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## **The Rhetoric of Property and Immunity in the Majority Opinion in the *Impact Assessment Reference***

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**Opinion Commented On:** *Reference re Impact Assessment Act*, [2022 ABCA 165 \(CanLII\)](#).

The Alberta Court of Appeal recently released its opinion in *Reference re Impact Assessment Act*, [2022 ABCA 165 \(CanLII\)](#). A majority of the Court found the *Impact Assessment Act*, [SC 2019, c. 28, s 1 \[IAA\]](#) to be unconstitutional. [Our colleague Martin Olszynski has already summarized the majority’s approach and some of the doctrinal difficulties therein.](#)

In this post, we consider in more detail the majority’s lengthy discussion of the historical evolution of the resource rights of the prairie provinces from the creation of Alberta and Saskatchewan as provinces in 1905, through to the Natural Resources Transfer Agreements (NRTAs) of 1930, culminating with the adoption of s 92A (the Resources Amendment) in 1982.

The majority’s historical account provides useful context, but it also seems designed to perform two more rhetorical purposes. First, the majority seeks to characterize the federal *IAA* as interference with provincial property rights. Second, the majority builds an implied immunity argument to protect a supposed provincial “right to development” from federal interference. In our view, both rhetorical claims seriously overstate provincial authority and, in particular, overstate the effect of both the Resources Amendment and Crown ownership of public lands and resources within a province, and also conflate the two in unhelpful ways.

In what follows we track the organization of the majority’s opinion, beginning with the period from 1905 – 1930, through the adoption and amendment of the NRTAs, followed by the period from 1930 through to the 1982 adoption of the Resources Amendment. We conclude with some discussion of the alternative argument of Alberta and Saskatchewan with respect to interjurisdictional immunity.

### **From 1905 to 1930**

Alberta was established as a province in 1905 by a federal statute (the *Alberta Act*, 1905, 4 & 5 Edw VII, c3) as authorized by s 2 of the *British North America Act (BNA Act or Constitution Act)* of 1871. The long name of that Imperial statute is “*An Act respect the establishment of provinces in the Dominion of Canada*”. Section 3 of the *Alberta Act* provided that the *BNA Acts of 1867 – 1886* would apply to Alberta in the same manner as to the original provinces of Confederation, except as varied by the *Act*.

Two aspects of the *Alberta Act* are relevant to our analysis of the majority opinion. First, there was nothing in the *Alberta Act* to vary the application of s 92 of the *Constitution Act, 1867* to Alberta. In other words, Alberta was born as a province with exactly the same legislative powers as the original provinces of Confederation. Second, s 21 of the *Alberta Act* did vary the application of s 109 of the *Constitution Act, 1867*. Section 109 provided that the public (Crown) lands and resources within each of the original confederating provinces would remain vested in that province after Confederation. By contrast, s 21 of the *Alberta Act* provided that the public (Crown) lands and resources within Alberta would remain vested in Canada (or under the administration and control of Canada). This provision denied Alberta ownership of public (Crown) lands and resources within the province, with the implication that there were no lands or resources on which s 92(5) of the *Constitution Act, 1867* (“The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon”) could operate.

The fact that s 92 of the *Constitution Act, 1867* applied to Alberta from 1905 means that Alberta could have made laws in relation to the conservation of oil and gas resources in the province at any time from 1905 onwards, pursuant to s 92(13) (property and civil rights), s 92(16) (all matters of a local nature), s 92(9) (licensing regimes), or s 92(10) (local works or undertakings). The decision of the Supreme Court of Canada in *Spooner Oils Ltd v Turner Valley Gas Conservation*, [1933 CanLII 86 \(SCC\)](#), [1933] SCR 629 is crystal clear on this point:

As respects tracts of land held in fee simple, totally different considerations apply. Such tracts have ceased to be the public property of the Dominion, and in the absence of some Dominion enactment relating to matters comprised within the subject of the public property, that would have the effect of limiting the jurisdiction of the provinces under 92(10) (13) and (16) there is no ground on which such legislation could, as affecting such lands, be held to be *ultra vires*. (at 644)

The point that Chief Justice Lyman Duff is making here is that while a provincial conservation law might be inapplicable to what was then still federal property (as part of the core content of s 91(1A) and the doctrine of interjurisdictional immunity [IJI], further discussed below), such a law would be valid and could apply to private lands in the province. The fact that Alberta chose not to pass its first oil and gas conservation law until 1932 is irrelevant to the question of the validity of such a law if passed prior to 1930.

So, what does the majority say about this period between 1905 and 1930?

While the majority’s opinion generally tracks the account above, the majority does not always make a clear distinction between resources in the province that are publicly owned and those that are privately owned. For example, the majority simply states that “[u]nlike other provinces, for decades following their entering into Confederation, the prairie provinces were denied ownership of the natural resources in their provinces” (at para 53). The majority omits [that these resource rights were used to encourage settlement](#) both by the federal government directly, or through arrangements with the Hudson’s Bay Company and the Canadian Pacific Railroad. They were not simply held by Ottawa to the detriment of progress in Alberta.

The majority is also inconsistent with respect to provincial jurisdiction to enact conservation laws before 1930. At para 56, the majority is emphatic that “provinces possess legislative authority to regulate non-Crown owned resources by virtue of [ss 92(13) and 92(16)],” yet cites *Spooner Oils* for the proposition that the province only gained the power to make a conservation law through the NRTA. As explained above, *Spooner Oils* clearly establishes that such conservation laws depend on ss 92(10), (13) & (16) and not on s 92(5) or s 109, and thus such laws would have been valid under the provisions of the Constitution, which applied to Alberta from 1905.

## **The Alberta Natural Resources Transfer Agreement**

The purpose of the Alberta NRTA of 1930 was to vary s 21 of the *Alberta Act* and to put Alberta in a position of *equality* with the other Provinces of Confederation “with respect to the administration and control of its natural resources” (Preamble, at para 2).

This was achieved by stipulating that all Crown lands within the province shall henceforward “belong” to the province subject to the same conditions as are contained in s 109 (trusts and interests other than those of the Crown), plus the obligation to observe the terms and condition of interests (e.g. leases) that the Dominion had created. Certain lands were also excluded from the transfer including Indian reserves and national parks as listed in a schedule to the Agreement. In addition, ss 20 – 22 of the NRTA provided some financial terms including compensation to be paid to Alberta as decided by a joint commission of inquiry: see [Report of the Royal Commission on the Natural Resources of Alberta](#) (1935). This compensation (albeit a rough and ready calculation) was intended to represent the “net revenue which the province would probably have obtained from those portions of its resources alienated or otherwise disposed of by the Dominion during the course of its twenty-five year administration” (Report at para 89).

The NRTA did not amend s 92 of the *Constitution Act, 1867* since, as observed above, Alberta already had all the legislative powers of the original provinces of Confederation.

What did the majority opinion say about the Alberta NRTA?

Again, the majority’s opinion generally tracks this account, although the majority again suggests that the province “gained a number of significant new powers” (at para 56), which we would argue is not the case. The province did not obtain new legislative powers via the NRTA, although the transfer did place the now-provincial public lands and resources within the legislative ambit of s 92(5). Furthermore, the majority makes no reference to the financial terms of the Agreement as part of putting Alberta in a position of equality with the original provinces of Confederation.

## **From 1930 to 1982**

The *Spooner Oils* case of 1933 arose as a result of the stipulation in s 2 of the NRTA that Alberta laws would not alter or affect existing interests (such as leases) granted by the Dominion prior to 1930. As such, the Supreme Court held in *Spooner Oils* that conservation legislation did not apply to the Dominion leases held by Spooner. This limitation on provincial authority was addressed when Canada and Alberta agreed to an amendment to the NRTA which took effect in 1938 and made provincial conservation laws of general application applicable to Dominion lessees ([Natural](#)

[Resources Transfer \(Amendment\) Act, SA 1938, c 14](#)). This suggests a willingness on the part of both orders of government to address collaboratively some issues that were identified as a result of the transfer.

The majority opinion does not mention this development (nor does it mention other amendments to the NRTAs relating to water powers) but instead offers an account that focuses on “Federal Government Interventions and Pressures for Constitution Reform” (at para 57). The adoption of the word “intervention” (here and later, at para 76, referring to the curtailment of provincial proprietary rights), carries the implication that the federal government (or perhaps the Court) was acting illegitimately or in breach of the Constitution. The majority opinion offers no support for that characterization.

Under this heading (“Federal Government Interventions and Pressures for Constitution Reform”) the majority makes the following points.

First, the majority acknowledges that “provincial ownership rights were still subject to laws passed by Parliament under its heads of power” (at para 57). Most significantly perhaps, the majority acknowledges that provincial Crown lands are subject to federal expropriation laws where the expropriation is necessary to fulfill legitimate federal purposes, such as the construction of an interprovincial rail line, powerline or, of course, pipeline. The principal authority for this is the decision of the Privy Council in *Attorney-General for Quebec v Nipissing Central Railway Company*, [1926 CanLII 280 \(UK JCPC\)](#), [1926] AC 715.

As the date suggests, however, this case can hardly be cited as having anything to do with any supposed post-1930 attack on provincial resource rights. The majority opinion might also have noted at this point that, generally speaking, the Constitution does not confer immunities on either order of government from the application of the laws of the other order of government. There are only two exceptions to this: s 125 of the *Constitution Act, 1867* which confers a specific taxation immunity (the two levels of government cannot tax each other’s land or property) and the judicially-invented doctrine of interjurisdictional immunity, originating with cases on the application of provincial law to federally-incorporated companies (e.g. *John Deere Plow Co Ltd v Wharton*, [1914 CanLII 603 \(UK JCPC\)](#)). The majority opinion acknowledges neither of these points.

The second federal “intervention” mentioned is the measures adopted by the federal government in response to the OPEC oil embargo in 1973 which resulted in sharply increased international oil prices. These measures included an oil export tax and a domestic price freeze at levels well-below global prices. As noted above, the implication of the majority opinion is that these measures were somehow illegitimate.

Third, the majority opinion refers to the well-known decisions of the Supreme Court of Canada in *Canadian Industrial Gas & Oil Ltd v Government of Saskatchewan et al*, [1977 CanLII 210 \(SCC\)](#), [1978] 2 SCR 545 and *Central Canada Potash Co Ltd et al v Government of Saskatchewan*, [1978 CanLII 21 \(SCC\)](#), [1979] 1 SCR 42 [*Potash*]. It is disingenuous to characterize either of these decisions as federal government interventions. Both cases involved legislative initiatives of Saskatchewan, and challenges of provincial legislation by a third party.

The majority next catalogs the [National Energy Program of 1980](#) through which, inter alia, the federal government sought to obtain a share of the increased economic rents made available by the significant increase in world oil prices. While this is a fact, the majority opinion does not acknowledge that the federal government has the authority to recover a share of available economic rent through its taxation power, so long as it does not tax provincially owned resources (and the immunity lasts only for so long as those resources are owned by the province). Put another way, the Constitution does not, and never has, allocated the tax space between federal and provincial government. Each has the capacity to kill the proverbial goose that lays the golden egg. But both here and in other parts of its opinion, the majority appears to have hitched its legal analysis to its assessment of the desirability – or not – of such policies.

Lastly, the majority omits from this discussion aspects of federal legislation enacted with the express intent to increase the value of provincial oil and gas resources. Consider, for example, that *The National Oil Policy* (1961) reserved markets west of the Ottawa River for western Canadian crude. Even the much-loathed National Energy Program intervened directly to ensure the economic viability of the oil sands resource in Alberta by establishing a floor price for synthetic crude oil to provide a “substantially higher return” on oil sands investments than would have otherwise been the case (at 29).

The majority opinion weaves a narrative of this era which positions the provinces, and the Lougheed government in particular, to be standing as bulwarks against federal intervention in energy markets. That’s true of some types of intervention, but not of others. In April 1973, Premier Lougheed described the protectionist measures in the *National Oil Policy* as the “bare minimum in terms of Confederation,” while also acknowledging that “there wouldn’t be the Canadian petroleum industry as we know it here today,” but for that *minimum* level of federal intervention ([Hansard, April 18, 1973](#)). The Premier would have preferred to see the federal government exercising its jurisdiction over extra-provincial trade in order to provide greater protection from import competition, as he excoriated the rest of Canada for choosing imports, “saving pennies” at the expense of security of domestic supply.

## **Section 92A: The Resources Amendment**

Section 92A, the focus of much of the rhetoric in the majority opinion, reads as follows.

- 92A (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.

- (2) In each province, the legislature may make laws in relation to the export from the province to another part of Canada of the primary production from non-renewable natural resources and forestry resources in the province and the production from facilities in the

province for the generation of electrical energy, but such laws may not authorize or provide for discrimination in prices or in supplies exported to another part of Canada.

(3) Nothing in subsection (2) derogates from the authority of Parliament to enact laws in relation to the matters referred to in that subsection and, where such a law of Parliament and a law of a province conflict, the law of Parliament prevails to the extent of the conflict.

(4) In each province, the legislature may make laws in relation to the raising of money by any mode or system of taxation in respect of

(a) non-renewable natural resources and forestry resources in the province and the primary production therefrom, and

(b) sites and facilities in the province for the generation of electrical energy and the production therefrom, whether or not such production is exported in whole or in part from the province, but such laws may not authorize or provide for taxation that differentiates between production exported to another part of Canada and production not exported from the province.

*Primary production*

(5) The expression *primary production* has the meaning assigned by the Sixth Schedule.

(6) Nothing in subsections (1) – (5) derogates from any power or rights that a legislature or government of a province had immediately before the coming into force of this section.

Section 92A was added to the *Constitution Act, 1867* in 1982 at the time that the constitution was patriated from the United Kingdom, the *Charter of Rights and Freedoms* was adopted, constitutional recognition was afforded to Aboriginal and treaty rights, and a constitutional amending formula was added.

Subsection (1) of s 92A provides that the provinces have the exclusive power to make laws with respect to the exploration for non-renewable natural resources (s 92A(1)(a)), the “development” (a word the significance of which the majority emphasizes at para 415), conservation, and management of non-renewable and forest resources including “the rate of primary production therefrom” (s 92A(1)(b)), and in relation to sites for the generation and production of electrical energy (s 92A(1)(c)).

The major additions to provincial legislative authority, however, come in subsection (2), which affords provinces the concurrent power to make laws with respect to the export of resources to another part of Canada, and in subsection (4), which affords provinces the power to raise money by any mode or system of taxation with respect to natural resources and with respect to the generation of electrical energy. However, the new, concurrent provincial power to make laws in relation to export cannot derogate from the authority of Parliament to make similar laws, and it is expressly stipulated that, in the event of a conflict, the federal laws shall prevail (s 92A(3)). Furthermore there is nothing in s 92A(4) that limits federal taxation powers in any way.

Most commentators consider that s 92A in part confirmed or particularized existing provincial law-making powers and in part expanded them. Nathalie Chalifour writes that a consensus in the

legal academy holds that “92A has not limited federal powers, but in effect created broader overlapping jurisdiction” (Nathalie J Chalifour, “Making Federalism Work for Climate Change: Canada’s Division of Powers Over Carbon Taxes” (2008) 22:2 National Journal of Constitutional Law 119 at 169). The exclusive jurisdiction over the management of natural resources conferred in s 92A(1), on which the majority relies extensively, adds little to provincial legislative authority. In *Potash*, decided *before* the resources amendment was adopted, Chief Justice Bora Laskin had already held that the management of natural resources was within the exclusive legislative ambit of the provinces (at 74). Subsequently, in *Ontario Hydro v Ontario [Labour Relations Board]*, [1993 CanLII 72 \(SCC\)](#), [1993] 3 SCR 327 [*Ontario Hydro*] (decided *after* the resource amendment was enacted), Justice Gerard LaForest observed that “s 92A(1), including para (c), do not, at least at first sight, appear to add much to the broad and general catalogue of provincial powers,” while asserting that fortifying these extant powers was the major role of the section (at 54). Justice Russell Brown writes that 92A “fortifies the pre-existing provincial powers” in his dissent in the *GGPPA References* (at para 346).

In other words, while subsections 92A(3) and 92A(4) did indeed add to the authority of provincial legislatures the power to make laws in relation to exports, and the power of indirect taxation with respect to natural resources, the powers articulated in subsection (1) are largely affirmative of existing legislative powers in s 92, with the possible exception of the power to make laws in relation to the rate of production - at least insofar as the resources in question were destined for interprovincial or international trade.

The majority devotes an entire part of their opinion (Part VI) to a discussion of “The Purpose and Scope of the Resources Amendment”. The majority begins by dismissing unnamed commentators who “think or prefer to think that s 92A is a constitutional nothing” (at para 74). That cannot be the case, according to the majority, since no legislature enacts unnecessary laws. At the same time, the majority does acknowledge that part of the function of the new section was to resolve ambiguity and to define “with precision exactly what provincial governments had the exclusive jurisdiction to do as owners of those resources” (at para 76, emphasis in original).

This is just one of the many references in the opinion to the *exclusive* jurisdiction of the provincial legislatures under s 92A, but the juxtaposition – if not conflation – of this power to make laws with that of ownership is strange. The exclusive powers referenced in s 92A(1) apply to resources and electricity generating sites in the province *regardless* of ownership. The same is true of the entire section. The reference to ownership in the sentence above seems to be a rhetorical flourish designed to make it appear that s 92A is doing more (e.g. protecting provincial property rights) than it actually does.

Section 92A adds nothing to provincial proprietary rights. While s 92A(6) makes it clear (see para 413 & n 204) that the section does not derogate from provincial proprietary rights, there is nothing in s 92A that affords additional protection to provincial property rights. At the risk of stating the obvious, s 92A – like all other legislative heads of powers – is about assigning the authority to *make laws* in relation to certain classes of subjects. Laws that are in “pith and substance” about managing natural resources in the province fall within s 92A’s legislative authority. Those that are not, do not.

Neither was the resources amendment intended to confer an immunity on provincial resource rights against federal legislation. *AG Quebec v Nipissing* (above) is still good law and provincial resource rights are just as vulnerable today to the valid exercise of federal power as they were in 1925. To its credit, the majority seems to recognize this when it acknowledges that provincial resource rights may be subject to the proper exercise of POGG, the declaratory power, or federal authority with respect to interprovincial undertakings, but it appears to be of the view that this is all exceptional:

Section 92A does not override Parliament’s “Peace, Order, and good Government” (POGG) power nor its powers under both s 92(10)(a) vis à vis interprovincial undertakings and s 92(10)(c) to declare a work or undertaking for the benefit of Canada or two or more provinces: *Ontario Hydro v Ontario (Labour Relations Board)*, [1993 CanLII 72 \(SCC\)](#), [1993] 3 SCR 327 [*Ontario Hydro*]; *Westcoast Energy Inc v Canada (National Energy Board)*, [1998 CanLII 813 \(SCC\)](#), [1998] 1 SCR 322 at paras 80-84. But short of the proper invocation of these powers, the purpose of s 92A, when passed, was to ensure that the approval of projects for the exploration, development, conservation and management of 92A natural resources was vested exclusively in the province that owned them. (at para 81, emphasis added.)

This paragraph requires substantial unpacking. First, in our view, Section 92A does not override any federal power, and so this paragraph must apply equally to every single head of s 91. Properly invoked, a law passed under the fisheries or criminal law power, for example, may validly affect the exercise of resource rights within a province. The same is clearly true for federal laws passed under the trade and commerce power (the retained federal jurisdiction in this regard is explicitly referenced in s 92A(3)).

Section 92A does not provide for exclusive provincial jurisdiction over resource projects. The majority decision in *Westcoast Energy Inc v Canada [National Energy Board]*, [1998 CanLII 813 \(SCC\)](#), [1998] 1 SCR 322, states that the language of s 92A(1)(b) “does not refer to jurisdiction over ‘sites and facilities’, but more generally to jurisdiction over ‘development, conservation and management of non-renewable resources’” (at para 84). The exclusivity in s 92A refers to the subject matter of legislation. Laws affecting resource projects may be validly enacted by the federal government (*Quebec (Attorney General) v Moses*, [2010 SCC 17 \(CanLII\)](#), [*Moses*] at para 36). In fact, the majority contradicts its own assertion that the provinces have exclusive jurisdiction with respect to major projects in note 109, when it quotes the opinion of Justice Ian Binnie in *Moses*, which held that federal fisheries legislation could validly restrict the development of an intra-provincial project because “the mining of non-renewable mineral resources aspect falls within provincial jurisdiction, but the fisheries aspect is federal.” The fact that a federal law affects a resource project in a province offer no grounds upon which to judge the validity of that federal law. On the contrary, as Chief Justice Beverley McLachlin wrote in *Canada (Attorney General) v PHS Community Services Society*, [2011 SCC 44 \(CanLII\)](#), [*Insite*] it is “untenable to argue that a valid federal law becomes invalid if it affects a provincial subject” (at para 51).

Neither do provincial proprietary rights carry with them a right of development. The majority states (at para 413) that s 92A “explicitly authorizes the exercise of the provinces’ proprietary rights,” and that, as such, “no exploration for 92A natural resources can be undertaken without provincial permits.” While we might quibble with the assertion that such permits will always be necessary



(the need for a permit will always be contingent on the specifics of provincial legislation), the more important question raised here is whether compliance with provincial requirements is not only a necessary but also a sufficient condition for development to proceed.

Neither provincial resource ownership nor the exclusive legislative ambit formalized in s 92A offer provinces a monopoly on the terms and conditions on which resource projects within a province “will be constructed and operated” (at para 82), nor does either grant the provinces an “exclusive right to development” (at para 415) of provincial resources or “ensure that the approval of projects [...] was vested exclusively in the province that owned them” (at para 81). On the contrary, as Professor LaForest (as he then was) wrote, “there is no doubt [...] that the Dominion may very seriously affect provincial property by legislation” (Gerard V La Forest, *Natural Resources and Public Property Under the Canadian Constitution* (Toronto, Ontario, Canada: University of Toronto Press, 1969) at 148), an assertion confirmed in *Moses*.

### **Interjurisdictional Immunity?**

As noted above, at several points the majority seems to be articulating a claim that s 92A alone, or s 92A when read together with the NRTA and s 109, affords provinces what the majority refers to (at para 415) as a guaranteed right to the development of s 92A resources, along with an implied immunity from federal law. Perhaps the clearest articulation of this position is found in a part of the opinion headed “Provincial Heads of Power” (at para 409) and a subsection headed “Section 109 – Proprietary Rights as Owner of Public Lands” (we pause to clarify that s 109, found in Part VIII of the *Constitution Act, 1867*, is not a head of legislative power). The relevant extract reads as follows:

A province’s proprietary rights along with its exclusive powers under s 92A(1) include the right to exploit its natural resources. As the Supreme Court stated in *Natural Gas Tax* at 1080: “The allocation in 1930, by agreement and constitutional amendment, of property to the Crown in the right of the Province of Alberta necessarily carries with it the right of the province to the proceeds of disposition – in the words of Duff J to ‘enjoy the fruits of that property’. The resources were intended to be an important source of revenue, indeed the basis of the provincial financial integrity, and *therefore must be capable of realization*” (emphasis added). Section 92A(1) put this beyond doubt when it comes to the 92A natural resources since it expressly guarantees the provinces the exclusive right to “development” of those resources. (at para 415, emphasis added)

We agree with the propositions that, where the province owns public lands and resources, the province is entitled to the proceeds of disposition of that property and that, so long as this property is still owned by the province, there is also an immunity from taxation (s 125). But it is an entirely different thing to say that the reference to “development” in s 92A is an express guarantee (an implied immunity from contrary federal laws) that publicly- and privately-owned resources in the province can be developed with regard only to provincial values, goals, and objectives. Parliament could not make a law prohibiting the province from granting oil and gas leases for provincially-owned resources, nor could Parliament pass legislation precluding a province from granting regulatory licenses to develop publicly- or privately-owned oil and gas resources. But Parliament can, in exercising federal jurisdiction, make a law that impinges on resource development within

a province (see *Moses* at para 36) or deny federal permits required for such development (*Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992 CanLII 110 \(SCC\)](#), [1992] 1 SCR 3 at 59) to the extent that doing so is based on federal jurisdiction.

Given that much of the majority’s decision relies on an implied immunity claim, it is perhaps surprising that the majority’s treatment of the doctrine of interjurisdictional immunity [IJI] consists of a mere three paragraphs (at paras 428 – 430). The first two paragraphs make the point that IJI has principally been used to protect the core of federal powers, but that cases such as *Canadian Western Bank v Alberta*, [2007 SCC 22 \(CanLII\)](#), [*Canadian Western Bank*], and the *Insite* decision, as well as academic authority, support the view that, in principle, the immunity should be available on equal terms to the provinces. Not surprisingly, in making this point, the majority once again refers to the “exclusive” nature of provincial legislative powers:

Not only are the provincial powers under s 92 just as “exclusive” as the federal ones under s 91, so too are the provincial powers under s 92A(1). Thus, “each provincial head of power, no less than each federal head of power, has a ‘basic, minimum and unassailable content’ that is immune from incursion by the other level of government.” (at para 429, citing Hogg at §15:21)

But, while both Alberta and Saskatchewan had relied on IJI (at para 428) in the alternative, the majority concluded that even if there might be a case to invoke IJI, it would not be wise for the Court to make a ruling based on IJI in the absence of a clearer understanding of the core content of provincial powers (including, once again, s 109) (at para 430). Given all that the majority has said about the apparently massive content of provincial legislative and proprietary powers, this was perhaps a surprising conclusion. But perhaps the bigger difficulty facing the majority on this point is that the Supreme Court has consistently signalled over the last 15 years that it considers that IJI should only be used cautiously and based upon existing precedent, and that the doctrine is generally not suitable for broadly framed heads of power (federal or provincial).

In *Canadian Western Bank* the Supreme Court of Canada observed that an expansive application of the IJI (closely associated with the outdated watertight compartments approach) would not be consistent with the “dominant tide” of constitutional doctrine which “finds its principled underpinning in the concern that a court should favour, where possible, the ordinary operation of statutes enacted by both levels of government. In the absence of conflicting enactments of the other level of government, the Court should avoid blocking the application of measures which are taken to be enacted in furtherance of the public interest.” (Justices Ian Binnie and Louis LeBel at para 37)

Justices Binnie and LeBel went on to note the origins of the doctrine in the narrow field of protecting federally incorporated companies from provincial legislation “affecting the essence of the powers conferred on them as a result of their incorporation” (at para 39) before observing as follows:

While the text and logic of our federal structure justifies the application of interjurisdictional immunity to certain federal “activities” nevertheless, a broad application of the doctrine to “activities” creates practical problems of application much greater than

in the case of works or undertakings, things or persons, whose limits are more readily defined. A broad application also appears inconsistent, as stated, with the flexible federalism that the constitutional doctrines of pith and substance, double aspect and federal paramountcy are designed to promote. See F. G  linas, “La doctrine des immunit  s interjuridictionnelles dans le partage des comp  tences:   l  ments de syst  matisation”, in *M  langes Jean Beetz* (1995), at p. 471, and Hogg, at para. 15.8(c). It is these doctrines that have proved to be most consistent with contemporary views of Canadian federalism, which recognize that overlapping powers are unavoidable. Canadian federalism is not simply a matter of legalisms. The Constitution, though a legal document, serves as a framework for life and for political action within a federal state, in which the courts have rightly observed the importance of cooperation among government actors to ensure that federalism operates flexibly.

Excessive reliance on the doctrine of interjurisdictional immunity would create serious uncertainty. It is based on the attribution to every legislative head of power of a “core” of indeterminate scope — difficult to define, except over time by means of judicial interpretations triggered serendipitously on a case-by-case basis. The requirement to develop an abstract definition of a “core” is not compatible, generally speaking, with the tradition of Canadian constitutional interpretation, which favours an incremental approach. While it is true that the enumerations of ss. 91 and 92 contain a number of powers that are precise and not really open to discussion, other powers are far less precise, such as those relating to the criminal law, trade and commerce and matters of a local or private nature in a province. (at paras 42 – 43).

The majority concluded that “we intend now to make it clear that the Court does not favour an intensive reliance on the doctrine, nor should we accept the invitation of the appellants to turn it into a doctrine of first recourse in a division of powers dispute” (at para 47).

While the Court applied the doctrine of IJI in *Quebec Pilots Association*, [2010 SCC 39 \(CanLII\)](#), [2010] 2 SCR 536 [*COPA*] and in *Rogers Communications Inc v Ch  teauquay (City)*, [2016 SCC 23 \(CanLII\)](#), [2016] 1 SCR 467 [*Rogers*] it did so in both cases on the basis that the application of IJI in each instance was covered by precedent with respect to the relevant head of power (aeronautics and radio communications). The court went one step further in *Tsilhqot’in Nation v British Columbia*, [2014 SCC 44 \(CanLII\)](#), [2014] 2 SCR 257, when it held that IJI should not be used (as it had been in the past) to protect the core of s 91(24) (Indians and Lands Reserved for the Indians) where the more nuanced protection offered by s 35 of the *Constitution Act, 1982* was available. Once again, the Court stressed that IJI was too blunt a tool to deal with modern realities:

Increasingly, as our society becomes more complex, effective regulation requires cooperation between interlocking federal and provincial schemes. The two levels of government possess differing tools, capacities, and expertise, and the more flexible double aspect and paramountcy doctrines are alive to this reality: under these doctrines, jurisdictional cooperation is encouraged up until the point when actual conflict arises and must be resolved. (at para 148)

In sum, while IJI may, in principle be available to protect the core of provincial heads of power, the Court has firmly signaled that it will be reluctant to expand application of the doctrine to either federal or provincial governments.

The *Insite* decision confirms that any attempt to rely on IJI in the context of resource development (or what the majority refers to as s 92A resources) would face formidable challenges. It will be recalled that various parties in *Insite* sought to argue that IJI protected provincial jurisdiction over health care (drawing upon ss 92(7), (13) & 16) – much as Alberta draws upon ss 92(10), (13) & (16) and s 92A for its jurisdiction over intra-provincial resource projects. Chief Justice McLachlin gave three reasons for rejecting the IJI argument in *Insite*. The first was its novelty, especially in light of the Court’s expressed reluctance to expand the scope of IJI (at para 67).

Second, there was the difficulty associated with identifying

... a delineated ‘core’ of an exclusively provincial power. The provincial health power is broad and extensive. It extends to thousands of activities and to a host of different venues. Such a vast core would sit ill with the restrained application of the doctrine called for by the jurisprudence. To complicate the matter, Parliament has power to legislate with respect to federal matters, notably criminal law, that touch on health. [...] The federal role in the domain of health makes it impossible to precisely define what falls in or out of the proposed provincial “core”. Overlapping federal jurisdiction and the sheer size and diversity of provincial health power render daunting the task of drawing a bright line around a protected provincial core of health where federal legislation may not tread. (at para 68)

And third, there was the risk of creating a legislative vacuum where no level of government would have the authority to act.

All three reasons seem applicable here. The case would be novel. As for the second ground, substitute “environment” for “health” and one perhaps begins to see why the majority in the *IAA Reference* was reluctant to embark on identifying the core of provincial powers. It is simply too difficult to find that which is exclusively provincial when one has to take into account federal powers over fisheries, criminal law, navigable waters and migratory birds. The majority appears to have felt the same way about the natural resources powers and decided that the issue of the constitutionality of the *IAA* was best decided under the pith and substance doctrine.

And as for the risk of a vacuum, one could imagine, for example, that a broad reading of the core content of provincial resource power and an accompanying immunity might make it very difficult to address the protection of species at risk.

And finally, application of IJI to provincial resources would seem to constitute an unwarranted extension of the express immunity granted by s 125. Section 125 confirmed that the authors of the constitutional settlement expressly addressed their minds to the issue of immunity in the context of land and resources and decided to confer a limited immunity – an immunity from taxation and not a broader immunity from the validly passed laws of another order of government.

## Conclusion

In our view, the majority’s Opinion that the *IAA* represents unacceptable federal overreach is based upon an inflated interpretation of the NRTAs, s 109 and provincial property rights, and the implications of s 92A.

Much of the majority’s analysis relies on the claim that s 92A, read together with s 109, affords provinces an express right to development and an implied monopoly over project approvals. The jurisprudence does not support those claims. Instead, it supports the view that federal laws can prevent the development of intra-provincial resource projects (*Moses* at para 36) and may impose terms and conditions that are necessary conditions for such projects to be allowed to proceed. Furthermore, while the majority opinion toys with the availability of IJI for intra-provincial resource projects, any such reliance is inconsistent with the “dominant tide” of current constitutional doctrine.

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