Divided We Stand: Provinces and Feds Carry on the Scrap over the Environment

Authors: John Stefaniuk, K.C.

published 01/02/2024

When Canada's fathers of Confederation (there were no women at the table) first met in Charlottetown in 1864, little could they anticipate that the courts would still be hashing out the details 156 years after the product of their efforts, the *British North America Act* (now known as the *Constitution Act, 1867*) became Canada's Constitution. A good part of it is devoted to the division of powers between Canada's federal government and provincial governments. We are, after all, living in a federation.

In 1867, things looked simpler. Fisheries? Feds. Property and civil rights? Provinces. Currency and banking? Feds. Marriage? Provinces. Criminal law? Feds. No one would have contemplated "the environment" as a category of jurisdiction to be assigned exclusively to either level of government.

Hydro Quebec

Now move to 1990. Canada had enacted the Canadian Environmental Protection Act (CEPA) in 1985 and passed regulations in relation to the storage and handling of polychlorinated biphenyls (PCBs). PCBs were known to be a bioaccumulative, persistent, organic pollutant even then. In 1990, Canada charged Hydro Quebec with dumping PCBs, contrary to the regulations.

Hydro Quebec challenged the law. It said that Environment Canada did not have jurisdiction. It said that the regulation of PCBs was a matter of provincial law.

The dispute went to the Supreme Court of Canada, which, in 1997, by a 5-4 split decision, held that the regulation of the environment is an area of shared jurisdiction, The majority decided that Canada's criminal law power could support the charges, the regulation, and CEPA itself. Justice La Forest, writing for the majority, described the role of the courts in the adjudication of the limits of this shared jurisdiction:

The all-important duty of Parliament and the provincial legislatures to make full use of the legislative powers respectively assigned to them in protecting the environment has inevitably

placed upon the courts the burden of progressively defining the extent to which these powers may be used to that end. In performing this task, it is incumbent on the courts to secure the basic balance between the two levels of government envisioned by the Constitution. However, in doing so, they must be mindful that the Constitution must be interpreted in a manner that is fully responsive to emerging realities and to the nature of the subject matter sought to be regulated.

In the Hydro Quebec case, the SCC concluded that the federal government could rely on its criminal law power to prohibit conduct (in this case, the introduction of toxic substances into the environment) and enforce the prohibition through penalties as being the dominant purpose of CEPA and the *PCB Regulations*.

Reference re Impact Assessment Act

Fast forward to 2023. After an extensive review of federal environmental assessment legislation, Parliament enacted the *Impact Assessment Act* (the "IAA") in 2019. Regulations were passed under the IAA to designate which classes of projects would be subject to the federal environmental assessment process.

Alberta (later joined by just about every other province) objected. It said that the federal government exceeded its jurisdiction by including resource projects that had no adverse effects that fell within federal jurisdiction, such as impacts on fisheries, migratory birds, reserves, or international or interprovincial impacts. Alberta used its power to bring a constitutional reference in the courts. Alberta said that many projects fell within the exclusive authority of the provinces over local works and undertakings, and natural resources.

In October of this year, the SCC released its decision in which a majority concluded that the IAA was partly invalid, insofar as it resulted in environmental assessments of projects without federal impacts and assessment of impacts outside of the spheres of federal authority. Chief Justice Wagner wrote for the majority:

[I]t is clear that Parliament can enact legislation to protect the environment under the heads of power assigned to it in the *Constitution Act, 1867*. It is also open to Parliament to enact an impact assessment scheme as part of its laudable pursuit of environmental protection and sustainability… However, such a scheme must be consistently focused on federal matters… Projects ought to be designated based on their potential effects on areas of federal jurisdiction because, as I have explained, requiring definitive proof of such effects would put the cart before the horse. At the assessment stage, it would be both artificial and uncertain to limit the factors that can be considered to those that are federal. But, for the scheme to be *intra vires*, its main thrust must be directed at federal matters. The Agency's screening decision must be rooted in the possibility of adverse federal effects. The public interest decision must focus on the acceptability of the adverse federal effects. The scheme must

ensure that, in situations where the activity itself does not fall under federal jurisdiction, the decision does not veer towards regulating the project *qua* project or evaluating the wisdom of proceeding with the project as a whole. Finally, the effects regulated by the scheme must align with federal legislative competence…

Canada has gone back to the drawing board to develop amendments that would address the SCC's conclusions.

Responsible Plastic Use Coalition v. *Canada*

A coalition of plastic product companies and plastics suppliers challenged an Order resulting in the inclusion of "plastic manufactured items" ("PMIs") as toxic substances in the regulations enacted under the *Canadian Environmental Protection Act, 1999* ("CEPA"). Alberta and Saskatchewan joined in, arguing that, besides being unreasonable, the Order was unconstitutional. The Order was subsequently replaced by the *Single-Use Plastics Prohibition Regulation*.

On November 16, 2023, Justice Furlanetto of the Federal Court released her decision which struck down the Order. She found that the inclusion of all PMIs as toxic did not consider all of the variables that would affect the likelihood of how or whether a specific PMI would enter the environment and cause harm. To that extent, the Order was unreasonable. She also held that the breadth of the prohibition threatened the balance of federalism and could not be supported under the federal criminal law power. The federal minister of environment has announced that the decision will be appealed.

What's next?

Well, for starters, Alberta has laid down the gauntlet by passing the *Alberta Sovereignty Within a United Canada Act*. This legislation purports to give the province the power to ignore federal laws that it wants to choose to ignore. It is being used to oppose Canada's *Clean Electricity Regulations*. The smart money is on Canada. Nonetheless, it should make for some interesting political theatre and possibly a court process that will provide even more guidance on the limits on provincial and federal powers over environmental matters.

This article was written for Mid-Canada Forestry and Mining magazine and is reproduced with permission.

***John Stefaniuk** is a Manitoba-based lawyer who practises environmental and natural resource law.*

*If you have an environmental or natural resources law matter, **contact John** or any one of our **natural resources and energy law** lawyers.*