

Setting the Record Straight on Federal and Provincial Jurisdiction Over the Environmental Assessment of Resource Projects in the Provinces

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Matter Commented On: Bill C-69: [An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts](#)

Alberta's new premier has recently threatened to sue the federal government over Bill C-69, the Liberal government's attempt to restore some credibility to Canada's environmental assessment regime. More specifically, Premier Kenney [has recently been asserting](#) that section 92A of the *Constitution Act, 1982*, which gives the provinces jurisdiction over the development of non-renewable natural resources, precludes the federal government from assessing what [the Premier describes as "provincial projects"](#): "[Bill C-69] gives a new federal agency the power to regulate provincial projects, such as [in situ oil sands developments](#) and petrochemical refineries, which are entirely within a province's borders and already subject to provincial regulation. It disregards a landmark Supreme Court ruling on jurisdiction and the balance between federal and provincial powers spelled out in the Constitution — including section 92A in which provinces have exclusive authority over non-renewable resource projects." In making these comments, the Premier contradicts almost three decades of settled jurisprudence with respect to the federal and provincial division of powers over the environment generally, and federal jurisdiction to conduct environmental assessments specifically.

In Part I of this post, we review the settled constitutional principles that apply to federal and provincial jurisdiction over the environment generally, and with respect to environmental assessment specifically. In Part II, we offer a brief analysis of Bill C-69, focusing specifically on the proposed *Impact Assessment Act* (Part 1 of the Bill) and the *Canadian Energy Regulator Act* (Part 2 of the Bill).

I. A Primer on Federal and Provincial Division of Powers Over the Environment

As a starting point, it is useful to set out section 92A, the so-called "resources amendment" to the Constitution, adopted in 1982:

- (1) In each province, the legislature may exclusively make laws in relation to
 - a. exploration for non-renewable natural resources in the province;
 - b. development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom; and

- c. development, conservation and management of sites and facilities in the province for the generation and production of electrical energy

On its face, section 92A does assign “exclusive” jurisdiction to the provinces over matters such as the development, conservation and management of non-renewable natural resources. But the assignment of “exclusive” jurisdiction is also the hallmark of both sections 91 and 92 of the *Constitution Act*, which set out the legislative powers of the federal and provincial governments, respectively. Section 91 states that the matters listed there (e.g. criminal law, navigation, seacoast and inland fisheries) fall within “the *exclusive* Legislative Authority of the Parliament of Canada,” while section 92 states that the provinces “may *exclusively* make Laws in relation to Matters” listed there (e.g. management and sale of public lands, property and civil rights, the administration of justice, matters of a local nature).

While there was a time when Canadian courts attempted to interpret “exclusive” literally under what was called the “water tight compartments” doctrine, that approach was abandoned long ago in favour of a more cooperative approach to federalism. Generally, Canadian courts attempt to give both levels of government room to legislate, recognizing that many issues may have both a federal and provincial aspect, and that such laws can often operate concurrently. As recently explained by the Supreme Court of Canada in *Rogers Communications Inc. v Châteauguay (City)*, [2016 SCC 23 \(CanLII\)](#):

When [assessing the constitutionality of a law], a court must avoid adopting the watertight compartments approach, which this Court has in fact rejected...

...[W]hen the courts apply the various constitutional doctrines, they must take into account the principle of co-operative federalism, which favours, where possible, the concurrent operation of statutes enacted by governments at both levels... (at paras 37-38)

This approach is particularly relevant with respect to jurisdiction over the environment, which is not explicitly referred to in the *Constitution*. In *Reference re Greenhouse Gas Pollution Pricing Act*, [2019 SKCA 40 \(CanLII\)](#), the Saskatchewan Court of Appeal’s recent decision upholding the federal government’s carbon pricing regime, the Court reaffirmed the applicability of the following principles when considering the validity of laws pertaining to the environment:

First, “the environment” is not a legislative subject matter that has been assigned to either Parliament or the provincial legislatures under the *Constitution Act, 1867*. Rather, as the Supreme Court put it in *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992 CanLII 110 \(SCC\)](#), [1992] 1 SCR 3 at 64, the environment is “a constitutionally abstruse matter which does not comfortably fit within the existing division of powers without considerable overlap and uncertainty”. Justice La Forest explained this as follows in *R v Hydro-Québec*, [1997 CanLII 318 \(SCC\)](#), [1997] 3 SCR 213 [*Hydro-Québec*]:

In considering how the question of the constitutional validity of a legislative enactment relating to the environment should be approached,

this Court in *Oldman River, supra*, made it clear that the environment is not, as such, a subject matter of legislation under the *Constitution Act, 1867*. As it was put there, “the *Constitution Act, 1867* has not assigned the matter of ‘environment’ *sui generis* to either the provinces or Parliament” (p. 63). Rather, it is a diffuse subject that cuts across many different areas of constitutional responsibility, some federal, some provincial (pp. 63-64). Thus Parliament or a provincial legislature can, in advancing the scheme or purpose of a statute, enact provisions minimizing or preventing the detrimental impact that statute may have on the environment, prohibit pollution, and the like. In assessing the constitutional validity of a provision relating to the environment, therefore, what must first be done is to look at the catalogue of legislative powers listed in the *Constitution Act, 1867* to see if the provision falls within one or more of the powers assigned to the body (whether Parliament or a provincial legislature) that enacted the legislation (*ibid.* at p. 65). If the provision in essence, in pith and substance, falls within the parameters of any such power, then it is constitutionally valid. (at para 54, emphasis added)

In other words, while a province like Alberta certainly has the jurisdiction to enact laws for the development, conservation and management of non-renewable resources (see e.g. *Oil Sands Conservation Act*, [RSA 2000, c O-7](#)) and laws pertaining to the environmental assessment of projects within the province (see e.g. *Environmental Protection and Enhancement Act*, [RSA 2000, c E-12](#)), it does not follow from this that the federal government cannot also make a valid law pertaining to the environmental assessment of resource projects where such projects affect federal powers and interests.

Indeed, the Supreme Court of Canada has already decided this issue in favor of the federal government – not once but twice. The first time was in *Friends of the Oldman River Society v Canada*, cited above and alluded to by the Premier in the excerpt introducing this post. That decision, from 1992, involved [the-then controversial Oldman River dam](#) and Canada’s first federal environmental assessment regime, the *Environmental Assessment and Review Process Guidelines Order (Guidelines Order)*. In addition to the passage cited by the Saskatchewan Court of Appeal, the following are also relevant, especially in light of the Premier’s remarks:

What is not particularly helpful in sorting out the respective levels of constitutional authority over a work such as the Oldman River dam, however, is the characterization of it as a “provincial project” or an undertaking “primarily subject to provincial regulation” as the appellant Alberta sought to do. That begs the question and posits an erroneous principle that seems to hold that there exists a general doctrine of interjurisdictional immunity to shield provincial works or undertakings from otherwise valid federal legislation...

What is important is to determine whether either level of government may legislate. One may legislate in regard to provincial aspects, the other federal aspects. Although local projects will generally fall within provincial responsibility,

federal participation will be required if the project impinges on an area of federal jurisdiction as is the case here...

In essence, then, the *Guidelines Order* has two fundamental aspects. First, there is the substance of the *Guidelines Order* dealing with environmental impact assessment to facilitate decision-making under the federal head of power through which a proposal is regulated. As I mentioned earlier, this aspect of the *Guidelines Order* can be sustained on the basis that it is legislation in relation to the relevant subject matters enumerated in [s. 91](#) of the [Constitution Act, 1867](#). The second aspect of the legislation is its procedural or organizational element that coordinates the process of assessment, which can in any given case touch upon several areas of federal responsibility, under the auspices of a designated decision maker, or in the vernacular of the *Guidelines Order*, the “initiating department”. This facet of the legislation has as its object the regulation of the institutions and agencies of the Government of Canada as to the manner in which they perform their administrative functions and duties. This, in my view, is unquestionably *intra vires* Parliament. It may be viewed either as an adjunct of the particular legislative powers involved, or, in any event, be justifiable under the residuary power in [s. 91](#). (at 68-69, 73-74, emphasis added)

Thus, environmental assessment is to be understood first and foremost as a process for decision-making – one that both federal and provincial governments may deploy when exercising their respective authorities over resource projects. Two years later, in *Quebec (Attorney General) v Canada (National Energy Board)* [1994 CanLII 113 \(SCC\)](#), the Supreme Court recognized that while the existence of regimes at both levels of government may result in overlapping assessments, this was “neither unusual or unworkable”:

...If in applying [the *National Energy Board Act*, whose application triggered an environmental assessment pursuant to the *Guidelines Order* in this case], the [National Energy] Board finds environmental effects within a province relevant to its decision to grant an export licence, a matter of federal jurisdiction, it is entitled to consider those effects. So too may the province have, within its proper contemplation, the environmental effects of the provincially regulated aspects of such a project. This co-existence of responsibility is neither unusual nor unworkable ... [the Court went on to cite the provisions in the *Guidelines Order* for harmonizing assessments between both levels of government]. (at 193)

Shortly thereafter, in 1995, the *Canadian Environmental Assessment Act* [SC 1992, c 37 \(CEAA 1992\)](#) was brought into force. For our purposes here, it is sufficient to note that *CEAA* was broader in both scope and application than the *EARP Guidelines Order* at issue in Oldman River insofar as it was triggered by federal decision-making generally. Where the federal government proposed a project, provided financial assistance to a project, issued a permit or authorization for a project, or where a project involved federal lands, *CEAA 1992* generally required a federal environmental assessment.

Like the *Guidelines Order*, *CEAA 1992* was also eventually challenged, this time by Quebec. In *Quebec (Attorney General) v Moses*, [2010 SCC 17 \(CanLII\)](#), the Supreme Court was first and foremost concerned with the potential conflict between *CEAA* and the [James Bay and Northern Quebec Agreement](#). Quebec intervened early in the proceedings, however, resulting in the [certification of a constitutional question](#) regarding the applicability of *CEAA 1992* and its regulations to a proposed vanadium mine, construction and operation of which was expected to impact fish and fish habitat (which falls under federal jurisdiction by virtue of section 91(12) of the *Constitution Act, 1867*). While recognizing that such projects fall within provincial jurisdiction under section 92A, the Court observed that any project in Canada that puts fish habitat at risk could not proceed without a permit from the federal Fisheries Minister, who in turn could not issue a permit until after the completion of an assessment pursuant to the *CEAA 1992*:

There is no doubt that a vanadium mining project, considered in isolation, falls within provincial jurisdiction under s. 92A of the *Constitution Act, 1867* over natural resources. There is also no doubt that ordinarily a mining project anywhere in Canada that puts at risk fish habitat could not proceed without a permit from the federal Fisheries Minister, which he or she could not issue except after compliance with the *CEAA*. The mining of non-renewable mineral resources aspect falls within provincial jurisdiction, but the fisheries aspect is federal. (at para 36)

Critical to understanding the constitutional significance of *Moses* is that the Supreme Court had just rendered its only other *CEAA*-related decision a few months earlier. The main issue in *Miningwatch Canada v Canada* [2010 SCC 2 \(CanLII\)](#) was whether the federal government could restrict the scope of the projects that required assessment to those aspects that required federal approval (e.g. the destruction of a creek requiring *Fisheries Act* approval rather than the construction of an oil sands mine) – an approach that was often justified on constitutional grounds (see e.g. *Prairie Acid Rain Coalition v Canada (Minister of Fisheries and Oceans)*, [2006 FCA 31 \(CanLII\)](#)). The Supreme Court held that the project subject to assessment was the project *as proposed by a proponent*, not as scoped by federal departments. Combining these two decisions, there appears to be no constitutional barrier preventing the federal government from assessing resource projects – in their entirety – on the basis that they may have impacts on areas of federal jurisdiction, such as fisheries, navigation, migratory birds, and transboundary effects (for this last point, see *Interprovincial Co-operatives Ltd. et al v R*, [1975 CanLII 212 \(SCC\)](#)).

To summarize, jurisdiction over the environment is shared between the federal and provincial governments. This sharing results in some “overlap” (*Friends of the Oldman River, supra*), which is neither “unusual nor unworkable” (*Quebec (Attorney General) v Canada (National Energy Board, supra)*). Although structured somewhat differently, in both instances where the federal environmental assessment regime has been challenged (the *EARP Guidelines Order* and *CEAA 1992*), the federal government has prevailed. As further set out below, it is also likely to prevail in any challenge to Bill C-69.

II. Bill C-69: *The Impact Assessment Act and the Canadian Energy Regulator Act*

The rules for assessing the constitutional validity of a federal or provincial statute are well developed. According to the Supreme Court in *Rogers Communications, supra*:

The first step in a division of powers analysis is to determine whether the level of government or the entity exercising delegated powers possesses the authority under the Constitution to enact the impugned statute or adopt the impugned measure ... This is achieved by characterizing the “pith and substance” of the statute or measure ...

In analyzing the pith and substance of [a measure] ... the Court must consider both its purpose and its effects... (at paras 34-37, references omitted)

A. *The Impact Assessment Act*

The *Impact Assessment Act (IAA)* is found in Part 1 of Bill C-69. If passed, it will be the fourth environmental assessment regime to be implemented at the federal level in as many decades. This is because, as noted in the introduction to this post, the [IAA is a response to the previous Conservative government’s 2012 omnibus budget bills](#), which among other things repealed the original *CEAA* (Canada’s second regime) and replaced it with the current *Canadian Environmental Assessment Act, 2012* [SC 2012, c 19, s 52](#) (the third regime). We focus our analysis on *CEAA, 2012* because, from a constitutional perspective and despite so much rhetoric, [the IAA is structured identically](#).

The most important difference between *CEAA, 1992* and *CEAA, 2012* is that while the former was triggered by federal decision-making generally (triggering approximately 3,000 assessments/year), *CEAA, 2012* is first triggered on the basis of a “major project” list contained in a regulation (requiring approximately 70 assessments/year). A second difference is that *CEAA, 2012* process ends with its own “decision-statement” (i.e. certificate) setting out whether a project is approved and, if so, any applicable terms and conditions, whereas the original *CEAA*, being an adjunct to other federal regimes (e.g. the *Fisheries Act*, the *National Energy Board Act*), relied on those regimes for implementation.

Were this to be it, we acknowledge that there might be some uncertainty as to the constitutionality of the *CEAA, 2012* regime. At the very least, considerable care would have to be taken in drafting the project list to ensure that the projects contained there had a reasonable likelihood of impacting areas of federal jurisdiction. Critically, with the exception of projects regulated by the National Energy Board and the Canadian Nuclear Safety Commission (where federal jurisdiction is obvious), the presence of a project on the list *does not automatically* mean that an assessment will be required. Pursuant to section 10, the Canadian Environmental Assessment Agency must then make a decision (referred to as a screening decision) as to whether to require an assessment, taking into account several factors, including “the possibility that the carrying out of the designated project may cause adverse environmental effects” (para 10(1)(b)). Pursuant to subsection 5(1), “adverse environmental effects” are defined as:

- (a) a change that may be caused to the...components of the environment that are within the legislative authority of Parliament;
- (b) a change that may be caused to the environment that would occur (i) on federal lands, (ii) in a province other than the one in which the... designated project...is being carried out, or (iii) outside Canada; and
- (c) with respect to aboriginal peoples, effects on... (i) health and socio-economic conditions, (ii) physical and cultural heritage, (iii) the current use of lands and resources for traditional purposes, or (iv) any structure, site or thing that is of historical, archaeological, paleontological or architectural significance. (Emphasis added)

Finally, subsection 5(2) also includes effects that are “directly linked or necessarily incidental” to the exercise of a federal power, duty or function. Simply put, a key consideration in the screening decision is whether the project is *in fact* likely to have adverse effects on matters falling within federal jurisdiction.

In our view, this screening decision secures both *CEAA, 2012*'s and the *IAA*'s constitutionality (for the *IAA*, see section 16 and related definitions). Such a step is necessary because while in practice most projects on the project list will also require some kind of federal approval or authorization, and this would be sufficient to render the regime's application to such projects constitutional (as in *Moses v Canada, supra*), strictly speaking that is not necessary to trigger the Act's application. In such instances, the screening decision secures Parliament's jurisdiction. Viewed this way, *CEAA, 2012* is not merely an adjunct like its predecessors; it is more of a hybrid, having both procedural elements but also substantive one for “protect[ing] the components of the environment that are within the legislative authority of Parliament from significant adverse environmental effects caused by a designated project” (*CEAA, 2012* at para 4(1)(a)). Like the *EARP Guidelines Order*, then, it can be upheld by reference to those various subject matters enumerated in [s. 91](#) of the *Constitution Act, 1867*. Where federal approvals are necessary, the Act recognizes the government's jurisdiction to consider the effects of its own decisions, although this is limited to those that are “directly linked or necessarily incidental” to the issuance of such approvals.

Although the scope of assessment under the *IAA* will be broader than the *CEAA, 2012*, in that it explicitly contemplates not just environmental effects but also social, economic, and health effects, like environmental effects these are all tethered back to those that fall within Parliament's legislative authority or which can be considered directly linked or necessarily incidental to the exercise of a federal power or function (*IAA* at section 2). In our view, the *CEAA, 2012* and *IAA* regimes are actually more timid, constitutionally, than the original *CEAA* as [interpreted by the Supreme Court of Canada in *Miningwatch Canada, supra*](#).

B. Canadian Energy Regulator Act

Our analysis of Part 2 of Bill C-69, the *Canadian Energy Regulator Act (CERA)*, which will establish the Canadian Energy Regulator, can be brief for three reasons. First, notwithstanding the new name, much of the content of the new *CERA* follows (in many cases verbatim) the language of the *National Energy Board Act, RSC 1985, c N-7 (NEBA)*. The details of this have been covered in a previous post: see [“Some Things have Changed but Much Remains the Same: the New Canadian Energy Regulator”](#). Second, over the years that *NEBA* has been in force, the Act has not been subject to significant constitutional challenge. There have been concerns as to how far upstream the Act can reach (e.g. gas processing and gathering lines, see *Westcoast Energy Inc. v Canada (National Energy Board)*, [1998 CanLII 813 \(SCC\)](#), *Quebec (Attorney General) v Canada (National Energy Board)*, *supra*), as well as downstream (e.g. by-pass facilities, see *Reference re: National Energy Board Act*, [1987 CanLII 5285 \(FCA\)](#), and natural gas storage, see *Dome Petroleum Ltd v National Energy Board* (1973), 73 NR 135 (FCA)) but these questions go to the applicability of the legislation in particular factual circumstances rather than its validity. Third, the Premier should have no interest in attacking the validity of *NEBA* and the successor provisions in *CERA*. After all, the provisions on the construction of interprovincial pipelines are crucial to the permitting and construction of the TransMountain Expansion (TMX) project or indeed any other take-away pipeline facilities. Premier Kenney *needs* these federal powers.

The principal reasons for the lack of challenges to the validity of the legislation is simply that the legislation falls four square within two heads of federal power. The most significant head of federal power is section 91(29) when read in conjunction with section 92(10)(a). Together these provisions afford the federal parliament with the exclusive power to make laws in relation to international and interprovincial works and undertakings.

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say ...

29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say ...

10. Local Works and Undertakings other than such as are of the following Classes:

(a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province.

This does not mean that a province cannot assess the environmental implications of a federal pipeline (as demonstrated in *Coastal First Nations v British Columbia (Environment)*, [2016 BCSC 34](#) (CanLII), *Vancouver (City) v British Columbia (Environment)*, [2018 BCSC 843](#) (CanLII), *Squamish Nation v British Columbia (Environment)*, [2018 BCSC 844](#) (CanLII)), but a provincial environmental assessment law cannot be applied in such a manner as to [frustrate the purpose of the federal law/head of power](#).

Furthermore, to the extent that *NEBA* (and in the future *CERA*) is concerned with the commodity itself rather than works or undertakings (oil and gas or electricity), the legislation may also draw support from the federal trade and commerce power which affords the federal parliament the exclusive power to make laws in relation to “The Regulation of Trade and Commerce”: see *Caloil Inc. v Attorney General of Canada*, [1970 CanLII 194](#) (SCC).

The *CERA* division of Bill C-69 has nine parts. Part 1 deals with the establishment of the *CERA*. Part 2 is entitled Safety, Security, and Protection of the Environment and deals with cradle to grave regulation of international and interprovincial pipelines. Part 3 provides the scheme for the approval of new pipelines, as well as provisions dealing with the economic regulation of pipelines. This part includes the public convenience and necessity test for new pipelines and requires the regulator or the *IAA* panel in making a recommendation to the Governor in Council to have regard to “the extent to which the effects of the pipeline hinder or contribute to the Government of Canada’s ability to meet its environmental obligations and its commitments in respect of climate change” (section 183(2)(j)). This paragraph, as with others in the same section, is clearly tied to the “effects” of the pipeline and indeed the chapeau to the section insists that they must be “directly related to the pipeline”.

Part 4 deals with international and interprovincial powerlines. Part 5 is new and deals with offshore renewable energy projects and offshore powerlines. The offshore is defined in terms of marine areas that are not within a province. To the extent that these provisions of *CERA* cannot be justified under section 91(29) of the *Constitution Act, 1867* they can rely on the federal peace, order, and good government power (POGG), given the inability of provincial governments to make laws for areas and activities outside the province: *Reference re Upper Churchill Water Rights Reversion Act*, [1984 CanLII 17](#) (SCC). Part 6, entitled “lands”, deals with the acquisition of a right of way to facilitate construction of approved pipelines or powerlines. Old authority confirms that this is a valid exercise of federal power even in relation to provincial Crown lands (*Quebec (Attorney General) v Nipissing Central Railway Company*, [1926 CanLII 280](#) (UK JCPC)). Part 7 deals with exports and imports of oil and gas and electricity and can be justified under the trade and commerce power. Part 8 deals with some aspects of oil and gas exploration and conservation, but solely with respect to federal property held under the *Canada Petroleum Resources Act*, [RSC 1985, c 36 \(2nd Supp\)](#) and is therefore justified either under section 91(1A) public debt and property or under the *Constitution Act, 1871*. Part 9 is headed general and is ancillary to the balance of the statute.

In sum, there can be little doubt as to the constitutional validity of the *CERA* part of Bill C-69. To extent that the *CERA* incorporates provisions of the *IAA*, the validity of these incorporation provisions will stand or fall with the validity of the *IAA* provisions themselves. As set out above, we suggest that they are very likely to stand.

This post may be cited as: Martin Olszynski and Nigel Bankes, “Setting the Record Straight on Federal and Provincial Jurisdiction Over the Environmental Assessment of Resource Projects in the Provinces” (May 24, 2019), online: ABlawg, http://ablawg.ca/wp-content/uploads/2019/05/Blog_MO_NB_BillC69.pdf

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