Putting the Constitutional Horse Before the Cart: Federal Jurisdiction over Next Generation Environmental Assessment

by

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Abstract

This thesis explores the extent of federal jurisdiction over a next generation environmental assessment (EA) model proposed by Sinclair, Doelle and Gibson. Examining the jurisprudence and literature, it analyses the scope of federal constitutional authority during the triggering, information-gathering and analysis and decision-making stages of project, strategic and regional assessment. A federal next generation EA law focused on impacts on areas of federal authority could be upheld under various federal constitutional heads of power. Federal jurisdiction is most important at decision-making, and authority to trigger an assessment should be based on the low jurisdictional threshold of reasonable probability of federal effects. Where federal impacts will occur or undertakings otherwise engage federal jurisdiction, authorities have broad authority to consider all relevant impacts. Next generation EA's emphasis on multijurisdictional cooperation aligns with courts' preference for cooperative federalism and therefore may make courts more tolerant towards overlap, especially where cooperation occurs.

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And to Nakuuti, for putting up with me staring at a screen for so long.

List of Abbreviations Used

BNA Act	*British North America Act, 1867*
CCME	Canadian Council of Ministers of the Environment
CEA	Cumulative Effects Assessment
CEAA	Canadian Environmental Assessment Act
CEAA 2012	Canadian Environmental Assessment Act, 2012
CIA	*Combines Investigation Act*, RSC 1970, c C-23
CPCN	Certificate of Public Convenience and Necessity
EA	Environmental Assessment
EARP	Environmental Assessment and Review Process
EARPGO	Environmental Assessment and Review Process Guidelines Order
FA	Fisheries Act
FEARO	Federal Environmental Assessment Review Office
IA	Impact Assessment
IAA	Impact Assessment Act
IAAC	Impact Assessment Agency of Canada
LNG	Liquefied Natural Gas
NWPA	Navigable Waters Protection Act
RA	Regional Assessment
R-SEA	Regional-Strategic Environmental Assessment
SA	Strategic Assessment
SACC	Strategic Assessment of Climate Change
SATCM	Strategic Assessment of Thermal Coal Mining

I. Introduction

1. Context and Objectives

Environmental assessment (EA)[1] in Canada is in a state of flux. In recent years, federal EA has entered the political spotlight, prompting widespread discussions of its purpose, its role in federal environmental decision-making, its failings and ways to build on lessons learned during its nearly fifty years of practice.[2] In 2012, the former Conservative government under Prime Minister Stephen Harper replaced the *Canadian Environmental Assessment Act* (CEAA)[3] with the *Canadian Environmental Assessment Act, 2012* (CEAA 2012),[4] fundamentally altering certain core aspects of federal EA.[5] Next, in 2019, the Liberal government enacted the *Impact Assessment Act* (IAA).[6] Perhaps most relevant for this thesis were two major changes in the approach of federal EA adopted in CEAA 2012 and then under the IAA: the scope of and the alteration of how projects and activities are subjected to federal EA requirements by shifting

[1] There is no consensus in Canada or globally on assessment terminology. Both CEAA and CEAA 2012 refer to "environmental assessment," (EA), while the *Impact Assessment Act* refers to the process as "impact assessment" (IA) in order to reflect it broader consideration of all environmental, socio-economic and health effects. Internationally, Environmental Impact Assessment (EIA) is preferred, along with the various other forms of impact assessment (social, health, economic, etc) (see, e.g., International Association for Impact Assessment, "What is Impact Assessment" (October 2009), online: IAIA <https://www.iaia.org/uploads/pdf/What_is_IA_web.pdf>). As with the IAA, the next generation EA model studied in this thesis imagines a comprehensive scope, although for the sake of consistency with Sinclair *et al.*'s model this thesis adopts the term EA throughout.

[2] See, e.g.: Anna Johnston, "Imagining EA 2.0: Outcomes of the 2016 Federal Environmental Assessment Reform Summit" (2016) 30 JELP 1 ["Imagining EA 2.0"]; Stephen Hazell, "Improving the Effectiveness of Environmental Assessment in Addressing Federal Environmental Priorities" (2010) 20 JELP 214; Anthony Ho & Chris Tollefson, "Sustainability-based Assessment of Project-related Climate Change Impacts: A Next Generation Policy Conundrum" (2016) 30 JELP 67; Rod Northey, "Fading Role of Alternatives in Federal Environmental Assessment" (2016) 29 J Envtl L & Prac 41 ["Fading Role of Alternatives"]; Canada, *Environmental and Regulatory Reviews Discussion Paper* (June 2017) at 7, online: Government of Canada <https://www.canada.ca/content/dam/themes/environment/conservation/environmental-reviews/share-your-views/proposed-approach/discussion-paper-june-2017-eng.pdf>.

[3] SC 1992, c 37 [*CEAA*].

[4] SC 2012, c 19 [*CEAA 2012*].

[5] Meinhard Doelle, "CEAA 2012: The End of Federal EA as We Know It?" (2012) 24 J Envtl L & Prac 1 ["CEAA 2012"].

[6] SC 2019, c 28, s 1 [*IAA*].

from a "triggering approach" to a "project list" approach, eliminating federal regulatory authority as a gatekeeper to federal EA processes.[7]

As is discussed in Chapter II, the IAA introduces another set of shifts in federal EA that have implications on federal jurisdiction, including the transition to broader "impact assessment" (IA) that considers a broad range of positive and negative environmental, social, health and economic effects and their distribution.[8] During the years between CEAA 2012's appearance among federal environmental laws and the tabling of the IAA, Canada's EA academic and expert community remained busy, with a number of individuals and groups proposing various models of "next generation" EA to replace CEAA 2012 and its predecessor processes.[9] Many shared common recommendations, such as broadening the scope of factors considered to all socio-economic, health, cultural, environmental and economic, and enacting mandatory regional and strategic assessments.[10] Most of these recommendations are, to varying degrees, based on a paper by Robert B. Gibson, Meinhard Doelle and A.J. Sinclair titled *Fulfilling the Promise: Basic Components of Next Generation Environmental Assessment*.[11]

Among the different next generation EA models, and underlying the IAA, lurks a question about the extent of federal jurisdiction over EA in Canada, and in particular federal authority to broaden the

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[7] *CEAA*, *supra* note 3, s 5; *CEAA 2012, supra* note 4, ss 13-15, 84(a).

[8] *IAA*, *supra* note 6, s 22.

[9] See, e.g.: Johnston, Imagining EA 2.0, *supra* note 2; Environmental Planning and Assessment Caucus (Canadian Environmental Network), *Achieving a Next Generation of Environmental Assessment Submission to the Expert Review of Federal Environmental Assessment Processes* (14 December 2016), online: RCEN <http://rcen.ca/sites/default/files/epa_caucus_submission_to_expert_panel_2016-12-14.pdf> ["Expert Panel Submission"]; and Anna Johnston, *West Coast Environmental Law Submissions on Next Generation Environmental Assessment* (23 December 2016), online: West Coast Environmental Law <https://www.wcel.org/sites/default/files/publications/wcel-submissions-to-ea-panel-final-16-12-23.pdf> ["WCEL Submission"].

[10] Johnston, Imagining EA 2.0*, ibid* at 9-13; Environmental Planning and Assessment Caucus, Expert Panel Submission, *ibid* at 19-20, 30-34; and Johnston, WCEL Submission, *ibid* at 9-19.

[11] Robert B. Gibson, Meinhard Doelle & A. John Sinclair, "Fulfilling the Promise: Basic Components of Next Generation Environmental Assessment" (2016) 29 J Envtl L & Prac 25 ["Fulfilling the Promise"].

scope and application of assessment as per the next generation EA model. Neither the provinces nor the federal government have exclusive jurisdiction over the environment, a broad subject matter that touches on several heads of power of both provincial and federal governments.[12] Powers over and interests in environmental matters may overlap,[13] and tension and conflict between the federal and provincial governments feature prominently in Canadian federalism,[14] especially with respect to natural resources and the environment.[15] Indeed, in September 2019, Alberta's Lieutenant Governor in Council referred two constitutional questions to the Alberta Court of Appeal respecting the constitutional validity of the IAA and the *Physical Activities Regulations*.[16] Backed by the provinces of Saskatchewan and Ontario, Alberta is challenging federal authority to assess projects it describes as provincially regulated, and argues that provincial authority to manage natural resources cannot be interfered with by federal assessment and decision-making [IAA Reference].[17] The case not only highlights tensions between federal and provincial governments respecting environmental assessment and authority, but also illustrates the need for answers. While ultimately a decision on the IAA Reference should answer some questions respecting the scope of federal assessment authority, that decision will be based on the

[12] *Friends of the Oldman River Society v Canada (Minister of Transport),* [1992] 1 SCR 3, [1992] 2 WWR 193 [*Oldman*] at 74; Peter W. Hogg, *Constitutional Law of Canada*, 5th ed supplemented (Toronto, Thompson Reuters: 2016), vol 1 at 30-20 ["*Constitutional Law*"]; Meinhard Doelle, *The Federal Environmental Assessment Process: A Guide and Critique* (Markham, LexisNexis Canada Inc: 2008) at 52 [*The Federal EA Process*]; Jamie Benidickson, *Environmental Law*, 3rd ed (Toronto: Irwin Law, 2009) at 30.

[13] Patricia Fitzpatrick & A. John Sinclair, "Multi-jurisdictional environmental impact assessment: Canadian experiences" (2009) 29 Environ Impact Asses Rev 252 at 253 ["Canadian Experiences"].

[14] Herman Bakvis & Grace Skogstad, "Canadian Federalism: Performance, Effectiveness, and Legitimacy" in Herman Bakvis and Grace Skogstad, eds *Canadian Federalism* (Don Mills, Ont: Oxford University Press, 2012) 2 at 4; Roy J. Romanow, "Federalism and Resource Management" in J. Owen Saunders, ed. *Managing Natural Resources in a Federal State: Essays from the Second Banff Conference on Natural Resources Law* (Toronto: Carswell, 1986) 1 at 9.

[15] Romanow, *ibid* at 1.

[16] O.C. 160/2019 (*Judicature Act,* s 26); Physical Activities Regulations, SOR/2019-285.

[17] *Attorney General (Alberta) v Attorney General (Canada),* Calgary Appeal No 1901-0276AC, Factum of the Attorney General of Alberta, paras 122-26. The IAA Reference hearing concluded in February 2021. At the time of writing, a decision had not yet been rendered.

scheme of the Act, whereas this thesis explores the extent of federal jurisdiction outside the constraints of a particular legislative regime.

The purpose of this thesis is to explore the question of federal jurisdiction over all aspects of next generation EA at the project, regional and strategic levels. The outstanding questions it seeks to answer are: what is the extent of federal jurisdiction to trigger project, regional and strategic assessments? What is the scope of factors that authorities or panels can consider in those assessments? And what constitutional parameters, if any, exist on federal decision-making in each tier of assessment? As a result, its objectives are to: 1) identify the aspects and stages of next generation EA with jurisdictional implications, and establish why those jurisdictional implications exist; 2) identify and examine the case law and literature dealing with those or analogous aspects and stages in order to inform the analysis; and 3) draw conclusions respecting the extent of federal jurisdiction over those aspects during each stage of assessment, i.e., what project, regional or strategic assessments a federal authority could trigger, what information the authority could consider in assessments, and the range of possible outcomes of those assessments. It seeks to contribute to the academic literature on federal jurisdiction to assess and make decisions respecting projects and activities that impact on areas of federal authority. By delineating the outer limits of federal jurisdiction over next generation EA, and therefore what is possible within those limits, it is hoped that this thesis will help inform the drafting of a next generation federal EA law.

The thesis builds upon the seminal Supreme Court of Canada decision *Friends of the Oldman River Society v Canada (Minister of Transport)* (*Oldman*),[18] which considered the constitutional validity of the

[18] *Oldman*, *supra* note 12.

Environmental Assessment and Review Process Guidelines Order (EARPGO),[19] an early predecessor to the IAA. Writing for the majority, La Forest J. upheld the EARPGO as an adjunct of various federal powers relating to environmental protection, as well as under the "residuary aspect" of the Peace, Order and Good Government (POGG) head of power.[20] However, *Oldman* left unanswered key questions respecting federal authority over project, regional and strategic assessment. The EARPGO applied only to projects with federal proponents, that receive federal funding, were located on federal lands, or that may have had environmental effects on areas of federal responsibility, and it listed a more limited set of factors to consider than the next generation EA model, which requires assessments to consider all relevant information.[21] *Oldman* also did not consider the extent of federal authority respecting regional and strategic assessment.

Chapter II begins with a short history of EA in Canada in order to situate the discussion of jurisdiction in a shared understanding of EA's purposes, objectives and application, and then sets out the constitutional and political context by describing Canadian federalism, the constitutional separation of powers and the political sensitivities respecting environmental protection and resource management that courts will be live to in division of powers cases. It then moves into a discussion of the next generation EA model chosen for this thesis: a second paper by Sinclair, Doelle and Gibson about implementing next generation EA[22] was selected for the purposes of this discussion because it 1) is related to and builds on the foundational *Fulfilling the Promise* model; and 2) clearly articulates "key

[19] SOR/84-467 [EARPGO].

[20] *The Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5, s 91; *Oldman*, *supra* note 12 at 74; Hogg, *Constitutional Law, supra* note 12 at 17.1-2; Baier, Gerald. "Judicial Review and Canadian Federalism" in Herman Bakvis and Grace Skogstad, eds, *Canadian Federalism: Performance, Effectiveness, and Legitimacy* (Don Mills, Ont: Oxford University Press, 2002) 24 at 25.

[21] EARPGO, *supra* note 19, ss 4, 6.

[22] A.J. Sinclair, M. Doelle & R. B. Gibson, "Implementing next generation assessment: A case example of a global challenge" (2018) 72 EIA Rev 166 ["Implementing Next Generation EA"].

components" of next generation assessment that provide a useful breakdown of the different ways federal jurisdiction is implicated during the stages of assessment. The chapter describes the three main "stages" of assessment (triggering, information gathering and analysis, and decision-making), and then identifies those aspects or components of the next generation model that have jurisdictional implications: sustainability, alternatives, tiered regional and strategic assessment, cumulative effects and multijurisdictional collaboration.

Chapter III provides an overview of the steps in a constitutional division of powers analysis and the main applicable doctrines, then situates the analysis within Canada's "political constitution" by examining trends in approaches to Canadian federalism issues, and describing the preference of the courts and in the legal scholarship for a cooperative federalism approach to environmental governance.

Finally, Chapter IV examines the scope of federal jurisdiction over next generation project, regional and strategic EA in light of the Supreme Court of Canada's findings in *Oldman* and other relevant case law. It begins by analyzing the pith and substance of a next generation federal EA law and under which heads of power it might be upheld, then walks through each stage of assessment for project and regional and strategic assessment, discussing the likely scope of federal constitutional authority during triggering, information-gathering and analysis, and decision-making, before summarizing its main conclusions.

The thesis concludes that there need only be reasonable probability of federal effects, or a federal role in the assessment, in order a federal authority to validly require an assessment. The scope of the information and the scope of the project that may be considered in assessments is broad, and while decisions must be in respect of a federal matter (such as a federal effect or federally-regulated project), decision makers may consider all relevant information when making their decisions respecting the

federal matter. Similarly, federal regional and strategic assessments must be mainly in relation to federal matters, but federal authorities have jurisdiction to regulate the pace and scale of impacts on areas of federal jurisdiction and activities over which Parliament has constitutional authority. Therefore, regional and strategic assessment decisions may incidentally affect the provincial sphere, such as natural resource management. Whether and when a project, regional or strategic assessment decision intrudes into a provincial matter such that it upsets the balance of power must be considered on a case-by-case basis.

2. Methodology

This thesis approaches the question of federal jurisdiction over next generation EA through four approaches: doctrinal, historical, interdisciplinary and cooperative federalism theory. The doctrinal research analyses legislation and case law, primarily from the Supreme Court of Canada and appellate courts, selected both through identification in the literature and subsequent cases, and through key search terms and noting up. Case law searches were conducted in CanLii and Lexis Advance Quicklaw. The constitutional research began with Hogg and a comprehensive examination of monographs on constitutional environmental law in the University of Ottawa Law Library, and proceeded into research of sources cited in those monographs and keyword searches in Google Scholar. Historically, the research examines the history of assessment law and practice federally in Canada through comparison of legal and policy instruments, and through case law and secondary sources found to refer to those instruments. It also draws on the case law and secondary literature to understand the evolution of approaches to Canadian federalism and current preference for a cooperative federalist model. The methods used to research cooperative federalism included a review of books available through the University of Ottawa, as well as key term searches in Google Scholar.

Finally, the research is interdisciplinary in that it draws on non-legal instruments and literature for its analysis of the main components of next generation EA. Indeed, EA itself is interdisciplinary, relying on sources such as physical and social sciences, health sciences and Indigenous knowledge for its conduct; accordingly, much has been written on subjects like CEA and sustainability by non-legal scholars.[23] To achieve the first objective of identifying aspects of stages and aspects of next generation EA of jurisdictional relevance, the research began with Sinclair *et al.*'s next generation EA model, then moved onto a literature review of secondary sources on EA law and practice to more fully understand the theoretical underpinnings of each aspect discussed in that paper. The literature review began with works by authors referred to by Sinclair *et al.* to provide further clarification on the next generation EA model. Where more context was required, the research used Google Scholar to identify further literature on the same subject, for example, by using the search terms "sustainability assessment," cumulative effects assessment," "regional assessment," "strategic assessment," and those terms in combination with such others as "triggering," "scope" and "outcomes." Sources were chosen that functionally align with the recommendations in the Sinclair *et. al.* paper and the Gibson *et al*. paper that first sets out the next generation assessment model. From these sources, inductive reasoning was used to make observations respecting aspects and stages of next generation EA and case law on EA and identify analogous case law and relationships between the findings, while deductive and analogical reasoning was used to apply the law to the next generation EA model and draw conclusions respecting federal authority over it.

[23] E.g., Robert B. Gibson, ed. *Sustainability Assessment: Applications and Opportunities* (Abingdon, UK: Routledge, 2017) ["*Sustainability Assessment: Applications*"]; Peter N. Duinker & Lorne A. Greig. "The Impotence of Cumulative Effects Assessment in Canada: Ailments and Ideas for Redeployment" (2006) 37 Envtl Mgmt 153 ["Impotence"].

In the analysis, the thesis uses a combination of hypothetical scenarios and real examples as fact patterns. For the analysis of the extent of federal jurisdiction, it provides examples of existing projects as well as hypothetical scenarios from the literature, and it also identifies new hypothetical scenarios pieced together from different experiences. For regional assessment (RA), it uses the federal RA in Ontario's Ring of Fire (the Ring of Fire RA)[24] as the basis of its analysis because of the significant provincial interests in the region (in particular, the significant mineral interests). For strategic assessment (SA), the analysis looks at the Strategic Assessment of Thermal Coal Mining (SATCM)[25] because the assessment seeks to explore an activity (mining) over which the provincial legislatures have jurisdiction, raising interesting questions respecting the extent of federal authority to trigger the assessment, the range of information it may consider in it, and potential outcomes.

[24] Government of Canada, *Regional Assessment in the Ring of Fire Area*, online: Canadian Impact Assessment Registry <https://iaac-aeic.gc.ca/050/evaluations/proj/80468>.

[25] Government of Canada, *Draft terms of reference for conducting a strategic assessment of thermal coal mining*, online: Government of Canada <https://www.canada.ca/en/environment-climate-change/corporate/transparency/consultations/draft-terms-reference-conducting-strategic-assessment-thermal-coal-mining.html>.

II. Federal EA and the Constitutional Context

This chapter sets the stage for the analysis in Chapter III by examining what EA is, Canada's model of federalism and the constitutional division of powers, and the current case law respecting EA to date. It begins by examining the fundamental objectives of EA and different theories about its purpose and its role in environmental decision-making, then describes the history of its application federally, including the IAA and the next generation EA model of Sinclair *et al*. It then shifts to the constitutional context, exploring Canada's division of constitutional powers, how the courts and literature wrestle with Canadian federalism, and federal jurisdiction over the environment and EA. In the last section, it applies the law respecting federal constitutional authority over the environment and EA to identify those aspects of next generation EA with that raise constitutional questions currently unresolved by the courts.

1. Background

a) What EA is

Environmental assessment has been described as a process designed to "look before you leap" into decisions that may have environmental implications.[26] While there are different perspectives on what EA is and what its objectives are or ought to be, there is widespread agreement that EA at its core is a process for informing environmental decision-making, and an opportunity to justify those decisions.[27]

[26] William A. Tilleman, "Environmental Assessment" in *Environmental Law and Policy*, 3rd edition, Elaine Hughes, Alastair R. Lucas and William A. Tilleman eds (Toronto; Emond Montgomery Publications Limited, 2003) 215 at 215; Jocelyn Stacey, "The Environmental, Democratic, and Rule-of-Law Implications of Harper's Environmental Assessment Legacy" (2016) 21 Rev Const Stud 1 at 169.

[27] D. Paul Emond, *Environmental Assessment Law in Canada* (Toronto: Emond-Montgomery Ltd., 1978; Benidickson, *Environmental Law, supra* note 12 at 249; Stacey, *Ibid*; Canadian Environmental Assessment Agency, *Canadian Environmental Assessment Act: An Overview* (Canada, 2003, updated 2011) at 3; Robert B. Gibson *et al*., *Sustainability Assessment: Criteria and Process* (London: Earthscan, 2005) at 15 ["*Sustainability Assessment: Criteria and Processes*"]; Neil Craik, "Transboundary Environmental Assessment in Canada: International and Constitutional Dimensions" (2010) 21 J Envtl L & Prac 107 at 127.

Doelle argues that CEAA, the first federal EA statute in Canada, was "designed around the basic idea that all federal decision makers, in principle, should consider the environmental implications of decisions they were being asked to make about proposed projects."[28] The Supreme Court of Canada reiterated this understanding of EA in *Oldman*, finding that EA is "essentially an information gathering process in furtherance of a decision-making function within federal jurisdiction."[29] In *Peace Valley Landowner Association v British Columbia*, the Federal Court of Appeal, citing La Forest J. in *Oldman*, held that the purpose of CEAA 2012 was environmental protection.[30] Expanding on the definition set out in *Oldman*, Rothstein J. for the Supreme Court in *MiningWatch Canada* described the former CEAA as "a detailed set of procedures that federal authorities must follow before projects that may adversely affect the environment are permitted to proceed."[31] This latter point is key, as without a resulting decision one may argue that assessment has no purpose. While EA processes are usually separate from regulatory decision-making, EA is inherently about gathering and analyzing information, and tends to result in a report for EA decision-makers and to guide regulatory decisions.[32]

Intended to help foster sustainable development,[33] EA seeks to predict the potential consequences of proposed human activity, mitigate or avoid any adverse effects, and promote stated benefits.[34] A planning tool, EA is designed to anticipate potential future unwanted consequences rather than react to them after they have occurred, and to bridge the gap between environmental planning

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[28] Doelle, CEAA 2012, *supra* note 5 at 4.

[29] *Oldman*, *supra* note 12 at 75.

[30] *Peace Valley Landowner Association v British Columbia (Environment)*, 2016 BCCA 377, para 34.

[31] *MiningWatch Canada v Canada (Minister of Fisheries & Oceans*, 2010 SCC 2, 2010 CarswellNat 55, para 1 [*MiningWatch*].

[32] Arlene Kwasniak, "Environmental Assessment, Overlap, Duplication, Harmonization, Equivalency, and Substitution: Interpretation, Misinterpretation, and a Path Forward" (2010) 20 J Envtl L & Prac 1 at 14-15.

[33] Stacey, *supra* note 26 at 170.

[34] *Ibid* at 170-71; Federal Environmental Assessment Review Office (FEARO), "The Federal Environmental Assessment and Review Process (Minister of Supply and Services Canada, 1987) at 1.

and project-level decision-making.[35] As a forum for environmental planning and decision-making, EA acts as a check on development by requiring proponents and authorities to consider its environmental and socio-economic costs.[36] As the Federal Court found in *Greenpeace Canada v Canada*[37] held:

> The most important role for a review panel is to provide an evidentiary basis for decisions that must be taken by Cabinet and responsible authorities. The jurisprudence establishes that gathering, disclosing, and holding hearings to assemble and assess this evidentiary foundation is an independent duty of a review panel, and failure to discharge it undermines the ability of the Cabinet and responsible authorities to discharge their own duties under the Act.[38]

Of course, EA can have substantive objectives, such as "providing a forum for explicitly considering whether the risks of projects are acceptable and whether proposals reflect the best use of our land and resources."[39] Other benefits include avoiding, reducing or eliminating adverse effects and risks, providing the public with opportunities to input into decision-making, and cost-savings.[40] In other words, EA serves to inform and strengthen decisions at the project level as well as at the policy, planning and program levels.[41]

Experts argue, however, that EA only achieves its purposes if it is wide-ranging. For example, an objective of EA should be to consider a broad range of potential effects, including the direct and indirect project-level and cumulative biophysical environmental, social, economic, health and cultural impacts of concern to the public, other participants and interested parties.[42] By adding to the assessment the

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[35] Rodney Northey, *Canada Environmental Assessment Act and EARP Guidelines Order* (Scarborough, Ont: Thomson Canada Ltd, 1994) at 2, 16 [*CEAA and EARPGO*]; Stacey, *ibid* at 171.

[36] Emond, *supra* note 27 at 1-2; Gibson, *Sustainability Assessment: Criteria and Processes, supra* note 27 at 15.

[37] *Greenpeace Canada v Canada (Attorney General)*, [2014] FCJ No 515, 2014 FC 463 [*Greenpeace*]

[38] *Ibid* at para 235.

[39] Stacey, *supra* note 26 at 170-71.

[40] Benidickson, *Environmental Law, supra* note 12 at 252.

[41] Albert Koehl, "EA and Climate Change Mitigation" (2010) 21 JELP 181 at 185.

[42] Northey, *CEAA and EARPGO, supra* note 35 at 1; Gibson, *Sustainability Assessment: Criteria and Processes, supra* note 27 at 24.

identification of the proposal's purposes, and a comparative evaluation of its alternatives and alternative means of carrying it out, assessment authorities enhance the credibility and sustainability of environmental decision-making.[43] Assessments should also occur across the lifespan of an undertaking, from the early planning stages through to operation and decommissioning.[44] Gibson identifies the three main principles of effective EA as ensuring attention to the integration of biophysical, social and economic effects, selecting the most desirable option from among the alternatives for maximizing benefits while avoiding or mitigating adverse effects, and improving the "consistency, impartiality, transparency and accountability" of decision-making.[45] To these may be added promotion of sustainability, facilitating collaboration and reconciliation with Indigenous peoples, coordination across and among governments, and encouraging meaningful public engagement.[46] As Winfield observes, the goal of EA is to "provide a more integrated picture of potential project impacts of projects [*sic*] than could be provided by the existing, institutionally and legislatively fragmented, environmental regulatory regime."[47]

Opinion differs on how many stages EA has. In *Oldman*, La Forest held that EA is comprised of two primary components: information gathering and evaluation of the potential environmental consequences of a proposed undertaking, and decision-making.[48] In addition to these, Chalifour has identified the initial trigger that causes an environmental assessment to be initiated, and post-decision

[43] Northey, *CEAA and EARPGO, ibid* at 1; Gibson, *Sustainability Assessment: Criteria and Processes, supra* note 27 at 24.

[44] Gibson, *Sustainability Assessment: Criteria and Processes, ibid* at 16.

[45] Robert B. Gibson, "In full retreat: the Canadian government's new environmental assessment law undoes decades of progress" (2012) 30 Impact Assess Proj Apprais 179 at 181 ["In Full Retreat"].

[46] Mark Winfield, "Decision-Making, Governance and Sustainability" (2016) 29 J Envtl L & Prac 129 at 130; Stacey, *supra* note 26 at 170; Benidickson, *Environmental Law,* 3rd ed, *supra* note 12 at 254.

[47] Winfield, *ibid* at 134.

[48] *Oldman*, *supra* note 12 at 71.

follow-up and monitoring.[49] The IAA adds yet another stage to the assessment: the planning phase.[50] Doelle suggests there are three main stages in an assessment that have jurisdictional implications: when triggering an assessment, when scoping the project and the assessment, and in decision-making.[51] Indeed, final decisions to approve projects include the imposition of conditions respecting mitigation and follow-up program,[52] meaning that from a jurisdictional perspective decision-making and follow-up can be considered under the same lens. Similarly, the primary focus of the planning phase under the IAA is the scope of information that will be considered in the assessment,[53] meaning that it can be categorized within the first of La Forest's identified components: information-gathering and analysis. As a result, the three stages of EA this paper will examine are 1) triggering, 2) information gathering and analysis, and 3) decision-making. Federal jurisdiction with respect to each stage is discussed in more detail in Chapter IV for project, regional and strategic assessment.

b) From EA to IA: History of federal EA

First required of federal departments in 1973,[54] EA has been informing federal decisions for over four decades. It emerged in response to a growing awareness in the 1960s that "the institutionally and legislative fragmented approach to the management of environmental issues was unable to provide comprehensive perspectives on the potential environmental impacts of proposed projects."[55] Initially, the Environmental Assessment and Review Process (EARP) was a federal policy initiative, supported by

[49] See, e.g., 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 Rev Const Stud 129 at 149.

[50] *IAA*, *supra* note 6, ss 10-20.

[51] Doelle, *The Federal EA Process, supra* note 12 at 62-63.

[52] Gibson, In Full Retreat, *supra* note 45 at 186.

[53] *IAA, supra* note 6, s 18.

[54] FEARO, *supra* note 34 at 3.

[55] Winfield, *supra* note 46 at 133.

the Federal Environmental Assessment Review Office (FEARO).[56] In 1984, the Governor in Council issued the Environmental Assessment and Review Process Guidelines Order (EARPGO),[57] under the authority of the *Government Organization Act*.[58] EARP and the EARPGO were intended as planning processes rather than regulatory reviews, designed to address potential environmental effects of proposals and any resulting changes that those effects may have on socio-economic conditions.[59] The process under both began with an initial assessment of the proposal's potential environmental effects and their significance, followed by a decision that the proposal would not result in any adverse effects and could proceed without an assessment, or a finding that the proposal might result in significant adverse environmental effects, in which case an assessment was required.[60] "Proposals" included "initiatives, undertakings and activities for which the Government of Canada has a decision making responsibility," including both physical works and policies, plans, programs and agreements.[61] While the EARPGO was primarily about informing decisions, there was a clear intention to also allow for the alteration or abandonment of projects where unacceptable effects could not be mitigated or avoided.[62]

In 1992, the federal government enacted CEAA, entrenching EA processes in legislation for the first time. As a planning tool, CEAA's two main purposes were to minimize or avoid adverse environmental effects, and to incorporate environmental factors into federal decision-making.[63] As with the EARPGO, federal action was the entry-point to an assessment. CEAA required assessments for

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[56] Tilleman, *supra* note 26 at 217.

[57] SOR/84-467.

[58] FEARO, *supra* note 34 at 3; Tilleman, *supra* note 26 at 217.

[59] FEARO, *ibid* at 1.

[60] *Ibid* at 2.

[61] Northey, *CEAA and EARPGO, supra* note 35 at 22.

[62] FEARO, *supra* note 34 at 1.

[63] Canadian Environmental Assessment Agency, *Canadian Environmental Assessment Act: An Overview* (Canada, 2003, updated 2011) at 3; *CEAA*, *supra* note 3, s 4(1).

projects and activities that required federal approval, occurred on federal lands, received federal funding or had a federal proponent.[64] Once an assessment was triggered in one of these ways, the authority had to consider any environmental effects of the project, including the health, socio-economic or cultural effects of any environmental changes.[65] Like EARPGO, a decision could result in an approval, an approval with conditions, or a rejection of the proposal.[66]

Federal EA underwent a significant transformation in 2012, with the passage of CEAA 2012. A key jurisdictional change this statute brought to the practice of federal EA was the shift from the regulatory triggering approach to a project-listing approach, which only required projects to undergo assessment if they were described in regulations, occurred on federal lands or were designated by the Minister. It also narrowed the factors that could be considered to only the biophysical effects of a project that were within federal jurisdiction and eliminated the consideration of alternatives, which.[67] As a result of these changes, federal EA was no longer a comprehensive process for looking at the full range of potential integrated and cumulative effects, but a restricted regulatory tool for looking exclusively at the narrow effects that fall under the federal Parliament's regulatory and constitutional authority.[68] By restricting what factors may be considered in an assessment (along with restricting what projects are assessed and the ability of the public to participate), CEAA 2012 failed to meet what Stacey argues is a basic rule-of-law standard of EA: "the federal decision-maker must now base his or her decision on a restricted understanding of environmental effects," and it is "unlikely that such a narrow understanding of

[64] *CEAA*, *ibid,* s 5(1).

[65] *Ibid*, ss 2(1), 16(1).

[66] *Ibid*, ss 23, 37(1).

[67] *CEAA 2012*, *supra* note 4, ss 2, 14(2), 19(1).

[68] Gibson, In Full Retreat, *supra* note 45 at 182; Doelle, CEAA 2012, *supra* note 5 at 4.

environmental effects can provide a sufficient basis for determining whether a project can be justified in the circumstances."[69]

Beyond the implications CEAA 2012 had on EA efficacy and fairness, it also had likely unintended implications on the jurisdictional bases of federal EA. Unintended, because many of the changes made through CEAA 2012 appear to be designed to limit federal assessment to a narrow view of the federal Parliament's constitutional authority, such as the restriction of the factors to consider to select ones within federal jurisdiction.[70] But while CEAA 2012 carefully grounded what occurs *during* an assessment in federal jurisdiction, it abandoned what many considered to be a jurisdictional gatekeeper that only subjected projects to assessment under CEAA and the EARPGO if those projects involved an exercise of federal authority. Of course, it is important not to conflate constitutional authority to enact valid federal laws with an exercise of statutory authority. It is s. 91 of *The Constitution Act, 1867*, not statutes enacted under its section 91 heads, that confers jurisdiction on Parliament. Therefore, when CEAA triggered an assessment on the basis that the project or activity required a federal approval, that trigger was not a *jurisdictional* one, but a regulatory one. However, a statutory requirement to obtain federal approval arguably provides greater confidence that the matter falls within federal jurisdiction than the "project list" approach employed under CEAA 2012. Retained under the IAA,[71] the project list approach designates for assessment projects that fall within categories presumed to usually involve federal jurisdiction, regardless of the specifics of the triggered projects themselves,[72] such as location or design.

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[69] Stacey, *supra* note 26 at 176.

[70] CEAA 2012 defined the environmental effects that were to be considered in an assessment as changes to fisheries, aquatic species at risk and migratory birds, environmental effects on federal lands, interprovincial environmental effects, and any health, socio-economic and cultural or land and resource-use effects on Indigenous peoples that result from an environmental effect: *CEAA 2012, supra* note 4, s 5.

[71] *IAA*, *supra* note 6, ss 2, 7(1), 9(1), 16(1), 109(b).

[72] See, e.g., Physical Activities Regulations: Regulatory Impact Analysis Statement, (2019) C Gaz II, Vol 153, No 17 at 5663.

The latest stage in the evolution of federal EA is the IAA, which came into force on August 28, 2019. While the focus of this thesis is on federal jurisdiction over next generation EA generally, the IAA contains a number of aspects of next generation EA that make it a helpful example to turn to throughout the analysis. For starters, the IAA broadens the scope of factors to consider in assessments to all positive and negative environmental, social, health and economic factors.[73] It requires assessments and decision-makers to consider the extent to which the project contributes to sustainability,[74] the intersection of sex and gender with other identity factors (GBA+),[75] and the extent to which the project helps or hinders Canada's ability to meet its environmental and climate obligations.[76] It also allows for regional and strategic assessments with or without provincial cooperation.[77] On the other hand, the IAA retains the project list approach employed under CEAA 2012,[78] weakening the link between federal constitutional authority and IA. Given the broadening of scope of assessment and retention of the project list approach, the issue of federal constitutional authority over assessment is a particularly live question at the time of writing, especially as the first assessments triggered under it unfold.

c) Next generation EA

It would be tempting to cite disappointment with CEAA 2012 as the sole catalyst for next generation EA proposals, but in fact calls for EA reform are arguably based as much in recognition of EA failings and lessons learned under CEAA, the EARP and EARPGO, as well as in experiences from other jurisdictions. Indeed, the authors of the next generation EA model used for the jurisdictional analysis in this paper

[73] *IAA*, *supra* note 6, s 22(1)(a).

[74] *Ibid*, s 22(h).

[75] *Ibid*, s 22(s).

[76] *Ibid*, s 22(1)(i).

[77] *Ibid*, ss 92-93, 95.

[78] *Ibid*, ss 2 *"designated project,"* 7(3), 16(1), 109(b).

claim that "[t]he history of Canadian environmental assessment has been a race between accomplishment and disappointment."[79] Of chief concern is EA's tendency to focus on mitigation and avoidance of effects while presuming that projects will nonetheless be approved, despite residual harms they may cause or the public's long-term wellbeing.[80] The almost exclusive focus on the project level, rather than on strategic and regional assessments, has undermined the ability to effectively address cumulative effects and broader policy issues, while even at the project level assessment has failed to reflect a growing recognition of complex interactions in socio-ecological systems and increasingly pressing needs to ensure progress towards sustainability."[81]

To remedy the myriad of defects identified in federal EA processes, Sinclair *et al* propose the next generation EA model as an integrated package of eleven "overlapping and interdependent" key components.[82] They are:[83]

1. Sustainability as a core purpose;
2. Consideration of alternatives;
3. Integrated, tiered assessments at the regional, strategic and project levels;
4. Application of appropriate assessment streams;
5. Effective attention to cumulative effects;
6. Cooperation with other jurisdictions;
7. Co-governance with Indigenous nations;
8. Participation for the people;
9. Learning-oriented assessment;
10. Transparency and accountability; and
11. Ensuring contributions to sustainability throughout the lifespan of the project.

[79] Gibson *et al*, Fulfilling the Promise, *supra* note 11 at 258.

[80] *Ibid*.

[81] *Ibid*.

[82] Sinclair *et al*, Implementing Next Generation EA, *supra* note 22 at 168.

[83] *Ibid* at 169.

That these components are to be viewed and applied as an integrated package with a strong legislative foundation must be stressed.[84] While the purpose of this thesis is to examine only those aspects identified as having substantive jurisdictional implications, the teasing out of only some components is not intended to detract from the other components or undermine the integration of the suite of components. Also, not all components are within the power of the federal Parliament to achieve unilaterally, such as collaboration with other relevant provincial and territorial authorities. Thus, while the authors argue that "the preference is for participative and, to the extent possible, consensus-based approaches" to assessment and decision-making,[85] a strong federal role is required for situations where consensus is not possible. Given the political reality of federal-provincial environmental relations, federal jurisdiction may be essential for achieving the promise of next generation EA.

2. Constitutional Context: Canada's Unique Model of Federalism and Implications for Next Generation Federal EA

a) The division of constitutional powers over the environment

Neither the provinces nor the federal government have exclusive jurisdiction over the environment, perhaps owing to the lack of knowledge of or attention to environmental matters at the time Canada's original constitution,[86] the *British North America Act* (BNA Act),[87] was written.[88] Not explicitly

[84] *Ibid* at 174.

[85] Gibson *et al*, Fulfilling the Promise, *supra* note 11 at 273.

[86] Benidickson argues that the "pollution of Canada's lakes and rivers was certainly under discussion in the Confederation era," although offers no sources to substantiate this claim: Benidickson, *Environmental Law*, *supra* note 12 at 30.

[87] 1867, SS 1867, c 3 [*BNA*

[88] Dale Gibson, "Constitutional Jurisdiction over Environmental Management in Canada," (1973) 23 UTLJ 54 ["Constitutional Jurisdiction"] at 54-55. In 1982, the BNA Act was amended and re-named *The Constitution Act, 1867*, which continues to operate as the supreme law in Canada: Benidickson, *Environmental Law, supra* note 12 at 27.

enumerated under the Constitution,[89] the environment is a broad subject matter that touches on several heads of power of both provincial and federal governments.[90] In the Supreme Court of Canada decision *Oldman,* the majority described the environment as "a constitutionally abstruse matter which does not comfortably fit within the existing division of powers without considerable overlap and uncertainty."[91] For example, the federal government has power over trade and commerce, navigation and shipping, the sea coast[92] and inland fisheries, Indigenous peoples and their lands, and criminal law,[93] whereas the provinces have jurisdiction over forests, local works and undertakings, property and civil rights,[94] non-renewable natural resources, and the generation and production of electrical energy.[95] Both levels of government are granted taxation powers,[96] and the federal government has a residual power to enact legislation "for the Peace, Order, and good Government of Canada" respecting matters that the Constitution does not assign to the provinces (known as the POGG power).[97] The federal Parliament also has jurisdiction over ships, railways, canals, telegraphs, and undertakings "connecting

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[89] *The Constitution Act, 1867, supra* note 20.

[90] *Oldman*, *supra* note 12 at 9; Hogg, *Constitutional Law, supra* note 12 at 30.20; Doelle, *The Federal EA Process, supra* note 12 at 52; Benidickson, *Environmental Law*, *supra* note 12 at 30.

[91] *Oldman*, *ibid* at 64.

[92] Canada has claimed a 12-mile territorial sea (*Territorial Sea and Fishing Zones Act*, RSC 1985, c T-8, s 3). In *Reference re Ownership of Off Shore Mineral Rights (British Columbia),* [1967] SCR 792, the SCC held that the boundaries of British Columbia end at the low-water mark. As a result, BC does not have any property rights in, or rights to explore or exploit the continental shelf. Thus, the federal government owns the seabed of the territorial sea and has legislative jurisdiction over it, including jurisdiction over the resources of the continental shelf, as well as the right to explore and exploit those resources. Hogg states that this holding likely applies to the Atlantic Canada provinces, although Newfoundland-Labrador may be an exception because it joined Canada in 1949 and claims it had acquired international status and therefore rights over its territorial sea, which it claims to retain (Hogg, *Constitutional Law, supra* note 12 at 30.7-9). Other exceptions include inland waters, harbours, bays, estuaries and other waters lying "between the jaws of the land," including the water between mainland BC and Vancouver Island, which belong to the provinces: *Reference re Strait of Georgia,* [1984] 1 SCR 388; Hogg, *Constitutional Law, supra* note 12 at 30.7-8.

[93] *The Constitution Act, 1867, supra* note 20, ss 91(2), (10), (12), (24), (27).

[94] This power includes most mining, manufacturing and other industries that affect the environment: Peter W. Hogg, "Constitutional Authority over Greenhouse Gas Emissions" (2009) 46:2 Alta L R 507 at 510 ["Constitutional Authority"].

[95] *The Constitution Act, 1867, supra* note 20, ss 92(5), (10), (13), 92A(1)-(2); see also Hogg, *Constitutional Law, supra* note 12 at 30.3.

[96] *Ibid*, ss 91(3), 92(2).

[97] *Ibid*, s 91.

the Province with any other or others of the Provinces, or extending beyond the Limits of the Province," including pipelines,[98] as well as pollution originating in one province that has an external impact on another province or internationally.[99] According to Hogg, the most obvious sources of federal power over the environment are criminal law, fisheries, navigation and shipping, coastal waters outside provincial boundaries, international and interprovincial rivers, federal public lands, taxation, and industries within federal jurisdiction (e.g., aviation, interprovincial and international transportation and communication, nuclear power and banking).[100] Doelle suggests that while the list of federal heads of power related to the environment is longer, they tend to be more focused in nature than the provincial powers.[101] Benidikson agrees, noting that the federal trade and commerce power has failed to give rise to broad federal environmental authority.[102]

In many cases, powers related to environmental matters overlap.[103] For example, while the provinces have jurisdiction over non-renewable resources, the federal government has legislative authority over onshore minerals where they occur on or under federal public property, and privately-owned minerals in the territories and the offshore.[104] In 1993, the Supreme Court of Canada upheld the

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[98] *The Constitution Act, 1867, supra* note 20, s 92(10)(a). In *Campbell-Bennett v Comstock Midwestern,* [1954] SCR 207 and *Sask Power Corp v Trans-Can Pipelines,* [1979] 1 SCR 297, the SCC held that pipelines that extend beyond limits of province falls outside provincial jurisdiction. However, in *Re Westspur Pipeline Co Gathering System,* (1957) 76 CRTC 158 and *Westcoast Energy v Can,* [1998] 1 SCR 322, the CRTC and SCC held that a pipeline that is local but connected to and operated as part of an interprovincial system is outside of federal jurisdiction, and a distribution line that carries gas from the interprovincial trunk line to the consumer has been held to be within provincial jurisdiction (*Re National Energy Board Act,* [1988] 2 FC 196 (CA)). The courts have held that the connection or extension must be an operational connection, not merely physical (Hogg, *Constitutional Law, supra* note 12 at 22.5).

[99] *Interprovincial Co-operatives v R*, [1976] 1 SCR 477; Benidickson, *Environmental Law*, *supra* note 12 at 33-34.

[100] Hogg, *Constitutional Law, supra* note 12 at 30.20-21.

[101] Doelle, *The Federal EA Process, supra* note 12 at 54.

[102] Benidickson, *Environmental Law*, *supra* note 12 at 33.

[103] Fitzpatrick & Sinclair, Canadian Experiences, *supra* note 13 at 253.

[104] Hogg, *Constitutional Law, supra* note 12 at 30.4.

constitutional validity of the *Atomic Energy Control Act*[105] under the federal declaratory power under section 92(10)(c), giving the federal Parliament responsibility over prospecting for, mining, producing, refining, handling and marketing uranium.[106] While the provinces have jurisdiction over forests, the federal Parliament has legislative authority over forests on federal lands (such as national parks, military reserves, and forests in the three territories), and forests as they relate to navigation (for example, log booms on navigable waters) and fisheries (e.g., if logging debris harms fish or fish habitat).[107] Federal powers act as a limit on provincial authority over natural resources, meaning that a province may not authorize obstructions on navigation or harm to fish habitat.[108] Likewise, provincial Legislatures have power over the generation and distribution of hydroelectricity because dams, generating stations and distribution systems are "local works and undertakings" within s 92(10) of *The Constitution Act, 1867*,[109] while on the other hand, the federal government has authority over dams under its power over navigation and shipping.[110] The federal power to make laws in relation to the sea coast and inland fisheries extends to all fisheries in Canada, including those that do not cross provincial borders,[111] and includes authority to protect fish habitat, such as spawning grounds,[112] but does not give the federal Parliament general authority to regulate water pollution.[113] Similarly, while as noted above the federal Parliament has authority over the development and generation of nuclear power, the provinces have

[105] SC 1946, c 37; now RSC 1985, c A-6.

[106] *Ontario Hydro v Ontario* [1993] 3 SCR 327; see also Hogg, *Constitutional Law, supra* note 12 at 30.5-6.

[107] Hogg, *ibid* at 30.11-12.

[108] *Queddy River Driving Boom Co. v Davidson,* (1883) 10 SCR 222; Hogg, *Constitutional Law, supra* note 12 at 30.12.

[109] Hogg, *ibid* at 30-18.

[110] *Smith v Ontario and Minnesota Power Co,* [1918] OJ No 7, 44 OLR, para 20; *Ibid* at 30.28.

[111] Hogg, *ibid* at 30.13.

[112] *Ward v Canada,* [2002] 1 SCR 569, [2002] SCJ No 21, paras 32-33 [*Ward*].

[113] *R v Fowler*, [1980] 2 SCR 213, [1980] SCJ No 58 [*Fowler*]; see also Hogg, *Constitutional Law, supra* note 12 at 30.16. It should be noted that in *R v Crown Zellerbach Canada Ltd.,* [1988] 1 SCR 401, [1988] SCJ No. 23 [*Crown Zellerbach*], a majority of the Supreme Court of Canada upheld a federal law prohibiting dumping at sea, including in marine waters where the substance will also pollute extra-provincial waters, under the POGG power.

power to make laws in relation to the "development, conservation and management of sites and facilities in the province for the generation and production of electrical energy."[114] And while the provinces have authority over mining, control of the import and export of commodities to and from Canada is a federal responsibility that "provides considerable opportunity to affect the activities of any industry, including mining, that is profoundly affected by import policies, and heavily engaged in export trade."[115] This power stems from the federal Parliament's authority over customs and excise laws, trade and commerce, taxation and POGG,[116] and the overlap between federal and provincial powers in relation to mining were mirrored in the Australian case *Murphyores Incorporated Pty. Ltd. v Commonwealth of Australia* (1976).[117] In *Murphyores*, the High Court of Australia held that the Australian federal power over exports includes the power to examine and put conditions on the production of mineral sands, the control of which is generally a matter under state control.[118] While the question of federal authority to impose environmental conditions in relation to the exploration, extraction or processing of natural resources remains unanswered by Canadian courts, *Murphyores* provides some guidance on how the courts might decide the matter on Canadian soil.

Due to the overlapping, diverse and important nature of environmental protection, it is considered to be an area of shared jurisdiction (see section 2, below, for a discussion of constitutional doctrines that apply where overlap occurs).[119] While one level of government cannot enact a law in

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[114] Hogg, *Constitutional Law, supra* note 12 at 30.19.

[115] Gibson, Constitutional Jurisdiction, *supra* note 88 at 62.

[116] Gibson, Constitutional Jurisdiction, *supra* note 88 at 62, fn 43.

[117] 136 CLR. 1 (HC).

[118] *Ibid* at para 29.

[119] *R v Chiasson*, (1982), 66 CCC (2d) 195 (NBCA), aff'd [1984] 1 SCR 266 (SCC); *British Columbia (Attorney General) v Lafarge Canada Inc.*, 2007 SCC 23, [2007] 2 SCR 86 [*Lafarge*]; Hogg, *Constitutional Authority, supra* note 94 at 510; Barry C. Field & Nancy D. Olewiler, *Environmental Economics*, 3rd ed. (Whitby: McGraw-Hill Ryerson, 2011), ch 15 at 3-4, online: Simon Fraser University <http://www.sfu.ca/~wainwrig/Econ400/Olewiler-Field_3rd-ed/Field%203Ce%20Final%20MS%20Ch15.pdf>; and Doelle, *The Federal EA Process, supra* note 12 at 59.

relation to a matter over which the other level has exclusive jurisdiction, there may be another aspect that the government can regulate.[120] Gibson warns that while federal authority takes priority where there is inconsistency, federal powers should not be assumed to be more significant than provincial powers, such as where provincial jurisdiction over a matter is indisputable and federal jurisdiction is debatable.[121] At the same time, where the federal Parliament does have constitutional authority, such as over fisheries or navigation, it has considerable powers in respect of environmental protection related to that power.[122]

Courts have set limitations on federal authority to encroach on matters of provincial jurisdiction, even when enacting legislation ostensibly under an enumerated head of power. In *R v Fowler*,[123] for example, the Supreme Court of Canada held that a provision of the *Fisheries Act* prohibiting discharging logging debris into waters frequented by fish was *ultra vires* Parliament (invalid). Section 33(3) read:

> No person engaged in logging, lumbering, land clearing or other operations, shall put or knowingly permit to be put, any slash, stumps or other debris into any water frequented by fish or that flows into such water, or on the ice over either such water, or at a place from which it is likely to be carried into either such water.[124]

In that case, the appellant had been charged under the provision for causing debris to enter into salmon habitat during the course of logging operations. Justice Martland, writing for the Court, upheld the trial judge's decision to acquit the Appellant. He held that the provision was overbroad, covering logging, lumbering, land clearing and other operations, and prohibiting slash, stumps and other debris, did not set out a threshold amount of debris, blanket-prohibited activities subject to provincial jurisdiction,

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[120] Doelle, *ibid*.

[121] Gibson, Constitutional Jurisdiction, *supra* note 88 at 55.

[122] Gibson, Constitutional Jurisdiction, *supra* note 88 at 79, 81.

[123] *Supra* note 113

[124] *Ibid*, para 2.

covered waters and ice beyond just waters frequented by fish, and did not link the proscribed conduct to any actual or potential harm to fisheries.[125] Because the provision in question was not sufficiently linked to harm to fisheries, and because of the lack of evidence that the proscribed actions would always be harmful to fisheries, the Court held that it could not be upheld under the federal fisheries power.[126] However, in the related case *Northwest Falling Contractors Ltd. v R.* (*Northwest Falling*),[127] Martland J went on to uphold a provision prohibiting the deposit of a deleterious substance into water frequented by fish because the term "deleterious substance" was defined as something that was "deleterious to fish or fish habitat or to the use by man of fish,"[128] which provides a link between the prescribed conduct and harm to fisheries. Since the impugned provision in *Northwest Falling* did relate to harm to fish (an area within federal jurisdiction), Martland J distinguished it from *Fowler* and held that the provision was *intra vires* the federal Parliament to enact (valid). Thus, attempts by the federal government to regulate environmental matters must specifically relate to an impact on a valid head of power, rather than simply refer to that power.

b) Federalism and the political constitution

While this thesis is about federal constitutional authority over next generation EA, any understanding of the extent of federal authority would be impoverished without concurrent understanding of the broader socio-political context of Canadian federalism within which the constitutional division of powers sits.[129] In *Canadian Western Bank*, a majority of the Supreme Court described federalism as "the legal

[125] *Ibid*, paras 22-23.

[126] *Fowler, supra* note 113 at 8.

[127] [1980] 2 SCR 292, [1980] SCJ No 68 at 301 [*Northwest Falling*].

[128] *Fisheries Act*, RSC 1970, c F-14, s 33(11)(b).

[129] W.R. Lederman, "Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation" (1975) 53 Can B Rev 597 at 601 ["Unity and Diversity"]; William R. MacKay, "Canadian Federalism and the Environment: The Literature" (2004) 17 Geo Int'l Envtl L Rev 25 at 28.

response… to the political and cultural realities" of Confederation-era Canada, "a legal recognition of the diversity of the original members."[130] As a component of federalism, the division of powers "was designed to uphold this diversity within a single nation" by conferring broad powers on the provinces while ensuring national unity through assignment to the federal Parliament "powers better exercised in relation to the country as a whole."[131] At Confederation as well as now, the "fundamental objectives of federalism" are "to reconcile unity with diversity, promote democratic participation by reserving meaningful powers to the local or regional level and to foster co-operation among governments and legislatures for the common good."[132]

When determining the extent of each order of government's authority over next generation EA, one must look beyond constitutional texts and jurisprudence to Canada's "political constitution," or the "understood role of the federal and provincial governments."[133] This political constitution "forms a kind of gloss upon the legalities of federal-provincial relations," as "perceived provincial sensitivities" and intergovernmental relations tend to be critical factors in judicial consideration of the extent of federal authority over a matter.[134] Also, because at least some degree of cooperation in the pursuit of shared environmental goals is more likely to yield desired outcomes, understanding of the division of environmental powers is required at a political as well as strictly legal level.[135] The federal system and its resulting interjurisdictional tensions have both benefits and downsides; they can help find balance

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[130] *Canadian Western Bank v Alberta*, [2007] 2 SCR 3, 2007 SCC 22 at para 22 [*Canadian Western Bank*].

[131] *Ibid*.

[132] *Ibid*.

[133] J. Owen Saunders, "Introduction – Good Federalism, Bad Federalism: Managing our Natural Resources" in in J. Owen Saunders, ed. *Managing Natural Resources in a Federal State: Essays from the Second Banff Conference on Natural Resources Law* (Toronto: Carswell, 1986) ix at xiv; MacKay, *supra* note 129 at 26 and 33.

[134] Alastair R. Lucas, "Harmonization of the Federal and Provincial Environmental Policies: The Changing Legal and Policy Framework," in J. Owen Saunders, ed *Managing Natural Resources in a Federal State: Essays from the Second Banff Conference on Natural Resources Law* (Toronto: Carswell, 1986) 33 at 35; MacKay, *ibid* at 26.

[135] MacKay, *ibid* at 28.

between the desire for national unity and diverging regional needs and wants,[136] but the division of powers risks fragmentation and can result in legal vacuums over important environmental issues.[137] Conflict between the two orders of government has been especially pronounced with respect to natural resources and the competing need for environmental protection,[138] with EA especially vulnerable to jurisdictional tensions due to its application early on in decision-making and its goal of obtaining and assessing a comprehensive suite of relevant information, much of which may be viewed by one order of government as being outside of the reach of the other.[139]

Canadian courts, when addressing questions of constitutional authority, will be live to these tensions,[140] and often disappointing legislative measures (or lack of measures at all) in response to pressing environmental issues[141] suggest that the federal government is, too. Academics have noted three reasons for a historically weak federal role in environmental regulation over time: constitutional constraint, provincial resistance, and external pressure.[142] The federal government has tended to avoid asserting itself unilaterally over environmental matters due to concerns over conflicts with provincial

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[136] Romanow, *supra* note 14 at 9.

[137] Steven A. Kennett, "Federal Environmental Jurisdiction After Oldman" (1993) 38 McGill LJ 180 at 182.

[138] Romanow, *supra* note 14 at 1.

[139] Kennett, *supra* note 137 at 182.

[140] Lucas, *supra* note 134 at 35.

[141] See, e.g., Mark & Douglas Macdonald, "Federalism and Canadian Climate Change Policy" in Herman Bakvis and Grace Skogstad, eds *Canadian Federalism* (Don Mills, Ont: Oxford University Press, 2012) 223 at 257; Stewart Elgie, "Federal, State and Provincial Interplay Regarding Cross-Border Environmental Pollution" (2001) 27 Can-US LJ 205 at 214; Grace Skogstad, "Intergovernmental Relations and the Politics of Environmental Protection in Canada" in Kenneth M. Holland, F.L. Morton, and Brian Galligan, eds *Federalism and the Environment: Environmental Policymaking in Australia, Canada and the United States* (Westport, Conneticut: Greenwood Press, 1996) 103 at 111; Saunders, *supra* note 133 at xv. This view is contested by Lucas, who argues that the federal government "has served as a national leader in developing environmental policy, in establishing emission and ambient standards and objectives for contaminants, and in encouraging environmental impact assessment of major projects": Alastair R. "Harmonization of the Federal and Provincial Environmental Policies: The Changing Legal and Policy Framework," in J. Owen Saunders, ed *Managing Natural Resources in a Federal State: Essays from the Second Banff Conference on Natural Resources Law* (Toronto: Carswell, 1986) 33 at 39.

[142] MacKay, *supra* note 129 at 30.

authorities, resulting in weaker federal leadership in environmental policy-making,[143] likely in large part due to the fact that many provinces' economies depend largely on one or two resource industries.[144] Even after a favourable ruling in the *Crown Zellerbach* decision (discussed below), the federal government was "reluctant to press for greater control over environmental policy-making due to provincial resistance."[145] While the federal government has asserted its authority in matters with extra-provincial or international implications, it has predominantly preferred to follow a collaborative approach when addressing environmental matters in order to avoid provoking the resource-dependent provinces.[146] A desire for voter support and international pressures are additional considerations facing the federal government when deciding whether to exercise its jurisdiction over the environment, often outweighing what are seen as "diffuse benefits."[147] Indeed, the federal government only began asserting power over environmental policy after the mid-1980s, at least partially in response to rising pressures from international coalitions and domestic environmental groups.[148] Thus, the political constitution must also be read as including the "cultural, social and economic realities of the society for which [the sections 91 and 92 heads of power] were intended," as those realities will inevitably inform the policy direction of both orders of government along with federal-provincial political realities. [149] Along with the need to balance national standards with provincial autonomy and regional diversity, these realities are likely to influence judicial consideration of balance of power questions.[150]

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[143] *Ibid* at 33-34; Lucas, *supra* note 134 at 39.

[144] MacKay, *ibid* at 34.

[145] MacKay, *ibid* at 33.

[146] *Ibid* at 34; Winfield, *supra* note 46 at 127; Skogstad, *supra* note 141 at 111.

[147] MacKay, *ibid* at 35

[148] Skogstad, *supra* note 141 at 112; MacKay at 36-37.

[149] Lederman, "Unity and Diversity," *supra* note 129 at 601.

[150] W. R. Lederman, "The Concurrent Operation of Federal and Provincial Laws in Canada" (1963) 9 McGill LJ 185 at 186-87 ["Concurrent Operation"].

3. Next Generation EA: The Jurisdictional Questions

As seen above, sections 91 and 92 of *The Constitution Act, 1867* enumerate and assign classes of subjects to the federal Parliament and provinces, respectively. A process for informing decision-making,[151] EA has potential to tread beyond federal heads of power and affect provincial matters. As this section discusses, overlap with or impacts on provincial jurisdiction may occur when deciding what projects must undergo an EA, the scope of information to consider in an assessment, and through decision-making. This section therefore examines those aspects of next generation EA with potential for encroachment upon provincial matters. To identify which aspects of next generation EA raise jurisdictional issues, each of the 11 were identified for whether they involve decisions respecting which undertakings may be subject to assessment, the scope of information considered, or decision-making. For the reasons discussed in the remainder of this section, those aspects are the sustainability scope, consideration of alternatives, application of assessments to all undertakings at the project, regional and strategic levels, and cumulative effects.[152] Other aspects, such as multijurisdictional collaboration and designing appropriate assessment streams, which are focused on process and so do not directly risk infringement on provincial authority (but do have potential to ameliorate infringement on provincial jurisdiction), are factored into the analysis of federal jurisdiction over next generation EA in Chapter IV.

a) Sustainability focus

In next generation EA, assessments should consider the "full range of environmental and socio-economic impacts," including "social, cultural, ecological, economic and health considerations," and "aim to ensure net contributions to sustainability including the equitable distribution of risks, impacts

[151] *Oldman*, *supra* note 12 at 75.

[152] Sinclair *et al*, Implementing Next Generation EA, *supra* note 22 at 168.

and benefits."[153] Further, assessments lead to decisions that, in the project context, include conditions, monitoring, reporting and enforcement of compliance.[154] Sustainability is a broad term, which may be best described as "a holistic concept in which social and environmental concerns are inherently intertwined, regardless of which particular definition of sustainability, or sustainable development, is adopted."[155] The Brundtland Commission defined sustainable development as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs."[156] In EA, sustainability has been used to refer to both the scope of factors considered in the assessment as including socio-economic and health effects along with biophysical environmental ones, as well as a substantive overall sustainability objective or test for project approval.[157] Accordingly, "sustainability" for the purposes of this thesis includes overall assessment purposes, scope of assessment, how decisions are made, and what occurs following the decision. According to Gibson, a key characteristic of sustainability in the EA context is the recognition of links and interdependencies between human and ecological systems.[158] In other words, while sustainability is often perceived as being comprised of "pillars" (e.g., environmental, economic, social and health), assessment must understand the interdependencies among the pillars in addition to effects on the pillars themselves, in order for sustainability to be achieved.[159] Some definitions, such as the one applied by the Canadian

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[153] *Ibid* at 168, 170.

[154] *Ibid* at 168.

[155] William Grace & Jenny Pope, "A Systems Approach to Sustainability" in Angus Morrison-Saunders, Jenny Pope & Alan Bond, eds., *Handbook of Sustainability Assessment* (Cheltenham, UK: Edward Elgar Publishing Ltd., 2015) 285 at 285.

[156] G.H. Brundtland (chair), World Commission on Environment and Development, *Our Common Future* (New York: United Nations, 1987): https://en.wikisource.org/wiki/Brundtland_Report at 8.

[157] Sinclair *et al*, Implementing Next Generation EA, *supra* note 22 at 170; Expert Panel, Review of Environmental Assessment Processes, *Building Common Ground: A New Vision for Impact Assessment in Canada: The Final Report of the Expert Panel for the Review of Environmental Assessment Processes* (2017), online: <https://www.canada.ca/content/dam/themes/environment/conservation/environmental-reviews/building-common-ground/building-common-ground.pdf at 20-21.

[158] Gibson, *Sustainability Assessment: Criteria and Processes, supra* note 27 at 60.

[159] *Ibid* at 94.

Council of Ministers of the Environment (CCME), include socio-economic and health conditions along with biophysical ones in the definition of environmental effects.[160]

Sustainability has been an objective of assessment since the 1970s, when EA and other mechanisms for public participation began to be seen as having the potential to make environmental decision-making more sustainable, accountable and legitimate.[161] Because one of EA's goals is to provide a comprehensive and integrated picture of potential socio-economic and environmental impacts,[162] EA should aspire to enhance social well-being while respecting ecological thresholds and biophysical systems.[163] Thus, a core purpose of next generation EA should be to "ensure net contributions to sustainability including the equitable distribution of risks, impacts and benefits."[164] In addition to a broad range of social, environmental, cultural, economic and health factors, EA should consider government commitments, such as those related to biodiversity and climate change.[165] While some argue that a systems approach could better help EA integrate the interrelated and sometimes competing aspects of sustainability,[166] the next generation EA model that Sinclair *et al* propose uses sustainability criteria and rules to guide decisions.[167] Decision criteria help to recognize and better understand the linkages among different pillars or aspects of sustainability, as well as to determine, given the myriad impacts, benefits, risks and uncertainties of the project, whether it will make a net

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[160] Canadian Council of Ministers of the Environment (CCME), *Regional Strategic Environmental Assessment in Canada: Principles and Guidance* (2009), online: CCME <https://www.ccme.ca/files/Resources/enviro_assessment/rsea_principles_guidance_e.pdf> at 6.

[161] Winfield, *supra* note 46 at 130.

[162] *Ibid* at 134.

[163] Gibson, *Sustainability Assessment: Applications, supra* note 23 at 1, 8.

[164] Sinclair *et al*, Implementing Next Generation EA, *supra* note 22 at 168.

[165] *Ibid* at 171.

[166] Grace & Pope, *supra* note 155 at 285.

[167] Sinclair *et al*, Implementing Next Generation EA, *supra* note 22 at 173.

contribution to sustainability.[168] In essence, sustainability criteria should seek "multiple, mutually reinforcing, fairly distributed and lasting benefits" across all environmental and socio-economic factors while preventing decision makers from viewing "sustainability as a field of tension among competing social, economic and ecological objectives."[169] Where a criterion is not achieved or where trade-offs occur (between or among pillars), trade-off rules provide legal bottom-lines against a project approval that would result in prescribed unacceptable outcomes. As Northey states, at the core of the concept of trade-offs is recognition of the fact that "what is an advantage to one aspect of environmental impact is a disadvantage to another aspect of impact."[170] Trade-offs occur where it is not possible to achieve the project benefits while avoiding the negative effects.[171] Together, sustainability rules and criteria help guide decisions towards maximum sustainability benefits while safeguarding against unacceptable trade-offs where negative consequences are unavoidable, enhancing transparency and accountability in the process.[172]

To date, a sustainability framework has been applied in at least five assessments in Canada.[173] For example, in 1997 the joint panel appointed to review the Voisey's Bay Mine and Mill project located in

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[168] Gibson, *Sustainability Assessment: Criteria and Processes, supra* note 27 at 94-95; Sinclair *et al*., Implementing Next Generation EA, *ibid* at 174.

[169] Gibson, *Sustainability Assessment: Applications, supra* note 23 at 13.

[170] Northey, Fading Role of Alternatives, *supra* note 2 at 49.

[171] *Ibid* at 49.

[172] Gibson *et al*, Fulfilling the Promise, *supra* note 11 at 263.

[173] They are: Canadian Environmental Assessment Agency, *Joint Review Panel Report: Foundation for a Sustainable Northern Future* (Government of Canada: 2009), online: CEAA <http://publications.gc.ca/collections/collection_2010/acee-ceaa/En106-87-2009-I-eng.pdf>; Canadian Environmental Assessment Agency, *Joint Review Panel Report: Kemess North Copper-Gold Mine Project* (Government of Canada: 2007), online: CEAA <http://www.ceaa-acee.gc.ca/050/documents_staticpost/cearref_3394/24441E.pdf> ["Kemess North"]; Canadian Environmental Assessment Agency, *Voisey's Bay Mine and Mill Environmental Assessment Panel Report* (Government of Canada: 1997), online: CEAA <http://www.ceaa.gc.ca/default.asp?lang=En&n=0A571A1A-1> [Voisey's Bay]; Canadian Environmental Assessment Agency, *Lower Churchill Hydroelectric Generation Project: Report of the Joint Review Panel* (Government of Canada: 2011), online: CEAA <http://www.ceaa.gc.ca/050/documents/53120/53120E.pdf> [Lower Churchill]; and Canadian Environmental Assessment Agency, *Joint Review Panel Report: Environmental Assessment of the Whites Point Quarry and Marine Terminal Project* (Government of Canada: 2007), online: CEAA <http://www.ceaa.gc.ca/B4777C6B-docs/WP-1837_e.pdf> ["Whites Point"].

northern Labrador looked at "ecosystem integrity, biodiversity and renewable resources," as well as "durable and equitable social and economic benefits" when assessing the project's net long-term sustainability.[174] In the 2011 assessment report of the Lower Churchill hydroelectric project in Labrador, the panel identified six overarching criteria to guide the assessment: ecological impacts, benefits, risks and uncertainties; economic impacts, benefits, risks and uncertainties; social and cultural impacts, benefits, risks and uncertainties; the fair distribution of effects, risks and uncertainties; present versus future generations; and integration (i.e., do the sustainability principles work together to seek mutually-reinforcing gains).[175] More detailed criteria helped guide the determination respecting the overarching criteria, and four additional principles were established to guide the panel's consideration of the positive and negative effects: maximize net gains; avoid significant adverse effects; apply fairness; and provide explicit and transparent justification of any compromises.[176]

A sustainability approach raises three jurisdictional questions: first, do federal authorities have authority to consider the full spectrum of impacts, benefits, risks and undertakings – including provincial matters – when assessing an undertaking? Second, do decision-makers have the constitutional authority to reject provincially regulated projects, or (in the case of regional and strategic assessment) direct the pace and scale of development of a particular kind or in a particular region? Third, are decision-makers authorized to issue conditions on undertakings that may be provincially regulated or conditions respecting impacts on provincial matters, monitor those undertakings for compliance, and enforce the conditions?

[174] Voisey's Bay, *ibid* at 2.2 & 2.3.

[175] Lower Churchill, *supra* note 173 at 352-54.

[176] *Ibid* at 354-55.

b) Consideration of alternatives

Closely linked with a sustainability approach, assessment of alternatives "is at the heart of good environmental planning."[177] A key objective of next generation EA is therefore the "comparative evaluation of alternatives including the null alternative," and selection of the preferred alternative;[178] for example, where a project may cause adverse environmental effects, an assessment should "ensure that the location or design of the project avoide[s] or minimize[s] those effects by avoiding sensitive features or minimizing the impacts upon such features."[179] Consideration of alternatives is not unique to EA – it is also done under expropriation law and under the *Species at Risk Act*,[180] as well as in such day-to-day activities as selecting groceries[181] – but under EA, alternatives assessment has attracted much attention and criticism.[182] From a jurisdictional perspective, a fundamental question at the heart of alternatives assessment is the scope of potential alternatives that may be considered in an assessment and federal authority to prefer an alternative to the proposed undertaking.

Northey identifies five stages to a rigorous review of alternatives: 1) identification of reasonable alternatives; 2) evaluation of alternatives; 3) identification of all trade-offs; 4) application of steps and criteria to transparently evaluate alternatives; and 5) identification of a preferred alternative.[183] At the project level, alternatives analysis falls on a spectrum from alternatives *to* the project, such as not proceeding with the project or finding alternate means of meeting the proposed needs, to alternative

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[177] Tilleman, *supra* note 26 at 243.

[178] Sinclair *et al*, Implementing Next Generation EA, *supra* note 22 at 168; Northey, Fading Role of Alternatives, *supra* note 2 at 54; Chalifour, *supra* note 49 at 146.

[179] Northey, Fading Role of Alternatives*, ibid* at 47.

[180] *Ibid* at 46.

[181] Gibson, *Sustainability Assessment: Applications, supra* note 23 at 15.

[182] Northey, Fading Role of Alternatives, *supra* note 2 at 46.

[183] *Ibid* at 46-47.

means of carrying it out, such as identification of alternative routes, sites, waste management strategies, project designs, technologies, construction scheduling, and resource management strategies.[184] Determination of what "reasonable alternatives" should be on the table should include all reasonable potential alternatives and alternative means of carrying out the project.[185] In the Whites Point Quarry EA the Panel asked the proponent to identify alternatives to the proposed project that were "functionally different ways to achieve the project need and purpose," including the "no project" scenario.[186] Alternatives to the quarry included recycling used materials and purchasing aggregate from the market.[187] In the Kemess North joint review, the alternatives assessment focused primarily on different options for disposing of waste rock and tailings.[188] For the Lower Churchill Hydroelectric Generation Project – a public utility proposal – the proposed alternatives included aggressive demand-side management, alternative energy sources, adding capacity at existing generation facilities, and the "no project" option.[189] At the regional level, assessments should identify, evaluate and compare alternative development scenarios with the aim of selecting the scenario that best meets identified

[184] *Ibid* at 47.

[185] Gibson *et al*, Fulfilling the Promise, *supra* note 11 at 267-68.

[186] Whites Point, *supra* note 173 at 24.

[187] *Ibid.*

[188] Kemess North, *supra* note 173 at xiii.

[189] Lower Churchill, *supra* note 173 at 27-32.

objectives,[190] while SA should examine different approaches to policy, plan or programmatic undertakings, such as alternative endangered species recovery strategies.[191]

While each of the projects described above may impact areas of federal authority such as fisheries, each also falls under provincial jurisdiction.[192] Consequently, in a federal-only assessment the question is the scope of federal authority to consider those alternative means and alternatives to and select preferred alternatives, including the no-project scenario. In the case of Lower Churchill, the question may be even more pronounced given that the proponent is a provincial utility. In other words, where a project is provincially-regulated, does Parliament have authority to allow decision-makers to require the alteration of project siting or design, reject projects outright, or approve only entirely different means of achieving identified objectives? When does protection of a federal matter (such as fisheries) cross the line into the development and management of non-renewable resources or generation of electrical energy?[193] At the regional level, a key question is the extent to which federal authorities may examine and make decisions respecting alternative development scenarios that include provincially-regulated undertakings, such as forestry and non-renewable resources. Similarly, assessment of alternative strategic undertakings such as policies, plans, programs or issues may raise questions respecting the extent to which federal authorities can consider, rely on or potentially even

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[190] See, e.g Gibson *et al*, Fulfilling the Promise, *supra* note 11 at 266; Jill A.E. Harriman & Bram F. Noble, "Characterizing Project and Strategic Approaches to Regional Cumulative Effects Assessment in Canada" (2008) 10(1) JEAPM 25 at 44-45; CCME, *supra* note 160 at 5-7; International Association for Impact Assessment, *Strategic Environmental Assessment Performance Criteria* (January 2002), online: IAIA <https://www.iaia.org/uploads/pdf/sp1.pdf> at 1; Peter N. Duinker and Lorne A. Greig, "Scenario analysis in environmental impact assessment: Improving explorations of the future" (2007) EIAR 206 ["Scenario Analysis in EIA"] at 214; Meinhard Doelle & Rebecca Critchley, "The Role of Strategic Environmental Assessments in Improving the Governance of Emerging New Industries: A Case Study of Wind Developments in Nova Scotia" (2015) 11 McGill Int'l J Sust Dev L & Pol'y 87 at 109; and Bram Noble & Kelechi Nwanekezie, "Conceptualizing strategic environmental assessment: Principles, approaches and research directions" (2017) 62 EIA Rev 165 at 167.

[191] Northey, Fading Role of Alternatives, *supra* note 2 at 47.

[192] *The Constitution Act*, *supra* note 20, ss 92(5), (10), (13), 92A(1)-(2); see also Hogg, *Constitutional Law, supra* note 12 at 30.3.

[193] *The Constitution Act*, *supra* note 20, s92A(1)(b)-(c).

influence provincial undertakings. For example, Noble *et al* argue that the federal Strategic Assessment of Climate Change[194] ought to have considered (among other things), alternatives and scenario assessment of "delineated pathways (e.g. for activities in specified climate-significant sectors)" and identified such matters as "what categories of projects should be subject to assessment on climate grounds."[195]

Tilleman argues that the identification and assessment of alternatives requires decision makers to "take a "hard look" at all reasonable means of avoiding or minimizing significant adverse environmental effects *before* making their decisions"[196] [emphasis in original]. According to Duinker and Greig, EA requires a consideration of alternative possible, probable and preferable futures,[197] which entails a "comparative evaluation of the reasonable alternatives in light of their openly assessed socio-economic and biophysical effects and risks, and attention to the broader context including cumulative effects of other activities, existing and anticipated."[198] Before assessment of alternatives can begin, the assessment should define the purpose of and need for the project from a public interest perspective, in order to select the option that achieves that public interest purpose and need while also meeting the sustainability criteria.[199] Choosing among alternatives should seek to identify the "best options for progress towards a durable and desirable future"[200] according to the sustainability criteria discussed above, with alternatives being subjected to a "contribution to sustainability test."[201] Where such futures

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[194] Government of Canada, *Strategic Assessment of Climate Change* (Ottawa: Revised October 2020), online: Government of Canada <https://www.strategicassessmentclimatechange.ca/>.

[195] Noble *et al*., "Effectiveness of strategic environmental assessment in Canada under directive-based and informal practice" (2019) 37:3-4 IAPA 344 at 351.

[196] Tilleman, *supra* note 26 at 244.

[197] Duinker & Greig, Scenario analysis in EIA, *supra* note 190 at 208.

[198] Gibson, *Sustainability Assessment: Applications, supra* note 23 at 24.

[199] Gibson *et al*, Fulfilling the Promise, *supra* note 11 at 263

[200] Gibson, *Sustainability Assessment: Applications, supra* note 23 at 33.

[201] Gibson *et al,* Fulfilling the Promise, *supra* note 11 at 268-69.

involve the future of provincially-regulated undertakings or development pathways, or the future socio-economic and health conditions in a province, there will exist a jurisdictional tension that this thesis seeks to provide clarity on in Chapter IV.

c) Integrated, tiered assessments of all undertakings with sustainability implications

The third substantive component of Sinclair *et al.*'s next generation EA model is integrated, tiered assessments, wherein all undertakings that may affect sustainability, whether they occur at the project, strategic or regional levels, undergo assessment and are informed by assessments at the other levels.[202] From a jurisdictional perspective, at issue is federal authority to trigger project, regional or strategic assessments based on their implications for sustainability. For example, does the federal government have authority to assess projects with no predicted impacts on areas of federal jurisdiction? What degree of proof of federal effects is required to trigger an assessment? And as next generation EA suggests that legislation set out mandatory triggers for RA and SA,[203] the jurisdictional analysis must look at how such triggers can prescribe for RA and SA where warranted while respecting the constitutional division of powers. For example, is it constitutionally valid for federal authorities to trigger regional assessments based on cumulative effects on matters exclusively or predominantly within provincial jurisdiction? At the strategic level, to what degree must a policy, plan, program or issue pertain to federal matters to validly trigger an assessment?

SA and RA are both important tools for providing direction for broader project-level decision-making.[204] Indeed, the CCME considers effective cumulative effects assessment at the regional level a

[202] Sinclair *et al*, Implementing Next Generation EA, *supra* note 22 at 168.

[203] *Ibid* at 170.

[204] CCME, *supra* note 160 at 6.

"prerequisite" to regional sustainability.[205] Many conceptualizations of RA and SA exist:[206] Sinclair *et al.* define SA as either the assessment of new or existing policies, plans and programs, or "proactive" SAs that occur in order to fill policy gaps.[207] Sinclair, Doelle and Duinker distinguish between SA and RA in that SA focuses on a collection of project and activity types, or on policies, programs and plans, whereas RA is a comprehensive and integrated assessment of multiple or all human activities at a regional scale.[208] The Impact Assessment Agency of Canada defines RA broadly as "studies conducted in areas of existing projects or anticipated development to inform planning and management of cumulative effects and inform project impact assessments,"[209] while Duinker and Greig argue that regional-scale assessment is "an exercise in futuring" that requires scenario analysis to imagine (and identify preferred) development futures.[210] Others use the term regional-strategic EA (R-SEA) to describe regional cumulative effects assessments that are strategic in nature.[211] What numerous definitions of SA and RA do have in common is that at the regional scale, they should each be a strategic exercise that proactively addresses sources of cumulative effects by focusing on environmental or sustainability objectives, interactive effects and alternative development pathways, and result in the selection of preferred development scenarios to meet identified objectives.[212] Thus, as described in the section above on

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[205] *Ibid* at 5.

[206] Noble & Nwanekezie, *supra* note 190 at 165.

[207] Sinclair *et al*, Implementing Next Generation EA, *supra* note 22 at 170.

[208] A. John Sinclair, Meinhard Doelle & Peter N. Duinker, "Looking up, down, and sideways: Reconceiving cumulative effects assessment as a mindset" (2017) 62 EIAR 183 at 184, 191 ["Looking Up"].

[209] Impact Assessment Agency of Canada. "Regional Assessment under the *Impact Assessment Act*, online, Government of Canada <https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/regional-assessment-impact-assessment-act.html>.

[210] Peter N. Duinker and Lorne A. Greig, Scenario Analysis in EIA, *supra* note 190 at 207; see also G. Hegmann *et al, Cumulative effects assessment practitioners guide* (Canadian Environmental Assessment Agency, 1999) at 17, and CCME, *supra* note 160 at 6-7.

[211] E.g., Harriman & Noble, *supra* note 190; CCME, *ibid* at 6.

[212] See, e.g., Gibson *et al*, Fulfilling the Promise, *supra* note 11 at 266; Harriman & Noble, *ibid* at 44-45; CCME, *ibid* at 5-7; Duinker & Greig, Scenario Analysis in EIA, *supra* note 190 at 214; Doelle & Critchley, *supra* note 190 at 109; and Noble & Nwanekezie, *supra* note 190 at 167.

alternatives, the questions are what alternatives can be on the table and what alternatives may a federal authority choose over the proposed alternative?

Because of their futures-oriented approach that seeks to inform development pathways, RAs and SAs should be "effectively tiered with project-level IA so that each tier informs and guides the others."[213] In other words, they must inform project-level decision-making, and project IA should inform RA and SA. A "multi-faceted and multi-dimensional assessment process" intended to inform policy and planning processes, SA and RA can also help shape the development and implementation of strategic initiatives and political decision-making.[214] When done well, they can improve EA efficiency and effectiveness, identify important policy objectives, generate public support for project types, identify key issues and impacts and ways to address or minimize them, and provide guidance for project decisions.[215] They can also help address issues that are repeatedly raised in project EAs of projects of a similar type or with a similar impact, which in turn helps ensure broader support for projects that are identified as achieving desired outcomes[216] while also identifying "no go" zones or undesired project impacts and types. As a result, this thesis will examine the degree to which a validly-triggered regional or strategic assessment may result in binding conditions at the project level or bar development of certain types or in certain areas.

[213] Sinclair *et al*, Implementing Next Generation EA*, supra* note 22 at 171; Gibson *et al.,* Fulfilling the Promise*, ibid* at 266.

[214] Noble & Nwanekezie, *supra* note 190 at 165.

[215] Doelle & Critchley, *supra* note 190 at 90-91, 98-100.

[216] *Ibid* at 101.

d) Cumulative effects

Closely related to RA, SA and a sustainability approach is the consideration of cumulative and interactive biophysical and socio-economic effects.[217] The Cumulative Effects Assessment Working Group defined cumulative effects as "changes to the environment that are caused by an action in combination with other past, present and future human actions,"[218] while Harriman and Noble describe them as "effects of an additive, interactive, synergistic, or irregular (surprise) nature, caused by individually minor, but collectively significant actions that accumulate over time and space."[219] While assessment of cumulative effects has been a requirement of federal EA since the introduction of CEAA,[220] and continues to be required under the IAA,[221] critics argue that project-level EA has consistently failed to properly account for and address cumulative effects.[222] Much blame for the failure of cumulative effects assessment to function as desired lies in the lack of regional and strategic approaches to addressing cumulative effects and the pace and scale of development.[223] Nonetheless, a fundamental goal of next generation EA is to ensure that all undertakings that may contribute to cumulative effects are assessed, and that project-level EAs emphasize the focus on cumulative effects.[224]

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[217] Gibson *et al*, Fulfilling the Promise, *supra* note 11 at 267-68.

[218] Hegmann *et al*, *supra* note 210 at 3.

[219] Harriman & Noble, *supra* note 190 at 27.

[220] *CEAA*, *supra* note 3, s 16(1)(a); *CEAA 2012, supra* note 4, s 19(1)(a); Duinker & Greig, Impotence, *supra* note 23 at 153.

[221] The IAA requires assessment of "any cumulative effects that are likely to result from the designated project in combination with other physical activities that have been or will be carried out:" *IAA*, *supra* note 6, s 22(1)(a)(ii).

[222] E.g., Sinclair *et al*, Implementing Next Generation EA, *supra* note 22 at 171; Gibson *et al*, Fulfilling the Promise, *supra* note 11 at 258-59; Duinker & Greig, Impotence, *supra* note 23 at 156-57.

[223] E.g., Sinclair *et al.*, Implementing Next Generation EA, *ibid* at 171; Gibson *et al*., Fulfilling the Promise, *ibid* at 258-59; Duinker & Greig, Impotence, *supra* note 23 at 155.

[224] Sinclair *et al.*, Implementing Next Generation EA, *ibid* at 168; Gibson *et al.,* Fulfilling the Promise, *ibid* at 264, 269.

Indeed, some suggest that all effects identified in EAs should be assumed to be cumulative, unless the assessment demonstrates otherwise.[225] The objective of cumulative effects assessment is critical, and is linked to its scope. In next generation EA, the aim of cumulative effects assessment should be the sustainability of valued components, including by looking at how components are affected by two or more factors or stressors.[226] Further, Robert Gibson argues that next generation EA should require projects to demonstrate that any trade-offs will deliver "mutually reinforcing, cumulative and lasting contributions" to environmental and socio-economic conditions.[227] Central to a sustainability approach to cumulative effects assessment is placing valued components (VCs) – those components of the environment or socio-economic conditions considered in an assessment – at "centre stage," examining all projects, activities and other stressors on those components, and keeping cumulative effects within defined "tolerable and acceptable levels."[228] Only focusing on interactions between a project and a VC is "largely incapable of securing VEC sustainability."[229] Thus, cumulative effects assessment requires assessment of the effects of past, existing and reasonably foreseeable future actions or stressors that may contribute to cumulative effects on the valued component.[230] For example, in *Alberta Wilderness Assn. v Cardinal River Coals Ltd*.,[231] (Alberta Wilderness Assn), the trial judge held that the Department of Fisheries and Oceans had a duty to obtain all information about likely forestry and mining in the area, and consider those effects in its cumulative effects assessment of a coal mine under CEAA.[232]

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[225] Sinclair *et al*, Looking Up, *supra* note 208 at 183-84.

[226] *Ibid* at 184; Duinker & Greig, Impotence, *supra* note 23 at 154.

[227] Gibson, *Sustainability Assessment: Criteria and Principles* at 236.

[228] Duinker & Greig, Impotence, *supra* note 23 at 154.

[229] *Ibid*.

[230] Hegmann *et al*, *supra* note 210 at 3.

[231] [1999] 3 FC 425, [1999] FCJ No 441 (TD) [*Alberta Wilderness Association*.].

[232] *Ibid* at paras 63, 69 & 76.

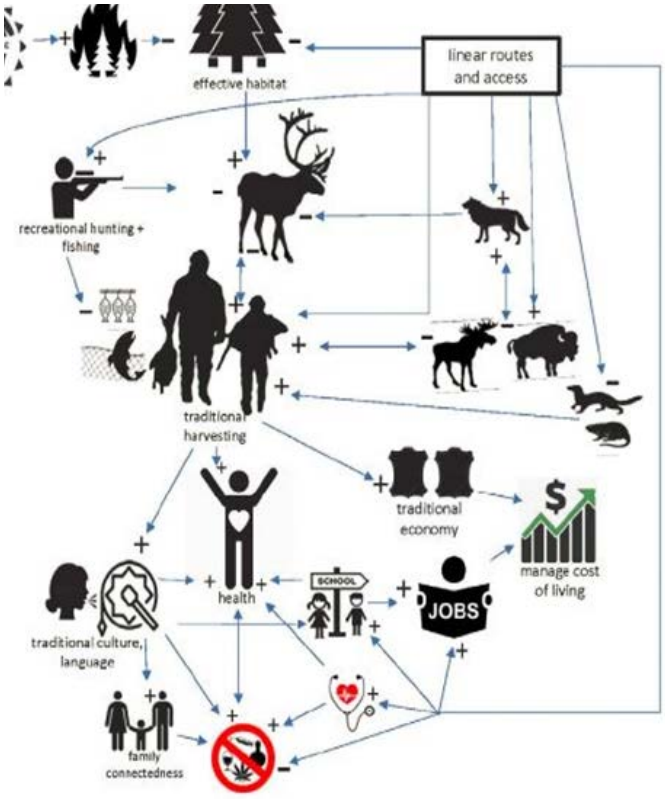
Reasonably foreseeable actions include projects and activities induced by the proposed development:[233] e.g., a road into a mineral-rich but undeveloped region with numerous water bodies may induce mining and forestry projects, as well as increased hunting, fishing and trapping. To avoid gaps, the scope of the assessment should include indirect effects from upstream and, where possible, downstream activities, such as downstream discharges and waste generation or, in the case of pipeline projects, upstream fossil fuel extraction and downstream combustion.[234] Regionally, the assessment should include local, regional and global effects of anticipated, existing and future stressors,[235] which can be natural (such as weather) or human-caused (such as natural resource development).[236]

[233] Hegmann *et al*, *supra* note 210 at 6.

[234] Chalifour, *supra* note 49 at 144; Northey, *CEAA and EARPGO, supra* note 35 at 116.

[235] Sinclair *et al*, Implementing Next Generation EA, *supra* note 22 at 166-67; Gibson, *Sustainability Assessment: Criteria and Processes, supra* note 27 at 24.

[236] Sinclair *et al*, Looking Up, *supra* note 208 at 184.



Scenarios are also integral to effective cumulative effects assessment, and are useful for determining the temporal boundaries of CEAs.[237] If cumulative effects assessment aims to identify and avoid or mitigate cumulative effects by avoiding or mitigating the sources of those effects, and if the scope of cumulative effects assessment should include reasonably foreseeable future effects (as demonstrated above), then identifying and assessing alternative development scenarios is "vital" to understanding the consequences of possible futures.[238] Just as in regional and strategic assessments

[237] Hegmann *et al*, *supra* note 210 at 15; Duinker & Greig, Scenario analysis in EIA, *supra* note 190 at 213, 217.

[238] Duinker & Greig, *ibid* at 214.

(described above), scenarios might include the future without the project and the future with the project.[239] As also discussed above, cumulative effects assessment is greatly assisted by the identification of preferred visions of the future, such as through carbon budgeting in the case of climate change, in order to contextualize a project's contributions to cumulative effects and ensure that no project pushes a valued component beyond a threshold or tipping point.[240] Finally, while a decision-maker may only have authority to deny or impose conditions on the project at hand in a project-level EA (as opposed to other human-generated stressors), being able to reject that project or impose conditions that may dramatically alter its design, location, pace or scale is key.[241] From the above, the jurisdictional questions arising in an effective cumulative effects assessment are clear: what is the extent of federal authority to consider the broader impacts of human activities on a project, even when those impacts may not contribute significant individual effects to an area within federal authority? What is the extent of a federal decision-maker's authority to say "no" or require the dramatic alteration to a project largely regulated by a province (such as a mine) due to cumulative effects? What is the scope of federal authority to consider the upstream and downstream impacts of a project, even where those impacts may occur outside of federal jurisdiction (such as the burning of fossil fuels in the consuming country)? And, as cumulative effects assessment includes follow-up,[242] what is the extent of federal authority to monitor and, where necessary, require adaptive measures where cumulative effects are found to be unacceptable? Section IV of this thesis attempts to answer those questions, along with the others raised by the next generation EA model.

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[239] Hegmann *et al*, *supra* note 210 at 17; Duinker & Greig, *ibid* at 212.

[240] Chalifour, *supra* note 49 at 165.

[241] Harriman & Noble, *supra* note 190 at 27.

[242] Sinclair *et al*, Looking Up, *supra* note 208 at 185.

e) Cooperative assessment

Next generation EA requires assessment authorities to cooperate with all other jurisdictions throughout each stage of the assessment.[243] Multijurisdictional cooperation should begin as early as possible so that authorities collaborate in designing and implementing EA processes[244] that foster collaborative decision-making.[245] Cooperation streamlines costs and other burdens caused by duplicative federal-provincial (and Indigenous) processes, enhances certainty and efficiency, advances sustainability and enables collective decision-making.[246] Mechanisms for cooperation that have appeared in federal EA legislation include harmonization, substitution, equivalency, delegation and standardization.[247] Fitzpatrick and Sinclair describe substitution, equivalency and, at least in some cases delegation, as retrenchment, as they have been applied in Canada as a means of reducing the federal role in EA rather than fostering collaboration and consequently have resulted in weaker assessments.[248] Next generation EA requires assessment authorities to collaborate with other jurisdictions at all tiers, through "upward harmonization of assessment processes and requirements," in an effort to reach consensus on process and final decisions.[249] While the federal government has broad jurisdiction to assess environmental and socio-economic factors, cooperating with provincial authorities ensures that wherever an undertaking

[243] Sinclair *et al*, Implementing Next Generation EA, *supra* note 22 at 168.

[244] *Ibid* at 170.

[245] Gibson *et al*, Fulfilling the Promise, *supra* note 11 at 261.

[246] Fitzpatrick & Sinclair, Canadian Experiences, *supra* note 13 at 253 at 253; Jason MacLean, Meinhard Doelle & Chris Tollefson, "Polyjural and Polycentric Sustainability Assessment: A Once-in-a-Generation Law Reform Opportunity" (2016) 30 J Envtl L & Prac 35 at 38, 49, 52.

[247] *CEAA*, *supra* note 3, s 40(1); *CEAA 2012, supra* note 4, ss 18, 32(1)-(2), 37(1), 40(1); *IAA*, *supra* note 6, ss 21, 29, 31(1), 39(1).

[248] Patricia Fitzpatrick & A John Sinclair, "Multi-Jurisdictional Environmental Assessment in Canada," in Kevin Hanna, ed., *Environmental impact assessment: Process and Practice* (Toronto: Oxford University Press, 2016) at 189-90 ["Multi-Jurisdictional EA in Canada"]; Hogg, *Constitutional Law, supra* note 12 at 30.23.

[249] Gibson *et al*, Fulfilling the Promise, *supra* note 11 at 279; MacLean *et al., supra* note 246 at 38, 52.

may impact on an area of federal authority, an assessment is able to examine the full range of issues and address all impacts and benefits through coordinated decision-making.[250]

Next generation EA's emphasis on multijurisdictional cooperation is relevant to jurisdiction because it is through cooperation that the federal and provincial governments may achieve one of the "fundamental objectives" of cooperative federalism described by Justices Binnie and LeBel in *Canadian Western Bank* (discussed in Chapter III).[251] EA can act as a table for federal and provincial cooperation in environmental decision-making, as it facilitates intergovernmental dialogue that can result in agreement on whether the project should be approved, which alternative should proceed, and other decisions such as project design, location, mitigation measures, adaptive management and other conditions of approval. In other words, next generation EA is a platform by which the two orders of government can achieve intergovernmental dialogue aimed at fostering cooperative federalism.[252] As a result, it will feature throughout the analysis of federal jurisdiction over next generation EA in Chapter IV.

f) EA stages: triggering, information-gathering and analysis, and decision-making

As noted in section 1 of this chapter, this thesis examines federal jurisdiction over three stages of next-generation EA: triggering, information-gathering and analysis, and decision-making (including follow-up). Each of those stages raises unique constitutional questions not yet fully settled in the case law. While those questions are explored more fully in Chapter IV, this section sets out the key issues as context for the division of powers discussion in Chapter III.

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[250] MacLean *et al. ibid* at 40, 46; see also Lederman, "Unity and Diversity," *supra* note 129 at 616.

[251] *Canadian Western Bank, supra* note 130 at para 22.

[252] Fitzpatrick & Sinclair, Canadian Experiences, *supra* note 13 at 253 at 260.

Triggering

A fundamental goal of next generation EA is to ensure that assessments are carried out for all project and strategic undertakings with the potential for significant effects on sustainability, or the potential to contribute to cumulative effects.[253] Thus the key jurisdictional questions with respect to triggering are what, if any, federal constitutional "hook" or threshold is needed to trigger an assessment, and how much certainty does a federal authority require in order to trigger an assessment? As noted above, the EARPGO – which the Supreme Court of Canada upheld in *Oldman* – grounded the requirement for a federal assessment in a federal decision or action. The EARPGO required EAs for any "initiative, undertaking or activity for which the Government of Canada has a decision-making responsibility" and that "may have an environmental effect on an area of federal responsibility."[254] It also required assessments of undertakings with a federal proponent[255] that would receive federal financial assistance,[256] or were located on federal lands.[257] Of course, it is important not to conflate constitutional authority to trigger an assessment with an exercise of statutory authority. A federal statutory trigger (such as a *Fisheries Act* authorization) may itself be *ultra vires* the federal Parliament; conversely, there may be impacts or activities within federal jurisdiction not covered by statute. As Nature Canada argues:

> It is s. 91 of *The Constitution Act, 1867*, not statutes enacted under s. 91 heads, that confers jurisdiction on Parliament. Further, a regulatory scheme pursuant to a federal statute may not fully occupy the field of federal environmental jurisdiction. Failure to have enacted the *Fisheries Act* would not have nullified the federal fisheries power, and Parliament would still have authority to assess projects based on potential impacts on fish.[258]

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[253] Gibson *et al*, Fulfilling the Promise, *supra* note 11 at 264.

[254] EARPGO, *supra* note 19, ss 2, 6(b).

[255] *Ibid*, s 6(a).

[256] *Ibid*, s 6(c).

[257] *Ibid*, s 6(d).

[258] *Attorney General (Alberta) v Attorney General (Canada),* Calgary Appeal No 1901-0276AC, Factum of the Intervener Nature Canada at para 31 [Nature Canada Factum].

However, a federal regulatory trigger does provide greater confidence in the link to federal jurisdiction, and at the very least demonstrates an intention of the legislators to limit the application of assessment to areas of federal constitutional authority. Thus, this thesis seeks to answer whether a next generation federal EA law would require an approach similar to that used in the EARPGO to be constitutionally valid, or would it be within federal power to cast a wider net in order to uphold the goal of assessing all projects with implications on sustainability (or the somewhat more limited objective, such as assessment of all projects with implications on the sustainability of subject matters assigned to Parliament under *The Constitution Act, 1867*). Additionally, if a next generation EA law could trigger assessments based on their effects, what, if any, proof of impacts on federal matters would be required at the triggering stage? For regional assessments, the key question is the extent of federal authority to trigger an assessment in a region comprised primarily or entirely of provincial Crown lands, and the scope of issues within regions that could justify triggering a regional assessment: for example, would the federal government's decision to trigger an RA in Ontario's Ring of Fire be constitutionally valid if the sole reason for triggering the assessment is concerns respecting future mining activities? If so, what potential impacts, if any, on areas of federal jurisdiction could a federal authority rely on to ensure that the assessment trigger is a valid exercise of federal authority? For strategic assessment, the question relates to the breadth of policies, plans, programs and issues the federal government could assess. For example, does the federal government have constitutional authority to trigger the SATCM, given provincial authority over non-renewable natural resources?

Information-gathering and analysis

The questions respecting federal jurisdiction regarding the scope of information a federal authority may require and assess are closely related to the questions identified in the other sections above: namely, once an assessment is validly triggered, does the federal Parliament have jurisdiction to assess the full

scope of environmental, socio-economic and health impacts and cumulative effects? For project assessment, in addition to the scope of effects is the question of scope of project and activities a federal authority may consider.[259] For example, does Parliament have authority to consider the impacts of upstream petroleum exploration, extraction and production required to produce the oil that will flow through a pipeline that is the subject of the assessment? What about the downstream climate implications of burning that oil? What if the oil is consumed in another country? If so, can it also consider the health effects arising from that downstream consumption, such as health effects caused by increased air pollution from the oil consumption in another country? For regional assessment, can the federal government consider the full range of undertakings within a region, such as the impacts of provincial land and resource-use planning, and socio-economic considerations respecting mineral development in a region such as the Ring of Fire? As with project assessment, are there upstream and downstream limits to the information that a federal authority can consider? And for strategic assessment, is there any limit to the information that federal authorities may consider when assessing strategic undertakings like federal policies, plans or programs, or policy direction respecting an activity like thermal coal mining?

Decision-making

The decision stage is likely the phase requiring most attention to federal jurisdiction. At the project level, decision-making entails determining whether a project should or should not proceed,[260] although in next generation EA the focus moves beyond the project/no project binary and emphasizes the application of sustainability-based criteria and trade off rules to identify the preferred alternative.[261] Thus two key

[259] Benidickson, *Environmental Law*, *supra* note 12 at 259.

[260] Kwasniak, *supra* note 32 at 4.

[261] Sinclair *et al*, Implementing Next Generation EA, *supra* note 22 at 168 & 173; Northey, Fading Role of Alternatives, *supra* note 2 at 54; Chalifour, *supra* note 49 at 146.

questions for project assessment are the extent to which there must be impacts on areas of federal jurisdiction for a federal authority may apply criteria and trade-off rules and select the preferred alternative, and the extent to which the criteria and rules may pertain to provincial matters. For example, Kennett raises the hypothetical situation of a hydroelectric dam that will impact cottonwood trees:[262] what degree of impacts, if any, on areas of federal jurisdiction (such as navigation and shipping or fisheries) would be required to uphold a federal decision to refuse the project? Where the dam would have moderate impacts on navigation, could the federal government also rely on the impacts to the cottonwood trees as a basis for refusing the dam? What about where the dam would have significant impacts on navigation and cottonwood trees, but the provincial authority has determined that the dam is its preferred option for meeting energy demand and reducing provincial greenhouse gas emissions? Could the federal government apply criteria and rules respecting health, socio-economic and provincial environmental factors to select a different option, such as geothermal, that the province has rejected on another basis (for example, cost)? What happens in the case of an impasse? Finally, after the assessment, what is the extent of federal authority to impose conditions of approval on projects and impose follow-up and monitoring programs, for example, in relation to provincial impacts?

For regional and strategic assessment, the constitutional questions relate to the extent to which federal Parliament has authority to direct planning or other provincial matters at the regional or strategic levels. For example, since (as noted above) SA and RA are strategic exercises that should result in the selection of preferred development scenarios to meet identified objectives, [263] what jurisdictional limits are there on federal power to direct natural resource development in a region? For example,

[262] Kennett, *supra* note 137 at 191.

[263] See, e.g., Gibson *et al*, Fulfilling the Promise, *supra* note 11 at 266; Duinker & Greig, Scenario Analysis in EIA, *supra* note 190 at 214; Doelle & Critchley, *supra* note 190 at 109.

could the Ring of Fire RA result in direction respecting the pace and scale of mining in the region and if so, what are the jurisdictional limitations to that direction? For a strategic assessment like the SATCM, to what degree can a federal authority issue policy direction respecting thermal coal mining, such as its pace, scale, and end uses? Is there any limit to the information federal authorities may consider when developing policies, plans or programs? Before seeking to answer these questions in Chapter IV, this thesis describes the key applicable constitutional doctrines and principles to help guide the analysis.

III. The Division of Powers: Analyses, Doctrines and Cooperative Federalism

As noted above, the 'fathers of confederation' divided legislative power between the federal and provincial legislatures through sections 91 and 92 of the BNA Act by assigning specific matters among sections 91 and 92 to one of the orders of government and, for matters not specifically listed, allocating to the provinces matters of a merely local or private nature and to the federal Parliament matters concerning POGG and those not specifically allocated to the provinces.[264] Due to the broad, diffuse nature of the environment, it is possible to relate certain aspects of it to "either a federal or a provincial head of legislative power."[265] In this way, the federal and provincial heads of power are in competition,[266] as laws may be rationally classified in more than one way and legislative overlap is inevitable.[267]

A court may strike down a law as being *ultra vires* the enacting legislature if it is beyond that government's constitutional authority.[268] It does so by first identifying the "essence of the regulated subject matter," or its "pith and substance," and then identifying under which head of power the subject matter falls.[269] Challenged laws are classified by their leading features,[270] and legislation will be found to be *intra vires* if its essential character is related to a head of power that has been assigned in the

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[264] Meinhard Doelle, "Federal/Provincial Power Struggles in Environmental Law: Marine Pollution and the Canadian Oceans" (1990) 2 J Envt L 195 at 197.

[265] Wade K. Wright, "Facilitating Intergovernmental Dialogue: Judicial Review of the Division of Powers in the Supreme Court of Canada" (2010) 51 Sup Ct L Rev 625 at 643.

[266] Lederman, Unity and Diversity, *supra* note 129 at 600.

[267] Lederman, Concurrent Operation, *supra* note 150 at 186; H. Scott Fairley, "The Environment, Sustainable Development and the Limits of Constitutional Jurisdiction" in *Sustainable Development in Canada: Options for Law Reform* (Ottawa: Canadian Bar Association, 1990) 55 at 68.

[268] Kwasniak, *supra* note 32 at 15.

[269] *Canadian Western Bank, supra* note 130 at paras 25-26; Kwasniak, *ibid* at 15; Wright, *supra* note 265 at 640; Benidickson, *Environmental Law*, *supra* note 12 at 31.

[270] Lederman, Concurrent Operation, *supra* note 150 at 187.

Constitution to the enacting order of government.[271] A measure that encroaches on the jurisdiction of the other order of government may still be found to be *intra vires* under doctrines such as the ancillary powers or double aspect doctrines, or it may be found to be inoperable under the paramountcy doctrine, or inapplicable under the interjurisdictional immunity doctrine (both discussed below).[272]

This chapter seeks to establish the constitutional foundation of next generation EA by exploring how a reviewing court may define its pith and substance, and under what head or heads of power a court may assign its subject matter. It begins by investigating the division of powers case law, as well as the relevant constitutional doctrines articulated by the courts. It next applies the case law to the next generation EA framework in an effort to identify whether and how next generation EA could be upheld as *intra vires* the federal Parliament. Finally, it discusses the principle of cooperative federalism and how emphasizing cooperation with other jurisdictions could help shield a next generation federal assessment law from judicial interference.

1. Steps in a Division of Powers Analysis

The two steps in a division of powers case are first to identify the matter, or pith and substance, of the challenged law, and second to assign the matter to a class of subjects in order to identify the relevant head of power.[273] Each step is discussed below.

[271] Wright, *supra* note 265 at 640.

[272] *Ibid* at 640-41.

[273] Hogg, *Constitutional Law, supra* note 12 at 15.6; *Ward*, *supra* note 112 at para 16.

a) Characterizing the subject matter of the legislation

Where the validity of a legislative measure is challenged on the basis of the division of powers, the first step is to analyse the "pith and substance" of the legislation.[274] Determining the law's pith and substance entails characterizing it in order to identify its essential character or "true nature" or "dominant characteristic" in order to identify the matter it relates to.[275] In *Whitbread v Walley*, the Court described the term "pith and substance" as:

> … [the] constitutional value represented by the challenged legislation", as "an abstract of the statute's content", and as "the true meaning of the challenged legislation" or the "leading feature" or "true nature and character" of the impugned law... Whatever the phrase used, the idea remains the same: division of powers analysis commences with an identification of "the dominant or most important characteristic of the challenged law.[276]

The objective of this step is to identify the subject matter of the law in order to assign that law to a matter over which the enacting legislature has authority.[277] If a law's pith and substance is found to relate to a matter that falls within the jurisdiction of the enacting legislature it will be *intra vires*, and if it is found to relate to a matter outside that legislature, it will be held invalid.[278] The need to identify the matter of a law is derived from the language of sections 91 and 92 of *The Constitution Act*, which give legislative authority in relation to "matters" coming within "classes of subjects."[279] Hogg states that "the sole purpose of identifying the "matter" of a law is to determine whether the law is constitutional or not," and therefore in identifying the subject matter, the courts will often "use concepts that will assist

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[274] *Canadian Western Bank*, *supra* note 130 at para 25; *Ontario Public Service Employees Union v Ontario (Attorney General)*, [1987] 2 SCR 2, [1987] SCJ no 48 at para 14 [*OPSEU*]; *Whitbread v Walley,* [1990] SCJ No 138, [1990] 3 SCR 1273 at para 15 [*Whitbread*]; *Reference re Firearms Act (Can),* [2000] 1 SCR 783, 2000 SCC 31 at para 16 [*Firearms Reference*]; Hogg, *ibid* at 15.6; Wright, *supra* note 265 at 640.

[275] *Whitbread, ibid; Ward*, *supra* note 112 at para 17; *Canadian Western Bank, ibid* at para 26; Hogg, *ibid* at 15.7, 14.

[276] *Whitbread, ibid*.

[277] *Canadian Western Bank*, *supra* note 130 at para 26.

[278] *Ibid*.

[279] Hogg, *Constitutional Law, supra* note 12 at 15.6

in determining to which head of power the "matter" should be alloccted [*sic*]," such as finding that a matter is related to insurance (which falls under provincial authority) or banking (federal).[280] By identifying the matter of a statute, courts "will often effectively settle the question of its validity, leaving the allocation of the matter to a class of subject little more than a formality."[281]

A pith and substance analysis is "essentially a matter of interpretation" rather than a formalistic undertaking.[282] Courts will look to the legislative scheme, relevant extrinsic material and judicial decisions on similar kinds of statues, but the "choice is inevitably one of policy" that Hogg argues will be guided by federalism principles.[283] Indeed, in *Canadian Western Bank*, the majority acknowledged that a fundamental rule of constitutional interpretation is that "[w]hen a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict between the two statutes."[284] In determining the pith and substance of a law, the court will look to both its purpose and effect to determine its "main thrust."[285] The purpose of the law must be its true purpose and not just a stated or apparent purpose, and to determine a law's purpose, a court may look to intrinsic evidence such as preambles and purpose provisions, as well as extrinsic evidence, such as Hansard, reports of royal commissions, law reform commissions and government policy papers.[286] The purpose may be

[280] *Ibid* at 15.7-8.

[281] *Ibid* at 15.7-8.

[282] *Ward*, *supra* note 112 at para 18.

[283] Hogg, *Constitutional Law, supra* note 12 at 15-21.

[284] *Canadian Western Bank*, *supra* note 130 at para 75.

[285] *Ibid* at para 27; *Reference re Securities Act,* 2011 SCC 66, [2011] 3 SCR 837 at para 63 [*Securities Act Reference*]; *Firearms Reference, supra* note 274 at para 16; *Ward*, *supra* note 112 at para 17; *Kitkatla Band v British Columbia (Minister of Small Business, Tourism and Culture),* [2002] 2 SCR 146, 2002 SCC 31 at para 52 [*Kitkatla*].

[286] *Canadian Western Bank, ibid* at para 27; *Securities Act Reference, ibid* at para 64; *Kitkatla, ibid*; *Ward, ibid* at para 18; *Firearms Reference, ibid* at para 17; Hogg, *Constitutional Law, supra* note 12 at 15.15-16.

ascertained by identifying the "mischief," or problems the law is intended to address.[287] The law's effects include both its legal and practical consequences,[288] and may also reveal its true purpose, although secondary, or incidental, effects or objectives do not impact a law's constitutionality if its pith and substance falls within the legislating jurisdiction's authority.[289] A court may also find that a law is a colourable attempt to legislate in respect of a matter within the other order of government's authority.[290] The colourability doctrine "applies the maxim that a legislative body cannot do indirectly what it cannot do directly."[291] In the *Firearms Reference*, the Supreme Court held that a law may be "colourable if its stated purposes diverge substantially from its actual effects."[292]

In *Ward v Canada*,[293] at issue was whether provisions of the federal *Fisheries Act* prohibiting the sale, trade or barter of young hooded and harp seals fell under the federal fisheries or criminal powers and were therefore valid, or under the provincial power over property and civil rights.[294] The Supreme Court of Canada held that a law's purpose refers to "what the legislature wanted to accomplish" and in this case "is relevant to determine whether… Parliament was regulating the fishery, or venturing into the provincial area of property and civil rights."[295] The legal effect of the law "refers to how the law will affect rights and liabilities, and is also helpful in illuminating the core meaning of the law" as well as whether it is colourable.[296] Courts may also look to the practical effect of the law, or what side effects

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[287] *Firearms Reference, ibid* at para 21.

[288] *Securities Act Reference*, *supra* note 285 at para 64.

[289] *Canadian Western Bank*, *supra* note 130 at paras 27-28.

[290] Hogg, *Constitutional Law, supra* note 12 at 15.19.

[291] *Ibid* at 15.20

[292] *Firearms Reference, supra* note 274 at para 18.

[293] *Supra* note 112; Kwasniak, *supra* note 32 at 20.

[294] *Ibid* at para 1

[295] *Ibid* at para 17.

[296] *Ibid.*

may result from the application of the statute,[297] but the analysis does not ask about the law's efficacy in achieving the legislature's goals.[298]

Looking at the regulatory scheme as a whole, as well as the legislative history, the Court found that the purpose of the impugned provision was to control the killing of the seals by prohibiting their sale, not to control commerce.[299] It held that "[t]he question is not whether the Regulations prohibit the sale so much as why it is prohibited."[300] The Court noted the difficulty in identifying the particular species of seals during a hunt, and therefore that prohibiting the harvesting of the seals "simply would not have worked," and while the method chosen – to prohibit their sale in order to discourage their harvest – may not have been perfect, "the efficacy of the law is not a valid consideration in the pith and substance analysis."[301] The Court held that the intention of the federal Parliament was to "regulate the seal fishery by eliminating the commercial hunting of whitecoats and bluebacks through a prohibition on sale… Stated another way, the "mischief' that Parliament sought to remedy was the large-scale commercial hunting of whitecoats and bluebacks."[302] Regarding the effects of the impugned provision, the Court acknowledged that it "affects the legal rights of its subjects by prohibiting the sale of whitecoats and bluebacks that have otherwise been legally harvested," but dismissed the defendant's argument that the legal effect is to regulate property, holding that the argument "amounts to saying that because the legislative measure is a prohibition on sale, it must be in pith and substance concerned

[297] *Kitkatla supra* note 285 at para 54.

[298] *Ward*, *supra* note 112 at para 18; *Firearms Reference, supra* note 274 at para 18.

[299] *Ward*, *ibid* at para 20.

[300] *Ibid* at para 19.

[301] *Ibid* at para 22.

[302] *Ibid* at para 24

with the regulation of sale."[303] Accordingly, the Court held that the prohibition was a valid exercise of the federal Parliament's authority under the fisheries power.[304]

b) Assigning the matter to a head of power

The second stage in a division of powers analysis is to assign the matter to a "class of subjects" specified in Constitution (i.e., a head of power).[305] In other words, a court must identify what the matter is "in relation to."[306] This step is also known as the classification stage, or "whether the legislation so characterized falls under the head of power said to support it."[307] Classifying the law is not a technical, formalistic exercise confined to its strict legal operation,[308] and "may require interpretation of the scope of the power."[309] This exercise involves interpreting the Constitution's division of powers.[310] The distribution of powers is exhaustive, meaning that "the totality of the legislative power is distributed between the federal Parliament and the provincial Legislatures," although because the drafters could not have foreseen all future laws and matters, new or unforeseen kinds of laws and matters are dealt with by section 92(16) ("generally all matters of a merely local or private nature in the province") and the POGG power, a residual power granted to Parliament under section 91.[311] As a result, "any matter

[303] *Ibid* at para 25.

[304] *Ibid* at para 2.

[305] *Bell Canada v Québec (Commission de santé et de la sécurité du travail du Québec),* [1988] 1 SCR 749, [1988] SCJ No 41 at para 185 [*Bell Canada*]; *Ward*, *ibid* at para 29; *Firearms Reference, supra* note 274 at para 25; Hogg, *Constitutional Law, supra* note 12 at 15.3.8.

[306] *Firearms Reference, ibid*.

[307] *Securities Act Reference*, *supra* note 285 at para 65.

[308] Hogg, *Constitutional Law, supra* note 12 at 15.14

[309] *Securities Act Reference*, *supra* note 285 at para 65.

[310] Hogg, *Constitutional Law, supra* note 12 at 15.38.8.

[311] *Ibid* at 15.46.

which does not come within any of the specific classes of subjects will be provincial if it is merely local or private… and will be federal if it has a national dimension."[312]

In *Ward*, McLachlin C.J. summarized the principles that guide the exercise of assigning the matter to a class of subjects as follows: First, "[t]he Constitution must be interpreted flexibly over time to meet new social, political and historic realities."[313] Second, "[t]he principle of federalism must be respected," meaning that "[c]lasses of subjects should be construed in relation to each other," and in the case of overlap, "meaning may be given to both through the process of "mutual modification."[314] Finally, care must be taken not to construe classes of subjects so broadly "as to expand jurisdiction indefinitely."[315] She summarized these principles as "flexibility and respect for the proper powers of both the federal government and the provinces."[316] Canvassing the case law on the extent of the fisheries power, MacLachlin C.J. concluded that there is no doubt that "the fisheries power includes not only conservation and protection, but also the general "regulation" of the fisheries, including their management and control."[317] Under the Constitution, fisheries "refers to fisheries as a resource" that includes both the animals themselves and the related "commercial and economic interests, aboriginal rights and interest, and public interest in sport and recreation."[318] However, the fisheries power is not unlimited and must be construed to respect the provincial power over property and civil rights.[319] Where there exist broad provincial and federal powers, "bright jurisdictional lines are elusive," and

[312] *Ibid*.

[313] *Ward*, *supra* note 112 at para 30.

[314] *Ibid*.

[315] *Ibid*.

[316] *Ibid* at para 31.

[317] *Ibid* at para 41.

[318] *Ibid*.

[319] *Ibid* at para 42.

determining which class of subjects an activity falls under "can only be determined by examining the activity at stake."[320] If the measures are in pith and substance related to the maintenance and preservation of fisheries, they fall under federal power, whereas if the measures are in pith and substance related to trade and industry within the province they will be outside the federal power.[321] The Chief Justice held:

> While Parliament must respect the provincial power over property and civil rights, the approach to be adopted is not simply drawing a line between federal and provincial powers on the basis of conservation or sale. The issue is rather whether the matter regulated is essentially connected -- related in pith and substance -- to the federal fisheries power, or to the provincial power over property and civil rights.[322]

The Court found that the provision was a valid exercise of the federal fisheries power because in pith and substance, it is concerned with preservation of the fisheries as an economic resource.[323]

In the *Securities Act Reference* (2011), the Supreme Court of Canada referred the federalism principle that the two orders of government are coordinate, and noted that as a result, "a federal head of power cannot be given a scope that would eviscerate a provincial legislative competence."[324] In that case, the Court was considering whether a proposed Canadian securities law fell under the federal power over general trade and commerce under section 91(2). It noted that the potential for the general trade and commerce power to be interpreted so broadly as to permit it to duplicate or even eviscerate aspects of certain provincial powers has led courts to curtail the power in order to maintain the balance of federalism.[325] At the same time, it also noted that the power must be given a meaningful scope so as

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[320] *Ibid* at para 43.

[321] *Ibid* at para 42.

[322] *Ibid* at para 48.

[323] *Ibid* at para 49.

[324] *Securities Act Reference*, *supra* note 285 at para 71.

[325] *Ibid* at paras 70-72.

to not upset the balance of power *against* Parliament.[326] The Court held that the main thrust of the law in question was the regulation of all aspects of securities trading in Canada, a matter that it found was primarily local in nature, and therefore fell outside the scope of the general trade and commerce power as it had been defined in the jurisprudence.[327]

2. Where Overlap Occurs

Federal legislation may affect matters within provincial authority and still be upheld as constitutional – in fact, overlap is considered "proper and expected" under Canada's model of federalism, so long as conflict is avoided.[328] This section describes the different tools courts have created to address issues of overlap. Courts have dealt with concurrency through the double aspect and pith and substance doctrines (the latter through incidental effects and ancillary powers), conflict through the paramountcy doctrine, and adverse impacts on a core competence of the other jurisdiction through the interjurisdictional immunity doctrine. [329] These doctrines are described in more detail below, following a brief look at the presumption of constitutionality.

a) Presumption of constitutionality

The presumption of constitutionality assumes that a law is *intra vires* unless it is proved to be invalid. The presumption places the onus of proving unconstitutionality on the challenging party, and requires "[j]udicial restraint" in determining that a law is invalid.[330] The presumption has been recently summarized by the Supreme Court as holding that "Parliament intends its laws to co-exist with

[326] *Ibid* at para 74.

[327] *Ibid* at paras 106, 122.

[328] *Canadian Western Bank*, *supra* note 130 at para 28.

[329] Hogg, *Constitutional Law, supra* note 12 at 15.38.9, 15.46; see also Wright, *supra* note 265 at 642-43.

[330] Hogg, *ibid* at 15.23; *Firearms Reference, supra* note 274 at para 25.

provincial laws."[331] A purpose of the doctrine is to reduce the interference of unelected judges with the elected legislative branch, a concern expressed by the Court in such cases as the *Employment Insurance Reference* and *OPSEU*.[332] According to Hogg, it carries three legal consequences: first, "in choosing between competing, plausible characterizations of a law, the court should normally choose the one that would support the validity of the law.[333] Second, the enacting government need only demonstrate that there is a "rational basis" for a finding of fact in support of the law (such as that an emergency exists), not prove that fact strictly.[334] And third, "where a law is open to both a narrow and a wide interpretation, and under the wide interpretation the law's application would extend beyond the powers of the enacting legislative body, the court should "read down" the law so as to confine it to those applications that are within the power of the enacting legislative body."[335] Pursuant to this doctrine, a reviewing court would presume that a federal next generation EA law is valid, and the onus would be on the challenging party to show that the law is invalid. Moreover, to the extent a next generation EA law could be read as permitting Parliament to encroach on provincial authority to an extent that would upset the balance of power, a reviewing court would interpret the law in a manner that supports its validity while ensuring its application respects constitutional bounds.

b) Incidental effects

The pith and substance doctrine permits federal laws that in pith and substance relate to a federal head of power to have incidental effects on a provincial head of power; similarly, provincial legislatures may

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[331] *Alberta (Attorney General) v Moloney*, 2015 SCC 51, [2015] 3 SCR 327; *Desgagnés Transport Inc. v Wärtsilä Canada Inc.*, 2019 SCC 58, [2019] SCJ No 58.

[332] *Reference re Employment Insurance Act (Can), ss 22 and 23,* [2005] 2 SCR 669, 2005 SCC 56 at paras 8, 10 [*Employment Insurance Reference*]; *OPSEU, supra* note 274 at para 22; Hogg, *Constitutional Law, supra* note 12 at 15.23.

[333] *Firearms Reference, supra* note 274 at para 25.

[334] Hogg, *Constitutional Law, supra* note 12 at 15.23.

[335] *Ibid*.

enact laws that in pith and substance relate to provincial heads of power but that have incidental effects on a federal head of power. As a majority of the Supreme Court in *Canadian Western Bank* held:

> The "pith and substance" doctrine is founded on the recognition that it is in practice impossible for a legislature to exercise its jurisdiction over a matter effectively without incidentally affecting matters within the jurisdiction of another level of government. For example, as Brun and Tremblay point out, it would be impossible for Parliament to make effective laws in relation to copyright without affecting property and civil rights, or for provincial legislatures to make effective laws in relation to civil law matters without incidentally affecting the status of foreign nationals.[336]

"Incidental" is defined as including "effects that may be of significant practical importance but are collateral and secondary to the mandate of the enacting legislature."[337] In *Whitbread*, La Forest J. for the Court held that provisions of the *Canada Shipping Act*, RSC 1970, c S-9 (now RSC 1985, c S-9) respecting the liability of ship owners in actions for damages will be held constitutionally valid if they are "in pith and substance legislation in relation to a matter that comes within the jurisdiction conferred by s. 91(10) or, alternatively… if they are found to be "necessarily incidental", "ancillary" or "integral" to the legislative scheme that is admittedly within s 91(10)."[338] If the provisions "are found to be legislation that is in pith and substance in relation to matters within Parliament's exclusive jurisdiction over navigation and shipping, the inquiry is at an end, for it would then be immaterial that they also affect matters of property and civil rights."[339] The Court held that the pith and substance of the impugned provisions is Canadian maritime law, and they therefore are *intra vires* Parliament,[340] and that pleasure

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[336] *Canadian Western Bank*, *supra* note 130 at para 29; *Securities Act Reference*, *supra* note 285 at para 63.

[337] *Canadian Western Bank*, *ibid* at para 28.

[338] *Whitbread, supra* note 274 at paras 1, 13.

[339] *Ibid* at para 14.

[340] *Ibid* at para 20.

craft are "closely integrated" with navigation and shipping and therefore fall under the federal authority.[341]

In the *Firearms Reference*, the question was whether Parliament has constitutional authority to enact a gun control law requiring firearm holders to obtain licenses and register their guns under the POGG or criminal law powers.[342] In that case, Alberta argued that the law "inappropriately trenches on provincial powers and that upholding it as criminal law will upset the balance of federalism."[343] The Court held that if the law is mainly in relation to criminal law, "incidental effects in the provincial sphere are constitutionally irrelevant."[344] But if the purpose and effects of the law "go so far as to establish that it is mainly a law in relation to property and civil rights, then the law is *ultra vires* the federal government," and so the question at bar is "whether the "provincial" effects are incidental, in which case they are constitutionally irrelevant, or whether they are so substantial that they show that the law is mainly, or "in pith and substance" the regulation of property and civil rights."[345] The Court held that Alberta failed to establish that any effects of the law on provincial matters were more than incidental: the criminal law power often affects property and civil rights and sharp lines cannot be drawn between the two powers, the impugned legislation does not significant hinder the province's ability to regulate firearms, and under the double aspect doctrine the provinces can still regulate the ownership of ordinary firearms.[346]

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[341] *Ibid* at para 31.

[342] *Firearms Reference, supra* note 274 at paras 1-2, 25.

[343] *Ibid* at para 48.

[344] *Ibid* at para 49.

[345] *Ibid* at para 49.

[346] *Ibid* at paras 50-52.

Under the "modern paradigm" approach to federalism, which is used to "accommodate substantial overlap in federal and provincial jurisdiction,"[347] problems resulting from incidental effects may be resolved by viewing the law "in a different light so as to place it in another constitutional head of power."[348]

c) Ancillary powers doctrine/necessarily incidental

The ancillary powers doctrine applies where a provision of a validly enacted statute intrudes on the jurisdiction of another order of government. Unlike the incidental effects rule, the ancillary powers doctrine may save an otherwise invalid provision providing that the provision is an integral part of an otherwise valid legislative scheme.[349] As McLachlin CJ described in *Quebec (AG) v Lacombe*:

> The ancillary powers doctrine permits one level of government to trench on the jurisdiction of the other in order to enact a comprehensive regulatory scheme. In pith and substance, provisions enacted pursuant to the ancillary powers doctrine fall outside the enumerated powers of their enacting body: *General Motors*, at pp. 667-70. Consequently, the invocation of ancillary powers runs contrary to the notion that Parliament and the legislatures have sole authority to legislate within the jurisdiction allocated to them by the *Constitution Act, 1867*. Because of this, the availability of ancillary powers is limited to situations in which the intrusion on the powers of the other level of government is justified by the important role that the extrajurisdictional provision plays in a valid legislative scheme. The relation cannot be insubstantial: *Nykorak v. Attorney General of Canada*, [1962] S.C.R. 331, at p. 335; *Gold Seal Ltd. v. Attorney-General for the Province of Alberta* (1921), 62 S.C.R. 424, at p. 460; *Global Securities*, at para. 23.

In *General Motors v City National Leasing*, the Supreme Court held that "[a]s the seriousness of the encroachment on provincial powers varies, so does the test required to ensure that an appropriate constitutional balance is maintained."[350] In determining whether the ancillary powers doctrine may save

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[347] Wright, *supra* note 265 at 643.

[348] *Canadian Western Bank*, *supra* note 130 at para 31.

[349] *Quebec (AG) v Lacombe*, 2010 SCC 38, [2010] 2 SCR at paras 32, 35 [*Lacombe*]; *General Motors of Canada Ltd. v City National Leasing Ltd.,* [1989] 1 SCR 641, [1989] SCJ No 28 at 668 [*General Motors*].

[350] *General Motors* at 671.

an impugned provision, a court must consider how integrated into and important for the legislative scheme the provision is, as well as the degree of encroachment into the other order of government's powers. Where the encroachment is marginal, the provision may only require a "rational, functional relationship" with the legislative scheme to be justified. However, where the degree of intrusion is great, the provision may only be saved if it is found to be "necessarily incidental" to (i.e., a necessary component of) a valid statute.[351] Thus, a provision of a next generation EA law that intrudes on provincial jurisdiction may be upheld if it is found to be rationally connected or necessarily incidental to the federal law.

d) Double aspect doctrine

The double aspect doctrine is a means of tolerating overlap between federal and provincial legislative power by permitting the federal Parliament and provincial legislatures to legislate in respect of the same matter for two different legislative purposes.[352] It is used to sustain laws related to the same general matter enacted by the federal and a provincial government under their respective heads of power (such as criminal law federally, and property and civil rights provincially).[353] The doctrine recognizes that "some kinds of laws have both a federal and a provincial "matter" and are therefore competent to both the Dominion and the provinces."[354] Indeed, Lederman argues that matters having double aspects is the norm rather than the exception,[355] although he then goes on to claim that much of Canadian

[351] *General Motors* at 668-72; *Lacombe, supra* note 349 at paras 40-42.

[352] *Firearms Reference, supra* note 274 at para 52; Wright, *supra* note 265 at 641-42.

[353] Wright, *ibid* at 644.

[354] Hogg, *Constitutional Law, supra* note 12 at 15.12; see also *Canadian Western Bank*, *supra* note 130 at para 30; Lederman, Concurrent Operation, *supra* note 150 at 186.

[355] Lederman, Concurrent Operation, *ibid*.

constitutional law has adhered to the principle of finding "mutual exclusion if practical, but concurrency if necessary."[356] As the Court in the *Securities Act Reference* wrote:

> Canadian constitutional law has long recognized that the same subject or "matter" may possess both federal and provincial aspects. This means that a federal law may govern a matter from one perspective and a provincial law from another. The federal law pursues an objective that in pith and substance falls within Parliament's jurisdiction, while the provincial law pursues a different objective that falls within provincial jurisdiction.[357]

In this way, the double aspect doctrine "allows for the *concurrent application* of both federal and provincial legislation, but it does not create *concurrent jurisdiction* over a matter"[358] [emphasis in original]. The doctrine simply recognizes that where a matter has a double aspect, it will be "impossible" to categorize it "under a single head of power"[359] and the federal and provincial legislatures may govern it from different perspectives.[360] As the majority in *Canadian Western Bank* held, "the fact that a matter may for one purpose and in one aspect fall within federal jurisdiction does not mean that it cannot, for another purpose and in another aspect, fall within provincial competence." [361] Where the federal and provincial aspects of a matter are found to be of equivalent importance or significance, it will not be possible to find that the matter falls exclusively to one order of government or another.[362] A classic example is drunk driving: the federal government may regulate in respect of it under the criminal law power, while the provinces may enact drunk driving legislation under its power over local works and

[356] *Ibid* at 188.

[357] *Securities Act Reference*, *supra* note 285 at para 66.

[358] *Ibid* at para 67.

[359] *Canadian Western Bank*, *supra* note 130 at para 30.

[360] *Securities Act Reference*, *supra* note 285 at para 66.

[361] *Canadian Western Bank*, *supra* note 130 at para 30.

[362] Lederman, Concurrent Operation, *supra* note 150 at 188.

undertakings (i.e., highways) and property and civil rights (licensing). Seen thus, drunk driving cannot be classified as an exclusively federal or provincial matter.

The double aspect doctrine is applicable when "the contrast between the relative importance of the two features is not so sharp."[363] It demonstrates judicial restraint when finding that "the federal and provincial characteristics of a law are roughly equal in importance" and may fall under the authority of the federal or provincial governments.[364] However, in *Bell Canada* the Supreme Court held that the double aspect doctrine does not apply when both levels of government have legislated "for the same purpose and in the same aspect."[365] Justice Beetz wrote that section 91(29) and the exceptions in section 92(10) create exclusive classes of subject – federal undertakings – and that this power includes the exclusive power to manage those undertakings.[366] In the *Firearms Reference*, the Supreme Court held that a federal gun control law, pertaining to a matter with both a criminal law and property and civil rights aspect, had only incidental effects on provincial authority.[367] In *Multiple Access Ltd. v McCutcheon*, Dickson J. for the majority applied the double aspect doctrine to uphold both Ontario securities legislation and the *Canada Corporations Act*, RSC 1970, c C-32 in the face of a challenge of federally-incorporated companies charged under the Ontario *Securities Act*, RSO 1970, c 426. At issue was whether provisions in the Ontario act respecting insider trading were *ultra vires* the province of Ontario and inoperative under the paramountcy doctrine because they duplicated provisions of the federal legislation. Dickson J. noted the double character of securities legislation, and that provinces have the authority to regulate securities under the property and civil rights power.[368] He held that so

[363] *Multiple Access v McCutcheon* [1982] 2 SCR 161 at 181 [*Multiple Access*].

[364] Hogg, *Constitutional Law, supra* note 12 at 15.12-13.

[365] *Bell Canada, supra* note 305 at para 295.

[366] *Ibid*.

[367] *Firearms Reference, supra* note 274 at para 49.

[368] *Multiple Access, supra* note 363 at 181, 183.

long as provincial securities legislation does not sterilize or substantially impair a federally-incorporated company, the provincial securities power extends to those companies.[369] Additionally, federal provisions respecting insider trading "have both a securities law and a companies law aspect" of relatively equal importance, and could be upheld under the double aspect doctrine.[370] Dickson J. held that where the federal and provincial aspects of a matter are of roughly equal importance, "there would seem little reason, when considering validity, to kill one and let the other live."[371]

Applied during a pith and substance analysis, the double aspect doctrine is used to demonstrate judicial restraint by ensuring "the policies of the elected legislators of both levels of government are respected."[372] For example, federal and provincial EA legislation may be identical in their purposes and processes they set out, but the provincial law may be classified as informing provincial decision-making, whereas the federal law would be classified as informing federal decision-making. Where the double aspect doctrine gives rise to conflict between valid federal and valid provincial laws, the doctrine of federal paramountcy applies.[373]

e) Paramountcy

The paramountcy doctrine looks at the operability of overlapping legislation, rendering provincial legislation inoperative if it is found to conflict with federal legislation.[374] Where a court finds that both orders of government may validly legislate in respect of a matter but a federal and provincial law conflict, the doctrine of paramountcy states that the federal law prevails and the provincial law is

[369] *Ibid* at 183-84.

[370] *Ibid* at 181.

[371] *Ibid* at 182.

[372] *Canadian Western Bank*, *supra* note 130 at para 30; Hogg, *Constitutional Law, supra* note 12 at 15.12-13.

[373] Hogg, *Constitutional Law, ibid* at 15.13-14.

[374] Wright, *supra* note 265 at 641.

inoperative to the extent of the inconsistency.[375] Both laws need to be found to be otherwise valid (i.e., that the pith and substance of the law comes within a class of subjects assigned to the enacting government) in order for the doctrine to be invoked. Only if both are found to be valid can a court move on to the question of inconsistency.[376] As a result, the paramountcy doctrine could not be applied to uphold next generation EA legislation that is *ultra vires* Parliament; however, as it may shield a valid federal EA law or decision that conflicts with a provincial one, it merits exploring here.

As a rationale for the doctrine, Lederman writes that the 'fathers of confederation' intended the heads of power enumerated under section 91 to act as subtractions or withdrawals from the provincial power over property and civil rights, evidenced by the "notwithstanding" clause in the opening words of section 91 and "deeming" clause in the closing words:[377] namely that Parliament has exclusive legislative authority over the classes of subjects enumerated in section 91 "notwithstanding anything in this Act," and those classes of subjects "shall not be deemed" to also come within the provincial power over matters of a local nature.[378] He argues that these exemptions to the provincial general power were necessary because "a general grant of power to the central Parliament in all matters not assigned to the provinces would in and by itself *not* be enough to give the central Parliament all the powers they wished it to have."[379] The doctrine of paramountcy operates as a safeguard for these specific powers, as well as a practical means of determining the allocation of power in cases of conflict.

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[375] Hogg, *Constitutional Law, supra* note 12 at 5.2, 16.2-3; Kwasniak, *supra* note 32 at 15.

[376] Hogg, *Ibid* at 16.3.

[377] Lederman, "Unity and Diversity," *supra* note 129 at 601-02.

[378] *The Constitution Act, 1867, supra* note 20, s 91.

[379] Lederman, "Unity and Diversity," *supra* note 129 at 602.

Wright argues that while the Supreme Court has indicated that the doctrine should be used with restraint,[380] "the paramountcy doctrine is clearly to occupy pride of place in a division of powers analysis."[381] Hogg agrees with the need for restraint, stating that "[w]here it is possible to interpret either the federal law or the provincial law so as to avoid the conflict that would trigger paramountcy, then that interpretation should be preferred to an alternative that brings about a conflict between the two laws."[382] In *Canadian Western Bank*, Binnie and LeBel JJ. for the majority reconciled this tension by explaining that the doctrine of federal paramountcy "recognizes that where laws of the federal and provincial levels come into conflict, there must be a rule to result the impasse," and that "[u]nder our system, the federal law prevails."[383] The doctrine applies where there is an express contradiction or operational conflict between a provincial and federal law, as well as when a provincial law is incompatible with or frustrates the purpose of a federal law.[384] It may apply to laws enacted both under provincial ancillary powers as well as primary powers, and renders the provincial legislation "inoperative to the extent of the incompatibility, [385] and therefore not invalid. Express contradiction occurs when one law expressly contradicts the other, such as when it is impossible for a person to comply with both laws at once.[386] In *Multiple Access*, Dickson J. found that there was no operational conflict between the *Ontario Securities Act* and the *Canada Corporations Act*, as the provincial legislation simply duplicated the federal law without conflicting it.[387] He noted that "the doctrine of paramountcy applies where

[380] *Saskatchewan v Lemare Lake Logging,* [2015] SCR 419, 2015 SCC 53 at para 27 [*Saskatchewan v Lemare Lake*].

[381] Wright, *supra* note 265 at 649.

[382] Hogg, *Constitutional Law, supra* note 12 at 16.5.

[383] *Canadian Western Bank*, *supra* note 130 at para 32.

[384] *Ibid* at paras 69, 71-73; Hogg, *Constitutional Law, supra* note 12 at 16.4.

[385] *Canadian Western Bank, ibid* at para 69.

[386] Hogg, *Constitutional Law, supra* note 12 at 16.4.

[387] *Multiple Access,* supra note 363 at 189-90.

there is a federal law and a provincial law which are (1) each valid and (2) inconsistent,"[388] which it referred to as the "express contradiction test."[389] The majority went on to find:

> In principle, there would seem to be no good reasons to speak of paramountcy and preclusion except where there is actual conflict in operation as where one enactment says "yes" and the other says "no"; "the same citizens are being told to do inconsistent things"; compliance with one is defiance of the other.[390]

In that case, it was germane that the potential conflict at bar – double-recovery in the case of insider trading – could be safeguarded against by the courts.[391] As a result, the majority held that the paramountcy doctrine did not apply and upheld the impugned Ontario provisions.[392] The Supreme Court in *Spraytech* also referred to the "express contradiction test" used in *Multiple Access* in finding that as the federal pesticides legislation regulating the use of pesticides is permissive in nature, there was no operational conflict between it and the bylaw in question.[393] Similarly, the majority in *Canadian Western Bank* held that the paramountcy doctrine was not engaged in that case, as there was no operational conflict between the provincial and federal laws and compliance with the provincial law would not frustrate the purposes of the federal law.[394]

In 2005 in *Rothmans*, the Supreme Court upheld provincial legislation prohibiting the advertising, promotion and display of tobacco products in any premises in Saskatchewan where minors were permitted. Tobacco companies challenged the legislation, arguing that it conflicted with federal

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[388] *Ibid* at 168-69.

[389] *Ibid* at 187

[390] *Ibid* at 191.

[391] *Ibid*.

[392] *Ibid*.

[393] *114957 Canada Ltée (Spray-Tech, Société d'arrosage) v Hudson (Ville)*, [2001] 2 S.C.R. 241, 2001 SCC 40, paras 34-35 [*Spraytech*].

[394] *Canadian Western Bank*, *supra* note 130 at para 127.

legislation that permitted the display of tobacco products.[395] The Court held that there was no impossibility of dual compliance, as the federal *Tobacco Act*, SC 1997, c 13 did not give rise to a "positive entitlement" to display tobacco products, and so it was possible to comply with both the federal and provincial statutes by either not displaying tobacco products or not permitting minors to enter the establishment.[396] It found that the purpose of the federal legislation was "to address a national health problem," and the purpose of the impugned provision to be "to circumscribe the general prohibition on promotion of tobacco products," which the provincial legislation furthered.[397] In *Saskatchewan v Lemare Lake Logging* of 2015, the majority of the Supreme Court emphasized "the guiding principle of cooperative federalism [that] paramountcy must be narrowly construed" and held that "harmonious interpretations of federal and provincial legislation should be favoured over interpretations that result in incompatibility."[398] There was an alleged conflict between federal bankruptcy legislation, which required 10-day period of advance notice to debtor of an application to appoint a receiver over the debtor's assets, and Saskatchewan legislation requiring a 150-day period of advance notice along with a mandatory review and mediation process. The majority found that there was no express contradiction, as the creditor could comply with both acts by complying the with longer notice period and other requirements of provincial law.[399]

However, in *Lafarge*, issued concurrently with *Canadian Western Bank*, the majority of the Supreme Court found that a City of Vancouver bylaw would create an operational conflict with federal authority over a marine facility in the Vancouver Port. In that case, the proponent needed approval from

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[395] *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, [2005] 1 SCR 188, 2005 SCJ No 1 [*Rothmans*].

[396] *Ibid* at paras 18-20, 22-23; Wright, *supra* note 265 at 677.

[397] *Rothmans*, *ibid* at para 25.

[398] *Saskatchewan v Lemare Lake, supra* note 380 at para 21.

[399] *Ibid* at para 25.

the Vancouver Port Authority and the City under its land-use bylaw to develop the facility. The majority held that "the mere requirement of municipal approval would give rise to "operational conflict" and therefore it was not even necessary to seek the permission of the City.[400] The operational conflict arose due to the fact that the bylaw imposed a 30-foot height restriction. Even though the City could waive the height limit up to 100 feet, doing so "would impose the condition precedent of an exercise of discretion by the City to approve a project that has already been approved by the VPA," which "would create an operational conflict that would flout the federal purpose, by depriving the VPA of its final decisional authority on the development of the port, in respect of matters which fall within the legislative authority of Parliament."[401] The majority also found that the bylaw would frustrate the federal purpose under the *Canada Marine Act*, SC 1998 c 10 to allow the port authority to have decision-making authority over the project.[402] Wright argues that the key distinction between *Lafarge* and *Canadian Western Bank* that likely influenced the difference in outcomes was the fact that in *Lafarge*, the federal and municipal authorities had worked out an agreement regarding the proposed development that would not require application of the bylaw, and it was a ratepayers association, not an order of government, that brought the challenge.[403] In other words, by finding the bylaw inoperative, the majority was facilitating intergovernmental dialogue, just as it was by upholding provincial legislation in *Canadian Western Bank*.

Express contradiction will also be found where it is possible to comply with both laws but the effect of the provincial law would frustrate the purpose of the federal law.[404] For the doctrine to be

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[400] *Lafarge, supra* note 119 at paras 81-82.

[401] *Ibid* at para 75.

[402] *Ibid* at para 84.

[403] Wright, *supra* note 265 at 680-81; *Lafarge*, *ibid* at paras 86-88.

[404] *Saskatchewan v Lemare Lake, supra* note 380 at para 19; Hogg, *Constitutional Law, supra* note 12 at 16-10.1.

invoked, “clear proof of purpose" is required.”[405] In *Law Society of BC v Mangat*,[406] the Supreme Court held that a BC law prohibiting non-lawyers from practicing law for remuneration (including by going before a federal administrative tribunal) frustrated the purpose of the federal *Immigration Act*, RSC 1985, c I-2, which provided that a party could be represented by a non-lawyer in proceedings before the Immigration and Refugee Board. The Supreme Court acknowledged that a party could comply with both laws by obeying the stricter provincial law, but to do so would frustrate the purpose of the federal law of allowing informal, affordable, speedier and more accessible processes.[407]

Hogg argues that there should not be an impossibility of dual compliance where both a federal and provincial law require the consent of their respective authorities for a project, as “[b]oth levels of government may give their consent, which would obviate any conflict.”[408] It is only where one level of government denies consent and the other grants consent that there is an impossibility of dual compliance, which would cause the federal decision to prevail over the provincial decision.[409] Where one level of government imposes more stringent conditions of approval, there will be no conflict as the proponent can simply comply with the stricter conditions.[410] In other words, according to Hogg a federal authority may approve or reject a project based on the outcomes of a next generation EA, and so long as a provincial authority issues the same decision, there will be no conflict. If a provincial authority reaches a different decision, the federal decision will prevail (although see Chapter IV for a discussion of the necessary constitutional basis for federal decisions), and in the case of approval with conditions, there

[405] *Ibid* at para 45.

[406] [2001] 3 SCR 113, [2001] 3 SCR 113 [*Mangat*].

[407] *Ibid* at para 72.

[408] Hogg, *Constitutional Law, supra* note 12 at 16.7.

[409] *Ibid* at 16.7-8.

[410] *Ibid* at 16.7.

should be no conflict providing there is no contradiction among the conditions and the proponent adheres to the higher standards.

The burden of proving that a provincial law frustrates the purpose of a federal law is high, as clear proof is required.[411] As seen in the discussion on the double aspect doctrine duplication is not a trigger of paramountcy,[412] and a provincial law may supplement the requirements of a federal law.[413] As the majority found in *Canadian Western* Bank, "[i]n the absence of conflicting enactments of the other level of government, the Court should avoid blocking the application of measures which are taken to be enacted in furtherance of the public interest."[414] Finally, as will be examined below, the court has also held that the doctrine of paramountcy "is much better suited to contemporary Canadian federalism than is the doctrine of interjurisdictional immunity."[415]

f) Interjurisdictional immunity

At its core, the doctrine of interjurisdictional immunity is an acknowledgement that a law is valid in most applications, but in limited circumstances should be interpreted so as not to apply to a matter or activity that is outside the enacting body's jurisdiction.[416] Unlike the paramountcy doctrine interjurisdictional immunity does not require conflict to apply; rather, it acts to restrict the extent to which otherwise valid legislation enacted by one order of government can interfere with or impact on the "basic core" of a subject that falls under the jurisdiction of the other order.[417] The doctrine of interjurisdictional immunity

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[411] *Saskatchewan v Lemare Lake, supra* note 380 at para 26.

[412] *Multiple Access, supra* note 363 at 185-191.

[413] *Canadian Western Bank*, *supra* note 130 at para 72.

[414] *Ibid* at para 37.

[415] *Ibid* at para 69.

[416] Hogg, *Constitutional Law, supra* note 12 at 15.28.

[417] *OPSEU, supra* note 274 at para 20; Hogg, *ibid*; Wright, *supra* note 265 at 641; Doelle, *The Federal EA Process, supra* note 12 at 60.

"recognizes that our Constitution is based on an allocation of exclusive powers to both levels of government, not concurrent powers, although these powers are bound to interact in the realities of the life of our Constitution."[418] The majority in *Lafarge* explains that the doctrine recognizes that "there are circumstances in which the powers of one level of government must be protected against intrusions, even incidental ones, by the other level."[419]

An exception to the general rule that the legislation of one order of government may affect matters beyond its jurisdiction,[420] the doctrine of interjurisdictional immunity is applied to a law's application, by "reading down" a law so it does not apply to the subject matter that is within the authority of the other order of government.[421] Originating with regard to federally-incorporated companies, the doctrine has had its "greatest success in the context of the application of provincial laws to federal works and undertakings," and "came to stand for the proposition that a provincial law could not affect a vital part of the management and operation of a federal undertaking."[422] While in theory the doctrine can apply to limit the intrusion of federal laws into areas of provincial authority, it has to date exclusively been used to protect federal heads of power from intrusion by provincial laws.[423]

Canadian Western Bank greatly restricted the application of the doctrine. Because interjurisdictional immunity is used to limit overlap between the orders of government, restricting its use provides greater opportunity for overlap and cooperative federalism.[424] In *Canadian Western Bank*,

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[418] *Ibid* at para 32.

[419] *Lafarge, supra* note 119 at para 41; see also *Canadian Western Bank*, *ibid* at para 32.

[420] *Lafarge*, *ibid* at para 41; *Canadian Western Bank*, *ibid* at para 26.

[421] Wright, *supra* note 265 at 641.

[422] *OPSEU, supra* note 274 at para 20; *Canadian Western Bank*, *supra* note 130 at para 41.

[423] *Canadian Western Bank*, *ibid* at para 45. In *obiter dicta* in *Taseko Mines Ltd. v Canada (Minister of Environment)*, 2017 FC 1100, [2017] FCJ No 1179 [*Taseko*], Phelan J. for the Federal Court stated that the doctrine of interjurisdictional immunity has never been found to cover a provincial head of power (para 160).

[424] Wright, *supra* note 265 at 645.

Binnie and Lebel JJ. described interjurisdictional immunity as “a doctrine of limited application.”[425] Noting the formulation set out by Beetz J. in *Bell Canada*, who wrote that "classes of subject" in ss. 91 and 92 must be assured a "basic, minimum and unassailable content" (p. 839) immune from the application of legislation enacted by the other level of government,”[426] the majority found that the doctrine is rooted in the word “exclusive” mentioned throughout sections 91 and 92 of *The Constitution Act, 1867*.[427] The underlying reasoning behind the doctrine is that if a power is exclusive, it cannot be invaded by legislation by the other order of government, which gave rise to a “watertight compartments” approach to federalism.[428] It is based on a concern about the risk to the relative powers of the orders of government, although the majority in *Canadian Western Bank* noted that the “dominant tide” of constitutional doctrines has tended to favour approaches that put “greater emphasis on the legitimate interplay between federal and provincial powers,” such as the pith and substance and double aspect doctrines.[429] The majority held that a broad application of the interjurisdictional immunity doctrine results in practical problems and is inconsistent “with the flexible federalism that the constitutional doctrines of pith and substance, double aspect and federal paramountcy are designed to promote.”[430] Absent conflict, “the Court should avoid blocking the application of measures which are taken to be enacted in furtherance of the public interest.”[431]

Justices Binnie and LeBel held that the doctrine should come into play when a law adopted by one level of government impairs, rather than just affects, the core competence of the other level of

[425] *Canadian Western Bank*, *supra* note 130 at para 33.

[426] *Ibid*.

[427] *Canadian Western Bank, ibid* at para 34.

[428] *Ibid*.

[429] *Ibid* at paras 34, 36.

[430] *Ibid* at para 42.

[431] *Ibid* at para 37.

government, or the "vital or essential part of an undertaking."[432] As an example of a matter that affects the "vital or essential" nature of a matter within the legislative competence of another jurisdiction, Binnie and LeBel JJ. referred to *Bell Canada*, in which the Court found that a provincial workers' compensation scheme "is aimed at and regulates the management and operations" of federally-regulated undertakings and was therefore invalid.[433] In *Canadian Western Bank*, it was "not credible" to suggest that promotion of the insurance in question is "absolutely indispensable or necessary" for the banks to carry out their work as banks under federal jurisdiction, and therefore the doctrine does not apply.[434] Types of measures that would impede activities that are absolutely indispensable or necessary for carrying out a federally-regulated undertaking include imposing land use development controls on airports, regulating access to banks, or requiring a license to board or disembark passengers from a bus.[435] On the other hand, requiring federally-regulated transport undertakings to comply with provincial road and safety legislation does not impede a vital or essential federal interest.[436] Having reviewed the case law on the doctrine, the majority concluded that it has been and should be used with restraint, and that "[a]lthough the doctrine is in principle applicable to all federal and provincial heads of legislative authority, the case law demonstrates that its natural area of operation is in relation to those heads of legislative authority that confer on Parliament power over enumerated federal things, people, works or undertakings."[437] In other words, the majority reinforced the presumption that the doctrine is more likely to apply to render provincial legislation inoperable to the extent that it conflicts with the

[432] *Ibid* at para 48.

[433] *Bell Canada, supra* note 305 at para 182; *Canadian Western Bank, ibid* at para 52.

[434] *Canadian Western Bank, ibid* at para 53.

[435] *Ibid* at para 54.

[436] *Ibid* at para 55.

[437] *Ibid* at para 67.

exercise of federal regulatory authority than it is to apply to federal legislation where it conflicts with validly enacted provincial laws, or to provincial legislation that interferes with federal functional powers.

Wright writes that the majority in *Canadian Western Bank* "reformulated its approach" to the doctrine of interjurisdictional immunity in three ways: first, by raising the threshold so that it only applies where "the basic, minimum and unassailable content" of a head of power would be impaired by a regulatory measure enacted by another order of government; second, by finding that the doctrine should be "reserved for situations already covered by precedent;" and third, by only applying the doctrine after the paramountcy doctrine unless prior case law exists.[438] Reasons for limiting the application of the doctrine include: a reluctance for the courts to "define the possible scope" of broad powers, such as that over matters of a local or private nature; to "avoid blocking the application of laws which are taken to be enacted in the furtherance of the public interest;" a concern that the doctrine risks creating "legal vacuums;" that the doctrine is inconsistent with the need for more "flexible federalism;" because it can "create serious uncertainty" as it "requires judges to define the core of legislative powers;" so that division of powers results do not operate asymmetrically to favour federal jurisdiction over provincial authority; and because the doctrine is unnecessary, given the federal Parliament's ability to enact laws that could be upheld under the paramountcy doctrine.[439]

Prior to *Canadian Western Bank*, the Court had indicated a preference to limit the application of the doctrine: for example, in *OPSEU,* Dickson C.J., in concurring reasons, held that "even though the doctrine of interjurisdictional immunity has arguably expanded since its company law origins, it is, in my opinion, not a particularly compelling doctrine."[440] The Chief Justice referred to Hogg, who posits that

[438] *Ibid* at paras 33, 77, 78; Wright, *supra* note 265 at 645.

[439] *Canadian Western Bank, ibid* at paras 37, 42-44, 46, 83; see also Wright, *supra* note 265 at 645-46.

[440] *OPSEU, supra* note 274 at para 21.

the theory that federal heads of power operate "defensively" to deny power to the provinces is inconsistent with the pith and substance doctrine, under which a provincial law may validly affect a federal matter. Hogg also states that from a policy perspective, immunity of federal undertakings is unnecessary because the federal Parliament can always enact laws that would be paramount to provincial laws, thereby shielding federal undertakings from those provincial laws.[441] Of the interjurisdictional immunity doctrine, Dickson C.J. wrote:

> The history of Canadian constitutional law has been to allow for a fair amount of interplay and indeed overlap between federal and provincial powers. It is true that doctrines like interjurisdictional and Crown immunity and concepts like "watertight compartments" qualify the extent of that interplay. But it must be recognized that these doctrines and concepts have not been the dominant tide of constitutional doctrines; rather they have been an undertow against the strong pull of pith and substance, the aspect doctrine and, in recent years, a very restrained approach to concurrency and paramountcy issues.[442]

Similarly, in both *Mangat* and *Lafarge* the Supreme Court preferred to apply the paramountcy doctrine so as to not create a legal vacuum and to better protect both federal and provincial jurisdiction.[443] In *Lafarge*, the majority noted that in *Bell Canada*, the Court "restricted interjurisdictional immunity to the "essential and vital elements" of undertakings, and that Beetz J. referred to a general rule that works and things within federal authority, such as railways and "lands reserved for Indians," are subject to provincial laws provided "that the application of these provincial laws does not bear upon those subjects in what makes them specifically of federal jurisdiction."[444] In its ordinary grammatical sense, the term "vital" means "essential to the existence of something; absolutely indispensable or necessary; extremely important, crucial," while "essential" means "absolutely indispensable or

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[441] *Ibid*.

[442] *Ibid* at para 22.

[443] *Mangat*, *supra* note 406 at paras 52-54; *Lafarge, supra* note 119 at para 4.

[444] *Lafarge*, *ibid* at para 42; *Bell Canada, supra* note 305 at paras 20, 250.

necessary."[445] Thus the question in *Lafarge* was whether "federal jurisdiction over all development on VPA lands within the port area of Vancouver, even non-Crown lands *not* used for shipping and navigation purposes, is "absolutely indispensable or necessary" to the discharge by the VPA of its responsibilities in relation to federal "public property" or "navigation and shipping.""[446] The majority found that activities that indirectly support the port do not qualify as exclusive federal jurisdiction, and as "interjurisdictional immunity is not essential to make [the relevant] federal powers effective for the purposes for which they were conferred," the appeal should be decided on the basis of the paramountcy doctrine.[447] It can be seen from the above that the doctrine of interjurisdictional immunity "operates to protect exclusive enclaves of legislative power,"[448] but that courts are increasingly reluctant to apply the doctrine, especially where to do so would risk upsetting the balance of power or creating legal vacuums. As a result, while it may be within a court's power to shield a federally-regulated undertaking from the application of a provincial EA law, it is unlikely to do so unless the impugned law sought to affect an essential or vital element of that undertaking. Moreover, given that the doctrine has to date not been used to shield provincial matters from the application of federal legislation,[449] it is highly unlikely that a court would apply the doctrine to shield an undertaking from the application of a federal EA law except perhaps where the federal encroachment was severe and constituted an interference with an absolutely indispensable or necessary aspect of a provincial matter.

[445] *Lafarge*, *ibid* at para 42.

[446] *Ibid* at para 43.

[447] *Ibid* at para 43, 46.

[448] Wright, *supra* note 265 at 674.

[449] *Taseko, supra* note 423 at para 160.

g) The Constitution as a living tree

Also known as the doctrine of progressive interpretation, the "living tree" doctrine posits that "the general language used to describe the classes of subjects (or heads of power) is not to be frozen in the sense in which it would have been understood in 1867."[450] Essentially, the doctrine is a means of ensuring that the Constitution can adapt to changes in Canadian society.[451] The metaphor of the Constitution as a living tree originated with Lord Sankey in the *Persons* case of 1930: "the BNA Act planted in Canada a living tree capable of growth and expansion within its natural limits."[452] This approach is more generally accepted than the "watertight compartments" or originalist approaches to constitutional interpretation, which limit flexibility in overlap and in adapting the division of powers to suit changing social and political realities.[453] According to Hogg:

> The idea underlying the doctrine of progressive interpretation is that the Constitution Act, 1867, although undeniably a statute, is not a statute like any other: it is a "constituent" or "organic" statute, which has to provide the basis for the entire government of a nation over a long period of time. An inflexible interpretation, rooted in the past, would only serve to withhold necessary powers from the Parliament or Legislatures, and deny remedies to hitherto unrecognized victims of injustice.[454]

In the *Same-Sex Marriage Reference*, the Supreme Court of Canada called the living tree doctrine "one of the most fundamental principles of Canadian constitutional interpretation." [455] It preferred the living tree doctrine over "originalism" (or "frozen concepts"), (which believes that courts are bound by an "original understanding" of the constitution), in finding that marriage could include same-sex couples,

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[450] Hogg, *Constitutional Law, supra* note 12 at 15.48; *Employment Insurance Reference, supra* note 332 at para 9.

[451] *Ibid*.

[452] *Edwards v Canada (Attorney General)*, 1929 CanLII 438 (UK JCPC) at 106-07.

[453] Hogg, *Constitutional Law, supra* note 12 at 15.48-49.

[454] *Ibid* at 15.51.

[455] *Reference re Same-Sex Marriage,* 2004 SCC 79, [2004] 3 SCR 698 at para 22.

and not be restricted to a union between a man and woman.[456] In the *Employment Insurance Reference*, the Supreme Court similarly adopted the "living tree" approach in upholding federal legislation respecting maternity and paternity leave, and held that courts must take "a progressive approach to ensure that Confederation can be adapted to new social realities."[457] It held that "the Court takes a progressive approach to ensure that Confederation can be adapted to new social realities," including women's employment and male parenting.[458] Constitutional interpretation must still "be anchored in the historical context of the provision,"[459] but these cases demonstrate that as social – and environmental – issues emerge and society's priorities evolve, courts will apply a progressive interpretation of the heads of power in order to advance societal objectives and federalism. Accordingly, the doctrine would posit that a court should especially seek to accommodate overlap between next generation EA legislation and provincial laws where the overlap pertains to pressing environmental issues.

3. Cooperative Federalism

As seen in the above section of this chapter, courts have increasingly preferred to accommodate overlap between legislation enacted by the federal Parliament and provincial legislatures. Tensions among competing federal and provincial governments and tensions arising out of the fragmentation of the environment among various heads of power gives rise to the need for interjurisdictional cooperation, both in the pursuit of national harmony and in order to achieve environmental and sustainability

[456] *Ibid*.

[457] *Employment Insurance Reference, supra* note 332 at para 9.

[458] *Ibid* at paras 9, 77.

[459] Hogg, *Constitutional Law, supra* note 12 at 15.50.

objectives.[460] This cooperation – known as "cooperative federalism" – can be achieved at the political level through intergovernmental agreement, or through the courts as they attempt to reconcile the legal framing of the Constitution with political, social and policy objectives and realities. This next section examines cooperative federalism as understood in the academic literature and as promoted by the courts in an effort to illuminate how a federal next generation EA law might – or might not – align with cooperative federalism principles set out in the case law.

Many commentators have argued that intergovernmental cooperation is necessary for effective and efficient environmental management in Canada.[461] While individual provincial regimes may be more stringent than federal action, regional divergence means that the federal government cannot "depend on unreliable state co-operation" that might jeopardize national efforts on matters, especially in cases where some or all provinces may lack the resources or political will to achieve desired or necessary results.[462] Effective federal-provincial cooperation respects the constitutional division of powers, seeks to balance unity with diversity, and facilitates intergovernmental dialogue and shared decision-making on matters of mutual concern.[463] Lederman describes cooperative federalism as "complementary federal and provincial statutes co-ordinated by virtue of custom, practice or intergovernmental agreements of some sort,"[464] pursuant to which the federal and provincial governments come to agreement on complementary approaches to environmental management, response and decision-making.[465] This need for diplomacy and dialogue has caused the federal and provincial governments to

[460] Romanow, *supra* note 14 at 1.

[461] Winfield & Macdonald, *supra* note 141 at 241; Bakvis & Skogstad, *supra* note 14 at 4; Benidickson, *Environmental Law*, *supra* note 12 at 45.

[462] MacKay, *supra* note 129 at 47.

[463] Bakvis & Skogstad, *supra* note 14 at 4.

[464] Lederman, "Unity and Diversity," *supra* note 129 at 616.

[465] *Ibid* at 616.

enter into "several hundred federal-provincial agreements on the environment as well as informal agreements,"[466] which recognize the constitutional authority of both orders of government and seek to avoid duplication and encourage mutually-reinforcing gains.[467]

While cooperative federalism at the political level has received much attention in the academic literature, judicial consideration of cooperative federalism is critical to understanding how a court might interpret federal jurisdiction over next generation EA. Increasingly over the decades, courts have looked to the principle of cooperative federalism to guide their analysis on jurisdictional questions. The relationship between political attention to cooperative federalism and judicial treatment of are mutually-reinforcing: cooperative federalism at the political level requires a shared understanding of the distribution of legislative powers that is aided by judicial guidance, while the jurisprudence has evolved in Canada to increasingly reflect social and political advantages of shared authority.[468]

The Constitution of Canada includes both its written texts and supporting unwritten rules and principles that govern the interpretation of constitutional authority.[469] Federalism is one of those unwritten principles, one that has been "discovered" by the courts to help guide division of powers questions.[470] As part of its evolving understanding of federalism, the Supreme Court of Canada appears to be increasingly intent on facilitating intergovernmental dialogue.[471] In the 1980s and 1990s, the Supreme Court stressed the need to reject the "watertight compartments" model of federalism that viewed the enumerated heads of power as exclusive enclaves, and indicated a preference for

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[466] MacKay, *supra* note 129 at 27.

[467] Craik, *supra* note 27 at 128-29; Fairley, *supra* note 267 at 69.

[468] Lederman, "Unity and Diversity," *supra* note 129 at 616

[469] *Reference re Secession of Quebec,* [1998] 2 SCR 217, [1998] SCJ no 61 at para 32.

[470] *Ibid*; Hogg, *Constitutional Law, supra* note 12 at 15.52.

[471] Wright, *supra* note 265 at 629.

recognizing concurrent or overlapping powers.[472] After the appointment of McLachlin J. as Chief in 2000, the Supreme Court shifted more prominently towards encouraging cooperative federalism and intergovernmental dialogue, beginning with the *Firearms Reference*. In that case, the Supreme Court of Canada held that "overlap of legislation [was] to be expected and accommodated in a federal state."[473] A few years later in the *Employment Insurance Reference* it stated that it must take a progressive approach to identifying the head of power "to ensure that Confederation can be adapted to new social realities,"[474] although cooperative federalism cannot be used to encroach on provincial constitutional authority.[475] At issue was whether Parliament has constitutional authority to grant maternity and parental benefits.[476] The Court rejected the "watertight compartments" approach in favour of the "double aspect" doctrine (discussed in the next section, below),[477] and in doing so cautioned against judicial imposition of personal or political values:

> To derive the evolution of constitutional powers from the structure of Canada is delicate, as what that structure is will often depend on a given court's view of what federalism is. *What are regarded as the characteristic features of federalism may vary from one judge to another, and will be based on political rather than legal notions. The task of maintaining the balance between federal and provincial powers falls primarily to governments*. If an issue comes before a court, the court must refer to the framers' description of the power in order to identify its essential components, and must be guided by the way in which courts have interpreted the power in the past. In this area, the meaning of the words used may be adapted to modern-day realities, in a manner consistent with the separation of powers of the executive, legislative and judicial branches.[478] [emphasis added]

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[472] See, e.g., *Husky Oil Operations Ltd. v Canada (Minister of National Revenue - MNR)*, [1995] 3 SCR 453, [1995] SCJ No 77 at para 162 [*Husky Oil*]; *OPSEU, supra* note 274 at para 18.

[473] *Firearms Reference, supra* note 274 at para 26.

[474] *Employment Insurance Reference, supra* note 332 at para 9.

[475] *Ibid* at para 10.

[476] *Ibid* at para 1.

[477] *Ibid* at para 8.

[478] *Ibid* at para 10.

Wright interprets this finding as an indication that the Court is concerned that judge-based assignments of power will be "informed by politics" rather than law, and that "it is considerably more comfortable leaving such line-drawing exercises to the political branches, as much as possible."[479]

The growing trend in the above-mentioned cases led to the seminal decision in *Canadian Western Bank* which, as described above, "significantly restricted the application of the doctrine of interjurisdictional immunity" in favour of a judicial approach to the division of powers that encourages and supports cooperative federalism by limiting when courts will intervene to find a law *ultra vires* an order of government.[480] Justices Binnie and LeBel, writing for the majority, identified three "fundamental objectives" of Canadian federalism:[481] to reconcile the "legal recognition of the diversity of the original members" of the federation with the need for national unity; to "promote democratic participation by reserving meaningful powers to the local or regional level; and "to foster co-operation among governments and legislatures for the common good."[482] The Constitution is a "living tree," and the interpretation and interrelation of the constitutional heads of power "must evolve and be tailored to the changing political and cultural realities of Canadian society," guided by the principle of federalism "in light of the fundamental values it was the designed to serve."[483]

This flexible approach to federalism was reiterated in the 2011 *Securities Act Reference,* in which the Supreme Court held that the federal *Securities Act*, aimed at regulating the trade in securities, which comes under provincial authority as a matter of property and civil rights, was not a valid exercise of federal power. The Court in that case acknowledged that it had adopted a "more flexible view of

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[479] Wright, *supra* note 265 at 635.

[480] *Ibid* at 627.

[481] *Canadian Western Bank*, *supra* note 130 at para 22; see also Wright, *ibid* at 631.

[482] *Canadian Western Bank, ibid* at para 22; Wright, *ibid*.

[483] *Canadian Western Bank, ibid* at para 23.

federalism that accommodates overlapping jurisdiction and encourages intergovernmental cooperation,"[484] but reiterated that flexibility and cooperation "cannot override or modify the separation of powers."[485] In this case, the need to maintain an appropriate balance in the constitutional division of powers outweighed the goals of flexibility and cooperation:

> … notwithstanding the Court's promotion of cooperative and flexible federalism, the constitutional boundaries that underlie the division of powers must be respected. The "dominant tide" of flexible federalism, however strong its pull may be, cannot sweep designated powers out to sea, nor erode the constitutional balance inherent in the Canadian federal state."[486]

In the 2015 *Firearms Reference*,[487] the Supreme Court of Canada considered whether it was within the federal Parliament's authority to destroy data from the long gun registry without transferring that data to provinces that requested it. The majority rejected Quebec's argument that cooperative federalism operated as a bar on unilateral federal action that hinders federal-provincial cooperation, holding that the principle of cooperative federalism "cannot… be seen as imposing limits on the otherwise valid exercise of legislative competence."[488] Cooperative federalism has been relied on in relaxing a rigid, watertight compartments approach to division of powers, but it does not supersede the written text of the Constitution.[489] It also does not "impose a positive obligation to facilitate cooperation where the constitutional division of powers authorizes unilateral action," and so cannot be relied on to require Canada to share its long gun registry data with the provinces.[490] Justices Lebel, Wagner and Gascon disagreed (with Abella J concurring), describing cooperative federalism as a reflection of "the

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[484] *Securities Act Reference*, *supra* note 285 at para 57.

[485] *Ibid* at para 61.

[486] *Ibid* at para 62.

[487] *Quebec (Attorney General) v Canada (Attorney General)*, 2015 SCC 14, [2015] 1 SCR 693.

[488] *Ibid* at para 18.

[489] *Ibid* at paras 17-18.

[490] *Ibid* at para 20.

realities of an increasingly complex society that requires the enactment of co-ordinated federal and provincial legislative schemes to better deal with the local needs of unity and diversity."[491] They reasoned that the provincial and federal governments had formed a partnership with respect to the registry, a partnership that was "within the spirit of co-operative federalism,"[492] and one order of government cannot unilaterally dismantle that cooperative scheme without taking into account the impact on the balance of powers.[493]

Finally, the Supreme Court in the *Pan-Canadian Securities Reference*[494] held that cooperative federalism is "an interpretive aid" used to consider how the allocation of powers in a particular legislative circumstance may affect the balance of power.[495] The Court reiterated that cooperative federalism cannot "be used to make *ultra vires* legislation *intra* vires, but it does encourage intergovernmental cooperation and can be applied "to facilitate interlocking federal and provincial legislative schemes."[496] Federalism is "a set of boundaries within which provinces and the federal government are free to give full effect to "Canadian federalism's constitutional creativity and cooperative flexibility."[497] So long as the provincial and federal governments are working within those boundaries, and so long as they are working in tandem, a cooperative legislative scheme may jointly provide both orders of government to legislate a matter that may be outside of one order's power on its

[491] *Ibid* at para 148.

[492] *Ibid* at para 149.

[493] *Ibid* at para 154.

[494] *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48, [2018] SCJ No 48 [*Pan-Canadian Securities Reference*].

[495] *Ibid* at para 17.

[496] *Ibid* at para 18.

[497] *Ibid* at para 19.

own. As we turn to the analysis of federal jurisdiction over next generation EA, this evolving model of cooperative federalism will be an underlying principle throughout.[498]

[498] *Ibid*.

IV. Federal Jurisdiction over Next Generation EA

1. Constitutional Basis of Next Generation EA

In *Oldman*, the Supreme Court considered whether the EARPGO was a valid exercise of federal legislative power under section 91 of *The Constitution Act, 1867*.[499] Writing for the majority, La Forest J. rejected the claim that EAs are a "constitutional Trojan horse enabling the federal government, on the pretext of some narrow ground of federal jurisdiction, to conduct a far-ranging inquiry into matters that are exclusively within provincial jurisdiction."[500] Rather, the EARPGO simply required federal authorities with decision-making responsibility over an undertaking to consider more factors when exercising their authority.[501] Justice La Forest defined the pith and substance of the EARPGO as a process setting out how federal decision-makers must exercise their authority under various heads of federal power.[502] As a result, EA is auxiliary in nature and can "only affect matters that are "truly in relation to an institution or activity that is otherwise within [federal] legislative jurisdiction"."[503] Accordingly, the EARPGO was supported by whichever head – or heads – of power an EA is triggered under, and was an "adjunct" of federal powers enumerated in section 91.[504]

Justice La Forest also stated that the EARPGO was justified under the residuary aspect of POGG.[505] By residuary, he meant not that federal EA was a matter of national concern, pertained to a national emergency or filled in a constitutional gap (the three branches of the POGG power),[506] but

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[499] *Oldman*, *supra* note 12 at 62.

[500] *Ibid* at 71-72; Chalifour, *supra* note 49 at 160.

[501] *Oldman, ibid* at 71-72; EARPGO, *supra* note 19, ss 2, 6.

[502] *Oldman, ibid* at 75.

[503] *Ibid* at 72, quoting from *Devine v Quebec (Attorney General),* [1988] 2 SCR 790 at 808.

[504] *Ibid* at 72-74.

[505] *Ibid* at 75.

[506] Hogg, *Constitutional Law, supra* note 12 at 17.

rather that, as held in *Jones v Attorney General of New Brunswick*,[507] POGG conferred on Parliament authority "to legislate in relation to the operation and administration of the institutions and agencies of the Parliament and Government of Canada."[508] In other words, because the EARPGO simply prescribes processes and factors for federal authorities to consider when determining whether to exercise a statutory decision under various heads of power, it can be upheld both under those various powers as well as by the authority conferred under POGG for federal institutions to "administer their multifarious duties and functions.[509] Indeed, La Forest J. reiterated his dissenting opinion in *Crown Zellerbach* that environmental control "does not have the requisite distinctiveness to meet the test under the "national concern" doctrine" of POGG.[510]

While as planning tools the EARPGO and next generation EA share many features, the scope of next generation EA and its broader application would make a next generation EA law differ from the EARPGO in pith and substance and, potentially, in its classification under federal powers. In particular, unlike EARPGO, next generation EA does not necessarily require the exercise of federal authority (such as regulatory permitting, funding, or existence of a federal proponent) in order for an assessment to be triggered, leaving open the question of whether it could similarly be upheld under enumerated heads of power. As noted above, La Forest J.'s rationale for upholding the EARPGO under various heads appears to stem from the fact that the exercise of valid federal authority was a prerequisite to falling under the Order, whereas next generation EA requires assessments of all undertakings with implications on sustainability.[511]

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[507] [1975] 2 SCR 182.

[508] *Ibid* at 189.

[509] *Oldman*, *supra* note 12 at 75.

[510] *Ibid* at 64.

[511] Sinclair *et al*, Implementing Next Generation EA, *supra* note 22 at 168.

In its breadth of scope and lack of a federal regulatory trigger, next generation EA is analogous to the *IAA,* which also does not require the exercise of federal authority in order to trigger an assessment, and which does require a broad range of factors. Assessments are triggered by a project being listed in the *Regulations Designating Physical Activities,*[512] where they are described by project type and magnitude (e.g., metal mines of a certain production capacity, or railways of a minimum length along a new right of way). Once triggered, the *IAA* requires assessments to consider all positive and negative environmental, social, economic, and health effects of designated projects, as well as whether the project fosters sustainability.[513] At the end of the assessment, the Minister of Environment and Climate Change or Governor in Council (as the case may be) must determine whether the adverse federal, direct or indirect effects are in the public interest in light of five enumerated factors: the extent to which the project fosters sustainability, the extent to which it contributes to or hinders Canada's ability to meet its environmental and climate obligations, mitigation measures, impacts on Indigenous rights, and the extent to which the adverse federal, direct or indirect effects are in the public interest.[514] Section 7 of the Act prohibits proponents from carrying out work related to the project that may result in federal impacts until the assessment has concluded and the federal, direct or indirect effects have been approved. Purposes of the Act include fostering sustainability, protecting environmental, social, health and economic conditions that are within federal authority, accounting for all positive and adverse effects of designated projects, and ensuring "that designated projects that require the exercise of a power or performance of a duty or function by a federal authority under any Act of Parliament other than this Act to be carried out, are considered in a careful and precautionary manner to avoid adverse

[512] SOR/2012-147.
[513] *IAA*, *supra* note 6, s 22(1).
[514] *Ibid*, ss 60, 63.

effects within federal jurisdiction and adverse direct or incidental effects."[515] As Nature Canada, an intervenor in the Alberta reference case respecting the constitutionality of the *IAA*, argues, together, the decision-making, section 7 prohibition and purposes provision demonstrate that "the *IAA* is structured to focus not on projects, but on federal effects and effects that are directly related or necessarily incidental to an exercise of federal authority or federal funding in relation to a designated project."[516] Moreover, the requirement under the *IAA* to assess alternatives to the project and alternative means of carrying it out enables proponents to alter the project's design so as to minimize or avoid adverse federal effects and effects that are directly linked or incidental to the exercise of federal authority, and a court is likely to consider any effects on provincial jurisdiction incidental to the Act's intended effect of "understanding, avoiding, mitigating or justifying federal, direct or incidental effects."[517] Thus, Nature Canada describes the pith and substance of the *IAA* as a "tool for ensuring that the effects of projects with potential to impact federal jurisdiction are considered in an informed and precautionary manner in order to enable federal authorities to protect the environmental, social, health and economic conditions within Parliament's authority and determine whether federal, direct or incidental effects are in the public interest."[518]

Like the EARPGO and *IAA,* a next generation federal EA law could be designed to ensure that its pith and substance is in relation to federal heads of power. As noted in Chapter II, a key purpose of next generation EA is to "ensure net contributions to sustainability" of all relevant environmental, social, economic and health factors and their interactions,[519] including cumulative effects.[520] It does so by

[515] *Ibid*, s 6(a)-(b), (c)-(d).

[516] Nature Canada Factum at para 8.

[517] Nature Canada Factum at paras 16-18.

[518] Nature Canada Factum at para 7.

[519] Sinclair *et al*, Implementing Next Generation EA, *supra* note 22 at 168, 170; Gibson, *Sustainability Assessment: Criteria and Processes, supra* note 27 at 94; CCME, *supra* note 160 at 6.

[520] Gibson *et al*, Fulfilling the Promise, *supra* note 11 at 267-68.

applying sustainability criteria and trade-off rules to the comparative evaluation of alternatives in order to select the alternative that enhances socio-economic and environmental benefits while avoiding unwanted negative effects.[521] Next generation EA should be applied to all undertakings at the project, strategic and regional levels that have implications on sustainability,[522] but to provide the necessary nexus between next generation EA and federal constitutional authority a federal next generation EA law could focus the application of assessment to undertakings with potential implications on areas of federal jurisdiction and decisions on avoiding, mitigating or justifying those impacts (see the next section for a discussion of the scope of federal jurisdiction to trigger an EA). As such, the pith and substance of next generation EA could be described as a tool for ensuring that undertakings with potential for federal, direct or incidental effects foster sustainability by ensuring that decisions with respect to federal effects are made in light of all the undertaking's potential effects.[523]

Having defined a plausible pith and substance of a next generation EA law, the next step is to determine whether it could be upheld under a head of federal power.[524] By narrowing its application to undertakings with implications on federal heads of power, next generation EA could, like the EARPGO, be found to be an adjunct of relevant federal heads of power and the residuary aspect of POGG.[525] It should be immaterial that unlike the EARPGO, which triggered EAs on the basis of an exercise of federal authority made elsewhere (i.e., not under the EARPGO), a next generation EA law would apply to all undertakings with potential for federal effects, regardless of whether those projects require federal

[521] Sinclair *et al*, Implementing Next Generation EA, *supra* note 22 at 168, 173; Northey, Fading Role of Alternatives, *supra* note 2 at 54; Gibson, *Sustainability Assessment: Applications, supra* note 23 at 13.

[522] Sinclair *et al.*, Implementing Next Generation EA, *ibid* at 168.

[523] *Ibid* at 171.

[524] *Bell Canada, supra* note 305 at para 185; *Ward*, *supra* note 112 at para 29; *Firearms Reference, supra* note 274 at para 25; Hogg, *Constitutional Law, supra* note 12 at 15.3.8.

[525] *Oldman*, *supra* note 12 at 74.

regulatory approval or federal funding, occur on federal lands or have a federal proponent. Federal jurisdiction stems from the Constitution, not from exercises of legislative authority made pursuant to constitutional powers. To require an exercise of legislative power in order to find jurisdiction would be putting the constitutional cart before the horse. Doing so would also risk the legal vacuums of which the courts are wary,[526] as any undertakings not regulated under federal statute that could have federal effects would go unassessed. It would also run contrary to the court's recognition that the Constitution must be interpreted in a manner that reflects emerging social and biophysical realities, realities that may not yet be legislated or require a regulatory decision.[527]

However, while federal jurisdiction over next generation EA should not flow from pre-existing federal regulatory power, it must flow from a head of power. A federal next generation EA law could be upheld under various federal heads of power providing it provides a "necessary element of proximity" between EA and subject matters of federal jurisdiction.[528] Additionally, given the presumption of constitutionality, a court interpreting a next generation federal EA law should be restrained in determining that the law is *ultra vires*.[529] Thus, where that necessary element of proximity exits, a reviewing court could interpret a next generation EA statute in such a manner that confines its application to a head or heads of federal authority;[530] in other words, as an adjunct under various heads of federal power, with federal authority under the law being confined to matters that directly or incidentally affect those heads. Therefore, while the pith and substance of next generation EA differs somewhat from that of the EARPGO, its assignment to federal constitutional powers would be similar: as

[526] *Canadian Western Bank*, *supra* note 130 at para 44; *Lafarge, supra* note 119 at para 4; see also Wright, *supra* note 265 at 645-46.

[527] *Employment Insurance Reference, supra* note 332 at paras 9, 77.

[528] *Oldman*, *supra* note 12 at 72.

[529] Hogg, *Constitutional Law, supra* note 12 at 15.23; *Firearms Reference, supra* note 274 at para 25.

[530] Hogg, *ibi*d.

an adjunct of enumerated heads of power. These heads would include such heads as the federal fisheries and navigation powers and federal powers interprovincial projects and pollution, and potentially the residual aspect of POGG. In *Oldman*, La Forest J. described that residuary character as pertaining to the operation and administration of institutions,[531] which in the case of a next generation federal EA law could be used to support the administrative functions of next generation EA.

2. Scope of Federal Jurisdiction under Next Generation EA Legislation

Having established the likely jurisdictional bases for next generation EA, the next step is to examine the extent of federal authority under those valid heads of power for project assessment, RA and SA. This section breaks that analysis into three stages: triggering, information-gathering and analysis, and decision-making.

a) Triggering

Project EA

La Forest J. in *Oldman* made it clear that a federal assessment must be rooted in federal constitutional authority.[532] He found that the EARPGO was only engaged where a proposal requires a regulatory decision by the federal government, and not "every time there is some potential environmental effect on a matter of federal jurisdiction."[533] Of course, La Forest J. was describing the EARPGO's regulatory scheme rather than the extent of federal authority, and so while *Oldman* makes it clear that an affirmative regulatory duty is a constitutionally valid EA trigger, it does not address the question of authority to trigger an EA where there is a *potential* impact on an area of federal constitutional authority

[531] *Oldman*, *supra* note 12 at 74-75.

[532] *Ibid* at 72; Kennett, *supra* note 137 at 187-87; Benidickson, *Environmental Law*, *supra* note 12 at 31 and 253.

[533] *Oldman*, *ibid* at 47.

but a regulatory authorization is not required.[534] As noted above, next generation EA should be applied to all undertakings with implications on sustainability,[535] but if the above analysis is correct that a next generation federal EA law would, like the EARPGO, be supported by the various section 91 heads under which an EA is triggered,[536] it stands to reason that the trigger must relate to one or more section 91 heads. In other words, federal jurisdiction to trigger an EA must flow from a federal subject matter. What remains unanswered is what degree of certainty is required that an undertaking will involve federal jurisdiction at the triggering stage?

Reviewing the case law and the literature on EA, it appears likely that the courts would find broad federal authority to trigger a next generation EA even where need for regulatory approval or impacts on areas of federal authority are not immediately clear, and even where the project does not have other obvious jurisdictional hooks (such as federal lands, proponent or funding). As a planning tool, next generation EA occurs at the earliest stages of decision-making, before information about potential impacts on areas of federal jurisdiction may be known. [537] As Justice La Forest described in *Oldman*, EA is "essentially an information gathering process"[538] to inform decision making. Projects' impacts – and therefore the question of whether those impacts will affect federal interests – often cannot be fully known and understood until after an assessment is completed.[539] Requiring federal authorities to obtain evidence of a project's effects prior to the assessment would be to put the cart before the Constitutional horse and undermine the objectives of precaution and sustainability.

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[534] Doelle, *The Federal EA Process, supra* note 12 at 73.

[535] Sinclair *et al*, Implementing Next Generation EA, *supra* note 22 at 168.

[536] *Oldman*, *supra* note 12 at 72-74.

[537] MacLean *et al., supra* note 246 at 43; Noble & Nwanekezie, *supra* note 190 at 166; Doelle & Critchley, *supra* note 190 at 110; Gibson, *Sustainability Assessment: Criteria and Processes, supra* note 27 at 16.

[538] *Oldman*, *supra* note 12 at 71, 75.

[539] MacLean *et al, ibid* at 39-40, 43.

Secondly, review panel reports are not reviewable on the basis that no legal right or interest has yet been affected, which suggests there may be judicial preference to let triggers stand and wait to see whether there is a jurisdictional basis for a decision. In *Gitxaala*, the Federal Court of Appeal held that judicial review does not lie with reports made under the *National Energy Board Act* as the reports only make recommendations and therefore do not carry legal consequences.[540] In that case, the Court found that the decision-making process was triggered by the statutory requirement for a proponent to apply for a Certificate of Public Convenience and Necessity (CPCN).[541] A similar decision was made by the Federal Court in *Alberta Wilderness Association v Canada (Minister of Fisheries and Oceans)*, which held that assessment reports under CEAA are simply an essential but preliminary statutory step in an assessment, not a decision or order.[542] While procedurally a legislative or regulatory trigger for an assessment differs from an assessment report in that the trigger is a statutory requirement that is not immune from judicial review, these cases do suggest that the courts are inclined to wait until the decision stage, during which the decision-maker can determine that he or she has no constitutional authority to reject or impose conditions on a project. This rationale is not posed as a potential bar on judicial review at the triggering stage, but rather a factor the court is likely to take into account.

Relatedly, assessment authorities have power to scope assessments, and so where the jurisdictional hook is low (e.g., there is only uncertain potential for low-level impacts on areas of federal authority), the assessment can be scoped to focus only on potential effects related to those areas, and the activities that would result in those effects. Through scoping, assessment authorities can tailor the assessment to the magnitude and likelihood of risk, lessening the burden on proponents as well as the

[540] *Gitxaala Nation v Canada*, 2016 FCA 187 (CanLII), [2016] 4 FCR 418, para 125 [*Gitxaala*].

[541] *Gitxaala* at para 99.

[542] *Alberta Wilderness Association, supra* note 231 at paras 2, 4.

risk that the assessment will far exceed the scope of federal authority affected.[543] Fourthly, the Supreme Court of Canada has looked to the precautionary principle in upholding environmental legislation in division of powers cases,[544] and may be inclined to recognize the precautionary principle in the nature of next generation EA. As with the other reasons, the precautionary principle itself is not a legally compelling reason to override federalism, but a court could follow it in justifying a decision that federal jurisdiction need not be certain, only reasonably likely, at the triggering stage. This recognition of the precautionary principle is analogous to the trend in recent decades of the Supreme Court according the federal government jurisdictional latitude to deal with environmental issues in recognition of the need for both orders of government to be at the table when environmental protection is concerned.[545] Finally, as noted above, federal jurisdiction stems from section 91 of the Constitution, not from the existence of a legislative scheme. To require regulatory approval for a project under another statute as proof of federal jurisdiction would risk legal vacuums, as not all projects with federal implications may be regulated elsewhere.[546] Indeed, it could be argued that absence of federal regulatory approval actually enhances the rationale for next generation federal EA, as unregulated impacts on areas of federal authority would otherwise go unscrutinized.

Instead, the jurisdictional threshold for triggering a federal EA should be reasonable probability of federal effects or other means of federal authority. This approach is consistent with the presumption of constitutionality, which, as seen above, holds that a law is *intra vires* unless it is proved to be invalid. According to the presumption, a decision to trigger an EA should be presumed to be valid providing that

[543] Benidickson, *Environmental Law*, *supra* note 12 at 259; Doelle, *The Federal EA Process, supra* note 12 at 62-63.

[544] *Spraytech*, *supra* note 393 at paras 31-32.

[545] MacLean *et al., supra* note 246 at 43; MacKay, *supra* note 129 at 27-28.

[546] Nature Canada Factum at para 31.

there is a rational basis for the trigger.[547] This approach is reflected in *Canadian Wildlife Federation Inc. v Canada (Minister of the Environment)*,[548] which suggests that effects on areas within federal jurisdiction need not be established to trigger an assessment. In that case, the Federal Court of Appeal held that the EARPGO applied to two dams on the basis of their potential to have transboundary impacts. While the case was not about federal jurisdiction, the Federal Court of Appeal noted that the responsible minister was not aware of the potential federal impacts before deciding that the EARPGO did not apply, but the Court held that the Order applied nonetheless.[549] It is also consistent with the Supreme Court's approach in *Hydro-Québec*,[550] in which La Forest J. held that the constitution "should be so interpreted as to afford both levels of government ample means to protect the environment while maintaining the general structure of the Constitution."[551] An early trigger based on reasonable probability of federal effects would afford the federal government ample means to protect the environmental components within its power, or broader environmental effects resulting from federally-regulated projects, while maintaining the ability to stop the assessment should it become clear that the undertaking will not implicate areas of federal jurisdiction.

A broad trigger based only on reasonable probability of federal effects also aligns with the pith and substance doctrine, which holds that a law's subject matter is to be gleaned from its purpose and effects.[552] The fundamental purpose of next generation project EA is to aid in the project planning process and inform subsequent decision-making[553] so that decisions minimize federal impacts and

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[547] Hogg, *Constitutional Law, supra* note 12 at 15.23.

[548] [1989] 3 FC 309, [1989] 4 WWR 526 (TD), aff'd [1990] 2 WWR 69, 99 NR 72 (FCA).

[549] *Ibid* at 325-26.

[550] *R v Hydro-Québec,* [1997] 3 SCR 213, 1997 CanLII 318 (SCC) [*Hydro-Québec*].

[551] *Ibid* at para 116.

[552] *Canadian Western Bank*, *supra* note 130 at para 27; *Securities Act Reference*, *supra* note 285 at para 63; *Firearms Reference, supra* note 274 at para 16; *Ward*, *supra* note 112 at para 17; *Kitkatla supra* note 285 at para 52.

[553] *Oldman*, *supra* note 12 at 71.

enhance benefits so any residual impacts are justified.[554] To achieve that objective, EA must occur concurrently with project planning and begin early, before impacts on areas of federal jurisdiction may be known. To assess a project only once federal effects have been identified – and therefore after project planning decisions may already have been made – would undermine EA's ability to avoid unwanted federal effects and be conducted collaboratively with provincial authorities.[555] Indeed, an early trigger would facilitate multijurisdictional cooperation,[556] as it would afford federal authorities more opportunities to seek collaboration with provincial authorities and greater prospects for designing mutually-acceptable processes and projects, an objective promoted by the courts in environmental division of powers cases.[557] Accordingly, an early trigger based on reasonable probability of federal effects (as well as other sources of federal powers, such as federal proponency or federal authority over the project, such as railways) would likely maintain the balance between federal and provincial interests.

Regional and Strategic EA

The above principles apply equally with respect to regional and strategic assessments. The jurisdictional threshold for deciding whether to trigger an RA or SA should be potential for reasonable probability of effects on areas of federal authority or of other federal jurisdictional hooks (such as activities being on federal lands or having a federal proponent or federal funding).[558] Given the interactive nature of cumulative effects and the presumption that all effects should be considered cumulative unless proven

[554] Sinclair *et al*, Implementing Next Generation EA, *supra* note 22 at 168; Gibson, *Sustainability Assessment: Applications, supra* note 23 at 1, 8, 13.

[555] Expert Panel, *supra* note 157 at 18-19.

[556] Multijurisdictional cooperation is another pillar of next generation EA: Sinclair *et al*, Implementing Next Generation EA, *supra* note 22 at 169.

[557] See, e.g., *Hydro-Québec, supra* note 550 at para 153; *Greenhouse Gas Pollution Pricing Act Reference*, [2019] SJ No 156, 2019 SKCA 40; William Lahey, "Justice Gérard v LaForest and the Uncertain Greening of Canadian Public Law" (2013) 54 Can Bus LJ 223 at 234.

[558] MacLean *et al., supra* note 246 at 40.

otherwise,[559] to limit federal authority to trigger an RA or SA to only where effects on federal jurisdiction are known or likely would be contrary to the precautionary principle and result in impoverished understandings of cumulative effects on areas within federal jurisdiction. In fact, the constitutional basis for federal RA and SA will generally be stronger, as the effects of undertakings not typically regulated by the federal government (e.g., forestry) will be more apparent when viewed cumulatively.

To answer the question raised in Chapter II, the federal government likely does have jurisdiction to trigger the SATCM. While the Impact Assessment Agency of Canada recommended against assessing the expansion of the Vista thermal coal mine,[560] it did conclude that thermal coal mines have the potential for impacts on areas of federal jurisdiction,[561] and cumulative effects, themselves significant, may be caused by individually minor effects.[562] While the SATCM terms of reference are not yet finalized, as discussed in Chapter II, SA is not applied to individual projects, but rather is undertaken either of policies, plans or programs, or of collections of project types.[563] Thus while thermal coal mining proponents may elect to participate in the SATCM, no provincial or proponent interests should be affected by the mere triggering of the assessment, and a court would likely determine that it is premature at the triggering stage to declare a strategic assessment invalid.[564] Even were a federal authority to trigger a SA of a provincial policy, plan or program (for example, a provincial utility's

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[559] Gibson *et al*, Fulfilling the Promise, *supra* note 11 at 267-68l; Sinclair *et al*, Looking Up, *supra* note 208 at 183-84.

[560] Impact Assessment Agency of Canada, *Analysis Report: Whether to Designate the Coalspur Mine Ltd Vista Coal Underground Mine and Expansion Activities Project in Alberta Pursuant to the* Impact Assessment Act (30 July 2020), online, IAAC: <https://iaac-aeic.gc.ca/050/documents/p80731/135628E.pdf> at 13-14. Contrary to the Agency's recommendation, the Minister of Environment and Climate Change designated the project under section 9(1) of the IAA due to its potential to result in federal impacts (Minister of Environment and Climate Change, "Minister's Response" (30 July 2020), online, IAAC: <https://iaac-aeic.gc.ca/050/evaluations/document/135632>). While the proponent Coalspur has applied for a judicial review of the Minister's determination, the application is based on administrative law, not constitutional, grounds (*Coalsupr Mines (Operations) Ltd. v Canada (Minister of Environment and Climate Change)*, Notice of Application, FC File No T-1008-20, online, Narwhal: <https://thenarwhal.ca/wp-content/uploads/2020/09/Coalspur-notice-of-application-Vista-mine.pdf>.

[561] See, e.g., *Ibid* at 8.

[562] Harriman & Noble, *supra* note 190 at 27.

[563] Sinclair *et al*, Implementing Next Generation EA, *supra* note 22 at 170; Sinclair *et al*, Looking Up, *supra* note 208 at 184, 191.

[564] *Gitxaala, supra* note 540 at para 125; *Alberta Wilderness Association, supra* note 231 at paras 2, 4.

integrated resources plan), that trigger would likely be valid so long as there is potential for the policy, plan or program to impact on federal matters.

Similarly, the federal decision to trigger the Ring of Fire RA was likely valid, despite the fact that the RA will predominantly occur on provincial lands.[565] The RA was triggered pursuant to requests citing concerns that two proposed road projects into the region have the potential to induce mining development that in turn could lead to significant impacts on areas of federal authority, such as fisheries, Indigenous peoples, migratory birds and international effects,[566] and will function as a tool for the federal Minister of Environment and Climate Change to assess those effects collectively and better ensure the sustainability of federal matters in the region.[567] It is difficult to imagine a region in Canada in which all projects and activities would not result in cumulative effects on federal matters, but as with project triggering, federal authority to trigger a regional EA is likely based on reasonable probability of federal effects, rather than proof of effects.

b) Information-gathering and analysis

Project EA

Information-gathering and analysis lie at the heart of EA. While EA may be perceived as and used simply as an information-gathering tool for generating and revealing information about the external costs of development prior to project approval,[568] it is generally also held to be a mechanism for ensuring better

[565] Impact Assessment Agency of Canada, *Information Sheet: Planning the Regional Assessment in the Ring of Fire Area* (12 November 2020), online, IAAC: <https://iaac-aeic.gc.ca/050/documents/p80468/136708E.pdf>; Cheryl Chetkiewicz, Justina Ray & Matthew Scrafford, Letter to Minister re Formal Request for a Regional Assessment with respect to Marten Falls Community Access Road Project (Reference number: 80184) and Webequie Supply Road (Reference number: 80183) (19 November 2019), online, IAAC: < https://iaac-aeic.gc.ca/050/documents/p80468/133836E.pdf>.

[566] See, e.g., Chetkiewicz *et al*, *ibid* at 12-20.

[567] CCME, *supra* note 160 at 5.

[568] Emond, *supra* note 27 at 2.

decisions about whether and under what conditions to allow proposals to proceed.[569] More recently, EA has also been recognized as an important public disclosure tool, in addition to being a planning tool.[570] In *Greenpeace Canada v Canada (AG)*, Russel J. for the Federal Court distinguished between the information-gathering and decision-making stages of EA, holding:

> The most important role for a review panel is to provide an evidentiary basis for decisions that must be taken by Cabinet and responsible authorities. The jurisprudence establishes that gathering, disclosing, and holding hearings to assemble and assess this evidentiary foundation is an independent duty of a review panel, and failure to discharge it undermines the ability of the Cabinet and responsible authorities to discharge their own duties under the Act.[571]

Benidickson identifies three types of scoping that occurs during an assessment: scope of undertaking (what components of a project or activity are assessed), scope of assessment (what activities related to the undertaking get assessed, such as upstream or downstream activities), and scope of factors to be considered.[572] Kwasniak and Mascher include both a project's component and related activities in their definition of scope of project,[573] an approach followed in this thesis. Broad scoping of both factors considered and project components and activities aligns with next generation EA principles. Gibson et al state that assessments should include a consideration of "the full suite of considerations that affect the potential for progress towards sustainability," including all positive and negative, direct and indirect, cumulative, interactive and individual, immediate and long-term, biophysical and socio-economic effects and their interactions.[574] Benidickson agrees, also arguing that a broad project scope "will lead to a

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[569] Chalifour, *supra* note 49 at 145-46; Emond, *ibid* at 5.

[570] Martin Z.P. Olszynski, "Environmental Assessment as Planning and Disclosure Tool: *Greenpeace Canada v Canada (A.G.)*" (2015) 38 Dal LJ 207 at 225 ["EA as a Planning and Disclosure Tool"].

[571] *Greenpeace, supra* note 37 at para 231.

[572] Benidickson, *Environmental Law*, *supra* note 12 at 259.

[573] Arlene Kwaskiak and Sharon Mascher, "Purpose, Need and Alternatives through the Lens of Sustainability and the Public Interest," in Meinhard Doelle and A. John Sinclair, eds, *Impact Assessment in Transition: A Critical Review of the Canadian* Impact Assessment Act (forthcoming).

[574] Sinclair *et al*, Implementing Next Generation EA, *supra* note 22 at 171; Gibson *et al*, Fulfilling the Promise, *supra* note 11 at 267-68.

broader, more encompassing environmental assessment, whereas a narrower, more restricted approach to the scope of a project will confine the ambit of the associated environmental assessment."[575]

As an information-gathering tool to inform federal decisions, La Forest J. suggested that the scope of information that may be taken into account in an EA will vary depending on the head of power involved.[576] In La Forest J.'s words:

> … since the nature of the various heads of power under the *Constitution Act, 1867*, differ, the extent to which environmental concerns may be taken into account in the exercise of a power may vary from one power to another. For example, *a somewhat different environmental role can be played by Parliament in the exercise of its jurisdiction over fisheries than under its powers concerning railways or navigation since the former involves the management of a resource, the others activities*."[577] [emphasis added]

This approach to federal environmental jurisdiction stems from *Fowler* and *Northwest Falling*, which as noted above require an exercise of the federal fisheries power to be rooted in actual or potential harm to fisheries, and cannot be extended to blanket prohibitions of activities that are "not sufficiently linked to any actual or potential harm."[578] In summary, because the environment is a diffuse matter that touches on numerous different heads of power, federal environmental authority is rooted in its authority under the different heads assigned to it under section 91, and is therefore related to the nature of those heads (whether the nature is resource or activity) and circumscribed by them.[579]

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[575] Benidickson, *Environmental Law*, *supra* note 12 at 259.

[576] *Oldman*, *supra* note 12 at 67-68.

[577] *Ibid*.

[578] *Ibid*.

[579] Kennett, *supra* note 137 at 187-87; Benidickson, *Environmental Law*, *supra* note 12 at 31 and 253.

Some suggest that *Oldman* indicates that where an assessment is rooted in a valid exercise of federal constitutional authority, the scope of factors that may be considered is extensive.[580] Kennett, on the other hand, argues that a distinction should be made in the possible scope of an assessment "between activities over which Parliament has "comprehensive" environmental jurisdiction and activities which, because they merely touch on or have consequences for an area of federal competence, are subject to only "restricted" jurisdiction."[581] Heads of power respecting federally-regulated activities with environmental consequences, such as railways, give rise to comprehensive jurisdiction, whereas heads related to resources, such as fisheries, give rise to what Kennett calls restricted federal jurisdiction.[582] Where the federal government has comprehensive jurisdiction, such as over railways, navigation, and activities "referred to by implication in a federal head of power" (e.g., interprovincial projects), it may regulate with respect to all of that activity's environmental and socio-economic effects.[583] But where the relevant head of power relates to natural resources (e.g., fisheries) or activities that affect a federally-regulated activity (such as depositing substances into navigable waters), Kennett argues that restricted federal jurisdiction limits the federal government to only addressing consequences for that subject matter.[584] In those cases, "legislation relating in "pith and substance" to fisheries, navigation and shipping, or Indians and lands reserved for Indians may have incidental implications for dam-building" or other natural resource projects, but there are restrictions on the extent of the federal authority.[585] That said, Kennett does claim that the federal Parliament has

[580] Benidickson, *ibid* at 253; Hogg, *Constitutional Law, supra* note 12 at 30.23; Doelle, *The Federal EA Process, supra* note 12 at 70; Chalifour, *supra* note 49 at 164.

[581] Kennett, *supra* note 137 at 187.

[582] *Ibid* at 187-89.

[583] *Ibid* at 187-88; *Oldman*, *supra* note 12 at 67-68.

[584] Kennett, *ibid* at 189-90.

[585] *Ibid* at 191.

authority to "veto or attach stringent conditions to certain projects" over which it has restricted jurisdiction, providing that a "significant link has been established" between the reason for the veto or the conditions and an area within federal jurisdiction.[586] Judicial control thus occurs through the "pith and substance" doctrine, which would find that imposing restrictions on dam building that are unconnected to a federal head of power are not in pith and substance concerned with a matter of federal jurisdiction.[587]

Doelle suggests that Kennett's interpretation of *Oldman* "would give no weight to the very strong statements at the start of the [*Oldman*] decision suggesting a progressive interpretation of federal jurisdiction to enable integrated decision-making unless to do so would be an invasion of provincial jurisdiction."[588] Indeed, La Forest J. does not himself distinguish between restricted and comprehensive environmental jurisdiction, or suggest that the scope of federal jurisdiction may be any more or less depending on the head of power. It is true that La Forest J. distinguished between "activity" heads (e.g., navigation) and "resource" heads (e.g., fisheries),[589] but only to illustrate the point that environmental roles vary according to the nature of the head of power, not to suggest that jurisdiction is somehow more limited where the matter relates to a resource. Indeed, it seems logical that regardless of whether federal jurisdiction is over an activity (such as a fishery) or an impact (such as a mine's impact on a fishery), the extent of jurisdiction is the same.

There is a strong argument that the scope both of factors and of project is vast in the information-gathering and analysis stage. According to MacLean *et al.*, there is likely no jurisdictional limit on the

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[586] *Ibid*.

[587] *Ibid* at 193.

[588] Doelle, *The Federal EA Process, supra* note 12 at 68.

[589] *Oldman*, *supra* note 12 at 67-68.

scope of information that may be considered in an assessment, and jurisdictional limits are instead relevant at the decision-making stage.[590] In *Oldman*, it was important for La Forest J. that the EARPGO only required responsible authorities to consider environmental matters within federal jurisdiction, and the socio-economic impacts directly related to areas of federal responsibility affected by proposals; "[t]hus, an initiating department or panel cannot use the *Guidelines Order* as a colourable device to invade areas of provincial jurisdiction which are unconnected to the relevant heads of federal power."[591] Also important was the fact that the EARPGO only required the assessment of social effects that are "directly related" to potential environmental effects within federal jurisdiction, and where the assessment trigger is an impact on an area of federal jurisdiction (such as fisheries) rather than being located on federal land, receiving federal funding or having a federal proponent, it limited the environmental effects to be studied to those that may impact on areas of federal responsibility.[592] However, La Forest J. also does appear to find that where matters do relate to an area of federal jurisdiction, authorities may consider all information relevant to that matter. For example, he holds that the federal power over railways includes the authority to consider all social, environmental, and economic ramifications of railway decisions.[593] It similarly seems logical that when considering the impacts of undertakings on resources, the federal government may consider all of a project's positive and adverse environmental and socio-economic effects in order to have a comprehensive picture to inform decision making.[594]

[590] MacLean *et al., supra* note 246 at 44-45.

[591] *Oldman*, *supra* note 12 at 72.

[592] *Ibid*.

[593] *Ibid* at 66.

[594] *Ibid* at 66-68, 72; MacLean *et al, supra* note 246 at 42.

Justice La Forest held that exercises of legislative power respecting environmental matters must be linked to an appropriate head of power, just as other matters must be. Responsible authorities must consider matters within their purview when deciding whether to issue a permit or authorization under their respective regulatory power (such as impacts on fish when deciding whether to issue an authorization under the *Fisheries Act*), and EA simply adds to the list of federal matters those decision-makers must consider.[595] He found that it is not helpful to characterize undertakings as "provincial projects," or projects "primarily subject to provincial regulation," and that there is no general doctrine of interjurisdictional immunity that shields provincial projects from valid federal legislation.[596] Each order of government may legislate in regard to aspects of a matter pertaining to their respective authorities, meaning that the federal government may have a decision-making role with natural resource projects that impact on areas of federal jurisdiction.[597] He defined EA as "a planning tool that is now generally regarded as an integral component of sound decision-making," comprised of "both an information-gathering and a decision-making component which provide the decision-maker with an objective basis for granting or denying approval for a proposed development."[598]

The rationale for considering all relevant effects appears in La Forest J.'s recognition that many projects requiring a permit under federal navigation legislation, such as dams or bridges, do not improve waterway navigation, and so require the minister to "weigh the advantages and disadvantages resulting from interference with navigation," jobs or restricted navigability.[599] Similarly, where a project such as a mine will impact fish and fish habitat, it is unlikely that those impacts will be positive. Thus, the process

[595] *Oldman*, *ibid* at 71.
[596] *Ibid* at 68.
[597] *Ibid*.
[598] *Ibid* at 71.
[599] *Ibid* at 67.

of environmental decision-making usually involves a process of justification, wherein negative impacts on an area of constitutional authority (such as navigation or fisheries) must be found to be outweighed by (usually) socio-economic benefits. Inherent in federal environmental decision-making of all projects, then, regardless of whether the project is a federally-regulated activity such as a railway or a project that merely impacts on a head of power like fisheries, is the consideration of benefits that will flow from the activity and that will (or will not) outweigh the negative impacts on fish, navigation or another area of federal responsibility.[600] As Bowden and Olszynski argue, to suggest that jobs and revenue are within federal powers to consider but broader environmental and social impacts are not is "to suggest that the Constitution is inherently and permanently biased towards an out-dated and discredited model for economic growth – a seemingly untenable position."[601] It stands to reason that if the federal government may consider the socio-economic benefits of all projects over which it has some constitutional authority, it may also consider the *negative* socio-economic impacts, as those are also relevant to the justification analysis – indeed, in La Forest J.'s words, it "defies reason" to hold otherwise.[602] As La Forest J. held, because the location of railways may have socio-economic effects and impacts on air quality and noise pollution, it is relevant to consider those broader matters in an assessment of a proposed railway.[603] This approach is consistent with *Nakina (Township) v Canadian National Railway Co.*,[604] in which the Federal Court of Appeal held that the Railway Transport Committee of the Canadian Transport Commission erred in deciding it could not take into account the

[600] Marie-Ann Bowden & Martin Z. P. Olszynski, "Old Puzzle, New Pieces: *Red Chris* and *Vanadium* and the Future of Federal Environmental Assessment" (2010) 89 Can Bar Rev 445 at 475-76.

[601] *Ibid* at 484.

[602] *Oldman*, *supra* note 12 at 66.

[603] *Ibid*.

[604] [1986] FCJ No 426, 69 NR 124 [*Nakina*].

socio-economic effects of a proposed railway station closure.[605] Similarly, it is only logical that for a project like a dam or mine, where federal authority is rooted in federal effects, the federal government may also consider a broad spectrum of environmental, social and economic effects in order to determine whether the benefits of approving the harm outweigh the impacts themselves.

Regarding scope of project, as Doelle says, the question is "whether and how far the federal environmental assessment can look beyond the proposal that requires federal regulatory approval."[606] The same principles that apply to the scope of factors analysis apply to the scope of project, and *Quebec (Attorney General) v Canada (National Energy Board)* provides some guidance here, too. It is notable that in that case, the Court upheld an NEB decision to require an assessment of a future upstream energy production facility as a condition of the export license.[607] This decision is "very much in line with the interpretation of *Oldman*… the jurisdictional issue is relevant to determine whether a federal project decision can be made, not what environmental impacts may be considered when exercising that decision-making authority."[608] Similarly, in *Sumas Energy 2, Inc. v. Canada (National Energy Board)*,[609] the Federal Court of Appeal held that the NEB has jurisdiction to consider the potential environmental effects within Canada of a power plant located outside Canada. Sumas Energy 2 had applied for a CPCN to construct an international power line from a proposed power plant located in Washington State to a BC Hydro substation just north of the Canadian border, a plant which would "emit over 800 tons of pollutants annually into the Fraser Valley airshed."[610] The Court held that while the NEB did not have

[605] *Ibid* at 2.

[606] Doelle, *The Federal EA Process, supra* note 12 at 74.

[607] *Quebec (Attorney General) v Canada (National Energy Board),* [1994] 1 SCR 159, 1994 CanLII 113 (SCC) at para 57.

[608] Doelle, *The Federal EA Process, supra* note 12 at 77.

[609] 2005 FCA 377, [2005] FCJ No 1895 [*Sumas*].

[610] *Ibid* at paras 1, 4.

authority to consider the effects of the plant that occurred in the US as it could not enforce mitigation measures there, it did have jurisdiction to consider the environmental impacts that occurred in Canada, and could refuse to issue the CPCN on those grounds.[611] Likewise, in *Friends of the West Country Association,* the Federal Court of Appeal found that the possibility that construction or operation of roads or bridges over non-navigable waters could have cumulative adverse environmental effects "demonstrates why it is logical that a cumulative effects assessment under paragraph 16(1)(a) not be restricted to the scope of the federal project or to projects only under federal jurisdiction."[612]

In *MiningWatch Canada*, Rothstein J. for the Supreme Court went so far as to hold that federal authorities were *required* to consider all associated project components in an EA, not only those components requiring authorization under federal statutes, due to the legislative scheme involved.[613] The proponent was seeking to develop an open pit copper and gold mine and mill operation in northwestern British Columbia, which included the mine itself, a tailings pond, access roads, water diversion system, transmission lines, explosives storage and ancillary facilities.[614] The responsible authority subsequently determined that the scope of the project for the purposes of the federal EA would not include the mine or mill, which meant that a less rigorous assessment process would apply.[615] The Court held that under CEAA, responsible authorities did not have discretion to scope projects more narrowly than that described by proponents, but instead must accept the scope of project as described in its entirety.[616] Further, the Court rejected the notion that avoidance of duplication was justification

[611] *Ibid* at paras 12, 14.

[612] *Friends of the West Country Assn. v Canada (Minister of Fisheries and Oceans)*, [2000] 2 FC 263, [1999] FCJ No 1515, para 35.

[613] *MiningWatch*, *supra* note 31 at para 6.

[614] *Ibid* at paras 3, 5-6.

[615] *Ibid* at para 6.

[616] *Ibid* at para 34.

for a narrow scope of project, as duplication could be avoided through the cooperation mechanisms offered under CEAA.[617]

While *MiningWatch* was decided on the basis of the language of CEAA and did not address the question of jurisdiction, it is telling that the Court was aware that the purpose of the narrow scoping was to focus only on areas within federal statutory authority and did not give any indication of concern that doing so might intrude on provincial jurisdiction. Indeed, in *Quebec (Attorney General) v Canada (National Energy Board)*,[618] the Supreme Court rejected the argument that the scope of the National Energy Board (NEB)'s EA must be limited to those matters within federal jurisdiction, and determined that the NEB was authorized to consider the environmental effects of provincially-regulated energy generation facilities when deciding on granting licences for export of electrical power to the U.S. Applying *Oldman*, the Court held:

> If in applying this Act the Board finds environmental effects within a province relevant to its decision to grant an export licence, a matter of federal jurisdiction, it is entitled to consider those effects. So too may the province have, within its proper contemplation, the environmental effects of the provincially regulated aspects of such a project. This co-existence of responsibility is neither unusual nor unworkable. While duplication and contradiction of directives should of course be minimized, it is precisely this dilemma that the *EARP Guidelines Order*, specifically ss. 5 and 8, is designed to avoid, and that the Board attempted to reduce with the imposition of conditions 10 and 11 to the licences.
>
> It is also worth noting that the Board is the forum in which the environmental impact attributable solely to the export, that is, to the impact of the increase in power output needed to service the export contracts, will be considered. A focused assessment of these effects may be lost if subsumed in a comprehensive evaluation by the province of the environmental effects of the projects in their totality. In this way, both levels of government have a unique sphere in which to contribute to environmental impact assessment.[619]

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[617] *Ibid* at paras 24-25.

[618] *Quebec (Attorney General) v Canada (National Energy Board), supra* note 607.

[619] *Ibid* at 193-94.

As a result, the Court found that it was *intra vires* the NEB's power to consider the future effects of provincial power generation, and attach conditions related to environmental protection when issuing export licenses.[620]

These cases demonstrate that the federal government has power to scope the project broadly, regardless of whether the components and activities studied themselves fall under federal jurisdiction. This approach is consistent with assessing a broad scope of factors, and follows the same logic that scoping the project broadly will result in more informed decisions.[621] According to Stacey, restricting what may be considered in an assessment would cause decision-makers to "base his or her decision on a restricted understanding of environmental effects," and it is "unlikely that such a narrow understanding of environmental effects can provide a sufficient basis for determining whether a project can be justified in the circumstances."[622] In *Forest Ethics Advocacy*, the Federal Court of Appeal upheld a NEB ruling to not consider the environmental and socio-economic effects of upstream activities when assessing a pipeline.[623] However, as Chalifour notes, the decision was based on administrative law principles, not constitutional authority, and the court applied a standard of reasonableness to the NEB's decision, giving it a high degree of deference.[624] It was also relevant for the court that the legislative framework did not require consideration of those broader factors;[625] in other words, at issue was not whether the NEB was *able* to assess the project's upstream activities, but whether it *had* to. The court held that decision-makers must be granted "leeway" to determine the relevance of a consideration.[626]

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[620] *Ibid* at 193-94.

[621] Chalifour, *supra* note 49 at 145-46; Emond, *supra* note 27 at 5.

[622] Stacey, *supra* note 26 at 176.

[623] *Forest Ethics Advocacy Assn. v Canada (National Energy Board)*, [2014] FCJ No 1089, 2014 FCA 245, para 8.

[624] *Ibid* at para 60; Chalifour, *supra* note 49 at 152.

[625] *Ibid* at para 69; Chalifour, *ibid* at 151.

[626] *Ibid* at para 67.

Accordingly, it appears that the limits of federal authority when scoping assessments is based on the administrative, rather than constitutional, principle of relevance to the project. What components and activities are deemed relevant to a project will have to be determined on a case-by-case basis, but previous case law suggests that a valid scope may include all direct components and activities,[627] future facilities,[628] upstream power generation,[629] facilities or activities in other jurisdictions that may result in federal effects,[630] and project-related marine shipping.[631]

Additionally, it is instructive that the Supreme Court in *MiningWatch* rejected the argument that duplication with provincial reviews was a valid reason to focus the scope only on components within federal jurisdiction.[632] Next generation EA recognizes that EA has multijurisdictional implications due to overlapping legislative environmental responsibilities, and that intergovernmental coordination is required in order to minimize duplication, enhance certainty and efficiency, and advance sustainability.[633] It does so by requiring assessment authorities to collaborate upward with other jurisdictions in the development of assessment processes and in efforts to reach consensus on decisions.[634] As discussed in Chapter III, courts will use cooperative federalism as an interpretive aid when considering whether legislation upsets the balance of power,[635] and the emphasis in next generation EA may assuage a court's concerns that an assessment has scoped in provincial effects and provincially-regulated components and activities. While cooperative federalism cannot be relied upon to

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[627] *MiningWatch*, *supra* note 31 at para 6.

[628] *Quebec (Attorney General) v Canada (National Energy Board)*, *supra* note 607 at para 57.

[629] *Ibid* at para 57.

[630] *Sumas*, *supra* note 609 at paras 12, 14.

[631] *Tsleil-Waututh Nation v Canada (Attorney General)*, [2018] FCJ No 876, 2018 FCA 153 at para 468 [*Tsleil-Waututh Nation*].

[632] *MiningWatch*, *supra* note 31 at paras 24-25.

[633] Fitzpatrick & Sinclair, Canadian Experiences, *supra* note 13 at 253 at 253; MacLean *et al, supra* note 246 at 38, 49, 52.

[634] Gibson *et al.,* Fulfilling the Promise, *ibid*; MacLean *et al*, *ibid.*

[635] *Pan-Canadian Securities Reference*, *supra* note 494 at para 17.

"make *ultra vires* legislation *intra* vires,"[636] courts "should avoid blocking the application of measures which are taken to be enacted in furtherance of the public interest."[637] Given the importance of EA as a tool for furthering the public interest through a careful and comprehensive weighing of the benefits, risks, impacts and uncertainties of proposals,[638] and the fact that (as noted in the triggering section above) courts have declined to interfere with assessment processes until there is a decision with legal consequences,[639] it stands to reason that a court would accommodate a scope of federal EA that overlaps with provincial jurisdiction, especially in light of efforts under a next generation EA law to collaborate with provincial jurisdictions to minimize duplication and facilitate intergovernmental dialogue. As a result, it is quite likely that a court would find that where a federal assessment has been validly triggered, a federal authority will have jurisdiction to consider all of a project's environmental and socio-economic implications, and the implications of all relevant direct, upstream and downstream activities related to the project.

Regional and Strategic EA

As with project EA, the scope of projects, activities and effects that may be considered in federal RA and SA is likely broad. Given that all effects should be assumed to be cumulative until proven otherwise,[640] even projects and effects that individually would not normally be assumed to fall within provincial jurisdiction have potential to impact cumulatively on areas of federal authority, or to interact with effects that do fall within federal power and augment them. Also, as SA and RA are strategic tools for

[636] *Pan-Canadian Securities Reference, supra* note 494 at para 18.

[637] *Canadian Western Bank*, *supra* note 130 at para 37.

[638] *Oldman*, *supra* note 12 at 71; *Hydro-Québec, supra* note 550 at para 85; Stacey, *supra* note 26 at 168; Olszynski, EA as Planning and Disclosure Tool*, supra* note 570 at 222.

[639] *Gitxaala, supra* note 564 at para 125; *Alberta Wilderness Association, supra* note 231 at paras 2, 4.

[640] Sinclair *et al*, Looking Up, *supra* note 208 at 183-84.

identifying pathways towards desired futures,[641] it is logical that federal authorities have jurisdiction to assess all relevant positive and negative environmental and socio-economic effects in order to inform the identification of those desired futures and pathways.[642] For example, if the federal government sought to understand and make decisions respecting cumulative effects in a region on areas within its authority – for example, fisheries – it would need to examine and address all activities that contribute to cumulative effects, as well as all other environmental and socio-economic effects of those activities in order to make fully-informed decisions about the pace and scale of impacts on and management of fisheries in that region. Similarly, while the pace and scale of the development of natural resources is within provincial authority,[643] identifying and assessing possible future development scenarios[644] is required to understand the range of potential future federal effects.

Accordingly, the SATCM should be able to validly consider the full range of effects related to thermal coal mining and related upstream and downstream activities. For example, thermal coal mined in Canada is currently exported through Canadian ports,[645] and assessing the impacts of the marine shipping of those exports is a valid exercise of federal authority.[646] It is logical that a federal authority may wish to understand the impacts of thermal coal mining and shipping in the context of the impacts of transporting the coal from the mining and milling operations to the ports for export. Assessing the full range of activities within alternative development scenarios would likewise enrich federal understanding

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[641] Gibson *et al*, Fulfilling the Promise, *supra* note 11 at 266; Duinker & Greig, Scenario Analysis in EIA, *supra* note 190 at 214; and Doelle & Critchley, *supra* note 190 at 109.

[642] *Oldman*, *supra* note 12 at 66.

[643] *The Constitution Act, 1867, supra* note 20, s 92A(1)(b).

[644] Duinker & Greig, Scenario Analysis in EIA, *supra* note 190 at 214.

[645] See, e.g., Port of Vancouver, "2019 Statistics Overview" (Port of Vancouver, 2019), online: <https://www.portvancouver.com/wp-content/uploads/2020/03/Statistics-overview-2017-to-2019.pdf> at 11.

[646] *Tsleil-Waututh Nation, supra* note 631 at para 468.

of the environmental and socio-economic contexts related to impacts on federal matters[647] and the full extent of the cumulative effects of those activities.[648] Similarly, there should be no limits on the scope of activities and effects that may be considered in the Ring of Fire RA, given the interactive nature of effects and the significant potential for impacts of proposed or foreseeable activities on federal matters.[649] Assessing the pace and scale of different development scenarios within the region would be relevant to federal authorities' understanding of the different impacts on areas of federal jurisdiction and management options to ensure the sustainability of those impacts.[650] The scope of the RA would in and of itself have no legal consequence for proponents or the provinces,[651] and a court would likely not interfere with scoping decisions made during a RA or SA. Additionally, as with project EA, attempts by federal authorities to cooperate with provincial jurisdictions would help avoid perceptions that the assessment is intruding into provincial constitutional territory.

c) Decision-making

Project EA

The decision stage of assessments is likely the area that requires the strongest degree of federal jurisdiction. Decision-making is, of course, about determining whether a project should or should not proceed,[652] although Sinclair *et al*. prefer to frame the ultimate decision as being "about favouring good projects and sending clear signals that good sustainability-enhancing projects will receive favourable reviews – attracting the right kind of proponents proposing the right kind of projects."[653] Decisions

[647] Hegmann *et al*, *supra* note 210 at 6.

[648] *Alberta Wilderness Association, supra* note 231 at paras 63, 69 & 76.

[649] Chetkiewicz *et al*, *supra* note 567 at 12-20; Harriman & Noble, *supra* note 190 at 27; *Oldman*, *supra* note 12 at 66-68, 72.

[650] Duinker & Greig, Impotence, *supra* note 23 at 154.

[651] *Gitxaala, supra* note 540 at para 125; *Alberta Wilderness Association, supra* note 231 at paras 2, 4.

[652] Kwasniak, *supra* note 32 at 4; Sinclair *et al*, Implementing Next Generation EA, *supra* note 22 at 174.

[653] Sinclair *et al*, Implementing Next Generation EA, *ibid.*

should be accompanied by explicit reasons that include justification for any trade-offs.[654] They can also include the imposition of any conditions on an approval, and should establish requirements for project monitoring and follow-up.[655] Indeed, both CEAA 2012 and the IAA require the decision-maker to establish any binding conditions on a project approval that she or he deems appropriate, are directly linked or necessarily incidental to the exercise of federal authority, and that include conditions respecting the implementation of mitigation measures and a follow-up program.[656] Conditions of approval may involve modifications to project design or siting, or select alternatives to the original proposal in order to reduce environmental risk and enhance benefits.[657] Monitoring should help identify whether conditions of approval are being met and fulfilled, whether the project is "living up to its promise of making a net contribution to sustainability," as well as whether it is resulting in any unanticipated effects that require addressing.[658] As with the scope of the assessment, monitoring and follow-up should focus not just on biophysical environmental effects, but also on any effects on the public, and especially vulnerable communities.[659]

The basic jurisdictional questions related to decision-making are the extent to which a federal decision must be rooted in federal jurisdiction (i.e., federal impact or valid exercise of federal authority, such as federal proponency, federal funding, ownership of lands or regulation of the project itself, such as railways) and the extent to which it may encroach on provincial matters. If as concluded above the scope of factors that may be considered in a federal EA is limitless, is the scope of factors that may be

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[654] Gibson *et al*, Fulfilling the Promise, *supra* note 11 at 273.

[655] Northey, *CEAA and EARPGO, supra* note 35 at 113-14; Kwasniak, *supra* note 32 at 4.

[656] *CEAA 2012, supra* note 4, ss 31, 54; *IAA*, *supra* note 6, s 64(2),(4); Gibson, In Full Retreat, *supra* note 45 at 186.

[657] Chalifour, *supra* note 49 at 146.

[658] Sinclair *et al*, Implementing Next Generation EA, *supra* note 22 at 174; Gibson *et al*, Fulfilling the Promise, *supra* note 11 at 274.

[659] Gibson *et al.*, Fulfilling the Promise, *ibid* at 275.

relied on in decision-making similarly so? What is the appropriate constitutional balance between addressing impacts on or resulting from federal matters and respecting provincial authority? To what extent may a federal authority prefer an alternative to a proposed undertaking (including the null alternative) or impose conditions on approval, including monitoring and follow-up, where conditions may act as a bar to projects or relate to provincial matters? Could a federal authority revoke a project approval on the basis that a condition pertaining to a provincial matter is not being met or provincial effects are not as predicted?

Having established at the outset of this chapter that next generation federal EA legislation would likely fall under the various heads of power to which an undertaking pertains, it follows that federal decision-making authority under EA legislation also stems from the head (or heads) of power involved. However, while it was relevant for La Forest J that the EARPGO simply expanded on the factors that decision-makers must consider when exercising their discretion under other statutes,[660] it should be noted that it is the Constitution, not federal laws enacted pursuant to the Constitution, that confers jurisdictional authority. An assertion of federal regulatory authority may in fact be *ultra vires* federal jurisdiction, and the suite of federal environmental regulatory requirements may not comprehensively cover all areas of federal jurisdiction. For example, should Parliament repeal the *Canadian Navigable Waters Act*[661] it would still have jurisdiction over navigation under section 91(10) and would therefore have authority to decide whether to approve impacts on navigation or the impacts of navigation projects.[662] Conversely, the Supreme Court's decisions in *Fowler* and *Northwest Falling* suggest that where the assessment reveals no impacts on a federal power Parliament would be unable to reject or

[660] *Oldman*, *supra* note 12 at 75.

[661] RSC 1985, c N-22.

[662] Anna Johnston, "Federal Jurisdiction and the Impact Assessment Act: Trojan Horse or Rational Ecological Accounting?" in Meinhard Doelle and A. John Sinclair, eds, *Impact Assessment in Transition: A Critical Review of the Canadian* Impact Assessment Act (forthcoming) ["Federal Jurisdiction and the IAA"].

impose conditions on a project, as those decisions would fall outside its constitutional authority to do so.[663] As La Forest J. asserted, an assessment authority cannot use EA "as a colourable device to invade areas of provincial jurisdiction."[664]

Where a federal authority exercises a power or an EA reveals impacts on areas of federal authority, La Forest J. suggests that authorities may consider effects that are merely incidental to the federal effect or decision involved. He referred to Australian case *Murphyores*, in which the Court held that the Australian federal Minister for Minerals and Energy was authorized to consider the environmental impact of mineral extraction when considering whether to approve the minerals' export, even though it is the state governments in Australia who regulate mineral extraction, and environmental effects related to the minerals is incidental to the exercise of federal authority over exports.[665] Thus, non-federal effects that are incidental to the federal head invoked by the undertaking are valid considerations. Indeed, La Forest J. warns against "the danger of falling into the conceptual trap of thinking of the environment as an extraneous matter in making legislative choices or administrative decisions," and states that the environment in its broadest conceptualization "must be a part of what actuates many decisions of any moment."[666] Any intrusion into matters within provincial authority is incidental to the pith and substance of next generation federal EA,[667] which (as found above) could, with some tailoring to focus assessments on federal projects or impacts, be defined as a tool for ensuring the sustainability of matters within federal authority and upheld under various heads of federal power. As La Forest J. held in *Oldman*:

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[663] *Supra* notes 113 and 127; Doelle, *The Federal EA Process, supra* note 12 at 75.

[664] *Oldman*, *supra* note 12 at 72.

[665] *Ibid* at 69-70.

[666] *Ibid* at 70.

[667] *Ibid* at 75.

> In legislating regarding a subject, it is sufficient that the legislative body legislate on that subject. The practical purpose that inspires the legislation and the implications that body must consider in making its decision are another thing. Absent a colourable purpose or a lack of bona fides, these considerations will not detract from the fundamental nature of the legislation. A railway line may be required to locate so as to avoid a nuisance resulting from smoke or noise in a municipality, but it is nonetheless railway regulation.[668]

In other words, there is a distinction between legislating on a matter and making decisions pursuant to that legislation.[669] If next generation federal EA legislation is *intra vires* Parliament's authority, decision-makers may validly consider information beyond that which relates to the head of power involved. As La Forest J. recognized, projects impacting a federal matter or requiring a federal authorization rarely improve the matter over which Parliament has the authority.[670] Environmental decision-making thus inherently entails justifying negative impacts through the activity's benefits, including those that do not fall within federal authority, such as local jobs or other socio-economic benefits.[671]

While *Oldman* casts some doubt as to the extent to which federal decision-makers may consider adverse impacts beyond those that are federal in nature,[672] the 2004 Supreme Court *Canadian Forest Products* (*CanFor*)[673] case suggests that scope is broad. *CanFor* was an appeal of a decision respecting damages owed by a logging company to British Columbia arising out of its negligence. In particular, the Court was asked to quantify the environmental cost of losing non-commercial, protected trees due to a wildfire.[674] Binnie J. for a majority of the Court noted expert testimony at trial that the loss of the trees could result in ecological impacts such as watershed degradation and financial losses resulting from less

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[668] *Ibid* at 69.

[669] Olszynski, " Reconsidering *Red Chris*: Federal Environmental Decision-Making after *MiningWatch Canada v Canada (Fisheries and Oceans)*" in William A. Tilleman and Alistair Lucas, eds, *Litigating Canada's Environment: Leading Canadian Environmental Law Cases by the Lawyers Involved* (Toronto: Thomson Reuters Canada Ltd, 2017) 267 at 271 ["Reconsidering Red Chris"].

[670] *Oldman*, *supra* note 12 at 67.

[671] Bowden & Olszynski, *supra* note 600 at 475-76, 484.

[672] *Oldman*, *supra* note 12 at 72.

[673] *British Columbia v Canadian Forest Products Ltd*., 2004 SCC 38, [2004] 2 SCR 74 [*CanFor*].

[674] *Ibid* at 86.

tourism and sport fishing, and held that the Crown may claim damages for environmental harms.[675] While he highlighted the need for evidence respecting the economic quantification of ecosystem services,[676] the case is important for its recognition of the fact that impacts on one component of the environment can have ripple effects across other environmental or socio-economic factors, from species' habitats, biodiversity, regulation of systems like water and soil erosion, and the recreational or emotional benefits people may derive from the component or its contribution to a healthy environment.[677] Those ecosystem services may have "use value," or the value humans derive from services they use, like drinking water and food. They may have "existence value," which is the value derived from knowing an environmental component or ecosystem exists even if a person does not directly use it (such as a protected area one may nor may not visit in the future). And they may have "inherent value," which is the non-human value of ecosystems.[678] Navigation and fisheries are two such ecosystem services, and when proponents seek permission to impact those matters they are in effect seeking permission to use those services, which may come at a public cost. It is only logical, then, that when deciding whether to allocate ecosystem services to a proponent, a federal authority should consider whether that allocation is warranted in light of all of the project's impacts, benefits, risks and uncertainties,[679] as it is in doing so that decision-makers have the comprehensive "objective basis" for decisions described by La Forest J. in *Oldman.*[680] Similarly, when the federal government is regulating a project like a railway, it is rational and proper for it to consider all implications of its decision and impose restrictions accordingly.[681] As Olszynski states, a federal authority "might be more willing to authorize

[675] *Ibid* at 100-01, 141-42.
[676] *Ibid* at 141.
[677] *Ibid* at 136-37; Olszynski, Reconsidering Red Chris, *supra* note 669 at 276-77.
[678] *CanFor, ibid* at 135-36.
[679] Nature Canada Factum at para 38.
[680] *Oldman*, *supra* note 12 at 71.
[681] *Ibid* at 66; *Nakina, supra* note 604 at 2.

the fishery impacts associated with a hospital than with a casino… [and] may be more inclined to authorize fishery impacts associated with a project that is more consistent with the principles of sustainable development than one that is not."[682]

As confirmed by a majority of the Supreme Court in *Moses,* the federal government has authority to reject projects impacting on federal matters even where those projects also fall under provincial jurisdiction, such as mines,[683] and it is immaterial that the decision also impacts on a provincial matter.[684] Where such impacts exist, it is only reasonable that federal decision-makers may apply criteria designed to reduce unwanted impacts and enhance benefits[685] in order to decide whether and under what circumstances federal impacts are warranted. In fact, it may be through the application of such criteria that a federal authority finds a federal impact to be warranted, for example by preferring an alternative that enhances a provincial benefit or minimizes an additional provincial impact. Selecting an alternative would be less of an intrusion into an area of provincial authority than an outright rejection and would therefore indicate an attempt by the federal government to respect the balance of powers. As Doelle argues, "[i]t does not serve to protect provincial jurisdiction to force the federal decision, whether or not to approve an impact on navigation, to be made in a partially blind manner."[686] Likewise, it does not serve to protect provincial jurisdiction to restrict federal ability to find mutually-acceptable ways to allow projects to proceed.

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[682] Olszynski, Reconsidering Red Chris, *supra* note 669 at 279.

[683] *Quebec (Attorney General) v Moses*, 2010 SCC 17, [2010] 1 SCR 557 at para 53 [*Moses*].

[684] *Oldman*, *supra* note 12 at 75.

[685] Sinclair *et al*, Implementing Next Generation EA, *supra* note 22 at 168, 173; Northey, Fading Role of Alternatives, *supra* note 2 at 54; Gibson, *Sustainability Assessment: Applications, supra* note 23 at 13.

[686] Doelle, *The Federal EA Process, supra* note 12 at 67.

Similarly, it is logical that federal authority over the subject matters assigned to it under section 91 includes authority to impose conditions respecting provincial matters. Where a federal authority imposes more stringent conditions of approval than the province, there will be no conflict so long as the proponent can comply with the stricter conditions.[687] If a proponent cannot comply with a condition or if provincial and federal conditions conflict, the federal decision prevails.[688] The question is the extent to which a federal authority can impose conditions respecting provincial matters or conditions that the proponent cannot meet, or when might a decision to reject a project or impose conditions respecting provincial matters be seen as an unlawful intrusion into provincial jurisdiction.[689]

Kennett argues that it would be colourable for the federal government to refuse a project in the absence of "negative consequence for matters of federal jurisdiction," or to attach to an approval conditions unrelated to federal constitutional authority.[690] As noted above, the colourability doctrine is aimed at preventing legislators from "do[ing something] indirectly what [they] cannot do directly."[691] The Supreme Court in the *Firearms Reference* held that a law may be "colourable if its stated purposes diverge substantially from its actual effects."[692] However, the Court has also held that the colourability doctrine only applies to the threshold question of whether impugned legislation is in pith and substance in relation to a federal matter, and that where the legislation validly relates to a federal matter, the question is in respect to its applicability rather than colourability.[693] In the *Firearms Reference* the Court also held that the provincial effects of a federal law may be "so substantial that they show that the law

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[687] *Rothmans*, *supra* note 395 at paras 18-20, 22-23; Hogg, *Constitutional Law, supra* note 12 at 16.7.

[688] Hogg, *ibid* at 16.7-8.

[689] Fulfilling the Promise at 268-69; *Oldman*, *supra* note 12 at 72.

[690] Kennett, *supra* note 137 at 200.

[691] Hogg, *Constitutional Law, supra* note 12 at 15.20

[692] *Firearms Reference, supra* note 274 at para 18.

[693] *Husky Oil, supra* note 472 at para 42.

is mainly, or "in pith and substance" the regulation" of a matter within provincial jurisdiction.[694] The same test likely applies to decisions made pursuant to legislation: whether the purpose and effects of a decision are mainly in relation to a federal matter, and if so, whether it and any conditions and follow-up are based on relevant considerations and do not intrude so far into provincial jurisdiction as to "erode the constitutional balance inherent in the Canadian federal state."[695] In other words, federal authority to impact on provincial matters depends on the degree of impact on the area within federal authority and the degree of intrusion into the provincial arena. The Supreme Court has made it clear that an exercise of federal authority may have incidental effects on provincial jurisdiction that are "of significant practical importance" so long as they "are collateral and secondary to the mandate of the enacting legislature."[696] As seen in *Ward* in Chapter II, the Supreme Court upheld a *Fisheries Act* provision prohibiting the sale of hooded and harp seals, even though it was aimed at commerce rather than hunting, finding that the purpose of the impugned provision was to discourage their killing and therefore within federal fisheries power.[697] Accordingly, so long as the effects of a federal decision are collateral to a valid federal purpose,[698] they should not render that decision invalid. If a mine's impacts on fisheries are inconsequential and the burden on the proponent to relocate the mine is great, a court may find that the federal government has overstepped its jurisdiction, but where the impacts on fisheries are significant, the effects on provincial jurisdiction may be considered incidental.

For example, since the federal government has authority to reject a mine on the basis of effects on a federal fishery,[699] and since (as set out above) the enhancement of jobs or mitigation of provincial

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[694] *Firearms Reference, supra* note 274 at para 49.

[695] *Ibid*; *Securities Act Reference*, *supra* note 285 at para 62.

[696] *Canadian Western Bank*, *supra* note 130 at para 28; *Oldman*, *supra* note 12 at 75.

[697] *Ward*, *supra* note 112 at paras 20-22.

[698] Fulfilling the Promise at 268-69; *Oldman*, *supra* note 12 at 72.

[699] *Moses, supra* note 683 at para 53.

effects may be relevant to a federal determination respecting whether the mine's federal effects are warranted, it would likely be appropriate for a federal authority to impose conditions respecting the enhancement of jobs or mitigation of additional provincial impacts. Given that the alternative would be to permit the federal government to reject a project based on federal impacts, as La Forest J. held, it would defy reason to bar it from imposing conditions that would result in an approval.[700] This logic may be extended to post-decision monitoring and follow-up: if a federal authority is acting within the bounds of federal jurisdiction in making decisions in light of all relevant impacts and in imposing conditions on approval, it stands to reason that federal authorities may monitor effects to ensure they are as predicted, monitor conditions to ensure they are being followed, and address any findings of non-compliance or effects that are not as predicted.[701]

On the other hand, courts will be live to provincial sensitivities[702] and the need to ensure that federal decisions do not upset the balance of power. A less clear situation may be where provincial interest in the project is high, such as a provincial utility like a wind farm. If due to the size, siting and design of the wind farm the federal effects will be minimal and the project is necessary to meet the province's energy needs, a court may find that a federal rejection on the basis of those minimal federal impacts to be an unconstitutional intrusion into provincial authority that "override[s] or modif[es] the separation of powers"[703] and that the purpose and effect of a federal rejection are mainly in relation to a provincial matter.[704] In such a situation, the paramountcy or interjurisdictional immunity doctrines

[700] *Oldman*, *supra* note 12 at 66; Johnston, Federal Jurisdiction and the IAA, *supra* note 662 at 16.

[701] Benidickson, *Environmental Law*, *supra* note 12 at 259.

[702] Lucas, *supra* note 134 at 35; MacKay, *supra* note 129 at 26.

[703] *Securities Act Reference*, *supra* note 285 at para 61.

[704] *Firearms Reference, supra* note 274 at para 49.

would not apply, as both require laws to be otherwise valid,[705] which would not be the case if a decision's purpose and effects are primarily in relation to a provincial matter. Additionally, those doctrines apply to statutes and legislative provisions, rather than decisions made under such legislation. While the Supreme Court in *Canadian Western Bank* indicated an intention for courts to play a limited role in protecting the balance of power out of a concern that the allocation of powers will be informed by politics and should therefore be left to the political orders of government,[706] it did state that there is a role for courts to facilitate cooperative federalism and ensure that the balance of power is maintained.[707]

Federalism has featured prominently in environmental division of powers cases, and as with other cases, courts have demonstrated a preference for respecting the division while maintaining a flexible approach that allows both orders of government to address emerging environmental issues. In his dissent in *Crown Zellerbach*, La Forest J. expressed concerns with the majority's decision to uphold the federal *Ocean Dumping Control Act*, SC 1974-75-76, c 55, which regulated the dumping of substances at sea, under the federal POGG power:

> It must be remembered that the peace, order and good government clause may comprise not only prohibitions, like criminal law, but regulation. Regulation to control pollution, which is incidentally only part of the even larger global problem of managing the environment, could arguably include not only emission standards but the control of the substances used in manufacture, as well as the techniques of production generally, in so far as these may have an impact on pollution. This has profound implications for the federal-provincial balance mandated by the Constitution. The challenge for the courts, as in the past, will be to allow the federal Parliament sufficient scope to acquit itself of its duties to deal with national and international problems while respecting the scheme of federalism provided by the Constitution.[708]

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[705] Hogg, *Constitutional Law, supra* note 12 at 15.28, 16.3; Wright, *supra* note 265 at 641; Doelle, *The Federal EA Process, supra* note 12 at 60.

[706] Wright, *ibid* at 634-35.

[707] *Canadian Western Bank*, *supra* note 130 at para 24.

[708] *Crown Zellerbach, supra* note 113 at 447-48.

Justice La Forest's concern was that the provinces would not have concurrent authority over marine pollution under a head of provincial power.[709] To uphold the legislation under POGG, La Forest stated, would "create considerable stress on Canadian federalism as it has developed over the years,"[710] as it risks allocating environmental pollution broadly and exclusively to the federal Parliament, which would "involve sacrificing the principles of federalism enshrined in the Constitution."[711] In the subsequent case of *Hydro-Québec*, La Forest J. (this time writing for the majority), addressed these concerns by upholding provisions of the *Canadian Environmental Protection Act*, RSC, 1985, c 16 (4th Supp) (CEPA) as well as an order made under that Act not under POGG, but under the federal criminal law power. In doing so, the majority recognized the "superordinate importance" of both federal and provincial legislative measures to protect the environment.[712] That importance, it found, requires courts to define the extent to which each level of government may use those powers progressively, "in a manner that is fully responsive to emerging realities and to the nature of the subject matter sought to be regulated."[713]

Justice La Forest held that the Constitution "should be so interpreted as to afford both levels of government ample means to protect the environment while maintaining the general structure of the Constitution."[714] He wrote:

> … each constitutional head of power has its own particular characteristics and raises concerns peculiar to itself in assessing it in the balance of Canadian federalism. This may seem obvious, perhaps even trite, but it is all too easy (see *R. v. Fowler*, [1980] 2 S.C.R. 213 (S.C.C.)) to overlook the characteristics of a particular power and overshoot the mark or, again, in assessing the applicability of one head of power to give effect to concerns appropriate to another head of power when this is neither appropriate nor consistent with the law laid down by this Court respecting the ambit and contours of that other power. In the present case, it seems to me, this

[709] Lahey, *supra* note 557 at 233.

[710] *Crown Zellerbach, supra* note 113 at 451.

[711] *Ibid* at 455.

[712] *Hydro-Québec, supra* note 550 at para 85.

[713] *Ibid* at para 86.

[714] *Ibid* at para 116.

> was the case of certain propositions placed before us regarding the breadth and application of the criminal law power. There was a marked attempt to raise concerns appropriate to the national concern doctrine under the peace, order and good government clause to the criminal law power in a manner that, in my view, is wholly inconsistent with the nature and ambit of that power as set down by this Court from a very early period and continually reiterated since, notably in specific pronouncements in the most recent cases on the subject.[715]

Justice La Forest went on to address the concern he expressed in *Crown Zellerbach* over the possibility of allocating exclusive legislative power over the environment to the federal Parliament, noting that he "would be equally concerned with an interpretation of the Constitution that effectively allocated to the provinces, under general powers such as property and civil rights, control over the environment in a manner that prevented Parliament from exercising the leadership role expected of it."[716] Due to the "sweeping" nature of environmental pollution, care must be taken to respect the division of powers and preserve the ability of both orders of government to "exercise leadership" in environmental protection.[717] Influencing La Forest J.'s decision was the fact that CEPA largely only restricted, rather than prohibited, toxic substances, and therefore "limited provincial jurisdiction must less than it would if it were primarily prohibitory."[718] Also, unlike upholding the *Ocean Dumping Control Act* under POGG in *Crown Zellerbach*, upholding CEPA under the criminal law power maintained provincial authority to manage toxic substances concurrently.[719] Indeed, La Forest J. noted how "in enacting the legislation in issue here, Parliament was alive to the need for cooperation and coordination between the federal and provincial authorities."[720]

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[715] *Ibid* at para 117.

[716] *Ibid* at para 154.

[717] *Ibid* at para 154.

[718] Lahey, *supra* note 557 at 235; *Hydro-Québec, ibid* at para 146.

[719] Lahey, *ibid* at 235; *Hydro-Québec, ibid* at para 152.

[720] *Hydro-Québec, ibid* at para 153.

In *Oldman*, the third of La Forest J.'s trilogy of environmental division of powers cases, as noted above he rejected the interjurisdictional immunity argument that projects should be classified as "a "provincial project" or an undertaking "primarily subject to provincial regulation."[721] Through this recognition of the multifaceted nature of the environment (and EA) and the need for both orders of government to share responsibility for it through their respective heads of power, La Forest J. advanced the notion that for efforts towards environmental protection to be effective and to advance federalism principles, the courts should facilitate "integrated approach[es] to environmental management."[722] This cooperative federalism model has been more recently cited by courts when upholding federal carbon pricing legislation: in the Saskatchewan *Greenhouse Gas Pollution Pricing Act Reference*,[723] the dissenting reasons of the Saskatchewan Court of Appeal considered the principle of cooperative federalism in holding that the federal legislation is invalid.[724] The minority referred to federalism and constitutional balance as "normative and organising principles of constitutional interpretation," and described cooperative federalism as an interpretive tool for allowing "room for flexibility, overlapping jurisdictions and intergovernmental cooperation in a division of power analysis."[725] Similarly, a majority of the Ontario Court of Appeal in its *Reference re Greenhouse Gas Pollution Pricing Act* cited the principle of cooperative federalism in upholding the federal act.[726] The majority held that cooperative federalism "does support the concurrent operation of statutes enacted by governments at both levels," which the legislation in question encourages.[727]

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[721] *Oldman*, *supra* note 12 at 68.

[722] Lahey, *supra* note 557 at 234.

[723] [2019] SJ No 156, 2019 SKCA 40.

[724] *Ibid* at para 390.

[725] *Ibid* at para 393.

[726] *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544, [2019] OJ No 3403, para 135.

[727] *Ibid* at para 135.

The above cases indicate that while cooperative federalism cannot be used to uphold legislation that is otherwise *ultra vires* the enacting government, it is a powerful tool for accommodating overlap, especially where governments are working together or the legislative scheme recognizes the authority of the other order of government and makes efforts to minimalize intrusion and offer means of intergovernmental cooperation, as is the case with next generation EA.[728] Accordingly, in the example of the wind farm above, a court may find that a federal authority has jurisdiction to reject the farm in favour of an alternative if it does so in cooperation with a provincial authority that reaches the same decision (and the challenge is brought by a non-state actor, such as a citizen's group), since doing so would foster cooperation and avoid legislative vacuums.[729]

Additionally, even where the assessment isn't coordinated but federal impacts may be significant – for example, on migratory birds – and there is a technically and economically feasible alternative (such as demand-side management or alternative electrification that is not contrary to provincial policy),[730] a court may find that the purpose and effects are mainly in relation to that federal matter and therefore that it is within federal authority to approve that alternative over the project as proposed by the provincial utility. The extent of federal authority with respect to follow-up would also be tied to the extent of federal effects versus degree of federal interest: for example, in the case of the wind project it may be valid for a federal authority to require a proponent to monitor impacts on migratory birds where the assessment has indicated such effects will occur and address findings that the impacts are greater than predicted, but it may not have authority to order the wind farm to close due to

[728] Fitzpatrick & Sinclair, Multi-Jurisdictional EA in Canada, *supra* note 248 at 189-90.

[729] *Canadian Western Bank*, *supra* note 130 at para 44; Wright, *supra* note 265 at 648.

[730] E.g., in the EA of the Site C dam, it was noted that certain alternative means of meeting BC's electricity needs, such as Burrard Thermal and nuclear, were barred by legislation and therefore could not be considered: *Report of the Joint Review Panel, Site C Clean Energy Project* (1 May 2014), online, CEAA: <https://www.ceaa-acee.gc.ca/050/documents/p63919/99173E.pdf> at 291.

unpredicted noise causing a nuisance for local residents that cannot be mitigated. This approach is consistent with the double aspect doctrine, which (as discussed above) allows for the concurrent application of both federal and provincial legislation,[731] and decisions made pursuant to that legislation, provided the two do not conflict. When exactly a federal decision crosses the line from valid incidental effects on provincial authority to unconstitutional intrusion into provincial jurisdiction and an upset to the balance of Canadian federalism will have to be resolved on a case-by-case basis, in light of the particular facts of each situation.

Regional and Strategic EA

Again, the above principles would apply with respect of regional and strategic EA. Chapter II posed the question of the extent of federal authority to direct the pace and scale of development of a particular kind or in a particular region, and whether there are any limits to the information federal authorities may consider when developing the outcomes of RA and SA. The above analysis suggests that while provinces have jurisdiction over the management of natural resources on provincial lands,[732] federal authorities have jurisdiction to regulate the pace and scale of impacts on areas of federal jurisdiction and activities over which Parliament has been assigned authority under section 91 of *The Constitution Act, 1867*.[733] So long as the purpose and effect of RA and SA outcomes are mainly in relation to federal matters, they may incidentally affect the provincial sphere, such as natural resource management.[734] For example, the Ring of Fire RA may result in the identification of a preferred vision of the future of fisheries in the region and preferred scenarios related to those fisheries.[735] So long as the RA outcomes

[731] *Securities Act Reference*, *supra* note 285 at para 67.

[732] *The Constitution Act, 1867, supra* note 20, s 92A(1)(b).

[733] *Moses, supra* note 683 at para 53; *Ward*, *supra* note 112 at paras 24-25; *Northwest Falling, supra* note 127 at 301.

[734] *General Motors, supra* note 349 at 669; *Firearms Reference, supra* note 274 at para 49.

[735] Gibson *et al*, Fulfilling the Promise, *supra* note 11 at 266.

pertain to federal matters,[736] it is constitutionally irrelevant whether they are based on provincial considerations like socio-economic conditions and opportunities, air pollution or impacts on non-Aboriginal hunting and fishing.[737] Indeed, as with project assessment, it is only rational that a federal authority would consider the full range of predicted impacts, benefits, risks and uncertainties of different scenarios in order to make fully-informed decisions respecting the future allocation of ecosystem services within its authority.[738]

It should also be noted that in next generation EA, regional and strategic assessment merely result in "authoritative guidance" for project assessment.[739] Tools for informing and guiding project-level decision-making,[740] RA and SA do not themselves result in decisions respecting individual projects. So long as RA and SA decisions are not binding on provinces and individual proponents, courts may be reluctant to weigh in on their constitutionality just as they are reluctant to weigh in on questions related to project assessment reports[741] and instead decide it is appropriate to wait until decisions are made that affect legal rights or interests – in other words, at the project level. Of course, it could be argued that a federal policy to ban all projects of a particular type would be *ultra vires* the federal Parliament if that project type was provincially-regulated, but that such a ban would either need to be made in a legally-binding instrument or be found to have such a deterrent effect on proponents that it has the

[736] It should be noted that, given that the Ring of Fire exists in First Nations territory and the existence of potential impacts of existing and future projects and activities on those First Nations and their territories (Chetkiewicz *et al, supra* note 567 at 17-20), federal jurisdiction may be triggered by virtue of federal authority over "Indians, and Lands reserved for the Indians" under section 91(24) of the *Constitution Act, 1867*. It is outside the scope of this thesis to analyse the extent of federal authority pursuant to that subject matter, but as with other heads of federal power, section 24 is a potentially considerable source of federal EA authority.

[737] *Firearms Reference, supra* note 274 at para 49.

[738] *CanFor, supra* note 673 at paras 138, 141; Olszynski, Reconsidering Red Chris, *supra* note 669 at 279.

[739] Gibson *et al*, Fulfilling the Promise, *supra* note 11 at 266.

[740] Sinclair *et al*, Implementing Next Generation EA, *supra* note 22 at 171; Gibson *et al.,* Fulfilling the Promise, *ibid*; Doelle & Critchley, *supra* note 190 at 90-91, 98-100.

[741] *Gitxaala, supra* note 540 at para 125; *Alberta Wilderness Association, supra* note 231 at paras 2, 4.

effect of a legal ban. In such cases, as with project assessment, federal jurisdiction will hinge on whether the purpose and effect of such a ban are mainly in relation to a federal matter.[742] The SATCM may be illuminating: if, for example, the SATCM resulted in a ban on thermal coal mining, a provincial legislature may argue that such outcomes are unconstitutional intrusions into provincial authority. However, if the SATCM resulted in a decision that the federal impacts of thermal coal mining and export were unavoidable, un-mitigatable and unwarranted in light of all the project's impacts, and resulted in a ban on future exports of thermal coal (a federal matter)[743] and direction to federal authorities to not authorize federal impacts of thermal coal mining – in other words, so long as the ban is implemented through valid exercises of federal authority (i.e., by prohibiting federal impacts on a project-by-project basis) – its purpose and effects would appear to be mainly in relation to a federal matter. Determining whether the ban imbalanced the division of powers by intruding too far into provincial jurisdiction would depend on the particular facts on a project-by-project basis: as with project assessment, a court would likely look at the degree to which a federal decision is integrated with a federal matter and the "seriousness of the encroachment on provincial powers,"[744] as well as efforts to cooperate with provincial jurisdictions.

Thus, RA and SA may be tiered with project assessment by providing direction to authorities relating to federal matters, and being informed by other assessments at all levels.[745] They may also inform federal planning with respect to federal matters, such as the pace and scale of development of federally-regulated undertakings (such as railways)[746] or the pace and scale of impacts on federal

[742] *Firearms Reference, supra* note 274 at para 49.

[743] Gibson, Constitutional Jurisdiction, *supra* note 88 at 62.

[744] *General Motors, supra* note 349 at 671-72.

[745] Sinclair *et al*, Implementing Next Generation EA, *supra* note 22 at 168.

[746] *Oldman*, *supra* note 12 at 69.

matters, such as fisheries. Similarly, they may result in federal policies, plans or programs; indeed, as with EA under the EARPGO, SA and RA may be conceptualized as simply a tool for informing federal creation of policies, plans and programs under its constitutional authority.[747] Where a federal and provincial policy, plan or program (including a preferred scenario respecting federal matters versus a provincial preferred scenario respecting development) conflict, a court will have to look at the doctrines pertaining to the division of powers, such as interjurisdictional immunity, paramountcy and the double aspect doctrine. Take a hypothetical example of a federal strategic assessment of marine shipping along BC's northwest coast that results in a policy to not approve marine vessels above a certain size due to impacts on endangered orcas – including liquefied natural gas (LNG) tankers – and a provincial policy in BC to promote LNG production and export. Orcas fall under the federal fisheries power,[748] and the strategic assessment may find that impacts of LNG shipping on them are significant due to their threatened status.[749] In such a case the federal policy's purpose and effects would likely be found to be mainly in relation to federal matters, and it would be immaterial whether the policy is actually effective at protecting the orcas.[750] Further, federal authorities may find that but for adverse provincial effects of the LNG facilities – e.g., localized air pollution and the health and gendered impacts of workers' camps – the projects benefits would justify the impacts on orcas, and ban LNG shipping due to the impacts on orcas in light of all provincial impacts and benefits. As with EARPGO, the SA would have simply "added to the matters that federal decision-maker should consider.[751] However, a federal policy respecting electrical generation within a province that runs contrary to that province's own electrification policy may be found to have upset the balance of powers if the intrusion is considerable and the purpose of

[747] *Ibid* at 71.

[748] *Fisheries Act*, *supra* note 128, s 2.

[749] *Species at Risk Act*, SC 2002, c 29, Schedule 1, Part 2.

[750] *Ward*, *supra* note 112 at para 18; *Firearms Reference, supra* note 274 at para 18.

[751] *Oldman*, *supra* note 12 at 71.

the federal policy is not mainly in relation to a federal matter. For example, a federal policy to prefer wind over solar electricity in a province, where the federal impacts of wind are found to be greater than those of solar and the primary reason for the federal policy is local opposition to solar in politically significant ridings for the government of the day, the purpose and effects of the policy may be found to be mainly in relation to a provincial matter (generation and production of electrical energy).[752] Again, the balance of impacts on areas within federal authority versus the intrusion into provincial matters will be key, as will be efforts to cooperate with provincial jurisdictions, as courts seek to maintain a flexible approach to division of powers cases that allows both orders of government to address emerging environmental issues.

[752] *The Constitution Act, 1867, supra* note 20, s 92A(1)(c). It is outside the scope of this thesis to analyse whether a political consideration may be irrelevant for the purposes of a federal environmental policy.

V. Conclusions

Four main conclusions can be drawn from the above analysis. The first is that a federal next generation EA statute would need to be drafted in such a way as to make it in "relation to" one or more federal heads of power. The EARPGO simply set out a process for how federal decision-makers had to exercise their authority under various heads of power,[753] and could therefore be upheld under those heads.[754] The *IAA* is rooted in federal jurisdiction primarily through its decision-making function in section 60, which requires decision-makers to determine whether the adverse federal, direct or indirect effects are in the public interest, as well as purposes related to federal matters and a prohibition that also focuses on federal effects.[755] Were a next generation EA law to apply to undertakings with potential for federal impacts and similarly focus its decision-making on federal impacts, it would likely be upheld under various federal heads of power.

The second main conclusion is that it is at the decision-making phase that federal jurisdiction becomes most important. Courts have expressed a reluctance to interfere with assessments before a decision has been made that carries legal consequences,[756] and while a federal decision to trigger an assessment of a project with no possibility of federal effects or other federal jurisdictional hook may constitute an improper intrusion into provincial jurisdiction, EA should be triggered early, before authorities may have information about an undertaking's potential effects.[757] Also, because the suite of federal environmental regulatory processes may not capture all federal impacts and undertakings, authority to require an EA should not be limited to the EARPGO-style regulatory triggers.[758] Given the

[753] *Oldman*, *supra* note 12 at 75.
[754] *Ibid* at 72-74.
[755] *IAA*, *supra* note 6, ss s 6(a)-(b), (c)-(d), 7.
[756] *Gitxaala, supra* note 540 at para 125; *Alberta Wilderness Association, supra* note 231 at paras 2, 4.
[757] MacLean *et al., supra* note 246 at 43; Gibson, *Sustainability Assessment: Criteria and Processes, supra* note 27 at 16.
[758] Nature Canada Factum, *supra* note 258 at para 31.

need for precaution and the mechanisms available to authorities to avoid duplication and tailor assessments to the scope of potential federal impacts, the jurisdictional threshold at the triggering stage should be low, such as the reasonable probability of federal impacts. At the strategic and regional tiers, this threshold will capture a wide range of undertakings, given the compounding nature of cumulative effects.[759]

Rather, it is in decision-making that the EA must be rooted in federal constitutional authority. Where an assessment reveals no impacts on federal matters and there is no other federal involvement (such as a federal proponent, federal funding or federal lands), there will exist no jurisdiction on which to base a decision. On the other hand, where federal impacts will occur, the federal government will have authority to approve or reject the project, impose conditions and require follow-up.[760] Federal jurisdiction in such cases will not be unlimited: courts will seek to maintain the balance of powers by ensuring that the purpose and effects of federal decisions are in relation to federal matters, and will therefore weigh the magnitude of federal impacts against the degree of intrusion into provincial jurisdiction.[761] Where the assessment reveals only minimal federal effects and there are no other federal jurisdictional hooks, federal authorities will have little authority to reject or impose stringent conditions. But where federal effects occur, authorities may make decisions that incidentally affect provincial matters.[762] For regional and strategic assessments, federal authorities will similarly need to ensure that outcomes focus on federal constitutional authority, such as the pace and scale of federal impacts, or policies, plans and programs respecting federal issues.

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[759] Harriman & Noble, *supra* note 190 at 27.

[760] *Moses, supra* note 683 at para 53; *Ward*, *supra* note 112 at paras 24-25; *Northwest Falling, supra* note 27 at 301.

[761] *Firearms Reference, supra* note 274 at para 49.

[762] *Ibid* at para 49.

Third, the scope of factors a federal decision-maker may consider when making decisions respecting federal effects is broad, limited only to those considerations that are relevant to the undertaking. The case law suggests that assessments may be scoped to include a wide range of upstream, direct and downstream effects and project components, such as future facilities and facilities in other jurisdictions, upstream production and electrification, and downstream marine shipping.[763] Also, given the interactive nature of effects and the ecosystem and social services that environmental matters provide,[764] it is only logical that federal jurisdiction related to the various section 91 subject-matters includes the power to consider all relevant environmental, social and economic (including health) implications of undertakings that affect those matters.[765] For example, when deciding whether to authorize impacts on fisheries, a federal minister may find it relevant to consider the benefits associated with those impacts, and may also deem non-federal adverse impacts relevant to the overall cost-benefit analysis.[766] In fact, it may be through the weighing of the overall impacts, benefits, risks and uncertainties that federal authorities find themselves able to justify federal effects and minimize their intrusion into provincial jurisdiction. So long as the purpose and effect of federal decisions relate mainly to federal heads of power, any overlap with provincial jurisdiction "is just what would be expected in a federation such as Canada."[767]

Finally, next generation EA's emphasis on multijurisdictional collaboration interacts with the court's preference in recent decades for cooperative federalism and the need for 'all hands on deck' when it comes to environmental protection. The environment touches on multiple heads of power

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[763] *MiningWatch*, *supra* note 31 at para 6; *Quebec (Attorney General) v Canada (National Energy Board)*, *supra* note 607 at para 57; *Sumas*, *supra* note 609 at paras 12, 14; *Tsleil-Waututh Nation, supra* note 631 at para 468.

[764] *CanFor, supra* note 673 at 136-37; Olszynski, Reconsidering Red Chris, *supra* note 669 at 276-77; Gibson *et al*, Fulfilling the Promise, *supra* note 11 at 267-68.

[765] *Oldman*, *supra* note 12 at 66; *Nakina, supra* note 604 at 2; Olszynski, Reconsidering Red Chris, *ibid* at 279.

[766] Olszynski, Reconsidering Red Chris, *ibid*.

[767] Kwasniak, *supra* note 32 at 22.

accorded to both orders of government, and courts are unlikely to draw "bright jurisdictional lines" between federal and provincial power to assess matters.[768] As Baier states, "[i]f a protester's placard were to read, 'the environment belongs to no one and to everyone' it would be as much an observation about constitutional jurisdiction in Canada as it would be Earth-friendly philosophy."[769] Overlap in EA is not of itself a good or a bad thing,[770] and so long as triggering decisions are based on a reasonable probability of impacts on areas within federal authority and decisions – including conditions of approval and follow-up programs – are linked to direct or incidental impacts on matters falling within a head or heads of federal power, Parliament should be accorded latitude to overlap into areas of provincial concern. Where federal authorities seek to collaborate with provincial authorities early and throughout assessments, courts may be more inclined to tolerate incidental effects on provincial matters. As Saunders notes, "the purpose of federalism is not the elimination of conflict," but rather accommodation of overlap and conflict.[771] Through multijurisdictional cooperation in next generation EA, governments can seek consensus on process and final decisions, and where provincial authorities are not willing to come to the table there would still be broad authority to ensure the sustainability of federal activities and resources. To paraphrase Madame Justice L'Heureux-Dubé in *Spraytech*, our common future depends on it.[772]

[768] *Ward*, *supra* note 112 at para 43.

[769] Baier, *supra* note 20 at 28.

[770] Kwasniak, *supra* note 32 at 22.

[771] Saunders at xi.

[772] *Spraytech*, *supra* note 393 at para 1.

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