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Playing Games with the Constitution: The Saskatchewan First Act

By: Nigel Bankes, Andrew Leach, and Martin Olszynski

Matter commented on: [Bill 88: An Act to Assert Saskatchewan's Exclusive Legislative Jurisdiction and to Confirm the Autonomy of Saskatchewan](#)

On November 1, 2022, Bronwyn Eyre, as Minister of Energy and Resources and Minister of Justice and Attorney General, introduced Bill 88, The Saskatchewan First Act, for First Reading in Saskatchewan's Legislative Assembly. Bill 88 is comprised of a lengthy preamble and three separate parts. Part 1 is entitled "Preliminary Matters and Constitutional Assertion". Part 2 proposes amendments to the Constitution of Saskatchewan and Part 3 establishes an Economic Impact Assessment Tribunal.

This post offers a descriptive account of the different elements of the Bill and then provides analysis and critique. Briefly, and as further set out below, we are of the opinion that Parts 1 and 2 of Bill 88 constitute, in different measures, pure surplusage and constitutional overreach. Part 3 is different – it merely sets out a legislated process for studies and reports. Any subsequent decisions or actions taken based on those reports, however, could be subject to scrutiny on either constitutional or administrative law grounds, or both.

The structure and content of Bill 88 should be of particular interest to Albertans insofar as it presages [what we might expect to see](#) when we finally have the text of Premier Smith's proposed and controversial Alberta Sovereignty Act. We return to the similarities between these two policies at the end of this post.

The Preamble

The Preamble establishes the premises for the legislation. It begins by reciting certain historical facts, namely that while Saskatchewan was established as a province in 1905, the Government of Canada "retained jurisdiction" over Crown lands and natural resources within the province until the province gained "autonomy" of these lands and resources in 1930 through the terms of the *Natural Resources Transfer Agreement*. The Preamble goes on to recite that the addition of [s 92A](#) to the [Constitution Act, 1867](#) in 1982 "confirmed and strengthened" Saskatchewan's "exclusive legislative jurisdiction" in relation to natural resources and in relation to "several aspects of Saskatchewan's economy". The recitals continue with what might best be described as a series of allegations that "the Government of Canada has unilaterally intruded into core areas of Saskatchewan's exclusive legislative jurisdiction," which "causes economic harm and uncertainty to Saskatchewan residents and enterprises". Given these allegations, the Preamble concludes that it is in the province's interest to establish a tribunal to identify and assess the nature and extent of these harms and uncertainties, and to amend the Constitution of the Province "in order to affirm

Saskatchewan's exclusive legislative jurisdiction". The Preamble concludes with the statement that "Saskatchewan resolves to never be less than an equal partner within Confederation again".

Part 1: Preliminary Matters and Constitutional Assertion

Part 1 consists of two principal sections. The first (at s 2) establishes the purpose of the Act which is "to assert and confirm" Saskatchewan's jurisdiction over legislative matters exclusively assigned to Saskatchewan by the Constitution and to "provide certainty" with respect to the inapplicability of federal initiatives that would otherwise "bring uncertainty, disruption and economic harm" to Saskatchewan. In this context, the reference to inapplicability must be interpreted as an attempt to call in aid the judicially-created doctrine of interjurisdictional immunity (IJI), pursuant to which a valid provincial (or federal) law is rendered inapplicable to the extent that it "impairs" the "core content" of another order of government's legislative authority (further discussed below).

A second section (at s 3) makes a series of constitutional "assertions". The first is little more than a restatement of ss 92 and 92A of the *Constitution Act, 1867*, asserting simply that Saskatchewan has exclusive legislative jurisdiction "in particular" for the matters listed in those two sections (at s 3(1)). The second assertion is that the doctrine of IJI "applies to exclusive provincial legislative jurisdiction to the same extent that it applies to exclusive federal legislative jurisdiction." (at s 3(2)) A third group of assertions seeks to deem certain matters to fall within the core content of various provincial heads of power for the purposes IJI. Included in this list are:

- a) the exploration for non-renewable natural resources in Saskatchewan
- b) the development, conservation and management of non-renewable natural resources in Saskatchewan
- c) the development, conservation and management of forestry resources in Saskatchewan
- d) the operation of sites and facilities in Saskatchewan for the generation and production of electrical energy
- e) the regulation of all industries and businesses falling within the exclusive jurisdiction of Saskatchewan, including any regulations, terms or conditions applicable to the licensing of industries and businesses, including the regulation of environmental standards and the regulation of greenhouse gas emissions and other emissions;
- f) the regulation of fertilizer use in Saskatchewan, including application, production, quantities and emissions;
- g) any other prescribed matter. (at s 3(3), emphasis added)

Four of these core content deeming provisions track the language of paragraphs (a), (b), and (c) of s 92A. For example, s 3 states that the core content of "the development, conservation and management of non-renewable natural resources in Saskatchewan" (the language of s 92A(1)(c)) includes:

- (i) who may be licensed;
- (ii) where and when the development, conservation and management may take place; and
- (iii) any terms or conditions applicable to the development, conservation and management, including the regulation of environmental standards and the regulation of greenhouse gas emissions and other emissions.

Beyond the sectors covered by the s 92A resources amendment, s 3 also claims to define core content in relation to two other subjects, the regulation of all industries and businesses (s 3(e)) and fertilizer use (s 3(f)) - which picks up on the rhetoric in Saskatchewan's October [White Paper](#) ("[Drawing the Line: Defending Saskatchewan's Economic Autonomy](#)"), with respect to federal impact assessment legislation and fertilizer application guidelines (see at 6).

The drafting approach adopted with respect to these latter two subjects departs from that adopted in the previous paragraphs which, as noted above, seek to define the core content of particular matters that s 92A(1) accords to provincial legislatures. Presumably what the drafter is actually trying to say with respect to these two additional subject areas is that these matters (regulation of businesses generally, including GHG emissions and pollution more generally, and the use of fertilizers) form the core content of other heads of provincial power in the *Constitution Act, 1867*, most likely s 92(10) (local works and undertakings), s 92(9) (licensing regimes), s 92(13) (property and civil rights), or s 92(16) (matters of a merely local or private nature). Parenthetically, we observe that the reference to the regulation of fertilizer use stands on a different footing insofar as this may be characterized as a matter in relation to agriculture which is the subject of shared jurisdiction under s 95 of the *Constitution Act, 1867*.

A final paragraph (at s 3(d); see also s 6 (definitions)) claims the right to prescribe by regulation the core content of "any other prescribed matter".

Part 2: Amendment to Saskatchewan's Constitution

Part 2 proposes two identical amendments to the Constitution of Saskatchewan. The first is proposed as an amendment to the *Saskatchewan Act*. The *Saskatchewan Act*, [4-5 Ed VII, c 42](#) of 1905 is the federal statute establishing the province and government of Saskatchewan, enacted pursuant to s 2 of the imperial [Constitution Act, 1871](#) which allowed

The Parliament of Canada may from time to time establish new Provinces in any territories forming for the time being part of the Dominion of Canada, but not included in any Province thereof, and may, at the time of such establishment, make provision for the constitution and administration of any such Province, and for the passing of laws for the peace, order, and good government of such Province, and for its representation in the said Parliament. Parliament of Canada may establish new Provinces and provide for the constitution and administration of any such Province

Section 4 of Bill 88 purports to add a new s 3.1 to the *Saskatchewan Act* to provide as follows:

Autonomy of Saskatchewan

3.1(1) Saskatchewan has autonomy with respect to all of the matters falling under its exclusive legislative jurisdiction pursuant to the *Constitution Act, 1867*.

(2) Saskatchewan is and always has been dependent on agriculture, and on the development of its non-renewable natural resources, forestry resources and electrical energy generation and production.

(3) Saskatchewan's ability to control the development of its non-renewable natural resources, its forestry resources and its electrical energy generation and production is critical to the future well-being and prosperity of Saskatchewan and its people.

The second amendment, also framed as an amendment to the Constitution of the Province, is presented as an amendment to the *Constitution Act, 1867*. If enacted, s 5 of Bill 88 will add a new section “90S.2” to the 1867 Act which will track, verbatim, the language that Saskatchewan proposes to add to the *Saskatchewan Act*. It is not clear to us why the drafters assigned the section number “90S.2” to this proposed amendment.

Part 3: The Economic Impact Assessment Tribunal

Part 3 of Bill 88 proposes to establish the Economic Impact Assessment Tribunal (EIAT) “for the purpose of conducting economic impact assessments in relation to federal initiatives” (at s 7). “Federal initiatives” are defined as “a federal law or policy that may have an economic impact on a project, operation, activity, industry, business or resident in Saskatchewan” (at s 6). The Lieutenant Governor in Council may refer a federal initiative to the EIAT for an economic impact assessment if it is of the opinion that the federal initiative “will cause economic harm to Saskatchewan” (at s 8(1)). Bill 88 does not define the term “economic harm”, but it does anticipate that the elements of an economic impact assessment will be prescribed by regulation. Section 9 anticipates that the EIAT will issue a report to the Minister on a reference and may make recommendations relating to (a) the nature of the economic impact of the federal initiative, (b) the steps that may be taken to minimize the economic impact of the federal initiative in Saskatchewan (we infer that that Bill 88 is only concerned with negative economic impacts, although the text does not make that clear), and (c) “any other matter that should be brought to the attention of the Government of Saskatchewan as having unintended consequences on projects, operations, activities, industries, businesses or residents in Saskatchewan.” There is nothing in the text of the Bill that would require the Minister to publicly release the reports of the EIAT.

Finally, it is worth noting that Part 3 also contains a broad immunity clause shielding the Crown, as well as its employees and agents, from any action or proceeding arising from this Act. It seems likely that this is intended to apply to the entire Act and not just to Part 3.

Analysis and Critique

As noted at the outset, we are of the opinion that Parts 1 and 2 of Bill 88 (along with associated paragraphs of the preamble) constitute, in different measures, pure surplusage and constitutional overreach. Part 3 is different. The EIAT clearly represents a new initiative, and it is not an example of constitutional overreach. Even in the absence of any legislation, provinces are free to examine the economic implications of federal legislation for that province, and the fact that Saskatchewan is proposing to do this by way of a standing tribunal is immaterial to the validity of that exercise. Part 3 does not itself require anything other than studies and reports. Any measures taken as a result of those reports, however, might well require additional scrutiny, of either the constitutional or administrative law variety (see *Canada (Minister of Citizenship and Immigration) v Vavilov*, [2019 SCC 65 \(CanLII\)](#) at para 74: “...reasoned decision-making is the lynchpin of institutional legitimacy”). As an example, the above-noted white paper released by Saskatchewan last month

as a prelude to this legislation, “[Drawing the Line: Defending Saskatchewan's Economic Autonomy](#)”, would [arguably fail this latter kind of scrutiny](#).

What do we mean by surplusage? Parts 1 and 2 of Bill 88 contain some provisions that simply restate existing constitutional law. A prominent example is s 3(1), which provides that “Saskatchewan asserts its exclusive legislative jurisdiction under the Constitution of Canada, and in particular, those matters listed in sections 92 and 92A of the *Constitution Act, 1867*.” This assertion is entirely unnecessary since it simply affirms the text of those sections of the Constitution. There is nothing constitutionally problematic about this sort of provision, but it is legally meaningless.

More problematic are the provisions in Bill 88 that seek to influence the doctrine of interjurisdictional immunity (IJI) and its application to provincial heads of power, or that seek to peremptorily characterize constitutional amendments as amendments to the Constitution of the Province rather than as an amendment of the Constitution of Canada. Both types of provisions are problematic insofar as they purport to unilaterally arrogate to the legislature functions that the Constitution allocates to the courts (*Ontario v Criminal Lawyers' Association of Ontario*, [2013 SCC 43 \(CanLII\)](#) at paras 28-29).

The doctrine of interjurisdictional immunity is a judicially created doctrine that serves to operationalize the exclusivity of federal and, theoretically at least, provincial legislative powers. It does so by protecting the core of at least some heads of power (*Canadian Western Bank v Alberta*, [2007 SCC 22 \(CanLII\)](#)) by making an otherwise valid law inapplicable insofar as it “impairs” the “core content” of another level of government’s head of power. However, while it now appears to be accepted that the doctrine can, at least in principle, be used to protect core areas of provincial powers as much as federal powers (*Canadian Western Bank; Canada (Attorney General) v PHS Community Services Society*, [2011 SCC 44 \(CanLII\)](#), (*Insite*)), it is equally the case that recent decisions of our Supreme Court have cautioned against extending the doctrine’s application, especially with respect to novel areas or to cases where it might be difficult to delineate the core of a federal or provincial power (*Insite*).

The question of what is core to a particular head of power for IJI purposes is ultimately a question of interpretation for the courts. It cannot be up to either the federal Parliament or a provincial legislature to define what is core, since neither order of government is competent to define a constitutional term or, in this case, a judicially created constitutional doctrine: “A legislature cannot alter the scope of its own constitutional powers through statute” (*Vavilov*, at para 56).

Perhaps the best illustration of this proposition is the Supreme Court of Canada’s decision in *R v Sutherland*, [1980 CanLII 18 \(SCC\)](#), [\[1980\] 2 SCR 451](#). *R v Sutherland* engaged the interpretation of the words “unoccupied Crown lands” in the First Nation hunting clause in the Manitoba Natural Resources Transfer Agreement (the Alberta and Saskatchewan Agreements contain identical language). The province had passed legislation conclusively deeming certain categories of Crown lands, including provincial forests and provincial wildlife management areas, to be *occupied* Crown lands. The Court gave two reasons for concluding that the provincial legislation was *ultra vires*. Both reasons turned on the effect of the deeming language. The first reason focused on the fact that the inclusion of the deeming language transformed the provision of the *Wildlife Act* from

being a law of general application into a law that targeted Indians, and thus a law in relation to s 91(24) of the *Constitution Act, 1867*, Indians and Lands reserved for the Indians:

The purpose of any "deeming" clause is to impose a meaning, to cause something to be taken to be different from that which it might have been in the absence of the clause. In the present instance, the patent purpose of s. 49 is to cause certain provincial forests, wildlife management areas, and the like, to be regarded as occupied whether or not, on the facts, they can properly be said to be occupied. The unoccupied is conclusively deemed to be occupied. Section 49 seeks to affect the status of Indians in respect of their constitutionally entrenched right to hunt for food. It is a blatant attempt to un-entrench the concluding words of para. 13 and, by taking lands out of the operation of para. 13, to derogate from rights granted to the Indians by the agreement. (at 456)

The second reason the Court gave was that, by purporting to define the words of a constitutionalized agreement, the province was usurping the amendment procedure provided in the Agreement itself.

The Province cannot arrogate to itself the right to amend, unilaterally, para. 13 of the Memorandum of Agreement of December 14, 1929 by giving words a particular interpretation. Paragraph 24 of that agreement makes provision for amendment in these words:

The foregoing provisions of this agreement may be varied by agreement confirmed by concurrent statutes of the Parliament of Canada and the Legislature of the Province. (at 456)

The Court went on to say, in words that seem equally applicable here:

The changes sought to be effected in the agreement, by s. 49 of *The Wildlife Act*, were not accompanied either by an amending agreement, or by concurrent statutes of the Parliament of Canada and the Legislature of Manitoba. A provincial legislature may not pass laws to determine the scope of the protection afforded by the *Natural Resources Transfer Agreement*. If the laws have the effect of altering the agreement, they are constitutionally invalid; if not, they are mere surplusage. (at 456 – 457, emphasis added)

There is much more that we could say about judicial reticence to apply the doctrine of IJI. Indeed, two of us have made these arguments in a recent [post](#) on the Alberta Court of Appeal's reference opinion regarding the federal *Impact Assessment Act*, [SC 2019, c 28, s 1](#) and in a paper forthcoming in the Alberta Law Review, "[Preparing for a Mid-Life Crisis: Section 92A at 40](#)". We also observe that Bill 88's approach to IJI appears considerably broader than *any* application sanctioned by the courts thus far. Furthermore, Bill 88's proposed scope of core provincial powers appears to contradict the Supreme Court of Canada's numerous findings that jurisdiction over a broad range of environmental issues is shared between parliament and provincial legislatures, including: climate change mitigation (*References re Greenhouse Gas Pollution Pricing Act*, [2021 SCC 11 \(CanLII\)](#)), the prohibition of pollution (*R v Hydro-Québec*, [1997 SCC 318 \(CanLII\)](#)), the regulation of certain aspects of resource extraction (*Quebec (Attorney General) v Moses*, [2010](#)

[SCC 17 \(CanLII\)](#)), and so on. But those arguments are not pertinent to the constitutionality of Bill 88. The IJI provisions of Bill 88 are problematic because they purport to provide constitutional direction to the Supreme Court of Canada in developing and applying the doctrine of IJI. That is not the job of a provincial legislature nor the federal Parliament, regardless of whether the proposed specification is consistent with relevant precedent.

As for the proposed amendment provisions, as we have noted above, Bill 88 proposes two identical amendments to the Constitution of the Province, the one framed as an amendment to the *Saskatchewan Act*, the other as an amendment to the *Constitution Act, 1867*.

Part V of the [Constitution Act, 1982](#) establishes the rules for amending the Constitution of Canada and the Constitution of a Province. Section 52(2) and the Schedule to the 1982 Act provide a non-exhaustive definition of the Constitution of Canada which includes the *Saskatchewan Act* of 1905 (Schedule, item 13). Section 52(3) provides that amendments to the Constitution of Canada can only be made in accordance with the Constitution.

The text of the constitutional amendment provisions in Bill 88 are both premised on the view that the proposed amendments are amendments to the Constitution of Saskatchewan and not the Constitution of Canada. If this premise were to hold, then Saskatchewan could rely on s 45 of the 1982 Act which provides that, subject to the list of matters provided in s 41 (for which unanimity is required), “the legislature of each province may exclusively make laws amending the constitution of the province.” But the premise is demonstrably false.

In the case of the proposed amendment to the *Saskatchewan Act*, s 52(3) of the 1982 Act and the Schedule make it clear that any amendment to the *Saskatchewan Act* is an amendment to the Constitution of Canada. Furthermore, this characterization of an amendment to the *Saskatchewan Act* is confirmed by very recent practice, specifically an amendment adopted in 2022 to repeal s 24 of the *Saskatchewan Act* which conferred an immunity on the Canadian Pacific Railway Company: [Canada Gazette, Part II, Volume 156, Extra Number 3, SI/2022-25, May 9, 2022](#).

This amendment proceeded under s 43 of 1982 Act, which allows an amendment to a provision of the Constitution of Canada that applies to one or more but not all provinces, to be made by proclamation on the authorization of resolutions passed by the Senate, the House of Commons, and the relevant legislative assembly/assemblies. It is worth quoting extensively from this recent Proclamation:

By Her Excellency the Right Honourable Mary May Simon, Governor General and Commander-in-Chief of Canada

To all to whom these presents shall come,

GREETING:

A Proclamation

Whereas section 43 of the *Constitution Act, 1982* provides that an amendment to the Constitution of Canada may be made by proclamation issued by the Governor General under the Great Seal of Canada where so authorized by resolutions of the Senate and House

of Commons and of the legislative assembly of each province to which the amendment applies;

Whereas the Senate adopted a resolution on April 7, 2022 authorizing an amendment to the Constitution of Canada;

Whereas the House of Commons adopted a resolution on February 9, 2022 authorizing an amendment to the Constitution of Canada;

Whereas the Legislative Assembly of Saskatchewan adopted a resolution on November 29, 2021 authorizing an amendment to the Constitution of Canada;

And whereas the Queen's Privy Council for Canada has advised me to issue this proclamation;

Now know You that I do issue this proclamation amending the Constitution of Canada in accordance with the schedule.

In testimony whereof, I have caused these Letters to be made patent and the Great Seal of Canada to be affixed to them.

...

By Command,

Justin
Prime Minister of Canada

Trudeau

David
Attorney General of Canada

Lametti

François-Philippe
Registrar General of Canada

Champagne

SCHEDULE

Amendment to the Constitution of Canada

1 Section 24 of the *Saskatchewan Act* is repealed.

2 The repeal of section 24 is deemed to have been made on August 29, 1966, and is retroactive to that date.

Citation

3 This Amendment may be cited as the *Constitution Amendment, 2022 (Saskatchewan Act)*. (emphasis added)

While the present Bill proposes to add a new section to the *Saskatchewan Act* rather than repeal an existing provision, the Bill still presents the amendment as an amendment to that federal Act and it must therefore be treated as a proposed amendment to the Constitution of Canada. Such an amendment must be initiated by way of resolution as contemplated by s 43 of the Act.

The proposed amendment to the *Constitution Act, 1867* is equally problematic, and for similar reasons, for it will come as no surprise to anybody that the *Constitution Act, 1867* is also listed in the Schedule as part of the Constitution of Canada (Schedule, item 1).

Frankly, it is something of a mystery why the drafters elected to adopt these specific texts as an amendment to existing constitutional provisions rather than say, establishing *de novo*, a Constitution of Saskatchewan (See *Constitution Act*, [RSBC 1996, c 66](#)).

Finally, and as noted at the outset, Bill 88 bears many similarities to the proposed and controversial, but yet to be seen, Alberta Sovereignty Act (see post [here](#)). Both represent attempts by provincial governments to usurp the role of our independent courts in mediating jurisdictional disputes between the federal and provincial governments. This is clearly contrary to the separation of powers between the legislative, executive, and judicial branches of government that is so fundamental to our constitutional democracy (*New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)*, [1993 CanLII 153 \(SCC\)](#)) and should be rejected on that basis.

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