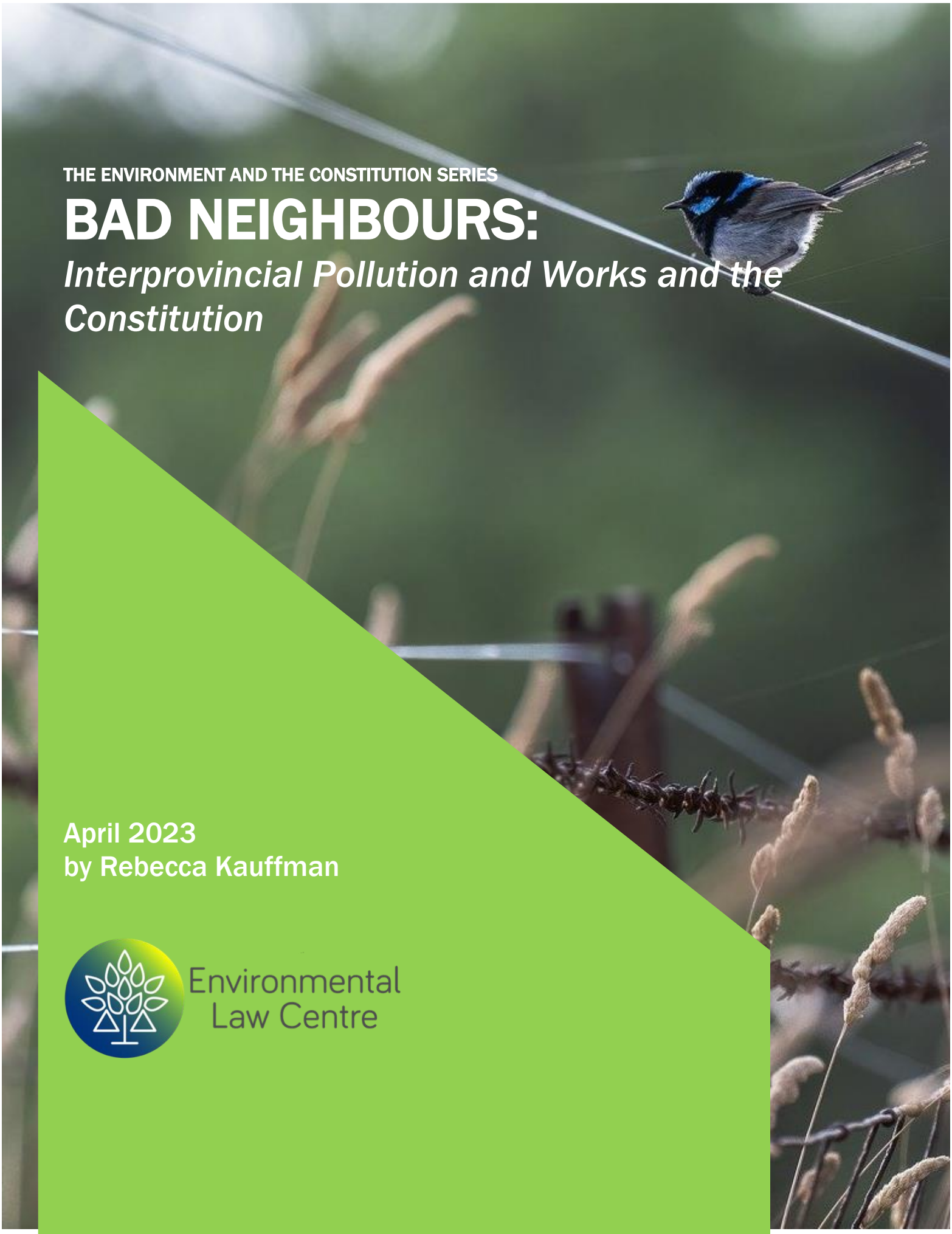

THE ENVIRONMENT AND THE CONSTITUTION SERIES

BAD NEIGHBOURS:

Interprovincial Pollution and Works and the Constitution

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by Rebecca Kauffman

Environmental Law Centre

TABLE OF CONTENTS

INTERPROVINCIAL POLLUTION AND WORKS IN THE CONSTITUTION

Where pollution or built infrastructure cross political boundaries there is an opportunity for disputes to arise. From the export of bitumen to upstream river pollution, there are disputes about how we can best regulate matters when they cross borders. In Canada, interprovincial works and undertakings are set out in the *Constitution Act*, 1867 as falling within federal jurisdiction. This applies most readily to projects like the construction and regulation of a railway or pipeline, both of which we will consider below. However, infrastructure is not the only type of interprovincial regulation that engages with issues of constitutional jurisdiction. In particular, we consider how interprovincial pollution is managed and the overlapping jurisdiction over waterways. We also briefly highlight the management greenhouse gas emissions although this is primarily the subject of an accompanying report.

INTRODUCTION

This report looks at what happens when our geopolitical boundaries are crossed by pollution and works (e.g., pipelines and transmission lines). As will be discussed, where matters cross provincial or territorial boundaries, the Constitution and jurisprudence elevates the relevance of federal laws. This, in turn, creates a risk of conflict where environmental objectives of different provincial territories come into play. This report sets out the state of the law and highlights some of the issues that arise, first where interprovincial works offend the environmental objectives of a province and second, where interprovincial pollution largely escapes both federal and provincial regulatory accountability and relies on cooperative agreements.

Interprovincial Works

Interprovincial works are, unlike many other areas of the environment, specifically included in the *Constitution Act, 1867* and, due to a carve-out of otherwise provincial works, clearly fall under federal jurisdiction. Specifically, section 92(10) states that while local works and undertakings are provincial jurisdiction, these **do not** include:[1]

> "(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;
> (b) lines of steam ships between the province and any British or foreign country; and
> (c) such works as, although wholly situate within the province, are before or after their execution declared by the parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the provinces."

Further, section 91(29) assigns federal jurisdiction to "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."[2] In other words, if a matter is carved out of provincial jurisdiction, then it is assigned to federal jurisdiction. This is the case with section 92(10) and results in interprovincial works falling under the jurisdiction of the federal government.

While these two sections firmly place matters that are, in pith and substance, interprovincial, under federal control, questions remain as to how far the classification of 'interprovincial' extends. In the modern context, we see this primarily in the regulation of pipelines and their associated infrastructure. We will consider some more recent pipeline projects below, but we will begin with historical caselaw setting out limits on interprovincial projects.

[1] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5, s 92(10) [*Constitution Act, 1867*].
[2] *Ibid,* s 91(29).

A History of Interprovincial Matters Before the Courts

In part due to its size and geography, the connection of Canada through interprovincial works, is a key part of our history. In large part this was a story of the railway. For example, as Dwight Newman highlights, the *British North America Act* committed the Government of Canada to the construction of an intercolonial railway and the later accession to Confederation of provinces like Prince Edward Island and British Columbia were contingent upon commitments to interprovincial works.[3] The national importance of these projects is reflected in section 92(10) of the *Constitution Act, 1867* which grants federal jurisdiction over interprovincial matters.

Only a few decades after the *Constitution Act, 1867* was passed, the issue of jurisdiction over interprovincial matters came before the courts. In the 1899 case of *Canadian Pacific Railway Company v Corporation of the Parish of Notre Dame de Bonsecours (Quebec)*, the Privy Council considered jurisdiction over the management of an interprovincial railway and the land running directly parallel to the railway track.[4] According to the facts of the case, the Canadian Pacific Railway Company was served with a municipal code requirement with which they did not comply. In refusing to comply, the railway company argued that the regulation of their railway was an interprovincial project and, as such, was more properly within the jurisdiction of the federal Parliament.[5]

In their decision, the Privy Council (at the time, the highest court in Canada) held that any attempt by the province, including through a municipal enactment, to affect the structure of part of the railway would be considered "in excess of its powers."[6] However, it also held that in this case, the municipal code requirement more properly applied to the surrounding land which they distinguished from the railway itself. It found that management of the area in such a way that did not impact upon the structure of the railway may fall properly within provincial jurisdiction, suggesting a limit on what is properly considered interprovincial.[7]

In the same year, the Privy Council released its decision in *Madden v Nelson and Fort Sheppard Railway Co*.[8] The facts of this case arose after the provincial government passed the *Cattle Protection Act* which assigned liability to those Railway Companies that chose not to erect proper fences, resulting in the death or injury of cattle, and enabled by a lack of fencing standards at the federal level.[9] The Province "pointed out by their preamble that in their view the Dominion Parliament has neglected proper precautions, and that they are going to supplement the provisions which, in the view of the Provincial Legislature, the Dominion Parliament ought to

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[3] Dwight Newman, "Pipelines and the Constitution: Canadian Dreams and Canadian Nightmares" (April 2018) *A Macdonald-Laurier Institute Publication* at 3 online: https://macdonaldlaurier.ca/mli-files/pdf/MLICommentary_April2018_Newman_FWeb.pdf [Dwight Newman].

[4] *Canadian Pacific Railway Company v Corporation of the Parish of Notre Dame de Bonsecours (Quebec),* [1899] UKPC 22 (24 March 1899).

[5] *Ibid* at 2.

[6] *Ibid* at 3-4.

[7] *Ibid* at 4-5.

[8] *Madden v Nelson and Fort Sheppard Railway Co. (British Columbia)*, [1899] UKPC 47 (19 July 1899).

[9] *Ibid* at 2.

have made."[10] In their decision, the Privy Council distinguished this case from the *Canadian Pacific Railway Company v Corporation of the Parish of Notre Dame de Bonsecours (Quebec)* stating that it is "manifestly and clearly beyond the jurisdiction" of the province to impose liability on a railway unless it abides by the provincial law.[11]

Almost a century later, in 1988, the Supreme Court of Canada ("SCC") released an important trilogy of cases considering interprovincial matters:

- *Alltrans Express Ltd. v British Columbia (Workers' Compensation Board)* was a case in which the SCC held that the federal undertaking in question was not bound by provincial safety laws;[12]
- *Canadian National Railway Co. v Courtois* which was a SCC decision that found that a federal undertaking (a railway) was not bound by provincial law authorizing accident investigation; [13] and
- *Bell Canada*, the leading case,[14] in which the SCC held that "it is sufficient that the provincial statute which purports to apply to the federal undertaking affects a vital or essential part of that undertaking, without necessarily going as far as impairing or paralyzing it."[15]

In each of these decisions, the SCC emphasized the "exclusive" nature of federal jurisdiction. However, since then the Courts have moved away from the idea that sections 91 and 92 of the *Constitution Act, 1867* are watertight compartments or exclusive jurisdictional silos. Instead, the current trend in constitutional interpretation is to uphold cooperative federalism which is a modern interpretation "urg[ing] courts to adopt constitutional interpretations which favour, where possible, the ordinary operation of statutes enacted by both levels of government."[16] This is limited; however, as interprovincial works are clearly federal jurisdiction. Instead, the lens of cooperative federalism may apply to understanding the limits of the definition of 'interprovincial.' For further discussion of the doctrine of cooperative federalism, see our accompanying report "Battleground Environment: Deconstructing Environmental Jurisdiction in the Canadian Constitution."

[10] *Ibid* at 3.
[11] *Ibid* at 3.
[12] *Alltrans Express Ltd. v British Columbia (Worker's Compensation Board)*, [1988] 1 SCR 897 [Alltrans Express]; Peter Hogg & Rahat Godil, "Narrowing Interjurisdictional Immunity" (2008) 42:22 *The Supreme Court L Rev: Osgoode's Annual Constitutional Cases Conference* 623 at 631 [Hogg & Godil].
[13] *Canadian National Railway Co. v Courtois,* [1988] 1 SCR 868 [Courtois]; Hogg & Godil, *supra* note 12 at 630.
[14] Alltrans Express*, supra* note 12; Courtois*, supra* note 13; *Bell Canada v Quebec (Commission de la Sante et de la Securite du Travail),* [1988] 1 SCR 749 [Bell Canada].
[15] Bell Canada*, supra* note 14 at 859-860.
[16] Andrew Leach & Eric M Adams, "Seeing Double: Peace, Order, and Good Government, and the Impact of Federal Greenhouse Emissions Legislation on Provincial Jurisdiction" (2020) 29-1 *Constitutional Forum* 1 at 9.

Interprovincial Works and the Environment: A Focus on Pipelines

Historically, much of the litigation that helped to define section 92(10)(a) involved railways. However, more recently this has shifted to a focus on pipelines. Susan Blackman and her co-authors have summarized the history of interprovincial projects, particularly pipelines, and point out that upon the discovery of oil at Leduc in 1947, both the province and the federal government moved to increase their control over oil and gas.[17] This included the federal *Pipelines Act* passed in 1949 and which purported to exercise control over interprovincial and international oil and gas pipelines and the Albertan response with the passage of the *Gas Resources Preservation Act* which extended Albertan jurisdiction over its production of oil and gas. Blackman argues that even at the time, the constitutionality of Alberta's *Gas Resources Preservation Act* was in doubt.[18]

Since then, the limits of section 92(10)(a) with regard to pipelines and their associated infrastructure have appeared before the courts many times. To begin, we will highlight two decisions: *Campbell-Bennet v Comstock Midwestern Limited* and *Westcoast Energy Inc. v Canada (National Energy Board)*.[19]

Campbell-Bennet v Comstock Midwestern

The SCC decision in *Campbell-Bennet v Comstock Midwestern Limited* dealt with a dispute over the first Trans Mountain pipeline. There are a few parties to the matter including two respondents (1) Trans Mountain, the owner of the pipeline; and (2) Comstock Midwestern, a company that entered into a contractual arrangement with Trans Mountain to complete certain sections of the pipeline.[20] The appellant, Campbell-Bennett, made an agreement with Comstock to complete "clearing, grubbing and grading of the construction right of way."[21] However, Campbell-Bennett brought a lien "upon and against the oil pipe line in the County of Yale and real property, land tenements, hereditaments, rights, privileges, and interests in land" and this action was brought to enforce it.[22] An important point is that in this jurisdiction, the remedy for a mechanics' lien would have been payment of the amount owing and an order for the sale of the pipeline located within the limits of the County of Yale.[23] Eventually the matter made its way up to the SCC.

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[17] Susan Blackman et al., "The Evolution of Federal/Provincial Relations in Natural Resources Management" (1994) 32:3 Alta L Rev 511.
[18] *Ibid* at 514.
[19] *Campbell-Bennet v Comstock Midwestern Limited*, [1954] SCR 207 [Campbell-Bennet]; *Westcoast Energy Inc. v Canada (National Energy Board),* [1998] 1 SCR 322 [Westcoast Energy].
[20] Campbell-Bennet*, supra* note 19 at 209.
[21] *Ibid* at 209.
[22] *Ibid* at 210.
[23] *Ibid* at 210.

In their decision, the SCC made a number of pronouncements regarding jurisdiction over interprovincial matters. The first was that a pipeline being "a work and undertaking within the exclusive jurisdiction of Parliament is now past controversy."[24] In coming to this conclusion, the Court highlighted that this applies because the pipeline crosses provincial borders, specifically the Alberta and British Columbia border.[25] In light of this conclusion, the Court moves on to focus on the remedy being sought.

Specifically, the remedy set out in the applicable provincial legislation would require a portion of the pipeline to be sold and the SCC found that this would have resulted in the project being separated into units, which could only be done by the Board of Trans Mountain.[26] The Court found; therefore, that supporting provincial jurisdiction to impose a lien "would completely nullify the object of Parliament."[27] It even went so far as to say that allowing the lien "would substantially destroy the purpose for which Trans Mountain was incorporated by the Dominion."[28] To uphold these findings, the SCC relied in part on railway precedent including the decisions in *Johnson & Carey Co v Canadian National Northern Railway Co* and *Crawford v Tilden* in which liens were claimed by a sub-contractor against a portion of the railway and were denied.[29] This further serves to connect pipelines with the enumerated activities in section 92(10)(a) of the *Constitution Act, 1867*.

Dwight Neman argues that this case provides us with an early example of the doctrine of interjurisdictional immunity.[30] He argues that this decision prohibited the use of builders' liens, which usually fall under provincial jurisdiction, because they would impact the essential nature of the pipeline – a federal undertaking.[31]

Westcoast Energy Inc. v Canada (National Energy Board)

Westcoast Energy Inc. v Canada (National Energy Board) is a more recent SCC to consider the limits and parameters of sections 92(10) and 92A of the *Constitution Act, 1867,* particularly as they relate to pipelines.[32] In *Westcoast Energy,* the issue before the Court was "whether certain proposed natural gas gathering pipeline and processing plant facilities form part of a federal natural gas pipeline transportation undertaking under s.92(10)(a) of the *Constitution Act, 1867*."[33] Put another way, the Court was called upon to determine whether the 'upstream'

[24] *Ibid* at 214.
[25] *Ibid* at 214.
[26] *Ibid* at 215.
[27] *Ibid* at 216.
[28] *Ibid* at 220.
[29] *Ibid* at 216.
[30] Dwight Newman, *supra* note 3, at 7.
[31] *Ibid* at 7.
[32] Westcoast Energy, *supra* note 19.
[33] *Ibid* at paras 1 & 35.

facilities involved in the pipeline project fell properly within federal jurisdiction.[34] Clearly, the pipeline itself was *intra vires* federal jurisdiction but how far did this jurisdiction extend?

For this, the SCC found that "[i]n order for several operations to be considered a single federal undertaking for the purposes of s. 92(10)(a), they must be functionally integrated and subject to common management, control and direction."[35] The Court also confirmed that "the mere fact that a local work or undertaking is physically connected to an interprovincial undertaking is insufficient to render the former a part of the latter" and "[t]he fact that both operations are owned by the same entity is also insufficient."[36]

The majority clarified that "the fact that an activity or service is not of a transportation or communications character does not preclude a finding that it forms part of a single federal undertaking."[37] They highlight certain factors to consider including, whether:[38]

- "the various operations are functionally integrated and subject to common management, control and direction;
- the operations are under common ownership (perhaps as an indicator of common management and control); and
- the goods or services provided by one operation are for the sole benefit of the other operation and/or its customers, or whether they are generally available."

With regard to *Westcoast Energy,* the SCC found that the upstream facilities met this test. From there, they went on to consider the effect of section 92A.

The issue of section 92A was raised by the Government of Alberta, an intervener in the matter when they argued that "s. 92A(1)(b), which provides provincial legislatures with exclusive jurisdiction to make laws in relation to 'development, conservation and management of non-renewable natural resources…in the province', circumscribes Parliament's jurisdiction over interprovincial natural gas transportation undertakings under s. 92(10)(a)."[39] The Court disagreed, citing the 1993 decision in *Ontario Hydro v Ontario (Labour Relations Board)*, [1993] 3 SCR 327 in which the majority of that Court concluded that s. 92A(1) did not "alter the scope of the declaratory power in s. 92(10)(c)."[40] In the majority decision in *Westcoast Energy,* Justices Iacobucci and Major argue that this applies similarly to section 92(10)(a):

> "In our view, those comments apply with equal force to Parliament's jurisdiction over interprovincial transportation undertakings under s. 92(10)(a). Section 92A does not derogate from Parliament's jurisdiction

[34] Nigel Bankes, "Pipelines and the Constitution: a Special Issue of the *Review of Constitutional Studies"* (2018) 23:1 *Review of Constitutional Studies* at 12 online: https://ualawccsprod.srv.ualberta.ca/wp-content/uploads/2021/02/01_Bankes-4.pdf [Bankes].
[35] Westcoast Energy*, supra* note 19 at para 49.
[36] *Ibid* at para 48.
[37] *Ibid* at para 64.
[38] *Ibid* at para 65.
[39] *Ibid* at para 80.
[40] *Ibid* at para 81.

> under s. 92(10)(a). Federal jurisdiction under s. 92(10)(a) is premised on a finding that an interprovincial transportation undertaking exists. Subsection 92A(1)(b), on the other hand, is not concerned with the transportation of natural resources beyond the province, but rather with the "development, conservation and management" of these resources within the province."[41]

They go so far as to specifically state that "[n]othing in s. 92A was intended to derogate from the pre-existing powers of Parliament."[42] In the end, the Court found that the proposed facilities "constitute a single federal transportation undertaking which is engaged in the transportation of natural gas from production fields located in the Yukon, the Northwest Territories, Alberta and British Columbia to delivery points within Alberta and British Columbia and the international boundary with the United States. As such, the proposed facilities come within the exclusive jurisdiction of Parliament."[43]

In her dissent, Justice McLachlin (as she then was) argued that "the relationship between the processing plants and the interprovincial pipeline which will carry most of their product does not suffice to remove the plants from provincial to federal control."[44] She adopts the test relied upon by the National Energy Board (now the Canadian Energy Regulator) in their decision on the matter. This test "suggests that so long as the local work or undertaking retains a distinct identity from the interprovincial work or undertaking, it will not be subsumed into the federal sphere."[45] Instead, she concludes that the project is properly within provincial jurisdiction.

Professor Nigel Bankes distinguishes the project in *Westcoast Energy* noting that the "system is an unusual system in the context of the upstream Canadian pipeline industry insofar as Westcoast owns and operates upstream processing facilities closely associated with the operation of its transmission line" and that this "is not the case in Alberta."[46] Nathalie Chalifour also argues that it is still unclear whether federal regulators "have the jurisdiction to consider the upstream and downstream GHG emissions associated with an interprovincial" project also highlighting the limits of this case.[47] Despite these interpretations it is an important decision through which to consider the limits of section 92(10)(a).

Impact Assessment of Interprovincial Works

Impact, or environmental assessment, is the subject of an accompanying report "All Things Considered: Impact Assessment and the Constitution;" however, in the following section we

[41] *Ibid* at para 82.
[42] *Ibid* at para 84.
[43] *Ibid* at para 85.
[44] *Ibid* at para 93.
[45] *Ibid* at para 105.
[46] Bankes, *supra* note 34 at 11.
[47] Nathalie J Chalifour, "Drawing Lines in the Sand: Parliament's Jurisdiction to Consider Upstream and Downstream Greenhouse Gas (GHG) Emissions in Interprovincial Pipeline Project Reviews" (2018) 23:1 *Rev of Const Studies* 129 at 133.

consider where the jurisdiction to perform an impact assessment over an interprovincial project lies.

For example, pipelines are a major interprovincial project subject to the federal *Impact Assessment Act* ("IAA").[48] Specifically, they are included in the Schedule to the *Physical Activities Regulations* under the IAA which requires that projects which include "the construction, operation, decommissioning and abandonment of a new pipeline, as defined in section 2 of the *Canadian Energy Regulator Act*, other than an offshore pipeline, that requires a total of 75km or more of new right of way" are subject to an impact assessment.[49] Professor Andrew Leach provides examples of projects that would likely fall under this mandate, arguing that "[e]xpansion projects like Keystone XL (approximately 400km of new right-of-way in Canada) and the Trans Mountain expansion (approximately 265km of new right-of-way) would have fit this description for a designated project, while the Enbridge's Line 3 replacement project would likely not have fit by default."[50]

In addition to this regulatory requirement, the IAA enables the Minister to "designate a physical activity that is not prescribed by regulations made under paragraph 109(b) if, in his or her opinion, either the carrying out of that physical activity may cause adverse effects within federal jurisdiction or adverse direct or incidental effects, or public concerns related to those effects warrant the designation."[51] This provision enables the Minister to designate a pipeline project that would not otherwise trigger an automatic impact assessment. Professor Leach argues that "[i]t is thus likely, but not guaranteed, that any new or significantly expanded oil sands pipeline would be designated for review."[52]

It is clear that the federal government retains legal jurisdiction to require the impact assessment of an interprovincial project, like a pipeline, but as Alastair Lucas asks, "do provinces have constitutional power to conduct environmental assessment and review of pipeline projects and attach conditions to projects?"[53] Provinces can enact impact assessment laws which may be upheld under numerous constitutional sections including 92(10) local works and undertakings, (13) property and civil rights, and (16) generally all matters of a merely local or private nature in the province.[54] However, this does not necessarily apply to interprovincial works. Alastair Lucas

[48] *Impact Assessment Act*, SC 2019, c 28, s 1 [IAA].
[49] *Physical Activities Regulations,* SOR/2019-285, Sched, s 41; The *Physical Activities Regulation* defines a 'new right of way' as "land that is to be developed for an international electrical transmission line, a *pipeline*, as defined in section 2 of the *Canadian Energy Regulator Act*, a railway line or an all-season public highway, and that is not alongside and contiguous to an area of land that was developed for an electrical transmission line, oil and gas pipeline, railway line or all-season public highway.
[50] Andrew Leach, "The No More Pipelines Act?" (2021) 59:1 *Alta L Rev* 7 at 24 [Leach, "The No More Pipelines Act?"].
[51] IAA, *supra* note 48, s 9(1).
[52] Leach, "The No More Pipelines Act?", *supra* note 50 at 25.
[53] Alastair R. Lucas, "Can Provincial Governments Stop Interprovincial Pipelines?" (4 June 2021) *Canadian Institute of Resources Law Occasional Paper #74* at 2 [Lucas].
[54] *Constitution Act, 1867, supra* note 1, ss 92(10), (13) & (16).

highlights two decisions of relevance: *Vancouver (City) v British Columbia (Environment)* and *Squamish Nation v British Columbia (Minister of Environment)* to consider this question.[55]

In both these decisions, the British Columbia Supreme Court found that "a ministerial environmental assessment certificate for TMX could not be denied" but "the province could impose appropriate conditions provided the conditions did not amount to an impairment of a vital aspect, or frustration of the purpose of the project, as a federal undertaking."[56] In light of these decisions, Lucas concludes that "provinces have no constitutional power to stop interprovincial pipelines. Nor can they deny project approvals under environmental regulatory or environmental assessment legislation."[57]

While there are limits on the provincial impact assessment of an interprovincial project, the *Impact Assessment Act* includes opportunities for cooperation between the two levels of government. These are major projects with significant impacts to land, air, and water. More details about the impact assessment system in Canada can be found in our accompanying report "All Things Considered: Impact Assessment and the Constitution."

Export woes and the TMX Pipeline

In more recent history, the legal battle over the construction of the Trans Mountain Pipeline Extension may be the most well-known debate over interprovincial constitutional jurisdiction. On its face, this was a federally regulated project – a pipeline that crossed the Alberta/British Columbia border but which also garnered significant provincial and municipal opposition. This led to a number of legal actions – some of which will be described below.

The Trans Mountain Expansion ("TMX") is set to transport crude oil from Alberta to the coast of British Columbia along the original Trans Mountain pipeline route. Not long after receiving approval from the federal government the British Columbia government passed amendments to their *Environmental Management Act* which would have limited the transport of heavy oil.[58] Specifically, these proposed amendments would have prohibited the "possession, charge or control" of heavy oil in an amount larger than the "largest annual amount of the substance transported… during each of 2013 to 2017."[59] Alberta responded in opposition to these proposals and against this background, the government of BC put the proposed legislation to the test at the British Columbia Court of Appeal, asking three questions of the Court:[60]

[55] *Vancouver (City) v British Columbia (Environment*), 2018 BCSC 843; *Squamish Nation v British Columbia (Minister of Environment),* 2018 BCSC 844.
[56] Lucas, *supra* note 53 at para 10.
[57] *Ibid* at 29.
[58] *Environmental Management Act,* SBC 2003, c 53.
[59] *Ibid*, Part 2.1; Brendan Downey et al., "Federalism in the Patch: Canada's Energy Industry and the Constitutional Division of Powers" (2020) 58:2 Alta L Rev 273 at 301-302 [Downey].
[60] *Reference re Environmental Management Act (British Columbia),* 2019 BCCA 181 at para 47 [Reference re EMA]; Downey, *supra* note 59 at 302.

1. "Is it within the legislative authority of the Legislature of BC to enact legislation substantially in the form contemplated in the proposed amendments?
2. If the answer to question 1 is yes, would the proposed amendments be applicable to hazardous substances brought into BC by means of interprovincial undertakings?
3. If the answers to 1 and 2 are yes, would existing federal legislation render all or part of the proposed amendments inoperative?"

The answers to this question were provided by the Court of Appeal in the *Reference re Environmental Management Act*.

Reference re Environmental Management Act

In their decision regarding the constitutionality of the proposed changes to the *Environmental Management Act,* the British Columbia Court of Appeal ("BCCA") began by acknowledging that provincial law of this type can be "validly enacted under sections 92(10), (13), and (16)" under the *Constitution Act, 1867* while asking "to what extent this legislation is applicable to interprovincial pipelines?"[61]

In support of their position, the BC government argued that the proposed amendments were *intra vires* section 92(13) of the *Constitution Act, 1867* and that the pith and substance of the legislation in question was the protection of the environment, which validly falls within provincial jurisdiction.[62] BC also relied on the ancillary powers doctrine to argue that the amendments were "rationally and functionally" related to the Act.[63] Canada disagreed, arguing that the provision was aimed specifically at the TMX project and "crosses the line between 'incidentally affecting' and impermissibly regulating the expansion and operation of the pipeline."[64] In their response, the federal government argued that the amendments were actually attempting to do what BC could not do otherwise which was to "frustrate the construction and operation of TMX."[65]

In their conclusion, the BCCA found that the proposed sections of the Act "cross[ed] the line between environmental laws of general application and the regulation of federal undertakings."[66] Justice Newbury, for the majority, held that unless a pipeline is located entirely within a single province, "federal jurisdiction is the only way it may be regulated" and it "is simply not practical or appropriate in terms of constitutional law for different laws and regulations to apply to an interprovincial pipeline (or railway or communications infrastructure) every time it crosses a border."[67] Further, the Court found that "[j]urisdiction over interprovincial undertakings was allocated exclusively to Parliament by the *Constitution Act* to deal with just this type of

[61] Lucas, *supra* note 53 at 11.
[62] Reference re EMA*, supra* note 60 at para 2.
[63] This doctrine is explored in more depth in our background module.
[64] Reference re EMA*, supra* note 60 at para 55.
[65] *Ibid*; Downey, *supra* note 59 at 302 – 303.
[66] Reference re EMA*, supra* note 60 at para 101.
[67] *Ibid* at para 101.

situation."[68] While the Court acknowledged the trend towards cooperative federalism, they also found that "co-operative federalism cannot override or modify the separation of powers nor support a finding that an otherwise unconstitutional law is valid."[69] Simply, the provincial law was found to infringe upon an area of federal jurisdiction and was declared *ultra vires*.

In his analysis of the decision, Brendan Downey argued that "the Court's reasons clarify that our current constitutional toolbox will not go so far as to restructure the division of powers in the name of environmental protection."[70] Downey goes further arguing that the amendments would have created a provincial veto over the TMX project, impairing the federal government to act within its jurisdiction.[71] Similarly, Marie-France Major argued: "the bottom line is that a valid law enacted by either level of government will very likely affect a matter reserved for the other government. But when the affected matter is exclusively federal, provincial law must yield. It's a simple matter of constitutional traffic law."[72]

The decision was appealed up to the Supreme Court of Canada ("SCC") where a number of intervenors also submitted arguments. However, the SCC dismissed the reference from the bench and as Downey put it, seemed unwilling to chip away at federal jurisdiction over interprovincial undertakings.[73] Allastair Lucas highlighted the relevance of the SCC deciding to rule from the bench rather than simply denying leave to appeal noting that the Court specifically stated that "we are all of the view to dismiss the appeal for the unanimous reasons of the Court of Appeal for British Columbia."[74]

City of Burnaby seeks to further stymie TMX

Next came the City of Burnaby's denial of Trans Mountain's entry into a municipal park and delay of a street traffic authorization, thereby hindering construction progress.[75] In response, Trans Mountain filed a number of applications at the National Energy Board ("NEB") - now the Canadian Energy Regulator ("CER").[76]

The first application concerned the denial of entry onto a "3-kilometre long new preferred corridor through Burnaby Mountain."[77] In their decision to confirm Trans Mountain's access

[68] *Ibid* at para 101.
[69] *Ibid* at para 7.
[70] Downey, *supra* note 59 at 303.
[71] *Ibid* at 304.
[72] Marie-France Major, "Who Regulates Pipeline Expansion?" (28 May 2019) *Supreme Advocacy LLP* online: https://canliiconnects.org/en/summaries/66867.
[73] Downey, *supra* note 59 at 306.
[74] Lucas, *supra* note 53 at 10.
[75] See City of Burnaby, by-law No. 4299, *Burnaby Street and Traffic Bylaw 1961*, (20 November 1961); City of Burnaby, by-law No. 7331, *Burnaby Parks Regulation Bylaw 1979*, (26 March 1979); Lucas, *supra* note 53 at 13-14.
[76] National Energy Board, Trans Mountain Pipeline ULC and City of Burnaby (Interpretation of 73(a) of National Energy Board Act) OH-001-2014 (19 August 2014) (Ruling No 28) (File OF-Fac-Oil-T260-2013-03 02 19 August 2014 at 4 [Ruling No 28]; National Energy Board, Trans Mountain Pipeline ULC and City of Burnaby (Trans Mountain Notice of Constitutional Question Reasons for Decision) (23 October 2014), OH-001-2014 (Ruling No 40), File OF-Fac-Oil-T260-2013-03 02 23 October 2014 at 2 [Ruling No 40].
[77] Ruling No 28, *supra* note 76 at 1.

rights, the NEB considered section 73 of the NEB Act (now the *Canadian Energy Regulator Act*). This section falls under Part V which considers the 'Powers of Pipeline Companies' and sets out the powers of these companies as follows:

> **73** A company may, for the purposes of its undertaking, subject to this Act and to any Special Act applicable to it,
>
> **(a)** enter into and on any Crown land without previous licence therefor, or into or on the land of any person, lying in the intended route of its pipeline, and make surveys, examinations or other necessary arrangements on the land for fixing the site of the pipeline, and set out and ascertain such parts of the land as are necessary and proper for the pipeline;
>
> **(b)** purchase, take and hold of and from any person any land or other property necessary for the construction, maintenance, operation and abandonment of its pipeline, or the maintenance of its abandoned pipeline, and sell or otherwise dispose of any of its land or property that has become unnecessary for the purpose of the pipeline or the abandoned pipeline;
>
> **(c)** construct, lay, carry or place its pipeline across, on or under the land of any person on the located line of the pipeline;
>
> **(d)** join its pipeline with the transmission facilities of any other person at any point on its route;
>
> **(e)** construct, erect and maintain all necessary and convenient roads, buildings, houses, stations, depots, wharves, docks and other structures, and construct, purchase and acquire machinery and other apparatus necessary for the construction, maintenance, operation and abandonment of its pipeline or the maintenance of its abandoned pipeline;
>
> **(f)** construct, maintain and operate branch lines, and for that purpose exercise all the powers, privileges and authority necessary therefor, in as full and ample a manner as for a pipeline;
>
> **(g)** alter, repair or discontinue the works mentioned in this section, or any of them, and substitute others in their stead;
>
> **(h)** transmit hydrocarbons by pipeline and regulate the time and manner in which hydrocarbons shall be transmitted, and the tolls to be charged therefor; and

> **(i)** do all other acts necessary for the construction, maintenance, operation and abandonment of its pipeline or the maintenance of its abandoned pipeline.

In their interpretation, the NEB confirmed that this section, which grants access to any Crown (federal or provincial) on privately owned land, does not constitute an application for a temporary access order – which would be issued by the municipality.[78] Instead, this section gives Trans Mountain access to those lands which lie in the "intended route of its pipeline to make surveys and examinations."[79] The NEB also found that allowing only "superficial access" would defeat the purpose of this section of the legislation. Thus, the Board concluded that Trans Mountain "has the power to enter into and on Burnaby land without Burnaby's agreement" and "does not require a Board order for temporary access."[80]

In their response Burnaby also put forward a 'Notice of Constitutional Question' arguing that Paragraph 73(a) of the NEB Act:[81]

- does not empower the Board to make orders that override provincial and municipal jurisdiction;
- to the extent that it purports to empower a company to enter lands, does not override municipal jurisdiction or by-laws; and
- should operate concurrently to facilitate co-operative federalism.

Paragraph 73(a) deals specifically with the powers of a company to enter into and on any Crown land without previous licence. However, in response to this specific argument, the NEB found that no constitutional issues were engaged by Trans Mountain's request as the Board "is not judging any legislation to be invalid, inapplicable, or inoperable."[82] They also disagreed that the concept of co-operative federalism should "influence the interpretation of paragraph 73(a)" and was "not persuaded that the concept is applicable in interpreting this clear provision."[83]

A second decision from the NEB came down a few months later, after work had already begun in the Burnaby Mountain Conservation Area, which, in Burnaby's view violated certain bylaw provisions.[84] In this decision, the NEB held that:[85]

1. "the Board has jurisdiction to determine that specific Burnaby bylaws are inoperative or inapplicable to the extent they conflict with or impair the exercise of Trans Mountain's powers under paragraph 73(a) of the NEB Act;

[78] *National Energy Board Act,* RSC 1985, c N-7 (repealed).
[79] Ruling No 28, *supra* note 76 at 4.
[80] *Ibid* at 4.
[81] *Ibid* at 2.
[82] *Ibid* at 5.
[83] *Ibid* at 6.
[84] Ruling No 40, *supra* note 76 at 3.
[85] *Ibid* at 2.

2. the doctrine of federal paramountcy, or alternatively, interjurisdictional immunity renders the Impugned Bylaws inapplicable or inoperative for the purposes of Trans Mountain's exercise of its powers under paragraph 73(a) of the NEB Act;
3. the Board has authority under subsection 13(b) of the NEB Act to issue an order against Burnaby; and
4. the facts necessitate the granting of such an order, and an order is attached."

In particular, the Board found that they have the "legal authority to consider constitutional questions relating to its own jurisdiction."[86] They also reiterate that the SCC has "confirmed that tribunals with the authority to determine questions of law can adjudicate division of powers cases relating to their own jurisdiction."[87]

Alberta's Preserving Canada's Economic Prosperity Act

The constitutional wrangling continued with Alberta's decision to draft and release the *Preserving Canada's Economic Prosperity Act*, which was proclaimed into law in 2019.[88] The Act expired according to a sunset clause two years after coming into force and a second version was passed on May 1, 2021.[89] The main difference between the two versions was that in the 2021 version, any reference to 'refined fuel' was removed. The next section will describe the judicial history of this Act and example why it was important to remove reference to 'refined fuels' throughout.

Preserving Canada's Economic Prosperity Act: The Details

The Act begins by limiting the export of natural gas or crude oil to those persons who meet the Act's licence requirements.[90] For the purposes of this section, crude oil is defined as "a mixture mainly of pentanes and heavier hydrocarbons (i) that may be contaminated with sulphur compounds (ii) that is recovered or is recoverable at a well from an underground reservoir, and (iii) that is liquid at the conditions under which its volume is measured or estimated, and includes all other hydrocarbon mixtures so recovered or recoverable except natural gas or crude bitumen."[91] As Professor Nigel Bankes highlights, this definition excludes crude bitumen or bitumen diluted with a diluent which he argues means "that the exports of crude bitumen cannot be subjected to a licensing requirement."[92]

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[86] *Ibid* at 6; Lucas, *supra* note 53 at 14.
[87] Ruling No 40, *supra* note 76 at 8.
[88] *Preserving Canada's Economic Prosperity Act,* SA 2018, c P-21.5.
[89] *Ibid*, s 14(1); later *Preserving Canada's Economic Prosperity Act,* SA 2021, c P-21.51 [*Preserving Canada's Economic Prosperity Act*].
[90] *Preserving Canada's Economic Prosperity Act, supra* note 89, s 2(1).
[91] *Ibid*, s 1(a).
[92] Nigel Bankes, "A Bill to Restrict the Interprovincial Movement of Hydrocarbons: aka Preserving Canada's Economic Prosperity [Act]" (18 Apr 2018) *ABlawg* at 3 online: https://ablawg.ca/2018/04/18/a-bill-to-restrict-the-interprovincial-movement-of-hydrocarbons-a-k-a-preserving-canadas-economic-prosperity-act/ [Bankes 2].

According to the Act, licensing requirements only apply if the Minister has required a person, or class of persons, to obtain such a licence.[93] The Act goes on to specify that prior to issuing the required licences the Minister must have first determined the order "to be in the public interest of Alberta having regard to:"[94]

- whether adequate pipeline capacity exists to maximize the return on crude oil and bitumen produced in Alberta;
- whether adequate supplies and reserves of natural gas and crude oil will be available for Alberta's present and future needs; and
- any other matters considered relevant by the Minister.

In his work, Professor Bankes argues that section 2(3)(b) could not be relied upon unless there was evidence of a domestic shortage of these substances in Alberta.[95] He also argues that section 2(3)(a) would be difficult to rely upon because there is no "direct connection between the export of refined product exports and adequate pipeline capacity."[96] As of publishing, these provisions have yet to be used.

Is Preserving Canada's Economic Prosperity Act Constitutional?

Upon release of the *Preserving Canada's Economic Prosperity Act* in 2018, two constitutional issues were flagged.

The first concerned the purported regulation of refined fuels. Nigel Bankes highlights that it remains unclear whether 'refined fuels' would properly qualify as 'primary production' under section 92A of the *Constitution Act*.[97] While Alberta clearly has the constitutional authority to "make laws in relation to the export from the province to another part of Canada of the primary production from non-renewable natural resources"; the Sixth Schedule of the Constitution defines primary production from a non-renewable natural resource as "(ii) it is a product resulting from processing or refining the resource, and is not a manufactured product or a product resulting from refining crude oil, refining upgraded heavy crude oil, refining gases or liquids derived from coal or refining a synthetic equivalent of crude oil."[98] Note that this definition seemingly excludes refined fuel. Professor Bankes argued that the second part of paragraph (ii) which specifies that a natural resource in section 92A is not a refined fuel, means that the Act in its original form was an overreach of provincial constitutional authority because it purported to control the export of refined fuels which are not included in section 92A.[99] With the removal of 'refined fuels' from the 2021 version of the Act, this would no longer present an issue. However, according to Bankes this change does not necessarily mean that the Act's constitutionality is in the clear. Specifically, section 92A(2) allows for laws that relate to the export of non-renewable

[93] *Preserving Canada's Economic Prosperity Act, supra* note 89, s 2(2).
[94] *Ibid*, s 2(3).
[95] Bankes 2, *supra* note 92.
[96] *Ibid* at 4.
[97] *Constitution Act, 1867, supra* note 1, s 92A, Bankes 2, *supra* note 92 at 9.
[98] *Constitution Act, 1867, supra* note 1, Sixth Sched, s 1.
[99] Bankes 2, *supra* note 92 at 9.

natural resources "but such laws may not authorize or provide for discrimination in prices or in supplies exported to another part of Canada."[100] While on the face of the Act discrimination is not clear, Bankes highlights that any "terms and conditions of any licences" must be sure not to discriminate or they could run afoul of section 92A(2).[101] He argues that restrictions on exports only to BC would likely not be entitled to protection under section 92A but that the onus would be on BC to prove the same.[102]

Thus far, the Act has not been used to restrict exports.

Before the Courts

The provincial government of British Columbia challenged the constitutionality of the *Preserving Canada's Economic Prosperity Act* in its first iteration. They argued that the Bill was unconstitutional in light of section 92A and section 121 of the *Constitution Act, 1867.* Section 92A grants provinces jurisdiction over the export of non-renewable natural resources with certain caveats. For example, it only applies to primary production and excludes "a product resulting from refining crude oil or refining upgraded heavy crude oil," it also limits provinces from discriminating in price or supply to other parts of Canada, and does not "derogate from Parliament's jurisdiction over the same subject."[103] This is particularly relevant when we consider the doctrine of paramountcy.

Section 121 of the *Constitution* protects free trade among the provinces and reads "[a]ll articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces."[104] This section was clarified in the 1921 decision of *Gold Seal Limited v The Attorney General of the Province of Alberta* when the SCC found that section 121 protected against custom duties and charges but not from other barriers to trade.[105]

The matter appeared before the federal court where the court chose to rule on the matter, finding that the federal Court has "optional jurisdiction over interprovincial disputes" and in this case "the two provinces involved have opted into that jurisdiction."[106]

> At page 309 of their paper, "Federalism in the Patch: Canada's Energy Industry and the Constitutional Division of Powers", Brendan Downey and his co-authors point out that this may have been a mistake because ""where one province asserts that another has exceeded its authority, it is Parliament whose jurisdiction has been trenched upon, not the moving province."

[100] *Constitution Act, 1867, supra* note 1, s 92A(2).
[101] Bankes 2, *supra* note 92.
[102] *Ibid*.
[103] Downey, *supra* note 59 at 307.
[104] *Constitution Act, 1867, supra* note 1.
[105] *Gold Seal Limited v Alberta (Attorney General)*, (1921) 62 SCR 424; Ian A Blue, "Long Overdue: A Reappraisal of Section 121 of the Constitution Act, 1867" (2010) 33-2 *Dalhousie Law Journal* 161 at 163.
[106] *British Columbia (Attorney General) v Alberta (Attorney General)*, 2019 FC 1195 at para 6.

While the Courts did not agree with this interpretation, it may become an issue going forward, particularly if other groups, such as municipalities, attempt to fight decisions related to interjurisdictional projects. For example, Alastair Lucas points out that in *Forest Ethics Advocacy Association v Canada* the FCA denied the group Forest Ethics standing on the grounds that the NEB decision did not affect its rights, impose legal obligations on it, or prejudicially affect it.

The Federal Court allowed British Columbia's motion for an interlocutory injunction. They agreed that British Columbia's motion met the criteria for an injunction by demonstrating that the validity of the Act raises a serious issue; could cause irreparable harm to the residents of BC; and by demonstrating that the balance of convenience was in their favour.[107]

The government of Alberta appealed and upon appeal, the Federal Court of Appeal ("FCA"), overturned the lower court's injunction, striking BC's Statement of Claim.[108] For the majority, Justice Leblanc held that while the impugned section was broad in scope and could in the appropriate circumstances include "challenges to the validity of legislation, including provincial legislation" the dispute did not lend itself to declaratory relief.[109] In their challenge under both sections 92A and 121, the majority found BC's arguments premature, in part because it was not yet known how the law would operate in practice.[110] In doing this, the Court left open non-discriminatory uses for the Act.[111] In his concurring decision, Justice Nadon even went so far as to hold that Alberta established that "it is plain and obvious that BC's challenge of the Act does not constitute a 'controversy' falling under section 19 of the *FCA*."[112]

However, neither of these conclusions mean that the Act nor any regulatory scheme that may arise from it are ultimately valid nor does it provide Alberta with the ability carte blanche to regulate exports.[113] The 2021 version of the Act has yet to be tested in Court.

Interprovincial Pollution

Unlike works, interprovincial pollution is not designated as either federal or provincial jurisdiction in the Constitution. Rather, as will become apparent, it is an area where a federal role in legislation is justified, in light of the inability of provinces to regulate extraprovincial matters, i.e.,

[107] *Ibid* at para 7.
[108] *Alberta (Attorney General) v British Columbia (Attorney General)*, 2021 FCA 84 at para 190 [Alberta v British Columbia].
[109] *Ibid* at paras 168 & 181-182.
[110] *Ibid* at paras 180 & 181; Nigel Bankes, Andrew Leach & Martin Olszynski, "The Curious Demise of Alberta's Turn Off the Taps Legislation" (18 May 2021) online: https://ablawg.ca/2021/05/18/the-curious-demise-of-albertas-turn-off-the-taps-legislation/ [Bankes, Leach & Olszynski].
[111] Alberta v British Columbia*, supra* note 108 at para 187.
[112] *Ibid* at para 111.
[113] Bankes, Leach & Olszynski, *supra* note 110.

pollution or the harms it causes, coming from another province. The primary decision in this regard is the SCC decision of *Interprovincial Co-operatives Ltd* which we describe below.

The SCC decision in *R v Hydro-Quebec,* [1997] 3 SCR 213 is the leading decision on the federal jurisdiction to regulate toxic substances. Specifically, this decision involved a challenge to the *Chlorobiphenyls Interim Order* which was an order adopted under the previous *Canadian Environmental Protection Act*. In this decision, the Court concluded "that Parliament may validly enact prohibitions under its criminal law power against specific acts for the purpose of preventing pollution or, to put it in other terms, causing the entry into the environment of certain toxic substances." We consider the regulation of toxic substances in an accompanying report "Drowning in Plastic: Toxins and the Constitution."

Interprovincial Co-operatives Ltd. et al v R

The SCC decision *Interprovincial Co-operatives Ltd. et al v Manitoba* ("IPCO v R") involved a complicated set of facts. It began when the defendants, including Interprovincial Co-operatives and Dryden Chemical, who operate plants in Saskatchewan and Ontario discharged mercury or mercury compounds into neighbouring rivers, compounds which eventually ended up in Manitoba waters.[114] As a result, the Manitoba government found that fish in these waters became unsafe for human consumption due to mercury contamination. This led to the closure of the commercial fishery in the area.

The closure of the Manitoba fishery may have been instigated by a Manitoba official; however, he was acting as the appropriate federal authority as the fishery regulations applicable in this case fell under the federal *Fisheries Act*. This was not an issue. We do not consider the issue of fisheries in depth in this section but you can read more about water and fisheries in our accompanying report "A Fish out of Water: Fisheries, Water Management and the Constitution."

In response to the closure of the commercial fishery, the Manitoba government passed the *Fishermen's Assistance and Polluter's Liability Act*.[115] This Act provided financial aid for those who suffered losses due to the closure and for the recovery of damages from those responsible for the contamination – including the defendants Interprovincial Co-operatives and Dryden Chemicals Limited. Specifically, Manitoba's statement of claim alleged that the mercury was "ingested into the tissues of fish" which made it "unsafe for human consumption and unmarketable" thereby resulting in a refusal to permit fishing for commercial purposes.[116] The defendants brought motions to strike those portions of the claim that relied on the statute,

[114] *Interprovincial Co-operatives Ltd. et al v R,* [1976] 1 SCR 477 at 477 [IPCO].
[115] *Fishermen's Assistance and Polluter's Liability Act,* SM 1970, c 32.
[116] IPCO, *supra* note 114 at 482.

alleging that *The Fishermen's Assistance and Polluters' Liability Act* was *ultra vires* provincial jurisdiction or otherwise had no application.[117] It is notable that the Act found that liability was based on the discharge of 'any contaminant' into the water making this a stricter liability than that which existed at common law.

At trial, the Court found "that because s. 4(2) of the challenged Act purported to preclude the defendants from raising a defence of lawful authority to discharge mercury into water in Saskatchewan and Ontario it derogated from civil rights of the defendants outside Manitoba. It was beyond the powers of the Manitoba Legislature to deprive them of the extraterritorial civil rights, and consequently the Act was inapplicable to the defendants and unenforceable against them."[118] However, the trial judge also found that the Act was *intra vires* were it not for its reach outside the province, finding that it was "open to a province to legislate on the effect of pollution within the province, although an interprovincial river was involved."[119] However, at the Manitoba Court of Appeal, this decision was set aside.

The appeals before the SCC raised a number of questions including:[120]

> "1. Is the *Fishermen's Assistance and Polluters' Liability Act ultra vires* the Legislature of the Province of Manitoba in that it is legislation in relation to "sea coast and inland fisheries" and hence within the exclusive jurisdiction of the Parliament of Canada under Section 91(12) of the British North America Act or is otherwise outside the competence of the Legislature of Manitoba?
>
> 2.(a) Is the *Fishermen's Assistance and Polluters' Liability Act ultra vires* the Legislature of the Province of Manitoba for the reason that its provisions are not limited in their application, (either expressly or by implication) to property and civil rights within the province nor directed solely to matters of a merely local or private nature within it? Or, alternatively;
>
> 2.(b) Are the provisions of the *Fishermen's Assistance and Polluters' Liability Act* inapplicable insofar as they purport to regulate acts done by the Appellants, Interprovincial Co-operatives Limited and Dryden Chemicals Limited, outside the Province of Manitoba for the reason that the power of the Legislature of the Province of Manitoba and therefore the application of The *Fishermen's Assistance and Polluters' Liability Act* is limited to the regulation of conduct within the Province?"

In their decision, the majority of the SCC held that the "essential provision on which Manitoba relies to claim against the appellants is the discharge of a contaminant from premises outside Manitoba into waters whereby it is carried into waters in the province" and therefore "the basic provision on which the claim is founded is an act done outside the province namely, the discharge of the contaminant."[121] When considering the constitutionality of this Act, the majority

[117] *Ibid* at 483.
[118] *Ibid* at 488.
[119] *Ibid* at 488.
[120] *Ibid* at 481.
[121] *Ibid* at 507.

also highlights that "the fact that a party is amenable to the jurisdiction of the Courts of a province does not mean that the Legislature of that province has unlimited authority over the matter to be adjudicated upon."[122] As such, the "authority over substantive law must be derived from the other enumerated heads [of power]."[123]

The majority goes on to state that a province cannot validly licence operations within its borders that have an 'injurious effect' outside its borders so as to prevent whatever remedies are available at common law in favour of those who have suffered these injurious effects in another province.[124] Further, they find that there is an overarching constitutional limitation on the legislative authority of provinces and that the courts provide a common forum to enforce this authority.[125] Essentially, the majority finds that when there is a question of which province has valid legislative authority, there is always the possibility that neither province has the proper authority and that it instead resides with the federal Parliament.[126]

In their conclusion, the Court also compares the facts of the case to past decisions on interprovincial trade.[127] If comparable, this would mean that when pollution impacts interprovincial water, it becomes the jurisdiction of the federal government despite the fact that if it was contained within a province water falls under provincial jurisdiction. As the Court notes, "[h]ere, we are faced with a pollution problem that is not really local in scope but truly interprovincial" finding it analogous to the well-established federal jurisdiction over interprovincial works.[128] Joost Bloom highlights one potential flaw in this comparison noting that "interprovincial trade is firmly based on the federal 'trade and commerce' power (section 91(2)) whereas interprovincial pollution cannot be brought so squarely within an enumerated power."[129] However, even Bloom concedes that while interprovincial pollution may not be mentioned in the Constitution, "due to the interprovincial nature of the pollution it seems to falls outside property and civil rights within the province."[130] The question will then rely on the definition of 'interprovincial.'

As such, the Court found that while Saskatchewan and Ontario cannot licence contaminant discharge so as to preclude a legal remedy by those who suffer damage in Manitoba, neither can Manitoba prohibit the discharge of any contaminant into waters flowing into its territory.[131] The Court agrees that Manitobans may still be able to rely on the common law for damages due to pollution but the province cannot prohibit all quantities of contaminant from being lawfully discharged.[132] In both instances, the attempts to legislate by the provinces shift into federal

[122] *Ibid* at 508.
[123] *Ibid* at 508.
[124] *Ibid* at 511.
[125] *Ibid* at 512.
[126] *Ibid* at 513.
[127] *Ibid* at 513.
[128] *Ibid* at 514.
[129] Joost Blom, "The Conflict of Laws and the Constitution--Interprovincial Co-Operatives Ltd. v. The Queen" (1977) 11:1 U Brit Colum L Rev 144 at 153.
[130] *Ibid* at 153.
[131] IPCO, *supra* note 114 at 515.
[132] *Ibid* at 515.

jurisdiction over interprovincial pollution. In the end, the provincial legislation is *ultra vires* and Manitoba is restricted to remedies available at common law which means that the appeals are allowed and the trial judgment is restored.[133]

It is likely that a similar outcome could apply to other forms of pollution so long as they were interprovincial in nature. For example, the management of toxic substances has been confirmed as a valid exercise of the federal criminal law power. As such, this provides another example of how the federal government may be able to exert its jurisdiction to manage interprovincial pollution. Read our accompanying report "Drowning in Plastic: Toxic Substances and the Constitution" to learn more.

From a practical perspective the implications of the IPCO case are problematic as, in the absence of federal intervention in the interprovincial pollution space one is left with common law tort actions that are challenged by issues of causation and cumulative effects. If someone in a downstream jurisdiction is harmed by extra-provincial pollution, they must rely on proving that an upstream defendant caused their harm. An effective regulatory system to prevent harms; however, requires intervention through federal legislation. This, in turn, places the federal government in the position of being accused of overreach if the federal government prohibits pollution impacts from adjoining jurisdictions. In practice, the country is left with significant gaps in regulatory assurances against cross jurisdictional harms, relying instead on multistakeholder processes as described below.

Greenhouse Gas Emissions

Greenhouse gas emissions are clearly an example of interprovincial air pollution. They are also the subject of both federal and provincial laws. In Alberta, the regulation of GHGs is primarily through the *Technology Innovation and Emissions Reduction Regulation*.[134]

However, the regulation of greenhouse gas emissions is also done at the federal level. For example, the *Greenhouse Gas Pollution Pricing Act* and specifically "minimum national standards of GHG price stringency to reduce GHG emissions" were the subject of a recent Supreme Court of Canada ("SCC") decision.[135] The SCC found the *Greenhouse Gas Pollution Pricing Act* could be upheld under the federal peace, order, and good government power.[136] Specifically, in the *Reference re Greenhouse Gas Pollution Pricing Act*, the SCC found that due to the seriousness of climate change as "a threat of the highest order to the country, and indeed to the world" and the evidence that carbon pricing "is a critical measure for the reduction of GHG emissions," the subject matter of the GGPPA is a concern to Canada as a whole.[137] They also

[133] *Ibid* at 516.
[134] *Technology Innovation and Emissions Reduction Regulation*, Alta Reg 133/2019.
[135] *Reference re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at para 4 [*Reference re GGPPA* - SCC].
[136] *Constitution Act, 1867, supra* note 1, s 91.
[137] *Reference re GGPPA* – SCC, *supra* note 135 at paras 167-171.

stated that GHG emissions are "predominantly extraprovincial and international in their character."[138]

Decisions made by the SCC are binding on courts across the country and this will impact on future decisions with regard to the management and regulation of GHGs. It may also be relevant to decisions of the federal government to include certain GHG emissions on the List of Toxic Substances in the *Canadian Environmental Protection Act* and to enact further management of emissions through the *Canadian Net-Zero Emissions Accountability Act*. We consider the idea of GHG emissions as interprovincial pollution fully in our report "It's Getting Hot in Here: Greenhouse Gas Regulation and the Constitution."

Overlapping Jurisdiction: Management of Waterways

The management of waterways in Canada provides an interesting example of overlapping constitutional jurisdiction over interprovincial matters. While a more detailed description of water and fisheries management is the subject of a previous report, we will consider the interprovincial nature of waterways below.

The initial premise is that both levels of government have the authority to legislate with respect to water. At the federal level, the *Constitution Act, 1867* assigns the power to legislate through the jurisdictional heads of power in navigation and shipping and sea coast and inland fisheries.[139] The provincial government is also involved through their broad powers to legislate over property and civil rights; the management of provincial lands; local works and undertakings; and generally, all matters of a merely local or private nature.[140] Collectively, these powers have enabled provincial governments broad control over the use and flow of water, management of water quality, water systems. Notably, as we see in the *Interprovincial Co-operatives* decision above, the federal government has authority over interprovincial water pollution.

Interprovincial Rivers

So, what does this mean for interprovincial rivers? In some instances, to manage water flow and quality the Government of Alberta and the Government of Canada have entered into agreements with neighbouring jurisdictions representing a non-regulatory approach to interprovincial river management. In this case, the federal government has decided to pursue

[138] *Ibid* at para 173.
[139] *Constitution Act, 1867, supra* note 1, ss 91(10) & (12).
[140] *Ibid*, ss 92(13), (5), (10) & (16).

collaborative management rather than take on a role which it has the constitutional jurisdiction to manage.

In Alberta, there are three main interprovincial and international agreements that govern the use and flow of water: the *Boundary Waters Treaty*, the *Master Agreement on Apportionment*, and the *Mackenzie River Basin Transboundary Waters Master Agreement*.[141]

- The *Boundary Waters Treaty* is an agreement between Canada and the United States managing water that is shared between the two countries. As Allison Boutillier notes, this agreement "restricts the use of water from the lakes and rivers along the border between the two nations, insofar as that use affects the flow of water on the other side of the border."[142] In Alberta, the *Boundary Waters Treaty* governs the Milk and St. Mary Rivers allocating half of the water flow to each country respectively.[143] The treaty also includes a commitment that neither country pollute the water covered under the agreement in such a way that would cause injury to health or property in the other country.[144] However, there are no binding mechanisms to enforce these water quality provisions.

- The *Master Agreement on Apportionment* is an agreement between Alberta, Saskatchewan, Manitoba, and the federal government regarding the rivers that travel eastward from Alberta. This includes the Cold River, Beaver River, North Saskatchewan River, South Saskatchewan River, and Battle River.[145] Schedule A requires Alberta to leave approximately 50% of water in the rivers flowing east.[146] In turn, Schedule E sets out water quality objectives for the rivers covered under the Agreement which must be met by each province through "reasonable and practical measures" so "that the quality of the water in the river reach is within the acceptable limit or limits."[147]

- The *Mackenzie River Basin Transboundary Waters Master Agreement* manages the Mackenzie River Basin which flows through Alberta, British Columbia, Saskatchewan, Yukon, and the Northwest Territories.[148] It requires bilateral agreements for the management of the Mackenzie River and in 2015 Alberta entered into such an

[141] *International Boundary Waters Treaty Act*, RSC 1985, c I-17 [*International Boundary Waters Treaty Act*]; "Master Agreement on Apportionment" (Jul 2015), online: https://www.ppwb.ca/about-us/what-we-do/1969-master-agreement-on-apportionment/master-agreement-on-apportionment [Master Agreement 2015]; Mackenzie River Basin Transboundary Waters Master Agreement (24 July 1997), online: Government of Alberta https://open.alberta.ca/publications/mackenzie-river-basin-transboundary-waters-master-agreement [Mackenzie River Basin Transboundary Agreement].

[142] Allison Boutillier, "Water Law in Alberta: A Comprehensive Guide Chapter 2: Use and Flow of Water" (Jan 2022) *Environmental Law Centre* at 6 citing *International Boundary Waters Treaty Act*, *supra* note 141, Sched 1, Arts II & III.

[143] *International Boundary Waters Treaty Act*, *supra* note 141, Sched 1, Art VI.

[144] *Ibid*, Sched 1, Art IV.

[145] Master Agreement 2015, *supra* note 141; The 1969 Master Agreement on Apportionment and By-laws, Rules and Procedures (July 2015), online: Prairie Provinces Water Board https://www.ppwb.ca/uploads/media/5cad077eeae53/master-agreement.pdf?v1.

[146] Master Agreement 2015, *supra* note 141 at 9-11.

[147] *Ibid* at Sched E, s 4.

[148] Mackenzie River Basin Transboundary Agreement, *supra* note 141.

agreement with the Northwest Territories.[149] Under this agreement, Alberta committed to ongoing water quality monitoring and certain water quality objectives.[150]

The basis for these agreements stems from the *Canada Water Act*.[151] Under the *Canada Water Act*, the federal government is able to enter into agreements with the provinces to create and implement water quality management programs and policies. Specifically, under the *Act*, the federal government may enter into agreements with the provinces:[152]

- to establish intergovernmental committees to coordinate programs and policies relating to water;
- to co-manage any waters where there is a significant federal interest, through management plans, conservation projects, and data collection; and
- to co-manage water quality where it has become a matter of urgent national concern, through assessments of the kind and amount of contaminants present in the water, recommendations for water quality standards, restrictions on substances that may be disposed of in the waters, and treatment of any contaminants.

There is also a federal role for the management of water quality stemming from the federal *Fisheries Act*; however, there are limited examples of this role dealing with water quality and monitoring, particularly as it relates to interprovincial rivers.

The Federal Role in Water Quality Management

As we saw in the SCC decision in IPCO, a province cannot validly licence operations within its border that have an 'injurious effect' outside its borders.[153] As the Court notes, "[h]ere, we are faced with a pollution problem that is not really local in scope but truly interprovincial" finding it analogous to the well-established federal jurisdiction over interprovincial works.[154] As such, it suggests that the jurisdiction to manage this type pollution is federal. Despite this, the federal government has undertaken a limited role in its management of interprovincial water pollution. Generally, this federal role is limited to effluent regulations. We consider three such regulations below.

[149] Mackenzie River Basin Bilateral Water Management Agreement Between the Government of Alberta and the Government of the Northwest Territories (23 February 2015), online: https://open.alberta.ca/dataset/a9d6c809-b7f1-4c3a-ac50-5a2194a1b7a0/resource/b8ffd4d6-d7e2-4ccf-b8b9-6e4b3ec97ba2/download/mackenziebasinagreement-ab-nwt-feb2015.pdf.
[150] *Ibid* at 7-8 & appendices 18-38.
[151] *Canada Water Act,* RSC 1985, c C-11.
[152] *Ibid*, ss 4, 5, 11 & 15.
[153] IPCO, *supra* note 114 at 511.
[154] *Ibid* at 514.

Wastewater Systems Effluent Regulations

The federal government regulates the discharge of wastewater contaminants from storm drainage and wastewater systems through the *Wastewater Systems Effluent Regulations*.[155] This regulation sets out restrictions for discharging wastewater into waters frequented by fish and thus derives its constitutionality from its impact on fisheries rather than interprovincial matters. This regulation falls under the auspices of the federal *Fisheries Act* which is *intra vires* Parliament's jurisdiction under section 91(12) sea coast and inland fisheries in the *Constitution Act, 1867*.[156] You can read more about the management fisheries in two accompanying modules on species at risk and fisheries and water management.

Pulp and Paper Effluent Regulations

This regulation limits the release of harmful substances by pulp and paper mills and prohibits the deposit of substances that are acutely lethal to fish.[157] The *Pulp and Paper Effluent Regulations* also fall under the *Fisheries Act*, managing deleterious substances which include acutely lethal effluent, biochemical oxygen demand ("BOD") matter, and suspended solids released from a mill.[158]

The Regulations set maximum limits for BOD matter and suspended solids deposited from a mill.[159] It also prohibits the release of acutely lethal substances unless deposited into a wastewater system that is regulated by the *Wastewater Systems Effluent Regulations* or into a treatment facility that is owned or operated by the owner of the factory or into the common treatment facility for a complex of factories.[160] Finally, the Regulations set out requirements for environmental effects monitoring to identify effects on fish and fish habitat.[161]

Petroleum Refinery Liquid Effluent Regulations

The *Petroleum Refinery Liquid Effluent Regulations* is another effluent regulation that falls under the mandate of the *Fisheries Act*.[162] This Regulation manages the harmful substances released from petroleum refineries into waters frequented by fish. It applies to every refinery that commences the processing of crude oil on or after November 1, 1973.[163]

Deleterious substances for the purposes of these regulations include oil and grease; phenols; sulfide; ammonia nitrogen; total suspended matter; and any substance capable of altering the

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[155] *Wastewater Systems Effluent Regulations*, SOR/2012-139.
[156] *Constitution Act, 1867, supra* note 1, s 91(12).
[157] *Pulp and Paper Effluent Regulations,* SOR/92-269, s 3 [Pulp and Paper]; Government of Canada, "Pulp and Paper Effluent Regulations: overview" online: https://www.canada.ca/en/environment-climate-change/services/managing-pollution/sources-industry/pulp-paper-effluent.html.
[158] Pulp and Paper*, supra* note 157, s 3.
[159] *Ibid*, s 14.
[160] *Ibid*, ss 6(3), (4) & (5).
[161] *Ibid*, s 28.
[162] *Petroleum Refinery Liquid Effluent Regulations,* CRC, c 828.
[163] *Ibid,* s 3.

pH of liquid effluent or once-through cooling water.[164] There are options for authorization for the deposit of these substances so long as the actual deposit does not exceed the authorized deposit amounts set out in the regulations.[165] Finally, the regulations require reporting of the deposit of any of these deleterious substances to the Minister in charge.[166]

Across the board these regulations are limited in scope as they are focused on point source pollution, leaving many sources of non-point source pollution and cumulative loading of waterways unregulated.

FINAL THOUGHTS

Throughout this report we have highlighted a significant difference in the management of interprovincial works and interprovincial pollution. Interprovincial works are managed under a strong regulatory framework including by regulatory agencies at both the federal and provincial levels.[167] On the other hand, an environmental matter, like interprovincial pollution, does not have the same regulatory framework and instead, often relies on agreements such as the Prairie Provinces Water Board.[168] Why do economic matters attract a full regulatory framework and associated agencies, while environmental matters do not?

The SCC decision in IPCO seems to invite federal oversight of interprovincial pollution and yet limited action has been taken. This begs the question, if a province cannot validly licence operations within its borders that have an 'injurious effect' outside its borders and yet this pollution still occurs, who is doing the permitting?[169] Similar to other environmental matters, in order to properly manage interprovincial environmental impacts, both levels of government need to be fully involved. However, in the event that the provinces do not have the jurisdiction to manage these impacts, the federal government needs to fulfill its constitutional role.

Specific to interprovincial works, while they are designated as federal jurisdiction, constitutional overlap will still occur particularly with regards to accompanying works or infrastructure. It is not necessarily simple to separate the railway from the land that surrounds it. As such, a fulsome regulatory framework at both the federal and provincial level is necessary to ensure beneficial environmental outcomes.

[164] *Ibid*, s 4.
[165] *Ibid*, s 5.
[166] *Ibid*, s 12.
[167] See, for example, the Impact Assessment Agency.
[168] The Prairie Provinces Water Board manages any collaborative water sharing between the prairie provinces including under the Master Agreement on Apportionment.
[169] IPCO, *supra* note 114 at 511.