

PREPARING FOR A MID-LIFE CRISIS: SECTION 92A AT 40

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Section 92A, the resources amendment, was added to Canada's foundational constitutional document in 1982 at the same time as Canada patriated its Constitution from Westminster and adopted the Canadian Charter of Rights and Freedoms. The provision was designed to confirm and enhance the legislative and executive authority of provincial governments. As we approach the fortieth anniversary of section 92A, Canada appears destined for another federation-defining conflict over resource-related issues including the construction of new pipelines, legislative and policy responses to greenhouse gas emissions, and the reach of federal environmental impact assessment legislation. This article begins by examining the events that led to the adoption of section 92A and next assesses both how litigants have invoked section 92A and how Canadian courts have interpreted its text in the 40 years since its adoption. Earlier decisions relied on section 92A to confirm the validity of provincial or municipal legislation, but, in more recent cases, section 92A has been invoked to question the validity or applicability of federal legislation. Section 92A arose out of conflict with respect to trade in resources and the right to appropriate the economic rent associated with developing those resources. The current conflicts focus on the power to make laws with respect to the development and exploitation of those resources.

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I. INTRODUCTION

Section 92A, along with its accompanying Sixth Schedule, was added to Canada's foundational constitutional document in 1982 at the same time as Canada patriated its

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Constitution from Westminster and adopted the *Canadian Charter of Rights and Freedoms*.¹ Known colloquially as the “resources amendment,” the provision was designed to confirm and enhance the legislative and executive authority of provincial governments with respect to resource exploitation within the boundaries of the respective provinces. A significant body of literature on the resources amendment emerged in the years immediately following its adoption, but there has been little written on the subject since.²

As we approach the fortieth anniversary of section 92A, Canada appears destined for another federation-defining conflict over resource-related issues including the construction of new pipelines, legislative and policy responses to greenhouse gas emissions, and the reach of federal environmental impact assessment legislation. It is therefore appropriate, 40 years on, to assess how litigants have invoked section 92A and how Canadian courts have interpreted its text. This will help shed light on how our understanding of section 92A has evolved and what role section 92A may play in the resolution of current disputes.

The article begins by examining the events that led to the adoption of section 92A before turning to review the case law and literature on section 92A. Parties have referenced section 92A to support or confirm the validity of provincial or municipal legislation but, in more recent cases, and especially in the majority decisions of the Alberta Court of Appeal in the *Reference re Greenhouse Gas Pollution Pricing Act*,³ and the *Reference re Impact Assessment Act*,⁴ provincial interests have invoked section 92A to buttress arguments questioning the validity or applicability of *federal* legislation. And, while section 92A arose out of conflict with respect to trade in resources and the right to appropriate the economic rent associated with developing those resources, the current conflicts focus on the power to make laws with respect to the development and exploitation of those resources.

II. THE ROAD TO SECTION 92A

Accounts of the adoption of section 92A emphasize a number of developments in international energy markets as well as domestic events⁵ including: the rising conflict over resource jurisdiction largely due to dramatic changes in world energy prices; federal and provincial responses to that pricing environment; and two decisions of the Supreme Court

¹ *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 92A, reprinted in RSC 1985, Appendix II, No 5; *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

² The contemporaneous accounts and analysis include William D Moull, “Natural Resources: Provincial Proprietary Rights, the Supreme Court of Canada, and the Resource Amendment to the Constitution” (1983) 21:3 *Alta L Rev* 472 [Moull, “Proprietary Rights”]; William D Moull, “Section 92A of the Constitution Act, 1867” (1983) 61:4 *Can Bar Rev* 715 [Moull, “Section 92A”]; Brian W Semkow, “Energy and the New Constitution” (1985) 23:1 *Alta L Rev* 101; G Bruce Doern & Glen Toner, *The Politics of Energy: The Development and Implementation of the NEP*, vol 4 (Toronto: Methuen, 1985); Robert Cairns, Marsha A Chandler & William D Moull, “The Resource Amendment (Section 92A) and the Political Economy of Canadian Federalism” (1985) 23:2 *Osgoode Hall LJ* 253. Roy Romanow, John Whyte & Howard Leeson, *Canada ... Notwithstanding: The Making of the Constitution 1976–1982* (Toronto: Thomson Carswell, 2007) offers a perspective from those present during the negotiations. More recent work includes Michael Howlett, “The Politics of Constitutional Change in a Federal System: Negotiating Section 92A of the Canadian Constitution Act (1982)” (1991) 21:1 *Publius: J Federalism* 121; Susan Blackman et al, “The Evolution of Federal/Provincial Relations in Natural Resources Management” (1994) 32:3 *Alta L Rev* 511.

³ 2020 ABCA 74 [*Alberta GGPPA Reference*], appeal allowed in *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 [*GGPPA References*].

⁴ 2022 ABCA 165 [*IAA Reference*].

⁵ This section draws on the sources referenced in *supra* note 2.

of Canada, *Canadian Industrial Gas & Oil Ltd v. Government of Saskatchewan*⁶ and *Central Canada Potash Co. Ltd. v. Government of Saskatchewan*.⁷ But, the broader discussions of constitutional reform initiated by Prime Minister Pierre Elliott Trudeau in 1976, intended principally to address concerns raised by Quebec nationalism, were of equal importance.⁸ Provincial premiers used the occasion of these discussions to add to the list of issues to be addressed including strengthened provincial authority over natural resources.⁹ These topics were discussed further in the next two years, ultimately crystallizing in a Best Efforts Draft amendment to Canada's constitution in February 1979.¹⁰ While that Best Efforts Draft was not included in Trudeau's Resolution to patriate the Constitution and adopt the *Charter*, pressure from the federal New Democratic Party (NDP) led to the Special Joint Committee proposing an amendment to the Resolution providing for what became section 92A and the Sixth Schedule.¹¹ The following sections expand on these points.

A. CHANGES IN ENERGY MARKETS AND RISING CONFLICT OVER RESOURCE JURISDICTION

In the 1970s, issues of jurisdiction, equity, and revenue sharing were paramount as provinces and the federal government contested each others' jurisdiction to regulate the production of, and trade in, oil, gas, and other non-renewable resources. As Robert Cairns and co-authors outline in a 1985 article, the general tenor of federal and provincial policies prior to the 1973 oil crisis focused on encouraging development of the resource.¹² This extended as far as creating, under the 1961 National Oil Policy, a protected market in Eastern Canada for Canadian crude, defined by the Ottawa River Valley,¹³ which led to eastern Canadian consumers paying a premium of 27 cents per barrel over world prices.¹⁴ Prior to the oil price rise, provincial governments focused on policies to enable development and, to some degree, fix domestic prices for energy. While provincial agricultural marketing boards had been constituted largely to increase domestic prices for natural products, similar structures existed in the provinces to maintain low prices for the sale of coal or petroleum products within a province.¹⁵ For example, the British Columbia Petroleum Corporation

⁶ [1978] 2 SCR 545 [*CIGOL*].

⁷ [1979] 1 SCR 42 [*Potash*].

⁸ Romanow, Whyte & Leeson, *supra* note 2 at 1.

⁹ *Ibid* at 4. Other issues included limitations on the federal declaratory power, culture, communications, the Supreme Court, and the federal spending power.

¹⁰ Cairns, Chandler & Moull, *supra* note 2 at 263–66; Romanow, Whyte & Leeson, *ibid* at 21–59, with discussion of proposals with respect to natural resources at 24–29. The text of the Best Efforts Draft is included as the second part of Appendix A in Moull, “Section 92A,” *supra* note 2.

¹¹ On the omission of the resources and declaratory power proposals from the provinces from the federal resolution, see Hon Allan Blakeney, “The Patriation and Amendment of the Constitution of Canada” (Brief presented to the Special Joint Committee on the Constitution, Saskatchewan, 19 December 1980) [unpublished], online: <primarydocuments.ca/wp-content/uploads/2018/04/PatriaAmendCanSK1980Dec19.pdf> at 9. Howlett, *supra* note 2 at 140, suggests that the Federal Government may have intended to re-insert the resource provisions and welcomed the NDP pressure which provided cover. A modified version of the Best Efforts Draft eventually came to form Part IV of the *Canada Act 1982* (UK), 1982, c 11. The final resolution may be found at *House of Commons Debates*, 32-1, Vol 147, No 158 (1 December 1981) at 13554 (Hon Jean Chrétien).

¹² Cairns, Chandler, & Moull, *supra* note 2 at 263–66. Blackman et al, *supra* note 2 at 513, refer to this period as “the calm before the storm” in federal/provincial relations, citing Doern & Toner, *supra* note 2, which also provides an extensive account of the period in chapter 3.

¹³ Cairns, Chandler & Moull, *ibid*. The National Oil Policy was introduced in *House of Commons Debates* 24-4, Vol 2, No 158 (1 February 1961) at 1641 (Hon George H Hees).

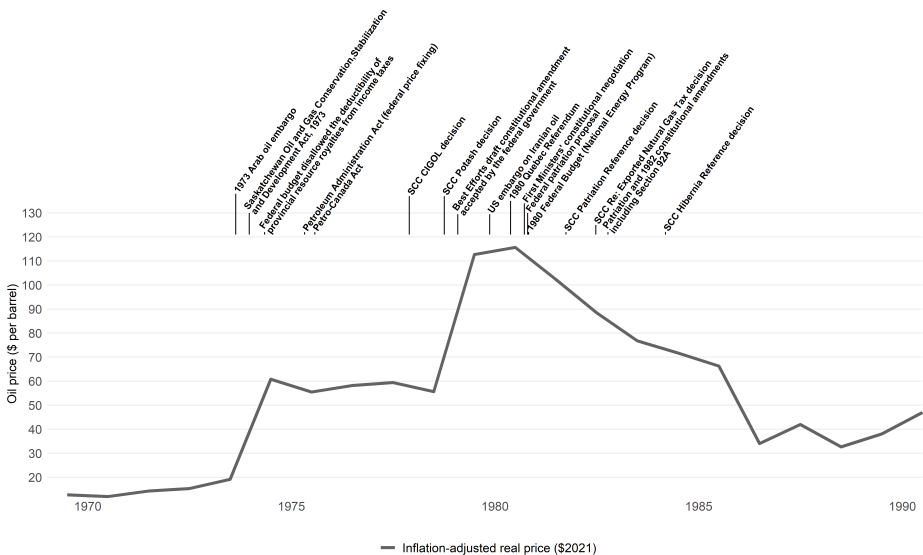
¹⁴ Cairns, Chandler & Moull, *ibid* at 256.

¹⁵ *Home Oil Distributors Ltd v Attorney-General of British Columbia*, [1940] SCR 444.

would buy natural gas from producers and re-sell gas destined for export at federally-determined market prices while selling gas for local use at a much lower price.¹⁶

After the 1973 Arab oil embargo, launched in retaliation for United States and Dutch support for Israel during the Yom Kippur war, oil prices, which had been low for decades, spiked for the first of two times in the 1970s (see Figure 1 below).¹⁷ This had two important impacts on resource politics in Canada: first, it led to increasing concerns with respect to energy costs and competitiveness and, second and more crucially, the price increases created substantial wealth transfers with Western Canadian oil-producing provinces benefitting and Eastern Canadian consumers paying the freight.¹⁸ As Thomas Courchene and James Melvin showed in a 1980 paper, the increased resource wealth also had fiscal impacts on governments: while Alberta and, to a lesser degree, Saskatchewan, saw substantial increases in government revenue, there was a substantial negative fiscal shock for Ontario as a result of the structure of the federal equalization program at the time.¹⁹ These factors continue to be relevant in today's conflicts over resource federalism.

Figure 1:
**World Oil Prices and Key Events Leading to the
1982 Constitutional Amendments**²⁰



¹⁶ John F Helliwell, “Canada” (1982) 3:2 Energy J 20 at 21.

¹⁷ For an extensive account of domestic and international oil markets at this time, see Doern & Toner, *supra* note 2, ch 3.

¹⁸ Cairns, Chandler & Moull, *supra* note 2 at 257.

¹⁹ Thomas J Courchene & James R Melvin, “Energy Revenues: Consequences for the Rest of Canada” (1980) 6 Can Pub Pol’y 192 at 194–95.

²⁰ Data via BP, “Statistical Review of World Energy,” online: <www.bp.com/statisticalreview> [authors’ graphic].

As commodity prices rose, both Alberta and Saskatchewan introduced changes to their regulatory and fiscal regimes to allow them to capture more of the rents available from resource extraction.²¹ In Saskatchewan, *The Oil and Gas Conservation, Stabilization and Development Act, 1973*, and subsequent amendments to the legislation in 1974, had three primary effects.²² The legislation expropriated freehold resource rights, imposed a royalty surcharge on production from Crown lands, and levied an income tax upon freehold producers.²³ Alberta legislation at the time removed caps on Crown land royalties and introduced a new royalty adder to capture the increases in wellhead prices, although it did not seek to capture 100 percent of price increases as had been the case with Saskatchewan's legislation.²⁴

The federal government was far from silent during this period. In December of 1973, it effectively erased the 1961 National Oil Policy and established a system of oil import subsidies funded by export tariffs and, in the budget of May 1974, it disallowed the deductibility of provincial resource royalties from federal income taxes.²⁵ Trade measures were used to establish a domestic price for Canadian oil below the world price.²⁶ Natural gas too was indexed to maintain near 85 percent of the cost per unit energy as crude oil.²⁷ This, per the telling of Peter Meekison and Roy Romanow, led to substantial Western alienation and a feeling that Western oil producers were directly subsidizing the consumption of oil at discounted prices by Eastern Canadians.²⁸

Two Supreme Court decisions, *CIGOL* and *Potash*, further fueled provincial resentment and a desire to secure greater control over provincially-owned resources, but also those produced in the province, regardless of ownership.

B. *CIGOL* AND *POTASH*

CIGOL contested the validity of *The Oil and Gas Conservation, Stabilization and Development Act, 1973* and related statutes referenced above.²⁹ The majority of the Supreme Court agreed with the company, with Justice Martland providing two reasons for concluding

²¹ See generally Arne Paus-Jenssen, "Resource Taxation and the Supreme Court of Canada: The Cigol Case" (1979) 5:1 Can Pub Pol'y 45, regarding Saskatchewan; David E Thring, "Alberta, Oil, and the Constitution" (1979) 17:1 Alta L Rev 69, regarding Alberta.

²² SS 1973-74, c 72; SS 1973-74, c 73 respectively.

²³ William D Moull, "Natural Resources: The Other Crisis in Canadian Federalism" (1980) 18:1 Osgoode Hall LJ 1 at 12 [Moull, "Natural Resources"].

²⁴ *Ibid* at 15; Doern & Toner, *supra* note 2 at 90.

²⁵ See generally Cairns, Chandler & Moull, *supra* note 2 at 256–63; Romanow, Whyte & Leeson, *supra* note 2 at 14–15; and specifically Paus-Jenssen, *supra* note 21 at 46, regarding the deductibility of royalties. See also Hon John N Turner, "Budget Speech" (Speech delivered in the House of Commons, Ottawa, 6 May 1974) [unpublished], online: *Finance Canada* <www.budget.gc.ca/pdfarch/1974-MA-sd-eng.pdf> at 4.

²⁶ J Peter Meekison & Roy J Romanow, "Western Advocacy and Section 92A of the Constitution, 1982" in J Peter Meekison, Roy J Romanow & William D Moull, *Origins and Meaning of Section 92A: The 1982 Constitutional Amendment on Resources* (Montreal: Institute for Research on Public Policy, 1985) 3 at 5 [Meekison, Romanow & Moull, *Origins*].

²⁷ Helliwell, *supra* note 16 at 22.

²⁸ Meekison & Romanow, *supra* note 26 at 6.

²⁹ For more detail on the underlying facts and politics of *CIGOL*, see John Richards & Larry Pratt, *Prairie Capitalism: Power and Influence in the New West* (Toronto: McClelland and Stewart, 1979) at 288–89; Doern & Toner, *supra* note 2 at 182–87.

that the Saskatchewan legislation was ultra vires the province.³⁰ Justice Martland first held that the legislation levied a tax (and not a royalty) on the lessee's share of production and that such tax was effectively an export tax and thus an indirect tax,³¹ and thus beyond the scope of provincial powers under section 92(2) of the *Constitution Act, 1867*.³² While this conclusion has been much criticized by both economists³³ and lawyers,³⁴ the key point for present purposes is simply that this conclusion severely compromised the ability of the province to capture the increased economic rent resulting from increased world oil prices. Justice Martland's second reason for denying the validity of the legislation was that it was a law in relation to trade and commerce insofar as "practically all of the oil to which the [impugned charge] becomes applicable is destined for interprovincial or international trade."³⁵ The effect of the legislation was to set a floor price for oil produced in the province and purchased for export.³⁶ This conclusion has also been criticized on the basis that the legislation applied to all oil produced in the province whether destined for export or not.³⁷ But, once again, the key point is that this represented a serious blow to provincial authority. As Cairns and co-authors observe, *CIGOL* expanded the reach of the federal trade and commerce power "at the expense of provincial legislative powers and possibly provincial Crown proprietary rights."³⁸

The Supreme Court of Canada decision in *Potash* followed 11 months later. This decision examined the validity of regulations which capped the total quantity of potash production in Saskatchewan and allocated each producer a pro-rata share based on its historical production capacity.³⁹ Each producer received 40 percent of its prior production in the initial implementation of the quota.⁴⁰ As with oil in *CIGOL*, essentially all Saskatchewan-produced potash was sold in interprovincial and export trade.⁴¹ However, unlike in *CIGOL*, there was evidence that the pro-rationing scheme was adopted as a price support mechanism and to avoid anti-dumping tariffs from the US.⁴² The scheme effectively required Potash Corp. to share its offtake contracts with other producers. Potash Corp. contested the validity of the Provincial scheme as an invasion of the federal trade and commerce power. The Supreme Court of Canada unanimously agreed with this assessment.

Chief Justice Laskin concluded that extra-provincial sales were the target of the legislative scheme⁴³ and that the province was not acting under "proprietary right but in pursuance of legislative and statutory authority directed to the proprietary rights of others, including the appellant."⁴⁴ The Chief Justice was prepared to accept that "production controls and

³⁰ *CIGOL*, *supra* note 6. Justices Dickson and de Grandpré dissented and would have upheld the validity of the statute as a direct tax.

³¹ *Ibid* at 565.

³² *Ibid* at 567.

³³ Paus-Jenssen, *supra* note 21.

³⁴ Moull, "Natural Resources," *supra* note 23 at 25; Moull, "Proprietary Rights," *supra* note 2 at 482–84.

³⁵ *CIGOL*, *supra* note 6 at 567.

³⁶ *Ibid*.

³⁷ Moull, "Natural Resources," *supra* note 23; *CIGOL*, *ibid* at 573.

³⁸ Cairns, Chandler & Moull, *supra* note 2 at 262.

³⁹ Blackman et al, *supra* note 2 at 518–19 for a similar discussion of the facts of the case.

⁴⁰ *Potash*, *supra* note 7 at 43. Moull, "Natural Resources," *supra* note 23 at 29–31 provides a comprehensive review of the legislation.

⁴¹ *Potash*, *ibid* at 49.

⁴² *Ibid* at 43.

⁴³ *Ibid* at 72.

⁴⁴ *Ibid* at 73.

conservation measures with respect to natural resources in a Province are, ordinarily, matters within provincial legislative authority,”⁴⁵ but found that such authority “does not extend to the control or regulation of the marketing of provincial products, whether minerals or natural resources, in interprovincial or export trade.”⁴⁶

The *Potash* decision further exposed the gaps in provincial legislative authority when it came to securing the full benefits of resources produced in the province but destined for export markets.⁴⁷ Together with the international developments in energy markets, the decisions in *CIGOL* and *Potash* helped fuel pressure for enhanced provincial constitutional power over natural resources.

C. THE RESOURCES PROVISIONS OF THE BEST EFFORTS DRAFT

With this background, we can now return to a consideration of how these provincial concerns came to be reflected in the Best Efforts Draft. As noted above, the provinces added considerably to the federal government’s original list of constitutional amendment topics. In order to address these issues collectively, the First Ministers Conference in late 1978 resolved to charge a Continuing Committee of Ministers on the Constitution (CCMC) with the responsibility for elaborating text to address these items. First on the list, in recognition of the importance of the issue according to Roy Romanow, John Whyte, and Howard Leeson, was natural resources.⁴⁸

The Best Efforts Draft on “Resource Ownership and Interprovincial Trade” had four main elements.⁴⁹ First, it would have strengthened provincial law-making authority with respect to natural resources, including the rate of primary production of those resources. Second, it would have authorized provinces to make laws with respect to the export of natural resources from the province, with no distinction drawn between interprovincial and international exports. Third, while the power to make laws with respect to exports was to be concurrent with federal authority, the proposed text turned the usual paramountcy rule on its head and proposed that, in the event of a conflict with a valid federal trade and commerce law, the provincial law would prevail unless the federal law was necessary to serve a compelling national interest, or if the federal law pertained to the regulation of international trade and commerce. Fourth, the Best Efforts Draft would have provided provinces with broad authority to levy taxes on natural resources.

⁴⁵ *Ibid* at 74.

⁴⁶ *Ibid*.

⁴⁷ As we (with Martin Olszynski) have observed elsewhere “both [*CIGOL* and *Potash*] involved a corporation seeking to strike down a provincial law on the basis that the law could not be justified under a provincial head of power.” Neither involved a provincial attack on federal laws allegedly encroaching on provincial turf. This distinction seems largely to have been ignored at the time. It suggests that the key concern was a weakness in provincial power, not overbearing federal authority. See Martin Olszynski, Nigel Bankes & Andrew Leach, “Breaking Ranks (and Precedent): Reference re Greenhouse Gas Pollution Pricing Act, 2020 ABCA 74,” Case Comments (2020) 33:2 J Envtl L & Prac 159 at 172. See also Guy Régimbald & Dwight G Newman, *The Law of the Canadian Constitution*, 2nd ed (Toronto: LexisNexis Canada, 2017), in particular at 489–90.

⁴⁸ Romanow, Whyte & Leeson, *supra* note 2 at 24.

⁴⁹ For a more detailed account, see Moull, “Section 92A,” *supra* note 2.

While there are obvious similarities between this Best Efforts Draft and the text of section 92A as ultimately adopted, the adopted amendment is less favourable to the provinces in a number of respects. First, the Best Efforts Draft extended provincial law-making authority to international exports as well as interprovincial exports. This is not the case under section 92A, and so a provincial law directed at international exports of a resource would still be *ultra vires* a province (unless the law lent itself to some other classification).⁵⁰ Second, concurrent provincial law-making power with respect to exports under section 92A(2) is expressly made subject to federal paramountcy.⁵¹ Third, the Best Efforts Draft would have limited the scope of the federal declaratory power so as to ensure that a declaration “could [not] be made without the concurrence of the affected province if the work concerned the primary production or initial processing of non-renewable or forestry resources or the generation of electrical energy.”⁵² No such provision found its way into section 92A. Thus, the final section 92A text both reduced the subject matter of provincial law-making power over that provided by the Best Efforts Draft, and was drafted such that the concurrent law-making power that it does confer is subject to federal trumping.

It is also important to recognize, given current disputes, that even the Best Efforts Draft was a compromise between different provincial interests and certainly fell well short of Alberta’s expectations. In particular, Romanow, Whyte, and Leeson note that Alberta’s draft provision on natural resources “sought not only to secure jurisdiction over natural resources but also to immunize provincial resource laws from virtually all federal powers and laws except those enacted under an emergency conception of the federal trade and commerce power.”⁵³ This approach, which is echoed in present-day disputes,⁵⁴ did not make it into the Best Efforts Draft. As Robert Cairns, Marsha Chandler, and William Moull note, while there was unanimous support for enhanced provincial powers, there was less support for efforts to limit federal resource jurisdiction.⁵⁵ In the end, according to Romanow et al, Alberta, along with Quebec, firmly rejected the natural resource provisions of the Best Efforts Draft.⁵⁶

While the federal government was initially prepared to support the Best Efforts Draft in early 1979, it subsequently withdrew that support following the February 1980 election which returned the Liberals to power after the short-lived Progressive Conservative government under Prime Minister Joe Clark (May 1979 – February 1980).⁵⁷ Thus, there was no reference to the resource amendment nor to the many other division of powers issues included in the Best Efforts Draft in what became the constitutional package consisting of

⁵⁰ As Moull observes, “under the present subsection 92A(2), the provinces cannot even get into the ‘export from Canada’ game in the first place” *ibid* at 724.

⁵¹ *Ibid* at 725; Cairns, Chandler & Moull, *supra* note 2 at 264–65.

⁵² Romanow, Whyte & Leeson, *supra* note 2 at 47.

⁵³ *Ibid* at 27.

⁵⁴ In *IAA Reference*, *supra* note 4, the majority toys with the idea that the doctrine of interjurisdictional immunity should apply to offer such immunization. See e.g. paras 428–30.

⁵⁵ Cairns, Chandler & Moull, *supra* note 2 at 263.

⁵⁶ Romanow, Whyte & Leeson, *supra* note 2 at 52.

⁵⁷ Cairns, Chandler & Moull, *supra* note 2 at 265.

the proposed *Charter of Rights and Freedoms* and a set of provisions dealing with future constitutional amendments.⁵⁸

D. THE CONSTITUTIONAL AMENDMENT

The ultimate package that was negotiated following the *Re: Resolution to Amend the Constitution* did have section 92A, the only federalism provision to be included.⁵⁹ The Federal Government agreed to include the clause in exchange for the support of the federal NDP.⁶⁰ Romanow, Whyte, and Leeson express surprise as to what they describe as Alberta's acquiescence to the final federal proposal. They note that the "absence of protection for the international trade aspect of [a province's] resources policies ... was a disappointment" and that while the power to frame rent collection legislation as an indirect tax was certainly a benefit, this was of more value to provinces with significant privately-owned resource rights (such as Saskatchewan) rather than to Alberta.⁶¹ They do, however, suggest that the opting-out opportunity included in the amending formula was seen as a major gain by Alberta. One concern that Alberta had was that a majority of provinces might seek to amend the Constitution to gain "clear access to Alberta's resource wealth."⁶² The text as adopted renders this impossible insofar as sections 38(2) and (3) in combination provide that, where an amendment adopted under the general amending formula (two thirds of the provinces and 50 percent of the population) derogates from the legislative powers, the proprietary rights, or other rights or privileges of the legislature or government of a province, such an amendment "shall not have effect" in any province that expresses its dissent by resolution.⁶³ As for other threats, Romanow et al caution with some perspicacity that the continued presence of residual federal legislative authority under the peace, order, and good government power (POGG) "represents a serious and unresolved threat to provincial ownership and jurisdictional authority" and further that federal legislation adopted under this head of power and "manifesting conflicting policies [to those of a provincial government] could be sustained."⁶⁴

We turn now to examine the text of section 92A and the Sixth Schedule, as well as the relevant case law. Looking at the commentary from the early 1980s, one might have anticipated a large body of case law grappling with the interpretation of the technical language in section 92A,⁶⁵ as none of the terms "non-renewable resources," "exploration," "development," "conservation," or "management," are defined in the text nor in the Sixth

⁵⁸ Government of Canada, "Proposed Resolution respecting the Constitution of Canada" (1980), online: <primarydocuments.ca/wp-content/uploads/2018/02/CanCons1980.pdf>. See in particular Cairns, Chandler & Moull, *ibid* at 73–74, discussing withdrawal of federal support for a key portion of the 1979 Best Efforts draft as it pertained to resources; Romanow, Whyte & Leeson, *supra* note 2 at 24–29; Howlett, *supra* note 2 at 135.

⁵⁹ [1981] 1 SCR 753.

⁶⁰ Semkow, *supra* note 2 at 102.

⁶¹ Romanow, Whyte & Leeson, *supra* note 2 at 274; Moull, "Section 92A," *supra* note 2, in particular at 483–87 suggests that some of Alberta royalty and marketing legislation might have been more vulnerable than the province was prepared to admit.

⁶² Romanow, Whyte & Leeson, *ibid* at 273.

⁶³ *Constitution Act, 1982*, *supra* note 1, ss 38(2)–(3).

⁶⁴ Romanow, Whyte & Leeson, *supra* note 2 at 274.

⁶⁵ See e.g. Moull, "Section 92A," *supra* note 2 at 717. By contrast, the majority opinion of the Alberta Court of Appeal in the *IAA Reference*, *supra* note 4 at para 76, concludes that the amendment "defined with precision exactly what provincial governments had the *exclusive* jurisdiction to do as *owners* of those resources" [emphasis is the Court's].

Schedule. But that has not occurred. There are, no doubt, many possible explanations for this but part of the explanation perhaps lies in a general trend to deregulation or light-handed or even market-based regulation, which took hold subsequent to the adoption of section 92A. These global trends were reinforced by the terms of US–Canada Free Trade Agreement,⁶⁶ the *North American Free Trade Agreement*,⁶⁷ and now the Canada, US, Mexico Agreement (CUSMA).⁶⁸ Furthermore, many constitutional cases dealing with the environment and natural resources were settled on the basis of other heads of power.⁶⁹ That seems poised to change with the rise of a new provincialism which argues, in effect, that federal heads of power must be interpreted in such a way as to immunize the jurisdiction conferred upon the provinces to manage the development, conservation, and management of natural resources from federal legislation that does not reflect provincial resource development priorities.

III. THE CASE LAW AND LITERATURE ON SECTION 92A

Section 92A comprises six subsections along with the accompanying Sixth Schedule defining the term “primary production.”⁷⁰ Section 92A(1) confirms the legislative authority of the provinces with respect to natural resources, specifically referencing forestry and electricity generating facilities. Sections 92A(2) and (4) deal with more specific issues. Section 92A(2) confers legislative authority on the provinces with respect to interprovincial trade in natural resources, while section 92A(4) extends the taxation authority of the provinces in relation to natural resources and the production of electrical energy. Sections 92A(3) and (5) are non-derogation clauses. Section 92A(3) is a specific non-derogation clause confirming that the conferral of legislative authority in relation to interprovincial trade in natural resources does not derogate from federal law-making authority. Section 92A(6) is a more general non-derogation clause confirming that nothing in section 92A derogates from any existing powers or rights of a provincial legislature or government of a province. Section 92A(5) referentially incorporates the definition of “primary production” from the Sixth Schedule. In what follows, we examine each subsection and the interpretive case law.

A. THE GENERAL PROVISION: SECTION 92A(1)

Section 92A(1) provides as follows:

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

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

⁶⁶ *Free Trade Agreement between the Government of Canada and the Government of the United States of America*, 2 January 1988, 2316 UNTS 3 (entered into force 2 January 1989).

⁶⁷ *North American Free Trade Agreement Between the Government of Canada, the Government of the United Mexican States and the Government of the United States*, 17 December 1992, Can TS 1994 No 2 (entered into force 1 January 1994).

⁶⁸ *Protocol replacing the North American Free Trade Agreement with the Agreement between Canada, the United States of America, and the United Mexican States*, 30 November 2018, Can TS 2020 No 5 (entered into force 1 July 2020).

⁶⁹ For example, the fisheries power in *Northwest Falling Contractors Ltd v The Queen*, [1980] 2 SCR 292; *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3; *Fowler v The Queen*, [1980] 2 SCR 213; or the criminal law power in *R v Hydro-Québec*, [1997] 3 SCR 213; *Syncrude Canada Ltd v The Attorney General of Canada*, 2016 FCA 160 [*Syncrude*].

⁷⁰ *Constitution Act, 1867*, *supra* note 1, s 92A; *ibid*, Sixth Schedule.

(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.⁷¹

In many respects, this subsection is the most intriguing provision of section 92A insofar as it seems to cover a lot of the ground already covered by section 92. Cairns et al remark that it “is the most difficult provision ... to assess in terms of its legal impact,” since the activities it mentions — exploration, development, conservation, and management, were almost certainly within provincial legislative jurisdiction before the adoption of the resources amendment.⁷²

At the very least, per Cairns, Chandler, and Moull, the section confirms that, unlike measures based on the more specific references to Crown-owned natural resources in sections 92(5) and 109 of the *Constitution Act, 1867*, “provincial resource management measures need no longer be concerned with the distinction between Crown-owned and freehold resources within the province.”⁷³

There has been some judicial comment on section 92A(1), most notably in *Reference re Newfoundland Continental Shelf*,⁷⁴ (1984), *Ontario Hydro* (1993),⁷⁵ and *Westcoast Energy Inc. v. Canada (National Energy Board)*,⁷⁶ and more recently in the majority decisions of Alberta’s Court of Appeal in the *Alberta GGPPA Reference*⁷⁷ and the *IAA Reference*.⁷⁸

1. THE EARLIER CASES

First, the Supreme Court of Canada recognized in the *Hibernia Reference* that the terms of section 92A(1) do not extend the reach of provincial legislative authority beyond provincial borders.⁷⁹ Much as with section 92, section 92A(1) (and the following subsections) opens with the words “[i]n each province,” thus making it clear that the section does not expand the territorial ambit of provincial legislative authority.⁸⁰

In *Ontario Hydro*, a constitutional labour law case, the Supreme Court was unanimous in the conclusion that the *exclusive* provincial legislative authority conferred in section 92A(1) over electrical generating facilities in the provinces did not impinge upon federal legislative

⁷¹ *Ibid*, s 92A(1).

⁷² Cairns, Chandler & Moull, *supra* note 2 at 270. See also the reasons of Justice La Forest in *Ontario Hydro v Ontario (Labour Relations Board)*, [1993] 3 SCR 327 at 376 [*Ontario Hydro*].

⁷³ Cairns, Chandler & Moull, *ibid*. We observe that provincial oil and gas conservation laws and similar regulatory rules never made that distinction but applied generally to oil and gas exploratory on production activities whether on Crown or freehold lands. See also *Spooner Oils Ltd v Turner Valley Gas Conservation*, [1933] SCR 629.

⁷⁴ [1984] 1 SCR 86 [*Hibernia Reference*].

⁷⁵ *Ontario Hydro*, *supra* note 72.

⁷⁶ [1998] 1 SCR 322 [*Westcoast Energy*].

⁷⁷ *Supra* note 3.

⁷⁸ *Supra* note 4.

⁷⁹ *Hibernia Reference*, *supra* note 74 at 127. See also *Newfoundland and Labrador (Attorney General) v Uashaunuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4 at para 114.

⁸⁰ *Hibernia Reference*, *ibid* at 128.

authority under either the residuary POGG clause in section 91, or the section 92(10)(c) declaratory power. The specific issue in *Ontario Hydro* was the applicability of provincial labour laws to employees of Ontario Hydro, and in particular, those at nuclear generating facilities which were under federal jurisdiction by virtue of a combination of the federal declaratory power and the national concern branch of the peace, order and good government power. The majority of the Supreme Court, in two separate judgments, concluded that the provincial labour code was inapplicable to employees at Hydro's nuclear facilities, notwithstanding the *exclusive* provincial jurisdiction over electricity-generating facilities in the province conferred in section 92A(1).

In reaching his conclusion as to the inapplicability of the provincial labour code, Chief Justice Lamer largely decided the case on the basis that labour relations at the nuclear facilities were an integral and essential part of the federally-declared work. As such, and following the labour relations trilogy of cases,⁸¹ the provincial legislation would be inapplicable insofar as it impaired the core content of the federal power.⁸² Having reached this conclusion, the Chief Justice then turned his attention to Ontario Hydro's argument to the effect that the matter must be governed by section 92A(1)(c), which made Ontario Hydro's activities a provincial undertaking rather than a federal undertaking. Chief Justice Lamer was not prepared to give such a displacing effect to section 92A(1). While he was prepared to concede that section 92A(1)(c) might afford the province legislative authority over all of Hydro's non-nuclear facilities, and even those aspects of its nuclear facilities downstream of the use of nuclear energy to produce steam,⁸³ it could not displace federal jurisdiction over those of Hydro's employees employed in the production of nuclear (heat) energy who "come under federal jurisdiction under both the declaratory and p.o.g.g. powers."⁸⁴

Justice La Forest, writing for himself as well as Justices Gonthier and L'Heureux-Dubé, observed that those supporting the applicability of the provincial labour code relied on a number of heads of provincial legislative authority under section 92 (ss 92(10), (13), and (16)) but placed "especial reliance on s 92(A)(1)."⁸⁵ Justice La Forest followed a similar path to that taken by the Chief Justice, largely deciding the case on the basis of the labour relations trilogy.⁸⁶ Justice La Forest was prepared to concede that provincial laws of general application might apply to a federal work or undertaking, "but these cannot touch an integral part of Parliament's jurisdiction over the work," under POGG and the declaratory power.⁸⁷

⁸¹ *Bell Canada v Quebec (Commission de la Santé et de la Sécurité du Travail)*, [1988] 1 SCR 749; *Canadian National Railway Co v Courtois*, [1988] 1 SCR 868; *Alltrans Express Ltd v British Columbia (Workers' Compensation Board)*, [1988] 1 SCR 897.

⁸² *Ontario Hydro*, *supra* note 72 at 347–51. Chief Justice Lamer does not use this precise phrasing, but it is implicit in his application of the labour relations trilogy.

⁸³ *Ibid* at 355–56.

⁸⁴ *Ibid* at 356.

⁸⁵ *Ibid* at 361.

⁸⁶ *Ibid* at 363–69.

⁸⁷ *Ibid* at 363.

Justice La Forest did, however, return to consider section 92A(1) towards the end of his judgment. He began by observing that

[i]t must be confessed that s. 92A(1), including para. (c), do not, at least at first sight, appear to add much to the broad and general catalogue of provincial powers ... [s]o it is tempting to seek additional meaning from the provision. It may be, however, that s. 92A(1) is merely preliminary to the provisions that follow, although, as I will indicate, it, at a minimum, *fortifies the pre-existing provincial powers*. There is reason to think this was one of its major goals.⁸⁸

That led him to discuss the background to the adoption of section 92A generally, before addressing section 92A(1)(c) in more detail. In his view, paragraph (c) was included to address the concern that the interconnected nature of the grid might allow federal jurisdiction to move upstream from the grid to generation facilities. While he himself did not favour that view, he concluded that:

The express grant of legislative power over the development of facilities for the generation and production of electrical energy (s. 92A(1)(c)), coupled with the legislative power in relation to the export of electrical energy offers at least comfort for the position that, leaving aside other heads of power, the development, conservation and management of generating facilities fall exclusively within provincial competence.⁸⁹

Justice La Forest went on to say that section 92A therefore “ensures the province the management, including the regulation of labour relations, of the sites and facilities for the generation and production of electrical energy *that might otherwise be threatened by s 92(10)(a)*.”⁹⁰ But Justice La Forest could see nothing in the section that was meant to interfere with the power of Parliament to legislate for nuclear facilities that fell under Parliament’s jurisdiction by virtue of either POGG or the declaratory power.

Justice Iacobucci (writing for himself and Justices Cory and Sopinka) dissented on the principal finding but provided comments on section 92A with which Justice La Forest largely agreed.⁹¹ Justice Iacobucci made two main points with respect to the language of section 92A(1)(c). The first was that there was no contradiction between the declaratory authority of section 92(10)(c) and the language of section 92A(1)(c). This was because, while the former afforded Parliament jurisdiction over the works subject to the declaration, the latter, by contrast, did not confer jurisdiction on the provinces over the works themselves, but only jurisdiction over the conservation, development, and management of these works.⁹² While this does not seem especially convincing (what else is left if we remove conservation, development, and management?), Justice Iacobucci’s more important point, like that of Justice La Forest’s, was that it was simply not possible to read section 92A as having

⁸⁸ *Ibid* at 376, citing Peter W Hogg, *Constitutional Law of Canada*, 3rd ed, vol 1 (Scarborough: Carswell, 1992) at 29-19 [emphasis added].

⁸⁹ *Ibid* at 378.

⁹⁰ *Ibid* [emphasis added]. The relationship between sections 92A and 92(10)(a) would come to be addressed in *Westcoast Energy*, *supra* note 76.

⁹¹ *Ontario Hydro*, *supra* note 72. Justice Iacobucci’s comments on 92A commence at 405, Justice La Forest’s endorsement of those comments is at 375–76.

⁹² *Ibid* at 406–407.

eviscerated the federal declaratory power with respect to the matters mentioned in that section:

While the wording of s. 92A is unambiguous that management of electrical generating facilities is within the exclusive jurisdiction of the province, the section does not indicate that any special reservation from the federal declaratory power was made. In my opinion, Parliament did not give up its declaratory power over nuclear electrical generating stations when s. 92A of the *Constitution Act, 1867* was added to the Constitution in 1982.⁹³

Justice Iacobucci reached essentially the same conclusion with respect to Parliament's POGG powers. However, as with the legislative reach provided by the declaratory power, Justice Iacobucci would have held that labour relations were "not part of the single, distinctive and indivisible matter identified as atomic energy," over which federal jurisdiction under POGG would apply.⁹⁴

Justice Iacobucci observed that his interpretation of section 92A was consistent with academic commentary which indicated that the section "increased provincial power with respect to the raising revenues from resources and to regulating the development and production of resources without diminishing Parliament's pre-existing powers."⁹⁵

The majority of the Supreme Court had much the same thing to say about the relationship between sections 92A(1)(b) and 92(10)(a) when the issue fell to be argued in *Westcoast Energy*.⁹⁶ Expressly referencing Justice Iacobucci's opinion in *Ontario Hydro*, Justices Iacobucci and Major observed in a jointly-authored judgment that what was true for the declaratory power must "apply with equal force to Parliament's jurisdiction over interprovincial transportation undertakings under s 92(10)(a)."⁹⁷ Here too, the decision hinged on the fact that the jurisdiction conferred by section 92A(1) was restricted to intra-provincial activities:

Federal jurisdiction under s. 92(10)(a) is premised on a finding that an interprovincial *transportation* undertaking exists. Subsection 92A(1)(b), on the other hand, is not concerned with the transportation of natural resources beyond the province, but rather with the "development, conservation and management" of these resources *within* the province. ... We fail to see how s. 92A(1)(b) could extend provincial jurisdiction to include the regulation of the transportation of natural gas through these facilities across provincial boundaries.⁹⁸

Interestingly, the parties favouring provincial jurisdiction over the facilities in question sought to rely on Justice La Forest's comments in *Ontario Hydro* with respect to the

⁹³ *Ibid* at 409–10.

⁹⁴ *Ibid* at 427.

⁹⁵ *Ibid* at 410. Justice Iacobucci cites Robert D Cairns, Marsha A Chandler & William D Moull, "Constitutional Change and the Private Sector: The Case of the Resource Amendment" (1987) 24:2 Osgoode Hall LJ 299 at 300; William D Moull, "The Legal Effect of the Resource Amendment: What's New in Section 92A" in Meekison, Romanow & Moull, *Origins*, *supra* note 26, 33 at 53–54.

⁹⁶ *Supra* note 76.

⁹⁷ *Ibid* at para 82.

⁹⁸ *Ibid* [emphasis in original].

protective effect of section 92A(1)(c) in relation to generating facilities tied in to the grid.⁹⁹ The majority, however, did not consider that Justice La Forest’s *obiter* observations were necessarily persuasive nor applicable with respect to gas transmission facilities. The majority noted that:

[Section] 92A(1)(c) deals specifically with jurisdiction over “development, conservation and management of sites and facilities in the province for the generation and production of electrical energy.” Subsection 92A(1)(b), on the other hand, does not refer to jurisdiction over “sites and facilities,” but more generally to jurisdiction over “development, conservation and management of non-renewable resources.”¹⁰⁰

Justice McLachlin dissented. In her view, facilities upstream of Westcoast’s main natural gas transmission line were not part of the interprovincial undertaking and neither were they integral to that undertaking. She reached this conclusion on the basis of her avowedly purposive reading of section 92(10)(a), which suggested that authority over local works and undertakings should only be transferred to the Federal Government in exceptional circumstances.¹⁰¹ In her view, the addition of section 92A served to confirm this purposive reading of section 92(10)(a),¹⁰² and, unlike the majority, she was willing to rely upon Justice La Forest’s *obiter* comments in *Ontario Hydro* as to the shielding effect of section 92A(1):

As stated by La Forest J. in *Ontario Hydro*, ... one purpose of the amendment which introduced s. 92A into the Constitution was precisely to avoid the very result being argued for here – that the federal government might acquire control over resource development and production by assimilating resource development and production facilities into its interprovincial transportation power through the means of s. 92(10)(a).¹⁰³

The principal significance of these two Supreme Court decisions is that, in both cases, the majority of the Supreme Court rejected any suggestion that section 92A(1) served to limit federal powers, or, in other words, to confer any sort of immunity from federal legislative jurisdiction on provincial resource activities. The section does not eviscerate the federal declaratory power nor the POGG power (*Ontario Hydro*), nor does it result in a different understanding of Parliament’s power to make laws with respect to interprovincial works and undertakings (*Westcoast Energy*).

2. THE REFERENCES CASES

We now turn to the recent reference cases examining the validity of the federal carbon pricing legislation, the *Greenhouse Gas Pollution Pricing Act* and the *Federal Impact Assessment Act*.¹⁰⁴ Of the three provincial reference cases examining the validity of the *GGPPA*, only the Alberta Court of Appeal placed material emphasis on section 92A in its analysis and decision. The majority opinion in the *Ontario Reference re Greenhouse Gas*

⁹⁹ Without getting into the facts too deeply, it is important to observe that the jurisdictional dispute in this case was not with respect to federal jurisdiction over Westcoast’s main transmission line itself (that was conceded) but rather with respect to a gas processing plant feeding the mainline pipeline quality gas as well as certain natural gas gathering facilities upstream of the processing plant.

¹⁰⁰ *Westcoast Energy*, *supra* note 76 at para 84.

¹⁰¹ *Ibid* at para 117.

¹⁰² *Ibid* at paras 118, 120–21, 149.

¹⁰³ *Ibid* at para 166.

¹⁰⁴ *Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12, s 186 [*GGPPA*]; *Impact Assessment Act*, SC 2019, c 28, s 1 [*IAA*].

Pollution Pricing Act mentions section 92A only once, explaining that “sections 92, 92A, and 93 [of the *Constitution Act, 1867*] give the provincial legislatures broad and exclusive jurisdiction over a wide range of local matters, including the vast majority of the activities that generate greenhouse gases.”¹⁰⁵ In the *Saskatchewan Reference re Greenhouse Gas Pollution Pricing Act*, section 92A receives only passing attention in the final thoughts of the majority, which held that the question of whether the *GGPPA* was inapplicable in the case of provincial utilities was beyond the scope of the reference question.¹⁰⁶ The minority opinion examines section 92A more closely, and leans on the language of section 92A(1) affording the provinces the exclusive power to make laws and would have held that “[ss 92(2), (5), (10), (13), and (16) and section 92A and section 93 of the *Constitution Act, 1867*] give provincial legislatures broad and exclusive jurisdiction over a wide range of local matters including the vast majority of the activities that generate GHG emissions.”¹⁰⁷ The minority concluded that the *GGPPA* was an attempt by Parliament to use its taxation power “in a way that controls constitutional measures taken by a Province to address GHG emissions,” and thus would have found the *GGPPA* unconstitutional.¹⁰⁸ In sum, in both the *Saskatchewan GGPPA Reference* and *Ontario GGPPA Reference*, section 92A played a very minor role.

In the Supreme Court of Canada decision, the majority also had little to say about section 92A.¹⁰⁹ In dissent, Justice Brown affirms that section 92A “fortifies the pre-existing provincial powers in this area and gives the provinces indirect taxation powers, and greater control over, their natural resources,”¹¹⁰ and would have held that since the provinces have jurisdiction to put a price on carbon emissions, authority in part derived from section 92A, the *GGPPA* could not be constitutional under the national concern branch of POGG.¹¹¹ Justice Brown would have held that the *GGPPA* amounted to federal legislation in respect of a subject matter reserved for the provinces, including subjects identified in section 92A.¹¹²

In contrast, and as we have observed elsewhere¹¹³ and discuss in more detail below, the majority of the Alberta Court of Appeal made great play of section 92A in both the *Alberta GGPPA Reference* and the more recent *IAA Reference*.

Four points deserve emphasis. First, in both opinions, the Alberta Court of Appeal emphasizes that section 92A(1) confers *exclusive* jurisdiction on provincial legislatures with respect to the three subject matters referenced in that subsection: (1) exploration for non-renewable resources; (2) development conservation and management of same; and (3) electrical generation facilities, and applies a *watertight compartments* interpretation of

¹⁰⁵ 2019 ONCA 544 at para 61 [*Ontario GGPPA Reference*].

¹⁰⁶ 2019 SKCA 40 at paras 205–208 [*Saskatchewan GGPPA Reference*].

¹⁰⁷ *Ibid* at para 339.

¹⁰⁸ *Ibid* at paras 386–88.

¹⁰⁹ The majority in *GGPPA References*, *supra* note 3, refers to section 92A at paras 137–38 in correcting the Alberta Court of Appeal’s assertion that matters that originally fell under provincial heads of power, other than section 92(16) of the Constitution, are incapable of acquiring national dimensions and again at para 197 in noting that provinces do have ample authority to legislate in relation to GHG pricing.

¹¹⁰ *Ibid* at para 346.

¹¹¹ *Ibid* at para 348.

¹¹² *Ibid* at para 372.

¹¹³ See Nigel Bankes & Andrew Leach, “The Rhetoric of Property and Immunity in the Majority Opinion in the *Impact Assessment Reference*” (8 June 2022), online (blog): <ablawg.ca/2022/06/08/the-rhetoric-of-property-and-immunity-in-the-majority-opinion-in-the-impact-assessment-reference/>.

exclusivity.¹¹⁴ Second, both decisions suggest that the context for the interpretation of these exclusive law-making powers includes section 38(3) of the *Constitution Act, 1982* (the opt-out provision in the amending formula), and, in particular, that “courts ought to be careful not to allow the national concern doctrine to be used to sidestep the amending formula and thereby render the opt out right nugatory.”¹¹⁵ Third, both opinions emphasize the breadth of the word “development” in section 92A(1) and its connection to broader economic issues, as well as matters such as embodied greenhouse gas emissions.¹¹⁶

Fourth, both opinions, implicitly at least, suggest that there is something exceptional about the exclusive nature of the provincial law-making power under section 92A(1). In the *Alberta GGPPA Reference*, the majority articulates this special status as part of its discussion of development when it says that the sustainable development of a province’s natural resources is a concern of the province and not the federal government because it is the province that owns those resources.¹¹⁷ The majority went on to say that this was the purpose of section 92A, to ensure that the development of those resources “would be subject only to specific heads of federal power.”¹¹⁸ The next few paragraphs are somewhat confusing,¹¹⁹ but the majority seems to admit the possibility that the specific heads of power to which provincial resources might be subject include the declaratory power (as per *Ontario Hydro*), the criminal law power, and the emergency branch of the POGG power.¹²⁰ The majority offers no support for why section 92A(1) might serve to shield provincial development policies from some federal powers, but not others.¹²¹ The majority in the *IAA Reference* doubles down on this theme, emphasizing once again the exclusive nature of provincial powers,¹²² and reiterating the point that:

[S]hort of the proper invocation of [the POGG power, the declaratory power, or the power over interprovincial works and undertakings] the purpose of s 92A, when passed, was to ensure that the approval of projects for the exploration, development, conservation and management of 92A natural resources was vested exclusively in the province that owned them.¹²³

¹¹⁴ *IAA Reference*, *supra* note 4 at para 66. The majority opinion in the *Alberta GGPPA Reference*, *supra* note 3 at para 60, mistakenly extends this claim of exclusivity to sections (2) and (3) which only confer concurrent law-making powers.

¹¹⁵ *Alberta GGPPA Reference*, *ibid* at para 64. And see also at para 128 suggesting that section 92A (and section 109) must also be weighed in the balance when assessing a new head of national concern and the scale of impact on provincial jurisdiction. Finally, see paras 328–32, in which the scale of impact analysis engages section 92A.

¹¹⁶ *Ibid* at paras 265–69. *IAA Reference*, *supra* note 4 at paras 411–13.

¹¹⁷ *Alberta GGPPA Reference*, *ibid* at para 269. This comment glosses over the point that section 92A is not concerned with ownership and that a section 92A law may apply to privately owned resource rights as well as publicly owned resource rights.

¹¹⁸ *Ibid* at para 269. “In other words, short of the use of the federal declaratory power and the emergency POGG power, the purpose of s 92A, when passed, was to bar the federal government’s intrusion into a province’s development and management of its natural resources” *ibid* at para 271 [emphasis added].

¹¹⁹ See the gratuitous reference to the *IAA*, *supra* note 104 at para 270 as if it were itself a head of power.

¹²⁰ *Alberta GGPPA Reference*, *supra* note 3 at paras 270–71.

¹²¹ See also per Justice Feehan (dissenting), *ibid* at para 962: “Whatever the exact parameters of s 92A, there is general consensus that the provision was not intended to limit any pre-existing powers of Parliament. ... This includes the federal peace, order and good government residual power in the preamble to s 91 of the *Constitution Act, 1867*” [citations omitted].

¹²² *IAA Reference*, *supra* note 4 at paras 77–80.

¹²³ *Ibid* at para 81. A nearly identical statement appears in the majority opinion in the *Alberta GGPPA Reference*, *supra* note 3 at para 271, stating that “short of the use of the federal declaratory power and the emergency POGG power, the purpose of s 92A, when passed, was to bar the federal government’s intrusion into a province’s development and management of its natural resources.” This is accompanied by a footnote stating that the Federal Government “also possesses powers under other legislation, including *CEPA* and the [*IAA*].”

There is simply no basis for ascribing to section 92A an implied claim that provincial resource rights are subject to some but not all (and a changing list at that) of federal heads of power.¹²⁴ While in theory it might be possible to build an interjurisdictional immunity (IJI) argument, that argument would have to proceed on the basis of general principles and an analysis of the core content of each power, and not on the basis that section 92A is somehow special or exceptional.¹²⁵ The majority declined to explore that possibility in the *IAA Reference*.¹²⁶ But our conclusion, based on the authorities and the Supreme Court's view that an expansive application of IJI would not be consistent with the dominant tide of constitutional doctrine, is that such an argument would be unlikely to succeed.¹²⁷

In conclusion, it is apparent that most of the litigation that has engaged section 92A(1) has arisen in the context of questioning the applicability or validity of federal legislation. This is true not only of the recent high profile *GGPPA Reference* and *IAA Reference*, but also true of *Westcoast Transmission*. And even though *Ontario Hydro* engages Provincial legislation, it was the applicability and not the validity of the Provincial legislation that was at issue in that case. With the exception of the Alberta Court of Appeal's decision in the *IAA Reference*, these attempts to read section 92A as limiting federal heads of power have not been successful. It remains to be seen if the Supreme Court of Canada will bring this decision back in line with its earlier jurisprudence.

Thus, notwithstanding what Moull describes as the definitional problems "perhaps most acute with respect to subsection 92A(1),"¹²⁸ we have largely not seen litigation on the interpretation of terms such as "conservation" (for example, is this confined to physical conservation or does it extend to economic conservation as in *Potash?*).¹²⁹ The closest that the courts have come to engaging with these issues are the two Alberta Court of Appeal reference decisions that are founded, at least in part, on the basis that the term "development"

¹²⁴ See Bankes & Leach, *supra* note 113. Neither does the text offer any support for provincial paramountcy. As Moull, "Section 92A," *supra* note 2 at 727 observes: "Even though subsection 92A(1) says that the provincial legislature may 'exclusively' make laws in relation to the development of resources, section 92 itself contains the word 'exclusively' in its introductory language and that has not prevented the paramountcy of conflicting federal legislation aimed at the same subject matter." We agree, although we might frame the latter part of this in terms of federal legislation pertaining to a different aspect of the same subject matter. Moull goes on to conclude that the "apparent retention" of the paramountcy doctrine in section 92A(1) "is disturbing." Also see *ibid* at 722 for arguments to much the same effect.

¹²⁵ Alberta made similar arguments in *Re: Exported Natural Gas Tax*, [1982] 1 SCR 1004. For discussion see Moull, "Proprietary Rights," *supra* note 2 at 485. The majority found it unnecessary to comment on these arguments, but they got short shrift from the dissent: see *Re: Exported Natural Gas Tax*, *ibid* at 1008 and especially at 1030.

¹²⁶ *IAA Reference*, *supra* note 4 at paras 428–30.

¹²⁷ Bankes & Leach, *supra* note 113, referencing and discussing the main authorities including *Quebec (Attorney General) v Canadian Owners and Pilots Association*, 2010 SCC 39; *Rogers Communications Inc v Châteauguay (City)*, 2016 SCC 23; *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44; *Canadian Western Bank v Alberta*, 2007 SCC 22; *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44. The recent Quebec Court of Appeal's decision in *Attorney General of Quebec v IMTT-Québec inc*, 2019 QCCA 1598, leave to appeal to SCC refused, 38929 (16 April 2020), (referenced in the majority opinion of the Alberta Court of Appeal in the *IAA Reference*, *ibid* at para 223, but not on this point) does offer some suggestions as to how an IJI argument might be developed. In that decision, which involved possible immunity arguments associated with federal public property as well as navigation and shipping, the Court emphasizes that the purpose of the IJI argument is to give real meaning to the notion of exclusivity (at para 91). The Court was of the view that provincial environmental assessment legislation might be inapplicable where the result would be to impair federal power to control development associated with the core contents of the above heads of power (see *ibid* at paras 217–18).

¹²⁸ Moull, "Section 92A," *supra* note 2 at 720.

¹²⁹ *Ibid* at 721.

as used in section 92A(1) deserves a broad interpretation that can then be used at the classification stage of constitutional analysis.

**B. INTERPROVINCIAL TRADE IN NATURAL RESOURCES:
SECTIONS 92A(2) AND 92A(3)**

Following Moull,¹³⁰ one can think of section 92A(1) as concerning “internal” resource control, while sections 92A(2) and (3) are concerned with export, or with the “external” aspects of resource control. Section 92A(2) provides that:

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.¹³¹

Unlike section 92A(1), it is clear that section 92A(2) enhances the legislative authority of provincial governments. At the same time, section 92A(3) makes it clear that it does not do so at the expense of the legislative powers accorded to Parliament. Section 92A(3) provides that:

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.¹³²

As Cairns, Chandler, and Moull note, section 92A(3) “was probably unnecessary” in the sense that the rules encoded in the section are the same rules that the courts have developed to deal with the interpretation and application of concurrent legislative powers more generally.¹³³ This conclusion is further supported by the fact that, unlike section 92A(1) and the opening words of section 92 of the Constitution, the provincial legislative authority in this subsection is not expressed to be exclusive.¹³⁴

Sections 92A(2) and (3) therefore combine to offer a province a limited concurrent power to make laws in relation to the export from that province to another province, or provinces, of the primary production of natural resources. The provision is subject to the limitations that such laws must not authorize or provide for discrimination in prices, or in supplies, exported to another part of Canada. While commentators suggest that these limitations are difficult to interpret, the gist (no discrimination) seems clear.¹³⁵ The more difficult question relates to whether or not a province can exercise a price or supply preference in favour of itself. Presumably, the same rule should apply to both supply and price since the proviso

¹³⁰ *Ibid* at 720–27.

¹³¹ *Constitution Act, 1867*, *supra* note 1, s 92A(2).

¹³² *Ibid*, s 92A(3).

¹³³ Cairns, Chandler & Moull, *supra* note 2 at 269.

¹³⁴ *Ibid*. Contrary to what the majority had to say (mistakenly) in the *Alberta GGPPA Reference*, *supra* note 3 at para 60. More generally, however, as we argue above, one should not read too much into the language of exclusivity.

¹³⁵ Cairns, Chandler & Moull, *ibid* at 269.

(discrimination in price or supply in product exported to another part of Canada), is framed in the same manner for both supply and price and in the same clause. Insofar as section 92A(2) confers incremental law-making authority on the provinces in relation to interprovincial trade in natural resources, it would seem odd if a province could not prescribe a supply preference for itself and its residents; and, if so, the parallel construction of the proviso suggests that the same rule should apply to price discrimination. But whatever difficulties there may be about the interpretation of the discrimination provision, it is clear that the subsection does not authorize the provinces to make laws in relation to *international* trade and commerce.

There has been little judicial comment on sections 92A(2) and (3), and “no law has ever been challenged on the basis of [section 92A(2)].”¹³⁶ Justice Grammond of the Federal Court did offer some preliminary comments on the interpretation of section 92A(2) in the context of British Columbia’s challenge to an Alberta statute, the *Preserving Canada’s Economic Prosperity Act*,¹³⁷ known more colloquially as the *Turn Off The Taps Act*. We refer to Justice Grammond’s comments as “preliminary” insofar that they were rendered in a decision dealing with British Columbia’s application for an interlocutory injunction.¹³⁸ Furthermore, the Federal Court of Appeal ultimately overturned Justice Grammond’s decision.¹³⁹ The majority of the Federal Court of Appeal did so on the basis that the matter was not ripe for judicial decision in the absence of implementing regulations. The absence of those regulations made it challenging to interpret the concept of discrimination as used in section 92A(2).¹⁴⁰ Justice Nadon wrote a concurring opinion in which he concluded that the Federal Court had no jurisdiction.¹⁴¹

With these qualifications in mind, we can examine Justice Grammond’s decision. Justice Grammond took the view that section 92A(2) should be read as a limited exception to the general proposition that a province could not legislate in relation to interprovincial commerce.¹⁴² It followed from this that “the proper analytical framework is to determine whether the impugned provincial legislation is, in pith and substance, related to interprovincial commerce and, if so, whether it is nevertheless valid because it complies with the conditions imposed by section 92A(2).”¹⁴³

¹³⁶ *Attorney General of Alberta v Attorney General of British Columbia*, 2021 FCA 84 at para 166 [*Turn Off the Taps* (FCA)].

¹³⁷ *Preserving Canada’s Economic Prosperity Act*, SA 2018, c P-21.5 [*Turn Off the Taps Act*]; *Attorney General of British Columbia v Attorney General of Alberta*, [2019] FC 1195 [*BC v Alta (Turn Off the Taps)*].

¹³⁸ *BC v Alta (Turn Off the Taps)*, *ibid* at paras 94–97. Justice Grammond would have granted an injunction in favour of British Columbia requiring Alberta to give British Columbia 42 days’ notice of any implementing rules for the legislation before exercising the powers granted by the legislation, pending judgment on the merits. Accordingly, Justice Grammond’s comments with respect to the interpretation of section 92A(2) are made in the context of assessing whether or not British Columbia had a serious question to be tried and perhaps also in the context of assessing the balance of convenience.

¹³⁹ *Turn Off the Taps* (FCA), *supra* note 136. They do not represent a judgment on the merits.

¹⁴⁰ *Ibid* at paras 184–88 per Justice LeBlanc, Justice Rivoalen concurring. For reasons that are not entirely clear, the FCA deals with the case as if it were an application for a declaration although it seems fairly clear from Justice Grammond’s judgment that the matter came before him as an application for an interlocutory injunction.

¹⁴¹ Justice Nadon concluded that there was no “controversy” between British Columbia and Alberta within the meaning of section 19 of the *Federal Court Act*: *ibid* at para 111. As such Justice Nadon found it unnecessary to comment on section 92A at all.

¹⁴² *Turn Off the Taps* (FCA), *supra* note 136 at para 108.

¹⁴³ *Ibid* at para 115.

Alberta introduced the *Turn Off the Taps Act* in response to its perception that British Columbia was putting up roadblocks to the development of pipelines from Alberta to the west coast.¹⁴⁴ The legislation empowered the Minister of Energy to require exporters of natural gas, crude oil, or refined fuel to obtain a licence.

Before imposing a licencing requirement, the Minister of Energy was required to assess whether it was in the public interest of Alberta to do so, having regard to:

(a) [W]hether adequate pipeline capacity exists to maximize the return on crude oil and diluted bitumen produced in Alberta,

(b) whether adequate supplies and reserves of natural gas, crude oil and refined fuels will be available for Alberta's present and future needs, and

(c) any other matters considered relevant by the Minister.¹⁴⁵

Section 4 of the *Turn Off the Taps Act* allowed the Minister of Energy to set the terms of export licences including “the point at which the licensee may export from Alberta any quantity of natural gas, crude oil or refined fuels,” as well as restrictions on maximum quantities and methods of exportation.¹⁴⁶

In introducing the legislation, the Minister of Energy, as well as other speakers in the Legislature, made it clear that the legislation was directed at British Columbia and was intended to impose pressure on that province. The details of those remarks do not concern us here. It is enough to refer to Justice Grammond's conclusion to the effect that “a detailed review of the legislative debates shows that the whole point of the Act is to impose a form of discrimination on British Columbia.”¹⁴⁷ He went on to say:

The fact that the Act was intended to impose supply discrimination on British Columbia is confirmed by section 2(3) of the Act, which sets out the factors that the Minister must take into consideration before triggering the requirement to obtain oil export licences. The first factor is “whether adequate pipeline capacity exists to maximize the return on crude oil and diluted bitumen produced in Alberta.” In the context where the only pipeline capacity expansion currently under consideration is the Trans Mountain expansion project, this factor is a transparent manner of enabling the Minister to stop exports on the basis of her opinion as to the progress of that project.¹⁴⁸

¹⁴⁴ See for example the justification for the legislation provided by Minister Marg McCuaig-Boyd in Alberta, Legislative Assembly, *Hansard*, 29th Leg, 4th Sess, (9 May 2018) at 963. The potential roadblocks included proposed amendments to British Columbia's *Environmental Management Act*, SBC 2003, c 53. British Columbia ultimately agreed to refer the validity of that legislation to its Court of Appeal. A five-person panel of the British Columbia Court of Appeal unanimously concluded that the legislation was a colourable attempt to legislate with respect to an interprovincial work or undertaking: *Reference re Environmental Management Act (British Columbia)*, 2019 BCCA 181. The Supreme Court of Canada dismissed the appeal for the reasons given by the British Columbia Court: 2020 SCC 1.

¹⁴⁵ *Turn Off the Taps Act*, *supra* note 137, s 2(3).

¹⁴⁶ *Ibid*, s 4(2)(a).

¹⁴⁷ *BC v Alta (Turn Off the Taps)*, *supra* note 137 at para 121.

¹⁴⁸ *Ibid* at para 128.

In Justice Grammond’s view, the legislation as enacted allowed him to draw the conclusion that British Columbia had established a serious issue with respect to the validity of the *Turn Off the Taps Act* on the grounds of discrimination, but also because of its breadth insofar as it purported to apply to products that fell outside the term “primary production.”

We deal with the primary production issue below. With respect to the discrimination point, Alberta effectively argued that British Columbia’s application was premature and that “discrimination could only result from concrete measures taken under the Act.”¹⁴⁹ Justice Grammond rejected that proposition.

At first blush, the concepts of “authorizing” and “providing,” in section 92A(2) are distinct. “Authorizing,” in its ordinary meaning, includes the delegation of a power that may be used so as to create discrimination. In this regard, the *Turn Off the Taps Act* allows the Minister of Energy to issue licences that contain restrictions concerning the point of export from Alberta. This obviously allows for discrimination between provinces located to the west and east of Alberta.¹⁵⁰

In sum, Justice Grammond found it relatively easy to conclude that Alberta had not been able to negate British Columbia’s claim that there was a serious issue to be tried with respect to whether the *Turn Off the Taps Act* “breaches section 92A(2) for authorizing discrimination.”¹⁵¹

As noted above, the majority of the Federal Court of Appeal found the matter premature and, as a result, apart from noting the challenges associated with interpreting the term discrimination as used in section 92A(2), the majority had little more to say. Furthermore, in a rather strange turn of events, Alberta allowed the legislation to lapse and then subsequently adopted a similar, but not identical, statute.¹⁵²

Contemporary commentary on section 92A(2) discussed some of the other implementation and interpretive difficulties that might be encountered as a result of confining provincial law-making powers to interprovincial exports. For example, if some of a particular resource was exported internationally and some only interprovincially, would it follow that a province could only legislate in relation to the latter and not the former? What if the resource left the province in a common and commingled stream? What if the vast majority of the resource

¹⁴⁹ *Ibid* at para 119.

¹⁵⁰ *Ibid* at para 120.

¹⁵¹ *Ibid* at para 131.

¹⁵² The original legislation included a provision which stipulated that the *Turn Off the Taps Act* would be automatically repealed after two years unless the Legislative Assembly considered it to be “in the public interest of Alberta to extend the date of the repeal of this Act for a further period” in which case “the Legislative Assembly may adopt a resolution to extend the date for a further period” (*supra* note 137, s 14). We commented on that development here: Nigel Bankes, Andrew Leach & Martin Olszynski, “The Curious Demise of Alberta’s Turn Off the Taps Legislation” (18 May 2021), online (blog): <ablawg.ca/2021/05/18/the-curious-demise-of-albertas-turn-off-the-taps-legislation/>. The government subsequently re-introduced and passed the legislation as Bill 72, *Preserving Canada’s Economic Prosperity Act*, 2nd Sess, 30th Leg, Alberta, 2021 (assented to 17 June 2021), SA 2021, c P-21.51 [*Turn Off the Taps, 2021*]. The new legislation omits any mention of refined fuels from its provisions, but is otherwise effectively identical to the original. There are still no implementing regulations and thus the Federal Court of Appeal’s decision continues to be persuasive were British Columbia to renew its challenge.

was subject to interprovincial export and only a very small proportion exported?¹⁵³ No decided cases have addressed these issues and these questions remain live today.

C. THE TAXATION PROVISION: SECTION 92A(4)

Section 92A(4) provides:

(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.¹⁵⁴

The principal purpose of this subsection was to extend the taxation powers of the provinces with respect to natural resources and the production of electricity generation beyond the cumbersome power of direct taxation conferred by section 92(2) of the Constitution.¹⁵⁵ The language of “any mode or system of taxation” parallels the Federal Parliament’s taxation power under section 91(3), but subject to the qualification that such laws may not impose a tax that differentiates between production exported to another part of Canada and production not exported from the province. Extending the taxation powers of the provinces reverses, on a go-forward basis, the principal conclusion of the majority in *CIGOL*,¹⁵⁶ as well as other court decisions dealing with other natural resources in which the courts concluded that a producer-level tax was an indirect rather than direct tax.¹⁵⁷

The expansive effect of section 92A(4) has been confirmed by a number of decisions from British Columbia dealing with municipal taxation of sand and gravel resources. The issue was first discussed in two decisions of that province’s Court of Appeal that were evidently

¹⁵³ For analysis of some of these possibilities see Moull, “Section 92A,” *supra* note 2 at 723. It is worth noting that the balance between interprovincial and international exports may change over time. For example, in the case of oil at the time that section 92A was adopted, very little was exported internationally (approximately 200,000 barrels per day). Currently, Canada exports approximately 3.8 million barrels per day, per Canada Energy Regulator, “Canadian Crude Oil Exports: A 30 Year Review,” online: <www.cer-rec.gc.ca/en/data-analysis/energy-commodities/crude-oil-petroleum-products/report/canadian-crude-oil-exports-30-year-review/>.

¹⁵⁴ *Constitution Act, 1867*, *supra* note 1, s 92A(4).

¹⁵⁵ As a result, and as noted by Justices Ottenbreit and Caldwell in *Saskatchewan GGPPA Reference*, *supra* note 106 at para 334, (dissenting but not on this point) the Federal and Provincial Governments share the power to tax natural resources. The majority decision of the Alberta Court of Appeal is evidently incorrect in ascribing to provinces exclusive law-making powers not only in relation to section 92A(1) but also in relation to taxation and trade in natural resources: *Alberta GGPPA Reference*, *supra* note 3 at para 60.

¹⁵⁶ *CIGOL*, *supra* note 6.

¹⁵⁷ In addition to *CIGOL*, *ibid*, see e.g. *Macdonald Murphy Lumber Company v British Columbia (Attorney General)*, [1930] 2 DLR 721 (UK JCPC); *Utah Company of the Americas Ltd v Attorney General for British Columbia*, [1959] 19 DLR (2d) 705 (BCCA).

argued together and handed down contemporaneously: *Allard Contractors Ltd. v. Coquitlam (District)*¹⁵⁸ and *Kirkpatrick Sand & Gravel Co. v. Corporation of District of Maple Ridge*.¹⁵⁹ The decisions involved a fee system imposed by a municipal by-law on sand and gravel operations under the authority of the *Municipal Act*. The by-law authorized a municipality (with the approval of the Minister) to levy a fee on the quantity of soil (defined to include sand, rock, and gravel) removed from land within a municipality. The levy could vary with the amount of soil removed and could also vary for different areas of the municipality. The Court of Appeal in *Allard BCCA* confirmed that section 92A “confers on the [provinces] legislative competence to pass statutes which ‘authorize’ the imposition of taxation, that is to say its imposition by other provincial taxing agencies, as well as statutes which ‘provide for’ such taxation, that is to say, statutes which themselves directly create taxation schemes and impose liability to taxation.”¹⁶⁰ The Court (per Justice Southin) also held that, while section 92A precluded differential taxation as between that share of a resource to be consumed within the province versus that exported from the province, that was the only form of differentiation that the section prohibited.¹⁶¹ In this case, the municipality only imposed the tax on those engaged in commercial extraction activities. While generally municipal by-laws may not discriminate, in this case, the Legislature expressly authorized discrimination.¹⁶² Furthermore, unlike a charge, the proceeds of which might only be used to cover the administrative costs or the damages flowing from an authorized operation

the fee remains simply a form of taxation authorized by s. 92A of the *Constitution Act*. The legislature has authorized the municipalities to impose the tax on soil removers only, and on such basis as each municipality thinks fit, and the money raised can be put to any municipal purpose council chooses.¹⁶³

On further appeal to the Supreme Court of Canada, it was found unnecessary¹⁶⁴ to consider the Court of Appeal’s conclusion that section 92A(4) “encompassed a power of indirect taxation delegable to municipalities.”¹⁶⁵

British Columbia’s Court of Appeal reaffirmed its interpretation of section 92A(4) a few years later in another decision dealing with gravel operations in the City of Coquitlam.¹⁶⁶ In this case, the Court of Appeal quoted extensively from the reasons of Justice Southin in *Allard BCCA* noting that:

One of the concerns raised in those cases, however, was that giving an overly broad interpretation to s. 92(9) of the *Constitution Act, 1867* [the basis on which the Supreme Court of Canada had affirmed the decision in *Allard*] would render the province’s power of direct taxation under s. 92(2) meaningless. Such a concern does

¹⁵⁸ (1991), 85 DLR (4th) 729 (BCCA) [*Allard BCCA*], aff’d on different grounds, [1993] 4 SCR 371 [*Allard*].

¹⁵⁹ [1991] CanLII 5747 (BCCA), rev’d on appeal on different grounds in *Allard*, *ibid*.

¹⁶⁰ *Allard BCCA*, *supra* note 158 at para 31.

¹⁶¹ *Ibid*.

¹⁶² *Ibid* at paras 49–50.

¹⁶³ *Ibid* at para 49.

¹⁶⁴ *Allard*, *supra* note 158 at 412. It was unnecessary for the Supreme Court to settle this question because the Supreme Court found that the fees in question could be justified under section 92(9) of the *Constitution Act, 1867*, *supra* note 1, as a part of a licencing scheme also supported by section 92(13) and (16).

¹⁶⁵ As summarized in *Coquitlam (City) v Construction Aggregates Ltd*, 2000 BCCA 301 at para 3, leave to appeal dismissed, [2001] 1 SCR ix.

¹⁶⁶ *Ibid*.

not arise with respect to s. 92A(4) which is clearly intended to be an adjunct to the province's powers under s. 92(2), and is confined to a narrow and distinct subject-matter. It enables the Province to resort to indirect taxation for the purpose of controlling and protecting its non-renewable natural resources.¹⁶⁷

The Quebec Court of Appeal decision in *Quebec (Attorney General) c Algonquin Développements Côte-Ste-Catherine inc (Développements Hydroméga inc)* on section 92A(4) engaged Quebec's efforts to tax the production of hydraulic energy in the Province.¹⁶⁸ The tax was imposed on the holders of hydraulic power rights in the Province and required them to make payments to the Generations Fund "to reduce the debt and establish the Generations Fund" with the amount of the payment to be based on the annual generation of electricity.¹⁶⁹ In *Hydroméga*, Algonquin resisted payment of the levy largely on the basis that the levy was a proprietary charge (equivalent to a royalty) and not a tax, that Algonquin derived its hydraulic rights from the federal Crown, and that therefore the Province was not in a position to levy a regulatory charge.¹⁷⁰ In the alternative, Algonquin claimed that it could take advantage of the federal Crown's immunity from taxation under section 125 of the Constitution.

The Quebec Court of Appeal ruled against Algonquin on both grounds. As to the first, the Court noted that the *Watercourses Act* provided for two types of charges, a rent payable under section 3 of the *Watercourses Act* by lessees of hydraulic powers from the provincial Crown, and the charge at issue in this case under section 68 of the *Watercourses Act*, payable by both lessees from the provincial Crown and any other owners. In light of this, the Court had little difficulty in concluding that:

The government does not levy the charge under section 68 *qua* owner-lessor but *qua* public authority: it is not exacted as an incident of crown ownership but rather of the crown's authority to regulate property in the province and to raise taxes on "sites and facilities in the province for the generation of electrical energy and the production therefrom" *pursuant to section 92A(4)(b)* of the *Constitution Act, 1867*. Not surprisingly, section 69.2 provides that the charge does not apply to Hydro-Québec or to a municipality, an electricity cooperative or to a mandatory of the crown. *Section 68 is a tax, not a proprietary charge.*¹⁷¹

As for the immunity argument, the Court emphasized that the tax was imposed on the holder of the hydraulic powers, such as Algonquin, and not on the federal Crown.¹⁷²

¹⁶⁷ *Ibid* at para 24. Construction Aggregates largely sought to argue the case on the basis that the soil removal fee was a regulatory charge that could not be justified under section 92(9) since it collected more than necessary revenues to cover the regulatory costs. Justice Prowse for the Court was not prepared to accept that characterization of the case perhaps largely because the principal decision relied on by the appellant was *Eurig Estate (Re)*, [1998] 2 SCR 565, which was not a decision dealing with natural resources.

¹⁶⁸ 2011 QCCA 1942 [*Hydroméga*].

¹⁶⁹ *Watercourses Act*, RSQ, c R-13, s 68.

¹⁷⁰ The federal Crown had expropriated the lands and waterpower in question as part of the development of the St. Lawrence Seaway. While that expropriation occurred pursuant to the federal government's powers over navigation and shipping and to develop a set of locks, the Seaway Authority, an agent of the federal Crown, had leased waters surplus to navigation purposes to Algonquin's predecessor in title for hydraulic power purposes.

¹⁷¹ *Hydroméga*, *supra* note 168 at para 46 [references omitted] [emphasis added.] See also at para 51 where the Court suggested that the current version of section 68 was perhaps "inspired by the invitation that the constitutional amendment adding section 92A(4)(b) to the *Constitution Act, 1867* extended to provincial legislatures."

¹⁷² *Ibid* at para 57.

Furthermore the tax was imposed on the electricity produced and not the waterpower as such.¹⁷³ While the Court was prepared to concede that the tax might have some implications for the revenues that the federal Crown might be able to “draw from the rental of the waterpower,”¹⁷⁴ this did not amount to the Province doing indirectly what the Constitution prohibited it from doing directly.¹⁷⁵ In sum, the lessee could not claim the benefit of its lessor’s immunity. That said, it seems fairly clear that the Court accepted that section 125 could impose a limit on the province’s taxation power under section 92A(4). Thus, had the federal Crown, or an agent of the federal Crown, developed these hydro resources, the provincial tax would have been inapplicable to the electricity so produced.¹⁷⁶ This confirms that section 92A cannot be read in isolation from the balance of the *Constitution Act, 1867*.

In summary, section 92A(4) has had the most substantive effect of any of the subsections, and also faced significant judicial scrutiny. It serves to extend the taxation powers of the provinces with respect to natural resources and the production of electricity generation beyond the cumbersome power of direct taxation conferred by section 92(2). Thus, by extension, it alters the conclusions of the key Supreme Court of Canada precedent in *CIGOL*, which played such an important role in the genesis of the resources amendment.

D. THE NON-DEROGATION CLAUSE: SECTION 92A(6)

Section 92A(6) provides that:

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.¹⁷⁷

This section is evidently intended to protect the existing legal and constitutional position of the provinces.¹⁷⁸ The language tracks the broad drafting and language of the Best Efforts Draft and is framed to protect not only the legislative powers of a province, but also any other powers or rights of a legislature or government (executive) of a province. Most commentators suggest that this additional language is intended to capture the rights that a province may have as an owner of public resources, including any prerogative rights, to impose terms and conditions on the use of land or resources.¹⁷⁹ There is some debate in the literature as to how broad such provincial powers might be and also as to how reliable the older case law on provincial proprietary rights might be.¹⁸⁰ This issue has not been taken up

¹⁷³ *Ibid* at para 59.

¹⁷⁴ *Ibid*.

¹⁷⁵ *Ibid* at paras 60–61.

¹⁷⁶ The Court also rejected two other arguments from Algonquin, namely that the tax was inapplicable on the basis that it impaired the core content of federal powers over federal public property (s 91(1A)) or its powers over navigation and shipping (s 91(10)). In neither case, reasoned the Court, did the tax trench upon the core content of the federal power. This was particularly the case with respect to the latter since Algonquin’s rights to water power were expressly stated by the lease to be limited to waters that were surplus to navigation requirements. There are parallels here to *Re: Exported Natural Gas Tax*, *supra* note 125.

¹⁷⁷ *Constitution Act, 1867*, *supra* note 1, s 92A(6).

¹⁷⁸ See Semkow, *supra* note 2 at 131–32; Moull, “Section 92A,” *supra* note 2 at 727.

¹⁷⁹ See e.g. Moull, “Section 92A,” *ibid*; Moull, “Proprietary Rights,” *supra* note 2; Semkow, *ibid* at 103–109.

¹⁸⁰ Moull, “Proprietary Rights,” *ibid*, referring *inter alia* to *Smylie v R*, [1900] OJ No 19 [*Smylie*]; *Brooks-Bidlake and Whitall Ltd v AGBC*, [1923] 2 DLR 189 (UK JCPC); *Attorney General for British Columbia v Attorney General for Canada*, [1923] 3 WWR 945 (UK JCPC). The *Smylie* decision, *ibid*, seems particularly questionable insofar as the impugned legislation required provincial timber licence

in the more recent case law apart from some allusions to the issue in the majority decision of the Alberta Court of Appeal in the *IAA Reference*.

According to the majority opinion in the *IAA Reference*, section 92A(6) “reinforces the exclusivity of provincial powers under s 92A(1).”¹⁸¹ A footnote to this statement seems to suggest that section 92A(6) achieves this result because, unlike section 92A(3) which expressly preserves Parliament’s power to make laws in relation to trade and commerce with respect to resources, there is no savings provision in favour of Parliament with respect to section 92A(1) included in section 92A(6).¹⁸² But, such a provision would be neither appropriate nor necessary. It would not be appropriate because the federal government does not claim the authority to make laws in relation to the subject matters of sections 92(5), 92(13), or 92(16) or even section 92A(1). It would not be necessary because there is nothing in the division of powers in sections 91, 92, and 92A that precludes Parliament making a law under a section 91 head of power that affects a resource industry. On the contrary, federal laws affecting resource industries have been upheld under Parliament’s criminal law power in *Syncrude*,¹⁸³ under the fisheries power in *Quebec (Attorney General) v. Moses*,¹⁸⁴ and under POGG in the *GGPPA References*.¹⁸⁵

In sum, while section 92A(6) no doubt serves to preserve pre-1982 provincial rights and powers, it is, as Brian Semkow observes, unlikely to be of much significance in resolving a new jurisdictional conflict because that is all that section 92A(6) does; it preserves the status quo with respect to the scope of provincial powers.¹⁸⁶

E. THE SIXTH SCHEDULE

The Sixth Schedule,¹⁸⁷ adopted at the same time as section 92A, serves to define the term “primary production” as used in sections 92A(1), (2), and (3). The first paragraph deals with production from a non-renewable natural resource. The second paragraph deals with production from a forestry resource. We focus here on non-renewable natural resources and the first paragraph which deems production from a non-renewable natural resource to be primary production if that production meets one of two conditions, which we discuss below.

to include a term requiring that timber cut on the licence be processed in Canada. On the face of it, that looks like a law in relation to trade and commerce. The case is discussed in detail in Moull, “Proprietary Rights,” *ibid* at 475–77. Moull’s overall assessment of the “proprietary rights” case law is that “[l]egislation enacted under section 92(5) thus stands in no better position as regards federal legislation and federal legislative authority than does any other provincial legislation enacted under section 92” (*ibid* at 480).

¹⁸¹ *IAA Reference*, *supra* note 4 at para 79.

¹⁸² *Ibid*, n 34.

¹⁸³ *Regulations Respecting Reduction in the Release of Methane and Certain Volatile Organic Compounds (Upstream Oil and Gas Sector)*, SOR/2018-66; *Syncrude*, *supra* note 69.

¹⁸⁴ 2010 SCC 17.

¹⁸⁵ *GGPPA References*, *supra* note 3. See also *Orphan Well Association v Grant Thornton Ltd*, 2019 SCC 5 [*Redwater*]. While the *Redwater* decision limited the scope of federal paramountcy, the decision in *Redwater* did not detract from the application of federal bankruptcy laws in the context of resource industries.

¹⁸⁶ Semkow, *supra* note 2 at 131.

¹⁸⁷ *Constitution Act, 1867*, *supra* note 1, Sixth Schedule.

The first condition is that the production must be in the form “in which it exists upon its recovery or severance from its natural state.”¹⁸⁸ Severance, in the context of non-renewable natural resources, refers to the point at which the product is “severed,” that is to say separated at the surface from the surrounding land. In legal terms, this occurs when the resource is no longer part of the land (real property) and becomes the personal property of the person responsible for the act of severance. In the case of conventional oil and gas production, the point of severance would be at the wellhead. In the case of mineable oil sands, the point of severance would be the point at which the shovel removes the ore from its position in the ground. It is at this point of severance that one characterizes the resource under the first condition: “recovery or severance from its natural state.”¹⁸⁹

The second condition is evidently intended to allow some forms of production to qualify as primary production even if the product is no longer in its natural state. The text provides as follows:

(ii) [P]roduction will be deemed to be primary production if] it is a product resulting from processing or refining the resource, and is not a manufactured product or a product resulting from refining crude oil, refining upgraded heavy crude oil, refining gases or liquids derived from coal or refining a synthetic equivalent of crude oil.¹⁹⁰

The principal idea is that production that is processed or refined will continue to qualify as primary production, but that this extended sense of primary production will not apply to something that can be regarded as a manufactured product, or a product that is the result of a refining process (whether that refining is the refining of crude oil, upgraded heavy crude oil, liquids or gases derived from coal, or a synthetic equivalent of crude oil).

The first point to note is that there is a carve out of manufactured products, that is to say, products that are manufactured from a non-renewable natural resource. This would include, for example, petrochemicals and plastics. Such manufactured products do not qualify as primary production.

Second, the definition makes a distinction between processing and refining. Processing in the oil and gas sector generally refers to the techniques applied to the severed resource to produce a marketable product. For example, water and other impurities are typically produced with oil and must be separated from the oil at the wellhead. The separated oil continues to be primary production. Similarly, produced natural gas is never pure methane (CH₄), and may contain not only some moisture, but other gases as well such as nitrogen, carbon dioxide, or hydrogen sulphide. Produced gas must be processed in the field in order to meet specifications required for shipment by pipeline.¹⁹¹ These upstream facilities are

¹⁸⁸ *Ibid.*, s 1(a)(i).

¹⁸⁹ *Ibid.*

¹⁹⁰ *Ibid.*, s 1(a)(ii).

¹⁹¹ For descriptive examples, see *Westcoast Energy*, *supra* note 76. In dissent at para 118, Justice McLachlin would have held that both raw natural gas as well as gas processed by the plants in question constituted primary production for the purposes of the Sixth Schedule. The Sixth Schedule is not explicitly referenced by the majority, since the majority decision turned on the findings that the gas processing facilities combined with the pipeline constituted a single, federal undertaking and that, as discussed above, Section 92A does not alter Parliament’s jurisdiction over such undertakings under section 92(10)(a) (see paras 78 and 80–84).

routinely referred to in the industry as processing facilities and not refinery facilities and thus, it seems evident that the methane resulting from these activities continues to be primary production within the meaning of the Sixth Schedule.

It is perhaps more difficult to apply the definition to the oil sands sector and refined products more generally, although it is clear that oil sands ore would be captured as primary production under section 1(a)(i), while crude bitumen, synthetic crude oil (a lighter, lower sulphur product derived from oil sands bitumen or heavy crude oil) would all be regarded as a product resulting from the processing or refining of that oil sands ore (whether one categorized the relevant activity as processing or refining or some combination thereof).¹⁹² But the point is not entirely clear because refined products are both included in the definition of primary production (is a product resulting from refining the resource) and excluded (is not a product resulting from refining), but the specific exclusion of products *refined from* upgraded heavy oil and synthetic crude oil suggests that the drafters intended that both of these resource categories would themselves qualify as primary production.

But what is the status of refined petroleum products such as diesel and other fuels? Are such fuels part of primary production (as a product resulting from refining) or excluded (as a product resulting from refining crude oil, upgraded crude oil, coal, or synthetic crude oil)? This point has not been explicitly tested although one might think that the specific should prevail over the general, and thus that such fuels would be excluded from the definition of primary production.¹⁹³ We might have obtained some guidance on this point had the litigation between Alberta and British Columbia over the validity of Alberta's *Turn Off the Taps Act* proceeded to the merits.¹⁹⁴ Section 2(1) of the *Turn Off the Taps Act* provided that no person may "export from Alberta any quantity of natural gas, crude oil or *refined fuels*"¹⁹⁵ without a licence, with the legislation having defined refined fuels to mean either:

- (i) [G]asoline, diesel, aviation fuel and locomotive fuel, or
- (ii) any other fuel or component used to produce refined fuels specified under a regulation made under this Act.¹⁹⁶

While both natural gas and crude oil evidently fall within the definition of primary production and could therefore properly be the subject of a law relating to the export of those products from Alberta, this was far from clear with respect to gasoline, diesel, and aviation and locomotive fuel.¹⁹⁷ Indeed, Alberta seems to have conceded this point in *AGBC v AGA* insofar as it sought to justify the inclusion of refined fuels within the scope of the legislation

¹⁹² For detailed oil sands product definitions including crude bitumen, synthetic crude oil, see for example the *Oil and Gas Conservation Act*, RSA 2000, c O-6, s 1(1). Oil sands are defined in the *Oil Sands Conservation Act*, RSA 2000, c O-7, s 1(1)(l).

¹⁹³ See Pierre-André Côté, in collaboration with Stéphane Beaulac and Mathieu Devinat, *The Interpretation of Legislation in Canada*, 4th ed (Toronto: Carswell, 2011) at 385–96; Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham: LexisNexis Canada, 2014) at 363–69.

¹⁹⁴ The litigation here refers to *BC v Alta (Turn Off the Taps)*, *supra* note 137; *Turn Off the Taps (FCA)*, *supra* note 136, which challenged the *Turn Off the Taps Act*, *supra* note 137.

¹⁹⁵ *Turn Off the Taps Act*, *ibid*, s 2(1) [emphasis added].

¹⁹⁶ *Ibid*, s 1(g).

¹⁹⁷ The text of *Turn Off the Taps Act*, *ibid*, defined both terms. Crude oil was defined in such a way as to exclude crude bitumen from the definition.

on the basis that it was necessarily incidental to the exercise of its power to regulate the export of crude oil.¹⁹⁸ Justice Grammond was not persuaded by this argument since the Alberta Attorney General had been unable to demonstrate “why it would be necessary to regulate the export of refined fuels to successfully regulate the export of crude oil.”¹⁹⁹ However, this distinction will not be clarified even if Alberta develops the necessary regulations to implement the legislation and British Columbia resumes its challenge. This is because Alberta’s revised *Turn Off the Taps Act, 2021* omits any reference to refined products and focuses exclusively on the export of crude oil and natural gas.²⁰⁰

In sum, the Sixth Schedule is an integral part of section 92A. The purpose of the schedule, at least with respect to non-renewable natural resources, was evidently to allow the provinces to benefit from an extended understanding of what might be considered to be primary production. The section presents some interpretive difficulties, but it has not been the subject of judicial comment beyond the preliminary opinions expressed by Justice Grammond in the *Turn Off the Taps Act* litigation.

IV. CONCLUSIONS

Canada finds itself in the early stages of another federation-defining conflict over resource-related issues including the construction of new pipelines, legislative and policy responses to greenhouse gas emissions, and the reach of federal environmental impact assessment legislation. A decade of conflict in the 1970s and early 1980s resulted in an amendment to Canada’s Constitution which clarified, to some degree, the roles of the Provinces with respect to the management and taxation of natural resource production and interprovincial trade in those resources. However, as this analysis has shown, after 40 years we have only limited examples of litigation relying on section 92A and, to date, some sections of the text of the amendment have yet to be the subject of extensive judicial interpretation.

Today’s conflicts represent new challenges. In particular, the recent *IAA Reference* offers the first example of an Appellate Court interpreting section 92A to limit the legislative power of Parliament rather than simply adding to the legislative powers of the Provinces. In our view, this result can only be achieved by the development of an interjurisdictional immunity argument and yet the current trend of the Supreme Court of Canada’s jurisprudence effectively rules out this possibility. The pending appeal of this decision offers the Supreme Court the opportunity to clarify its position on this point.

In the coming decade, Canadian courts will be asked to determine the degree to which meaningful provincial jurisdiction over the management and conservation of natural resources and electricity production can be reconciled with action on climate change, plastics pollution, and other environmental challenges.

¹⁹⁸ *BC v Alta (Turn Off the Taps)*, *supra* note 137 at para 117.

¹⁹⁹ *Ibid.*

²⁰⁰ *Turn Off the Taps, 2021*, *supra* note 152.