

COURT OF APPEAL OF ALBERTA

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In the matter of *An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts*, SC 2019, c. 28 and the *Physical Activities Regulations*, SOR/2019-285

And in the matter of a Reference by the Lieutenant Governor in Council to the Court of Appeal of Alberta under the *Judicature Act*, RSA 2000, c.J-2, s.26

DOCUMENT: **FACTUM**



REFERENCE BY THE LIEUTENANT GOVERNER IN COUNCIL
TO THE COURT OF APPEAL OF ALBERTA
Order in Council filed the 9th day of September 2019

**FACTUM OF THE INTERVENOR
NATURE CANADA**

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TABLE OF CONTENTS

OVERVIEW	1
PART 1. FACTS	1
A. Projects Assessed on Provincial Lands in Alberta under <i>CEAA 2012</i>	1
B. History of Section 92A	2
PART 2. ARGUMENT	2
A. The Pith and Substance of the <i>IAA</i>	2
i. The purpose of the <i>IAA</i> is to focus on federal, direct and incidental effects	2
ii. Effect of the <i>IAA</i> is to avoid, mitigate or justify federal, direct and incidental effects	3
B. The <i>IAA</i> Can Be Upheld under Various Federal Heads of Power	5
i. Cooperative federalism	6
C. Jurisdiction Need Not Be Proven to Trigger a Federal IA	7
D. It Is Rational and Proper to Consider All Relevant Effects	8
E. Conclusion	10
PART 3. RELIEF SOUGHT	10
TABLE OF AUTHORITIES	11
APPENDIX I – NATURE CANADA RECORD	13

OVERVIEW

1. Rather than the Trojan horse Alberta alleges, the *Impact Assessment Act* (“*IAA*”) is no more than a precautionary tool for safeguarding components of the environment within federal authority and ensuring that federal, direct and incidental effects are in the public interest.
2. The Federal government has constitutional authority to avoid, mitigate or justify adverse effects on matters within Parliament’s jurisdiction. When determining whether effects within federal jurisdiction (“federal effects”) or direct or incidental effects are in the public interest, it may properly consider all relevant positive and negative impacts. By focusing decision-making on federal, direct and incidental effects, rather than the approval of projects, the *IAA* is a valid exercise of federal jurisdiction.
3. The *Physical Activities Regulations* are likewise constitutionally valid. While they only designate projects with great potential for significant adverse effects on areas of federal jurisdiction, proof of jurisdiction should not be a prerequisite for triggering a federal impact assessment (“*IA*”), as a project’s effects may not be known until the assessment is well underway. Moreover, the *IAA*’s cooperation mechanisms foster cooperative federalism and minimize any incidental effects on provincial jurisdiction.

PART 1. FACTS

A. Projects Assessed on Provincial Lands in Alberta under *CEAA 2012*

4. Like the *IAA*, the *Canadian Environmental Assessment Act, 2012*¹ (“*CEAA 2012*”) designated projects for assessment through regulations (“*CEAA 2012 Regulations*”) that listed projects by type and threshold (size).² Under *CEAA 2012*, 15 assessments were triggered of projects and activities on provincial lands in Alberta during the seven-year period it was in force, averaging 2.14 assessments per year on non-federal lands in Alberta.³
5. Compared to the *CEAA 2012 Regulations*, the *Physical Activities Regulations* have removed eight and added seven project types for projects that may occur on non-federal lands, raised

¹ *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52 [JBOA, Tab L8].

² *Regulations Designating Physical Activities*, SOR/2012-147 [JBOA, Tab L10].

³ Affidavit of Stephen Hazell dated June 5, 2020 (“Hazell Affidavit”) at para 10, Appendix I at I3.

the threshold for 28 project types (meaning fewer assessments of mining, nuclear, hydro and pipeline projects), and lowered the threshold for an additional 26 project types.⁴

B. History of Section 92A

6. In 1981, when the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada debated the proposed s. 92A of *The Constitution Act, 1867*, then-Justice Minister Jean Chretien and Assistant Deputy Minister of Public Law Dr. B. L. Strayer clarified to Committee members that s. 92A would not derogate from federal jurisdiction under section 91. Following these opinions and stated concerns respecting the need to retain federal powers under section 91, Committee members passed s. 92A on the basis of their understanding that the amendment did not interfere with federal authority.⁵

PART 2. ARGUMENT

A. The Pith and Substance of the IAA

7. A plain-language reading of the *IAA* reveals its pith and substance as a tool for ensuring that the effects of projects with potential to impact federal jurisdiction are considered in an informed and precautionary manner in order to enable federal authorities to protect the environmental, social, health and economic conditions within Parliament's authority and determine whether federal, direct or incidental effects are in the public interest.

i. The purpose of the IAA is to focus on federal, direct and incidental effects

8. The dominant characteristic of the *IAA* is best demonstrated by its provisions respecting IA reports and decision-making,⁶ the s. 7 prohibition preventing proponents of designated projects from causing prescribed federal effects, and its purposes section. Read together, these provisions show that the *IAA* is structured to focus not on projects, but on federal effects and effects that are directly related or necessarily incidental to an exercise of federal authority or federal funding in relation to a designated project ("direct and incidental effects"⁷).

⁴ *Ibid* at para 11, Appendix I at I3-I4.

⁵ *Ibid* at paras 13-14, Appendix I at I4-I5.

⁶ *Impact Assessment Act*, SC 2019 c 28 ("*IAA*"), ss 28(3), 33(2), 51(d)(i)-(ii), 59(2), 60(1), 61(1), 62 and 64 [**Joint Book of Authorities ("JBOA"), Tab L1**].

⁷ *Ibid*, s 2 [**JBOA, Tab L1**].

9. Alberta repeatedly claims that the *IAA* requires decision-makers to determine whether a designated project is in the public interest.⁸ In fact, ss. 60(1), 61(1) and 62 require the Minister or Governor in Council (as the case may be) to determine whether adverse federal *effects* and direct or incidental *effects* are in the public interest. Where such effects are determined to be in the public interest, ss. 64(1) and 64(2) require the Minister to establish conditions in relation to adverse federal effects or direct or incidental effects. Similarly, ss. 28(3), 33(2), 51(d)(i)-(ii) and 59(2) require IA reports to indicate which project effects are adverse federal, direct or incidental effects, and the significance of those effects.
10. The distinction between projects and effects is subtle but important. Rather than purport to give Parliament a veto over designated projects,⁹ the *IAA* authorizes the Minister and Governor in Council to refuse to permit, or conditionally accept, adverse federal, direct and incidental effects, in light of all of a project's positive and negative effects.
11. The focus on effects is underscored by the purposes of the *IAA*, which include protecting the environmental, health, social and economic conditions within Parliament's authority from adverse effects of designated projects, and ensuring that designated projects "that require the exercise of... federal authority" are considered in a careful and precautionary manner to avoid adverse federal, direct or incidental effects.¹⁰
12. Similarly, s. 7 prohibits proponents only from doing acts or things that may cause federal effects enumerated in that section. Read together, the above provisions clearly demonstrate that the purpose of the *IAA* is focused on avoiding, mitigating or justifying federal, direct and incidental *effects* – all of which are tied to federal jurisdiction – rather than *projects*.

ii. *Effect of the IAA is to avoid, mitigate or justify federal, direct and incidental effects*

13. With respect, Alberta's claims that the *IAA* authorizes a veto over provincially regulated projects¹¹ is a mischaracterization. First, in *Friends of the Oldman River Society v Canada (Minister of Transport)* ("*Oldman*"), La Forest J. found that it is not helpful to characterize undertakings as "provincial projects," or projects "primarily subject to provincial regulation,"

⁸ AB Factum at paras 52, 55, 57, 148, 155.

⁹ *Ibid* at paras 3, 28, 55, 127-32, 136, 148, 155.

¹⁰ *IAA*, *supra* note 6, ss 6(b), (d) [**JBOA, Tab L1**].

¹¹ E.g., AB Factum at paras 3, 28, 55, 127-32, 136, 148, 155.

and that there is no general doctrine of interjurisdictional immunity that shields projects regulated by provinces from valid federal legislation.¹²

14. The drafters of s. 92A of *The Constitution Act, 1867* shared this understanding. As noted above, members of the Special Joint Committee considering s. 92A recommended approval of the provision after hearing the legal opinions of the Justice Minister and Assistant Deputy Minister of Public Law that the amendment does not interfere with federal authority under s. 91.¹³
15. Second, there are important constitutional and practical distinctions between focusing on effects and focusing on projects. Constitutionally, as the Supreme Court of Canada has recognized with respect to the federal fisheries power, it is within Parliament's power to prohibit activities with actual or potential harm to a matter within federal authority.¹⁴
16. Practically, the *IAA* requires assessments to consider alternatives to a project, alternative means of carrying it out, and potential mitigation measures.¹⁵ Through such considerations, the *IAA* allows for changes to project design, location, timing, pacing and other options that may allow proponents to avoid or mitigate unwanted federal, direct and incidental effects, or to enhance project benefits to enable the Minister or Governor in Council to find that the adverse effects are in the public interest. Indeed, through these planning-based mechanisms, the *IAA* may actually increase chances of project approval, compared to regulatory approval processes.
17. In *General Motors of Canada Ltd. v City National Leasing*, the SCC held that “in pursuing valid objectives, the legislation of each level of government will impact occasionally on the sphere of power of the other level of government; overlap of legislation is to be expected and accommodated in a federal state.”¹⁶ Secondary or incidental effects do not impact a law's constitutionality if in pith and substance it falls within the legislating jurisdiction's authority.¹⁷
18. To the degree that project proponents are unable or unwilling to redesign projects such that the Minister or Governor in Council may deem federal effects to be in the public interest, any

¹² *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3, 84 Alta LR (2d) 129 (“*Oldman*”) at 68 [**JBOA, Tab 1**].

¹³ Hazell Affidavit, *supra* note 3 at paras 13-14, Appendix I at I4-I5.

¹⁴ *Fowler v The Queen*, [1980] 2 SCR 213, [1980] 113 DLR (3d) 513 at paras 22-23 [**JBOA, Tab 22**]; *R v Northwest Falling Contractors Ltd.*, [1980] 2 SCR 292 at 301 [**JBOA, Tab 75**].

¹⁵ *IAA*, *supra* note 6, ss 22(1)(b), (e)-(f) [**JBOA, Tab L1**].

¹⁶ [1989] SCJ No 28, [1989] 1 SCR 641 at para 45 [**Nature Canada Book of Authorities (“NC BOA”), Tab 1**].

¹⁷ *Canadian Western Bank*, 2007 SCC 22, [2007] 2 SCR 3 at paras 27-28 [**JBOA, Tab 36**].

effect on provincial authority is incidental to the understanding, avoiding, mitigating or justifying federal, direct or incidental effects.¹⁸

19. It should also be noted that, contrary to Alberta’s claims that the *IAA* amounts to management of Alberta’s natural resources and economy,¹⁹ the *IAA* will likely apply to only approximately two projects on provincial lands in Alberta per year. Compared to the *CEAA 2012 Regulations*, the *Physical Activities Regulations* designate one fewer project type, and raises thresholds for two more project types than it lowers (likely meaning fewer assessments for those projects).²⁰
20. Assessing roughly two projects per year in Alberta is a minimal incidental effect compared to the “fundamental value” of protecting federal environmental matters.²¹

B. The *IAA* Can Be Upheld under Various Federal Heads of Power

21. The second stage in a division of powers analysis is to assign the matter to a “class of subjects” specified in s. 91 or s. 92.²² As noted above, the pith and substance of the *IAA* is a tool for ensuring that the effects of projects with potential to impact federal jurisdiction are considered in an informed and precautionary manner in order to enable federal authorities to protect the environmental, social, health and economic conditions within Parliament’s authority and determine whether federal, direct or incidental effects are in the public interest.
22. As such, while the triggering mechanisms of the *IAA* differ from those of the *Environmental Assessment and Review Process Guidelines Order* (EARPGO),²³ the pith and substance of the *IAA* is directly linked to federal effects, and effects that are directly linked or necessarily incidental to the exercise of federal authority or provision of federal funding. As such, like the EARPGO, the *IAA* flows from various federal powers under s. 91.²⁴

¹⁸ For clarity, in division of powers cases, “incidental” refers to secondary effects or objectives: *Canadian Western Bank*, *ibid* at paras 27-28 [**JBOA, Tab 36**]. Under the *IAA*, “direct or incidental effects” is defined as effects that are “directly linked or necessarily incidental to” the exercise of a federal duty or provision of federal funding: *IAA*, *supra* note 6, s 2 [**JBOA, Tab L1**]. In other words, “incidental” for the purposes of the *IAA* refers to effects that are connected to or flow from an exercise of a duty or provision of funding, such as harm to grizzly bears as a result of harm to fish that those grizzly eat, and which is authorized by the federal fisheries Minister.

¹⁹ AB Factum at paras 146(ii), (iv).

²⁰ Hazell Affidavit, *supra* note 3 at para 11, paras 13-14, Appendix I at I3-I4.

²¹ *114957 Canada Ltée (Spraytech, Société d’arrosage) v. Hudson (Town)*, [2001] 2 SCR 241, 2001 SCC 40 at para 1 [**JBOA, Tab 35**].

²² *R v Hydro-Québec*, [1997] 3 SCR 213, 151 DLR (4th) 32 (“*Hydro-Québec*”) at 239-40 [**JBOA, Tab 12**]; *Reference re Firearms Act*, [2000] 1 SCR 783 at para 25 [**JBOA, Tab 40**].

²³ SOR/84-467 [**JBOA, Tab L5**]. For a description of how, see AB Factum at para 63.

²⁴ *Oldman*, *supra* note 12 at 73-75 [**JBOA, Tab 1**].

23. Canada aptly describes numerous heads of power that support the *IAA*.²⁵ However, the list of federal heads of power that give rise to a federal IA power may evolve. As Lord Sankey famously stated in the *Persons* case, “the BNA Act planted in Canada a living tree capable of growth and expansion within its natural limits.”²⁶ As environmental issues emerge, courts may identify additional matters within federal constitutional authority, which the Governor in Council may add to Schedule 3.²⁷

i. Cooperative federalism

24. In recent decades, courts in Canada have increasingly looked to the principle of cooperative federalism to guide their analysis on jurisdictional questions. In *R v Hydro-Québec*, a majority of the Supreme Court of Canada recognized the “superordinate importance” of both federal and provincial legislative measures to protect the environment,²⁸ and held that care must be taken not only to respect the division of powers, but also to preserve the ability of both orders of government to “exercise leadership” in environmental protection.²⁹

25. Cooperative federalism cannot “be used to make *ultra vires* legislation *intra vires*,”³⁰ but the “dominant tide” of modern federalism “accommodates overlapping jurisdiction and encourages intergovernmental cooperation.”³¹ Courts “should avoid blocking the application of measures which are taken to be enacted in furtherance of the public interest.”³²

26. The *IAA* facilitates intergovernmental cooperation through the mechanisms described in Canada’s factum: substitution, delegation and joint assessments.³³ As Rothstein J. noted in *MiningWatch Canada v Canada*, these mechanisms provide means of reducing “unnecessary, costly and inefficient duplication.”³⁴ Just as La Forest J. in *Oldman* recognized that

²⁵ Canada Factum at paras 105-25.

²⁶ *Edwards v Canada (Attorney General)*, 1929 CanLII 438 (UK JCPC) at 106-07 [NC BOA, Tab 2].

²⁷ *IAA*, supra note 6, s 7(2) [JBOA, Tab L1].

²⁸ *Hydro-Québec*, supra note 22 at para 85 [JBOA, Tab 12].

²⁹ *Ibid* at para 154 [JBOA, Tab 12].

³⁰ *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48, [2018] 2 SCR 189 (“*Pan-Canadian Securities Reference*”) at para 18 [JBOA, Tab 8].

³¹ *Reference re Securities Act (Canada)*, 2011 SCC 66, [2011] 3 SCR 837 at para 57 [JBOA, Tab 7]; *Pan-Canadian Securities Reference*, *ibid* at para 18 [JBOA, Tab 8].

³² *Canadian Western Bank*, supra note 17 at para 37 [JBOA, Tab 36].

³³ Canada Factum at paras 65, 71; *IAA*, supra note 6, ss 29, 31, 39(1) [JBOA, Tab L1].

³⁴ *MiningWatch Canada v Canada*, 2010 SCC 2, [2010] 1 SCR 6 [“*MiningWatch*”] at paras 40-41 [JBOA Tab 28];

environmental protection is one of the “major challenges of our time,”³⁵ this Honourable Court should recognize the public’s interest in rigorous federal IA and uphold the *IAA* as a valid exercise of federal jurisdiction.

C. Jurisdiction Need Not Be Proven to Trigger a Federal IA

27. As Alberta notes, IA is a tool for facilitating informed decision-making and should be applied at the earliest stages of project planning and approval processes.³⁶ Given the importance of IA occurring early, it is unreasonable and impractical to require an assessment authority to prove that a project will result in federal effects before triggering an assessment.
28. As La Forest J. described in *Oldman*, IA is “essentially an information gathering process”³⁷ to inform decision-making. Requiring federal authorities to obtain information proving federal effects prior to the assessment would be to put the cart before the horse. It would also undermine the important objectives of precaution and protection of the environment,³⁸ as well as proponents’ opportunity to redesign projects in response to federal concerns and ensure projects’ effects are in the public interest.
29. Rather, the jurisdictional threshold or “gateway” should be a reasonable possibility of federal effects. Section 16(2)(b) properly reflects this threshold by requiring the Agency to consider, in deciding whether an IA is required, the “possibility” that the designated project “may” cause federal effects. The *Physical Activities Regulations* are designed in a manner that exceeds this threshold, aimed at capturing projects with the greatest potential for federal effects.³⁹
30. Where designated projects are already subject to provincial assessment processes, the *IAA*’s cooperation mechanisms⁴⁰ present opportunities to minimise duplication. In the event that an IA shows no likely federal effects (or exercise of federal authority or federal funding), the project may proceed. Moreover, as the s. 7 prohibition only applies against causing prescribed federal effects, proponents may proceed with designated projects where no such federal effects will occur, without assessment under the *IAA*.

³⁵ *Oldman*, *supra* note 12 at 16 [JBOA, Tab 1].

³⁶ AB Factum at para 6; Affidavit of Corinne Kristensen sworn (or affirmed) 12 December 2019 at para 18, **Alberta Record, Vol. 1 at A4**; Affidavit of Daniel Cheater, Exhibit D, **Ecojustice Record, Tab D at 000003**.

³⁷ *Oldman*, *supra* note 12 at 71, 75 [JBOA, Tab 1].

³⁸ *IAA*, *supra* note 6, ss 6(a), (d) [JBOA, Tab L1]; *Oldman*, *supra* note 12 at 16 [JBOA, Tab 1].

³⁹ Regulatory Impact Analysis Statement SOR/2019-285 [RIAS] at 5663. [JBOA, Tab L2].

⁴⁰ *IAA*, *supra* note 6, ss 29, 31, 39(1) [JBOA, Tab L1].

31. Alberta refers to the absence of an “affirmative regulatory duty” as a ground for lack of federal jurisdiction.⁴¹ However, it is important not to conflate constitutional authority to enact valid federal laws with an exercise of statutory authority. It is s. 91 of *The Constitution Act, 1867*, not statutes enacted under s. 91 heads, that confers jurisdiction on Parliament. Further, a regulatory scheme pursuant to a federal statute may not fully occupy the field of federal environmental jurisdiction. Failure to have enacted the *Fisheries Act*⁴² would not have nullified the federal fisheries power, and Parliament would still have authority to assess projects based on potential impacts on fish.
32. While La Forest J. did find that the EARPGO was only engaged where a proposal required a federal regulatory decision,⁴³ he was describing the EARPGO’s regulatory scheme rather than the extent of federal authority to trigger assessments. Regardless of whether Parliament has enacted other legislation concerning a matter, it has authority to assess projects on the basis of potential for effects on that matter.

D. It Is Rational and Proper to Consider All Relevant Effects

33. As Alberta notes, s. 22(1) sets out a broad list of factors that an IA must take into account, including the positive and negative environmental, social, health or economic conditions and their interactions; the effects of malfunctions or accidents; cumulative effects; contributions to sustainability; the intersection of sex and gender with other identity factors; and any other relevant matters.⁴⁴ Such effects are rational and proper factors to consider when deciding whether a federal, direct or incidental effect is in the public interest.
34. Indeed, in *Oldman*, the majority held that it would defy reason to bar federal authorities from considering the broad environmental and socio-economic repercussions of projects that impact on areas within federal jurisdiction.⁴⁵ For example, many projects requiring a permit to impede navigation, such as dams or bridges, do not improve waterway navigation, requiring the minister to “weigh the advantages and disadvantages resulting from interference with navigation,” such as job creation or restricted navigability.⁴⁶ As La Forest J. held:

⁴¹ See, e.g., Alberta Factum at paras 78-79.

⁴² RSC 1985, c F-14 [JBOA, Tab L11].

⁴³ *Oldman*, supra note 12 at 47-48 [JBOA, Tab 1].

⁴⁴ *IAA*, supra note 6, ss 22(1), (a)(i)-(iii), (h), (s), (t) [JBOA, Tab L1].

⁴⁵ *Oldman*, supra note 12 at 66 [JBOA, Tab 1].

⁴⁶ *Oldman*, supra note 12 at 67 [JBOA, Tab 1].

In legislating regarding a subject, it is sufficient that the legislative body legislate on that subject. The practical purpose that inspires the legislation and the implications that body must consider in making its decision are another thing. Absent a colourable purpose or a lack of *bona fides*, these considerations will not detract from the fundamental nature of the legislation. A railway line may be required to locate so as to avoid a nuisance resulting from smoke or noise in a municipality, but it is nonetheless railway regulation.⁴⁷

35. In other words, there is a distinction between legislating on a matter and making decisions under that legislation. So long as a statute is *intra vires*, the considerations that may inform decision-making under it are not restricted to the jurisdictional root anchoring that legislation.
36. Relevant considerations extend beyond direct and incidental effects, and may include matters within provincial jurisdiction. As Justice La Forest recognized, a project's socio-economic benefits may justify its adverse impacts, regardless of whether those benefits are "federal" in nature.⁴⁸ Accordingly, federal decision-makers must be able to consider all of a designated project's benefits when determining whether federal, direct or incidental effects are justified.
37. It is likewise appropriate for decision-makers to consider all of a project's adverse impacts when determining whether federal, direct or incidental effects are in the public interest. The Minister may decide, for example, that a mine's adverse impacts on fish, when considered together with the mine's air pollution and health effects, are not outweighed by the project's benefits. Similarly, she or he may impose conditions under s. 64(2) that enhance the mine's benefits – for example, to ensure longer-lasting jobs for the local community – in order to find that the impacts on fish are in the public interest. These powers are valid and rational exercises of federal authority under s. 91, and it is immaterial that the decision affects property or civil rights, the management of natural resources, or other matters of provincial authority.⁴⁹
38. Viewed another way, the determination of whether a federal, direct or incidental effect is in the public interest is a form of cost-benefit analysis that cannot be bifurcated along jurisdictional lines, whether it be economic benefits or environmental impacts. Indeed, in *British Columbia v. Canadian Forest Products Ltd.*, a majority of the Supreme Court of

⁴⁷ *Ibid* at 69 [JBOA, Tab 1].

⁴⁸ *Ibid* at 39, 67 [JBOA, Tab 1]; Martin Z. Olszynski, "Chapter 16: Reconsidering Red Chris: Federal Environmental Decision-Making after *MiningWatch Canada v. Canada (Fisheries and Oceans)*" in William A. Tilleman and Alistair Lucas, eds, *Litigating Canada's Environment: Leading Canadian Environmental Law Cases by the Lawyers Involved*, 2017 (Thomson Reuters Canada Ltd: Toronto, ON) at para 19 [NC BOA, Tab 4].

⁴⁹ *Oldman*, *supra* note 12 at 66 [JBOA, Tab 1]; Olszynski, *ibid* at paras 33-35 [NC BOA, Tab 4].

Canada recognized the value of ecosystem services, or “the services provided by the ecosystem to human beings, including food sources, water quality and recreational opportunities.”⁵⁰ Federal matters, such as fisheries and waterway navigation, are such examples. Where projects impact those federal matters, proponents are in effect seeking permission to use up those ecosystem services. The ss. 60(1) and 62 determinations, then, may appropriately be viewed as deciding whether it is in the public interest to allocate – or even forsake – a federal ecosystem service to the project in question. Accordingly, it is not only appropriate, but indeed necessary to consider all a project’s impacts, benefits, risks and uncertainties in order to make an informed decision as to whether federal, direct or incidental effects are in the public interest.

39. Just as the scope of a project subject to federal IA may be broad,⁵¹ federal authority to consider all relevant effects is broad. To find otherwise would be “to suggest that the Constitution is inherently and permanently biased towards an out-dated and discredited model for economic growth – a seemingly untenable position.”⁵²

E. Conclusion

40. The pith and substance of the *IAA* pertains to avoiding, mitigating or justifying federal, direct and incidental effects, and can be upheld under various federal heads of power. Similarly, while proof of federal effects is not necessary to trigger an assessment, the *Physical Activities Regulations* are carefully designed to capture projects with significant federal effects. Where a project will result in federal effects, federal authority to consider all relevant matters is broad, and the cooperation mechanisms in the *IAA* minimize any intrusions into provincial authority.

PART 3. RELIEF SOUGHT

41. That this Honourable Court answer both questions in this reference in the negative.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15^h day of June, 2020.



Anna Johnston, Counsel for the Intervener Nature Canada

⁵⁰ *British Columbia v. Canadian Forest Products Ltd.*, 2004 SCC 38, [2004] 2 SCR 74 at paras 138, 141 [NC BOA, Tab 3].

⁵¹ *MiningWatch*, *supra* note 34 at paras 40-41 [JBOA Tab 28]; *Quebec (Attorney General) v Canada (National Energy Board)*, [1994] 1 SCR 159 at 192-94 [JBOA Tab 38].

⁵² Marie-Ann Bowden & Martin Z. P. Olszynski, “Old Puzzle, New Pieces: *Red Chris* and *Vanadium* and the Future of Federal Environmental Assessment” (2010) 89 Can Bar Rev 445 at 484 [NC BOA, Tab 5].

TABLE OF AUTHORITIES

Legislation and Regulations

<i>Canadian Environmental Assessment Act, 2012</i> , SC 2012, c 19, s 52	JBOA, Tab L8
<i>Regulations Designating Physical Activities</i> , SOR/2012-147	JBOA, Tab L10
<i>Impact Assessment Act</i> , SC 2019 c 28	JBOA, Tab L1
<i>Environmental Assessment and Review Process Guidelines Order</i> , SOR/84-467	JBOA, Tab L5
Regulatory Impact Analysis Statement SOR/2019-285	JBOA, Tab L2
<i>Fisheries Act</i> , RSC 1985, c F-14	JBOA, Tab L11

Case Law

<i>Friends of the Oldman River Society v Canada (Minister of Transport)</i> , [1992] 1 SCR 3, 84 Alta LR (2d) 129	JBOA, Tab 1
<i>Fowler v The Queen</i> , [1980] 2 SCR 213, [1980] 113 DLR (3d) 513	JBOA, Tab 22
<i>R v Northwest Falling Contractors Ltd.</i> , [1980] 2 SCR 292	JBOA, Tab 75
<i>General Motors of Canada Ltd. v City National Leasing</i> , [1989] SCJ No 28, [1989] 1 SCR 641	NC BOA, Tab 1
<i>Canadian Western Bank</i> , 2007 SCC 22, [2007] 2 SCR 3	JBOA, Tab 36
<i>114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)</i> , [2001] 2 SCR 241, 2001 SCC 40	JBOA, Tab 35
<i>R v Hydro-Québec</i> , [1997] 3 SCR 213, 151 DLR (4th) 32	JBOA, Tab 12
<i>Reference re Firearms Act</i> , [2000] 1 SCR 783	JBOA, Tab 40
<i>Edwards v Canada (Attorney General)</i> , 1929 CanLII 438 (UK JCPC)	NC BOA, Tab 2
<i>Reference re Pan-Canadian Securities Regulation</i> , 2018 SCC 48, [2018] 2 SCR 189	JBOA, Tab 8
<i>Reference re Securities Act (Canada)</i> , 2011 SCC 66, [2011] 3 SCR 837	JBOA, Tab 7
<i>MiningWatch Canada v Canada</i> , 2010 SCC 2, [2010] 1 SCR 6	JBOA Tab 28
<i>British Columbia v. Canadian Forest Products Ltd.</i> , 2004 SCC 38, [2004] 2 SCR 74	NC BOA, Tab 3

Quebec (Attorney General) v Canada (National Energy Board), [1994] 1 SCR 159 JBOA Tab 38

Texts, Articles and Case Comments

Martin Z. Olszynski, "Chapter 16: Reconsidering Red Chris: Federal Environmental Decision-Making after *MiningWatch Canada v. Canada (Fisheries and Oceans)*" in William A. Tilleman and Alistair Lucas, eds, *Litigating Canada's Environment: Leading Canadian Environmental Law Cases by the Lawyers Involved*, 2017 (Thomson Reuters Canada Ltd: Toronto, ON) NC BOA, Tab 4

Marie-Ann Bowden & Martin Z. P. Olszynski, "Old Puzzle, New Pieces: *Red Chris* and *Vanadium* and the Future of Federal Environmental Assessment" (2010) 89 Can Bar Rev 445 NC BOA, Tab 5

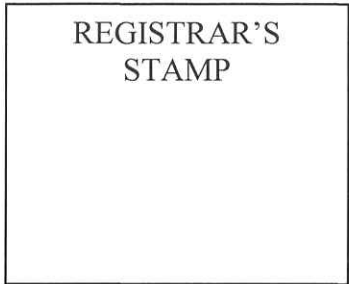
APPENDIX I – NATURE CANADA RECORD

Table of Contents

A.	Affidavit of Stephen Hazell, dated June 5, 2020	I1 - 5
B.	Exhibit “A”	I6 - 10
C.	Exhibit “B”	I11 - 24

COURT OF APPEAL OF ALBERTA

Form 49
[Rule 13.19]



COURT OF APPEAL FILE NUMBER **1901- 0276 AC**

REGISTRY OFFICE **CALGARY**

In the Matter of An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts, SC 2019, c. 28 and the Physical Activities Regulations, SOR/2019-285

And in the Matter of a Reference by the Lieutenant Governor in Council to the Court of Appeal of Alberta under the *Judicature Act*, RSA 2000, c. J-2, s. 26

DOCUMENT

AFFIDAVIT

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

WEST COAST ENVIRONMENTAL LAW
200 - 2006 W 10th Ave.
Vancouver, BC Canada, V6J 2B3
Coast Salish Territories

Attention: Anna Johnston
Tel: 604-340-2304
Fax: 604-684-1312
Email: ajohnston@wcel.org

AFFIDAVIT OF STEPHEN HAZELL

Sworn (or Affirmed) on June 5, 2020

I, STEPHEN HAZELL, of the City of Ottawa, in the Province of Ontario, SWEAR AND SAY THAT:

1. I am Nature Canada's Counsel, and I am authorized to give evidence on behalf of Nature Canada, an intervenor in this proceeding. I have personal knowledge of the facts and matters deposed to in this Affidavit, except where they are stated to be based on information from a source I identify, in which case I believe that the information from that source is true.
2. For over thirty-five years, I have worked in various capacities in the public, private and not-for-profit sectors to protect ecosystems and promote sustainable communities. In that time, I have held senior management positions in four national nature and environmental organizations, including Nature Canada.
3. I also served as director of regulatory affairs at the Canadian Environmental Assessment Agency from 1992 to 1995, where I led the team that developed the regulations needed to implement the *Canadian Environmental Assessment Act*.
4. I was partner and principal consultant with Marbek Resource Consultants from 1995 to 2000, in which capacity I advised federal agencies, provincial and territorial governments, and foreign governments on law and policy reform in the areas of impact assessment and sustainable resource development.
5. I was adjunct professor at the Faculty of Law at University of Ottawa, where I have taught environmental law and natural resources law from 2011 to 2017.
6. In 1999, I wrote the book *Canada v. the Environment: Federal Environmental Assessment 1984-1998* (Canadian Environmental Defence Fund, 1999), ISBN 096850860X, 9780968508602, which describes federal environmental assessment law and policy to date.
7. I was a member of the Regulatory Advisory Committee of the Canadian Environmental Assessment Agency on the *Canadian Environmental Assessment Act* from 2000 to 2010.

Supplementing the Record

Projects in Alberta Subject to Federal Environmental and Impact Assessment

8. In January 2020, I prepared a report of all comprehensive studies and panel reviews conducted in Alberta under the *Canadian Environmental Assessment Act*, SC 1992, c 37 (“CEAA”) from when that Act first came into force in 1995 until it was repealed in 2012, as well as all assessments conducted in Alberta under the *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52 (“CEAA 2012”) from the time that Act was enacted in 2012 to the time it was repealed in 2019 (the “Report”). A true copy of that report is attached as Exhibit “A”.

9. The Report shows that under CEAA, during the 17 year period the Act was in force, 23 comprehensive study or panel review assessments were conducted of projects and activities in Alberta. That figure amounts to an average of 1.35 comprehensive studies or panel reviews on provincial lands in Alberta per year.

10. The Report also shows that under CEAA 2012, 15 projects were triggered of projects and activities on provincial lands in Alberta during the seven year period it was in force. That figure amounts to 2.14 assessments on provincial lands in Alberta per year.

11. I have also reviewed the *Physical Activities Regulations*, SOR/2019-285 that are the subject of this constitutional reference, as well as the *Regulations Designating Physical Activities*, SOR/2012-147 made under CEAA 2012 (“CEAA 2012 Regulations”). Compared to the CEAA 2012 Regulations, the *Physical Activities Regulations*:

- (a) Has removed eight types of projects that may occur on provincial crown lands;
- (b) Has added seven new project types for projects that may occur on provincial lands;
- (c) Maintains the same (or near same) entry for 36 project types;

- (d) Has raised the threshold for 28 project types, including mining, nuclear, hydro and pipeline projects, meaning fewer assessments of those projects where they occur on provincial lands;
- (e) Has lowered the threshold for 26 project types, including offshore wind and tidal projects, meaning potentially more assessments for projects on provincial lands; and
- (f) Has amended designations of four air transportation infrastructure projects (it is unclear whether these changes will result in more or fewer assessments).

Parliamentary Debates Respecting Section 92A

12. In June 2020, I reviewed the Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada dated 5 February 1981, Issue No. 53, respecting amending the *Constitution Act, 1867* to add section 92A (“Hansard”). A true copy of excerpted pages of that Hansard showing discussion of the interplay between federal and provincial exclusive jurisdiction is attached as Exhibit “B”.

13. Pages 54:70-54:76 of the Hansard evidence shows members of the Joint Committee discussing the concerns of Member John Fraser respecting the possibility of section 92A derogating from Parliament’s jurisdiction over fisheries, navigation and shipping. The Hansard shows both then-Justice Minister Jean Chretien and then-Assistant Deputy Minister of Public Law Dr. Barry L. Strayer clarifying that section 92A would not derogate from federal jurisdiction under section 91.

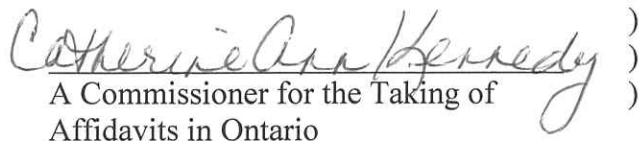
14. Those pages show Committee members voting against a proposed amendment to the proposed text of section 92A that would have clarified that section 92A does not derogate from the federal fisheries and navigation powers on the basis (stated by Mr. Chretien and Dr. Strayer)

that the amendment could be taken to infer that federal jurisdiction over other matters under section 91 may not be protected. In other words, Committee members passed section 92A on the basis of their understanding that 92A would not derogate from federal authority under section 91.

15. I swear this affidavit in support of Nature Canada's intervention in this reference, and for no other or improper purpose.

AFFIRMED / SWORN BEFORE ME)
at the City of Ottawa in the)
Province of Ontario,)
this 5th day of June, 2020.)


Stephen Hazell


A Commissioner for the Taking of)
Affidavits in Ontario)

This is **EXHIBIT "A"** referred to in the
Affidavit of STEPHEN HAZELL
Sworn before me this 5th of June, 2020

Catherine Ann Kennedy
A Commissioner for the Taking of
Affidavits in Ontario



Report of Stephen Hazell on Projects Subject to Federal Assessment in Alberta Since 1995
January 2020

This is a report of all comprehensive studies and panel reviews conducted on provincial lands in Alberta under of the *Canadian Environmental Assessment Act*, SC 1992, c 37 (“CEAA”) from when that Act first came into force in 1995 until it was repealed in 2012, as well as all assessments conducted on provincial lands in Alberta under the *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52 (“CEAA 2012”) from the time that Act was enacted in 2012 to the time it was repealed in 2019.

I found that under CEAA, during the 17 year period the Act was in force, 23 assessments were conducted in Alberta by comprehensive study or panel review, which can be found at Table 1, below. This list does not include projects that were wholly situated on federal lands such as National Parks or Department of National Defence property, or projects that were subject to a screening review. Sixteen of these projects were assessed by panel review, while seven were comprehensive studies. The information was obtained using the Canadian Environmental Assessment Registry. To find the comprehensive studies and panel reviews conducted in Alberta under CEAA, I browsed the Canadian Environmental Assessment Agency Registry at this link: <https://www.ceaa-acee.gc.ca/010/province-eng.cfm?provID=11>.

I found that 15 projects were assessed in Alberta under CEAA 2012 during the seven year period it was in force, not including projects initially commenced under CEAA. The list of these projects can be found in Table 2, below. Two of these were assessed by review panels. This number does not include projects that were wholly situated on federal lands such as National Parks, Indigenous lands or Department of National Defence Property, or projects for which an assessment was determined not to be required. To search for these assessments, I accessed the

Canadian Impact Assessment Registry using the following link: https://www.ceaa-acee.gc.ca/050/evaluations/exploration?active=true&showMap=false&document_type=project. I then used filters to modify the “Refine Search” parameters. I unchecked the “Active Assessments” criterion. I then verified that the “Result Type” parameters were limited to the “Assessments” criterion. I then used filters to restrict the “Province” parameters to the “Alberta” criterion. This limits results to solely assessments on projects occurring within the province of Alberta, either in whole or in part. I then performed two separate filters under Assessment Type:

1. I filtered for “Environmental assessment under CEAA 2012” criterion. This generated 14 results. I eliminated one result because it was determined that an assessment was not required of that designated project.
2. I filtered for “Environmental assessment by Review Panel under CEAA 2012” criterion, which generated eight results. I omitted six projects which began under CEAA 1992, leaving two “Environmental assessments by Review Panel,” which commenced after CEAA 2012 came into force.

Table 1: Comprehensive Studies and Panel Reviews under CEAA

Assessment by Panel Review		Date Commenced
1	Frontier Oil Sands Mine Project	2012
2	Cheviot Coal Mine Project	1996
3	Enbridge Northern Gateway Project	2006
4	Express Pipeline Project	1995
5	Glacier Power Ltd.'s Dunvegan Hydroelectric Project	2004
6	Highwood Storage and Diversion Plan	2000
7	Horizon Oil Sands Project	2001
8	Jackpine Mine Expansion Project	2010
9	Jackpine Oil Sands Project	2001
10	Joslyn North Mine Project, Townships 94-96, Ranges 11-13 West of 4th Meridian	2008
11	Kearl Oil Sands Project - Mine Development	2005
12	Little Bow Project/Highwood Diversion Plan	1996
13	Muskeg River Mine Expansion (MRME) - Albian Oil Sand Project	2005
14	Brooks Power Project	2001
15	Pierre River Mine Project	2010
16	Robb Trend Coal Mine Expansion Project	2011
Comprehensive Studies		
17	Alliance Pipeline Project	1996
18	Grizzly Extension Pipeline and Weejay Lateral	2001
19	Little Bow Reservoir Rehabilitation and Upgrading Project	2009
20	Local Access Road - Highway 58, Fox Lake and Garden River	2002
21	Millennium Oil Sands	1997
22	Valley South Water Project	1997
23	MacKay Operating Corporation - MacKay River Commercial Steam Assisted Gravity Drainage Project	2010

Table 2: Assessments under CEAA 2012

Assessment by Panel Review		Date Commenced
1	Grassy Mountain Coal Project	2015
2	Amisk Hydroelectric Project	2015
Regular-Stream Assessment		
3	Trans Mountain Expansion Project	2014
4	Towerbirch Expansion Project	2015
5	Enbridge Pipelines Inc. - Line 3 Replacement Program	2015
6	2017 NGTL System Expansion Project	2015
7	Wolverine River Lateral Loop (Carmon Creek Section)	2014
8	Springbank Off-Stream Reservoir Project	2016
9	NOVA Gas Transmission Ltd. - 2021 NGTL System Expansion Project	2018
10	Edson Mainline Expansion Project	2019
11	North Corridor Expansion Project	2019
12	Highway 947 Extension Project	2014
13	Sundog Renewable Generating Station Project	2017
14	Pelican Renewable Generating Station Project	2017
15	Energy East Project	2014

This is **EXHIBIT "B"** referred to in the
Affidavit of STEPHEN HAZELL
Sworn before me this 5th of June, 2020

Catherine Ann Kennedy
A Commissioner for the Taking of
Affidavits in Ontario



SENATE
HOUSE OF COMMONS

Issue No. 54

Thursday, February 5, 1981

Joint Chairmen:

Senator Harry Hays, P.C.
Serge Joyal, M.P.

SÉNAT
CHAMBRE DES COMMUNES

Fascicule n° 54

Le jeudi 5 février 1981

Coprésidents:

Sénateur Harry Hays, c.p.
Serge Joyal, député

*Minutes of Proceedings and Evidence
of the Special Joint Committee of
the Senate and of
the House of Commons on the*

*Procès-verbaux et témoignages
du Comité mixte spécial
du Sénat et de
la Chambre des communes sur la*

Constitution of Canada

Constitution du Canada

RESPECTING:

The document entitled "Proposed Resolution for a Joint Address to Her Majesty the Queen respecting the Constitution of Canada" published by the Government on October 2, 1980

CONCERNANT:

Le document intitulé «Projet de résolution portant adresse commune à Sa Majesté la Reine concernant la Constitution du Canada», publié par le gouvernement le 2 octobre 1980

APPEARING:

The Honourable Jean Chrétien,
Minister of Justice and Attorney
General of Canada

COMPARAÎT:

L'honorable Jean Chrétien,
ministre de la Justice et
procureur général du Canada

WITNESSES:

(See back cover)

First Session of the
Thirty-second Parliament, 1980-81

TÉMOINS:

(Voir à l'endos)

Première session de la
trente-deuxième législature, 1980-1981

SPECIAL JOINT COMMITTEE OF
THE SENATE AND OF THE HOUSE
OF COMMONS ON THE CONSTITUTION
OF CANADA

Joint Chairmen:

Senator Harry Hays, P.C.
Serge Joyal, M.P.

Representing the Senate:

Senators:

Asselin	Hays
Austin	Lapointe
Cottreau	Petten

Representing the House of Commons:

Messrs.

Beatty	Henderson
Bockstael	Irwin
Corbin	Joyal
Epp	King
Fraser	Mackasey

COMITÉ MIXTE SPÉCIAL DU SÉNAT
ET DE LA CHAMBRE DES COMMUNES
SUR LA CONSTITUTION DU CANADA

Coprésidents:

Sénateur Harry Hays, c.p.
Serge Joyal, député

Représentant le Sénat:

Les sénateurs:

Rousseau	Tremblay
Steuart	Yuzyk—10

Représentant la Chambre des communes:

Messieurs

McRae	Nystrom
Munro (<i>Esquimalt- Saanich</i>)	Robinson (<i>Burnaby</i>) Tobin—15

(Quorum 12)

Les cogreffiers du Comité

Richard Prigent

Paul Bélisle

Joint Clerks of the Committee

Pursuant to S.O. 65(4)(b) of the House of Commons:

On Thursday, February 5, 1981:

Mr. Hawkes replaced Mr. McDermid;
Mr. Waddell replaced Mr. Broadbent;
Mr. Irwin replaced Mrs. Côté;
Mr. Robinson (*Burnaby*) replaced Mr. Nystrom;
Mr. Nystrom replaced Mr. Robinson (*Burnaby*);
Mrs. Côté replaced Miss Campbell (*South West Nova*);
Mr. Hnatyshyn replaced Mr. Hawkes;
Mr. Mackasey replaced Mr. McRae;
Miss Campbell (*South West Nova*) replaced Mrs. Côté;
Mr. Munro (*Esquimalt-Saanich*) replaced Mr. Beatty;

Conformément à l'article 65(4)(b) du Règlement de la Chambre des communes:

Le jeudi 5 février 1981:

M. Hawkes remplace M. McDermid;
M. Waddell remplace M. Broadbent;
M. Irwin remplace M^{me} Côté;
M. Robinson (*Burnaby*) remplace M. Nystrom;
M. Nystrom remplace M. Robinson (*Burnaby*);
M^{me} Côté remplace M^{lle} Campbell (*South West Nova*);
M. Hnatyshyn remplace M. Hawkes;
M. Mackasey remplace M. McRae;
M^{lle} Campbell (*South West Nova*) remplace M^{me} Côté;
M. Munro (*Esquimalt-Saanich*) remplace M. Beatty;

Mr. McCain replaced Mr. McGrath;

Mr. King replaced Mr. McCain;

Mr. Dionne (*Northumberland-Miramichi*) replaced Mr. Henderson;

Mr. Robinson (*Burnaby*) replaced Mr. Waddell;

Mr. Tobin replaced Miss Campbell (*South West Nova*);

Mr. Henderson replaced Mr. Dionne (*Northumberland-Miramichi*);

Mr. Beatty replaced Mr. Hnatyshyn;

Mr. McRae replaced Mr. Lapierre.

M. McCain remplace M. McGrath;

M. King remplace M. McCain;

M. Dionne (*Northumberland-Miramichi*) remplace M. Henderson;

M. Robinson (*Burnaby*) remplace M. Waddell;

M. Tobin remplace M^{lle} Campbell (*South West Nova*);

M. Henderson remplace M. Dionne (*Northumberland-Miramichi*);

M. Beatty remplace M. Hnatyshyn;

M. McRae remplace M. Lapierre.

Pursuant to an order of the Senate adopted November 5, 1980:

On Thursday, February 5, 1981:

Senator Connolly replaced Senator Frith;

Senator Yuzyk replaced Senator Roblin;

Senator Cottreau replaced Senator Connolly.

Conformément à un ordre du Sénat adopté le 5 novembre 1980:

On Thursday, February 5, 1981:

Le sénateur Connolly remplace le sénateur Frith;

Le sénateur Yuzyk remplace le sénateur Roblin;

Le sénateur Cottreau remplace le sénateur Connolly.

MINUTES OF PROCEEDINGS

THURSDAY, FEBRUARY 5, 1981
(101)

[Text]

The Special Joint Committee on the Constitution of Canada met this day at 9:48 o'clock a.m., the Joint Chairman, Mr. Joyal, presiding.

Members of the Committee present:

Representing the Senate: The Honourable Senators Austin, Connolly, Hays, Lapointe, Petten, Roblin, Rousseau, Steuart and Tremblay.

Representing the House of Commons: Messrs. Beatty and Bockstael, Miss Campbell (*South West Nova*), Mr. Corbin, Mrs. Côté, Messrs. Epp, Fraser, Hawkes, Henderson, Hnatyshyn, Irwin, Joyal, Lapierre, McGrath, McRae, Nystrom, Robinson (*Burnaby*) and Waddell.

Other Members present: Messrs. Dionne (*Northumberland-Miramichi*) and Munro (*Esquimalt-Saanich*).

In attendance: From the Research Branch of the Library of Parliament: Mr. John McDonough, Researcher.

Appearing: The Honourable Jean Chrétien, Minister of Justice and Attorney General of Canada.

Witnesses: From the Department of Justice: Mr. Roger Tassé, Deputy Minister and Dr. B. L. Strayer, Assistant Deputy Minister, Public Law.

The Committee resumed consideration of its Order of Reference from the Senate dated November 3, 1980 and its Order of Reference from the House of Commons dated October 23, 1980, both relating to the document entitled "Proposed Resolution for a Joint Address to Her Majesty the Queen respecting the Constitution of Canada" published by the Government on October 2, 1980. (*See Minutes of Proceedings, Thursday, November 6, 1980, Issue No. 1.*)

The Chairman presented the Tenth Report of the Subcommittee on Agenda and Procedure which reads as follows:

(A)—That the Joint Committee meet on:

Thursday, February 5, 1981	9:30 a.m. to 12:30 p.m. 3:30 p.m. to 6:00 p.m. 8:00 p.m. to 10:30 p.m.
Friday, February 6, 1981	9:30 a.m. to 11:00 a.m.
Monday, February 9, 1981	3:30 p.m. to 5:45 p.m. 8:00 p.m. to 10:30 p.m.

(B)—That the Subcommittee on Agenda and Procedure meet at 5:45 o'clock p.m. on Monday, February 9, 1981.

By unanimous consent, the Tenth Report of the Subcommittee on Agenda and Procedure was concurred in.

The Committee resumed consideration of the motion of Mr. Broadbent,—That the proposed *Constitution Act, 1980* be amended by

(a) adding immediately after line 17 on page 15 the following headings and sections:

PROCÈS-VERBAL

LE JEUDI 5 FÉVRIER 1981
(101)

[Traduction]

Le Comité mixte spécial sur la Constitution du Canada se réunit aujourd'hui à 9 h 48 sous la présidence de M. Joyal (coprésident).

Membres du Comité présents:

Représentant le Sénat: Les honorables sénateurs Austin, Connolly, Hays, Lapointe, Petten, Roblin, Rousseau, Steuart et Tremblay.

Représentant la Chambre des communes: MM. Beatty et Bockstael, M^{lle} Campbell (*South West Nova*), M. Corbin, M^{me} Côté, MM. Epp, Fraser, Hawkes, Henderson, Hnatyshyn, Irwin, Joyal, Lapierre, McGrath, McRae, Nystrom, Robinson (*Burnaby*) et Waddell.

Autres députés présents: MM. Dionne (*Northumberland-Miramichi*) et Munro (*Esquimalt-Saanich*).

Aussi présent: Du Service de recherches de la Bibliothèque du Parlement: M. John McDonough, recherchiste.

Comparait: L'honorable Jean Chrétien, ministre de la Justice et procureur général du Canada.

Témoins: Du ministère de la Justice: M. Roger Tassé, sous-ministre, et M. B. L. Strayer, sous-ministre adjoint, Droit public.

Le Comité reprend l'étude de son ordre de renvoi du Sénat, du 3 novembre 1980, et de son ordre de renvoi de la Chambre des communes du 23 octobre 1980, tous deux portant sur le document intitulé «Projet de résolution portant adresse commune à Sa Majesté la Reine concernant la Constitution du Canada», publié par le gouvernement le 2 octobre 1980. (*Voir procès-verbal du jeudi 6 novembre 1980, Fascicule n° 1.*)

Le président présente le dixième rapport du Sous-comité du programme et de la procédure, ainsi libellé:

(A)—Que le Comité mixte se réunisse:

Le jeudi 5 février 1981	de 9 h 30 à 12 h 30 de 15 h 30 à 18 heures de 20 heures à 22 h 30
Le vendredi 6 février 1981	de 9 h 30 à 11 heures
Le lundi 9 février 1981	de 15 h 30 à 17 h 45 de 20 heures à 22 h 30

(B)—Que le Sous-comité du programme et de la procédure se réunisse le lundi 9 février 1981, à 17 h 45.

Du consentement unanime, le dixième rapport du Sous-comité du programme et de la procédure est adopté.

Le Comité reprend l'étude de la motion de M. Broadbent,—Que le projet de *Loi constitutionnelle de 1980* soit modifié par:

a) adjonction, après la ligne 17, page 15, de la rubrique et des articles suivants:

"PART VI

AMENDMENT TO THE
CONSTITUTION ACT, 1867

52. (1) The *Constitution Act, 1867* (formerly named the *British North America Act, 1867*) is amended by adding immediately after section 92 the following heading and section:

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

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

- (a) exploration for non-renewable natural resources in the province,
- (b) development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom; and
- (c) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy;

whether or not such production is exported in whole or in part from the province.

(2) In each province, the legislature may make laws in relation to the export from the province 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.

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

(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.

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

(6) Nothing in subsections (1) to (5) derogates from any powers or rights that a legislature or government of a

«PARTIE VI

MODIFICATION DE LA
LOI CONSTITUTIONNELLE DE 1867

52. (1) La *Loi constitutionnelle de 1867* (antérieurement désignée sous le titre: *Acte de l'Amérique du Nord britannique, 1867*) est modifiée par l'insertion après l'article 92 de la rubrique et de l'article suivants:

*«Ressources naturelles non renouvelables,
ressources forestières et énergie électrique*

92A. (1) La législature de chaque province a compétence exclusive pour légiférer dans les domaines suivants:

- a) prospection des ressources naturelles non renouvelables de la province;
- b) exploitation, conservation et gestion des ressources naturelles non renouvelables et des ressources forestières de la province, y compris leur rythme de production primaire;
- c) aménagement, conservation et gestion des emplacements et des installations de la province destinés à la production d'énergie électrique,

que cette production soit ou non exportée en tout ou en partie hors de la province.

(2) La législature de chaque province a compétence pour légiférer en ce qui concerne l'exportation, hors de la province, de la production primaire tirée des ressources naturelles non renouvelables et des ressources forestières de la province, ainsi que de la production d'énergie électrique de la province, sous réserve de ne pas adopter de lois autorisant ou prévoyant des disparités de prix ou des disparités dans les exportations destinées à une autre partie du Canada.

(3) Le paragraphe (2) ne porte pas atteinte au pouvoir du Parlement de légiférer dans les domaines visés à ce paragraphe, les dispositions d'une loi du Parlement adoptée dans ces domaines l'emportant sur les dispositions incompatibles d'une loi provinciale.

(4) La législature de chaque province a compétence pour prélever des sommes d'argent par tout mode ou système de taxation:

- a) des ressources naturelles non renouvelables et des ressources forestières de la province, ainsi que de la production primaire qui en est tirée,
- b) des emplacements et des installations de la province destinés à la production d'énergie électrique, ainsi que cette production même.

Cette compétence peut s'exercer indépendamment du fait que la production en cause soit ou non, en totalité ou en partie, exportée hors de la province, mais les lois adoptées dans ces domaines ne peuvent autoriser ou prévoir une taxation qui établisse une distinction entre la production exportée à destination d'une autre partie du Canada et la production non exportée hors de la province.

(5) L'expression «production primaire» a le sens qui lui est donné dans la sixième annexe.

(6) Les paragraphes (1) à (5) ne portent pas atteinte aux pouvoirs ou droits détenus par la législature ou le

province had immediately before the coming into force of this section.”

53. The said Act is further amended by adding the following Schedule:

“THE SIXTH SCHEDULE
PRIMARY PRODUCTION FROM
NON-RENEWABLE RESOURCES AND
FORESTRY RESOURCES

1. For the purposes of section 92A of this Act,

(a) production from a non-renewable resource is primary production therefrom if

(i) it is in the form in which it exists upon its recovery or severance from its natural state, or

(ii) 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; and

(b) production from a forestry resource is primary production therefrom if it consists of sawlogs, poles, lumber, wood chips, sawdust or any other primary wood product, or wood pulp, and is not a product manufactured from wood.”; and

(b) renumbering Part VI as Part VII, renumbering all subsequent sections accordingly and making such other changes in numbering as are consequential thereto.

and the motion of Mr. Corbin,—That the proposed amendment to the proposed *Constitution Act, 1980* adding a new section 52 be amended by

(a) striking out the portion of subsection 92A(1) following paragraph (c) that reads as follows:

“whether or not such production is exported in whole or in part from the provinces.”; and

(b) adding to subsection 92A(2) immediately after the words “make laws in relation to the export from the province” the following words:

“to another part of Canada”

and the motion of Mr. McGrath,—That the proposed amendment to Clause 51 of the proposed *Constitution Act, 1980* adding Part VI be amended by adding immediately after the proposed new Clause 92A of the *Constitution Act, 1867* the following:

“92B. All land, mines, minerals and royalties within and arising from the seabed and subsoil of the internal waters, the territorial sea and the continental shelf adjacent or appurtenant to any province, all economic or proprietary rights in the non-renewable natural resources thereof, and all rights to produce energy from the waters, currents and tides thereof, shall belong to the adjacent province.

gouvernement d’une province lors de l’entrée en vigueur du présent article.

53. La présente loi est en outre modifiée par l’adjonction de l’annexe suivante:

«SIXIÈME ANNEXE
PRODUCTION PRIMAIRE TIRÉE
DES RESSOURCES NATURELLES
NON RENOUVELABLES ET
DES RESSOURCES FORESTIÈRES

1. Pour l’application de l’article 92A:

a) on entend par production primaire tirée d’une ressource naturelle non renouvelable:

(i) soit le produit qui se présente sous la même forme que lors de son extraction du milieu naturel;

(ii) soit le produit non manufacturé de la transformation, du raffinage ou de l’affinage d’une ressource, à l’exception du produit du raffinage du pétrole brut, du raffinage du pétrole brut lourd amélioré, du raffinage des gaz ou des liquides dérivés du charbon ou du raffinage d’un équivalent synthétique du pétrole brut;

b) on entend par production primaire tirée d’une ressource forestière la production constituée de billots, de poteaux, de bois d’œuvre, de copeaux, de sciure ou d’autre produit primaire du bois, ou de pâte de bois, à l’exception d’un produit manufacturé en bois.»;

b) les changements de numéros de partie et d’article qui en découlent.

et de la motion de M. Corbin,—Que le projet de modification du projet de *Loi constitutionnelle de 1980* ajoutant le nouvel article 52 soit modifié par:

a) suppression du passage du paragraphe 92A(1) qui suit l’alinéa c) et dont le texte est comme suit:

«que cette production soit ou non exportée en tout ou en partie hors de la province.»;

b) adjonction, au paragraphe 92A(2), suivant le membre de phrase «légiférer en ce qui concerne l’exportation, hors de la province», de ce qui suit:

«à destination d’une autre partie du Canada.»

et de la motion de M. McGrath,—Que le projet de modification de l’article 51 du projet de *Loi constitutionnelle de 1980* ajoutant la partie VI soit modifié par adjonction, suivant le nouvel article 92A de la *Loi constitutionnelle de 1867*, de ce qui suit:

«92B. La surface et le sous-sol des fonds marins des eaux intérieures, de la mer territoriale et du plateau continental contigus à une province ou dépendant d’elle, les mines et minéraux qui y sont contenus, les redevances afférentes, les droits économiques ou le droit de propriété sur les ressources naturelles non renouvelables qui s’y trouvent, ainsi que le droit de production d’énergie hydraulique ou marémotrice, appartiennent à la province.

[Text]

as far as it pertains to a province developing that industry at home in the province.

I do not want to repeat any of those arguments, Mr. Chairman, but I would like to have a recorded vote on this if we could.

The Joint Chairman (Mr. Joyal): Thank you very much, Mr. Nystrom.

Subamendment agreed to: yeas, 21; nays, 2.

The Joint Chairman (Mr. Joyal): So I would like to invite the honourable John Fraser, but before I do I would like just to draw the attention of the honourable members to the following.

The Chair has listened carefully to all the interventions around this table and has allowed all honourable members to put forward their views on a very comprehensive basis; but at this point I think that the Chair will invite all honourable members from all sides of the table to try and keep their intervention on the very content of the proposed amendment and I think that all honourable members have been very co-operative this morning to give all the time needed for each speaker to put forward his views and I think at this point the Chair would like to remind honourable members we have adopted the procedure to make our work easier and I think that at this point it is the responsibility of the Chair to draw the attention of all honourable members to that very point.

So I would like to invite the honourable John Fraser to move the amendment that he is intending to.

Mr. Fraser: Mr. Chairman, I understand the amendment is ready for distribution.

The Joint Chairman (Mr. Joyal): Yes, the Chair has made sure that your amendment has been translated and been printed so that our clerks will circulate to all honourable members a copy of your proposed amendment.

Mr. Fraser: With your permission, Mr. Chairman, I will proceed.

I am going to read the amendment.

I move that the amendment be amended by adding to proposed Section 92A(1) the following new paragraph:

(d) Nothing in Section 92A derogates from the powers of the Parliament of Canada relating to fisheries, navigation and shipping.

(d) Rien dans l'article 92A ne doit être interprété comme constituant une dérogation aux pouvoirs du Parlement du Canada relatif aux pêcheries, à la navigation et au transport maritime.

Now, Mr. Chairman and colleagues, I spoke at length about this matter this morning and I do not want to repeat my entire intervention, and honourable members have had the benefit of hearing Senator Austin comment a few minutes ago, but basically this is what it is about:

In the main amendment, the New Democratic Party amendment, when you look carefully at what it is doing relative to the generation and production of electrical energy, the effect of the amendment is to say this, it is to say that in each

[Translation]

commerce international dans la mesure où il est lié à la mise en valeur d'un secteur industriel dans une province.

Je ne reviendrai sur aucun de ces arguments, monsieur le président, mais je tiens à ce qu'on vote par appel nominal si c'est possible.

Le coprésident (M. Joyal): Merci beaucoup, monsieur Nystrom.

Le sous-amendement est adopté par 21 voix contre 2.

Le coprésident (M. Joyal): J'invite donc M. John Fraser à prendre la parole mais, auparavant, je voudrais attirer votre attention sur ce qui suit.

J'ai suivi attentivement toutes les interventions et j'ai autorisé tous les membres du Comité à exprimer des points de vue très généraux; mais j'invite désormais tous les membres du Comité, quel que soit le parti auquel ils appartiennent, à s'en tenir au contenu même de l'amendement proposé. Je crois que vous avez été très tolérants ce matin et que vous avez accordé à chacun le temps voulu pour qu'il exprime son point de vue, mais je rappelle aux membres du Comité que nous avons adopté une procédure destinée à nous faciliter la tâche; il m'appartient donc d'attirer votre attention sur ce point.

J'invite M. John Fraser à proposer son amendement.

M. Fraser: Je crois, monsieur le président, que l'amendement attend d'être distribué.

Le coprésident (M. Joyal): Oui, je me suis assuré que votre amendement soit traduit et imprimé, de sorte que nos greffiers puissent en remettre un exemplaire à tous les membres du Comité.

M. Fraser: Avec votre autorisation, monsieur le président, je vais donc poursuivre.

Je vais lire l'amendement.

Je propose que l'amendement soit modifié par l'adjonction à l'article 92A(1) d'un nouveau paragraphe:

d) Rien dans l'article 92A ne doit être interprété comme constituant une dérogation aux pouvoirs du Parlement du Canada relatifs aux pêcheries, à la navigation et au transport maritime.

(d) Nothing in Section 92A derogates from the powers of the Parliament of Canada relating to fisheries, navigation and shipping.

Monsieur le président, chers collègues, je vous ai entretenus longuement ce matin de ce problème et je ne reviendrai pas sur mon intervention. Les membres du Comité ont eu l'avantage d'entendre les observations du sénateur Austin il y a quelques instants, et voilà en substance à quoi cela se résoud:

Si vous étudiez attentivement l'amendement du Parti néo-démocrate dans la perspective de ses répercussions concernant la production d'énergie électrique, vous constaterez qu'il autorise l'assemblée législative de chaque province à légiférer

[Texte]

province the legislatures may legislate exclusively with respect to the development, conservation and management of hydro electric sites and dams. Now, that is the effect of it.

Now, my concern, Mr. Chairman, you said words either mean something or they do not, and so far as I have been able to tell from the debate so far, nobody has told me, no one in their intervention has indicated with respect to the part of this section that I am referring to, whether this is really a new power that is being given to the provinces or whether the provinces already have it and it is only a statement of a power that the province already has; but if it is a new power, if it is a greater, broader power, then it had to come from somewhere.

Certainly when you keep in mind the fact that under the British North America Act there are two levels of power, if it is coming from somewhere, it is coming from the, it could be coming from the federal power, and to put it explicitly, Mr. Chairman, I am concerned that if it is not made clear that this exclusive power to make laws respecting the development, conservation and management of hydro electric power, which means in British Columbia dams on our great rivers, if it is not made clear that that does not derogate from the proper power of the federal government under Section 91, under fisheries and navigation and shipping, that we may be limiting that power and we may very well be in a position where in the years to come, as the pressure builds up in British Columbia to put more dams on more rivers, that there will be a court that is going to have to be looking at this wording and saying: what do those words mean? They have got to mean something.

And Senator Austin has, I think very correctly, put the other side of the argument, that is that if you put too much down you create confusion as to what powers are not affected in other parts of the constitution. That is a legitimate comment.

However, it is also very much a lawyers' comment, and it is a lawyer's comment because the lawyers have to deal with the statute, they have to deal with the words; but against that proposition, against the possibility of some difficulty being created is at least this, that if you make it clear what we are doing in this amendment by spelling out the fact that you are not taking away from the federal government its fisheries and navigation and shipping powers, then you are not going to have a problem years from now or a few years from now, which is much more likely, of having to take this case through the court to find out whether or not that power, which I think is so imperative to the protection of the fishery in British Columbia, has been diminished.

Now, I think that makes the point and I think that the other side of that argument was put forward quite lucidly by my friend, Senator Austin, and I say that you have to balance the two arguments given the reality of British Columbia, given the fact that if it was not for the federal power under fisheries I have no doubt that we would have a major dam on the Fraser River; I have no doubt that Alcan's projected additional works would be well under way; and I have no doubt that there would be no stopping certain people who look to power alone and who, unlike my friend Senator Austin, do not understand that

[Traduction]

exclusivement en matière d'aménagement, de conservation et de gestion des centrales et des barrages hydro-électriques. Voilà les faits.

Vous savez, monsieur le président, que les mots ont un sens ou bien qu'ils n'en ont pas; or, jusqu'à présent, il m'a été impossible de déterminer, à partir des interventions portant sur cette partie de l'article auquel je fais allusion, si l'on accorde en réalité un pouvoir nouveau aux provinces ou bien si celles-ci en disposent déjà, auquel cas on se contente de le préciser ici; cependant, s'il s'agit d'un pouvoir nouveau, et s'il est plus large, il faut bien qu'il vienne de quelque part.

Si l'on songe que l'Acte de l'Amérique du Nord britannique établit deux ordres de pouvoir, cela pourrait découler du pouvoir fédéral et, pour le dire explicitement, monsieur le président, je redoute qu'à défaut de préciser sans ambiguïté que ce pouvoir exclusif de légiférer en matière d'exploitation, de conservation et de gestion des installations hydro-électriques, en l'occurrence les barrages qui existent sur les grands cours d'eau de la Colombie-Britannique, à défaut de préciser que cela n'entame nullement ce pouvoir accordé au gouvernement fédéral en vertu de l'article 91 relatif aux pêcheries, à la navigation et au transport maritime, nous risquons de limiter ledit pouvoir. Dans quelques années, nous risquons de nous trouver dans une situation telle que la Colombie-Britannique soit poussée à installer davantage de barrages sur ses cours d'eau et qu'un tribunal doive trancher. Ce tribunal étudiera ce texte et s'interrogera sur sa signification. Car il faut bien qu'il signifie quelque chose.

A raison, je crois, le sénateur Austin a montré l'autre côté de la médaille, à savoir qu'un surcroît de précisions engendre la confusion quant aux pouvoirs que les autres parties de la Constitution laissent intacts. C'est une remarque tout à fait pertinente.

Quoi qu'il en soit, c'est un argument digne d'un juriste en ce sens que les juristes s'occupent de la loi, des mots eux-mêmes; mais en regard de cette difficulté éventuelle, il y a le fait qu'en précisant clairement le but de cet amendement, en explicitant les faits, on ne supprime pas au gouvernement fédéral ses pouvoirs en matière de pêcheries, de navigation et de transport maritime; dans quelques années, on ne risque pas d'être obligés d'avoir recours aux tribunaux pour déterminer si ce pouvoir, qui me paraît aussi important pour la protection des pêcheries de la Colombie-Britannique, a été entamé.

Voilà l'argument et je crois que mon ami, le sénateur Lucier, a présenté très lucidement son corollaire. C'est à vous de faire la part entre les deux, compte tenu de la réalité de la Colombie-Britannique, compte tenu du fait qu'à défaut d'un pouvoir fédéral sur les pêcheries, je suis persuadé qu'on construira un grand barrage sur le fleuve Fraser; je suis persuadé que les installations supplémentaires envisagées par l'Alcan seront bien avancées; et je suis persuadé qu'on sera incapable d'arrêter ceux qui n'ont que l'énergie en vue et qui, contrairement à mon ami, le sénateur Austin, ne comprennent pas

[Text]

there has to be a balance but who focus on one thing only and that is power, and often on forecasted power that is wildly inaccurate, and stemming from a philosophy not of conservation but just of finding more and more power, no matter how badly we misuse the power we develop.

I would urge honourable members to realize that it is relatively easy now to ensure the continuation of that federal power, and as a Westerner, a British Columbian, and as one who has been quick to defend provincial interests, as my friend Mr. Austin did in his eloquent address a few minutes ago, I have also always defended the necessity of the federal power to be strong in the places where it ought to be strong.

Now, I do not think I need add anything further to what I have already said, except to finish on this note: this is not an academic discussion we are having. This is against the backdrop of events which are taking place in my province which are bound to put pressure on the fisheries.

Because that fishery is a Canadian resource and does not just belong to British Columbia by any means and is to be shared by the whole nation, I ask honourable members to give very serious consideration to allowing this amendment to go through; because if it goes through, then the highly paid lawyers who act for the interests that want to put more and more dams on our rivers will at least have one less argument to use. They have no trouble getting many arguments on their own; but I would regret it if we handed them one.

I would just point out that it was only some months ago when Alcan absolutely refused to accept a fisheries order to put enough water in the Natchako River safely bring the salmon in for spawning.

They lost that case in the lower court and it has not gone any further.

But if anyone thinks that this is an argument just in an academic sense, please do not be taken in by that error; because the argument I am putting forward here is against the backdrop of constant pressure against our fisheries.

Thank you.

The Joint Chairman (Mr. Joyal): Thank you very much, the honourable John Fraser.

The honourable the Minister of Justice, followed by Mr. Waddell.

Mr. Chrétien: Mr. Chairman, I do not intend to be long on that, but I think I have to state what is the position of the government on this proposed amendment.

First of all, I think the amendment is not necessary; that the power referred to in Mr. Fraser's amendment is clearly the power of the federal government in relation to fisheries, navigation and shipping.

If you were to single out three powers like that in Section 91 and put in a different clause, there is a great danger that the court will put these three powers in a different category than

[Translation]

qu'un équilibre est nécessaire; ils s'attachent uniquement à l'énergie, une énergie souvent escomptée mais qui ne correspond pas à la réalité; ce qui les intéresse, ce n'est pas la conservation, mais la recherche d'une quantité d'énergie toujours plus importante, peu importe le gaspillage que nous en faisons.

J'exhorte les membres du Comité à comprendre qu'il est à présent relativement facile de veiller au maintien de ce pouvoir fédéral. Je viens de l'Ouest, de la Colombie-Britannique, et j'ai toujours été prompt à défendre les intérêts des provinces, tout comme l'a fait mon ami, M. Austin, par son intervention éloquentes il y a quelques instants; j'ai également toujours soutenu qu'il était nécessaire que le pouvoir fédéral soit fort là où cela se justifie.

Il est inutile, je crois, d'ajouter à ce que j'ai dit, si ce n'est la conclusion suivante: ce débat n'est pas un débat académique. Il se place dans l'optique des événements qui se déroulent actuellement dans ma province et qui auront forcément des répercussions sur les pêcheries.

Dans la mesure où la pêche est une ressource canadienne et qui n'appartient donc pas uniquement à la Colombie-Britannique, tant s'en faut, dans la mesure où elle doit être partagée par la nation entière, je demande instamment aux membres du Comité de permettre l'adoption de cet amendement; en effet, s'il est adopté, il supprime un argument aux avocats fortement rémunérés qui défendent les intérêts de ceux qui veulent installer davantage de barrages sur nos cours d'eau. Ils n'ont aucun mal à se trouver eux-mêmes des arguments; il serait regrettable que nous leur en fournissions.

J'attire votre attention sur le fait qu'il y a quelques mois à peine l'Alcan s'est catégoriquement opposé à un arrêté du ministère des Pêches qui lui ordonnait d'alimenter suffisamment en eau le bassin de la Natchako afin que le saumon puisse venir y frayer.

La société a perdu le procès en première instance et l'affaire n'est pas allée plus loin.

Mais ne commettez pas l'erreur de croire que c'est un argument de pure rhétorique; l'argument que je défends doit être considéré sur le fond de la pression constante qui s'exerce sur nos pêcheries.

Merci.

Le coprésident (M. Joyal): Merci beaucoup, monsieur John Fraser.

La parole est au ministre de la Justice, suivi de M. Waddell.

M. Chrétien: Je n'ai pas l'intention de parler longuement, monsieur le président, mais je me dois d'exposer la position du gouvernement vis-à-vis de cet amendement.

Tout d'abord, je crois que l'amendement est inutile; le pouvoir auquel M. Fraser fait allusion en ce qui concerne les pêches, la navigation et le transport maritime, relève sans ambiguïté du gouvernement fédéral.

En isolant trois pouvoirs comme cela, qui figurent dans l'article 91, pour en faire l'objet d'un article séparé, le risque est grand que les tribunaux placent ces trois pouvoirs dans une

[Texte]

the other federal power under Section 91 and seek a legal interpretation as to why it is we have done it.

In Section 91 it is clear that fisheries, navigation and shipping fall within the federal power.

We are satisfied that the amendment proposed Section 92A(1) will not affect those powers.

So, we think it is not needed, and it is dangerous; we are satisfied that the proposed Section 92A(1) as proposed in the amendment of Mr. Broadbent and the NDP, and which was the amendment I proposed to the provinces myself during the summer, gives adequate protection to these three powers that Mr. Fraser would like to protect. I would like to compliment him, because his preoccupation is very much along the lines of mine; and I am glad to see that he can be numbered among those who do not feel that all the virtues are to devolve absolutely to the provinces without any check.

His argument is well taken when the states that we should not make any move which would jeopardize the necessary federal power in those fields. But we do not need this amendment to ensure that.

The Joint Chairman (Mr. Joyal): Thank you very much, Mr. Minister.

Mr. Waddell.

Mr. Waddell: Thank you, Mr. Chairman.

This is a tough one, Mr. Chairman. I will try to be as objective as possible in dealing with it, considering that it is basically an amendment to our motion.

I say this to Mr. Fraser, that this is going to be a bit convoluted, but I will try my best.

The reason we do not have any dams on the Fraser River is basically, I think, that our people in British Columbia will not permit that. No matter what the laws are—the laws certainly help conservationists to a great extent, but I think that is the real reason, and not what is said in this amendment or in our motion.

I agree with the Minister to this extent, and only to this extent, that it is not necessary—the phrase you have introduced—in the sense, it is a bit academic, that fisheries navigation and shipping are covered in Section 91.

The Minister then says, "Well, if you single out these three particular areas by putting in Mr. Fraser's amendment, then that puts a special emphasis on these three matters and it hurts the other matters in Section 91 and is therefore a danger," if I understand his argument.

I see the argument, but only to a limited extent. It seems to me it is a kind of bureaucratic argument. I cannot completely accept that argument.

So, I have to look at Mr. Fraser's suggestion; and he said, basically—and I would perhaps make a little stronger argument than the one he has made—if you look at the context of the amendment, the context of the resolution, proposed Section 92A(1) states that in each province a legislature may exclu-

[Traduction]

catégorie différente par rapport à ceux que l'article 91 confère au gouvernement fédéral et qu'on soit obligé de justifier juridiquement cette action.

D'après l'article 91, il est clair que les pouvoirs en matière de pêcheries, de navigation et de transport maritime relèvent du fédéral.

Nous avons la conviction que l'amendement destiné à modifier l'article 92A(1) laissera ces pouvoirs intacts.

Nous estimons donc que ce texte est inutile, voire dangereux; nous sommes persuadés que l'article 92A(1) proposé par l'amendement de M. Broadbent et du NPD, amendement que j'ai moi-même proposé aux provinces au cours de l'été, protège suffisamment ces trois pouvoirs, conformément au souhait de M. Fraser. Je tiens à le féliciter car ses préoccupations rejoignent les miennes; et je suis content de voir qu'il peut être compté au nombre de ceux pour qui les provinces ne sont pas nécessairement douées de toutes les vertus et qu'il faut un contrepois.

Il a raison de refuser qu'on agisse de manière à compromettre un pouvoir fédéral qui est nécessaire dans ces domaines. Cependant, il n'est pas nécessaire de recourir à cet amendement pour atteindre cet objectif.

Le coprésident (M. Joyal): Merci beaucoup, monsieur le ministre.

Monsieur Waddell.

M. Waddell: Merci, monsieur le président.

C'est une question complexe, monsieur le président. Je vais m'efforcer d'être aussi objectif que possible, compte tenu du fait qu'il s'agit d'un amendement qui modifie notre motion.

Sachez, monsieur Fraser, que ce sera un peu compliqué, mais je ferai de mon mieux.

S'il n'existe pas de barrages sur le fleuve Fraser, c'est parce que les habitants de la Colombie-Britannique ne le permettraient pas. Je crois que c'est là la véritable raison, peu importe ce que disent les lois, certes, les lois sont, dans une large mesure, un secours pour les partisans de la conservation, mais votre motion ou votre amendement n'y changeront rien.

Jusque là, je suis d'accord avec le ministre, mais jusque là seulement, à savoir que c'est inutile. Pour reprendre votre expression, c'est un peu rhétorique dans la mesure où les pêcheries, la navigation et le transport maritime sont couverts par l'article 91.

Le ministre ajoute: si l'on isole ces trois domaines en adoptant l'amendement de M. Fraser, on leur donne par là même un caractère spécial qui nuit aux autres pouvoirs conférés par l'article 91, et c'est par conséquent un danger. C'est du moins ce que j'ai compris.

Je ne saisis que partiellement cet argument qui me paraît en quelque sorte bureaucratique. Je ne saurais y souscrire totalement.

Je dois donc reprendre la suggestion de M. Fraser qui, en substance, dit ceci, et je serai plus vigoureux que lui, si l'on prend en considération le contexte de l'amendement, le contexte de la résolution, l'article 92A(1) stipule que l'assemblée législative de chaque province pourra légiférer de manière

[Text]

sively make laws in relation to development, conservation and management of sites and facilities in the province for the generation and production of electrical energy. So, there is an argument to be made, it seems to me, Mr. Chairman, that that is a rather special context in the sense that that is dealing with the electrical facilities. There is a problem with dams; that if we err, let us err on the side of protecting the dams.

We have spoken of the great love we all have—the three of us here from British Columbia—for British Columbia, and therefore we are coming down on the side of accepting Mr. Fraser's amendment and throwing in that additional protection.

It may mean nothing. I personally think that it probably does not; but it may mean something, and, therefore, objectively we are going to vote in favour of his amendment.

Some hon. Members: Hear, hear!

The Joint Chairman (Mr. Joyal): Thank you very much, Mr. Waddell.

Mr. Munro.

Mr. Munro: Mr. Chairman, thank you.

I would like to speak in support of the proposed amendment to the amendment, and to ask the Minister if he can reconcile for me, at any rate, the use of the word "exclusively" at the beginning of the NDP amendment, and his suggestion that there is a federal paramountcy with respect to fishing, navigation and shipping.

Surely, that is just going to be fodder for lawyers to argue the use of "exclusively" in one place and paramountcy in another.

I, myself, feel it is absolutely unnecessary to have the addition that has been put in by Mr. Fraser in order to make it abundantly clear that there is a paramountcy for the federal authority where there could be a conflict.

"Exclusive" and "paramountcy" are so close—and they would be close in this context—that there could be litigation lasting years. Will the Minister care to comment?

Mr. Chrétien: I would just like to repeat that Section 91 is clear, and that fisheries, navigation and shipping come under federal jurisdiction. I see no need for saying that Section 92(2) does not affect those that are very clear; I do think that it just could create problems, because what about the other powers that you have in Section 91? Are we to put them in a special category? Section 91 is federal power. There is no difficulty. There is no difficulty in interpreting what "fisheries" means. There is no difficulty in interpreting what "navigation" or what "shipping" means.

So we do not think that we should do what is suggested to be on the side of the angels. It is clear.

We know it is clear, and the matter is complicated enough, and my responsibility, as Minister of Justice of Canada, is to make sure that when it is clear it will remain clear and not to create any doubts.

An hon. Member: You are the judge!

[Translation]

exclusive en matière de mise en valeur, conservation et gestion des installations servant à la production d'énergie électrique situées dans la province. Il faut bien voir ici, je crois, monsieur le président, que le contexte est particulier en ce sens que seules les installations hydro-électriques sont mises en cause. Les barrages posent un problème; si nous commettons une erreur, faisons du moins en sorte que cette erreur aille vers le sens de la protection des barrages.

Nous venons tous les trois de la Colombie-Britannique et nous avons exprimé notre attachement profond à cette province, et voilà pourquoi nous penchons en faveur de l'amendement de M. Fraser qui accorde cette protection supplémentaire.

Cela ne veut peut-être rien dire. C'est personnellement ce que je crois; mais nous douterons peut-être, auquel cas nous allons objectivement voter en faveur de cet amendement.

Des voix: Bravo!

Le coprésident (M. Joyal): Merci beaucoup, monsieur Waddell.

Monsieur Munro.

M. Munro: Merci, monsieur le président.

Je parlerai en faveur du sous-amendement et je demanderai au ministre s'il peut m'expliquer en quoi le terme «exclusivement» qui figure au début de l'amendement néo-démocrate concorde avec le fait que selon lui, le fédéral a la primauté en matière de pêche, de navigation et de transport maritime.

Il est certain que ce sera une cause parfaite pour les avocats mis en présence du terme «exclusivement», d'une part, et de la suprématie fédérale, d'autre part.

Pour ma part, j'estime qu'il est absolument inutile d'ajouter ce que propose M. Fraser dans le but de lever toute ambiguïté quant à la suprématie des autorités fédérales en cas de conflit.

Les mots «exclusivité» et «suprématie» sont si rapprochés et ils le seraient dans ce contexte—que le litige risquerait de durer éternellement. Qu'en pense monsieur le ministre?

M. Chrétien: Je me bornerai à répéter que l'article 91 est clair et que les pêcheries, la navigation et le transport maritime sont du ressort fédéral. Je ne vois pas l'utilité de dire que l'article 92(2) ne modifie en rien ces droits déjà très clairs; cela ne ferait que susciter des problèmes; en effet, qu'advierait-il des autres pouvoirs contenus dans l'article 91? Allons-nous les placer dans une catégorie à part? L'article 91 concerne le pouvoir fédéral. Cela ne pose aucune difficulté. On n'a aucun mal à interpréter la signification de «pêcheries». On n'a aucune difficulté à interpréter ce que recouvre «navigation» ou «transport maritime».

Nous ne jugeons donc pas utile de faire ce qui est proposé pour rester du côté des anges. C'est clair.

Nous savons que c'est clair, et le problème est déjà suffisamment compliqué. Il m'appartient, en tant que ministre de la Justice du Canada, de veiller à ce qui est clair le reste et qu'on ne crée aucune ambiguïté.

Une voix: Vous êtes juge!

[Texte]

Mr. Chrétien: On the technical grounds, perhaps I could ask Mr. Strayer to give you some explanation on the relationships between Sections 91 and proposed Section 92A.

Mr. Strayer: Mr. Chairman, if I might say a word on this, this was carefully discussed at many meetings with the provinces.

The place in the constitution at which any resources amendment ought to be put was carefully considered. The amendment as drafted here puts these provisions in proposed 92A(1) in the same position, we believe, as other things which are in Section 92 of the constitution.

The matters referred to in proposed 92A(1), as Mr. Munro points out, are described as exclusive powers of the provincial legislatures just as the matters in Section 92 are now described as exclusive powers of the provinces.

There is a well recognized relationship between the exclusive powers of parliament in Section 91 and the exclusive powers of the legislature in Section 92.

Part of that relationship is that where there is a law which is valid under Section 91, a federal law, and there is a provincial law which is valid under Section 92 and those two laws conflict in some way, the federal law prevails. That is the more common application of the concept of paramountcy.

Now, it is our belief that that relationship which has existed between Sections 91 and 92 will also exist between Section 91 and proposed Section 92A(1). That means any laws made under Section 91, if they come into conflict with the powers under proposed Section 92A(1) will prevail over those provincial laws made under proposed Section 92A(1) to the extent that there is a conflict.

One of the problems of putting in a special rule, as is proposed in the subamendment with respect to protecting the federal power over fisheries, navigation and shipping, is that there are other powers in Section 91 which, I am sure, members of the Committee would also want to protect; for example, the criminal law power. I am sure Mr. Waddell would want to protect the criminal law power, for example, with respect to dealing with pollution.

I am sure that members of the Committee would want to protect the power of parliament with respect to Indians, so that Parliament in legislating for Indians and lands reserved for Indians could, if necessary, legislate in a way which might be in conflict with some provincial law over the management of resources.

Again, there is the federal power with respect to peace, order and good government, which is used for water management or has a potential for use for water management and the management of water quality.

These are all matters which are within Section 91 which we believe enjoy a paramountcy vis-à-vis Section 92 and would enjoy a similar paramountcy vis-à-vis proposed Section 92A(1).

[Traduction]

M. Chrétien: Sur le plan technique, je pourrais demander à M. Strayer de vous expliquer les rapports qui existent entre l'article 91 et le projet d'article 92A.

M. Strayer: Si vous me permettez de dire un mot, monsieur le président, on en a discuté de manière très approfondie au cours de nombreuses réunions avec les provinces.

On a étudié très attentivement l'endroit où, dans la Constitution, un amendement sur les ressources devrait être introduit. Cet amendement place les dispositions de l'article 92A(1) dans la même position que tout ce qui figure dans l'article 92 de la Constitution.

Comme le fait remarquer M. Munro, les domaines auxquels se réfère l'article 92A(1) sont décrits comme étant des pouvoirs qui relèvent exclusivement des assemblées législatives provinciales, tout comme les domaines à présent accordés aux provinces par l'article 92.

Le lien qui existe entre les pouvoirs exclusifs du Parlement, en vertu de l'article 91, et les pouvoirs exclusifs que l'article 92 accorde aux assemblées législatives des provinces, est bien établi.

D'une part, il existe une loi fédérale dont la validité découle de l'article 91 et il existe une loi provinciale dont la validité découle de l'article 92. Lorsque ces deux lois entrent de quelque manière en contradiction, la loi fédérale prédomine. C'est l'application la plus commune de la notion de suprématie.

Nous estimons que ce rapport qui existe entre les articles 91 et 92 subsistera entre les articles 91 et l'article 92A(1). Il s'ensuit que toute loi promulguée aux termes de l'article 91 et qui serait incompatible avec les pouvoirs conférés par l'article 92A(1) aurait prépondérance sur les lois provinciales promulguées aux termes de l'article 92(1).

En ajoutant une règle particulière, comme le propose le sous-amendement destiné à protéger le pouvoir fédéral en matière de pêcheries, de navigation et de transport maritime, on introduit une difficulté en ce sens que l'article 91 contient d'autres pouvoirs que, j'en suis sûr, les membres du Comité voudront protéger; c'est, par exemple, le pouvoir en matière de droit pénal. Je suis sûr que M. Waddell tient à ce que le pouvoir en matière de droit pénal soit protégé dans le cas de la pollution, par exemple.

Je suis sûr que les membres du Comité veulent protéger le pouvoir du Parlement en ce qui concerne les Indiens. Il peut arriver que les lois du Parlement régissant les Indiens et les terres qui leur sont réservées s'opposent à certaines lois provinciales relatives à la gestion des ressources.

Il y a également le pouvoir fédéral relatif au maintien de la paix, de l'ordre et d'un bon gouvernement, pouvoir susceptible d'être invoqué dans le cas de la gestion des eaux et de leur qualité.

Toutes ces questions sont renfermées dans l'article 91 qui, selon nous, a suprématie par rapport à l'article 92, suprématie qu'il conserverait vis-à-vis de l'article 92A(1).

[Text]

If one started to put in a special rule that only certain things in Section 91 should enjoy that paramountcy, it would, with the greatest respect to the suggestion that this is only a bureaucratic notion, create the possibility of a court saying, "Well since you have made a special rule for fisheries and navigation, the implication must be that other things, such as the criminal law and laws with respect to Indians are not to be paramount over laws passed under proposed Section 92A(1)."

Mr. Hnatyshyn: Mr. Chairman, on a point of order.

The Joint Chairman (Mr. Joyal): The honourable Ray Hnatyshyn on a point of order.

Mr. Hnatyshyn: Mr. Chairman, I have listened with great interest to Mr. Strayer's dissertation. It just occurred to me, in case anybody doubts my credentials on this Committee, that I bought his constitutional law notes in second year law. I just wanted to put that on record in case anybody questions my ability to analyze his answer.

An hon. Member: Did you pass?

An hon. Member: How many years, Ray?

The Joint Chairman (Mr. Joyal): I see honourable members are ready for the question.

A recorded vote is requested.

Subamendment negatived: yeas, 9; nays, 14.

The Joint Chairman (Mr. Joyal): I would like to invite honourable members to take the subamendment as moved on behalf of the honourable James McGrath and on that subamendment I would like to invite the honourable Jake Epp.

Mr. Epp: Mr. Chairman, I would like to ask whether you have a number of speakers yet on the main motion?

The Joint Chairman (Mr. Joyal): Not on the main motion, no. We are dealing with the subamendment.

Mr. Epp: Why I ask is this. Is it your preference that I just respond to the subamendment now and hold the summation for the main motion?

The Joint Chairman (Mr. Joyal): Well, I have the honourable Senator Roblin and the honourable Ray Hnatyshyn.

Mr. Epp: That being the case, Mr. Chairman, I will only direct my remarks to Mr. McGrath's amendment.

May I speak to the amendment, then?

The Joint Chairman (Mr. Joyal): Yes.

Mr. Epp: Mr. Chairman, I would like just to sum up for the amendment moved by the honourable James McGrath and to indicate to members that the reason I am doing it is that Mr. McGrath could not be present today; he had to leave for Montreal to attend the funeral of his father-in-law, otherwise he would be here to give the concluding remarks on his amendment and indicate his strong support for it.

Mr. Chairman, the off-shore question has been one that has not only been dealt with in this country in a manner in which the power over resources should be dealt with, but it has gone even further into long discussions and international conferences known as the law of the sea.

[Translation]

Si l'on commençait à imposer une règle spéciale stipulant que seulement certaines des dispositions de l'article 91 auraient primauté, même si l'on prétend qu'il s'agit d'une notion purement bureaucratique, les tribunaux pourraient décider qu'étant donné l'existence d'une règle spéciale pour la pêche et la navigation, le Code pénal et les lois touchant les Indiens ne devraient pas non plus avoir la primauté sur les lois adoptées en vertu de l'article 92A(1).

M. Hnatyshyn: Un rappel au Règlement.

Le coprésident (M. Joyal): M. Ray Hnatyshyn invoque le Règlement.

M. Hnatyshyn: J'ai écouté avec un vif intérêt l'exposé de M. Strayer. Au cas où l'on douterait de ma compétence à siéger à ce Comité, je précise avoir acheté ces notes sur le droit constitutionnel pendant ma deuxième année de droit. Je tiens à dire cela au cas où l'on douterait de ma capacité d'analyser sa réponse.

Une voix: Avez-vous réussi?

Une voix: En combien d'années Ray?

Le coprésident (M. Joyal): Je crois que les membres sont prêts à passer au vote.

On demande un vote par appel nominal.

Le sous-amendement est rejeté par 14 voix contre 9.

Le coprésident (M. Joyal): Passons maintenant au sous-amendement proposé au nom de M. James McGrath. A ce propos, je cède la parole à M. Jake Epp.

M. Epp: Monsieur le président, je voudrais savoir combien de membres doivent encore prendre la parole à propos de la motion principale?

Le coprésident (M. Joyal): Personne. Nous sommes en train d'étudier le sous-amendement.

M. Epp: C'est pourquoi je pose la question. Préférez-vous que je discute seulement du sous-amendement ou de la motion principale?

Le coprésident (M. Joyal): J'ai sur ma liste les noms du sénateur Roblin et de M. Ray Hnatyshyn.

M. Epp: Dans ce cas, monsieur le président, je vais parler uniquement de la modification de M. McGrath.

Puis-je parler de la modification?

Le coprésident (M. Joyal): Oui.

M. Epp: Je voudrais donc résumer l'objet de la modification proposée par M. James McGrath en disant aux membres que si je suis ici, c'est que M. McGrath ne pouvait pas être là aujourd'hui. Il a dû aller aux funérailles de son beau-père à Montréal. Sans cette obligation, il serait venu vous dire lui-même pourquoi il est très en faveur de cette modification.

La question des ressources sous-marines n'a pas été discutée seulement ici de la façon dont devrait avoir lieu toute discussion sur la juridiction des ressources; il y a même eu de longues discussions et des conférences internationales comme celle sur le droit de la mer.

