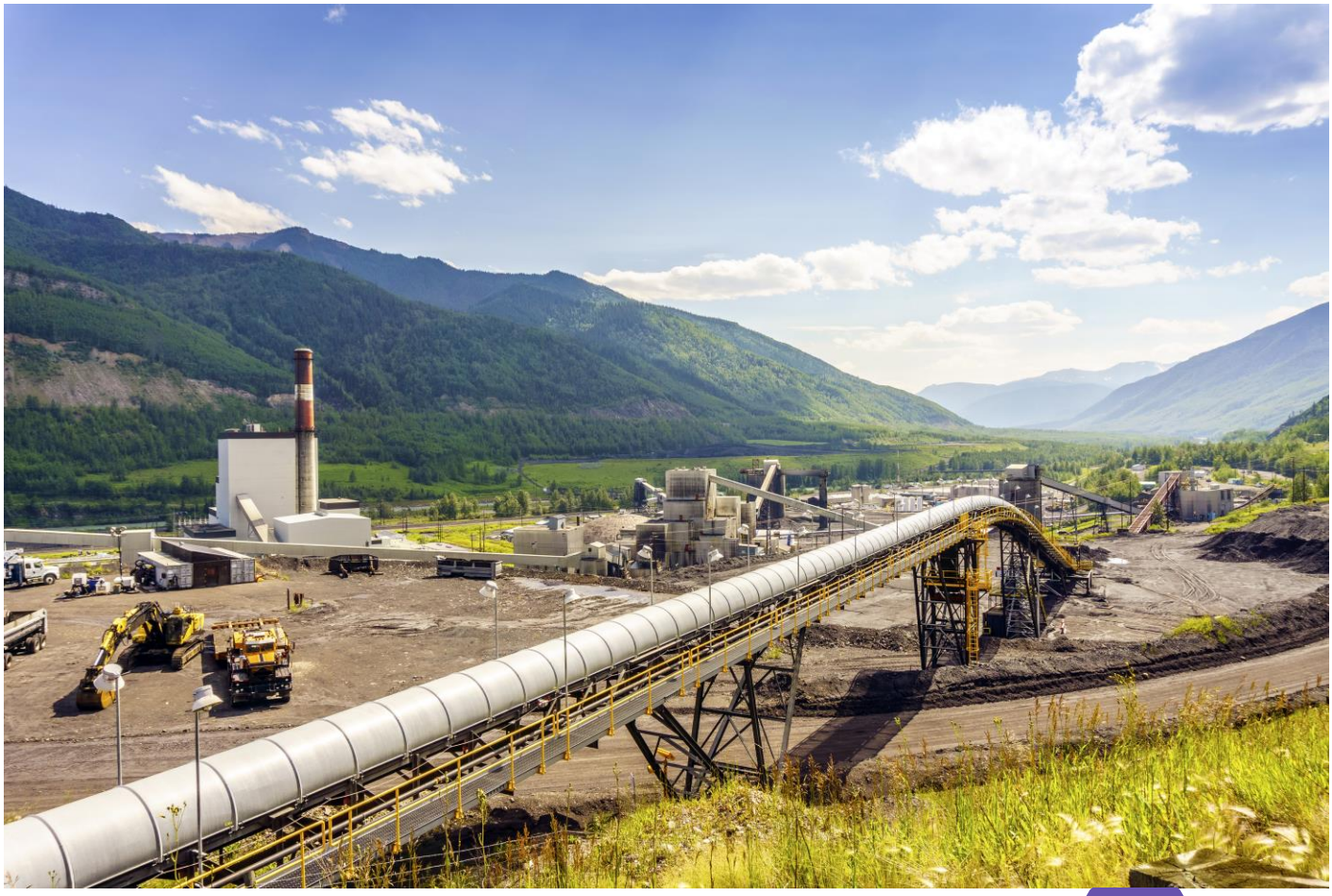
Canada's Constitution and Natural Resource Development

By John Stefaniuk



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One hundred fifty years after Confederation, there is a flurry of activity in the Canadian court system in relation to Canada's Constitution and its impacts on natural resource development and regulation. So what does the Canadian Constitution have to do with natural resources anyway? Let take a look.

The Division of Powers

When the Canadian Federation was formed in 1867 under the *British North America Act* (now referred to as the *Constitution Act, 1867*), law-making jurisdiction was divided between the federal and provincial governments. Parliament was given exclusive jurisdiction to make laws in relation to (among other things) trade and commerce, fisheries, First Nations, interprovincial railways and undertakings, and anything not under exclusive provincial jurisdiction. The provinces were given exclusive jurisdiction over such matters as direct taxation within the provinces, management and sale of public lands and timber belonging to the province, local works and undertakings, and property and civil rights. In the decades immediately following Confederation, a number of court cases went up to the Supreme Court and the Privy Council in England seeking clarification on just where the boundary lines between federal and provincial jurisdictions lay.

When the three Prairie Provinces, Manitoba, Saskatchewan and Alberta, entered Confederation, the federal government at the time reserved federal jurisdiction in Crown lands and natural resources in those provinces. You can see some of this evidenced in old Dominion Land Grants from the Crown. Understandably, given that the other provinces all had control over the natural resources within their boundaries, the Prairie Provinces objected to this unequal treatment. Those objections resulted in the Natural Resources Transfer agreements of 1930 (and subsequent amendments), which gave the Prairie Provinces jurisdiction over natural resources equal to those of the other provinces. Those agreements also forever preserved the rights of First Nations to hunt, fish and trap on unoccupied Crown lands within those provinces.

When the Canadian Constitution was repatriated in 1982, it was amended to clarify that the provinces had exclusive jurisdiction in making laws in relation to exploration for non-renewable natural resources in the provinces, and the development, conservation and management of non-renewable natural resources and forestry resources. This power also extends to the development, conservation and management of sites and facilities in the province for the generation and production of electrical energy. The amendments confirmed the non-exclusive taxing authority of the provinces over non-renewable natural resources.

Resource developers are sometime surprised to learn that there are two levels of government that have to be dealt with. For example, a mining or forestry project might be situated entirely within the boundaries of a province; however, if the project has potential impacts on fisheries or migratory birds (the *Migratory Birds Convention Act* falling under Canada's international treaty-making jurisdiction), then federal approvals may be required.

Battles can ensue (and have ensued in the past) when there are conflicts between the application of provincial and federal legislative powers. You can see this in the recent litigation surrounding the Trans Mountain Pipeline, the greenhouse gas tax litigation, and in the discussions surrounding Bill C-69, the new, proposed federal *Impact Assessment Act*.

Aboriginal and Treaty Rights

Section 35 of the Constitution came in as part of the 1982 amendments. It recognizes and affirms the aboriginal and treaty rights of the "aboriginal peoples of Canada". Those peoples are defined to include the Indian, Inuit and Metis peoples of Canada. Those "treaty rights" include rights that already existed by way of land claims, agreements or those rights that may be acquired.

As a result of the recognition of those rights in our Constitution, and the development of concepts like the honour of the Crown, neither a provincial nor a federal government can take action that could have the effect of derogating from those constitutionally protected rights without appropriate prior consultation, and, if necessary, mitigation and compensation. The interpretation of those rights, the exposition of the duty to consult and the exploration of mitigation and accommodation form the of a number of court decisions in the context of natural resource development.

The constitutional protection of Indigenous rights applies to all levels of government, and is not related to the exclusive jurisdiction of the federal government over "Indians and lands reserved for Indians".

Shared Jurisdiction – e.g., the Environment

A lot has changed since Canada's original Confederation. Both resource development and society have evolved. As an example, the "environment" as an area of concern or legislative jurisdiction, would not have been in the separate contemplation of the drafters of the Constitution in 1867. In those circumstances, the courts have been asked to interpret the Constitution as a living document, and to help to fill in some of the gaps. In the leading case of *R.* v. *Hydro-Quebec*, decided in 1997, the Supreme Court of Canada had to decide whether Hydro-Quebec (which operated only in that province) was subject to prosecution for violating federal PCB storage and handling regulations. The court held that regulation of the environment was not a specifically enumerated head of power under the Constitution and that it was an area of shared jurisdiction. In a five-four split, the Supreme Court decided that PCB regulation was a valid exercise of the federal government's criminal law powers.

Since the *Hydro-Quebec* case, both the provinces and the federal government (to the surprise of some regulated businesses) are recognized to have jurisdiction in this field. At the same time, the Supreme Court has been reluctant to limit provincial powers in areas of shared jurisdiction. In the *Hudson (Spraytech)* case from 2001, the Supreme Court upheld a municipal ban on cosmetic pesticides, even in the face of valid provincial licences to apply federally approved products, on the basis that it was not *impossible* for the regulated lawn care companies to simultaneously comply with both the ban and the legislation. That is not to say that the courts will not strike down provincial legislation that clearly steps on federal jurisdiction, as the British Columbia Court of Appeal has very recently done in connection with that province's attempts to regulate the transportation of heavy oil over interprovincial pipelines in *Reference re Environmental Management Act (British Columbia)*.

As long as society continues to change and governments and affected private parties are prepared to challenge legislation on constitutional grounds, we can expect the courts to continue to clarify these constitutional limits well into the next one hundred fifty years of Confederation.

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ABOUT THE AUTHOR

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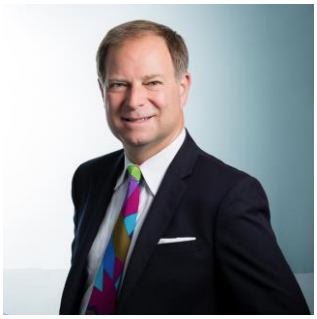

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John Stefaniuk engages in a broad practice with emphasis on environmental law, real estate and development law, natural resources and energy, commercial law and municipal law.