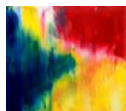




Coffin Prowse Law Office

**Environmental Law for Land and
Sea**

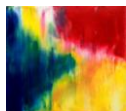
**Jurisdiction and Legislative
Overview**



Maggie Coffin Prowse
Professional Corporation

Discussion Summary

- Canadian Approach to International Environmental Law
- Division of Powers related to Environmental Matters



Canadian Approach to International Environmental Law

Does Canadian law expressly conflict with international environmental law?

Yes

Canadian environmental law will apply

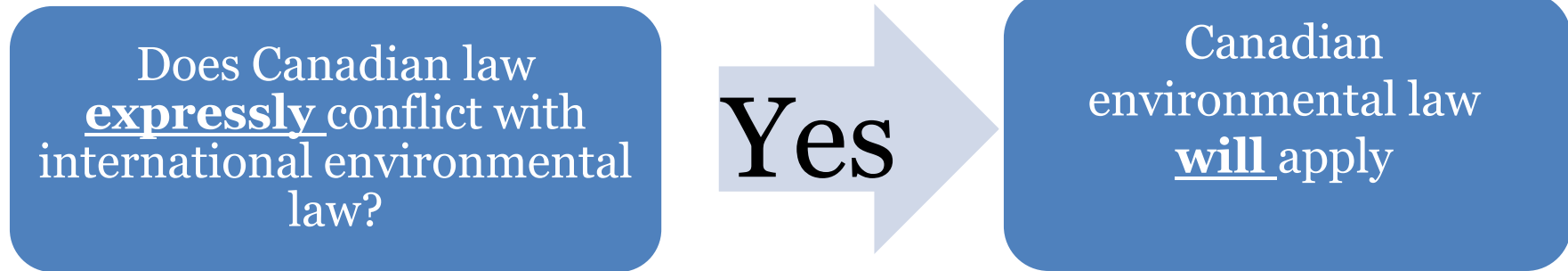
Does Canadian law expressly conflict with international environmental law?

No

International environmental law may apply under Canadian common law



Canadian Approach to International Environmental Law



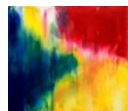
Express Incorporation of International Law into Canadian Legislation:

- express incorporation by reference
- partial incorporation
- limited references to a treaty in the statute
- legislation containing a general power to implement treaties

Passive Incorporation of International Law into Canadian Law

Positive action

Policy measures



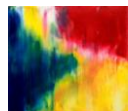
Canadian Approach to International Environmental Law

Does Canadian law expressly conflict with international environmental law?

No

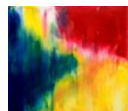
International environmental law may apply under Canadian common law

Precautionary Principle



Challenges with Canadian Approach to International Environmental Law

- International environmental law is not necessarily included in Canadian law.
- Canada can 'opt out' of international environmental law by creating express legislation to the contrary.



Division of Powers Under Canadian Constitution

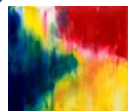
Federal Powers

- Trade and Commerce
- Seacoast and Inland Fisheries
- Navigation and Shipping.
- Sea Coast and Inland Fisheries.
- Criminal Law
- Subjects Not Assigned to the Provinces
- Peace, order and good government (POGG)

Environment

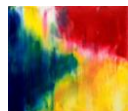
Provincial Powers

- Public Lands belonging to the Province, Timber and Wood
- Municipal Institutions
- Local Works and Undertakings other than Ships, Railways, Canals, Telegraphs, and other Works and Undertakings crossing jurisdictions
- Property and Civil Rights in the Province.
- Matters of local or private nature in the Province.
- Non-renewable natural resources and forestry resources
- Electrical energy



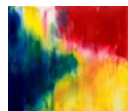
Examples of Canadian Federal Environmental Legislation

- *Canadian Environmental Protection Act, 1999*
- *Canada Wildlife Act*
- *Migratory Birds Convention Act, 1994*
- *Canadian Environmental Assessment Act*
- *Species At Risk Act*
- *Fisheries Act*
- *Navigable Waters Protection Act*



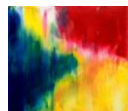
Examples of New Brunswick Provincial Environmental Legislation

- *Clean Air Act*
 - Air quality, ozone depleting substances
- *Clean Environment Act*
 - Environmental impact assessments, petroleum storage, waste management
- *Clean Water Act*
 - Watercourse and wetland protection, wellfield protection, watershed protection



Main Challenge Associated with Division of Powers

- Neither government can take complete ownership of the issue on a comprehensive scale.



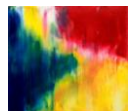
Jurisdictional Issues in the Courts

- *R v Crown Zellerbach Canada Ltd.*
 - *Ocean Dumping Control Act*. S.C. 1974-75-76, c. 55, s.4(1) “No person shall dump except in accordance with the terms and conditions of a permit.”
 - Definition of sea under the Act included internal waters of Canada other than fresh waters.
 - Crown Zellerbach operated a logging business on Vancouver Island and was dumping log waste in Beavers Cove, an area within the province of BC.



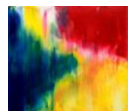
Jurisdictional Issues in the Courts

- *R v Crown Zellerbach Canada Ltd.*
 - Crown Zellerbach was charged by the federal government under the federal legislation for dumping without a permit.
 - Did the federal government have jurisdiction to regulate dumping in provincial waters?



Jurisdictional Issues in the Courts

- *R v Crown Zellerbach Canada Ltd.*
 - Majority: Yes, under POGG
 - “Marine pollution, because of its predominantly extra-provincial as well as international character and implications, is clearly a matter of concern to Canada as a whole.”
 - Minority: No, no clear nexus to fisheries or other jurisdiction; distinction between fresh and salt water cannot be clearly demarcated.



Jurisdictional Issues in the Courts – The Legislative Aftermath?

- Post - *R v Crown Zellerbach Canada Ltd.* legislation
- *Canadian Environmental Protection Act*
- *Oceans Act*

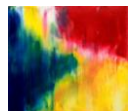


Jurisdictional Issues in the Courts – The Legislative Aftermath?

Canadian Environmental Protection Act

120. “marine pollution” means the introduction by humans, directly or indirectly, of substances or energy into the sea that results, or is likely to result, in

- (a) hazards to human health;
- (b) harm to living resources or marine ecosystems;
- (c) damage to amenities; or
- (d) interference with other legitimate uses of the sea.



Jurisdictional Issues in the Courts – The Legislative Aftermath?

Canadian Environmental Protection Act

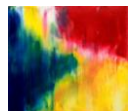
122.(2) In this Division and in Part 10, “sea” means

- (a) the territorial sea of Canada (low-tide to 12 nautical miles);
- (b) the internal waters of Canada, **excluding all the rivers, lakes and other fresh waters in Canada...**
- (c) any exclusive economic zone that may be created by Canada (low-tide to 200 nautical miles);

....

- (e) an area of the sea adjacent to the areas referred to in paragraphs (a) to (d) that is specified under paragraph 135(1)(g);

....

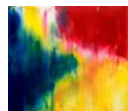


Jurisdictional Issues in the Courts

– The Legislative Aftermath?

Oceans Act – territorial limits of Canadian jurisdiction of the sea:

- From: baseline, which is the low-water line along the coast or on a low-tide elevation that is situated wholly or partly at a distance not exceeding the breadth of the territorial sea of Canada from the mainland or an island.
- To: 12 nautical miles from the nearest point of the baselines; or, if a specific limit has been prescribed by legislation, that point.



Jurisdictional Issues in the Courts

– The Legislative Aftermath

Oceans Act – exclusive economic zone of Canadian jurisdiction of the sea:

- From: baseline, which is the low-water line along the coast or on a low-tide elevation that is situated wholly or partly at a distance not exceeding the breadth of the territorial sea of Canada from the mainland or an island.
- To: 200 nautical miles from the baselines



Jurisdictional Issues in the Courts

- *R v Hydro-Québec*
 - HQ was charged under the *Canadian Environmental Protection Act* after an accidental discharge of PCBs (a toxic substance) into a Québec river.
 - *CEPA* defines toxic as “...a substance...having or that may have an immediate or long-term harmful effect on the environment... or ...a danger ...to human life or health.”



Jurisdictional Issues in the Courts

- *R v Hydro-Québec*
 - Majority: Risks to the environment include risks to human life and health. Prohibition was “...justified as a criminal prohibition for the protection of human health and public...”
 - Minority: Colourable attempt to use criminal law for a matter that is within provincial jurisdiction.



Jurisdictional Issues in the Courts

– The Legislative Aftermath

- Post *R v Hydro-Québec* legislation essentially unchanged:
Canadian Environmental Protection Act
s.2: ...the Government of Canada shall...
(j) protect the environment, including its biological diversity, and human health, from the risk of any adverse effects of the use and release of toxic substances, pollutants and wastes;
s.2: “environment” means the components of the Earth and includes
(a) air, land and water;
(b) all layers of the atmosphere;
(c) all organic and inorganic matter and living organisms; and
(d) the interacting natural systems that include components referred to in paragraphs (a) to (c).



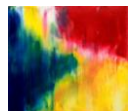
Resolving the Jurisdictional Battle

Explicit Legislation

Confederation Bridge Area Provincial (P.E.I.) Laws Application Regulations under Oceans Act

s.1. In these Regulations, “Confederation Bridge Area” means the area ...described in Schedule B, as amended from time to time, to the lease document registered on October 5, 1993 as document 3562 in the Prince County Registry Office of the Province of Prince Edward Island.

s.2. The laws of the Province of Prince Edward Island, except the *Highway Traffic Act*, apply in the Confederation Bridge Area.

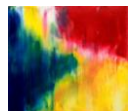


Resolving the Jurisdictional Battle

Explicit Legislation

Saguenay-St. Lawrence Marine Park Act

...WHEREAS each of the Parliament of Canada and the legislature of Quebec must enact legislation within its own jurisdiction for the establishment and management of a marine park;



Municipalities

Federal Powers

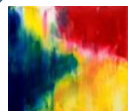
- Trade and Commerce
- Seacoast and Inland Fisheries
- Navigation and Shipping.
- Sea Coast and Inland Fisheries.
- Criminal Law
- Subjects Not Assigned to the Provinces
- Peace, order and good government (POGG)

Environment

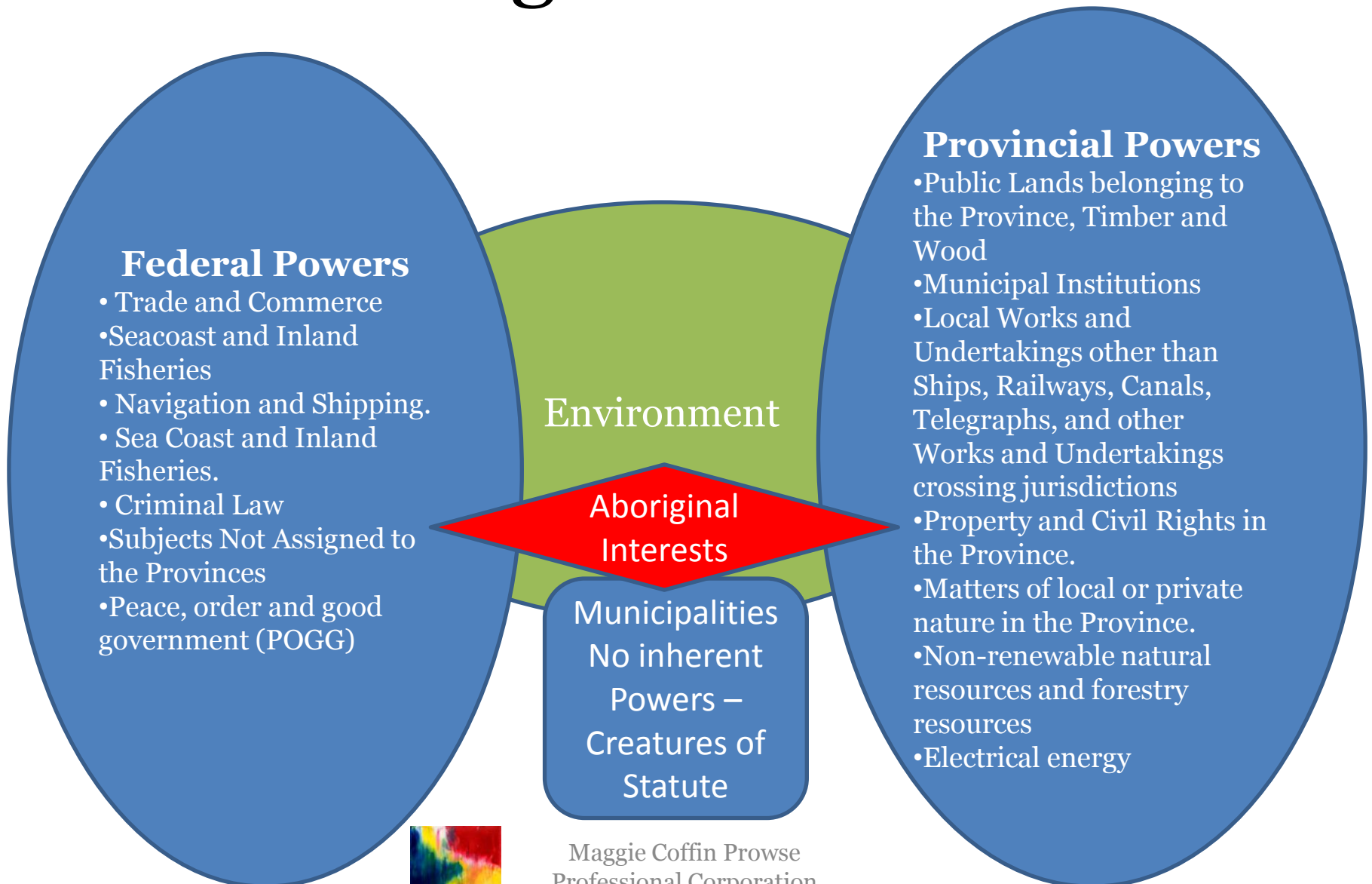
Municipalities
No inherent
Powers –
Creatures of
Statute

Provincial Powers

- Public Lands belonging to the Province, Timber and Wood
- Municipal Institutions
- Local Works and Undertakings other than Ships, Railways, Canals, Telegraphs, and other Works and Undertakings crossing jurisdictions
- Property and Civil Rights in the Province.
- Matters of local or private nature in the Province.
- Non-renewable natural resources and forestry resources
- Electrical energy

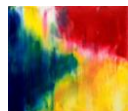


Aboriginal Interests



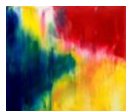
Aboriginal Rights

- s.35 (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
- s.35 (3) – For greater certainty, in subsection 1 “treaty rights” includes rights that now exist by way of land claim agreements or may be so acquired...



Aboriginal Rights

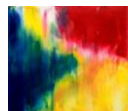
1. “element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming that right”
2. exclusive use and occupation of land (inalienable and are held communally)



Aboriginal Rights

Taku River Tlingit First Nation v British Columbia

“The duty to consult arises when a Crown actor has knowledge, real or constructive, of the potential existence of aboriginal rights or title and contemplates conduct that might adversely affect them. This in turn may lead to a duty to change government plans or policy to accommodate aboriginal concerns.”



Seabed and Mineral Exploration

*Reference re Offshore Mineral Rights
(British Columbia), [\[1967\] S.C.R. 792](#)
(S.C.C.).*

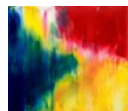
“The Crown in right of Canada and not the Crown in right of British Columbia owns the mineral rights to the seabed and subsoil seaward from the ordinary low-water mark off British Columbia.”



Seabed and Mineral Exploration

*ATTORNEY GENERAL OF CANADA V ATTORNEY
GENERAL OF BRITISH COLUMBIA Et Al.*, [1984]
1 S.C.R. 388

On a reference to determine the ownership, as between Canada and British Columbia, of the lands including mineral and other natural resources of the seabed and soil under the Straits of Queen Charlotte, Johnstone, Georgia, and Juan de Fuca, situated between Vancouver Island and mainland British Columbia, the Court of Appeal and SCC held the property was owned by the province.



Seabed and Mineral Exploration

Reference re Newfoundland Continental Shelf, [1984] 1 S.C.R. 86

“In summary, we conclude:

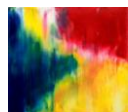
(1) Continental shelf rights are, in pith and substance, an extra territorial manifestation of external sovereignty.

(2) Canada has the right to explore and exploit in the continental shelf off Newfoundland ...

(c) in any event, international law did not recognize continental shelf rights by 1949; such rights were not indisputable recognized before the Geneva Convention of 1958.

(3) Canada has legislative jurisdiction in relation to the right to explore and exploit in the continental shelf off Newfoundland by virtue of the peace, order, and good government power in its residual capacity.

In short, in our opinion both parts of the question should be answered in favour of Canada.”



Thank You

Maggie Coffin Prowse
BBA, LLB, LLM

www.coffinprorowse.com

mcp@coffinprorowse.com

(506) 642-3414

