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The Word “Exclusive” Does Not Confer a Constitutional Monopoly, Nor a Right to Develop Provincial Resource Projects

By: Nigel Bankes and Andrew Leach

Decision Commented On: *Reference re Impact Assessment Act*, [2023 SCC 23 \(CanLII\)](#)

The majority opinion of the Supreme Court of Canada in the *Reference re Impact Assessment Act*, 2023 SCC 23 (CanLII) (*IAA Reference*) concludes that the federal government has arrogated to itself decision-making powers that properly belong to provincial governments; powers, that is, with respect to resource projects and other works and undertakings located entirely within a province (for short, “provincial resource projects”). (For an overview of the *IAA Reference* see Olszynski et al, “[Wait, What!? What the Supreme Court Actually Said in the IAA Reference](#)”.) Given that conclusion, it is not surprising that Premier Danielle Smith, as well as former premier Jason Kenney, who initiated the *Reference*, have celebrated the decision. But in doing so they have both significantly overstated the majority’s conclusions by suggesting that the majority endorsed a strong theory of exclusive provincial jurisdiction over provincial resource projects. Premier Smith, echoing language in the Alberta Court of Appeal majority opinion in the *IAA Reference* (which we commented on [here](#)), would extend this interpretation further to a right of development and to a form of interjurisdictional immunity for projects falling outside the exceptions in section 92(10) of the [Constitution Act, 1867](#). We provide concrete examples of Premier Smith’s use of the word “exclusive” (or its synonyms) and references to a “right to develop” from the [Premier’s press conference](#) on the *IAA Reference* decision and an interview prior to the decision in Appendix A to this post, and a link to the views of the Hon. Jason Kenney in Appendix B.

This rhetoric is unfortunate because it necessarily leads to unjustified expectations that the federal government will need to vacate important areas of law-making responsibility in deference to these claims of exclusivity, and/or that Parliament must necessarily be deferential to a provincial right to develop resources. Amendments to the *Impact Assessment Act*, [SC 2019, c 28, s 1](#) (*IAA*) regime need to be informed by a common understanding of fundamental constitutional principles as well as the guidance offered by the majority opinion of the Supreme Court. This means that the federal government will need to ensure that its *IAA* decision-making powers are securely tethered to real (and not speculative or yet-to-be established) heads of federal power. But, by the same token, there is no basis for provincial demands (framed in terms of exclusivity, rights, or “sole jurisdiction”) that the federal government simply abandon the field of regulating the federal aspects of provincial projects.

The respectful dialogue that the majority opinion calls for requires both federal and provincial governments to moderate their positions. The majority opinion, by its nature, is principally directed at the federal government, but provincial governments cannot ignore what the majority has said about the reality that provincial projects will frequently present a double aspect. In other words,

there will commonly (if not invariably) be elements of those provincial resource projects that fall squarely within a head or heads of federal power. The power to make a law in relation to a matter may be exclusive, but in most, if not all, cases there is no such thing as an exclusive power over a project or an activity. Projects typically affect the environment, and the environment is broadly recognized to be an area of shared jurisdiction - largely because the *Constitution Act, 1867* had nothing to say about the environment.

The 1867 *Act* as amended by the [Constitution Act, 1982](#) generally allocates the power to make laws to the federal and provincial governments on an exclusive basis. This is most clearly demonstrated by the opening words of s 92 of the 1867 *Act*, which provide that “[i]n each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated ...”. Section 91 is similar insofar as it states that matters not assigned exclusively to the provinces are assigned exclusively to Parliament, and, for greater certainty, to the classes of subject enumerated in that section. Section 92A(1), the first subsection of the 1982 “resources amendment”, follows the same pattern and affords the legislatures of the provinces the exclusive power to make laws in relation to the exploration and production of non-renewable and forestry resources and the generation of electricity.

While the exclusive assignment of law-making authority is the norm, the Constitution occasionally provides for concurrent law-making authority. As it happens, section 92A contains one such example: the power to make laws dealing with interprovincial exports of resources and electricity (s 92A(2)), for which concurrent and paramount federal law-making power of such exports is established in s 92A(3).

But how do we apply the notion of exclusive law-making authority to a resource activity such as a proposed new coal or oil sands mine, or a proposed new hydroelectric dam? The majority opinion in the *IAA Reference* offers important guidance on this crucial question. The majority begins by confirming that the general rule is as stated above, and that “[o]nly the level of government to which a head of power has been assigned can validly legislate in respect of matters falling within that head of power” (at para 112). But the classification of environmental laws is challenging because the environment is not a head of power under ss 91, 92, or 92A and rather is an aggregate of matters (at para 114). “Accordingly, *neither level of government has exclusive jurisdiction over the whole of the ‘environment’ or over all ‘environmental assessment’*” (at para 116, emphasis added). Instead, each level of government can legislate in relation to certain aspects of the environment and resource projects that affect the environment. The same fact pattern (for example, a new dam or a new mine), can be regulated from both provincial and federal perspectives (or aspects) so long as the law of each level of government can be classified as falling with one of its heads of power. This is known as the double aspect doctrine:

The double aspect doctrine explains how laws enacted by both the federal and provincial levels of government may validly regulate the same fact scenario from different perspectives, pursuant to their respective heads of power. (at para 119)

Each order of government has “the *exclusive* power to legislate within their respective jurisdiction” (at para 121, emphasis in original) and it follows from this that each can potentially regulate the same fact pattern. The fact pattern itself (the construction and/or operation of the project or activity,

the mine, or the dam) is unlikely to be exclusive. The province may be able to authorize the construction of a dam under various heads of power in s 92 and 92A, but that dam would also require federal fisheries authorization under legislation that has been repeatedly upheld under s 91(12) and, if the river on which the dam is built is navigable, then it will also need an authorization under the federal government's navigation and shipping power, a power upheld in the *Oldman River* decision under s 91(10): *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992 CanLII 110 \(SCC\)](#), [1992] 1 SCR 3. Parliament's power to regulate the dam, however, is constrained: "it can validly legislate only from the perspective of the federal aspects of the activity, such as the *impacts* of the activity on federal heads of power" (*IAA Reference* at para 131, emphasis in original), although it may consider a wide array of reasons for allowing (or disallowing) such an authorization. Some of these reasons, e.g. the value of *base-load* electricity generation, may fall within provincial jurisdiction but may be considered by the federal government in assessing the issuance of an authorization (at paras 157-161).

A provincial legislature is not entitled to waive whatever requirements Parliament may choose to impose on that dam to protect navigation or fishery interests, or other "federal aspects" such as Indigenous peoples or lands reserved for Indigenous peoples. As the majority warns at para 142, "[t]he fact that a project involves activities primarily regulated by the provincial legislatures does not create an enclave of exclusivity. The most 'provincial' of projects may cause effects in respect of which the federal government can properly legislate."

This is not new law derived from the decision in the *IAA Reference*, nor do our hypothetical mines or dams fall far from reality. As Justice Ian Binnie for the majority of the Supreme Court stated in *Quebec (Attorney General) v Moses*, [2010 SCC 17 \(CanLII\)](#):

[t]here 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...* The mining of non-renewable mineral resources aspect falls within provincial jurisdiction, but the fisheries aspect is federal. (at para 36, emphasis added)

In sum, just as lands reserved for Indigenous communities are not enclaves within a province (with the result that provincial laws of general application may apply to lands reserved, including Indian reserves: *Cardinal v Attorney General of Alberta*, [1973 CanLII 1980 \(SCC\)](#), [1974] SCR 695), neither are provincial projects "enclaves" that are immune from the application of valid federal laws (*IAA Reference* at para 142). Those federal laws must be connected to a federal head of power (and this is the principal clarification offered by the *IAA Reference*). But once the connection is established, federal regulation may be far reaching. For example, the federal government may validly instruct a proponent to construct fish ladders around a dam and prescribe certain flows of water to protect fish or to build locks to ensure navigation around that dam as a condition of federal approval.

The federal government may exercise its jurisdiction even if doing so would render the project uneconomic, such that the proponent is no longer prepared to proceed, and such measures may certainly affect resource production from provincial projects. A court may test the *vires* of such a requirement (i.e., the connection of the condition to a federal head of power, see e.g., *Fowler v The*

Queen, [1980 CanLII 201 \(SCC\)](#), [1980] 2 SCR 213), but it may not question the wisdom of such a requirement once the connection is established.

In conclusion, in most cases, the power to make laws is assigned exclusively to one or other level of government. But that does not itself assign exclusive project approval authority nor a right of development to a province for provincial projects or other works and undertakings lying wholly within the province. This is because most resource projects will also engage legitimate federal interests for which the federal government is entitled to legislate and regulate. In fact, one of the projects cited by Premier Smith – the Teck Frontier Mine – was itself subject to exactly such conditions before the *IAA* regime was enacted (see e.g. [Report of the Joint Review Panel, Teck Resources Limited Frontier Oil Sands Mine Project](#), (25 July 2019) at 3 and at para 1448). The *IAA Reference* has told the federal government that it can only use these federal interests to regulate the federal aspects of such projects and not interests and values that are not connected to a federal head of power. But the majority has also told the provinces that these provincial resource projects are not provincial approval enclaves immune from the application of federal laws. It is not helpful for the Premier to claim otherwise. Neither is it helpful for the Premier to continue to rely on the inflammatory rhetoric of the majority decision of Alberta’s Court of Appeal in the *IAA Reference*. The Supreme Court of Canada may have concluded that significant parts of the *IAA* were unconstitutional, but it gave very different reasons for that conclusion than those offered by Alberta’s Court of Appeal.

Appendix A: Examples of Premier Smith’s claims to provincial exclusivity (and/or the right to develop) in relation to provincial resource projects

(all quotes taken from [Premier Smith’s press conference, October 13, 2023](#); references are to the approximate time of the remarks, emphasis added.)

Premier Smith’s prepared comments

The Court ruled that the act and regulations are unconstitutional and reaffirms that the primary jurisdiction of non-renewable natural resource development *is the sole jurisdiction of the provinces.* [\(at 1m:32s\)](#)

Response to a question from Emma Graney (Globe and Mail)

The Supreme Court of Canada was very clear that the Constitution matters, sections of the Act, section 92, *they should reread them again so that they can see that we have the exclusive jurisdiction over natural resource development and the exclusive jurisdiction over electricity development, and they should make sure that they honour that.* (at 6m:56s)

Responses to a question from Shaun Polczer (Western Standard)

We have the exclusive right as the Supreme Court determined today to exercise under section 92 and that includes electricity and that’s what we’ll do ... (at 11m:19s)

They recognized that we have two orders of governments with sovereign powers and exclusive jurisdiction *and acknowledged that exclusive jurisdiction on resource development and on electricity belongs to us.* (at 12m:41s)

That's our exclusive right to be able to make decisions on being able to permit and approve those types of projects. I would say that if I want to build a highway between Grand Prairie and Fort McMurray, which is 70 for more than 75 kilometers of new roads *that's within our exclusive jurisdiction* in order to be able to develop and I would say that if a Teck Frontier mine wants to put in another application *that's also within our exclusive jurisdiction* to prove. Those are just three examples that I would give if they're completely within our borders. And we have the ability through our regulatory process to go through our own environmental reviews, then those are the ones that should stay with us. (at 13m:30s)

Response to a question from Don Braid (Calgary Herald)

... obviously we have to work together on certain issues, navigable waters being one, *but we also know from this court decision, we've got the exclusive right to develop our resources, and that includes electricity* and we're going to be exercising that. (at 16m:48s)

Response to a question from Lisa Johnson (Edmonton Journal)

But I'm asking for ... the federal government *to accept that there is exclusive provincial jurisdiction* under the Constitution, accept that that's what the language of the Constitution says, and to work with us on those areas of shared priority. (at 17m:23s)

See also Premier Smith's comments on [The ARC Energy Ideas Podcast](#), (4 October 2023), *before the SCC decision in the IAA Reference.*

In response to a question on the *Alberta Sovereignty within a United Canada Act*, [SA 2022, c A-33.8](#), Smith stated that "I'm prepared to go to court and say, we are defending the Constitution. *We are defending our right to develop our resources. We're defending our constitutional right to develop our own electricity system.*" (at 10m:07s)

And Premier Smith's [Throne Speech](#), (October 30, 2023)

Referring to "individuals [who] believe that developing Alberta's natural resources is inconsistent with reducing global emissions", "... they seek to impose these policies on our province *knowing full well the Canadian Constitution grants our province exclusive jurisdiction over the development of our natural resources and operation of our provincial electrical grid.*"

Appendix B: Views of the Hon. Jason Kenney

For Jason Kenney's post-*IAA Reference* views on the exclusive nature of provincial jurisdiction over provincial resource projects (and referencing the "black letter" of the *Constitution*), see his CBC interview on [October 16, Calgary Eyeopener](#) at 0:57s – 0:60s, 1m:56s, 3m:40s and 5m:23s.

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