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Constitutional Division of Powers

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A Submission to the Expert Panel in the Review of Federal Environmental Assessment Processes

Thank you for the opportunity to participate in this review of Federal environmental assessment processes. Please understand that this paper expresses my own thinking about the law and not the views of any client.

I know that industry groups and Provincial Governments are contributing useful advice on practical means of reducing duplication and improving/restoring cooperation between Federal and Provincial authorities. I intend to confine my comments to the Constitutional division of powers which must underpin Federal environmental assessment processes carried out in relation to private development on privately-owned or Provincial Crown land. I hope that this fairly technical legal analysis will be useful to the Expert Panel in considering the constitutionality both of certain provisions of the *Canadian Environmental Assessment Act, 2012* (CEAA 2012) and of any amendments thereof that you may recommend.

It must be assumed that CEAA 2012 was intended to operate within the confines of Federal jurisdiction pursuant to sections 91 and 92 of the *Constitution Act, 1867.* An explicit purpose of CEAA 2012 is to "protect the components of the environment that are **within the legislative authority of Parliament** from significant adverse environmental effects." Yet, concerns have arisen about the extent to which Federal environmental assessment processes have overstepped Constitutional boundaries into matters which are regulated across the country at the Provincial level. Why is this happening and is it justified?

All Federal environmental assessment regimes prior to CEAA 2012 relied upon a triggering mechanism that placed the finding of a **Federal ground of jurisdiction** at the beginning of the process. For practical purposes, a privately-owned and financed development to be carried out on Provincial Crown land was not subject to the Federal environmental assessment process unless it required a Federal permit, most often under the *Fisheries Act*. Even then, the project scoping phase often restricted the ambit of the assessment to portions of the project that were related to the Federal trigger. Even if the "scope of the project" was not so restricted, the environmental impacts considered in the assessment were those squarely within Federal jurisdiction, which did not include matters such as dust emissions in the local area of construction or closure of land-based facilities at the end of operations.

CEAA 2012 changed the start of the process in two ways. Firstly, the triggering mechanism for private development on Provincial Crown land is now a list of designated projects which must be described to the Canadian Environmental Assessment Agency, without regard to whether any Federal decision or other action is to be taken in relation to those projects. The first step is for the Agency to screen out projects which are not suitable for Federal assessment, but the new screening step relates to **impact on Federal areas of jurisdiction**, rather than **decisions** within Federal jurisdiction. Thus, there is potential for projects to be made subject to Federal assessment even if they entail no Federal money or land and require no Federal decisions to be made. This is problematic because environmental assessment has always been and continues to be understood as a **planning tool,** not as an end in itself.

The Constitutional basis for Federal environmental assessment was addressed in *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] S.C.J. No. 1 (*Oldman River*), which affirmed the constitutionality of the Guidelines Order, the predecessor to CEAA. The Guidelines Order, like all other Federal environmental assessment regimes until CEAA 2012, was predicated on environmental assessment being a **planning tool to aid decision making** in areas **unquestionably under Federal jurisdiction.** It was determined that, **once a Federal decision-making process** was properly engaged, the Federal environmental assessment could and should contemplate **all impacts on areas of Federal responsibility,** but no more than that.

The environment does not fit neatly into any one of the powers allocated to the Federal and Provincial Crowns in sections 91 and 92 of the *Constitution Act, 1867.* The areas of exclusive Federal and Provincial jurisdiction, with potential overlap, are nicely described in "Federal and Provincial Jurisdiction to Regulate Environmental Issues," Publication No. 2013-86-E, dated September 24, 2013, a Background Paper prepared by the Economic, Resources and International Affairs Division of the Parliamentary Information and Research Service. As that paper notes, there is **no plenary power** over the environment:

Lawmakers interested in regulating in relation to environmental issues must bear in mind which aspects of the physical environment fall under Federal jurisdiction, which are under Provincial jurisdiction, and which may be regulated by both levels of government.

Effectively, with powers over subject matter such as property and civil rights in the Province, all matters of a local and private nature, and ownership and development of all natural resources, there is no area of the environment which the Provinces cannot regulate inside their boundaries. There is no such sweeping category to support Federal jurisdiction over the environment.

If there is no plenary power in one jurisdiction or the other, the Courts must apply interpretive tools to determine whether a particular statutory provision can be justified by the heads of power allocated to that level of Government. The tool applied by the Supreme

Court of Canada in *Oldman River* and numerous other cases to decide whether Canada and the Provinces can both regulate a particular subject matter is the "pith and substance" test. The test examines the purpose of the provision and determines whether its main purpose is within that jurisdiction's powers. If it is, the effect on the jurisdiction of the other is **merely incidental** to its "pith and substance" or **main purpose**. In *Oldman River*, the only decision to be made in the Federal house was to apply the *Navigable Waters Protection Act*. The Supreme Court found that the pith and substance of the Guidelines Order was to require the decision-maker to gather information about environmental impacts within **all the heads of power under Federal jurisdiction** before making that decision about navigation. Thus, the pith and substance of the provision was to **aid in Federal decision making** and the intrusion into Provincial jurisdiction over the proposed dam was "**merely incidental**."

Another example may be found in the cases describing the scope and content of the Federal power over fisheries. The regulation of fisheries is a matter given to Parliament under section 91(12) of the *Constitution Act, 1867*. Any provision regulating fisheries will also affect the regulation of property and civil rights in the Province, a matter allocated to the Provinces under section 92(13). If the **true purpose** of the Federal provision is protection of the fishery, its effect on property is found to be **merely incidental** to the Federal purpose and the conflict does not prevent Parliament from legislating. On the other hand, if the Federal provision is insufficiently connected to protection of fisheries, the Federal provision will be found to be outside the power of Parliament to enact.

Two Supreme Court of Canada decisions, *R. v. Fowler*, [1980] 2 S.C.R. 213 (*Fowler*) and *Northwest Falling Contractors Ltd. v. R.*, [1980] 2 S.C.R. 292 (*Northwest Falling*), illustrate where this line is drawn in the case of the Federal fisheries power. In *Fowler,* the Court struck down a provision of the *Fisheries Act* which effectively prevented the deposit of the ordinary by-products of logging into all waterways; by contrast, in *Northwest Falling*, a related provision prohibiting the deposit of **deleterious substances** into water frequented by fish was upheld. Both of these *Fisheries Act* provisions trenched on Provincial powers over property and civil rights in the Province, but one was found to have the primary purpose of protecting fisheries with only an incidental effect on Provincial jurisdiction, while the other was found to be insufficiently connected to the Federal fisheries power to be a valid exercise of the Federal power. These cases demonstrate that it is important to understand the **content and scope of the power** to which the Federal environmental statutory provision is said to be connected.

The second significant change introduced by CEAA 2012 is the inclusion of the list of environmental effects set out in section 5. Federal jurisdiction unquestionably encompasses the environmental effects listed in sections 5(1)(a) and (b). The effects listed in these sections relate to fish and fish habitat, aquatic species and migratory birds, and all manner of effects on Federal lands or land in a jurisdiction **outside** the Province where the proposed project is located. Each of these subject matters is directly linked to at least one head of

Federal power. Therefore, federal assessment of impacts in these areas with a view to preventing significant adverse effects is likely *intra vires*, even when there is no decision to be made under other Federal statutes.

However, section 5(1)(c) of CEAA 2012 also includes a list of effects relating to "Aboriginal peoples." The list includes effects of changes in all aspects of the physical environment on health and socio-economic conditions, physical and cultural heritage, current use of lands and resources for traditional purposes and structures, sites or things of historical, archaeological, paleontological or architectural significance. As the provision is stated, the precipitating change in the physical environment could be to **components not directly subject to Federal jurisdiction**. Forests, mineral resources, local emissions to air and terrestrial wildlife, for example, do not engage any discrete area of the environment clearly linked to a Federal power. CEAA 2012 requires that changes to these aspects of the environment be considered to see if the changes will affect, for example, the health and socio-economic conditions of Aboriginal peoples. Section 5(1)(c), together with the duty to set conditions contained in sections 52 and 53, can lead to the setting of conditions which duplicate the **heart of Provincial regulation over resource use**, such as regulation of air quality in local areas and impacts to Provincial Crown or privately-held land and terrestrial resources.

It must be considered, therefore, whether there is any Constitutionally valid basis for section 5(1)(c). This requirement is within Federal power to enact only if it truly involves subject matter which has a **double aspect**, one Provincial and the other Federal, and only if the provision is, **in pith and substance**, made for the purpose of that Federal aspect.

The Constitution contains two sources of Crown powers and duties in relation to Aboriginal peoples, one in section 91(24) of the *Constitution Act, 1867*, which grants power over "Indians, and Lands reserved for the Indians" to the Federal Crown, and one in section 35 of the *Constitution Act, 1982*, which enshrines Aboriginal and treaty rights.

One of the purposes of CEAA 2012 was to enhance the role that environmental assessments play in fulfilling the section 35 Crown duty to consult Aboriginal groups. The Federal Crown clearly has such a duty **in relation to decisions that it contemplates** which could affect the exercise of Aboriginal or treaty rights. For example, before making a *Fisheries Act* decision to permit changes to waterways that could affect Aboriginal fishing or trapping, it must fulfill the Crown's duty to consult and either accommodate or justify infringement on the Aboriginal or treaty right. Some of the information gathered pursuant to section 5(1)(c) would support Crown consultation with Aboriginal peoples concerning the impacts of proposed projects; that may well have been one of the considerations in drafting CEAA 2012.

Until the release of two recent Supreme Court of Canada decisions (made after CEAA 2012 was enacted), it also might have been thought that **section 35 decisions concerning Aboriginal and treaty rights** were connected to the content of the power over Indians and

lands reserved for Indians contained in section 91(24) and, thus, **Federal in nature**. However, two Supreme Court of Canada cases released as companion decisions on May 15, 2014 **explicitly dispel that notion**.

In *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 (*Tsilhqot'in*), the landmark decision confirming Aboriginal title to a large tract of land in British Columbia, the Supreme Court found that the regulation of forestry on **Aboriginal title lands** presents a "double aspect." The Federal Crown has jurisdiction over **Aboriginal title land** under its power over "Indians, and Lands reserved for the Indians," but the Province has jurisdiction over forestry under its power over property and civil rights. The Province may regulate the forestry resource on Aboriginal title land, as it may anywhere else, provided that it meets the Crown's section 35 obligations to consult and accommodate the Aboriginal title holder or justify any infringement. **The Federal Crown has no role in the exercise of that duty**. Thus, both Canada and the Provinces are subject to the Crown duty to consult and accommodate Aboriginal peoples concerning the exercise of their section 35 Aboriginal and Treaty rights. Both may infringe on those rights provided that the justification test has been met.

Similarly, the Federal government has no role to play in consulting and accommodating First Nations that are party to treaties when Provinces "take up" Provincial Crown land to make resource allocations (*Grassy Narrows First Nation v. Ontario (Natural Resources)*, 2014 SCC 48 (*Grassy Narrows*), applying *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69)).

The principle to be learned from these companion cases is that **neither Crown is responsible for or entitled to** exercise the role of the other in consulting about decisions within its own jurisdiction. Also, it was the **presence of Aboriginal title land** that supported the finding of a "double aspect" in *Tsilhqot'in*. In light of *Tsilhqot'in* and *Grassy Narrows*, both Crowns must deal directly with Aboriginal peoples in relation to their section 35 Aboriginal and Treaty rights. Notwithstanding the Federal power over Indians and lands reserved for Indians, there is **no special Federal power or duty** to consult or accommodate Aboriginal peoples about resource decisions made by Provincial Crown governments. It does not appear, therefore, that the section 35 rights of Aboriginal peoples can be the ground for a **specifically Federal power** to carry out environmental assessments of **impacts of Provincial resource decisions** that implicate the exercise of Aboriginal or treaty rights to use lands and resources for traditional purposes.

It may be that in constructing the scheme set out in section 5 of CEAA 2012, the Federal government assumed that it had a special role to play in decisions that affect Aboriginal and Treaty rights and that decisions such as these were integral to the Federal power over Indians and lands reserved for Indians. Not so, said the Supreme Court definitively in *Tsilhqot'in* and *Grassy Narrows*. Thus, there is no need for a statutory provision which causes the Federal government to assess or set out conditions pertaining to the impacts of **Provincial Crown resource decisions** on areas of the environment which are subject to

current use by Aboriginal peoples for traditional purposes or other matters touching Aboriginal or treaty rights. Such matters are what lie at the heart of the **Provincial Crown's** duty to consult and accommodate the Aboriginal people or justify infringement on its rights, a process in which the **Federal government has no role**.

So what is left that could support section 5(1)(c) of CEAA 2012? Only the Federal power over "Indians, and lands reserved for the Indians" contained in section 91(24) of the *Constitution Act, 1867*, standing on its own. In my view, section 5(1)(c) is valid as legislation in relation to section 91(24) only if it concerns a **subject matter** that **truly presents a double aspect** and only if, in **pith and substance,** it concerns the **Federal power over Indians and lands reserved for Indians**. The matters to be assessed and conditions set in accordance with section 5(1)(c) regulate resource developments which are within Provincial jurisdiction and which have effects on elements of the environment (such as dust and other local air emissions) which also lie wholly within Provincial jurisdiction. The justification for trenching on Provincial jurisdiction appears to be that they have **incidental effects on Aboriginal peoples**, including for example, the "health of Aboriginal peoples." Although these impacts are cast in the provision as impacts to the "health of Aboriginal peoples," in fact they are related to the health of human beings generally.

A challenge to this provision would put directly into issue the **outer limit of the scope and content of the section 91(24) power**. Thus far, the Courts have not answered this question. The cases that have considered the power have been about finding the "protected core" of the Federal power, on which Provincial laws may not impinge, rather than the outer limit of the Federal power. These cases were trying to determine when the subject matter at issue makes the **Federal power exclusive**, rather than when the subject matter might have a **double aspect with concurrent jurisdiction** or when the subject matter is subject **only to Provincial jurisdiction**. In other words, there is no case which does for section 91(24) what the *Fowler* and *Northwest Falling* cases do for the fisheries power.

The cases do tell us something about the protected core of the power. In the 2010 decision in *NIL/TU,O Child & Family Services Society* v. *B.C.G.E.U.,* 2010 SCC 45, the Supreme Court reviewed the cases considering section 91(24) and summarized the functions that have been treated under the section 91(24) power. They concluded that the "basic, minimum and unassailable content" of the Federal power relates to the "status and rights of Indians," for which purpose, Indians are federal persons. Taking into account the further decisions in *Tsilhqot'in* and *Grassy Narrows*, some of the matters that fell under this category and which are still relevant are:

- Indian status;
- The "relationships within Indian families and reserve communities";
- "[R]ights so closely connected with Indian status that they should be regarded as necessary incidents of status such … registrability, membership in a band, the right to participate in the election of Chiefs and Band Councils, reserve privileges, etc.";

- The disposition of the matrimonial home on a reserve;
- The right to possession of lands on a reserve and, therefore, the division of family property on reserve lands; and
- The right to advance a claim for the existence or extent of Aboriginal rights or title in respect of a contested resource or lands [as was done in *Tsilhqot'in*].

As the Supreme Court in *NIL/TU,O* recognized, the protected core of the section 91(24) power is narrow. Aboriginal peoples are "members of the broader population and, therefore, in their day-to-day activities, they are subject to provincial laws of general application" (para. 73 and see also: *Canadian Western Bank v. Alberta*, 2007 SCC 22 (*Canadian Western Bank*) at para. 61). In *Canadian Western Bank*, the Supreme Court similarly noted that there is no need for federal exclusivity in matters remote from the Federal Government's special responsibilities for Aboriginal peoples, and that "[i]n other words, in their federal aspect ("Indianness"), Indian people are governed by federal law exclusively, but in their activities as citizens of a province, they remain subject to provincial laws of general application." (*Canadian Western Bank* as cited in para 69 of *NIL/TU,O Child and Family Services Society v. B.C.G.E.U.*)

The *Four B Manufacturing Ltd v. U.G.W.*, [1980] 1 S.C.R. 1031 case considered whether Provincial labour relations law applied to a shoe manufacturer owned by "Indian" shareholders, employing mostly "Indian" workers, located on an Indian Reserve, operating under a Federal permit and financed by Federal funds. The *NIL/TU,O Child and Family Services Society v. B.C.G.E.U.* case asked the same question concerning a child welfare agency providing child welfare services designed to preserve Aboriginal cultural identity. The answer was the same in both cases: neither of these types of organizations was found to fall within the "core of Indianness reserved to the Federal government" (*Ibid.* at para. 73). The Court concludes that the "scope of the core of s. 91(24) is admittedly narrow" (*Ibid.* at para. 73), finding that its core relates to matters that go to the **status and rights of Indians.** It is in this respect that "Indians" are "Federal persons" (*Ibid.*, at para. 70).

The policy behind these decisions was to **encourage cooperative Federalism**, which preserves as much freedom as possible for both Federal and Provincial legislatures to legislate in overlapping areas. The content of the power over Indians and lands reserved for Indians, though, **must have an outer limit**, past which Federal jurisdiction cannot be stretched. It may very well be that the limit has been reached where the subject matter is, for example, impacts on human health, particularly where there is no assertion by the Federal Government that Aboriginal people should be treated differently from other human beings in that regard. If that is the case, there is no basis for finding a "double aspect," and section 5(1)(c) of CEAA 2012 (at least portions and perhaps all of it), and related provisions which permit conditions to be set on Provincially-controlled resource developments, cross that outer limit; and the power they grant to the Federal Government to assess environmental effects and place conditions on air quality and other matters of general application is Constitutionally invalid.

While the Courts have not determined the outer limit of the content of the power, the existing case law supports the view that the content of the section 91(24) power **must include something that distinguishes** - or that the Federal government **thinks should distinguish** - Aboriginal people from other Canadians, rather than the ways in which they are the same as all human beings. There would not appear to be any principled basis for a distinction to be made between Aboriginal and non-Aboriginal persons in the way in which they are affected by air or drinking water quality. If the health of Aboriginal persons presents no double aspect, there is no Constitutional basis for such regulation. The same analysis may be applied to the other aspects of section 5(1)(c).

Even if there were a double aspect, it may be argued that this portion of CEAA 2012, in pith and substance, is a process for the assessment of the environmental effects of a privately owned development on components of the environment which are clearly under Provincial jurisdiction with a view to setting conditions on its operation and that the control of any indirect effect on Aboriginal people is merely incidental to its true purpose and effect. That is the reverse of what is required to pass the pith and substance test. Thus, it appears likely to me that the pith and substance of section 5(1)(c) is too remote from any Federal power for it to be valid.

In summary, the wording of section 5(1)(c) of CEAA 2012 directly puts into issue the content of the Federal power over “Indians,” which has yet to be decided. It may be wise therefore to consider amendment of the Act to delete what may have been an **unintended incursion** into Provincial resource management decisions.

In addition, it may be useful to consider adding at the beginning of the process an amendment to the section 10 screening process. At this time, private developments on Provincial Crown land which are subject to Provincial environmental assessment and control must undergo the screening process even if no Federal permits or other actions will be required. I would recommend consideration of whether these proposed developments should be required to undergo screening at all.

I trust that this analysis will be useful to you. Please accept my thanks for the opportunity to participate in this very important process.

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