which maintenance of ecological integrity is a precondition to all development.⁴¹¹ Environmental law is a means to an end, not an end in itself.

411. Many scientists and economists have advocated more fundamental changes to economic systems and institutions as the best way to achieve sustainability. *See, e.g.*, DALY, *supra* note 65; ROBERT COSTANZA, INSTITUTIONS, ECOSYSTEMS AND SUSTAINABILITY (2001).

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