Federal Legislative Authority in Relation to Oil and Gas Development in Canada

General rules and principles

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Martin Z. Olszynski

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General Rules and Principles of Federal Legislative Authority in Relation to Oil and Gas Development in Canada

February 2025

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Executive Summary

There is significant public debate and uncertainty regarding the validity of federal laws and regulations that affect oil and gas development in Canada. This paper outlines when and how Canada's federal government can regulate such development. The paper's key findings are as follows:

- **Oil and gas development is not exclusively the domain of provincial legislative authority** (i.e., the power to make laws). The federal legislature, and through it the federal government of the day, can regulate specific aspects of oil and gas development that engage federal legislative powers as set out in Canada's Constitution. For example, it is within federal legislative authority to regulate interprovincial infrastructure projects, including oil and gas pipelines. It is also within the federal government's legislative power to regulate industrial activity—including that of oil and gas production—with the objective of protecting federal interests, such as the health of transboundary waterways and fisheries (see Table ES1).
- **Federal regulation of oil and gas development must, in essence, be about matters that fall within federal jurisdiction**, although such regulation may have incidental effects on matters falling within provincial jurisdiction. Incidental does not mean insignificant but rather effects that are secondary to the legislation's primary purpose; they may be significant in practical terms and yet do not prevent a law from being constitutional. This is important for regulating oil and gas development as a law or regulation designed to protect federal interests is not automatically unconstitutional if it has an incidental effect on natural resource development. Instead, the central question is whether the federal legislation is focused on the federal interest at hand, and not in "pith and substance" attempting to regulate a provincial matter of concern.
- **Broad federal powers, for example, with respect to spending and taxation, can be used to support, or not, various forms of economic and industrial development.** The federal government has given substantial financial support and tax incentives to the fossil fuel industry; removing such support is equally within federal competency.
- **The federal criminal law power has become a powerful tool for environmental protection, and this includes fighting climate change.** Current federal initiatives to regulate greenhouse gas emissions from the electricity sector (enacted) and from oil and gas production (in development) appear consistent with current constitutional doctrine and existing precedents.

Table ES1. Federal and provincial legislative powers relevant to oil and gas

Federal heads of power	91.1A. The Public Debt and Property
	91.2. The Regulation of Trade and Commerce
	91.3. The raising of Money by any Mode or System of Taxation
	92.10. Interprovincial Works and Undertakings
	91.10. Navigation and Shipping
	91.12. Sea Coast and Inland Fisheries
	91.21. Bankruptcy and Insolvency
	91.22. Patents of Invention and Discovery
	91.24. Indians, and Lands reserved for the Indians
	91.27. The Criminal Law
	91. Residual power: Peace, order, and good government (POGG)
	132. The Imperial Treaty Power (Migratory Birds)
Provincial heads of power	92.2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.
	92.5. The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.
	92.10. Local Works and Undertakings other than such as are of the following Classes: (a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province …
	92.13. Property and Civil Rights in the Province.
	92.16. Generally all Matters of a merely local or private Nature in the Province.
	92A (1) In each province, the legislature may exclusively make laws in relation to (a) exploration for non-renewable natural resources in the province; (b) development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom; and (c) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy …

Source: Author.

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1.0 Introduction

Canadians are sometimes told that jurisdiction over oil and gas development is exclusively provincial. While provincial jurisdiction is broad, oil and gas development also affects and engages over a dozen areas of federal jurisdiction, both directly and indirectly. Oil and gas development on federal lands, offshore, and on Indigenous reserves, as well as its interprovincial and international transport and export, all fall directly under federal legislative authority. Indirectly, oil and gas development implicates and engages federal jurisdiction over navigation, fisheries, Indigenous Peoples and their interests in land (beyond reserves), transboundary river pollution, migratory birds, and certain aspects of climate change (i.e., federal carbon pricing and prohibitions on greenhouse gas (GHG) emissions under the federal criminal law power). Oil and gas development is also affected by the exercise of federal jurisdiction over taxation, spending, patents, and bankruptcy and insolvency.

The purpose of this paper, therefore, is to set out the general rules and principles of federal jurisdiction in relation to oil and gas development in Canada. Section 2 discusses the general principle of federalism within the Canadian state, while Section 3 sets out the rules that Canadian courts apply when assessing the constitutional validity of a given law or regulation (whether federal or provincial). Section 4 then briefly sets out a simplified life cycle of oil and gas development in Canada, from production through to processing, transportation (i.e., pipelines), domestic consumption or export, and closure (remediation and reclamation) to illustrate more clearly the various points at which federal interests and legislative authority may be engaged. Section 5, which is the main part of the paper, summarizes the rules and principles surrounding twelve relevant sources of federal legislative authority. Section 6 concludes.

Several key points emerge from this analysis:

- Legislative authority (jurisdiction) is divided between the federal and provincial governments. This division is primarily set out in Sections 91, 92, and 92A of the Constitution Act, 1867.
- These sections contain lists of "classes of subjects," also referred to as "heads of powers," and confer on legislatures (either federal or provincial) the power to pass laws in relation to "matters" that fall within those broad classes of subjects.
- The power to make laws in relation to a given matter does not confer any substantive rights (e.g., a right to resource development) but more simply the power to draft and pass laws.
- When assessing the constitutional validity of a given law or regulation, Canadian courts first identify its essential matter (or subject matter). They then determine whether that matter falls within one (or more) of the heads of power assigned to that level of government.

- Each head of power has its own rules and constraints, developed over decades of judicial interpretation and application, that must be respected when making laws pursuant to it.
- Both the federal and provincial governments may regulate the same activity or fact situation from different perspectives—or aspects—through what is known as the "double aspect" doctrine. In so doing, they are also permitted to affect matters that otherwise might fall within the other level of government's legislative authority through the "incidental effects" doctrine.
- For the better part of the past few decades, and as with resource development more broadly, Parliament and the federal government have generally used their legislative authorities to facilitate and promote oil and gas development—often at the expense of other federal interests, including what can be considered federal environmental interests in navigation, fisheries, Indigenous Peoples and lands reserved for them, transboundary river pollution, and migratory birds.
- Given broad interpretation by the courts, the federal criminal law power has become a powerful tool for environmental protection, and this includes fighting climate change. Current federal proposals to regulate GHG emissions from the electricity sector and from oil and gas production appear consistent with current constitutional doctrine and existing precedents.

2.0 General Principles of Federalism

Canada is a federal state. This means that the jurisdiction to make laws (also called legislative power or legislative authority) is divided between the federal and provincial legislatures. This "division of powers," as it is referred to in the case law, is primarily set out in Sections 91 (federal) and 92 and 92A (provincial) of the Constitution Act, 1867. These sections set out a list of over 20 "classes of subjects," also called "heads of power," for the federal and provincial legislatures, respectively (there are a few other relevant provisions in other parts of the Constitution that are also discussed below). Importantly, the relationship between the federal and provincial legislatures is one of equal partners, not of subordination. In other words, when making laws, each level of government is autonomous; neither level of government is under any obligation to accommodate the policy preferences of the other.

The full text of Sections 91, 92 and 92A (the latter is referred to as the "resources amendment" and was added in 1982) can be found in Appendix A. For the purposes of this paper, the most relevant federal and provincial legislative powers in relation to oil and gas development have been excerpted in Table 1.

Table 1. Federal and provincial legislative powers relevant to oil and gas

Federal heads of power	91.1A. The Public Debt and Property
	91.2. The Regulation of Trade and Commerce
	91.3. The raising of Money by any Mode or System of Taxation
	92.10. Interprovincial Works and Undertakings
	91.10. Navigation and Shipping
	91.12. Sea Coast and Inland Fisheries
	91.21. Bankruptcy and Insolvency
	91.22. Patents of Invention and Discovery
	91.24. Indians, and Lands reserved for the Indians
	91.27. The Criminal Law
	91. Residual power: Peace, order, and good government (POGG)
	132. The Imperial Treaty Power (Migratory Birds)

Provincial heads of power	92.2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.
	92.5. The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.
	92.10. Local Works and Undertakings other than such as are of the following Classes: (a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province …
	92.13. Property and Civil Rights in the Province.
	92.16. Generally all Matters of a merely local or private Nature in the Province.
	92A (1) In each province, the legislature may exclusively make laws in relation to (a) exploration for non-renewable natural resources in the province; (b) development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom; and (c) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy …

Source: Author.

In reading this table, it is important to understand what is—and what is not—being divided among the different levels of government. Legislative authority does not amount to, or confer, a right to anything, including the development of natural resources.[1] Rather, it simply enables the relevant government to pass laws in relation to "Matters coming within the Classes of Subjects" listed in Sections 91, 92, and 92A. For example, and as further explained below, the protection of fish habitat is a "matter" that falls within the scope of 91(12) (Sea Coast and Inland Fisheries), and therefore something that Parliament may pass laws in relation to—and indeed has. As another example, prohibitions with respect to the manufacture, import, or export of toxic substances have been deemed "matters" that fall within the scope of 91(24) (the Criminal Law). And as a final example, the development, conservation and management of non-renewable natural resources are "matters" found in 92A(1) that provincial legislatures may pass laws in relation to—and this includes oil and gas development. This does not mean, however, that the provinces or private proponents have some unfettered *right* to such development, conservation, and management: such development can be subject to, and constrained by, valid laws from both levels of government.

[1] Bankes, N. & Leach, A. (2023, November 2). The word 'exclusive' does not confer a constitutional monopoly, nor a right to develop provincial resource projects. *ABlawg.ca.* https://ablawg.ca/2023/11/01/the-word-exclusive-does-not-confer-a-constitutional-monopoly-nor-a-right-to-develop-provincial-resource-projects/

Two other types of federal authority or power merit a brief mention here. They are mentioned here because their use is primarily limited by political, rather than constitutional, constraints. The first is the authority to spend money, or the spending power: "The federal (and provincial) spending power is that of a natural person. Spending is not equivalent to the enactment of laws and is not restricted to the heads of power that authorize the making of laws. This broad view of the spending power has long governed federal-provincial financial arrangements."[2] In other words, both levels of government have the ability to spend money—and to attach conditions for such spending, including conditions on the receipt of such spending. Perhaps the most well-known example of the federal spending power in Canada is in relation to health care, the primary legislative authority for which resides with the provinces.[3] In the oil and gas context, the most conspicuous examples might be the relatively recent purchase of the Transmountain pipeline[4] and the provision of over CAD 1 billion in COVID relief funding to the provinces to address the oil and gas sector's significant closure liabilities.[5]

The second authority is the "declaratory power" in Section 92(10)(c), pursuant to which Parliament may declare a "work" wholly situated in one province to be "for the general Advantage of Canada or for the Advantage of Two or more of the Provinces." This power has been used "no less than 472 times, the majority of which have been in respect of local railways."[6] That being said, this power is regarded as generally inconsistent with Canada's federal structure—including by the federal government and Parliament, who are "sensitive to the anomalous character of the power and are now inclined to use the power only sparingly. It has been used very rarely in recent times."[7]

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[2] Hogg, P., & Wright, W. (2019). *Constitutional law of Canada* (5th ed.), §57:4 and §6:8.

[3] Section 92(7) grants the provinces legislative authority over the "Establishment, Maintenance, and Management of Hospitals." Nevertheless, using "its spending power, Parliament may set conditions for receipt of the money. The *Canada Health Act* … is constitutionally about the *financing* of health care, not health care directly, and the national standards it establishes are the conditions to which the provinces must adhere if they wish to continue to receive federal money." Butler, M., & Tiedemann, M. (2013). *The federal role in health and healthcare* (Publication No. 2011-91-E). Library of Parliament. https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/201191E#txt11

[4] Gunton, T. (2024). *Assessment of fossil fuel subsidies in Canada: A case study of the Trans Mountain Pipeline.* International Institute for Sustainable Development. https://www.iisd.org/system/files/2024-09/fossil-fuel-subsidies-trans-mountain-pipeline.pdf

[5] For a discussion regarding this funding, see Bankes, N., Fluker, S., Olszynski, M. & Yewchuk, D. (2020, April 24). Governance and accountability: Preconditions for committing public funds to orphan wells and facilities and inactive wells. *ABlawg.ca*. https://ablawg.ca/2020/04/24/governance-and-accountability-preconditions-for-committing-public-funds-to-orphan-wells-and-facilities-and-inactive-wells/

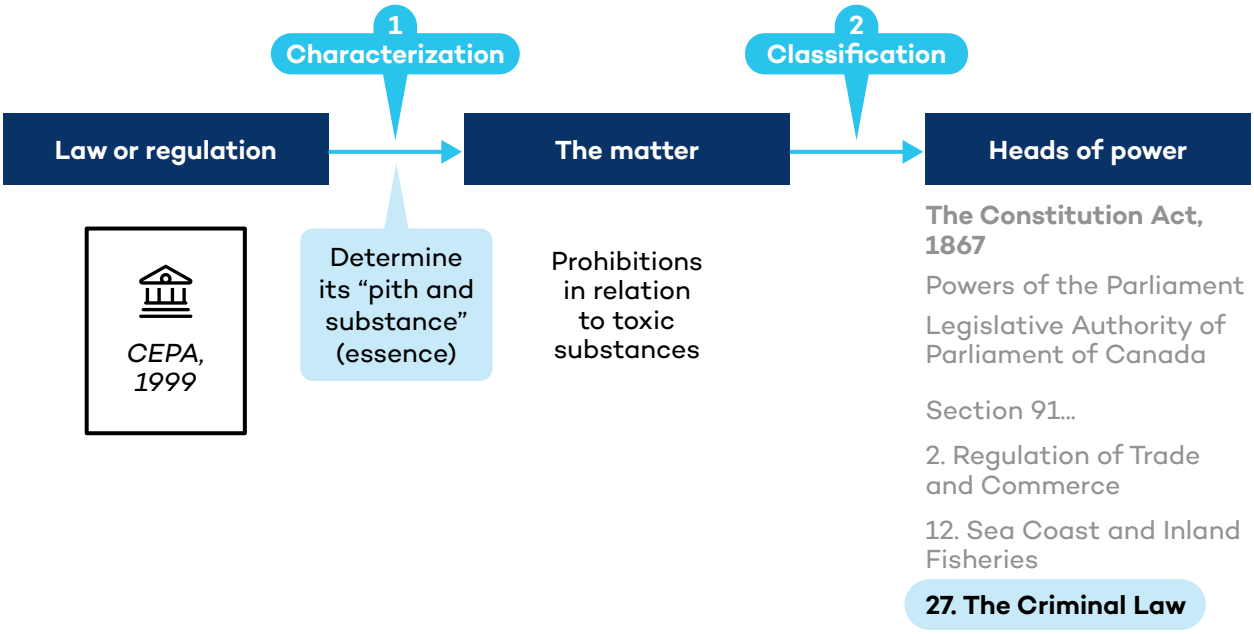
[6] Hogg, P., & Wright, W. (2019). *Constitutional law of Canada* (5th ed.), §22.10.

[7] Ibid.

3.0 Characterization, Categorization, Double Aspects, and Incidental Effects

In Section 4 below, I set out the basic rules around each federal head of power and their relevance, both current and potential, to the oil and gas development life cycle in Canada. Before doing so, however, it is useful to set out the general framework that Canadian courts apply when assessing whether a given law or regulation is indeed constitutional (i.e., whether it falls within the legislative authority of the government that passed it). As will be seen, what lawyers and judges refer to as the "division of powers" analysis is a two-step process of (i) characterization and (ii) categorization (see Figure 1).[8] This discussion is followed by a consideration of two important doctrines: the "double aspect" doctrine and the "incidental effects" doctrine. These doctrines essentially enable the concurrent *application* of federal and provincial laws and regulations in various contexts, provided always that those laws and regulations respect the rules of the head of power pursuant to which they were passed. In the event of a conflict or inconsistency between such federal and provincial laws, the federal law will prevail on the basis of the doctrine of federal paramountcy.[9]

Figure 1. A division of powers analysis example: *CEPA, 1999*



Source: Author.

[8] *Reference re Impact Assessment Act, 2023 SCC 23 [Reference re: IAA].*

[9] *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at paras. 129–130 [*References re: GGPPA*]. A detailed discussion of the paramountcy doctrine is beyond the scope of this paper.

3.1 Characterization

At the first step, a court examines the relevant law or regulation (or relevant portions thereof)[10] and seeks to identify its essence—what the case law refers to as its "pith and substance."[11] This, then, is the "matter" (sometimes also referred to as the subject matter) that is subsequently categorized as falling within one or, in some instances, several of the potentially relevant heads of power in Sections 91, 92, or 92A. To determine pith and substance,

> two aspects of the law must be examined: the purpose of the enacting body and the legal effect of the law. … To assess the purpose, the courts may consider both intrinsic evidence, such as the legislation's preamble or purpose clauses, and extrinsic evidence, such as *Hansard* or minutes of parliamentary debates. In so doing, they must nevertheless seek to ascertain the true purpose of the legislation, as opposed to its mere stated or apparent purpose.[12]

As a recent example, in *References re: Greenhouse Gas Pollution Pricing Act*[13] and after assessing its legal and practical effects, a majority of the Supreme Court of Canada concluded that the "true subject matter" of the *Greenhouse Gas Pollution Pricing Act* SC 2018, c. 12, s. 186 *(GGPPA)* was "establishing minimum national standards of GHG price stringency to reduce GHG emissions."[14] This was the "matter" or "subject matter" that the Court subsequently classified as falling within Parliament's residual POGG power (further discussed below). Importantly, the majority rejected other characterizations, such as the regulation of GHGs, generally, and even national standards for GHGs, generally, as overly broad characterizations of the *GGPPA*, favouring instead the "most precise" characterization of the subject matter of the legislation.[15]

3.2 Categorization

Once a law has been characterized as above (i.e., its matter has been identified), the courts then determine the head(s) of power into which the matter falls: "If the matter of the law is 'properly classified [i.e., categorized] as falling under a head of power assigned to the adopting level of government, the legislation is [constitutional] and valid.'"[16] Over the course of Canada's history, courts have developed various rules and principles that define the scope and breadth of each of the heads of power; these are discussed in Section 4, below.

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[10] *Canadian Western Bank v. Alberta*, 2007 SCC 22 [*Canadian Western Bank*] at para. 25.

[11] *Reference re: IAA, supra* note 8 at para. 61.

[12] *Western Canada Bank, supra* note 10 at para. 27.

[13] *References re: GGPPA, supra* note 9.

[14] Ibid at para. 80.

[15] Ibid at paras. 57 and 80.

[16] *Reference re; IAA, supra* note 8 at para. 110.

It is at this stage that some awareness and understanding of provincial heads of power becomes critical to the analysis: a federal law or regulation that purports to regulate some aspect of oil and gas production, processing, or transportation will not be categorized with a view only to potential *federal* heads of power but rather with awareness of, and sensitivity to, relevant provincial heads of power:

> Classes of subjects [i.e., heads of power] should be construed in relation to one another …. In cases where federal and provincial classes of subjects contemplate overlapping concepts, meaning may be given to both through the process of "mutual modification" …. Classes of subjects should not be construed so broadly as to expand jurisdiction indefinitely.[17]

For this reason, Section 5 (below) starts with a brief overview of provincial heads of power as they related to oil and gas development, and then proceeds to a more detailed examination of the potentially relevant federal heads of power.

3.3 Double Aspect

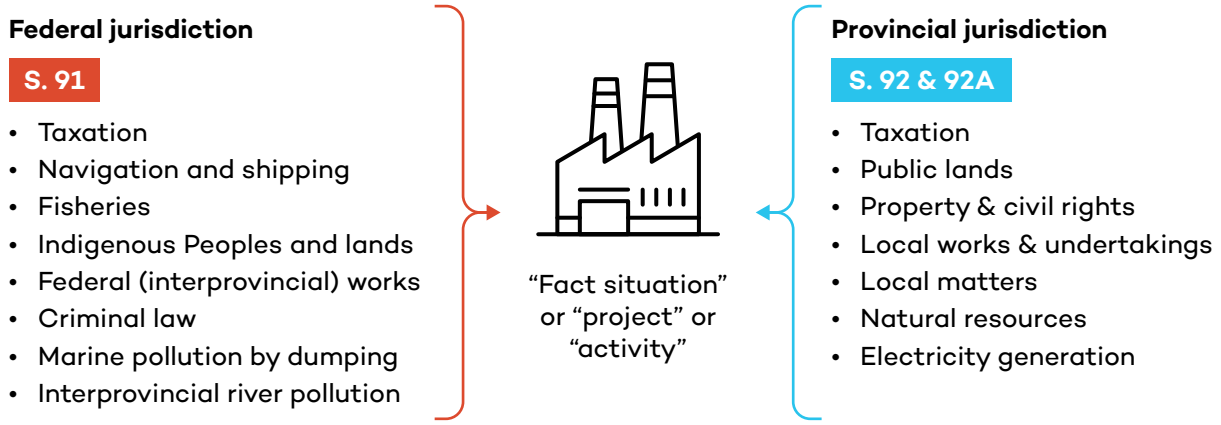
While there was once a time that Canadian courts applied a "watertight compartments" approach to the division of powers, whereby overlap between federal and provincial heads of power was strenuously avoided, this has long since given way to a more flexible approach that recognizes that the same *fact situation* can have both a federal and provincial aspect pursuant to what is called the "double aspect doctrine."[18] The "double aspect doctrine" allows the same set of facts to be regulated from different perspectives or aspects, with the federal government employing heads of power falling within Section 91 and provincial governments using heads of power within Sections 92 or 92A (see Figure 2, which was drafted with a view to clarify legislative authority relevant to environment management and protection).[19]

[17] *Ward v. Canada (Attorney General)*, [2002] 1 S.C.R. 569, 2002 SCC 17 at para. 30.

[18] *Reference re: IAA, supra* note 8 at paras. 117 and 119.

[19] See Olszynski, M., Bankes, N., & Wright, D. (2023, October 16). Wait, what!? What the Supreme Court actually said in the *IAA Reference*. *ABlawg.ca.* http://ablawg.ca/wp-content/uploads/2023/10/Blog_MO_NB_DW_IAA_Reference.pdf

Figure 2. The double aspect doctrine – One fact situation, two aspects[20]



Source: Olszynski, M., Bankes, N., & Wright, D. (2023, October 16). Wait, what!? What the Supreme Court actually said in the *IAA Reference*. *ABlawg.ca*. http://ablawg.ca/wp-content/uploads/2023/10/Blog_MO_NB_DW_IAA_Reference.pdf

Perhaps the most recent, relevant, and clear illustration of the double aspect doctrine can be found in the Supreme Court's decision in *Quebec (Attorney General) v Moses*.[21] That case involved a proposed vanadium mine, the construction and operation of which was expected to impact fish and fish habitat, triggering both regulatory and environmental assessment processes at the federal level:

> There is no doubt that a vanadium mining project, considered in isolation, falls within provincial jurisdiction under s. 92A. … There is also no doubt that ordinarily a mining project anywhere in Canada that puts at risk fish habitat could not proceed without a permit from the federal Fisheries Minister. … *The mining of non renewable mineral resources aspect falls within provincial jurisdiction, but the fisheries aspect is federal.*[22]

That being said, in the recent *Reference re: the Impact Assessment Act*, a majority of the Supreme Court cautioned that while the application of the double aspect doctrine allowed concurrent *operation* of federal and provincial laws, this did not amount to concurrent *jurisdiction:*

> Nonetheless, the double aspect doctrine must be applied with caution. First, not all fact situations have a double aspect, and each fact situation must be identified with precision.
>
> Second … If a fact situation can be regulated from both a federal perspective and a provincial perspective, it follows that *each level of government can only enact laws which, in pith and substance, fall under its respective jurisdiction.* In other words, both levels of

[20] Ibid.

[21] 2010 SCC 17 (CanLII) [*Moses*].

[22] Ibid at para. 36.

> government have the exclusive power to legislate within their respective jurisdictions, even if by doing so they both regulate the same fact situation.[23]

Simply put, care must always be taken to ensure that when passing laws under any of the heads of power, the rules and principles that govern those heads of power are respected. As is further discussed in Section 5, some heads of power, e.g., the criminal law power, have rules about both the substance and form of such laws.[24] Other heads of power have been described as being in relation to a resource (e.g., the fishery resource) or an activity (e.g., interprovincial railways), which can also have implications for their scope and breadth.

3.4 Incidental Effects

Finally, Canadian courts have also recognized that valid legislation may, to some degree, touch on matters beyond the legislature's jurisdiction *without* becoming unconstitutional:

> [A law's] secondary objectives and effects have no impact on its constitutionality: "merely incidental effects will not disturb the constitutionality of an otherwise [constitutional] law." … By "incidental" is meant *(sic) effects that may be of significant practical importance but are collateral and secondary to the mandate of the enacting legislature*… Such incidental intrusions into matters subject to the other level of government's authority are proper and to be expected.[25]

The "incidental effects" doctrine recognizes 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 … it would be impossible for Parliament to make effective laws in relation to copyright without affecting property and civil rights."[26] Thus, federal laws and regulations in relation to fisheries, navigation, or Indigenous Peoples may *incidentally* affect the development of oil and gas (matters of provincial jurisdiction) without being rendered unconstitutional. For example, the need to obtain authorization under the federal Fisheries Act RSC 1985 c. F-14 (Fisheries Act) to destroy fish habitat can affect—and indeed has affected—the timing of the construction of an oil sands mine.[27]

---

[23] *Reference re: IAA, supra* note 8 at para. 120, 121. [emphasis added]

[24] *Desgagnés Transport Inc. v. Wärtsilä Canada Inc.*, 2019 SCC 58 at para. 41 [*Desgagnés Transport*].

[25] *Canada Western Bank, supra* note 10 at para. 28.

[26] Ibid at para. 29.

[27] See *Imperial Oil Resources Ventures Limited v. Canada (Fisheries and Oceans)*, 2008 FC 382 (CanLII).

4.0 The Oil and Gas Development Life Cycle in Canada

Before considering the various federal interests and corresponding legislative authorities that are implicated in the development of oil and gas, it is useful to briefly describe all the different stages of that development. Figure 3 represents a simplified oil and gas development life cycle.

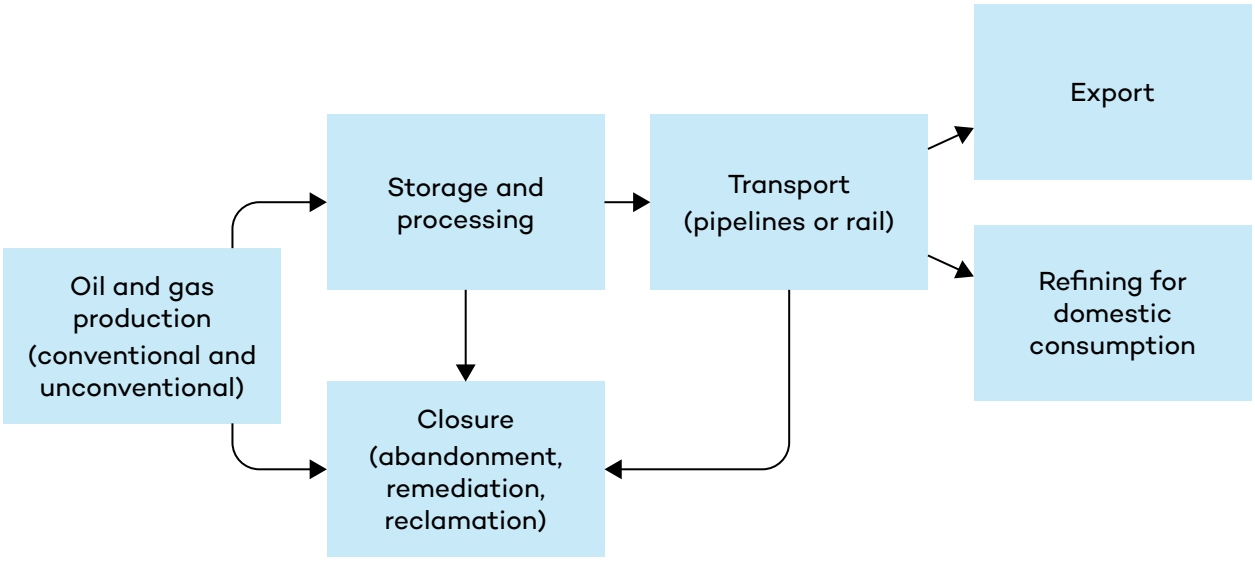
The starting point is production, which, for the purposes of this paper, includes various sub-steps, including exploration, financing, and ultimately production, each of which may trigger federal interests and legislative authority. In Canada, a distinction is often made between conventional and non-conventional oil and gas resources. Conventional resources are those that "can flow into a well at commercial rates without the extensive use of technology after the well is drilled," whereas non-conventional resources "cannot be produced without mining; the extensive use of technology; or without alteration the natural viscosity" of the resource.[28] Generally speaking, non-conventional production, which includes oil sands and natural gas produced through hydraulic fracturing (fracking), is more energy and resource intensive and subsequently has a larger environmental impact than conventional production, and therefore a greater likelihood of affecting federal interests in the same (e.g., fish and fish habitat, navigation, interprovincial rivers, migratory birds). The most significant environmental impact associated with oil sands mining may be the creation of massive tailings facilities, which collectively currently hold nearly 1.5 trillion litres of toxic tailings.[29] *In situ* oil sands production, on the other hand, requires significant energy to produce and inject steam deep underground (allowing the oil to then be pumped to the surface), and is therefore generally GHG emissions intensive.[30] As discussed below, these are both matters that implicate federal legislative authority.

[28] See Canada Energy Regulator. *Energy Information Program – Glossary.* https://www.cer-rec.gc.ca/en/data-analysis/glossary/index.html#conventionalcrudeoil

[29] See Alberta Energy Regulator. (2024). *State of fluid tailings management for mineable oil sands, 2023.* https://static.aer.ca/prd/documents/reports/State-Fluid-Tailings-Management-Mineable-OilSands.pdf

[30] See Government of Canada. (2022). *Greenhouse gas emissions from the oil and gas sector.* https://www.canada.ca/en/environment-climate-change/services/environmental-indicators/greenhouse-gas-emissions.html#oil-gas

Figure 3. Simplified oil and gas development life cycle



Source: Author.

Once oil or gas has been produced, it is transported by pipeline to storage and processing facilities, following which it will be further transported by pipeline for either further refining and domestic consumption or export (by pipeline or rail). The federal government's most obvious legislative authorities in this context are with respect to interprovincial works (e.g., the recently expanded Trans Mountain Pipeline) and over exports. Federal interests and legislative authority may also be triggered in processing and refining, especially in relation to any toxic substances that may be used or produced by these processes. Finally, at some point in the future, the various sites and infrastructure used throughout this life cycle will need to be decommissioned, remediated, and reclaimed, which can also trigger federal interests and legislative jurisdiction. Each of these are further discussed below.

5.0 Federal Heads of Power Relevant to Oil and Gas

As noted above, when construing the scope of federal legislative authority and whether a given law or regulation falls within the scope of that authority, Canadian courts are cognizant of provincial legislative authority. The heads of power listed in Sections 91, 92, and 92A are construed against each other, recognizing that some overlap is unavoidable but seeking to maintain the balance of federalism reflected in those sections and the policy choices underpinning them: "Each head of power was assigned to the level of government best placed to exercise the power."[31]

Provincial legislative authority in relation to oil and gas development is both broad and deep.[32] In many respects, the provinces' legislative jurisdiction over "property and civil rights" (92[13]) is itself sufficient to ground the vast majority of resource-related laws and regulations. As noted by the Supreme Court, "the regulation of trade and industry within the province generally (with certain exceptions) falls within the province's jurisdiction over property and civil rights."[33] Provisions with respect to public lands (92[5]), local works and undertakings (92[10]), and matters of a local nature (92[15]) provide any required supplementation in this context. Indeed, provincial legislative authority under Section 92 is so broad that it has led commentators to question whether subsection 92A(1), which explicitly refers to the development of non-renewable resources and electricity generation, actually added anything to provincial powers: "[Section 92A] seems to cover a lot of the ground already covered by section 92 … since the activities it mentions … were almost certainly within provincial legislative jurisdiction before the adoption of the resources amendment."[34]

With provincial legislative authority briefly set out, this section now turns to an examination of each of the potentially relevant federal heads of power. One clear theme that emerges is that, with some notable exceptions, over the past two decades federal legislative authority has been used to *facilitate and promote* natural resource development, including oil and gas development, often at the expense of federal interests, especially in such matters as navigation, fisheries, Indigenous Peoples and lands reserved for them, transboundary water pollution, migratory birds, and aspects of climate change.[35] As noted at the outset of this paper, however, there is nothing in Canada's

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[31] *Canada Western Bank*, *supra* note 10 at para. 22.

[32] For a comprehensive overview of the provincial laws, regulations, and policies applicable to oil sands development in Alberta, see Nikolaou, N. (2022). Mapping the legal framework for oil sands development in Alberta. *Alberta Law Review, 60*(1), 67.

[33] *Ward v. Canada*, *supra* note 17 at para. 42.

[34] Bankes, N., & Leach, A. (2023). Preparing for a mid-life crisis: Section 92A at 40. *Alberta Law Review 60*(4), p. 853, at 863.

[35] For a brief summary of the predicted federal impacts associated with the since-withdrawn Teck Frontier oil sands mine project, see https://www.cbc.ca/news/canada/calgary/teck-frontier-cost-benefit-leach-olszynski-1.5460151

Constitution that compels such an outcome; like the provinces, the federal government is autonomous in the exercise of its legislative authorities.

91(1A) The Public Debt and Property

Parliament has legislative authority over public debt and property. Federal public property, in this context, includes "national parks, military bases and the sea that lies beyond the geographic boundaries of any province or territory."[36] While geographically limited, this authority is important, especially in relation to offshore oil and gas development off Canada's coasts.[37] Where federal lands are concerned, the federal government has essentially the same broad authority over oil and gas development as the provinces do with respect to development on their own lands.

91(2) The Regulation of Trade and Commerce

Parliament has legislative authority over the regulation of trade and commerce but, out of concern for preserving provincial authority over "property and civil rights" (s 92[13]), this head of power has been interpreted relatively narrowly.[38] It consists of two branches: a general trade and commerce power, and power over international and interprovincial trade and commerce. With respect to the first branch, authority is restricted to matters that are "qualitatively different from anything that could practically or constitutionally be enacted by the individual provinces either separately or in combination."[39] The Supreme Court of Canada relies on five principal criteria in making this determination.[40] For the purposes of this paper, it is sufficient to note that Parliament does not have the authority to legislate with respect to specific trades or industries.

With respect to the second branch, international and interprovincial trade and commerce, most of the case law considers the question of interprovincial, rather than international, trade. Consequently, much of the international trade and commerce space appears governed by political convention rather than clear constitutional rules. The Canada Energy Regulator very clearly has the legislative authority to regulate the export of oil and gas, which it does pursuant to Part 7 of

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[36] Library of Parliament. (2022). *The distribution of legislative powers: An overview* (Publication No. 2019-35-E). https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/201935E#a3.3

[37] For an overview of relevant legislation and agreements, see Government of Canada. (2024). *Legislation and regulations – Offshore oil and gas.* https://natural-resources.canada.ca/energy/energy-sources-distribution/offshore-oil-and-gas/legislation-regulations-offshore-oil-gas/5837

[38] *Reference re Pan Canadian Securities Regulation,* 2018 SCC 48 at para. 100: "The scope of Parliament's jurisdiction over trade and commerce has been greatly influenced by 'the need to reconcile the general trade and commerce power of the federal government with the provincial power over property and civil rights.'" See also Hogg, P., & Wright, W. (2019). *Constitutional law of Canada* (5th ed.), § 20:3.

[39] *Attorney General of Canada v. Canadian National Transportation, Ltd.,* [1983] 2 S.C.R. 206, at p. 267.

[40] *Reference re: Pan-Canadian Securities, supra* note 38 at para. 103 states, "(1) Is the law part of a general regulatory scheme? (2) Is the scheme under the oversight of a regulatory agency? (3) Is the law concerned with trade as a whole rather than with a particular industry? (4) Is the scheme of such a nature that the provinces, acting alone or in concert, would be constitutionally incapable of enacting it? (5) Would a failure to include one or more provinces or localities in the scheme jeopardize its successful operation in other parts of the country?"

the Canada Energy Regulator Act SC 2019, c. 28, s. 10 (CERA). The Canada Energy Regulator states clearly on its website that it regulates "pipelines, energy development and trade in the Canadian public interest," that it factors in "economic, environmental, and social considerations," and that with respect to exports in particular, it "monitors the supply and demand of oil, as it does with natural gas, to ensure quantities exported do not exceed the surplus remaining after Canadian requirements have been met."[41] In other words, a primary objective appears to be to maintain domestic supply.

The natural question that arises is the breadth of this authority and, more specifically, the point at which its exercise might transgress and move beyond merely *incidentally affecting* provincial policies and preferences in relation to resource development to *encroaching* on provincial authority in relation to such development. This question has taken on increased urgency as a result of recent developments in the United States and the potential for a trade dispute in particular, which may include the American imposition of tariffs and potential retaliatory measures by Canada. Decisions made in that context fall squarely within federal jurisdiction over international trade.

Outside of that context (i.e., an international trade dispute), the federal government has gone so far as to ban the export of some products, such as asbestos. This ban, however, is also anchored in a prior listing of asbestos as a "toxic substance" under the Canadian Environmental Protection Act, 1999 SC 1999 c. 33 (CEPA, 1999) (further discussed below).[42] Conversely, when controversy over potential bulk freshwater exports from Canada to the United States hit a highwater mark at the turn of the 21st century, the federal government insisted that only the provinces were constitutionally capable of enacting bans on such exports (most of whom subsequently did so).[43] The latter position seems most directly analogous to the oil and gas context; while CO_2 and other GHGs have also been listed as toxic substances, neither oil nor natural gas have been listed as such.

91(3) The Raising of Money by Any Mode or System of Taxation

The federal government has broad authority to make laws in relation to taxation, both direct and indirect.[44] In a legal opinion prepared for the government of Manitoba and publicly released in the run-up to the Supreme Court's hearing in *References re: GGPPA*, this power was described

[41] See Canada Energy Regulator. (2023). *Export and import of energy*. https://www.cer-rec.gc.ca/en/about/who-we-are-what-we-do/responsibility/export-import-energy.html. See also *Quebec (Attorney General) v Canada (National Energy Board)*, 1994 CanLII 113 (SCC) at p. 193.

[42] See *Export of Substances on the Export Control List Regulations* (SOR/2013-88) and *Prohibition of Asbestos and Products Containing Asbestos Regulations* (SOR/2018-196).

[43] Olszynski, M. (2006). The commodification of Canadian water: Exploring international trade implications. 68 *Saskatchewan Law Review, 221.*

[44] Hogg, P., & Wright, W. (2019). *Constitutional law of Canada* (5th ed.), § 31.1.

as "extremely broad and generally subject to restriction only on the grounds that the measure in question can be classified as something other than a tax."[45]

While this power is constrained in a few other ways as well (e.g., Section 125 of the Constitution prohibits the taxation of lands and property belonging to either the federal or provincial governments), its relevance to oil and gas development should be plain. At the turn of the 21st century, the Income Tax Act RSC 1985 c. 1 (5th Supp.) and, more specifically, amendments to the Income Tax Act and its regulations were used to promote oil and gas development, especially oil sands development (e.g., through accelerated capital cost allowances).[46] More recently, the oil and gas sector has called for—and received—generous tax credits to facilitate the deployment of carbon capture, utilization, and storage facilities.[47] The extent to which this power is used (or not) to incentivize any economic activity is entirely within the federal government's discretion.

91(10) Navigation and Shipping

The federal government has legislative authority over navigation and shipping, which has been interpreted broadly: "Courts have interpreted the federal power generously in recognition of the national importance of the maritime industry, thereby permitting the development of uniform legal rules that apply across Canada … thereby bringing within federal legislative authority matters that would otherwise fall within provincial legislative authority."[48]

To understand the scope of this power, it is necessary to understand the scope of the public right of navigation in Canada. Under common law (i.e., judge-made law developed over centuries), a public right of navigation exists wherever a water body (e.g., ocean, lake, river, stream) is navigable.[49] Only Parliament is competent to legislate in relation to this common law right, including authorizing interferences with this right as a result of a work such as a dam or bridge. In the oil and gas context, Transport Canada relies on various permits pursuant to the Canada Navigable Waters Act RSC 1985, c. N-22 (CNWA) to authorize interferences with navigation in relation to various forms of infrastructure, e.g., a bridge, pipeline crossing, or water intake. Figure 4 is a screenshot of the federal Common Project Registry,[50] which lists over 100 CNWA

[45] Schwartz, B. P. (2017). *Legal opinion on the constitutionality of the federal carbon pricing benchmark and backstop proposals.* Pitblado Law. https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&ved=2ahUKEwjz57_Pn7fgAhUTCDQIHekdDQQQFjADegQICRAC&url=https%3A%2F%2Fmanitoba.ca%2Fasset_library%2Fen%2Fclimatechange%2Ffederal_carbon_pricing_benchmark_backstop_proposals.pdf&usg=AOvVaw0gDfLg5GB4696D2YPo7p6k. See also *Reference re: GGPPA, supra* note 7, at para. 219.

[46] Ketchum, K., Lavigne, R., & Plummer, R. (2001). *Oil sands tax expenditures* (Department of Finance Working Paper 2001-17). https://publications.gc.ca/site/archivee-archived.html?url=https://publications.gc.ca/collections/collection_2008/fin/F21-8-2001-17E.pdf

[47] Budget Implementation Act, 2024, No. 1. https://www.parl.ca/documentviewer/en/44-1/bill/C-69/royal-assent

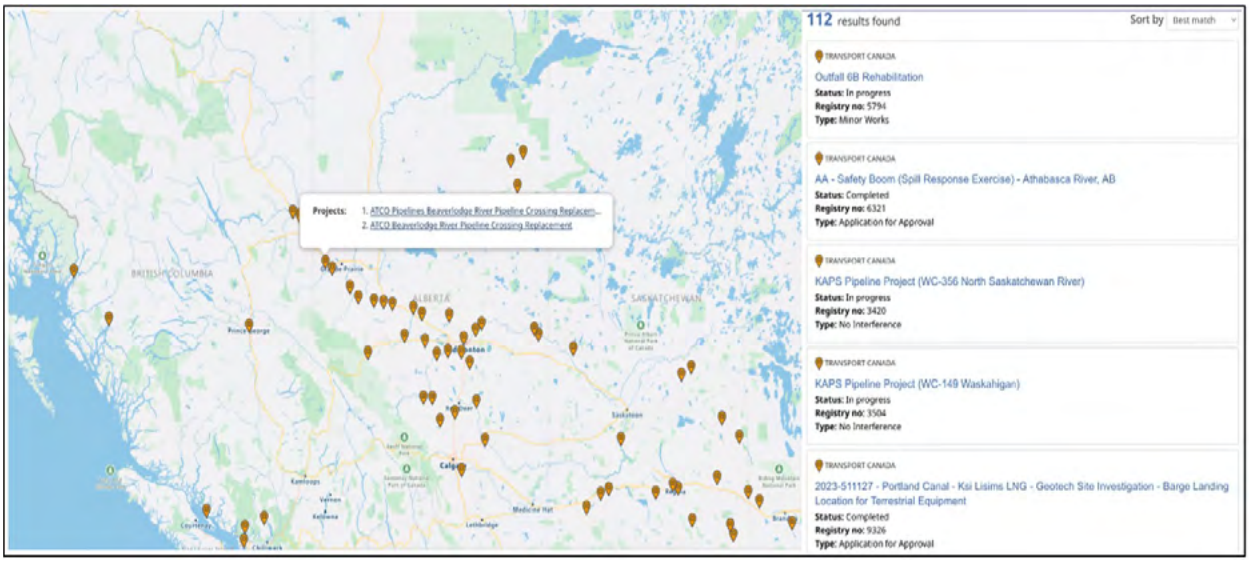
[48] *Desgagnés, supra* note 24 at para. 45.

[49] *Friends of the Oldman River Society v. Canada (1992)* [1992] 1 S.C.R. 3.

[50] See https://common-project-search.canada.ca/search-recherche?view=map

authorizations issued to the oil and gas sector in British Columbia, Alberta, and Saskatchewan (completed or in progress).

Figure 4. CNWA authorizations for oil and gas works interfering with navigation



Source: See footnote 50.

The federal government also regulates all shipping, including of oil and liquefied natural gas, under the Canada Shipping Act S.C. 2001, c. 26.

91(12) Sea Coast and Inland Fisheries

The federal government has broad jurisdiction over sea coast and inland fisheries. The fisheries power "includes *not only conservation and protection*, but also the general 'regulation' of the fisheries, including *their management and control*. They recognize that "fisheries" under s. 91(12) … refers to the fisheries as a resource; "a source of national or provincial wealth" … a "common property resource" to be *managed* for the good of all Canadians."[51]

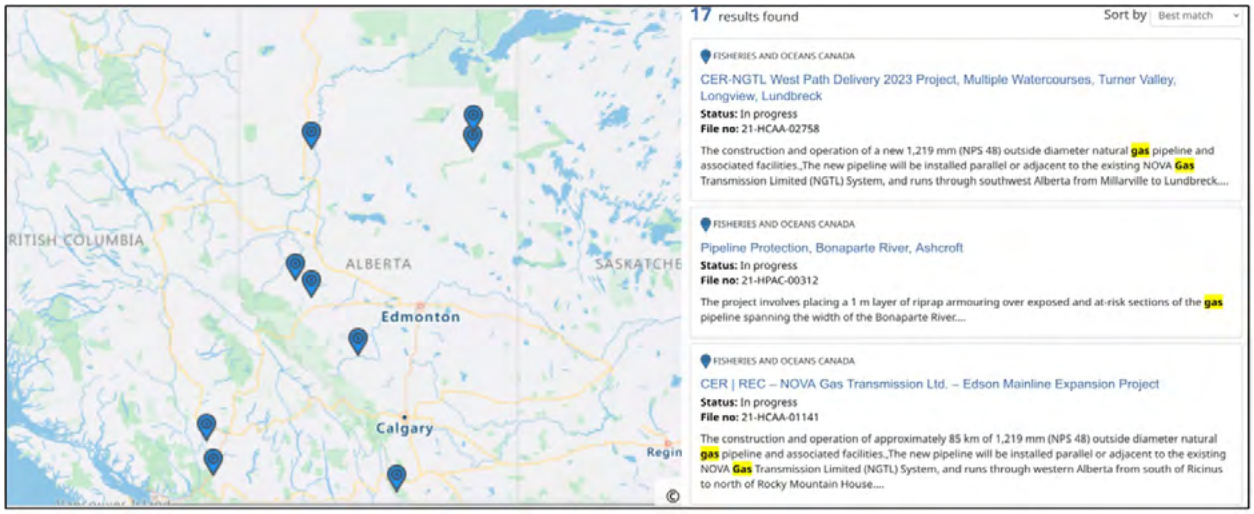
This legislative authority provides the basis for the federal Fisheries Act, RSC 1985 c. F-14. While the Fisheries Act is primarily concerned with fisheries management, there is an entire part—"Fish and Fish Habitat Protection and Pollution Prevention" (Sections 34–43)—that is concerned with impacts to fish, fish habitat, and pollution prevention, and that has come to represent the *de facto* national water quality regime in Canada. Of particular importance to oil and gas, Section 36 prohibits the deposit of deleterious substances in waters frequented by fish, which is virtually all waters in Canada, unless authorized by regulations. Pursuant to this regime, the federal government, through Environment and Climate Change Canada, has enacted numerous

[51] *Ward v. Canada, supra* note 17 at para. 41.

effluent regulations for most sectors, including metal and diamond mining, pulp and paper, and municipal wastewater, and is currently developing regulations for oil sands processed water (which is currently being stored in tailings facilities).

Other relevant provisions of the Fisheries Act include Section 34.2, which provides the federal Minister of Fisheries and Oceans with the authority to direct flows (relevant to water withdrawals for oil sands processing, fracking, as well as to future remediation and reclamation planning), and Section 35, which prohibits the harmful alteration, disruption or destruction (HADD) of fish habitat unless authorized by the Minister or by regulations. Every oil sands mine has required a Section 35 authorization, often requiring the destruction of several thousand hectares of fish habitat. HADD authorizations are also generally required for infrastructure in water, including bridges, pipeline crossings, and water intakes. Figure 5 is a screenshot of the Common Project Registry, listing 17 Fisheries Act authorizations issued to the oil and gas sector in Western Canada since 2018.

Figure 5. Fisheries Act authorizations for oil and gas-related HADDs



Source: See footnote 50.

91(21) Bankruptcy and Insolvency

Parliament has the authority to legislate matters relating to bankruptcy and insolvency. In the exercise of this jurisdiction, Parliament enacted the Bankruptcy and Insolvency Act (BIA) RSC, 1985, c. B-3. The BIA "outlines, among other things, the powers, duties and functions of receivers and trustees responsible for administering bankrupt or insolvent estates and the scope of claims

that fall within the bankruptcy process."[52] More fundamentally, and as recently explained by the Supreme Court:

> [1] The *[BIA]* furthers two important purposes: the *equitable distribution* of a bankrupt's assets among creditors and the *bankrupt's financial rehabilitation*. Financial rehabilitation means that a debtor will be afforded a "fresh start" when appropriate. The fresh start principle is codified in … the *BIA*; it allows a bankrupt to be released from outstanding debts at the end of the bankruptcy process. Thus, *subject to reasonable conditions*, the *BIA* permits an *honest but unfortunate debtor* to be freed from the burdens of indebtedness and to reintegrate into economic life.[53]

Parliament's authority to set the rules of bankruptcy and insolvency is directly relevant to the oil and gas sectors' significant and presently unfunded and unsecured environmental liabilities (i.e., the costs of closing, remediating, and reclaiming their sites and facilities that have not been set aside by industry or government). These are estimated to be as high as $260 billion in Alberta alone (both conventional and non-conventional).[54]

At present, in the absence of robust liability management regimes at the provincial level,[55] the *BIA* appears to incentivize oil and gas companies to neglect or ignore their environmental liabilities for as long as possible, and to then walk away from them through a combination of a "brisk trade in junk assets" and the bankruptcy process.[56] At the very least, it does not appear to provide an incentive for them to not do so. This was the subtext to the relatively recent and high-profile Redwater litigation in Alberta (known formally as *Orphan Well Association v. Grant Thornton Ltd.*).[57]

There is also no shortage of abandoned industrial sites throughout Canada, including the Giant Mine in the Northwest Territories, whose remediation and reclamation—in the billions of dollars—now weigh on the public purse.[58] Needless to say, Parliament's jurisdiction over

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[52] *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5 at para. 178 (known as the *Redwater* litigation).

[53] *Poonian v. British Columbia (Securities Commission),* 2024 SCC 28 at para. 1 [emphasis added].

[54] De Souza, M., Jarvis, C., McIntosh, E., & Bruser, D. (2018). *Cleaning up Alberta's oil patch could cost $260 billion, internal documents warn.* Global News. https://globalnews.ca/news/4617664/cleaning-up-albertasoilpatch-could-cost-260-billion-regulatory-documents-warn/

[55] See Olszynski, M., Leach, A., & Yewchuk, D. (2023). Not fit for purpose: Alberta's oil sands and the mine financial security program. University of Calgary School of Public Policy Research Paper, *16*(36); Yewchuk, D., Fluker, S., & Olszynski, M. (2023). A made-in-Alberta failure: Unfunded oil and gas closure liability. University of Calgary School of Public Policy Research Paper, *16*(31).

[56] Jones, J., Lewis, J., D'Aliesio, R., & Wang, C. (2018, November 23). Hustle in the oil patch: Inside a looming financial and environmental crisis. *The Globe and Mail.* https://www.theglobeandmail.com/canada/article-hustle-in-the-oil-patch-inside-a-looming-financial-and-environmental/

[57] *Supra* note 52.

[58] Federally, see Auditor General. (2024). *Contaminated sites in the North* (Report 1, Reports of the Commissioner of the Environment and Sustainable Development to the Parliament of Canada). https://www.oag-bvg.gc.ca/internet/docs/parl_cesd_202404_01_e.pdf

bankruptcy and insolvency could be recalibrated to try to prevent the externalization (directing the costs onto the public) of what should be private costs, rather than to facilitate it.

91(22) Patents of Invention and Discovery

Parliament has legislative authority in relation to patents of invention and discovery. There appears to be no case law that clearly defines the scope of this power, except to recognize that it is not restricted to the granting of a monopoly over the use of an invention for some specified period of time, but can also include the limiting of such rights to bring about certain economic effects (e.g., limits in relation to patented medicines to facilitate their eventual and affordable access), even where such legislation would otherwise fall within the scope of the provinces' power over property and civil rights.[59]

The relevance of patent legislation in the oil and gas context is reflected by the creation in 2012 of the Canadian Oil Sands Innovation Alliance, which is "focused on collaborative action and innovation in oil sands environmental technology."[60] It is also apparent from a 2015 expert panel report prepared under the auspices of the Council of Canadian Academies on the technological prospects for reducing the environmental footprint of the oil sands:

> This assessment of the evidence finds that most of the required challenges and solutions are multidisciplinary and have wide-ranging implications in highly integrated industrial and ecological ecosystems. The financial risks of implementing costly new technologies at the scale required are also immense. Moreover, despite a half-century of development, many seemingly intractable problems remain: what to do with tailings, how to treat and discharge water safely, how to reduce the amount of GHGs, and how to reduce the footprint on the land and wildlife caused by mining and in situ production. Few simple solutions remain to implement and no off-the-shelf technology.
>
> New technologies, especially those that can potentially bring major reductions in the environmental footprint, can take 10 to 20 years or more to develop and implement. The Panel concluded that oil sands development needs to reflect this reality if technology is to have maximum effect. The current pace of development requires the most promising technologies to be ready for broad adoption in the near term to prevent the locking in of existing and less efficient technologies to the majority of new projects. This underscores the need for a major collaborative effort to accelerate the development and adoption of the most promising technologies and solutions.[61]

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[59] *Smith, Kline & French Laboratories Ltd. v. Canada (A.-G.)* (1985), 1985 CanLII 5509 (FC).

[60] As described on the website of the Pathways Alliance: https://pathwaysalliance.ca/#:~:text=Formed%20in%202012%2C%20COSIA%20is,water%2C%20land%20and%20greenhouse%20gases.

[61] Council of Canadian Academies. (2015). *Technological prospects for reducing the environmental footprint of Canadian oil sands.* The Expert Panel on the Potential for New and Emerging Technologies to Reduce the Environmental Impacts of Oil Sands Development, at xiii, xxiii. https://cca-reports.ca/wp-content/uploads/2018/10/oilsandsfullreporten.pdf

Simply put, and as in other contexts, patent laws, regulations, and policies can stimulate or throttle the development and deployment of socially useful inventions in the oil and gas context.

91(24) Indians, and Lands Reserved for the Indians

The federal government is "vested with primary constitutional responsibility for securing the welfare" of Indigenous Peoples.[62] This broad power, which consists of two branches ("Indians" and "Lands reserved for the Indians," the latter being a larger concept than simply reserve lands), is the constitutional basis for the Indian Act RSC 1985, c. I-5. It is also one of the major jurisdictional anchors for the current federal Impact Assessment Act, SC 2019 c. 28 s. 1 (IAA) (the federal regime for major projects review) where, following recent amendments, relevant federal impacts include all *non-negligible* impacts on Indigenous Peoples and their traditional uses of land (these amendments were in response to the Supreme Court's recent ruling, in *Reference re: IAA*, that Section 91(24) does not extend to preventing "trivial" impacts on Indigenous Peoples or their lands).[63]

In *Reference re: An Act respecting First Nations, Inuit and Métis children, youth and families*,[64] which involved federal legislation that conferred federal law status on Indigenous laws in relation to child welfare, that Act's "essential matter" ("pith and substance") was described by the Supreme Court as "protecting the well-being of Indigenous children, youth and families by promoting the delivery of culturally appropriate child and family services and, in so doing, advancing the process of reconciliation with Indigenous peoples."[65] The Supreme Court concluded that this matter fell squarely within the scope of 91(24). This has led some commentators to wonder whether similar legislation could be applicable to Aboriginal title lands and treaty rights more generally:

> The *Reference* stands for the proposition that Parliament can make laws for Indigenous peoples as Indigenous peoples and that those laws may affirm Indigenous rights of self-government. Furthermore, Parliament may confer the status of federal law on those Indigenous laws … the reasoning in the opinion is equally applicable to other laws that fall within Parliament's jurisdiction under Section 91(24) including the lands reserved sub-head of that provision.[66]

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[62] *Delgamuukw v. British Columbia,* [1997] 3 S.C.R. 1010, at para. 176, cited with approval by the Supreme Court in *Reference re: IAA, supra* note 8 at para. 196.

[63] *Reference re: IAA, supra* note 8 at para. 196 and 200.

[64] 2024 SCC 5 (CanLII).

[65] Hamilton, R. (2024, February 20). Legislative reconciliation and Indigenous Rights of Self-Government: *Reference re: An Act respecting First Nations, Inuit and Métis children, youth and families. ABlawg.ca.* https://ablawg.ca/2024/02/20/legislative-reconciliation-and-indigenous-rights-of-self-government-reference-re-an-act-respecting-first-nations-inuit-and-metis-children-youth-and-families/

[66] See Bankes, N. (2024, March 5). Preliminary thoughts on the implications of the *Children, Youth and Families Reference* for the Lands Reserved Head of Section 91(24. *ABlawg.ca*. http://ablawg.ca/wp-content/uploads/2024/03/Blog_NB_Implications_Lands_Reserved.pdf

Simply put, Section 91(24) provides the federal government broad and mostly untested legislative authority going forward, with obvious touchpoints to resource development generally and oil and gas development specifically. In the meantime, the "lands reserved" branch already provides the constitutional basis for the Indian Oil and Gas Act RSC 1985, c. I-7 and associated regulations, which regulate oil and gas activity on reserve lands.

91(27) The Criminal Law

A law or regulation will be valid criminal law if "in pith and substance: (1) it consists of a prohibition (2) accompanied by a penalty and (3) backed by a criminal law purpose."[67] These requirements have been interpreted flexibly by Canadian courts in upholding various important federal regimes: "Parliament's criminal law power is broad and plenary … The criminal law must be able to respond to new and emerging matters, and the Court 'has been careful not to freeze the definition [of the criminal law power] in time or confine it to a fixed domain of activity.'"[68]

Examples include restricting food preservatives under the Food and Drugs Act;[69] imposing restrictions on tobacco advertising—without absolutely prohibiting tobacco itself—under the Tobacco Products Control Act;[70] regulating the disclosure of the results of genetic testing pursuant to the Genetic Non-Discrimination Act, 2020;[71] requiring gun owners to obtain licences and to register their firearms pursuant to the Firearms Act;[72] and finally, regulating "toxic substances" under the Canadian Environmental Protection Act, 1999 (CEPA, 1999).[73]

CEPA, 1999 is particularly relevant to oil and gas development. In 2005, the federal government designated six kinds of GHGs as "toxic substances" pursuant to the Act, unlocking its machinery and its regulation-making powers to be applied to the problem of climate change. Since then, the federal government has enacted several important regulations under the Act:

- Clean Fuel Regulations (SOR/2022-140)
- Heavy-duty Vehicle and Engine Greenhouse Gas Emission Regulations (SOR/2013-24)
- Passenger Automobile and Light Truck Greenhouse Gas Emission Regulations (SOR/2010-201)
- Regulations Respecting Reduction in the Release of Methane and Certain Volatile Organic Compounds (Upstream Oil and Gas Sector), (SOR/2018-66)

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67 *Reference re: Genetic Non-Discrimination Act* 2020 SCC 17 at para. 67.

68 Ibid at para. 69.

69 *Standard Sausage Co. v. Lee,* 1933 CanLII 282 (BC CA) [*Standard Sausage Co*].

70 *RJR-MacDonald Inc. v. Canada (Attorney General),* 1995 CanLII 64 (SCC).

71 *Supra* note 67.

72 *Reference re: Firearms Act (Can.),* 2000 SCC 31 (CanLII).

73 *R. v. Hydro-Québec,* 1997 CanLII 318 (SCC).

- Reduction of Carbon Dioxide Emissions from Coal-Fired Generation of Electricity Regulations (SOR/2012-167)
- Regulations Limiting Carbon Dioxide Emissions from Natural Gas-fired Generation of Electricity (SOR/2018-261)
- Renewable Fuels Regulations (SOR/2010-189)

In *Syncrude v. Canada*, which involved a challenge by Syncrude to the constitutionality of the Renewable Fuels Regulations (RFR, last item on the list above), the Federal Court of Appeal had no difficulty concluding that fighting climate change was a valid criminal law purpose: "It is uncontroverted that GHGs are harmful to both health and the environment and as such, constitute an evil that justifies the exercise of the criminal law power."[74]

The RFR also did not contravene the criminal law power's form requirements (a prohibition backed by a penalty) even though they incorporated market-based compliance mechanisms to increase their flexibility. In prior challenges to federal laws passed under the criminal law power, some provinces have argued that the existence of a relatively complex regulatory scheme is contrary to the form requirement. A critical question in this context is whether the relevant prohibition is "confined to ensuring compliance with the [legislative] scheme," which would make it impermissibly regulatory in nature, or whether it would "stand on [its] own, independently serving the purpose" of the law or regulation in question.[75] The RFR meets this requirement because the effect of its prohibition "on a yearly, Canada-wide, basis" is that "2% less fossil fuel is consumed."[76]

The federal government recently enacted the Clean Electricity Regulations,[77] which will limit the GHG emissions from power plants (including natural gas power plants) beginning in 2035, and is developing regulations to establish a GHG emissions cap on the oil and gas sector.[78] Both the Clean Electricity Regulations and the proposed oil and gas emissions cap contain a prohibition against emitting a certain level of GHGs, subject to conditions. Like the RFR, then, such prohibitions would appear to "stand on their own, independently serving the purpose"

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[74] *Syncrude Canada Ltd. v. Canada (Attorney General)*, 2016 FCA 160 (CanLII) at para. 62. The term "evil" in this context is a holdover from older case law and is now generally understood as a "reasoned apprehension of harm" to "public order, safety, health or morality or fundamental social values, or to a similar public interest": see *Reference re Genetic Non-Discrimination Act, supra* note 67 at para. 79.

[75] *Reference re Firearms Act (Can.), supra* note 72 at para. 38.

[76] *Syncrude, supra* note 74 at para. 79. See also Chalifour, N. (2016). Canadian climate federalism: Parliament's ample constitutional authority to legislate GHG emissions through regulations, a national cap and trade program, or a national carbon tax. 36 *National Journal of Constitutional Law, 331* at 357; Elgie, S. (2007). Kyoto, the Constitution, and carbon trading: Waking a sleeping BNA bear (or two). *Review of Constitutional Studies, 13*(1), at 108.

[77] SOR/2024-263. For a description of these regulations, see https://www.canada.ca/en/services/environment/weather/climatechange/climate-plan/clean-electricity.html

[78] For a description of these proposed regulations, see https://www.canada.ca/en/services/environment/weather/climatechange/climate-plan/oil-gas-emissions-cap.html

of combatting the "evil" (or apprehended harm) of anthropogenic climate change by reducing overall GHG emissions and are not merely about ensuring compliance with these regimes.

CEPA 1999's reach also extends to other toxic substances that are relevant to oil and gas development. As one recent example, the federal government is currently assessing the toxicity of naphthenic acids, which are a by-product of oil sands mine processing and a major constituent of tailings.[79]

While prohibitions on GHGs or naphthenic acids are bound to affect matters that otherwise fall within provincial legislative authority (e.g., the generation of electricity or the production of oil and gas), such impacts would be incidental and therefore constitutional. As noted almost 100 years ago, in terms that are entirely appropriate in relation to both GHG emissions and naphthenic acids:

> If the Federal Parliament, to protect the public health against actual or threatened danger, places restrictions on, and limits the number of preservatives that may be used [in the context of food-making], it may do so under s. 91(27). … This is not in essence an interference with [provincial jurisdiction]. That may follow as an incident but the real purpose (not colourable and not merely to aid what in substance is an encroachment) is to prevent actual, or threatened injury or the likelihood of injury of the most serious kind to all inhabitants of the Dominion.[80]

92(10)(a) Interprovincial Works and Undertakings

The federal government has legislative authority over *interprovincial* works and undertakings. This includes interprovincial railways and pipelines. The nature of this jurisdiction can be gleaned from its history, and specifically its explicit carving out from provincial jurisdiction over local works and undertakings:

> While the preference in s. 92(10) was for local regulation of works and undertakings, some works and undertakings were of sufficient national importance that they required centralized control. The works and undertakings specifically excepted in s. 92(10)(a) include some of those most important to the development and continued flourishing of the Canadian nation. …
>
> For example, it would be difficult to imagine the construction of an interprovincial railway system if the railway companies were subject to provincial legislation respecting the expropriation of land for the railway right of way or the gauge of the line of railway within each province. If the legislature of the province did not grant railway companies the

[79] See https://ecojustice.ca/wp-content/uploads/2024/05/Ecojustice-Response-to-Request-to-Assess-OSPW-NAs-under-section-76-of-CEPA.pdf.

[80] *Standard Sausage Co., supra* note 69 at pp. 506–7. A "colourable" purpose can be understood as a disguised purpose that falls outside of a given legislature's authority.

> power of expropriation or if they refused to agree to a uniform gauge, the development of a national railway system would have been stymied.[81]

Parliament's legislative authority in relation to interprovincial works and undertakings, including interprovincial oil or gas pipelines, can be described as comprehensive, encompassing all relevant social, economic and environmental considerations.[82]

91 Residual Power: Peace, order, and good government

On its face, the opening paragraph of Section 91 broadly authorizes the federal government to "make Laws for the Peace, Order, and good Government of Canada," which is commonly referred to as the POGG power. Read literally, the list of "classes of subjects" (heads of power) that follows is intended to *clarify* ("for greater certainty") this broad legislative authority "but not so as to restrict the Generality of the foregoing Terms." The only *explicit* limit on the general POGG power is the explicit exclusion of those "classes of subjects" (heads of power) assigned to the provinces in Section 92.

Nevertheless, over the past several decades and again out of concern for maintaining the balance of federalism (as with the trade and commerce power), the POGG power has received a restrictive interpretation. Presently, it consists of two branches: the emergency branch, and the national concern branch. The emergency branch provides a broad constitutional basis for addressing national emergencies, but any legislation so passed must be temporary in nature (until the emergency passes).[83] The contours of, and test for, the "national concern" branch were recently revised in *References re: GGPPA*,[84] where, as noted at the outset of this paper, a majority of the Supreme Court of Canada upheld the *GGPPA* on the basis that "establishing minimum national standards of GHG price stringency to reduce GHG emissions" was a matter of national concern.[85]

Previously recognized matters of national concern include marine pollution[86] and interprovincial river pollution.[87] In *Reference re: IAA* (discussed above in relation to Section 91(24)), the Supreme Court held that the federal government could not rely on the matter of national concern identified in *Reference re: GGPPA* to constitutionally anchor the *IAA*'s application to the GHG emissions of major projects.[88] Consequently, subsequent reliance on the POGG power in relation

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[81] *Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters* [2009] 3 SCR 407 at paras. 36 and 37.

[82] *Reference re: IAA, supra* note 8 at para. 176. See also *supra* note 41 and, generally, Olszynski, M. (2018). Testing the jurisdictional waters: The provincial regulation of interprovincial pipelines. *Review of Constitutional Studies, 23*(1), 91.

[83] *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401 at pp. 431–32.

[84] *Reference re: GGPPA, supra* note 9.

[85] Ibid at para. 80.

[86] *R. v. Crown Zellerbach Canada Ltd., supra* note 83.

[87] *Interprovincial Co-operatives Ltd. v. The Queen,* [1976] 1 S.C.R. 477.

[88] *Reference re: IAA, supra* note 8 at paras. 182–189.

to climate change will entail establishing a new matter of national concern by satisfying the current three-part test:

(i) Threshold question: Is there an evidentiary basis for asserting that a given matter is of national importance?

(ii) Singleness, distinctiveness, and indivisibility: Can the matter be distinguished from matters falling within provincial jurisdiction, with a view towards provincial inability to address the matter in particular; and

(iii) Scale of impact: balancing provincial and federal interests at stake.

132. Imperial Treaty Power: Migratory birds

As a general rule, international treaty-making does not create federal jurisdiction; rather, international treaties must be implemented by the level of government that is constitutionally competent to do so (i.e., as set out in Sections 91, 92 and 92A of the Constitution). This was the case for the initial *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, Dec. 10, 1997, 2303 U.N.T.S. 162, and it remains the case for the more recent *Paris Agreement to the United Nations Framework Convention on Climate Change*, Dec. 12, 2015, T.I.A.S. No. 16-1104.

The one exception to this rule is prior Imperial treaties entered into by the United Kingdom on Canada's behalf. Section 132 of the Constitution Act, 1867, "authorizes legislation implementing Imperial treaties and includes jurisdiction to enact legislation going beyond the narrow terms of the treaty, so long as that legislation is ancillary to the treaty."[89]

This power provides the basis for the federal Migratory Birds Convention Act, 1994, SC 1994, c. 22, which is rooted in the 1916 *Convention Between the United Kingdom and the United States of America for the Protection of Migratory Birds in Canada and the United States* [1917] Gr. Brit. T.S. No. 7 (Cd. 8476).[90] This statute, and more specifically the contravention of its prohibition against the deposit of substances deleterious to migratory birds, formed the basis of the relatively well-known *R. v. Syncrude* prosecution, wherein Syncrude was prosecuted for the death of 1,600 migratory birds after these landed in one of its tailings ponds in 2008.[91] Migratory bird mortalities from oil sands tailings ponds continue to this day.[92]

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[89] *Hamilton Wentworth (Regional Municipality of) v. Canada (Minister of The Environment)* 204 FTR 161 at para. 165.

[90] Canada and the United States amended that convention in 1995: *Protocol between the Government of Canada and the Government of the United States of America Amending the 1916 Convention between the United Kingdom and the United States of America for the Protection of Migratory Birds in Canada and the United States*, Can. T.S. 1999 No. 34.

[91] 2010 ABPC 229 (CanLII).

[92] See Riley, S. (2021, January 21). "Transparency is critical": Buried report raises questions about oilsands bird monitoring program. *The Narwhal.* https://thenarwhal.ca/alberta-oilsands-bird-monitoring-foi/

6.0 Conclusion

While oil and gas development clearly falls within provincial legislative authority, the foregoing discussion makes clear that numerous sources of federal legislative authority are also implicated, both directly and indirectly. Oil and gas development on federal lands, offshore, and on Indigenous reserves, as well as its interprovincial and international transport and export, all fall directly under federal legislative authority. Indirectly, oil and gas development implicates and engages federal jurisdiction over navigation, fisheries, Indigenous Peoples and lands reserved for them, transboundary river pollution, migratory birds, and aspects of climate change (i.e., federal carbon pricing and prohibitions on GHG emissions under the federal criminal law power). Moreover, the discussion above shows that for much of the past two decades, these and other legislative authorities (e.g., with respect to taxation, and bankruptcy and insolvency) have been used to facilitate and promote oil and gas development, often at the expense of other federal interests, especially federal environmental interests. This state of affairs is not pre-ordained but rather the result of deliberate policy choices.

Appendix A. Distribution of Legislative Powers in the Canadian Constitution

Powers of the Parliament

91 It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

1A. The Public Debt and Property.

2. The Regulation of Trade and Commerce.

2A. Unemployment insurance

3. The raising of Money by any Mode or System of Taxation.

4. The borrowing of Money on the Public Credit.

5. Postal Service.

6. The Census and Statistics.

7. Militia, Military and Naval Service, and Defence.

8. The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of Canada.

9. Beacons, Buoys, Lighthouses, and Sable Island.

10. Navigation and Shipping.

11. Quarantine and the Establishment and Maintenance of Marine Hospitals.

12. Sea Coast and Inland Fisheries.

13. Ferries between a Province and any British or Foreign Country or between Two Provinces.

14. Currency and Coinage.

15. Banking, Incorporation of Banks, and the Issue of Paper Money.

16. Savings Banks.

17. Weights and Measures.

18. Bills of Exchange and Promissory Notes.

19. Interest.

20. Legal Tender.

21. Bankruptcy and Insolvency.

22. Patents of Invention and Discovery.

23. Copyrights.

24. Indians, and Lands reserved for the Indians.

25. Naturalization and Aliens.

26. Marriage and Divorce.

27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.

28. The Establishment, Maintenance, and Management of Penitentiaries.

29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

Subjects of Exclusive Provincial Legislation

92 In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.

3. The borrowing of Money on the sole Credit of the Province.

4. The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers.

5. The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.

6. The Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province.

7. The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.

8. Municipal Institutions in the Province.

9. Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.

10. Local Works and Undertakings other than such as are of the following Classes:

(a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province:

(b) Lines of Steam Ships between the Province and any British or Foreign Country:

(c) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.

11. The Incorporation of Companies with Provincial Objects.

12. The Solemnization of Marriage in the Province.

13. Property and Civil Rights in the Province.

14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

15. The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.

16. Generally all Matters of a merely local or private Nature in the Province.

Non-Renewable Natural Resources, Forestry Resources, and Electrical Energy

Laws respecting non-renewable natural resources, forestry resources and electrical energy

92A (1) In each province, the legislature may exclusively make laws in relation to

(a) exploration for non-renewable natural resources in the province;

(b) development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom; and

(c) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy.

Export from provinces of resources

(2) In each province, the legislature may make laws in relation to the export from the province to another part of Canada of the primary production from non-renewable natural resources and forestry resources in the province and the production from facilities in the province for the generation of electrical energy, but such laws may not authorize or provide for discrimination in prices or in supplies exported to another part of Canada.

Authority of Parliament

(3) Nothing in subsection (2) derogates from the authority of Parliament to enact laws in relation to the matters referred to in that subsection and, where such a law of Parliament and a law of a province conflict, the law of Parliament prevails to the extent of the conflict.

Taxation of resources

(4) In each province, the legislature may make laws in relation to the raising of money by any mode or system of taxation in respect of

> (a) non-renewable natural resources and forestry resources in the province and the primary production therefrom, and
>
> (b) sites and facilities in the province for the generation of electrical energy and the production therefrom,

whether or not such production is exported in whole or in part from the province, but such laws may not authorize or provide for taxation that differentiates between production exported to another part of Canada and production not exported from the province.

Primary production

(5) The expression *primary production* has the meaning assigned by the Sixth Schedule.

Existing powers or rights

(6) Nothing in subsections (1) to (5) derogates from any powers or rights that a legislature or government of a province had immediately before the coming into force of this section.

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