

# A Constitutional Dilemma: Who Protects the Right Whales?

When Canadians face a health or safety risk, they can look to sections 91 and 92 of the [Constitution Act, 1867](#) to figure out whether the provincial or federal government has the power to help them.<sup>[1]</sup> But what about when a species such as our giant sea-faring cousin, the North Atlantic right whale<sup>[2]</sup> (the “right whale”) is in danger? What does the Constitution have to say about that?

## A species on the brink

Since June 7, 2017, six right whales have been found dead in the Gulf of Saint Lawrence.<sup>[3]</sup> The six deaths amount to a loss of more than one percent of the estimated 500 right whales that remain on the planet today.<sup>[4]</sup> Such a loss is a major blow for a species whose population was reduced by unrestricted hunting in the 19th and early 20th centuries to a fraction of what previously existed.<sup>[5]</sup>

## Are the right whales a provincial or federal responsibility?

Sections 91 and 92 of the *Constitution Act, 1867* outline which areas are under the authority of the federal and provincial governments (referred to as the “[division of powers](#)”), but neither section specifically mentions the “environment.” As a result, both the provinces and the federal government can make laws on a specific environmental matter, as long as it can be connected to a power granted to them in the Constitution.<sup>[6]</sup>

In the case of right whales, the federal government’s authority to create laws and regulations is relatively clear. The federal government has control over areas such as the sea coast and inland fisheries, navigation and shipping, criminal laws (including laws that prohibit the dumping of harmful substances into the water), and obligations that arise from international treaties (like the *Convention on Biological Diversity*).<sup>[7]</sup> More broadly speaking, the federal government also has the power to make laws for the [peace, order, and good government](#) of Canada on matters of national concern (such as marine or interprovincial water pollution).<sup>[8]</sup>

In contrast, a provincial government may also provide some protections to right whales, as provinces have the power to pass laws relating to property and civil rights (which may include controls on polluting emissions or hunting), trade of animals or animal products within the province, and subjects that provinces have delegated to municipalities (like development, waste management, and wastewater).<sup>[9]</sup>

At the end of the day, while the federal government has primary authority to protect the right whale, the necessary clean-up, necropsies (procedures used to determine cause of death), and future protections will likely require a collaborative effort between the federal and provincial governments.

## What protections are in place?

The right whale is listed as an endangered species in the federal *Species at Risk Act*, and the federal government has both identified its critical habitat, and developed an action plan for the recovery of the species.<sup>[10]</sup> Some protections from disturbances and hunting also exist in the *Marine Mammal Regulations* under the federal *Fisheries Act*.<sup>[11]</sup>

In light of the tragedy this June, questions surely to be asked in the days to come are whether more protections are needed, and how the provinces and federal government can best use their respective powers to help.

### For related reading see:

- [Federal Government: Constitutional Protector of Frogs](#)

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

[2] The scientific name for the North Atlantic Right Whale is *Eubalaena glacialis*. For more information on the species, see: Species at Risk Public Registry, “North Atlantic Right Whale”, Species Profile (2017), online: <[www.registrelep-sararegistry.gc.ca/species/speciesDetails\\_e.cfm?sid=780](http://www.registrelep-sararegistry.gc.ca/species/speciesDetails_e.cfm?sid=780)>.

[3] Jordan Gill, “‘Unprecedented event’: 6 North Atlantic right whales found dead in June”, *CBC News* (24 June 2017), online: <[www.cbc.ca/news/canada/new-brunswick/six-dead-right-whales-1.4176832](http://www.cbc.ca/news/canada/new-brunswick/six-dead-right-whales-1.4176832)>.

[4] *Ibid*; Fisheries and Oceans Canada, “Action Plan for the North Atlantic Right Whale (*Eubalaena glacialis*) in Canada: Fishery Interactions [Proposed]”, Species at Risk Act Action Plan Series (Ottawa: Fisheries and Oceans Canada, 2016).

[5] Sarah Gibbens, “In Unprecedented Loss, Endangered Whales Die of Mysterious Cause”, *National Geographic* (26 June 2017), online: <[news.nationalgeographic.com/2017/06/north-atlantic-right-whale-deaths-st-lawrence-spd/](http://news.nationalgeographic.com/2017/06/north-atlantic-right-whale-deaths-st-lawrence-spd/)>; Species at Risk Public Registry, *supra* note 2.

[6] See Meinhard Doelle & Chris Tollefson, *Environmental Law: Cases and Materials*, 2nd ed (Toronto: Thomson Reuters Canada, 2013) at 166. See also *Friends of the Oldman River Society v Canada*, [1992] 1 SCR 3; *R v Crown Zellerbach Canada Ltd*, [1988] 1 SCR 401 .

[7] *Constitution Act, 1867*, *supra* note 1, ss 91(10),(12),(27), 132; Penny Becklumb, Economics, Resources and International Affairs Division, “Federal and Provincial Jurisdiction to Regulate Environmental Issues”, Publication No 2013-86-E (Ottawa: Library of Parliament, 24 September 2013) at 2.1, 3.3.2, online: <[lop.parl.ca/Content/LOP/ResearchPublications/2013-86-e.htm#a5](http://lop.parl.ca/Content/LOP/ResearchPublications/2013-86-e.htm#a5)>; *R v Hydro-Québec*,

[1997] 3 SCR 213.

[8] *Constitution Act, 1867, ibid*, s 91; Becklumb, *ibid* at 2.1; *Crown Zellerbach, supra* note 6.

[9] *Constitution Act, 1867, ibid*, ss 92(8),(13); Becklumb, *ibid* at 2.2.

[10] Species at Risk Public Registry, *supra* note 2; Fisheries and Oceans Canada, *supra* note 4; *Species at Risk Act*, SC 2002, c 29.

[11] Species at Risk Public Registry, *ibid*; *Fisheries Act*, RSC 1985, c F-14; *Marine Mammal Regulations*, SOR/93-56.