



**Environmental Assessment & the Canadian Constitution:  
Substitution and Equivalency**

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## The Environmental Law Centre (Alberta) Society

The Environmental Law Centre (Alberta) Society is an Edmonton-based charitable organization established in 1982 to provide Albertans with an objective source of information about environmental and natural resources law and policy. Its vision is a clean, healthy and diverse environment protected through informed citizen participation and sound law and policy, effectively applied.

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## Introduction

The ultimate goal of this project is to make a determination as to constitutionality of the substitution and equivalency approach endorsed by *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19, s. 52 (*CEAA 2012*) and, if appropriate, create a case for a constitutional challenge of this aspect of *CEAA 2012*. The project will also delineate alternative approaches to dealing with the jurisdictional overlap created by Canada's Constitution in the area of environmental assessment. This project involved the collection and analysis of academic literature, legal literature and jurisprudence pertaining to environmental assessment and the Canadian Constitution.

Given the structure of Canada's constitution, there is significant jurisdictional overlap in regulating environmental matters. This can lead to environmental assessment of a single undertaking at both a provincial and federal level. In response to this situation, the federal government has endorsed the mechanisms of substitution and equivalency in the new *CEAA 2012*. This project considers the constitutionality of the substitution and equivalency approach adopted in *CEAA 2012*.

In late 2011, the federal government commenced its statutory review of the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37. Unlike the previous statutory review of this piece of legislation, the process was cursory and was completed within a matter of weeks. A few months later, with the passage of the omnibus budget bill in June 2012, the *Canadian Environmental Assessment Act* was repealed and replaced with *CEAA 2012*.

Under *CEAA 2012*, the number and scope of federal environmental assessments will be reduced. Previously, a federal environmental assessment was required for all projects which triggered *CEAA* (by virtue of involving the federal government as proponent, federal lands, a prescribed federal permit or federal financial assistance). Under *CEAA 2012*, only those projects designated by regulation or by the Minister of Environment may be subject to federal environmental assessment.

Even if a project is designated by regulation, a federal environmental assessment might not occur for two reasons.<sup>1</sup> First, the Canadian Environmental Assessment (CEA) Agency may determine that a federal environmental assessment is not required. Second, the federal government may decide not to conduct its own environmental assessment of a designated project on the basis that the project is being assessed provincially.

In the event that a designated project will be subject to a federal environmental assessment, the scope and content of that assessment are narrower under *CEAA 2012* than under the

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<sup>1</sup> There are a limited number of designated projects that must undergo a federal environmental assessment. These are the projects linked to either the Canadian Nuclear Safety Commission, the National Energy Board or a federal authority designated by regulation. As well, the Minister has the discretion to designate a particular project for which a federal environmental assessment must occur.

previous *CEAA*. The definition of “environmental effects” in *CEAA 2012* is limited to effects on fish, aquatic species at risk, migratory birds, federal lands and aboriginal peoples. This contrasts with the much broader definition of environmental effects under the previous *CEAA*. Significant procedural changes to the federal environmental assessment process have been introduced with *CEAA 2012*. These include legislated timelines for completion of environmental assessments and restricting public participation to only “interested parties” (i.e., those parties who are directly affected or have relevant information or experience).

As well, under the previous *CEAA*, there were various types of environmental assessments which could proceed under the Act. There were screenings, comprehensive studies and panel reviews. An environmental assessment could also proceed by way of mediation. Under *CEAA 2012*, there are two levels of assessment: environmental assessment by the responsible authority (i.e., the CEA Agency, National Energy Board or the Canadian Nuclear Safety Commission) or panel review.

As indicated above, *CEAA 2012* purports to allow provincial environmental assessment processes to substitute for or be deemed equivalent to the federal environmental assessment process. With substitution, the federal decision is based solely upon the findings of the provincial environmental assessment process. With equivalency, *CEAA 2012* is deemed not to apply because the provincial environmental assessment process is considered equivalent. This potential devolution of jurisdiction and decision-making power from the federal government to the provincial government raises questions of constitutionality.

To some degree, this project builds upon the Environmental Law Centre’s (ELC) recently published *A Model Environmental and Sustainability Assessment Law*.<sup>2</sup> The annotated version of *A Model Environmental and Sustainability Assessment Law* provides background discussion and information for the Model Law. The concepts of substitution and equivalency are not adopted in the Model Law proposed by the ELC; rather, an approach for multi-jurisdictional cooperation and coordination is adopted.

## Context

### What is Environmental Assessment?

The International Association for Impact Assessment defines environmental impact assessment as “the process of identifying, predicting, evaluating and mitigating the biophysical, social and other relevant effects of development proposals prior to major decisions being taken and

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<sup>2</sup> Brenda Heelan Powell, *A Model Environmental and Sustainability Assessment Law* (Edmonton: Environmental Law Centre, 2013).

commitments made.”<sup>3</sup> The International Association for Impact Assessment has set out several objectives for environmental impact assessment.<sup>4</sup> These are to:

- ensure that environmental considerations are explicitly addressed and incorporated into the development decision making process;
- anticipate and avoid, minimize or offset the adverse significant biophysical, social and other relevant effects of development proposals;
- protect the productivity and capacity of natural systems and the ecological processes which maintain their functions; and
- promote development that is sustainable and optimizes resource use and management opportunities.

In addition, the International Association for Impact Assessment has set out several best practice principles for environmental impact assessment. These consist of basic principles that should be applied through all stages of environmental impact assessment and operating principles that describe how the basic principles should be applied in various environmental impact assessment processes.

The Supreme Court of Canada has described environmental assessment as follows:<sup>5</sup>

Environmental impact assessment is, in its simplest form, a planning tool that is now generally regarded as an integral component of sound decision-making. Its fundamental purpose is summarized by R. Cotton and D. P. Emond in "Environmental Impact Assessment", in J. Swaigen, ed., *Environmental Rights in Canada* (1981), 245, at p. 247:

The basic concepts behind environmental assessment are simply stated: (1) early identification and evaluation of all potential environmental consequences of a proposed undertaking; (2) decision making that both guarantees the adequacy of this process and reconciles, to the greatest extent possible, the proponent's development desires with environmental protection and preservation.

As a planning tool it has 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 [citations omitted]. In short, environmental assessment is simply descriptive of a process of decision-making.

Environmental assessment is a means to improve decision-making and to enable the selection and design of undertakings with minimized negative environmental impacts. As such, environmental assessment is a key tool for achieving a sustainable society.

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<sup>3</sup> International Association for Impact Assessment, in cooperation with Institute of Environmental Assessment, UK, *Principles of Environmental Impact Assessment Best Practice* (January 1999).

<sup>4</sup> *Ibid.*

<sup>5</sup> *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 at 71.



## A Brief History of Environmental Assessment Law and Policy in Canada<sup>6</sup>

With increased public interest in environmental issues and following the lead of the United States (which adopted the concept of environmental assessment as federal law with the *National Environmental Policy Act* in 1969), the Canadian federal cabinet made a commitment to environmental assessment of federal decisions in the form of a cabinet policy in the early 1970s.

This commitment was formalized in 1984 as the *Environmental Assessment and Review Process Guidelines Order (EARPGO)*. Initially, the *EARPGO* was regarded by the federal government as a discretionary, non-binding process for federal decision-making. However, this interpretation was found to be incorrect by the Federal Court in the *Canadian Wildlife* decision<sup>7</sup> and, subsequently, by the Supreme Court of Canada in its *Oldman* decision<sup>8</sup>. The Courts determined that *EARPGO* was applicable whenever the federal government had an affirmative regulatory duty related to a proposed initiative, undertaking or activity.

Following these decisions, the federal government commenced development of federal environmental assessment legislation.<sup>9</sup> After its initial introduction into Parliament in 1990, the *Canadian Environmental Assessment Act (CEAA)* was finally passed in 1995. As required by *CEAA*, a statutory review process was conducted in 2000 which resulted in a variety of amendments to *CEAA* in late 2003. Additional amendments to *CEAA* – ostensibly designed to streamline the environmental assessment process - were imposed through an omnibus budget bill in mid-2010.

Following a truncated statutory review of *CEAA* in late 2011, the federal government introduced radical changes to environmental assessment laws and processes in an omnibus budget bill. The old *CEAA* was repealed and replaced with the *Canadian Environmental Assessment Act, 2012 (CEAA, 2012)*. The new environmental assessment law came into force on July 6, 2012.

In Canada, the field of environmental assessment law is not exclusively occupied by the federal government. Canadian provinces began implementing their own environmental assessment laws and processes in the 1970s and 1980s. The result is a patchwork of varying environmental assessment processes and standards throughout Canada.

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<sup>6</sup> For an excellent history of the development of environmental assessment law and policy in Canada, see Stephen Hazell, *Canada v. the Environment: Federal Environmental Assessment 1984-1998* (Toronto: Canadian Environmental Defence Fund, 1999).

<sup>7</sup> *Canadian Wildlife Federation Inc. v Canada (Minister of Environment)*, [1989] 3 F.C. 309 (T.D.), aff'd (1989) 99 N.R. 72.

<sup>8</sup> *Friends of the Oldman River Society v Canada (Minister of Transport)*, supra note 5.

<sup>9</sup> According to Elizabeth May, work had already begun on *CEAA* prior to the issuance of these decisions. See Elizabeth May, "Canadian Environmental Assessment – going, going, gone" (13 March 2012), online: Green Party of Canada, Elizabeth May's blog < <https://www.greenparty.ca/blogs/7/2012-03-13/canadian-environmental-assessment-going-going-gone>>.

## Constitutional Framework

In Canada, the authority of the federal and provincial governments to make laws is dictated by the *Constitution Act, 1867*.<sup>10</sup> Sections 91 and 92 of the constitution list the subject matters over which the federal and provincial governments have jurisdictional authority, respectively. It should be remembered that legislative authority over a particular subject matter does not compel the government to actually legislate in that area. As stated by Kathryn Harrison:<sup>11</sup>

Constitutional jurisdiction is the capacity to make policy. It does not compel a government to take any particular course of action or, for that matter, to take any action at all.

Indeed, with respect to environmental matters, it often seems that government is reluctant to legislate.<sup>12</sup> Despite this reluctance, both levels of government have passed legislation dealing with environmental matters. As previously indicated, laws regarding environmental assessments in Canada have been established by the federal government and provincial governments.

Canada's constitution does not grant one particular level of government exclusive authority to deal with the environment *per se*. It is often stated that this is because the framers of Canada's constitution did not consider environmental matters since such concerns were not present in 1867 (the date of the constitution).<sup>13</sup> However, there is research to demonstrate that this is not the case.<sup>14</sup> Environmental concerns had arisen in Canada by 1867. It is interesting to note that legislative authority over fisheries and navigation – the areas most affected by pollution in 1867 - was assigned to the federal government.

Although the constitution does not assign legislative authority over the environment to either the federal or provincial governments, both levels of government have legislative authority relevant to environmental matters. The environment is a matter of overlapping and concurrent legislative authority. In addition to authority to make laws, both the federal and provincial

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<sup>10</sup> *Constitution Act, 1867* (UK), 30 & 31 Vict., c. 3 (U.K.), reprinted in RSC 1985, App. II, No. 5.

<sup>11</sup> Kathryn Harrison, *Passing the Buck: Federalism and Canadian Environmental Policy* (Vancouver: UBC Press, 1996) at 18.

<sup>12</sup> Recent changes to federal environmental laws with the 2012 omnibus budget bills amount to the federal government stepping back from environmental regulation. For example, the changes made to CEAA through the omnibus budget bills reflect a restricted view of federal environmental jurisdiction by adopting a narrow definition of environment which encompasses only those matters explicitly listed in the *Constitution Act*. Similarly, the definition of fisheries under the *Fisheries Act* has been restricted to only commercial, recreational and Aboriginal fisheries (in contrast to the historic view of a fishery being waters containing fish) thereby limiting federal involvement in regulation and protection of fish habitat. See also Kathryn Harrison, *supra* note 11, which discusses this reluctance in detail.

<sup>13</sup> Noel Lyon, "Canadian Law Meets the Seventh Generation" (1993) 19 Queen's L.J. 350.

<sup>14</sup> Judith Hanebury, "Environmental Impact Assessment and the Constitution: The Never-Ending Story" (1999) 9 JELP 169.

governments have ownership over a variety of natural resources which confers a measure of control in environmental matters.

## Provincial powers

In relation to environmental matters, provinces have a dual role as legislators and owners of natural resources.<sup>15</sup> By virtue of s. 92 of the constitution, each province may make laws in relation to municipalities, property and civil rights in the province, local works and undertakings, and all matters of a merely local or private nature in the province. Each province also has jurisdiction to regulate with respect to the management and sale of public lands belonging to that province (including the timber and wood thereon). In addition, s. 92A grants jurisdiction to the provinces to legislate regarding conservation and management of non-renewable resources, forestry resources, and facilities for the generation and production of electric energy. Section 92 also grants provinces the power of direct taxation which can be useful for dealing with environmental matters.

In addition to legislative authority, each province has proprietary rights to certain natural resources within that province.<sup>16</sup> Each province owns the public lands within provincial boundaries including natural resources, beds of navigable water, wildlife, the proprietary and marketing aspects of fisheries, and wood and timber.

Given the broad legislative authority granted by the constitution and ownership rights, provinces generally have good authority to deal with environmental matters within the province. The primary exceptions to this are matters that affect fisheries or navigation, and intra-provincial pollution that moves across boundaries by air or water.<sup>17</sup>

## Federal powers

By virtue of s. 91 of the constitution, the federal government has legislative authority to make laws for the “Peace, Order and Good Government” of Canada in relation to all matters that are not exclusively assigned to the provinces. This is referred to as the POGG power. In addition to the broad, residuary power, the constitution explicitly assigns several heads of authority to the federal government. Many of these heads of authority are relevant to environmental matters and include:

- regulation of trade and commerce;
- navigation and shipping;

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<sup>15</sup> Alastair R. Lucas, “Natural Resource and Environmental Management: A Jurisdictional Primer” in Donna Tingley, ed, *Environmental Protection and the Canadian Constitution: Proceedings of the Canadian Symposium on Jurisdiction and Responsibility for the Environment* (Edmonton: Environmental Law Centre, 1987) 31.

<sup>16</sup> Judith Hanebury, “The Environment in the Current Constitution”, (1992) 18:4 *Alternatives* 14.

<sup>17</sup> *Ibid.*

- seacoast and inland fisheries;
- criminal law; and
- taxation.

Other matters over which the federal government has authority relevant to environmental matters are migratory birds, interprovincial works, atomic energy, aboriginal peoples and lands, and aeronautics. Federal spending power can also have a significant role to play in environmental matters.

Federal legislative powers have been described as falling into two categories: global and sectoral.<sup>18</sup> Sectoral powers are those associated with specific heads of power – such as fisheries, navigation and agriculture. Global powers have the potential to support a more far-reaching federal role. Global powers include criminal law, trade and commerce, and POGG. While there have been relatively few opportunities for the courts to clarify the extent of federal powers, the courts have typically been generous in granting the federal government jurisdiction over environmental matters.<sup>19</sup>

In addition to its legislative authority, the federal government has ownership interests which confer some control over environmental matters.<sup>20</sup> The federal government owns canals; public harbours; lighthouses and piers; river and lake improvements; military roads; armories and lands set aside for public purposes; northern territories; territorial seas; national parks; Indian lands; federal crown lands; and lands obtained by federal purchase or expropriation for federal purposes such as interprovincial railways or defence. However, generally speaking, proprietary rights do not provide a basis for comprehensive federal efforts within provinces.<sup>21</sup>

## Court Decisions

Over the years, the courts have developed several basic principles for considering the constitutionality and interaction of federal and provincial legislation.<sup>22</sup> Several principles relate to the characterization of legislation. Other principles – such as paramountcy – relate to the interaction of federal and provincial legislation.

In its decision in *Reference Re: Assisted Human Reproduction Act*,<sup>23</sup> the Supreme Court of Canada summarized the approach to constitutional analysis of a law:<sup>24</sup>

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<sup>18</sup> *Supra* note 11.

<sup>19</sup> *Ibid.*

<sup>20</sup> *Supra* note 16.

<sup>21</sup> *Supra* note 11.

<sup>22</sup> For detailed discussion of these constitutional principles, see Peter W. Hogg, *Constitutional Law of Canada (2009 Student Edition)* (Scarborough, ON: Thomson Reuters Canada Limited, 2009).

<sup>23</sup> *Reference Re: Assisted Human Reproduction Act* [2010] 3 S.C.R. 457.

<sup>24</sup> *Ibid* at paragraph 19.

There are two steps to determining whether a law is valid: characterization and classification. First the dominant “matter” or “pith and substance” of the law must be determined: *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, at para. 25. Once the “matter” is thus characterized, the second step is to determine if it falls under a head of power assigned to the enacting body: *Kitkatla Band*, at para. 52.

The Court continues:<sup>25</sup>

However, the doctrine of pith and substance permits either level of government to enact laws that have “substantial impact on matters outside its jurisdiction”: P. W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.), at p. 15-9. The issue in such cases is to determine the dominant effect of the law.

This means that, although a federal or provincial law may impact on matters outside its jurisdiction, so long as the dominant purpose falls within a federal or provincial head of power (as the case may be) the law is *prima facie* valid.

It should be noted that, due to application of the “double aspect doctrine,” a matter may be determined to fall into both federal and provincial heads of power allowing regulation by both levels of government.<sup>26</sup> According to Hogg, the double aspect doctrine applies when the “federal and provincial characteristics of a law are roughly equal in importance”.<sup>27</sup> Due to the double aspect doctrine, there is the possibility of conflict between valid federal legislation and valid provincial legislation. This conflict is addressed by the principle of “paramountcy” which resolves conflicts in favour of the federal legislation (i.e., in the case of conflict, the federal legislation is applicable).

In addition to developing basic constitutional principles, several court decisions have clarified the extent of federal and provincial authority in dealing with environmental matters. For example, in *R. v. Crown Zellerbach Canada Inc.*,<sup>28</sup> the Supreme Court of Canada considered a constitutional challenge to s. 4 of the *Ocean Dumping Control Act*.

In this case, the Supreme Court of Canada focused its attention on clarification of the federal residual POGG power and its application to environmental matters. Ultimately, the Court concluded that legislative authority to generally control marine pollution in provincial waters can be justified as a matter of national concern under POGG.

In the course of its decision, the Court stated:<sup>29</sup>

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<sup>25</sup> *Ibid* at paragraph 32.

<sup>26</sup> Stewart Elgie, “Kyoto, the Constitution, and Carbon Trading: Waking a Sleeping BNA Bear (or two)” (2008), 13:1 *Review of Constitutional Studies* 67.

<sup>27</sup> *Supra* note 22 at 376.

<sup>28</sup> *R. v. Crown Zellerbach Canada Inc.*, [1988] 1 S.C.R. 401

<sup>29</sup> *Ibid* at 431 to 432.

From the survey of the opinion expressed in this Court concerning the national concern doctrine of the peace, order and good government power I draw the following conclusions as to what now seems to be firmly established:

1. The national concern doctrine is separate and distinct from the national emergency doctrine of the peace, order and good government power, which is chiefly distinguishable by the fact that it provides a constitutional basis for what is necessarily legislation of a temporary nature;
2. The national concern doctrine applies to both new matters which did not exist at the time of Confederation and to matters which, although originally matters of a local or private nature in a province, have since, in the absence of national emergency, become matters of national concern;
3. For a matter to qualify as a matter of national concern in either sense it must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution;
4. In determining whether a matter has attained the required degree of singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern it is relevant to consider what would be the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the intra-provincial aspects of the matter.

The fourth factor summarized by the Court is commonly referred to as the “provincial inability” test. According to the Court, the utility of the provincial inability test is to help determine whether a matter has the requisite singleness or indivisibility from a functional, as well as conceptual, perspective. Given the Court’s conclusion that the matter of marine pollution had sufficient singleness, distinctiveness and indivisibility, the impugned legislative provisions were upheld as a matter of national concern under POGG.

While this decision specifically considered the matter of marine pollution, it is conceivable that the national concern branch of POGG could be extended to other environmental matters. According to the constitutional scholar, Peter Hogg, the *Crown Zellerbach* decision stands as good authority for the proposition that environmental protection laws may be enacted under POGG.<sup>30</sup>

In the *Oldman* decision, the Supreme Court of Canada considered the place of environmental matters within the Canadian constitution. The Court also considered the role of environmental assessment and the constraints that the Canadian constitution places on environmental assessment processes.

In this case, an organization called Friends of the Oldman River sought to compel the federal government to conduct an environmental assessment under the *Environmental Assessment and Review Process Guidelines Order (EARPGO)* of a dam constructed on the Oldman River by

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<sup>30</sup> Peter W. Hogg, “Constitutional Authority over Greenhouse Gas Emissions” (2008) 46 Alta. L. Rev. 507.

the Government of Alberta. The project affected several federal interests including navigable waters, fisheries, and Indians and Indian Lands. Ultimately, the Supreme Court of Canada determined that the *EARPGO* was mandatory in nature and was applicable to the undertaking in question.

In the course of its decision, the Supreme Court provided the following guidance on the place of environmental matters within the Canadian constitution:<sup>31</sup>

I agree that the *Constitution Act, 1867* has not assigned the matter of "environment" *sui generis* to either the provinces or Parliament. The environment, as understood in the generic sense, encompasses the physical, economic and social environment touching several of the heads of power assigned to the respective levels of government. Professor Gibson put it succinctly several years ago in his article "Constitutional Jurisdiction over Environmental Management in Canada" (1973) 23 *U.T.L.J.* 54, at p.85:

... "environmental management" does not, under the existing situation, constitute a homogeneous constitutional unit. Instead, it cuts across many different areas of constitutional responsibility, some federal and some provincial. And it is no less obvious that "environmental management" could never be treated as a constitutional unit under one order of government in any constitution that claimed to be federal, because no system in which one government was so powerful would be federal.

I earlier referred to the environment as a diffuse subject, echoing what I said in *R. v. Crown Zellerbach Canada Ltd.*, *supra*, to the effect that environmental control, as a subject matter, does not have the requisite distinctiveness to meet the test under the "national concern" doctrine as articulated by Beetz J. in *Reference re Anti-Inflation Act*, *supra*. Although I was writing for the minority in *Crown Zellerbach*, this opinion was not contested by the majority. The majority simply decided that marine pollution was a matter of national concern because it was predominately extraprovincial and international in character and implications, and possessed sufficiently distinct and separate characteristics as to make it subject to Parliament's residual power.

It must be recognized that the environment is not an independent matter of legislation under the *Constitution Act, 1867* and that it is a constitutionally abstruse matter which does not comfortably fit within the existing division of powers without considerable overlap and uncertainty.

In light of the diffuse nature of environmental matters, the Court stated that it was necessary to consider the heads of powers contained in the *Constitution Act, 1867* and how each may be employed to meet or avoid environmental concerns. As stated by the Court:<sup>32</sup>

It must be noted that the exercise of legislative power, as it affects concerns relating to the environment, must, as with other concerns, be linked to the appropriate head of power, and since the nature of the various heads of power under the *Constitution Act, 1867* differ, the

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<sup>31</sup> *Supra* note 5 at 63 to 64.

<sup>32</sup> *Supra* note 5 at 67 to 69.



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.

...

What is important is to determine whether either level of government may legislate. One may legislate in regard to provincial aspects, the other federal aspects. Although local projects will generally fall within provincial responsibility, federal participation will be required if the project impinges on an area of federal jurisdiction as is the case here.

In addition to its direction on how environmental matters fit within the framework set by the Canadian constitution, the Supreme Court of Canada provided direction on the role of environmental assessment. The Court stated that “[i]n short, environmental assessment is simply descriptive of a process of decision-making”.<sup>33</sup> The Court further pointed out that, due to its auxiliary nature, environmental assessment can only affect matters that are “truly in relation to an institution or activity that is otherwise within [federal] legislative jurisdiction.”<sup>34</sup>

Given its conclusion that the *EARPGO* was an instrument that regulates the manner in which government departments exercise their functions and duties, the Supreme Court of Canada found that the *EARPGO* was constitutional and fell within the ambit of the federal residual POGG power. The Court found that any intrusion into provincial power was merely incidental to the pith and substance of the *EARPGO* legislation.

As a significant environmental and constitutional decision, the decision in *Oldman* has been subject to much academic commentary. One commentator, Steven Kennett, has made the following observation about the *Oldman* decision:<sup>35</sup>

To conclude, the constitutional constraint on the use of EA in the exercise of federal regulatory authority depends on whether jurisdiction over the activity in question is comprehensive or restricted. Comprehensive jurisdiction permits full EA. If jurisdiction is restricted, however, constitutional logic dictates a restricted scope for EA to avoid the colourable use of decision-making authority to regulate aspects of the project beyond federal control. The problem with this approach is that the logic of EA makes it difficult to conduct an adequate holistic assessment on the basis of such a limited inquiry. The available responses are reliance on the government having comprehensive jurisdiction to conduct the EA or the establishment of a joint EA process, possibly through interdelegation.

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<sup>33</sup> *Supra* note 5 at 71.

<sup>34</sup> *Supra* note 5 at 72.

<sup>35</sup> Steven Kennett, “Case Comment: Federal Environmental Jurisdiction after *Oldman*” (1993) 38 McGill L.J. 180 at 202.



Given the decision in *Oldman*, it is clear that both the federal and provincial governments have good authority to regulate environmental matters related to their constitutional heads of power. Furthermore, in the course of carrying out its regulatory functions, either government may conduct environmental assessments as part of its own decision-making process.

Another constitutional challenge to environmental legislation was considered by the Supreme Court of Canada in *R. v. Hydro-Quebec*.<sup>36</sup> In this case, the Court considered a constitutional challenge to certain provisions of the *Canadian Environmental Protection Act*. The challenge was based on the ground that the provisions did not fall within the ambit of any head of power set out in s. 91 of the constitution. Ultimately, the Court determined that the impugned provisions of the *Canadian Environmental Protection Act* were constitutionally valid under the federal criminal law power.

In the *Hydro-Quebec* decision, the Court clarified the approach that was previously adopted in the *Oldman* decision. In the course of its judgment, the Court stated:<sup>37</sup>

In considering how the question of the constitutional validity of a legislative enactment relating to environment should be approached, this Court in *Oldman River, supra*, made it clear that the environment is not, as such, a subject matter of legislation under the *Constitution Act, 1867*. As it was put there, “the *Constitution Act, 1867* has not assigned the matter of “environment” *sui generis* to either the provinces or Parliament” (p. 63). Rather, it is a diffuse subject that cuts across many different areas of constitutional responsibility, some federal, some provincial (pp. 63-64). Thus Parliament or a provincial legislature can, in advancing the scheme or purpose of a statute, enact provisions minimizing or preventing the detrimental impact that statute may have on the environment, pollution, and the like. In assessing the constitutional validity of a provision relating to the environment, therefore, what must first be done is to look at the catalogue of legislative powers listed in the *Constitution Act, 1867* to see if the provision falls within one or more of the powers assigned to the body (whether Parliament or a provincial legislature) that enacted the legislation (*ibid.* at p. 65). If the provision in essence, in pith and substance, falls within the parameters of any such power, then it is constitutionally valid.

The Court continued:<sup>38</sup>

Different types of legislative powers may support different types of environmental provisions. The manner in which such provisions must be related to a legislative scheme was, by way of example, discussed in *Oldman River* in respect of railways, navigable waters and fisheries. An environmental provision may be validly aimed at curbing environmental damage, but in some cases the environmental damage may be directly related to the power itself. There is a considerable difference between regulating works and activities, like railways, and a resource like fisheries, and consequently the environmental provisions relating to each of these. Environmental provisions must be tied to the appropriate constitutional source.

In summarizing its views on this point, the Court stated:<sup>39</sup>

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<sup>36</sup> *R. v. Hydro-Quebec*, [1997] 3 S.C.R. 213.

<sup>37</sup> *Ibid* at 286.

<sup>38</sup> *Ibid* at 287.

I have gone on at this length to demonstrate the simple proposition that the validity of a legislative provision (including one relating to environmental protection) must be tested against the specific characteristics of the head of power under which it is proposed to justify it. For 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.

The Court acknowledged that environmental protection is a “major challenge” of our time and, ultimately concluded environmental stewardship is a fundamental value of our society which can be underlined by criminal law.<sup>40</sup> The Court specified that criminal sanctions aimed at environmental protection do not need to be justified in terms of protection of human life or health; environmental protection is a sufficient purpose for criminal law.

As a general proposition, criminal law requires a prohibition, penalty and a typically criminal purpose.<sup>41</sup> The decision in *Hydro-Quebec* does confirm that protection of the environment is a sufficient purpose for enactment of criminal law. However, while it can play an important role, promulgation of environmental laws under the federal criminal law authority has limited usefulness. The high standard of proof adopted in criminal law may be inappropriate for environmental matters.<sup>42</sup> As well, environmental matters are often better managed through extensive regulatory schemes rather than a system of prohibition and penalties.<sup>43</sup>

As can be seen from the foregoing, there is overlap of jurisdictional authority in environmental matters. This is the reality of Canada’s constitution which establishes a federal system of government. The result is that there is potential that a single undertaking may be subject to both a federal and a provincial environmental assessment. Many have argued that this jurisdictional overlap leads to needless duplication and delay which needs to be addressed.<sup>44</sup>

One commentator who has written extensively on the issue of harmonization of federal and provincial environmental assessment processes has drawn a distinction between overlap and duplication.<sup>45</sup> Overlap exists as a result of the constitutional division of powers between the

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<sup>39</sup> *Ibid* at 289.

<sup>40</sup> *Ibid* at 296.

<sup>41</sup> *Supra* note 30.

<sup>42</sup> F.L. Morton, “The Constitutional Division of Powers with Respect to the Environment in Canada” in Kenneth M. Holland, F.L. Morton and Brian Galligan, *Federalism and the Environment: Environmental Policymaking in Australia, Canada and the United States* (Connecticut: Greenwood Press, 1996) 55.

<sup>43</sup> *Ibid*.

<sup>44</sup> However, there is little evidence that this is actually the case. See Derrick Tupper de Kerckhove, Charles Kenneth Minns and Brian John Shutter, “The length of environmental reviews in Canada under the *Fisheries Act*” (2013) 70 Can. J. Fish. Aquat. Sci. 1.

<sup>45</sup> Arlene Kwasniak has written extensively in this area. See Arlene Kwasniak, *Harmonization in Environmental Assessment in Canada: The Good, The Bad and The Ugly* (March 2008), online: Canadian Environmental Network <[http://rcen.ca/sites/default/files/uploads/epa\\_harmonization.pdf](http://rcen.ca/sites/default/files/uploads/epa_harmonization.pdf)>; Arlene Kwasniak, *The Eviscerating of Federal Environmental Assessment in Canada* (31 March 2009), online: ABLawg.ca <<http://ablawg.ca/2009/03/31/the-eviscerating-of-federal-environmental-assessment-in-canada/>>; Arlene Kwasniak, *Environmental Assessment*,

federal and provincial governments. Overlap also results from the numerous, complex governmental ministries (even within one level of government). On the other hand, procedural and regulatory duplication may unnecessarily exist and cause inefficiencies.

Recent changes to the federal environmental assessment laws attempt to address this concern by introducing the mechanisms of equivalency and substitution.<sup>46</sup> The provisions of *CEAA 2012* allow provincial environmental assessment processes to substitute for or be deemed equivalent to the federal environmental assessment process. With substitution, the federal decision is based solely upon the findings of the provincial environmental assessment process. With equivalency, *CEAA 2012* is deemed not to apply because the provincial environmental assessment process is considered equivalent. This potential devolution of jurisdiction and decision-making power from the federal government to the provincial government raises questions of constitutionality.

## **Jurisdictional Overlap: Substitution and Equivalency under *CEAA 2012***

*CEAA 2012* marks a significant departure from the historical approach to federal environmental assessment in Canada. Historically, federal environmental assessment was triggered by federal involvement in an undertaking. Under the previous *CEAA*, the act was triggered when the undertaking involved the federal government as proponent or funder, impacted upon federal lands, or involved a federal decision designated in the law list regulation. The federal environmental assessment process applied to any undertaking meeting one of these triggers.

In contrast to the broad approach taken by the previous *CEAA*, *CEAA 2012* takes a more restricted “list” approach. A federal environmental assessment may only occur if a project is listed in the *Regulations Designating Physical Activities*<sup>47</sup> or at the discretion of the Minister of Environment (in the ELC’s view, an unlikely occurrence). Even if a project is designated by regulation, a federal environmental assessment might not occur for two reasons.<sup>48</sup> Firstly, the Canadian Environmental Assessment Agency (CEA Agency) may determine that a federal environmental assessment is not required. Secondly, the federal government may decide not to conduct its own environmental assessment of a designated project on the basis that the project is being assessed provincially (i.e., a substitution or declaration of equivalency).

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*Overlap, Duplication, Harmonization, Equivalency, and Substitution: Interpretation, Misinterpretation, and a Path Forward* (2009) 20 JELP 1; Arlene Kwasniak, *The Fading Federal Presence in Environmental Assessment and the Muting of the Public Interest Voice* (19 October 2011), online: ABLawg.ca <<http://ablawg.ca/2011/10/19/the-fading-federal-presence-in-environmental-assessment-and-the-muting-of-the-public-interest-voice/>>.

<sup>46</sup> *CEAA, 2012* at sections 32 to 37.

<sup>47</sup> *Regulations Designating Physical Activities*, SOR/2012-147.

<sup>48</sup> There are a limited number of designated projects that must undergo a federal environmental assessment. These are the projects linked to either the Canadian Nuclear Safety Commission, the National Energy Board or a federal authority designated by regulation. As well, the Minister has the discretion to designate a particular project for which a federal environmental assessment must occur.

The substitution and equivalency provisions are set out in *CEAA 2012* as follows:

### *Substitution*

#### Minister's obligation

**32.** (1) Subject to sections 33 and 34, if the Minister is of the opinion that a process for assessing the environmental effects of designated projects that is followed by the government of a province — or any agency or body that is established under an Act of the legislature of a province — that has powers, duties or functions in relation to an assessment of the environmental effects of a designated project would be an appropriate substitute, the Minister must, on request of the province, approve the substitution of that process for an environmental assessment.

#### Minister's power

(2) Subject to sections 33 and 34, if the Minister is of the opinion that a process for assessing the environmental effects of designated projects that is followed by any jurisdiction referred to in paragraph (e) or (f) of the definition "jurisdiction" in subsection 2(1) that has powers, duties or functions in relation to an assessment of the environmental effects of a designated project would be an appropriate substitute, the Minister may approve the substitution of that process for the environmental assessment.

#### Manner of approval

(3) An approval must be in writing and may be given in respect of a designated project or a class of designated projects.

#### Posting of notice of approval on Internet site

(4) The Agency must post a notice of the approval on the Internet site.

#### Exceptions

**33.** The Minister must not approve the substitution of a process in relation to a designated project  
(a) for which the responsible authority is referred to in paragraph 15(a) or (b); or  
(b) in relation to which the environmental assessment has been referred by the Minister to a review panel under section 38.

#### Conditions

**34.** (1) The Minister may only approve a substitution if he or she is satisfied that  
(a) the process to be substituted will include a consideration of the factors set out in subsection 19(1);  
(b) the public will be given an opportunity to participate in the assessment;  
(c) the public will have access to records in relation to the assessment to enable their meaningful participation;  
(d) at the end of the assessment, a report will be submitted to the responsible authority;  
(e) the report will be made available to the public; and  
(f) any other conditions that the Minister establishes are or will be met.

#### Approval

(2) The Minister may also approve the substitution of a process that has already been completed for an environmental assessment if he or she is satisfied that the conditions under subsection (1) have been met.

*Availability*

(3) The conditions referred to in paragraph (1)(f) must be made available to the public.

*Assessment considered in conformity*

**35.** If the Minister approves the substitution of a process under section 32, the assessment that results from the substitution is considered to be an environmental assessment under this Act and to satisfy any requirements of this Act and the regulations in respect of an environmental assessment.

*Responsible authority's or Minister's decision*

**36.** After taking into account the report with respect to the environmental assessment of the designated project that is received by the responsible authority at the end of the assessment under the process authorized by section 32, the responsible authority or, when the Agency is the responsible authority, the Minister must make decisions under subsection 52(1).

*Equivalent Assessment*

*Exemption*

**37.** (1) When the Minister must, under subsection 32(1), on request, approve the substitution of a process that is followed by the government of a province or any agency or body that is established under an Act of the legislature of a province for an environmental assessment of a designated project, the Governor in Council may, by order and on the Minister's recommendation, exempt the designated project from the application of this Act, if the Governor in Council is satisfied that

- (a) after the completion of the assessment process, the government or the agency or body determines whether, taking into account the implementation of any mitigation measures that it considers appropriate, the designated project is likely to cause significant adverse environmental effects;
- (b) the government or the agency or body ensures the implementation of the mitigation measures that are taken into account in making the determination and the implementation of a follow-up program; and
- (c) any other conditions that the Minister establishes are or will be met.

*Availability*

(2) The conditions referred to in paragraph (1)(c) must be made available to the public.

*Posting of notice of order on Internet site*

(3) The Agency must post a notice of any order made under subsection (1) on the Internet site.

The equivalency and substitution provisions of *CEAA 2012* are invoked only if three conditions are met:

- the project falls within the purview of the *Regulation Designating Physical Activities*;

- the CEA Agency has determined that the project requires a federal environmental assessment (otherwise, there would be no need to consider the options of substitution and equivalency); and
- the project is subject to a provincial environmental assessment process.

In determining whether or not a federal environmental assessment is required, the CEA Agency considers the possibility for adverse environmental effects. Key to this consideration is the definition of “environmental effects” which appears in section 5 of *CEAA 2012*:

5. (1) For the purposes of this Act, the environmental effects that are to be taken into account in relation to an act or thing, a physical activity, a designated project or a project are

(a) a change that may be caused to the following components of the environment that are within the legislative authority of Parliament: fish as defined in section 2 of the *Fisheries Act* and fish habitat as defined in subsection 34(1) of that Act, aquatic species as defined in subsection 2(1) of the *Species at Risk Act*, migratory birds as defined in subsection 2(1) of the *Migratory Birds Convention Act, 1994*, and any other component of the environment that is set out in Schedule 2;<sup>49</sup>

(b) a change that may be caused to the environment that would occur on federal lands, in a province other than the one in which the act or thing is done or where the physical activity, the designated project or the project is being carried out, or outside Canada; and

(c) with respect to aboriginal peoples, an effect occurring in Canada of any change that may be caused to the environment on health and socio-economic conditions, physical and cultural heritage, the current use of lands and resources for traditional purposes, or any structure, site or thing that is of historical, archaeological, paleontological or architectural significance.

In addition, environmental effects that are directly linked or necessarily incidental to a federal decision relevant to the project may be considered in the federal environmental assessment process.<sup>50</sup> The Panel decision for the *Taseko New Prosperity Gold-Copper Mine Project* (the “*Taseko Decision*”) provides some guidance on determining which environmental effects are directly linked or necessarily incidental as follows.<sup>51</sup>

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<sup>49</sup> Currently, there are no components of the environment set out in Schedule 2 of *CEAA, 2012*.

<sup>50</sup> *CEAA, 2012*, s. 5(2).

<sup>51</sup> Report of the Federal Review Panel, *New Prosperity Gold-Copper Mine Project: Taseko Mines Ltd., British Columbia* (October 31, 2013). CEAA Reference No. 63928 at page 21. It is interesting to note that because the process was commenced under the old *CEAA* and continued under *CEAA 2012*, the previous broader definition of “environmental effects” applied but the review panel was directed to identify which conclusions related to environmental effects as defined in s. 5 of *CEAA 2012*. In the *Taseko Decision*, environmental effects associated with surface hydrology, hydrogeology, wetland and riparian ecosystems, and navigation were identified as being directly linked or necessarily incidental effects under s. 5(2). Other environmental effects – such as impacts on grizzly and mule deer – were identified as being environmental effects under s. 5(1).

The Panel interprets the two branches of this definition of effects as follows:

- “directly linked” environmental effects to be effects that are the direct and proximate result of a federal decision; and
- “necessarily incidental” environmental effects are other effects that are substantially linked to a federal decision although they may be secondary or indirect effects.

All direct environmental effects resulting from the loss of Little Fish Lake (Y’anah Biny) and the upper reaches of Fish Creek (Teztan Yeqox) that are not captured under subsection 5(1) would be considered under subsection 5(2). Also, if the loss of the above-mentioned areas results in the loss of habitats used by the moose or grizzly bear, for example, those indirect and substantial effects on the grizzly bear and moose would be considered environmental effects that are necessarily incidental to a federal decision, and would therefore be captured under subsection 5(2) of CEAA 2012.

Essentially, the definition of “environmental effects” under *CEAA 2012* is limited to effects on fisheries, aquatic species at risk, migratory birds, federal lands and aboriginal peoples. The definition also includes environmental effects that are transboundary in nature or related to a federal decision. All these matters clearly fall into federal jurisdiction. The mechanisms of substitution or equivalency may be used to forgo federal environmental assessment despite potential environmental impacts clearly within federal jurisdiction. For this reason, the substitution and equivalency provisions in *CEAA 2012* are troubling.

### **Constitutionality of the Substitution and Equivalency Provisions**

The potential devolution of jurisdiction and decision-making power from the federal government to the provincial government raises questions of constitutionality. Can the mechanisms of substitution and equivalency be considered an improper delegation of authority and regulatory decision-making power from the federal government to the provincial governments? Is the federal government relying on improper information or not considering proper information in relying upon the provincial process to make its decisions?

In his authoritative text, *Constitutional Law of Canada*, Peter Hogg discusses the law of delegation between federal and provincial governments.<sup>52</sup> The Canadian constitution provides no express power of delegation. Based upon the case law in the area, Hogg states at page 358 that the key question is “whether the scheme of inter-delegation purports to enlarge the powers of one of the primary legislative bodies.” If the answer is yes, then there is an invalid delegation. If the answer is no, then the delegation is considered a valid administrative delegation. At page 364 of his text, Hogg concludes that “[t]he only vestige of a prohibition against inter-delegation which now remains is the rule that one legislative body cannot enlarge

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<sup>52</sup> *Supra* note 22.



the powers of another by authorizing the latter to enact laws which would have no significance and validity independent of the delegation.”

The substitution and equivalency provisions in *CEAA 2012* do not amount to an authorization by the federal government to enact laws that would have no significance or validity independent of a delegation. It is likely that the substitution and equivalency provisions would be viewed as delegation of administrative functions. In other words, the substitution and equivalency provisions do not amount to an improper delegation of legislative authority by the federal government to the provincial governments.

However, at least one commentator has observed that “administrative federalism – delegation of responsibility in environmental matters that falls short of legislative inter-delegation – poses a real threat to environmental quality and to the rights of Canadians.”<sup>53</sup> So despite not being an improper delegation in a strict sense, the substitution and equivalency provisions are problematic. As stated by Franklin Gertler:<sup>54</sup>

There may be impermissible interdelegation where, by agreement or exercise of executive authority, the federal government agrees not to exercise its legislative powers, refuses to intervene, or gives discretion to the province in the administration and enforcement of federal law that amounts to a policy and law-making function. Finally, even there is no legislative delegation as a matter of black-letter law, intergovernmental arrangements should be examined in order to determine whether they offend the *principles* of responsible government and accountability and the *federalism values* which motivated the rule against legislative interdelegation in the first place. This examination would include consideration of special federal responsibility in certain matters, including under ss. 91(12) and 91(24) of the *Constitution Act, 1867*.

Thus, the substitution and equivalency provisions of *CEAA 2012* should be examined from the perspective of whether the principles of responsible government and accountability are offended. The division of powers set out in the constitution allows the federal government to counter provincial bias or refusal to act. This protection is threatened by any sort of inter-delegation.

While the substitution and equivalency provisions are not likely to be considered an improper inter-delegation of legislative power (since legislative power is not delegated to the provinces by virtue of the provisions), in the ELC’s view the principles of responsible government and accountability may be offended by these provisions.

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<sup>53</sup> Franklin S. Gertler, “Lost in (Intergovernmental) Space: Cooperative Federalism in Environmental Protection” in Steven A. Kennett, ed, *Law and Process in Environmental Management: Essays from the Sixth CIRL Conference on Natural Resources Law* (Calgary: Canadian Institute of Resources Law, 1993) at 260.

<sup>54</sup> *Ibid* at 268.



As will be recalled, the Supreme Court of Canada in the *Oldman* decision described environmental assessment as follows:<sup>55</sup>

As a planning tool it has 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; [references omitted]. In short, environmental assessment is simply descriptive of a process of decision-making.

The role of the agency or panel in the decision-making aspect of environmental assessment was discussed by the Federal Court in *Greenpeace v Canada (AG)* (“*Greenpeace*”).<sup>56</sup> The Court stated:<sup>57</sup>

Indeed, there have been instances where a finding by a review panel that significant adverse environmental effects are likely to result from a project have caused decision-makers to decide not to permit that project to proceed. However, the Panel’s role as it pertains to the decision-making aspect of environmental assessment is to ensure that decision-makers have the necessary factual basis to make a scientifically informed decision.

The Court further states that “[t]he primary responsibility for assessing whether significant adverse environmental effects are likely to result from a project lies with the body conducting the environmental assessment (here, the Panel) and the subsequent decision-makers”.<sup>58</sup>

By delegating the environmental assessment process to the provinces, the federal government is forging a key element of its own decision-making process. In the case of equivalency under *CEAA 2012*, the federal government relies entirely on the provincial process even in the determination of whether a proposed undertaking will likely cause a significant adverse environmental impact. It is the ELC’s view that the determination of the significance of potential adverse environmental impacts is not a purely scientific decision but involves the consideration and balancing of a variety of socio-economic and environmental matters.

As described in *Greenpeace*, the role of the panel in the decision-making aspect of an environmental assessment is to ensure decision-makers have the necessary factual basis to make a scientifically informed decision. This, however, does not mean that the panel’s decision is devoid of consideration and balancing of a variety of socio-economic and environmental matters. The panel will make determinations of the “significance” of the anticipated environmental effects which necessitates consideration of socio-economic and environmental values and context. For example, the scientific quantification of anticipated loss of X individuals on an annual basis varies in significance given context (such as the status of the species, the economic and cultural significance of the species, and so forth). The determination of the

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<sup>55</sup> *Supra* note 5 at 71.

<sup>56</sup> *Greenpeace v Canada (AG)*, 2014 FC 463.

<sup>57</sup> *Supra* at paragraph 106.

<sup>58</sup> *Supra* at paragraph 107.

significance of potential environmental effects is made by the panel. If the panel determines that there are significant environmental effects, then the matter is referred to federal cabinet to determine if the effects are justified in the circumstances.<sup>59</sup>

Given the design of *CEAA 2012*, the option to substitute or declare equivalency of a provincial environmental assessment process will only occur in cases where it has been determined that federal environmental assessment is necessary (otherwise, the CEA Agency would determine that a federal environmental assessment is not necessary thereby raising no issue of concurrent provincial and federal processes). Therefore, the mere requirement for a federal environmental assessment confirms that there is federal authority engaged.

The decision to incorporate substitution and equivalency provisions in *CEAA 2012* reveals a fundamental misunderstanding of the purpose of environmental assessment. Environmental assessment is not a meaningless hoop to jump through on the road to regulatory approval. Environmental assessment is a key instrument for achieving sustainable decision-making. By delegating the environmental assessment process to the province, either via substitution or delegation, the federal government is foregoing a key element in its own decision-making process.

There is a distinction between the environmental assessment and the subsequent regulatory decisions that may be made. Under the substitution or equivalency provisions of *CEAA 2012*, it is the federal environmental assessment process that is forgone by the federal government. The subsequent regulatory decisions – such as the decision to issue federal approvals or licences – remain with the federal government.

Once the environmental assessment is complete, that information is used to make regulatory decisions to issue approvals, licences or other authorizing documents. There is a concern that the provincial environmental assessment will not gather information necessary for the federal government to make properly informed regulatory decisions. This means either federal regulatory decisions will be made without due regard to all relevant information or a second information gathering process will be required for the federal regulatory decision. The latter hardly seems efficient. It would be more efficient and predictable to include all relevant regulatory bodies in one process rather than conducting multiple information gathering exercises (regardless of whether or not all these exercises are referred to as environmental assessment). Furthermore, the provincial environmental assessment may not gather the requisite information for appropriate regulatory controls, limitations and monitoring which are often significant outcomes of the environmental assessment process.

According to one commentator, Arlene Kwasniak, there cannot be true federal – provincial equivalency in the environmental assessment that leads to a regulatory decision within the

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<sup>59</sup> *CEAA 2012*, s. 52.

exclusive jurisdiction of one level of government.<sup>60</sup> This is because the regulatory decision and the environmental assessment process are intimately connected and, as a result, the impacts considered in the environmental assessment will relate directly to the regulatory decision. In addition, the mitigation measures considered will depend on the power of the regulator to impose mitigation conditions in exercising its regulatory power. Kwasniak also argues that, even if there is shared jurisdiction, there cannot be equivalency because the environmental assessment is done for different motives or reasons.

## Substitution in British Columbia

Although the equivalency provision of *CEAA 2012* has not been implemented to date, substitution of provincial environmental assessment processes is occurring. The CEA Agency and the government of British Columbia entered into a Memorandum of Understanding for the substitution of environmental assessments (the “MOU”) shortly after passage of *CEAA 2012*.

The MOU outlines the process for requesting substitution and establishes the requirements for a substituted environmental assessment process. Section 4 of the MOU indicates that the provincial process will consider the factors set out in s. 19(1) of *CEAA 2012*. As well, the provincial process must provide an opportunity for public participation and for participation of federal departments with relevant expertise. Section 5 of the MOU outlines the procedural delegation of aboriginal consultation to British Columbia. The MOU addresses other matters such as information exchange, the delivery of the assessment report, the coordination of decisions, and monitoring and follow-up. Finally, the MOU indicates that both parties agree to explore the implementation of equivalency at a later date.

Several requests for substitution have been made and granted pursuant to the MOU.<sup>61</sup> At the time of writing, all the substitution projects in British Columbia are still in the early stages of environmental assessment. However, concerns have already been raised with the use of substitution which seems to be becoming a standard practice in British Columbia.<sup>62</sup> The process associated with the *Taseko Decision* is often cited as an example of the benefits of conducting coordinated federal and provincial environmental assessments. In the case of the proposed Taseko mine, the project was approved under the British Columbia environmental assessment process but rejected by the federal process.

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<sup>60</sup> Kwasniak, “Environmental Assessment, Overlap, Duplication, Harmonization, Equivalency, and Substitution: Interpretation, Misinterpretation, and a Path Forward” *supra* note 45.

<sup>61</sup> Information about substitution projects in B.C. can be found online at <http://www.eao.gov.bc.ca/substitution.html>. To date, substitution has been granted for 8 projects.

<sup>62</sup> See for example: Margo Harper, “Coal mining protest in B.C. set to erupt”, *Globe and Mail* (Sept. 20, 2013) and MiningWatch, “Federal government ignores First Nations and public input on environmental assessment” (July 22, 2014) available on < <http://www.miningwatch.ca/blog/federal-government-ignores-first-nations-and-public-input-environmental-assessment-its-own-legi>>.

## Elimination of Overlap

Essentially, the substitution and equivalency provisions of *CEAA 2012* strive to deal with the constitutional reality of federal-provincial overlap in environmental matters by eliminating the overlap. In the case of an overlap of environmental assessment processes, the federal government is choosing to step away from its jurisdiction in the matter.

It is the ELC's view that this is an ineffective approach. The federal environmental assessment process – like any environmental assessment – is a decision-making process which is designed to gather information on potential environmental impacts. At the end of the day, environmental assessment is meant to improve decisions to allow the selection and design of undertakings with minimized negative environmental impacts.<sup>63</sup> In the case of an overlap, the federal environmental assessment was triggered due to some involvement of federal jurisdiction over environmental matters. Often that involvement will require federal decision-making beyond the environmental assessment process. The environmental assessment process does not occur in a vacuum; the information and conclusions which arise in the course of the environmental assessment feed into other federal decision-making. By stepping back from the environmental assessment process due to overlap, the federal government is stepping back from its responsibility to make informed, balanced decisions.

Many have commented upon the importance of maintaining multi-jurisdictional environmental assessments.<sup>64</sup> As well, the Supreme Court of Canada has indicated a preference for cooperation and coordination of environmental assessment processes rather than a “step back” by one jurisdiction. The Supreme Court of Canada considered arguments about duplication and overlap under the previous *CEAA* in *Mining Watch Canada v. Canada (Fisheries and Oceans)* [“Red Chris”].<sup>65</sup> The *Red Chris* decision involved challenges to the environmental assessment process for a proposed copper and gold mine.

In the course of its decision, the Court addressed arguments concerning duplication and overlap.<sup>66</sup>

There is perhaps a rationale for the interpretation proposed by Red Chris and the government. Where projects are subject to environmental assessment by both provincial and federal authorities, it is not unreasonable to think that such projects should not be subject to two, duplicative, environmental assessments. Duplication could be minimized by scoping the project for federal environmental assessment purposes on a more limited basis than the project as

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<sup>63</sup> There are many who argue that environmental assessment should be used to select and design those undertakings which make a positive contribution to sustainability. For example, see Brenda Heelan Powell, *supra* note 2 and Bob Gibson, *Sustainability Assessment: Criteria, Processes and Applications* (London: Earthscan, 2008).

<sup>64</sup> See for example: Stephen Hazell, *supra* note 6; Steven Kennett, *supra* note 35; and Arlene Kwasniak, *supra* note 60.

<sup>65</sup> *Mining Watch Canada v Canada (Fisheries and Oceans)*, [2010] 1 S.C.R. 6.

<sup>66</sup> *Ibid* at paragraphs 24 to 25.

proposed by the proponent, and by focussing on matters within federal jurisdiction and the specific approvals sought from the federal government by the proponents of the project.

However, s. 12(4) of the *CEAA* provides that in such cases, a federal [responsible authority] may cooperate with the province in respect of the environmental assessment. Detailed provisions for coordination are set out in the *Regulations Respecting the Coordination by Federal Authorities of Environmental Assessment Procedures and Requirements*, SOR/97-181, the *Canada-British Columbia Agreement for Environmental Assessment Cooperation* (2004), and similar provincial federal harmonization agreements across the country. Thus, Red Chris and the government's policy arguments regarding duplication and coordination have been recognized in the *CEAA* and its regulations.

While the Court recognized that it is not desirable to have two, duplicative environmental assessments of one project, it is clear that the Court considers multi-jurisdictional environmental assessment can occur without needless duplication. The solution to jurisdictional overlap in environmental assessment is cooperation and coordination. The Court did not endorse reducing federal participation (in this case via narrow scoping of the project) as a means to deal with jurisdictional overlap.

This case has been analysed by Meinhard Doelle as follows:<sup>67</sup>

In the end, the message on the outcome is that projects have to be scoped broadly, and that efficiency cannot be used as a justification for narrow scoping. Rather, efficiency is to be achieved through coordination and cooperation among the levels of government with EA responsibilities for a given project. The court is clear; *CEAA* offers ample tools to avoid duplication and inefficiency. The underlying message is that the Act will not permit efficiency to trump an effective and sufficiently broad scoping. If there is an efficiency problem, responsibility rests with implementing governments to ensure proper coordination, not with broad scoping.

The basic idea is that all governments interested in a project EA need to get together and jointly initiate an integrated EA process so that decision makers at all levels of governments have a full appreciation of the decisions they are asked to make. Beyond the efficiency point made by the SCC, such active engagement and cooperation is critical for at least two reasons. First, without the active engagement of the various levels of government, it is unlikely that the process will do justice to the full range of issues that need to be considered in deciding whether and how a project should proceed. Second, without their active engagement, the final decision makers will be disconnected from the EA process and not be in a position to make sound decisions based on the information gathered. **The SCC was clear that "delegation" is not the answer.** Lack of active cooperation means unnecessary duplication, extra time and cost to everyone involved and reduced effectiveness. On the other hand, active, early and meaningful

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<sup>67</sup> Meinhard Doelle, "The Implications of the SCC Red Chris Decision for EA in Canada" (2010) 20 JELP 161 at 169-170.

cooperation and coordination along the lines suggested provides an opportunity to finally realize the hope for EA as an effective and efficient tool for sustainable development. [emphasis added]

A similar sentiment appears in the Federal Court's decision in *Canadian Environmental Law Association v. Canada (Minister of the Environment)*.<sup>68</sup> In this case, the Federal Court considered a challenge to the validity of the *Canada-Wide Accord on Environmental Harmonization* and its three sub-agreements (one of which dealt with environmental assessment). The *Accord* contemplates cooperation between the federal and provincial environment ministers to develop common measures to be implemented through legislation, regulations or policies.

The Canadian Environmental Law Association (CELA) sought a declaration that the federal Minister of Environment exceeded her jurisdiction in signing the *Accord* and its three sub-agreements. CELA was concerned that the *Accord* and sub-agreements established a structure under which the respective governments would rearrange roles and responsibilities thereby obligating the federal government to refuse to exercise some of its jurisdiction in environmental matters leading to a diminution in environmental protection for Canadians. As well, CELA raised the concern that the *Accord* and its sub-agreements constituted a transfer of authority to an intergovernmental body thereby diminishing the accountability of the federal Minister.

Ultimately, the Court concluded that the application ought to be dismissed. The Court characterized the *Accord* and its sub-agreements as agreements in principle which contain statements of political intention or objectives that the governments hope to implement. As well, the Court found that several pieces of legislation conferred authority on the federal Minister to enter into the *Accord* and its sub-agreements. Finally, the Court concluded the arguments about fettering discretion were premature since the content of future agreements would determine whether or not discretion was fettered.

In the course of its decision, the Court stated:<sup>69</sup>

The federal and provincial governments share jurisdiction over the environment. The Supreme Court of Canada commented on this shared jurisdiction in *Friends of the Oldman River Society v. Canada (Minister of Transport)*:

...the *Constitution Act, 1867* has not assigned the matter of "environment" *sui generis* to either the provinces or Parliament. The environment, as understood in the generic sense, encompasses the physical, economic and social environment touching several of the heads of power assigned to the respective levels of government.

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<sup>68</sup> *Canadian Environmental Law Association v Canada (Minister of the Environment)*, [1999] 3 FC 564.

<sup>69</sup> *Ibid* at paragraphs 11 to 12.

The Court went on to state that “in exercising their respective legislative powers, both levels of government may affect the environment, either by acting or not acting”.

It has long been clear that where one order of government wishes to use the same inspectors or agents as another order of government to fulfill a role for which it is responsible, this may be accomplished by both orders of government designating the same persons or agencies to fulfill their respective roles and responsibilities. Also, where one order of government wishes to adopt standards to regulate an activity that are the same as those used by another order of government, this may be accomplished by incorporation by reference, so that the standards adopted by one are incorporated by reference into the legislation of the other. A description of the constitutionally permissible methods of interdelegation can be found in P.W. Hogg, *Constitutional Law of Canada*, 4<sup>th</sup> ed. (Scarborough, Ont.: Carswell, 1996) at paragraphs 14.3(b)-14.6. A more detailed but critical description, specifically in relation to environmental matters, is found in F.S. Gertler, “Lost in (Intergovernmental) Space: Cooperative Federalism in Environmental Protection” in Steven A. Kennett (ed.), *Law and Process in Environmental Management: Essays from the Sixth CIRL Conference on Natural Resources Law* (Calgary: Canadian Institute of Resources Law, 1993)

The Court’s decision makes it clear that agreements between the federal and provincial governments to cooperate and coordinate processes are acceptable. The Court provides, as examples of acceptable cooperation and coordination, the use of common agencies and standards. However, the Court’s decision implies that certain arrangements could amount to an improper delegation of jurisdictional authority. As stated by Arlene Kwasniak, this decision:<sup>70</sup>

... implies that an agreement to cooperate and coordinate processes between jurisdictions is fine. However, the Court acknowledged that there could be specific fact situations that would amount to unauthorized devolution.

In other words, the decisions in *Red Chris* and *Canadian Environmental Law Association v. Canada (Minister of the Environment)* demonstrate that the Courts recognize the need to deal with jurisdictional overlap in environmental assessment. It seems that, according to Canadian courts, the preferable course of action is coordination and cooperation to minimize possible duplication arising from jurisdictional overlap. It is the ELC’s view that Canadian courts will be reluctant to accept arrangements which amount to a devolution of authority from the federal government to the provincial governments. The substitution and equivalency provisions of *CEAA 2012* have the potential to be such an arrangement.

In Canada, the norm for environmental regulation and policy has been a collaborative approach by the federal and provincial governments.<sup>71</sup> Given the constitutional reality of jurisdictional overlap in environmental matters, this collaborative approach makes sense. In Canada, both the federal and provincial governments have clear authority to deal with environmental

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<sup>70</sup> Arlene Kwasniak, *supra* note 60 at 29.

<sup>71</sup> William R. MacKay, “Canadian Federalism and the Environment: The Literature” (2004) 17 *Georgetown Int’l. Env’tl. Law Review* 25.



matters which necessitates at least some collaborative efforts. As stated by Edward Livingstone, given the shared jurisdiction in the environmental field, a cooperative approach is needed to achieve sustainable development.<sup>72</sup>

Indeed, many commentators have cautioned against devolution of environmental matters to the provinces.<sup>73</sup> There are many reasons to avoid devolution of environmental matters, including environmental assessment processes. Firstly, some environmental matters clearly fall within federal legislative authority and, as such, cannot be dealt with by the provincial governments. Secondly, environmental matters cover a large and diverse field which cannot be effectively managed by one level of government alone. Thirdly, there is a concern that devolution to the provinces will result in lower standards because provinces are subject to more demands than the federal government.<sup>74</sup> As stated by Steven Kennett, “[t]he best hope for avoiding regulatory capture is to incorporate pluralism directly into [environmental assessment] through the direct involvement of the [environmental assessment] regimes of all affected governments.”<sup>75</sup>

As argued by Arlene Kwasniak,<sup>76</sup> where improvements to joint environmental assessment processes are needed, these should occur through increased harmonization and improved coordination, cooperation and convergence. The federal environmental assessment process plays a critical role in environmental management and should not be diminished by the use of substitution or equivalency. Similar views have been expressed by Stephen Hazell who states that harmonization should be aimed at reducing regulatory duplication using cooperation and coordination, not by reducing the federal role in environmental assessment.<sup>77</sup> Hazell states that multijurisdictional environmental assessments are needed to provide environmental protection.

## Conclusion

The ELC recommends that the equivalency and substitution provisions be removed from *CEAA 2012*. In our view, the federal government should focus less on trying to avoid jurisdictional overlap – which is a constitutional reality – and work toward better coordination and

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<sup>72</sup> Edward Livingstone, “The Constitution and Environmental Regulation” in Leonard J. Griffiths and Patricia Houlihan, eds, *Sustainable Development in Canada: Into the Next Millennium* (Toronto: Canadian Bar Association, 2000).

<sup>73</sup> See for example William R. MacKay, *supra* note 43; Stephen Hazell, *supra* note 5; and Steven A. Kennett, “Chapter 5: Meeting the Intergovernmental Challenge of Environmental Assessment” in Patrick C. Fafard and Kathryn Harrison, eds, *Managing the Environmental Union: Intergovernmental Relations and Environmental Policy in Canada* (Kingston: School of Policy Studies, Queen’s University, 2000).

<sup>74</sup> See for example, Kathryn Harrison, *supra* note 11.

<sup>75</sup> Steven A. Kennett, *supra* note 73 at 127.

<sup>76</sup> Arlene Kwasniak, *supra* note 60.

<sup>77</sup> Stephen Hazell, *supra* note 6.



cooperation where multi-jurisdictional environmental assessment occurs. The equivalency and substitution provisions will decrease the federal presence in Canadian environmental decision-making which is not desirable especially for those matters (such as, fisheries and navigable waters) which fall squarely within federal jurisdiction.

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