Environmental Impact Assessment in the Canadian Federal System

Judith B. Hanebury*

Several recent court cases have focused attention on federal environmental impact assessment procedures. At the same time, proposed new legislation would create, for the first time, a statutorily defined federal environmental assessment process. Although presented as a resolution to current uncertainty, the proposed legislation suffers, in the author's view, from a restrictive definition of the "environment," and thus fails to ensure truly comprehensive environmental assessments. The author then explores the need for a comprehensive federal presence in the area, focusing on international, economic and ecological concerns. A comparative analysis of environmental assessment processes in Australia and the United States provides insight into alternative schemes available within a federal state. Finally, the author examines the place of the environment within existing ss 91-92 jurisprudence, arguing that a broad, comprehensive environmental impact assessment process can be firmly grounded in the peace, order and good government power as elaborated in *R.* v. *Crown Zellerbach.*

Plusieurs décisions se sont penchées récemment sur les procédures fédérales concernant les études d'impact environnemental. De plus, un nouveau projet de loi fédéral créerait, pour la première fois par voie statutaire, un processus formel d'étude d'impact environnemental. Malgré son objectif qui est de réduire l'incertitude actuelle dans ce domaine, ce projet de loi comporte, selon l'auteur, une définition trop restrictive de « l'environnement », qui ne permet pas une évaluation suffisamment compréhensive. L'auteur discute de l'opportunité pour le gouvernement fédéral de renforcer sa présence dans le domaine de l'environnement en examinant les facteurs économiques, écologiques et internationaux. Une analyse comparative des procédés d'étude d'impact en Australie et aux États-Unis permet d'élaborer les différents modèles possibles à l'intérieur d'une fédération. Enfin, une analyse constitutionnelle de la jurisprudence portant sur les art. 91 et 92 amène l'auteur à la conclusion qu'un processus large et complet d'étude d'impact environnemental mis en place par le gouvernement fédéral pourrait se justifier en vertu du pouvoir général prévu à l'art. 91, tel qu'interprété dans l'arrêt *R.* c. *Crown Zellerbach.*

*LL.M. candidate, University of Calgary Faculty of Law. Of Dunphy Calvert & Waller, Calgary, Alberta.

Synopsis

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Introduction

As a result of two decisions of the Federal Court of Appeal,[1] government, public and industry attention has been focused on the federal Environmental Assessment Review Process Guidelines Order.[2] These decisions held that the Guidelines Order applied to provincial dam projects already well under construction and as a result alarmed provincial governments, the boards of resource-based industries and the proponents of numerous developments, for they made uncertain the ambit of the federal entitlement to undertake federal environmental impact assessments over projects based in the provinces.[3] The far reaching effect of these decisions can be judged by the steps taken by the National Energy Board. By letter dated February 19th, 1990 the chairman of the National Energy Board advised the Minister of Energy, Mines and Resources that the board intended to conduct an environmental screening or initial assessment to "determine whether, and the extent to which, there may be any potentially adverse environmental effects from the proposed [gas] exports."[4] He went on to say that "in view of the working and intent of the E.A.R.P. Order, this would include screening for environmental impacts external to Canada."[5] As a result, the subsequent information request sent to companies licensed by the board to export gas from the McKenzie Delta asked for information relating to the end use of the gas to be exported.[6] After receiving this information request one executive in the industry admitted that "it's a whole new ball game out there."[7]

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[1]*Canadian Wildlife Federation Inc. et al* v. *Canada (Minister of the Environment)* (1989), [1990] 2 W.W.R. 69, 4 C.E.L.R. (n.s.) 1 (F.C.A.) [hereinafter *Canadian Wildlife* (F.C.A.)], aff'g [1989] 3 F.C. 309, 3 C.E.L.R. (n.s.) 287 (F.C.T.D) [hereinafter *Canadian Wildlife* (F.C.T.D.)] and *Friends of the Old Man (sic) River Society* v. *Minister of Transport et al*, [1990] 2 F.C. 18, 2 W.W.R. 150 (F.C.A.) [hereinafter *Friends* cited to F.C.].

[2]SOR/84-467 [hereinafter Guidelines Order].

[3]Leave to appeal to the Supreme Court of Canada was granted in *Friends* and was heard February 19th and 20th, 1991. At the request of the Alberta Government, Chief Justice Lamer framed a constitutional question to be considered by the Court being:

> Is the Environmental Assessment and Review Process Guidelines Order, S.O.R. 84/467 so broad as to offend s. 92 and 92A of the *Constitution Act, 1867* and thereby constitutionally inapplicable to the Oldman River Dam owned by the appellant, Her Majesty the Queen in Right of Alberta?

[4]Letter from Mr. R. Priddle to the Honourable Jake Epp (19 February 1990).

[5]*Ibid.*

[6]National Energy Board, News Release, "Information Request for Environmental Screening of Natural Gas Export" (19 February 1990). The specific information requested was:

> (a) Evidence as to the nature and significance of any potential environmental effects; (b) Evidence as to the nature and significance of any social effects directly related to the environmental effects identified in (a) above; (c) Evidence as to the extent to which the environmental and social effects identified in (a) and (b) above can be mitigated; and (d) Evidence that all required governmental authorizations have been or are likely to be obtained.

[7]G. Kubish, "The Greening of the N.E.B." *Alberta Report* (5 March 1990) 181.

Although there has been a mandated federal role in environmental impact assessment since 1974, it is only recently that public and governmental attention has focused on environmental impact assessment as a planning tool to promote and encourage environmentally-responsible decision-making and the protection of the environment. Environmental impact assessment, by considering the environmental effects of a project or decision before approval is given, is a proactive or preventative, rather than a reactive or remedial, process. This recent attention is a result, at least in part, of the Report of the National Task Force on Environment and Economy[8] which promoted sustainable development as a goal and stated as its first recommendation:

> 1.1 Government, industry, academic and other non-government organizations should develop new tools and improve existing tools which achieve more efficient and effective environment-economy integration. These tools should include consideration of, and where appropriate, application of "— analytical methodologies and techniques such as cost-benefit analysis, risk assessment, and increased use of environmental impact assessment ..."[9]

Environmental impact assessment has been seen as one way to ensure that the environmental mistakes of the past are not repeated. Admirable as this goal may be, the implementation of this process within the constitutional constrictions of Canadian federalism raises a plethora of difficult constitutional issues. The environment was not a subject specifically assigned to either federal or provincial jurisdiction in 1867 when the Fathers of Confederation drafted Canada's constitution.[10] Many projects which, at first glance, would appear to be matters of a merely local or private nature within the confines of the province, in fact upon closer examination impact on areas of established federal jurisdiction such as fisheries[11] and navigation.[12] Further, many local projects have impacts which cross provincial boundaries and are therefore inter-provincial or international in their effects, rendering the provinces incapable of dealing with these extra-provincial effects. The problem then becomes one of designing an effective environmental impact assessment process when both levels of government have some jurisdictional control over a proposal.

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[8]The Report of the National Task Force on Environment and Economy, Report to the Canadian Council of Resource and Environment Ministers, September 24, 1987. This task force was a direct result of the report of the World Commission on Environment and Development which was formed by the General Assembly of the United Nations to set a "global agenda for change." As a result of the visit of the Commission to Canada the Canadian Council of Resource and Environment Ministers formed the National Task Force on Environment and Economy.

[9]*Ibid.* at 5.

[10]See *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, ss 91 & 92 [hereinafter *Constitution Act, 1867*].

[11]*Ibid.*, s. 91(12).

[12]*Ibid.*, s. 91(10).

The question of the scope of federal constitutional jurisdiction over an environmental impact assessment review process operates on two different, but overlapping levels. First is the question of the kinds of proposals that will be covered by the federal process. Will it be only projects which involve the federal government as proponent or that are on federal lands, or will the net be more widely cast? Should federal jurisdiction extend to all federal projects, undertakings, decisions, policies and initiatives or only some? If a federal environmental impact assessment process is to apply only to federal projects or projects on federal lands, the narrowness of its application renders the concern about its constitutional basis nugatory.

The second jurisdictional question to be considered is whether all aspects of a proposal will be assessed or only those that fall directly within federal jurisdiction. How far the federal interest should be allowed to encroach into areas of traditional provincial jurisdiction cannot be easily answered. Should federal involvement be limited to only those aspects of the problem which are clearly within federal jurisdiction or cannot be dealt with by the province due to territorial limitations on its powers?[13] As well, it can be difficult to ascertain which specific elements of a proposal should come under federal jurisdiction and consideration.

Other federal states, Australia and the United States for example, have dealt with this problem as well. The lesson to be learned from their experiences is the importance of the federal government taking a strong role in environmental impact assessment,[14] with the result that the Canadian constitution must be examined to see if there is a basis for such a role in this jurisdiction. The power most apparent to substantiate such a role is the "peace, order and good government" power set out in the preamble to s. 91 of the *Constitution Act, 1867*. The approval by the Supreme Court of Canada of its use to support broad federal powers over marine dumping would appear to herald an environmental role for this residual power.[15] To be addressed in this paper are the questions of whether there should be a broad ranging federal environmental impact assessment process that can be triggered whenever a proposal impacts on a federal area of jurisdiction and, if so, whether the peace, order and good government power can support such a federal role.

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[13]See D. Gibson, "Environmental Protection and Enhancement Under a New Canadian Constitution" in S.M. Beck & I. Bernier, eds, *Canada and the New Constitution*, vol. 2 (Montreal: Institute for Research on Public Policy, 1983) 115 at 121 [hereinafter "Protection and Enhancement"] where he discusses this problem in relation to pollution rather than the role of environmental assessment.

[14]See discussion below, Part III.

[15]*R.* v. *Crown Zellerbach*, [1988] 1 S.C.R. 401, 48 D.L.R. (4th) 161 [hereinafter *Crown Zellerbach* cited to S.C.R.].

Before proceeding to consider these questions it is imperative that the meaning of "environment" be given some consideration.[16] The *Canadian Environmental Protection Act*[17] defines "environment" in the interpretation section to mean:

> "Environment" means the components of the Earth and includes
> (a) air, land and water,
> (b) all layers of the atmosphere,
> (c) all organic and inorganic matter and living organisms, and
> (d) the interacting natural systems that include components referred to in paragraphs (a) to (c).[18]

A provincial environmental assessment statute defines environment to mean:

> (i) air, land or water,
> (ii) plant and animal life, including man,
> (iii) the social, economic and cultural conditions that influence the life of man or a community,
> (iv) any building, structure, machine or other device or thing made by man,
> (v) any solid, liquid, gas, odour, heat, sound, vibration or radiation resulting directly or indirectly from the activities of man, or
> (vi) any part or combination of the foregoing and the inter-relationships between any two or more of them.[19]

A constitutional study on environmental management prepared for the federal government noted that the "physical-natural environment" would be the focus of the study.[20] Relying on an earlier definition of physical environment as "the sum of all social, biological, and physical or chemical factors which compose the surroundings of man" the author considered the scope of the study to include "the air we breathe; the water we drink and use for recreation; the land we cultivate, mine and build on; the cities we flock to in growing numbers; and the wilderness we seek to enjoy today and to preserve for future generations."[21] He went on to point out that the physical-natural environment is only a part of the total human environment, for it is conditioned by and reliant on the cultural, political, social and economic environment so that it adds to and is affected by the general quality of life in human society. As these examples demonstrate,

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[16]It is worth noting that no definition is contained within the Guidelines Order or the enacting legislation, *Government Organization Act, 1979*, S.C. 1978-79, c. 13, part III now known as the *Department of the Environment Act*, R.S.C. 1985, c. E-10. S. 6, the enabling section, has been repealed by s. 146 of the *Canadian Environmental Protection Act*, R.S.C. 1985 (4th Supp.), c. 16 but s. 146 has yet to be proclaimed.

[17]*Ibid.* [hereinafter *C.E.P.A.*].

[18]*C.E.P.A.* s. 3(1).

[19]*Environmental Assessment Act*, R.S.O. 1980, c. 140, s. 1.

[20]See J.M. MacNeill, *Environmental Management* (Ottawa: Information Canada, 1971) at 4.

[21]*Ibid.* at 4 and n. 1 where he quotes from the Environmental Pollution Panel, *Presidents' Science Advisory Committee Report: Restoring the Quality of Our Environment* (Washington, D.C.: The White House, 1965) at 93.

defining "environment" is not an easy task and the breadth of the definition can significantly affect the scope of the enactment which contains it. The broader the definition, the wider the scope of an assessment of environmental impacts with an increased likelihood of consequent jurisdictional problems.

The definitions of environmental impact assessment have varied as well. It has been defined as "the systemic description, prediction, evaluation, and integrated presentation of the environmental effects of a proposed action at a stage where serious environmental damage may be avoided or minimized."[22] On the other hand, environmental impact assessment has been defined as "a process which attempts to identify and predict the impacts of proposals, policies, programs, projects and operational procedures on the bio-geophysical environment and on human health and well being [and] it also interprets and communicates information about those impacts and investigates and proposes means for their management."[23] This latter definition, which relies upon the wider meaning of "environment" to include human health and well-being, is the one that will be utilized for the purposes of this article when considering the potential federal role in environmental impact assessment. Environmental impacts are so interrelated that an assessment, to be effective, must be comprehensive.[24] Although, depending on the situation, it may not be necessary to consider all of the environmental impacts of a proposal, the assessment must be capable of doing so where required. To make environmentally-responsible decisions, all necessary information about the complete range of environmental impacts must be available.

Can the peace, order and good government power support such a federal role in the environmental impact assessment field? Before exploring the possible scope of that power in relation to environmental impact assessment, the present Guidelines Order and the proposed federal legislation will be reviewed along with the recent court decisions on the present process. As well, the process in two other federal systems, Australia and the United States, will be examined to determine how they have dealt with these two fundamental questions, being the kinds of proposals which will trigger the process and the ultimate scope of the assessment itself. An exploration of the reasons for a broadly based and wide ranging federal process will be followed by a consideration of whether the peace, order and good government power could constitutionally ground such a process.

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[22]R. Lang, "Environment impact assessment: reform or rhetoric?" in W. Leiss, ed., *Ecology vs Politics in Canada* (Toronto: University of Toronto Press, 1979) 233.

[23]Canadian Environmental Assessment Research Council, *Evaluating Environmental Impact Assessment: An Action Prospectus* (Ottawa: Minister of Supply & Services Canada, 1988) at 1.

[24]See discussion below in Part II.

I. Federal Jurisdiction Over E.I.A. to Date

A. The Environmental Assessment Review Proeess Guidelines Order

Over one hundred years after Confederation environmental problems have exploded in a fashion that was both incomprehensible and unforeseeable in 1867. The demands of the public since the late 1960s for an active government role in environmental management were initially met by creating the Department of Environment and enacting the *Canada Water Act*.[25] The gradual development of an environmental impact assessment process started in 1972,[26] and resulted in the establishment in 1974 of a Federal Cabinet directive which was refined in 1977.[27] The directive was formally established in 1984 pursuant to the *Government Organization Act, 1979*.

The goal of the Guidelines Order was to ensure that the environmental implications of all proposals for which the federal government had a decision-making responsibility were considered fully and as early in the planning process as possible.[28] The Order provided that it applied to any proposal

> (a) that is to be undertaken directly by an initiating department;
> (b) that may have an environmental effect on an area of federal responsibility;
> (c) for which the Government of Canada makes a financial commitment; or
> (d) that is located on lands, including the off-shore, that are administered by the Government of Canada.[29]

Proposal is defined to include "any initiative, undertaking or activity for which the Government of Canada has a decision making responsibility."[30] The same section defines "initiating department" to mean "any department that is, on behalf of the Government of Canada, the decision making authority for a proposal."[31]

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[25]*Canada Water Act*, R.S.C. 1970 (1st Supp.), c. 5, now R.S.C. 1985, c. C-11 and *Government Organization Act 1970*, R.S.C. 1970 (2nd Supp.), c. 14.

[26]Environment Canada, *Task Force on Environmental Impact Policies and Procedure* (Ottawa: Environment Canada, 1972).

[27]W.J. Andrews & J.W. Higham, *Protecting the B.C. Environment* (Vancouver: Environment Canada, 1986) at 7.

[28]*Ibid.*

[29]Guidelines Order, s. 6.

[30]Guidelines Order, s. 2.

[31]Guidelines Order, s. 2. In the same section, Department is defined to mean, subject to sections 7 and 8:

(a) Any department, board or agency of the Government of Canada, and
(b) Any corporation listed on Schedule "D" to the *Financial Administration Act* and any regulatory body.

Although "environment" is not defined, the Guidelines Order goes on to require that the assessment of a proposal include the potential environmental effects, including the effects on foreign territory, the social effects directly related to the potential environmental effects, again including those external to Canadian territory and the concerns of the public regarding the proposal. As well, in the case of a panel review the matters considered may be extended to include the general socio-economic effects, technology assessment and the need for the proposal.[32] The process under the Guidelines Order was founded on the principle of self-assessment, which means that all initiating departments must develop their own internal screening procedures and use them to assess the potential environmental impacts of those proposals for which they have decision-making authority. The initiating department seeks to determine, in part, if a further study of the proposal is required, being an initial environmental evaluation.[33] After the initial assessment or the initial environmental evaluation, if the proposal has potentially significant or unknown environmental impacts or causes considerable public concern, it is referred for a public review.[34] The Minister of the initiating department, if a public review is recommended, refers the proposal to the Minister of the Environment so that the review can be conducted by an environmental assessment panel.[35] Alternately, the matter goes no further than the initial screening if the impacts of the proposal are found to be insignificant or capable of mitigation.[36] On the other hand, if the effects of the proposal are "unacceptable" it must be either modified or abandoned.[37]

Studies of the federal government's application of the Guidelines Order have demonstrated its erratic application. One study pointed out that by mid-1976 only one impact study had been completed and eleven were underway while after three years of the American process, over four thousand studies had been completed.[38] The same author found only thirteen federal agencies were using environmental impact assessment procedures and generally in a weak fashion, giving proponents substantial discretion in determining whether to proceed with an environmental impact assessment and what to do with the results.[39]

A government study examined six sample governmental departments and found that only Transport Canada's office of Canada Air Transportation Admin-

[32]Andrews & Higham, *supra*, note 27 at 7 and Guidelines Order, ss 10, 24.

[33]Guidelines Order, s. 12.

[34]Guidelines Order, ss 12 & 13.

[35]Guidelines Order, s. 20.

[36]Guidelines Order, s. 12.

[37]Guidelines Order, s. 12.

[38]R. Lang & A. Amour, "The Process of Environmental Assessment: Making It Work for Canada" in M. Plewes & J.B.R. Whitney, eds, *Environmental Impact Assessment in Canada: Processes and Approaches* (Toronto: Institute for Environmental Studies, University of Toronto, 1977) 15 at 23.

[39]*Ibid.*

istration was meeting the primary requirements of the environmental assessment review process.[40] Six of the remaining ten programs in those departments were found to have no formal environmental assessment review process while the remaining four had partial screening systems.[41] The screening, in most cases, was only carried out for capital projects.[42]

A review of the proposals where the Guidelines Order has been implemented at both the initial screening stage and at the full panel review stage is instructive. Such a review indicates where the federal government has assumed jurisdiction over environmental impact assessment and, as well, the breadth of the role assumed. Until April of 1986 there was no document published setting out the initial assessment decisions taken, but merely a "Register of Panel Projects" which tracked the progress of proposals slated for panel review.[43] In 1986 a Bulletin of Initial Assessment Decisions commenced publication and from an examination of the ensuing bulletins an analysis can be made of the areas of federal jurisdiction involved in these initial screening decisions.[44] As well, the federal environmental assessment review office has published the thirty-four panel reports done by 1990 which set out the recommendations made in relation to the proposals examined. Most of the proposals slated for panel review have involved federal proprietary rights, as the project was to be located on lands and waters over which the Government of Canada asserted ownership and jurisdiction.[45]

A recent "Initial Assessments Bulletin"[46] indicates over twelve hundred proposals have been considered or were under consideration during the prior eighteen-month period.[47] The initiating departments included Agriculture Canada, Canadian National Railway, The Canadian International Development

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[40]Planning and Evaluation Director, Corporate Planning Group, *Program Evaluation — Federal Environmental Assessment Review Process (E.A.R.P.)* (Ottawa: Environmental Canada, 1982) at 2 [hereinafter Program Evaluation].

[41]*Ibid.*

[42]*Ibid.*

[43]See, *e.g.*, F.E.A.R.O., *Register of Panel Projects No. 24* (Hull: Minister of Supply and Services Canada, 1987).

[44]F.E.A.R.O., *Bulletin of Initial Assessment Decisions Under the Federal Environmental Assessment and Review Process*, 1st ed. (Hull: Minister of Supply and Services Canada, 1986).

[45]See, *e.g.*, the Alaska Highway Gas Pipeline Review (1977), The Shakwak Highway Project (1978), the Eastern Arctic Off-Shore Drilling Project (1978), the Lancaster Sound Off-Shore Drilling Project (1979), the Roberts Bank Port Expansion (1979), the Banff Highway Project (1979), the Boundary Bay Airport Reactivation (1979), the Arctic Pilot Project (1980), the Norman Wells Oilfield Development and Pipeline (1981), the Banff Highway Project (1982), the Rogers Pass Development (1982), the Beaufort Sea Hydrocarbon Production and Transportation (1984), the Port of Quebec Expansion Project (1984), the Hibernia Development Project (1985), the West Coast Off-Shore Exploration (1986) and the Sea Island Fuel Barge Facility (1989).

[46]F.E.A.R.O., *Initital Assessment Decisions Bulletin*, 5th ed. (1 June 1988 — 31 December 1989) (Hull: Minister of Supply and Services, 1990) [hereinafter I.A.B.].

[47]*Ibid.* at 1-33.

Agency, Health and Welfare Canada, Transport Canada and The Royal Canadian Mint.[48] Proposals range from suggested improvements to a bomb disposal pit at the Calgary International Airport to the removal of dolphins at Springdale, Newfoundland.[49] Many of the proposals involve federal lands or explicit areas of federal jurisdiction, such as airports, the provision of services to Indians and harbours.[50] Very few proposals appear to involve private or provincial government proponents, which would indicate the Guidelines Order has been applied primarily where federal jurisdiction is clear, *i.e.*, where a proposal is for federal lands, is by the federal government or involves federal funds.[51] As a result, at least until the end of 1989, the assumption of jurisdiction under the Guidelines Order on the part of the federal government has remained for the most part within narrow jurisdictional bounds.

Once federal jurisdiction has been assumed and the proposal is ultimately submitted to a full panel review, areas outside traditional federal areas of jurisdiction are frequently subjected to assessment.[52] For example, at issue in the Shakwak Highway proposal was the reconstruction and paving of the Haines Road from the British Columbia/Alaska border to Haines Junction in the Yukon and from there to the Yukon/Alaska border.[53] The federally appointed environmental assessment review panel reviewed extensively community issues involved with the proposals.[54] Concerns such as worker involvement in community associations, equipment grants to communities, and the availability of social workers and medical services were all addressed and recommendations made.[55] Other more recent assessments of proposals in provinces indicate this is not an isolated phenomenon, and considerations that are not strictly within areas of explicit federal jurisdiction are often examined.[56]

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[48]*Ibid.* at 7-8.

[49]*Ibid.* at 1-21.

[50]*Ibid.* at 1-33. It is difficult to analyze the screening decisions as the information provided is scanty, but a review of the location of the project, its nature and the initiating department usually indicates that a project is either on federal lands or the proponent is the federal government in one form or another.

[51]*Ibid.* The primary applications of the Guidelines Order, where the proponents are other than federal government departments appear to originate with the Department of Fisheries and Oceans in relation to physical intrusions into fish habitat and Environment Canada, under *C.E.P.A.*

[52]See discussion to follow examining the reports in the Shakwak Highway proposal and the Sea Island Fuel Barge Facility.

[53]Environmental Assessment Panel, *Report of the Environmental Assessment Panel Shakwak Highway Project* (Ottawa: Minister of Supply and Services, 1978) 1 [hereinafter *Shakwak*]. It should be noted that in *Shakwak* there was a federal proprietary basis for jurisdiction as the proposal was in the Yukon, not within a province.

[54]*Ibid.* Over one third of the thirty-four pages of the report that dealt with the impacts of the project outlined economic and social considerations.

[55]*Ibid.* at 21-25.

[56]See discussion to follow on the Sea Island Fuel Barge Facility Panel Report. Some assessments are done jointly with the relevant province, thereby, to some extent, sidestepping jurisdictional issues.

In March of 1989 the federal environmental assessment review office published the report of the panel examining the Sea Island Fuel Barge Facility.[57] The proponent of this proposal was the Vancouver Airport Fuel Facilities Corporation which was seeking to construct and operate a jet fuel barge terminal on federal land located in the north arm of the Fraser River.[58] The terms of reference asked the panel to consider a number of matters, including the need for the project, the potential socio-economic impacts of the project, the possibility of socio-economic impact mitigation, liability and compensation. During the hearings three technical specialists assisted the panel, one of whom dealt specifically with the need for the project and its economic justification.[59] The panel concluded that although there was a need for additional jet fuel capability to Vancouver International Airport, there was no demonstrated regional economic benefit associated with the proposal.[60] As a result of that and other concerns, the panel recommended that the Minister of Transport unconditionally reject the proposal.[61]

In summary, although the federal government has held review panels when federal jurisdiction is clear,[62] once jurisdiction is assumed the panel is prepared to consider effects of the project that transcend federal jurisdictional boundaries. Panels have gone on to rely on those considerations to some degree in making a final recommendation as to whether the project should proceed.[63] In other instances those considerations have resulted in specific recommendations set out within the report.[64] The end result has generally been that the federal environmental assessment process has started from a base of clear federal jurisdiction at the original assessment stage and moved into an area of apparent mixed federal/provincial jurisdiction if the proposal resulted in a full panel review.

B. Recent Case Law

Recent case law at the Federal Court of Appeal level has altered dramatically the perceived applicability of the Guidelines Order. The first decision was

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[57]Environmental Assessment Panel, *Sea Island Fuel Barge Facility Report of the Environmental Assessment Panel* (Hull: Minister of Supply and Services, 1989) [hereinafter *Sea Island*].

[58]*Ibid.* at 1.

[59]*Ibid.* at 3.

[60]*Ibid.* at 1.

[61]*Ibid.*

[62]As earlier pointed out, the project involves federal lands, federal money or a federal government proponent.

[63]See the discussion of the decision in the Sea Island Fuel Barge Facility set out above at text accompanying notes 57-61.

[64]*Shakwak, supra*, note 53 where some of the recommendations expressly addressed questions relating to community matters. At 22, for example, the panel stated:

> The panel recommends the on-going development of community impact reports ... the report should cover such factors as medical and social services, schools, housing, native concerns, recreation, garbage disposal, wage and price inflation and the current schedule of project activities, camp locations and manpower.

in relation to the Rafferty Dam to be constructed by a provincial Crown corporation, the Saskatchewan Water Corporation. The Souris River is both an international and an inter-provincial river for it starts in Saskatchewan and flows into North Dakota and Manitoba. The Saskatchewan Water Corporation applied to the federal Minister of the Environment pursuant to the *International River Improvements Act*[65] and regulations for a licence to build the proposed dams and carry out other works on the Souris River system, which licence was issued. Despite requests that he conduct an assessment and review under the Guidelines Order when considering the licence application, the Environment Minister failed to do so. The applicant, the Canadian Wildlife Federation, maintained the impact of the project on wildlife and wildlife habitats would be adverse and substantial and alleged the project should have been subjected to the Guidelines Order before the licence was issued.

The Trial Division held the Guidelines Order was not a mere description of a policy or program and could create enforceable rights.[66] The decision to issue a licence under the *International Rivers Improvements Act* was sufficient to bring the project within the definition of "proposal" as the project would have an environmental effect on a number of areas of federal responsibility, namely international relations, transboundary water flows,[67] migratory birds,[68] inter-provincial affairs and fisheries. As the Minister had not complied with the Guidelines Order the application to set aside the licence was granted and compliance with the Order was directed.[69] In a one-page judgment the Federal Court of Appeal upheld the decision and confirmed that the Minister of the Environment was required to follow the Guidelines Order just as he must follow any law of general application.[70]

When a similar case was heard by the Federal Court Trial Division in relation to the Oldman River Dam in the south of Alberta, the Federal Court of Appeal's decision in Rafferty had been handed down. The Province of Alberta was the proponent in this case and work on the dam had been on-going since 1986 with studies of the project commenced some twenty years before construction. The challenge was mounted by an environmental group, The Friends of the Oldman River Society, who sought to quash a licence issued under the *Navigable Waters Protection Act*[71] by the Minister of Transport to the Province on the basis that he did not comply with the Guidelines Order. As well, the group

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[65]R.S.C. 1985, c. I-20.

[66]*Canadian Wildlife* (F.C.T.D.), *supra*, note 1.

[67]*Boundary Waters Treaties*, S.C. 1911, c. 28, Schedule and *International Boundary Waters Treaty Act*, R.S.C. 1985, c. I-17.

[68]*Migratory Birds Convention Act*, R.S.C. 1985, c. M-7 and the appended Convention.

[69]*Canadian Wildlife* (F.C.T.D.), *supra*, note 1 at 327-28.

[70]*Canadian Wildlife* (F.C.A.), *supra*, note 1.

[71]R.S.C. 1985, c. N-22 [hereinafter *Navigable Waters Protection Act*].

sought compliance with the Guidelines Order by both the Minister of Transport and the Minister of Fisheries and Oceans, arguing that the latter Minister had a decision-making responsibility pursuant to ss 35 and 37 of the *Fisheries Act*.[72] The Trial Division found that neither the Minister of Transport nor the Minister of Fisheries had to take into consideration the Guidelines Order and in fact it would be outside their jurisdiction to do so.[73] As the project did not involve the Minister of the Environment, being the only Minister the Court held to be under an obligation to follow the Order, the application was refused. In an intriguing and far reaching judgment, the Court of Appeal overturned this decision. After carefully reviewing the Guidelines Order and s. 6 of the *Department of the Environment Act*, the Court found that three areas of federal responsibility would be adversely affected by the dam: fisheries, Indians and Indian lands.[74] As s. 6 of the *Department of the Environment Act* provides for the use of the Guidelines by "departments ... in the exercise of their powers and the carrying out of their duties and functions," the Court found the Order was intended to bind the Minister of Transport in the performance of those duties and functions:

> I conclude that the Guidelines Order was intended to bind the Minister in the performance of his duties and functions. It created a duty which is superadded to the exercise of any other statutory power residing in him. The source of the Minister's jurisdiction and responsibility to address environmental questions in areas of federal responsibility springs not from that statutory law but from the Guidelines Order itself. The Minister had a positive obligation to comply with it.[75]

The Court's analysis of the position of the Minister of Fisheries and Oceans is even more interesting. Taking the position he had not made a "decision" under the *Fisheries Act*, the Minister alleged he was immune from compliance with the Guidelines Order as no proposal came before him for consideration. The Court made short shrift of that argument and held that if any "initiative, undertaking or activity" exists for which the Government of Canada has a "decision making responsibility" then a "proposal" also exists. The Court held that no "application" need exist. So long as the "initiative, undertaking or activity" comes within one of the categories set out in s. 6 of the Guidelines Order, it becomes the responsibility of every "initiating department" "for which it is the decision making authority" to deal with it as a "proposal" in accordance with the Order by subjecting it "to an environmental screening or initial assessment."[76] A department was an "initiating department" if it had a decision-making authority in relation to the proposal. The Minister of Fisheries and Oceans was faced with a proposal which fell within an area of federal respon-

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[72]R.S.C. 1985, c. F-14 [hereinafter *Fisheries Act*].

[73]*Friends of the Oldman River Society* v. *Canada (Minister of Transport)*, [1990] 1 F.C. 248, 2 W.W.R. 150 (F.C.T.D.).

[74]*Friends*, *supra*, note 1 at 34.

[75]*Ibid.* at 40.

[76]*Ibid.* at 45-46.

sibility. He had a decision-making authority in relation to that proposal since he had decided, upon receipt of a request for action, to do nothing under ss 35 and 37 of the *Fisheries Act*, which gave him the discretion to take action. This decision not to act was a decision which brought the Guidelines Order into play and he was bound by the Order and required to comply with it. As a result the Court ordered the approval of the Minister of Transport be quashed and the Guidelines Order be followed.[77]

The tests that must be met to invoke the Guidelines Order can be gleaned from this decision. The first requirement is the existence of a "proposal" which the Court of Appeal confirmed was any "initiative, undertaking or activity" that existed for which the Government of Canada has a "decision making responsibility." Essential is the existence of an "initiating department," being a government department, board, agency, regulatory body or certain corporations, that is the decision-making authority for the proposal. The proposal must then come within a category set out in s. 6 of the Guidelines Order, being federal lands, federal money, a federal project, or the proposal may have an environmental effect on an area of federal responsibility. The field of federal responsibility which is environmentally affected can be different than the federal jurisdictional field considered in defining "proposal" and "initiating department" with the result that proposals that trigger areas of federal responsibility and authority and have no environmental effect within those jurisdictional fields would still come within the Guidelines Order if they have an environmental effect on another field of federal jurisdiction.[78] Assuming one of the four criteria in s. 6 is met,

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[77]As noted, *supra*, note 3, this case is on appeal to the Supreme Court of Canada and was heard February 19-20, 1991. In addition to the constitutional questions to be argued, the Province of Alberta intends to argue as well that the Province is not bound by the *Navigable Waters Protection Act*.

[78]See *Friends*, *supra*, note 1 at 39-40 where the Court said:

> With respect, I am unable to agree that, in deciding whether to grant the approval, the Minister of Transport was restricted to considering factors affecting marine navigation only and that he was without authority to require environmental review. Such conclusions appear to be quite at odds with the true and, indeed, very far reaching import of the Guidelines Order. The dam project to which the approval related fell squarely within the purview of subparagraph 6(b) of the Guidelines Order as a "proposal...that may have an environmental effect on an area of federal responsibility." This "proposal" resulted in the Department of Transport becoming the "initiating department" responsible as the "decision making authority." The environmental effect of granting the application on *any area of federal responsibility* needed to be examined in accordance with the provisions of the Guidelines Order (emphasis added).

This statement is in clear contrast with the statement at 45:

> The crucial questions, therefore, are whether the Minister was here faced with a "proposal" that "may have an environmental effect on an area of federal responsibility" for which he was "the decision making authority."

It seems clear from the reading of the Guidelines Order that the first statement is correct and the latter is merely an unfortunate choice of wording.

it then becomes the responsibility of every "initiating department" which is "the decision making authority [for the proposal]" to deal with it as a proposal by submitting it to an environmental screening or assessment.[79]

As a result of these decisions, the federal government has been reviewing each government department and agency and considering the decisions it makes which would possibly come within the Guidelines Order.[80] The total number is substantial.[81] The Federal Environmental Assessment Review Office subsequently drafted "Post-Rafferty Environmental Assessment and Review Process (E.A.R.P.) Implementation Guidelines" which were to be updated again in relation to the Oldman River Dam decision.[82] These Court decisions established the Guidelines Order as a far reaching process which had to be relied upon whenever a federal decision was made if that decision might have an environmental effect on an area of federal responsibility. Once the process commenced, a wide range of environmental effects could be considered, although the net result could be such that, despite significant environmental effects, the original decision-making body did not have sufficient authority to ultimately affect the proposal one way or the other.[83]

C. Proposed Legislative Changes

In June of 1990 the federal government introduced into the House of Commons Bill C-78, the *Canadian Environmental Assessment Act*.[84] When announcing the proposed legislation on June 18th, 1990 the Honourable Robert de Cotret, then Minister of the Environment, stated that it "will go much further than the original Guidelines" and will result in a process "which is more powerful in its impact on decision-making than any other environmental assessment legislation in the world."[85] Included in the preamble to Bill C-78 is the statement

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[79]See *Friends*, *ibid.* at 44-45.

[80]Personal communication, Dr. R. K. Lane, Regional Director, Environmental Protection Service, Western and Northern Region, Environment Canada.

[81]*Ibid.*

[82]Correspondence from the Honourable Robert de Cotret, Minister of the Environment to Mr. Jim Fulton, M.P. Skeena (20 July 1990).

[83]This limitation is recognized in F.E.A.R.O., "Post-Rafferty Environmental Assessment and Review Process (E.A.R.P.) Implementation Guidelines" in part 9 where it is stated:

> In other words, even if a regulatory body cannot enforce the implementation of environmental protection measures, it still has an obligation to implement the E.A.R.P. This means that it is to understand the environmental consequences not only of its own regulatory actions but of the full proposal subject to the regulatory action.

[84]Bill C-78, *An Act to Establish a Federal Environmental Assessment Process*, 2d Sess., 34th Parl., 1989-90 [hereinafter Bill C-78]. Bill C-78 died on the order paper but has been reintroduced in identical terms as Bill C-13, *An Act to Establish a Federal Environmental Assessment Process*, 3rd Sess., 34th Parl., 1991.

[85]Text of statement by the Honourable Robert de Cotret, Minister of the Environment, introducing the *Canadian Environmental Assessment Act* (18 June 1990) at 6.

that "the government of Canada is committed to exercising leadership within Canada and internationally in anticipating and preventing the degradation of environmental quality and at the same time ensuring that economic development is compatible with the high value Canadians place on environmental quality."[86] With both the responsible Minister and the draft legislation asserting a strong federal role in environmental assessment, it is implied that the proposed legislation has a wide scope and is based on an assumption of broad constitutional powers. A review of the Bill reveals that this is not in fact the case.

Unlike the Guidelines Order the Bill defines both "environment" and "environmental effect." The former means:

> the components of the Earth, and includes:
> (a) land, water and air, including all layers of the atmosphere,
> (b) all organic and inorganic matter and living organisms, and
> (c) the interacting natural systems that include components referred to in paragraphs (a) and (b).[87]

This is the same definition as that used in the *C.E.P.A.* and would appear to exclude a number of components often thought to compose part of our environment such as, for example, cultural and economic systems.

> "Environmental effect" is defined to mean, in relation to a project:
> (a) any change that the project may cause in the environment, and
> (b) any change to the project that may be caused by the environment,
> whether any such change occurs within or outside Canada, and includes any effect of any such change on health and socio-economic conditions.[88]

By implication from this definition, "socio-economic conditions" are not part of the "environment." "Environmental assessment" is quite narrowly defined to mean "an assessment of the environmental effects of the project that is conducted in accordance with this Act and the regulations."[89]

An environmental assessment is to be done in relation to a "project" which is defined as "a physical work that a proponent proposes to construct, operate, modify, decommission, abandon or otherwise carry out or a physical activity that a proponent proposes to undertake or otherwise carry out."[90] By definition policies and many programs would appear to be excluded from the ambit of the

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[86]Bill C-78, Preamble.

[87]Bill C-78, s. 2(1). As is pointed out in the Submission of the Canadian Bar Association on Bill C-78 it is unclear whether "components of the Earth" includes components made by humans and therefore if the "interacting natural systems" include things not appearing in nature. See Canadian Bar Association, *Submission of the Canadian Bar Association on Bill C-78*, (November 1990) at 14-15.

[88]Bill C-78, s. 2(1).

[89]*Ibid.*

[90]*Ibid.*

Bill. This approach is confirmed in the Information Bulletin released at the same time as the Bill, for it advises that the environmental assessment of policies and programs "will require very different procedures from those used in project assessments."[91] Under the Guidelines Order the process is not limited to physical projects, but applies to any "initiative, undertaking or activity" which would include, for example, a decision to financially support small business in Rawanda or to assist in the development of an environmental network in Latin America.[92]

A project requires an environmental assessment where a federal authority undertakes certain acts and s. 2(1) of the Bill defines "federal authority" to mean a Minister of the Federal Crown, a Canadian government agency or other body established pursuant to an Act of Parliament and that is ultimately accountable through a federal Minister to Parliament for the conduct of its affairs, any department or departmental corporation set out in schedule 1 or 2 to the *Financial Administration Act* and any other prescribed body.[93]

Where a federal authority is the proponent[94] of the project and does anything that commits the federal authority to carrying out the project in whole or

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[91]See F.E.A.R.O., "Federal Environmental Assessment Reform — Fact Sheet #7, Environmental Assessment of Policies and Programs" (June 1990) 1 where it is explained that, apparently by way of a policy decision or a Cabinet directive, the environmental implications of each new federal policy or program will be considered and announced publicly. The fact sheet states that "[t]his opportunity for public scrutiny can be reinforced by the House of Commons, Standing Committee on the Environment which can request any Minister to appear before it to explain the environmental implications of any new policy or program." Some programs may be subject to the Bill pursuant to s. 50. It provides that where an agreement or arrangement is entered into by a federal authority or the Government of Canada on behalf of a federal authority with a provincial or international government or institution pursuant to which it exercises a power, duty or function relating to the provision of lands or monies, an early assessment of the environmental effects of the project must be provided for in the agreement. This is only to occur if the projects have not been identified at the time of the exercise of the power, duty or function and, once the projects are identified, the federal government or authority will have no power, duty or authority to exercise.

[92]I.A.B., *supra*, note 46 at 17, being projects #89-4-0383E and 89-4-0363E. It should be noted though that the scope of the Guidelines Order has been circumscribed in the recent decision of *Angus* v. *Canada*, [1990] 3 F.C. 410, 72 D.L.R. (4th) 672 (F.C.A.) where the Court held the Governor in Council was not a "department, board or agency" of the Government of Canada. As a result, various policy decisions made at that level would not be subject to the Guidelines Order.

[93]There are certain exceptions set out including the Commissioner in Council or an agency or body of the Yukon Territory or Northwest Territories, a Council of a Band within the meaning of the *Indian Act*, various harbour commissions and corporations set out in s. 85 of the *Financial Administration Act* or Schedule III to that Act. Corporations included in Schedule III include Atomic Energy of Canada, Petro-Canada, St. Lawrence Seaway and the Canadian National Railway. Special assessments for the exempted corporations and commissions can be prescribed pursuant to s. 55(1)(j) but no regulations have yet been made available for review.

[94]"Proponent" is defined as "the person, body or federal authority that proposes the project" (Bill C-78, s. 2(1)).

in part, an environmental assessment is required.[95] If a federal authority makes or authorizes financial assistance of any form to a proponent, other than full or partial relief from any federal tax or duty,[96] the project is subject to an environmental assessment.[97] Where a federal authority has the administration of federal lands[98] and disposes of those lands or any interest in those lands to anyone, including a province, for the purpose of enabling a project to be carried out in whole or in part, an environmental assessment is required.[99] In certain instances, where a federal authority takes any action for the purposes of enabling a project to proceed in whole or in part, including the issuance of a licence or permit or the granting of an approval, an environmental assessment is required.[100] Such action must be taken pursuant to the provisions of the Acts of Parliament or regulations as prescribed in the regulations ultimately established pursuant to the Bill.[101]

Where a project is likely to cause "serious adverse environmental effects in another province"[102] and a federal environmental assessment is not otherwise required, the Minister of the Environment can establish a review panel to conduct an assessment of the inter-provincial environmental effects of the project if no other method of conducting the assessment has been agreed upon by all affected provincial governments.[103] The panel may be established upon the Minister's own initiative or upon receipt of a request from the government of

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[95]*Ibid.*, s. 5(a).

[96]Relief from taxes and duties does not exempt a project from an environmental assessment if the relief "is provided for the purpose of enabling a specific project named in the Act, regulation or Order providing for the relief, to be carried out" (Bill C-78, s. 5(b)).

[97]Bill C-78, s. 5(b).

[98]"Federal lands" is defined in the Bill in s. 2(1) as being lands that belong to the federal Crown or where the federal Crown has a right of disposition, including all waters on and air space over those lands. Any fishing zone, internal waters of Canada and the territorial sea of Canada as determined in accordance with the *Territorial Sea and Fishing Zones Act* are included as well in "federal lands." Also included are reserves, surrendered lands, lands subject to the *Indian Act*, including waters on and air space above those lands. Exclusive economic zones and the continental shelf are as well "federal lands." Lands where the administration and control have been transferred to the Commission of the Yukon Territory or the Northwest Territories are exempted.

[99]Bill C-78, s. 5(c).

[100]*Ibid.*, s. 5(d).

[101]*Ibid.*, s. 5(d), 51(1)(g). In the Fact Sheets accompanying Bill C-78 when it was released it was suggested that some provisions of the following Acts may be prescribed: *National Energy Board Act*; *Railway Act*; *Railway Relocation and Crossing Act*; *Atomic Energy Control Act*; *International River Improvements Act*; *Fisheries Act*; *National Parks Act*; *Canada Oil & Gas Act*. See F.E.A.R.O., "Federal Environmental Assessment Reform — Fact Sheet #12, Impact on Other Acts of Parliament" (June 1990) 1.

[102]Bill C-78, s. 43(1).

[103]*Ibid.*, s. 43(1), (2). "Interested province" is defined in s. 43(5) to mean both the province in which the project is to be carried out and the province which is the recipient of the serious adverse environmental effects.

an interested province.[104] Similarly, when the Minister is of the opinion that a project inside Canada on federal lands is likely to cause serious adverse environmental effects outside Canada, a review panel may be established to conduct an assessment of the international environmental effects of the project if it is not otherwise subject to assessment under the Bill.[105]

When an assessment is not otherwise required under the Bill and a project in Canada is likely, in the Minister's opinion, to cause serious adverse environmental effects on federal lands or on lands in which Indians have an interest, a review panel may be established by the Minister to conduct an assessment of the environmental effects of the project on those lands.[106] As well, a panel may be established where a project is on native lands, is not otherwise subject to federal review, and is likely to have an effect outside those native lands.[107]

Projects that do not come within the criteria of the Bill can still be subject to its provisions relating to a panel review or a mediation if the Minister is of the opinion that the project is likely to cause significant adverse environmental effects that may not be mitigable or public concern respecting the environmental effects warrants it.[108] In essence, any project that touches upon an area of federal authority could be subject to panel review or mediation if the Minister is of the opinion that the circumstances justify it.

From this mandate various exclusions and exceptions are made.[109] Various exclusion lists of projects or classes of projects are permitted and are to be established by regulation.[110]

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[104]*Ibid.*, s. 43(3).

[105]*Ibid.*, s. 44(1).

[106]*Ibid.*, s. 45(1).

[107]*Ibid.*, s. 45(2). Native lands has been used here in a general sense. The Bill describes the relevant lands as "lands in a reserve that is set apart for the use and benefit of a Band and is subject to the *Indian Act*, ... settlement lands described in a comprehensive land claim agreement referred to in section 35 of the *Constitution Act, 1982* or ... lands that have been set aside for the use and benefit of Indians pursuant to legislation that relates to the self-government of Indians and is mentioned in a prescribed schedule ..."

[108]*Ibid.*, s. 24. This section requires the Minister to consult with the responsible authority, being the federal authority required under the Bill to ensure the environmental assessment is conducted. It goes on to provide for consultation with the appropriate federal authority if there is no responsible authority which would occur only when the criteria for inclusion under the mandate of the Bill have not been met. There must be some federal involvement in the project if there is a federal authority which can be consulted, although that federal authority is not acting in a fashion which would make it a "responsible authority." In essence this provision gives the Minister an overriding right to send to review or mediation any project which has a remote federal component if there are likely to be significant environmental effects or there is significant public concern.

[109]*Ibid.*, s. 6. For example, projects carried out during emergencies do not need to be subject to an environmental assessment.

[110]*Ibid.*, s. 55(1)(b). For example, where an assessment is "inappropriate" or the environmental effects are negligible or federal involvement is minimal, a project or class of projects may be

From this analysis of the scope of the Bill, it is apparent that much depends on the regulations promulgated thereunder. The establishment by regulation of the mandatory review list and the exclusion list, as well as the statutes and regulations to which the Bill will apply leaves much of the Bill open to conjecture. Its limitation to physical projects and undertakings and its applicability only to prescribed statutes and regulations results in a much narrower mandate than was available under the Guidelines Order.[111] For reasons that can only be surmised, the federal government appears determined to narrow its jurisdiction over environmental impact assessment, despite the broadening effect of recent Court decisions and before awaiting the ruling of the Supreme Court of Canada in the *Friends* case.

The Bill provides that the following factors are to be considered in every screening or mandatory study of a project and every mediation or assessment by a review panel:

> (a) the environmental effects of the project, including environmental effects of malfunctions or accidents that may occur in connection with the project and any cumulative environmental effects that are likely to result from the project in combination with other projects that have been or will be carried out;
> (b) the significance or, in the case of projects referred to in section 43, 44 or 45, the seriousness of those effects;
> (c) comments concerning those effects received from the public in accordance with this Act and the regulations; and
> (d) measures that are technically and economically feasible and that would mitigate any significant or, in the case of projects referred to in sections 43, 44 or 45, any serious adverse environmental effects of the project.[112]

In light of the definitions of both "environment" and "environmental effect" contained in the Bill, it would appear that the assessment is to consider only bio-physical effects of the project and any directly resulting effect on health and socio-economic conditions. Health and socio-economic effects are not, on their own, seen to be environmental effects. The assessment is not restricted to the effect on those environmental matters solely within federal jurisdiction.[113] As a result, once jurisdiction to do an assessment has been assumed on the basis of traditional federal constitutional juridiction, the Bill

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placed on the exclusion list. It is interesting to note that the word "inappropriate" is nowhere defined in the Bill.

[111]An exception, though, is the assumption by the federal government of jurisdiction in the area of transboundary adverse environmental effects, being one area where federal jurisdiction under the Guidelines Order was subject to conjecture.

[112]Bill C-78, s. 11(1). Ss 43, 44 & 45 of the Bill deal with trans-border and related environmental effects, both inter-provincial and international and the operative words used are "serious adverse environmental effects" rather than "significant adverse environmental effects" as are used elsewhere in the Bill.

[113]At the same time, by using the narrower definition of "environment" it would appear the assessment is not to look at all environmental effects in the broadest sense of the word.

appears to permit consideration of the effects upon traditionally provincial areas of jurisdiction. In light of the restricted definition of "environment" and "environmental effect," such a foray into areas of traditional provincial jurisdiction may still not be sufficient, in certain situations, to provide a truly comprehensive and worthwhile assessment.

II. Reasons for a Strong Federal Presence in Environmental Impact Assessments

A. The International Approach

Attention has focused internationally on the environmental impact assessment process, how it should be carried out and the rationale for its existence. This international concern with environmental impact assessment is not new. The declaration of the United Nations' Conference on the Human Environment held in Stockholm in 1972 included a principle which stated:

> In order to achieve a more rational management of resources and thus to improve the environment, States should adopt an integrated and co-ordinated approach to their development planning so as to ensure that development is compatible with the need to protect and improve the human environment for the benefit of their population ... Planning must be applied to human settlements and urbanization with a view to avoiding adverse effects on the environment and obtaining maximum social, economic and environmental benefits for all ...[114]

The United Nations' general assembly resolution on the World Charter for Nature, adopted in 1982 provided that:

> All planning shall include, among its essential elements, the formulation of strategies for the conservation of nature, the establishment of inventories of ecosystems and assessments of the effects on nature of proposed policies and activities; all of these elements shall be disclosed to the public by appropriate means in time to permit effective consultation and participation.[115]

Some of the justifications for an environmental impact assessment process were contained in the advice given by the Experts Group on Environmental Law to the World Commission on the Environment and Development.[116] The experts group, in its summary of relevant legal principles stated:

> The States shall maintain ecosystems and ecological processes essential for the functioning of the biosphere, to preserve biological diversity, and to observe the principles of optimum sustainable yield in the use of natural resources and ecosys-

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[114]Experts Group on Environmental Law of the World Commission on Environment and Development, *Environmental Protection and Sustainable Development* (London: Graham and Trotman, 1987) at 152 [hereinafter Experts Group].

[115]Experts Group, *ibid.*, "U.N. General Assembly Resolution on the World Charter for Nature" at 158-59.

[116]Experts Group, *ibid.*

> tems. ... States must make or require environmental assessments of proposed activities which may significantly affect the environment or use of a natural resources [*sic*]. ... States should ensure that conservation is treated as an integral part of the planning and implementation of development activities and to provide assistance to other States, especially to developing countries, in support of environmental protection and sustainable development. ... States must provide prior and timely notification and relevant information to the other concerned States and make an environment assessment of planned activities which may have significant trans-boundary effects.[117]

This international recognition of the importance of requiring environmental impact assessments in order to preserve and conserve ecosystems, natural resources and to protect the environment necessary for human health and benefit[118] serves to support the necessity for a broad federal environmental impact assessment process. With such a process national standards can be set and maintained across the country so that these internationally recognized goals can be realized in a uniform and consistent fashion. Further, the problem of pollution havens, where, to attract or keep industry, certain jurisdictions have lower standards or fail to enforce their standards, can be avoided.[119] The consideration of environmental impacts is fundamental to the establishment of the economy on a sustainable development basis, the conservation of nature and the management of resources, all of which will ultimately, in the long term, benefit the population of Canada as a whole.

B. Weighing the Benefit and the Burden

One of the most forceful arguments for a strong federal presence in the environmental impact assessment field was addressed in a thoughtful and perceptive article by Dale Gibson, where he considered jurisdiction generally over environmental matters.[120] Gibson pointed out that, at least *prima facie*, it makes sense to base constitutional jurisdiction over a subject, such as environmental regulation, on its territorial ramifications. One of the goals of federalism is to place matters of purely local import within local control and matters of wider import under federal control which is, of course, of itself not entirely territorial.[121] He noted, though, that to give the provincial governments complete autonomy over protection of their own provincial environments could, depending on the circumstances, reduce the likelihood of adequate protection. The greatest risk could occur where the benefit would accrue to the province and the

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[117]*Ibid.* at 8-14.

[118]For a more detailed consideration of the importance of environmental impact assessment see Experts Group, *ibid.* at 58-63.

[119]See the discussion of this in D.P. Emond, "The Case for a Greater Federal Role in the Environmental Protection Field: An Examination of the Pollution Problem and the Constitution" (1972) 10 Osgoode Hall L.J. 647.

[120]"Protection and Enhancement," *supra*, note 13 at 119; see also MacNeill, *supra*, note 20.

[121]"Protection and Enhancement," *ibid.* at 119.

resulting environmental damage would occur much further away, for example in the Northwest Territories. Gibson gave as an example of this problem the Churchill River diversion project in northern Manitoba.[122] In that instance Manitoba Hydro, a provincial Crown corporation, decided that it would be more economical to divert water from the Churchill River to the Nelson River to run through existing and proposed generators rather than to develop a new hydroelectric generating facility on the Churchill itself. The proposal would involve widespread environmental damage, as the Churchill would be deprived of its natural flows and large scale flooding of lakes, streams, and forests would take place along the diversion route. The northern area was remote so that the people affected were few in number and there were many economic benefits which would result for the majority of the population in the south of the province. As a result, the provincial government raised no serious opposition to the proposal and it was only when the federal government intervened that some ameliorating measures were undertaken.[123]

The point made by Gibson in this example is that a government which has general responsibility for an area is influenced primarily by the wishes of the majority of its constituents.[124] With a territorial principle as the basis for deciding jurisdiction, primary environmental responsibility would rest on provincial shoulders with possible resultant problems. As a result, when there is a wider territorial effect or a concern greater than a merely local concern, federal involvement can be more easily supported.

Many projects which, initially, would appear to be of merely a local nature can, in their ultimate effects, be extra-territorial. For example, the logging of provincially owned forests can, arguably, have an international effect when forests are seen to be "carbon sinks" with their cutting resulting in the release of carbon dioxide into the atmosphere.[125] It has been acknowledged by the Canadian government that the release of carbon dioxide into the atmosphere could lead to "global warming,"[126] with the result that a direct international effect can be tied back to provincial forestry practices. This is not to say that the federal government should, as of right, necessarily be entitled to environmental jurisdiction over the cutting of any and all provincial forests, but rather to demon-

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[122]*Ibid.* at 122.

[123]A similar situation occurred in Alberta in 1989 with the proposed Alberta Pacific pulp mill. The ultimate destination of the effluent being discharged in Alberta was the Northwest Territories. Ultimately a joint provincial federal review panel was established pursuant to the Environmental Assessment Review Process Guidelines Order which recommended the proposed mill not proceed immediately, pending further environmental studies.

[124]"Protection and Enhancement," *supra*, note 13 at 122.

[125]See Canada, *Canada's Green Plan* (Ottawa: Minister of Supply and Services, 1990) at 107 [hereinafter *Green Plan*].

[126]*Ibid.* at 97.

strate that increasingly, we are becoming aware of the wide ranging effects that can result from actions that appear, initially, to be of a merely local nature.

In considering pollution, rather than environmental impact assessment, Paul Emond has pointed out that "[u]p to a point different groups can choose different lifestyles, but after that, one group's choice will spill over and have some adverse effects on another group."[127] Pollution, "in its broadest sense" knows no boundaries and, therefore, any decision to sacrifice environmental protection in order to facilitate a higher economic standard of living must be restricted to decisions which will not have a serious impact on the well-being of another group.[128] To ensure this does not occur he recommends that controls be imposed so that both the group effected and the group benefited are adequately protected. He argues that certain kinds of pollution are local in their effect, citing urban planning, noise and aesthetics as examples.[129] Effects on air and water, though, are not confined to source. As a result he argues that when the "spill over effects" become great or alternately the pollution seriously threatens Canadians' well being, Parliament should have concurrent legislative responsibility with the provinces. He recommends the federal government regulate the economic and broad social well-being aspects of pollution while the provincial responsibility be confined to finding particular solutions to specific pollution problems.[130] As a result, the federal government would design a "broad framework" that would establish certain minimum standards for pollution control which would solve the economic and social problems involved with pollution. The provincial and local governments would work at up-grading those standards or further refining them so that they are more directly relevant to their constituents' social needs.[131]

The degree of this "spill over" problem has been increasingly recognized in the last twenty years.[132] For example, increased pollution from high smoke stacks have made local problems into transboundary problems, so that it is now believed that certain pollutants in Europe and North America may remain airborne for several days and travel over a thousand kilometres before being deposited.[133] Transboundary air pollution can result in a number of problems including ozone related forest and crop damage, the deposit of heavy metals resulting in toxicity to aquatic and terrestrial ecosystems, the acidification of the

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[127]Emond, *supra*, note 119 at 651.

[128]*Ibid.*

[129]*Ibid.* at 652.

[130]*Ibid.* at 653.

[131]*Ibid.*

[132]J.M. Alcamo & E.E. Runca, "Some Technical Dimensions of Transboundary Air Pollution" in C. Flinterman, B. Kwiatkowska & J. G. Lammers, eds, *Transboundary Air Pollution* (Dordrecht: Martinus Nijhoff, 1987) 1.

[133]*Ibid.* at 1.

natural environment, including both soil and aquatic systems and the impairment of visibility due to suspended particles.[134]

As a result, many initiatives will have a transboundary effect rendering them matters of not merely a "local and private" nature. To ensure the uniformity of environmental impact assessments across Canada and to safeguard the interests of those who will not benefit from the initiative but may suffer from its results, federal environmental impact assessments should apply to a broad range of proposals. Unless the impacts of a proposal are truly of a local and private nature, federal jurisdiction over the environmental impact assessment process in relation to that project is justifiable, with the only relevant question being the degree of significance of the wider territorial effects of the proposal required to trigger federal involvement.

C. The Ecological Approach to an Environmental Assessmcnt

Once federal jurisdiction over the environmental impact assessment of a proposal is established, the next question to be addressed is the scope of the assessment. It can be argued that a federal assessment should only address concerns directly related to the federal decision-making power to be exercised. Alternately, an argument could be made that the federal government can only consider and assess matters directly related to the specific areas of federal jurisdiction, such as the consideration of fisheries in relation to the granting of a *Navigable Waters Protection Act* licence.[135] Common sense would dictate that such an approach is difficult at best and foolhardy at worst. It ignores the very meaning of the word "environment" and the inter-relatedness of all of the aspects that compose the environment.

Various studies have examined just what constitutes a meaningful environmental impact assessment. One commentator posits that assessments "must be able to predict how the relevant components ... of the biophysical and socio-economic system interact with each other and change over time."[136] The author suggests that an environmental impact assessment must be able to:

> trace flows and impacts occurring among four systems:
> (i) flows originating and ending in the economy;
> (ii) flows originating in the economy but ending in the environment (e.g. residuals or emissions);
> (iii) flows originating and ending in the environment (e.g. spatial diffusion of emissions and energy and material flows in ecosystems) ...

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[134]*Ibid.* at 3.

[135]Both these arguments are being proposed by the Province of Alberta in its appeal to the Supreme Court of Canada of the Federal Court of Appeal decision in *Friends*.

[136]J.B.R. Whitney, "Integrated Economic-Environmental Models in Environmental Impact Assessment" in V.W. MacLaren & J.B.R. Whitney, eds, *New Directions in Environmental Impact Assessment in Canada* (Toronto: Methuen Publications, 1985) 53 at 55.

(iv) flows emanating from the environment and ending in the economy (*e.g.* pollution damages and loss of non-renewable resources).[137]

As that commentator noted, any intervention, being either an action or a policy that changes or encourages actions, will have repercussions on both the biophysical and economic environments. In turn, these repercussions will change, to some degree, all of the components of each system and further, they may affect the actual intervention itself.[138] As an example, he considers the construction of a new water polluting industry. As a result of its pollution it may cause the accumulation of heavy metals, or alternately a reduction, in the biota population rendering them unfit for human consumption. Food prices might then increase. At the same time that this occurs, the resulting deterioration in the quality of the water could increase the costs of water treatment which increases would, in turn, be passed on to both the original polluter and society.[139] With this example the necessity of broadly defining both "environment" and "environmental impact assessment" becomes self-evident.

This interrelatedness has been pointed out in relation to the importance of international, and in fact global, environmental law:

> The second aspect of the inter-relations among all components of the natural environment is that interactions are numerous and important between air, rivers, lakes, soil, oceans, underground water, wildlife and even outerspace. They cannot be isolated one from another. It is well known that significant decreases of sunshine produced by heavy air pollution will have consequences on all forms of life and even on the regeneration of polluted fresh waters. Moreover, a considerable part of the pollution of the ocean seems to have its origin in air pollution. The use of pesticides affects not only the soil and living organisms but also the lakes and rivers. These carry much of the polluting substances introduced into their waters into the sea. Ultimately, a considerable proportion of the world's waste and polluting substances goes to the seas; waters not only essential for the food-supply of mankind but also for the regeneration of the air and for maintenance of climatic balances. Thus the influence of a given nuisance can affect indirectly many other components of the global environment.[140]

The same writer goes on to point out that "the national level experience has proved that it is not possible, nor even desirable, to try to elaborate an environmental policy totally independent from other sectors of national life — social, economic, educational [for] [t]he requirements of ecology cannot be isolated from these other aspects."[141] He sees environmental protection as a "sort of philosophy" which should underlie most of the activities of a nation.[142]

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[137]*Ibid.* at 55-56.
[138]*Ibid.* at 55.
[139]*Ibid.*
[140]A.C. Kiss, *Survey of Current Developments in International Environmental Law* (Switzerland: International Union for Conservation of Nature and Natural Resources, 1976) at 13.
[141]*Ibid.* at 15.
[142]*Ibid.*

Workshops and task forces in Canada that have considered environmental impact assessment procedures have supported a broad ranging assessment which would examine the social, ecological, biophysical, economic and cultural implications of a project,[143] for it is only common sense to give consideration to the entire range of consequences of a contemplated action when deciding whether or not to proceed. Complete environmental impact assessment is, in essence, fundamental to the very process of decision-making, for most decisions are based on their likely outcomes or impacts.[144]

So that an assessment is not so broad as to be unworkable, a decision must first be made at the beginning of the assessment as to the ecosystem components that are valued by society and should therefore be considered in relation to the proposal. Once those "valued ecosystem components" have been identified, then an assessment can be designed to consider the changes in them that may occur.[145] When deciding on the valued components of the ecosystem to be considered it would be impossible to pick and choose based on federal jurisdictional requirements only in light of the interrelatedness of the components of an ecosystem. For example, we will assume that the federal government has jurisdiction over migratory wildlife,[146] it is seen to be a valued ecosystem component and a plant is to be built that may impact on that wildlife. With the province having jurisdiction over non-migratory wildlife, a purely federal assessment process would exclude consideration of the effect of the plant on that non-migratory wildlife. The problem with this approach becomes evident if in fact the migratory wildlife feeds on non-migratory wildlife which may be eradicated or harmed as a result of the anticipated project. To pick and choose the valued ecosystem components solely on a jurisdictional basis would render an environ-

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[143]See, *e.g.*, *Workshop on the Philosophy of Environmental Impact Assessments in Canada* (Winnipeg: Environment Protection Board, 1973) at 54 and Alberta Environmental Impact Assessment Task Force, *Report and Recommendations of the Alberta Environmental Impact Assessment Task Force* (Edmonton, 1990) at 5. See also *The National Consultation Workshop on Federal Environmental Assessment Reform* (Ottawa: Minister of Supply and Services, 1988) at 10 where it was suggested by some participants that archaeological, spiritual and native rights be considered as well.

[144]See the discussion of the underlying purposes of environmental impact assessment in Lang, *supra*, note 22 at 233. He is of the opinion that the distinction between social inequity and environmental inequity will, in time, blur, until the two in essence merge. At that point he believes that environmental impact assessment may take on a more significant and different role and become an instrument for social change. Environmental impact assessment could alter consumption patterns as well as change the thinking processes of people and institutions when they assess their real needs.

[145]G.E. Beanlands, "Ecology in Impact Assessment in Canada" in MacLaren & Whitney, eds, *supra*, note 136, 1 at 14. See also G.E. Beanlands & P.N. Duinker, *An Ecological Framework for Environmental Impact Assessment in Canada* (Halifax: Federal Environmental Assessment Review Office and Institute for Resource and Environmental Studies, Dalhousie University, 1983).

[146]See D. Gibson, "Constitutional Jurisdiction over Environmental Management in Canada" (1973) 23 U.T.L.J. 54 at 65 [hereinafter "Constitutional Jurisdiction"], where he states that he believes such federal jurisdiction does exist.

mental impact assessment process ineffectual and the ultimate decision ill considered.

D. Summary

Increasingly, international recognition is being given to the importance of undertaking environmental impact assessments well prior to the commencement of any proposals. The inter-provincial, international and even global effect of proposals, either solely or cumulatively, substantiates the need for a strong federal environmental impact assessment process. Further, even when impacts are not inter-provincial but have a wider territorial impact within a province so that the benefit and the burden of the proposal affect different constituent groups within that province, the need is demonstrated for a federal presence in the environmental impact assessment field.

Once that federal presence is established, the question arises as to the scope of the assessment. It is only good practice to review all of the potential consequences of a contemplated action at the time a decision is being made as to whether or not it will be carried out. Further, any action or policy that results in actions or inactions can affect many aspects of both the biophysical and the socio-economic environment. As well, the components of an ecosystem are so closely interrelated that to restrict an assessment to matters and considerations solely and narrowly within federal jurisdiction would make the assessment ineffectual and essentially worthless.

III. Other Federal Jurisdictions

An examination of the mechanisms used in other federal jurisdictions to assign jurisdiction over an environmental assessment review process is instructional although it must be kept in mind that no other constitution is identical to the *Constitution Act, 1867*. The system presently in use in Australia as well as the more established American model will be examined. The constitutional basis for the role in environmental impact assessment undertaken by the Australian and American federal governments will be reviewed and the scope of the process and breadth of the ultimate assessment considered. Of primary interest is the examination of how the relative strength of the federal position in the governmental impact assessment process affects the ultimate efficacy of that process. An important jurisdictional lesson can be learned from these examples. An effective, co-operative environmental impact assessment process appears to operate best in a federal system where the central government has asserted broad jurisdiction over the process both as to the proposals affected and the range of impacts considered. Only then will co-operation with state governments operate to improve rather than decimate the overall effectiveness of the process.

A. The Australian Example

As with the Canadian constitution, the Australian constitution makes no specific reference to environmental concerns nor establishes any specific basis for environmental powers.[147] This shortcoming has not operated to prevent both the States and the Commonwealth from proclaiming legislation in the areas of natural resources management and environmental policy.[148] Unlike the Canadian constitution, no specific powers are given to the States, with the result that residual powers, being powers not specifically awarded to the Commonwealth, lie with the States.[149] The powers considered best able to provide constitutional support to federal legislation in the environmental field are those enabling the Commonwealth to make laws in relation to:

(a) trade and commerce with other countries and among the States;[150]
(b) foreign corporations and trading and financial corporations formed within the limits of the Commonwealth;[151]
(c) taxation;[152]
(d) external affairs;[153] and
(e) the people of any race for whom it is deemed necessary to make special laws.[154]

As well, the Constitution gives Parliament the power to make laws with respect to the acquisition of property on "just terms from any State or person for any purpose in respect of which the Parliament has power to make laws."[155] S. 96 has one further notable provision in this area for it gives to Parliament the power to grant financial assistance to any State on such terms and conditions as it thinks fit.[156]

In addition to the express powers, constitutional commentators believe there is an implied or inherent power granted to the Commonwealth resulting

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[147]*Commonwealth of Australia Constitution Act* 63 & 64 Vict., c. 12 [hereinafter *Australia Constitution Act*].

[148]B.W. Davis, "Federalism and Environmental Politics: An Australian Overview" in R.L. Mathews, ed., *Federalism and the Environment* (Canberra: Australia National University, 1985) 2.

[149]J. Formby, "The Australian Government's Experience with Environmental Impact Assessment" (1987) 7 Env. Imp. Assess. Rev. 207 at 211.

[150]*Australia Constitution Act*, s. 51(i).

[151]*Ibid.*, s. 51(xx).

[152]*Ibid.*, s. 51(iii).

[153]*Ibid.*, s. 51(xxix).

[154]*Ibid.*, s. 51(xxvi). See also L. Zines, "The Environment and the Constitution" in Mathews, *supra*, note 148, 13 at 14.

[155]*Australia Constitution Act*, s. 51(xxxi) and Zines, *ibid.* at 13.

[156]*Australia Constitution Act*, s. 96 and Zines, *ibid.* at 14. The fisheries power which has been of considerable importance in establishing environmental power in Canada is of little use in Australia as the only power over fisheries is marine and starts outside the three mile limit.

from its status as the national government.[157] There have been no clear guidelines established for the determination of what is included in that power, but it appears that the perception of the need for national action or control is not alone sufficient to bring a matter within this implied power.[158] Providing for free interstate trade, s. 92 of the *Constitution Act* sets out the most important and obvious limitation on the powers of the federal government in Australia.[159]

In 1973 the newly elected Labour Government decided to legislate environmental impact assessment, which had to that point been only in the form of a policy.[160] Its application was to be extended from a consideration of federal development projects and projects where federal financial assistance had been requested to a consideration of every matter within the constitutional responsibility of the federal government,[161] including federal policies.[162] Effect was given to these intentions with the introduction of the *Environment Protection (Impact Proposals) Act* into the House where it was greeted with vigorous debate.[163] Debate raged over the Bill's potential to erode State powers and, as well, whether it would apply to proposals carried out by the State with the assistance of general funds, including loan council funds.[164] As a result, subsequent amendments were passed which limited the applicability of the Act to federal funding which involved direct and specific financial assistance to the State.[165]

The Act defines "environment" to include "all aspects of the surroundings of man, whether affecting him as an individual or in his social groupings."[166] The Procedures Order[167] provides that the process set out in the Act is to apply to "proposed actions" which are then defined to mean "matters referred to in

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[157]Zines, *ibid.* at 24 where he points out that one Judge has declared that it includes a "capacity to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation ... (and) it (is) an expanding power capable of adapting to changing circumstances."

[158]Zines, *ibid.*

[159]*Australia Constitution Act*, s. 92 states:

> Trade within the Commonwealth to be free.
>
> — On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free ...

[160]R.J. Fowler, *Environmental Impact Assessment, Planning and Pollution Measures in Australia* (Canberra: Australian Government Publishing Service, 1982) at 9.

[161]*Ibid.* at 9 & 14.

[162]Formby, *supra*, note 149 at 207.

[163]Fowler, *supra*, note 160 at 14.

[164]*Ibid.*

[165]*Ibid.*

[166]*Environment Protection (Impact of Proposals) Act* (Aust.), 1974, No. 164 of 1974, s. 3.

[167]Fowler, *supra*, note 160 at 17 and the Procedures Order, Australia Government Gazette, S. 120, (24 June 1975) s. 1.3.

any of the paragraphs of section 5 of the Act."[168] S. 5 sets out the Act's purpose, being to:

> Ensure to the greatest extent that is practicable, that matters affecting the environment to a significant extent are fully examined and taken into account in and in relation to —
> (a) the formulation of proposals;
> (b) the carrying out of works and other projects;
> (c) the negotiation, operation and enforcement of agreements and arrangements (including agreements and arrangements with and with authorities of, the States);
> (d) the making of, or the participation in the making of, decisions and recommendations, and
> (e) the incurring of expenditure
> by, or on behalf of, the Australian government ... either alone or in association with any other government, authority, body or person.[169]

Utilizing a literal interpretation, s. 5 would render the entire range of Commonwealth activities subject to the process and the significant environmental effects of those activities would have to be examined. In light of the broad definition of "environment," that examination would cover a wide range of potential impacts. It would appear from comments made at the time that a broad scope was intended and the Act was to apply generally throughout the range of federal government action.[170]

The new legislation was barely in place when its constitutional basis was challenged in the case of *Murphyores* v. *The Commonwealth*.[171] That decision considered the use by the Commonwealth of its power pursuant to s. 51(i) to prohibit exports in order to prevent the mining of Fraser Island. The Plaintiff had been granted mining leases by the Queensland State Government and proposed to export the minerals obtained. Permission to export was required under the requisite federal legislation from the Minister for Minerals and Energy and as a result, pursuant to s. 11 of the *Environment Protection (Impact of Proposals) Act*, an environmental impact assessment was ordered. The Plaintiffs asked that the Minister be prevented from considering the impact statement on the basis that he was not entitled under the Customs regulations to take into consideration any environmental aspect of the mining operations. Under the trade and commerce power, said the Plaintiff, the Minister could take into account only matters relevant to trading policy, and the beauty and ecology of Fraser Island was therefore irrelevant.

Unanimously the Court rejected this argument. It held that a law directed to the prohibition or authorization of exports was a law which related to exports

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[168]Procedures Order, *ibid.* s. 1.3.
[169]*Environment Protection (Impact of Proposals) Act* (Aust), *supra*, note 166, s. 5.
[170]Fowler, *supra*, note 160 at 17. See also Formby, *supra*, note 149 at 207.
[171](1976), 136 C.L.R. 1 [hereinafter *Murphyores*].

regardless of the policy or motive of the legislature or the Minister and whatever the practical effect on areas otherwise within State power. One Judge, in the course of his judgment, approved an earlier decision which held that if the Commonwealth could prohibit absolutely, it could prohibit on conditions even if the conditions related to activities that the Commonwealth could not directly control or regulate.[172] The upshot of the decision was, with the export market inaccessible to it, the company decided not to proceed with mining on Fraser Island, despite the fact it had been state policy to develop the mine.[173] It has been suggested that the export power is so broad that if there had been a domestic market for Fraser Island minerals, and the applicant sought a licence to export minerals it mined elsewhere, the Commonwealth Parliament could constitutionally authorize the Minister to refuse the licence unless the company refrained from mining on Fraser Island.[174]

The same constitutional power applies to imports, with the result that foreign capital can be denied entry on grounds related to environmental matters and conditions can be imposed in relation to the undertaking for which the funds are required.[175] In principle the same approach used in *Murphyores* could be extended to the prohibition of other activities or services that come within Commonwealth legislative power such as banking, postal services, insurance and broadcasting.[176]

The main vehicle of federal commercial regulation in Australia is the corporations' power, which was extended considerably by the *Franklin Dam* decision.[177] This power applies only to foreign corporations and trading or financial corporations formed within the limits of the Commonwealth.[178] Pursuant to its environmental impact assessment legislation, the federal government can regulate and control all acts of those corporations done for the purposes of trade, which would include most manufacturing, mining or agricultural activities undertaken by them. So long as the federal intervention controls, prohibits, regulates or authorizes the activity, the underlying environmental policy or objective of the Commonwealth Parliament is irrelevant.[179] Other Commonwealth powers, such as the races' power,[180] the taxation power,[181] the external affairs

[172]Stephen J. in *Murphyores, ibid.* at 11, citing *Herald & Weekly Times* v. *The Commonwealth*, (1956), 115 C.L.R. 418.
[173]Zines, *supra*, note 154 at 14.
[174]*Ibid.* at 16.
[175]*Ibid.* at 16.
[176]*Ibid.* at 15.
[177]*Commonwealth* v. *Tasmania* (1983), 46 A.L.R. 625.
[178]*Australia Constitution Act*, s. 51(xx).
[179]Davis, *supra*, note 148 at 18.
[180]*Australia Constitution Act*, s. 51(xxvi).
[181]*Ibid.*, s. 96.

power,[182] and the limited navigation and shipping power[183] play an important role as well in providing a constitutional basis for environmental assessment in Australia.

Although the Australian constitution appears to support a wide environmental assessment review power, and despite the contention of the government in power that the new legislation be broadly applied, the Act has had limited use, often for purely political reasons.[184] Subsequent arrangements and agreements entered into between a majority of the States and the Commonwealth government have indicated withdrawal by the federal government from its original position.[185] The limitation of the full operation of the legislation to areas of essentially exclusive federal responsibility and the agreement that some other areas of joint activity will require only State assessments along with the somewhat loose arrangements for co-operation in relation to joint assessments all exemplify this retrenchment.[186] As a result, by the late 1980s only ten environmental impact statements per year had been required by the federal government, a very small number given the potential breadth of the jurisdictional responsibilities of the federal government.[187] Further, by that time only four inquiries had been initiated under the Act.[188]

As with the traditional Canadian approach to environmental assessment, Australia relies on an ad hoc constitutional justification for each assessment. There is no overriding power viewed as the basis for the legislation. Case law has indicated judicial support for a strong federal role in environmental matters, but despite that support and the firm position of the government when the legislation was introduced, federal power has been eroded. The process has not pervaded the entire decision-making structure of the federal government, but rather has been applied on a piecemeal basis. The original rhetoric promised a strong federal presence. Tempered in the political arena, that vision has been replaced with a practical solution being co-operative agreements made with only some of the States, resulting in a lack of uniformity across the country.[189] The end

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[182]*Ibid.*, s. 51(xxix).

[183]*Ibid.*, s. 98. This section states: "The power of the Parliament to make laws with respect to trade and commerce extends to navigation and shipping, and to railways the property of any State."

[184]Fowler, *supra*, note 160 at 17 & 259-62 and Formby, *supra*, note 149 at 211, where he points to, as an example, the proposal to develop a road through a Queensland rain forest, an area of high conservation value. The government's decision to refuse to take unilateral action to stop the road was strongly influenced by its concern that it would lose votes in Queensland, similar to the losses in Tasmaina after action was taken to prevent construction of the Gordon-Below-Franklin Dam.

[185]Fowler, *ibid.* at 30-32.

[186]*Ibid.* See also Davis, *supra*, note 148 at 3.

[187]Formby, *supra*, note 149 at 208.

[188]G.M. Bates, *Environmental Law in Australia*, 2d ed. (Australia: Butterworths, 1987) at 73.

[189]Fowler, *supra*, note 160 at 267-71. See also S.D. Clark, *Environmental Assessment in Australia and Canada* (Vancouver: Westwater Research Centre, 1981) at 193.

result has been an erratic, weak and ineffectual process, which makes it difficult for the federal government to undertake environmentally-responsible decision-making.

B. The Ameriean Example

The United States' Constitution clearly assigns to the federal government the primary legislative role by designating the constitutional and federal legislation "the Supreme Law of the Land."[190] The States retain all powers not "delegated to the United States ... or to the people."[191] State powers are broadly defined to include the promulgation of regulations to promote the education, morals, health, peace and good order of the population and the right to legislate to increase state industry, to develop the State's resources and to add to its prosperity.[192] With explicit permission from Congress, concurrent State legislation can be allowed to stand.[193]

The federal government can act only on the basis of its ascribed constitutional powers, although it has been argued that judicial interpretation has so expanded their scope that no measure reasonably intended to protect the environment is beyond the reach of federal authority.[194] Congress is granted the power to "regulate Commerce ... among the several states"[195] and it is this broad power that has been used as the basis of much federal environmental legislation. Under this power Congress may regulate certain activities "affecting" commerce, which, given the transitory nature of pollution, provides jurisdiction for much of the federal environmental legislation.[196] Control of air pollution, for example, is based on this power as it can have an effect on various branches of interstate commerce including damage to agricultural crops and livestock, hazards to transportation systems and damage to property.[197] Congress can presumably regulate a manufacturing process on the grounds that the process affects interstate commerce or as part of its control over the interstate movement of the ultimate product.[198] Similarly, the commerce power can be used to regulate water pollution.[199] Congress can control navigable waters as travel routes for commerce and this concept has been applied to waters that were only navigable

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[190]*U.S. Constitution*, art. VI, cl. 2 [hereinafter *U.S. Constitution*].

[191]*U.S. Constitution*, amend. X.

[192]P. Soper, "The Constitutional Framework of Environmental Law" in E.L. Dolgin & T.G.P. Guilbert, eds, *Federal Environmental Law* (St. Paul: West Publishing Co., 1974) 20 at 78.

[193]*Ibid.* at 82.

[194]G.P. Thompson, "The Role of the Courts" in Dolgin & Guilbert, eds, *supra*, note 192, 192 at 221-22.

[195]*U.S. Constitution*, art. I, s. 8, cl. 3.

[196]Soper, *supra*, note 192 at 24.

[197]*Ibid.* These problems were noted in the congressional hearings on the *Clean Air Act* itself.

[198]Soper, *ibid.* at 25.

[199]*Ibid.*

in the past and by canoe.[200] Even if waters are non-navigable, federal pollution control laws can be justified on the basis that manufacturing plants on non-navigable waters would enjoy a competitive advantage if exempted from compliance, thereby affecting commerce.[201] The same line of argument can be used to justify environmental legislation in relation to pesticides, solid wastes and noise.[202]

In addition to the commerce power, other federal powers play a role in federal environmental legislation. The federal government has the power to make treaties, which then become the "Supreme Law of the Land."[203] The recognition that environmental problems can have world-wide effects has resulted in considerable international activity and the execution of a number of agreements which can ultimately support domestic federal legislation.[204] The admiralty power is the theoretical basis used to justify legislation establishing standards of liability for oil spills, the size of ships allowed into ports and the dumping of polluting materials.[205] The spending power[206] is important as well, for it can be used to shape environmental decision-making at the state or private level.[207] The other primary power available to the federal government in relation to environmental matters is its control over federally owned land. The United States federal government owns approximately one third of the total land area of the fifty states, which lands supply almost one third of the nation's timber production as well as oil, gas and various hard minerals.[208]

Much of the United States' environmental legislation has originated from the federal government,[209] both as a result of these broad powers and the willingness of the federal government to use and rely upon them. The environmental impact assessment legislation implemented federally is the *National Environmental Policy Act*[210] which resulted from a compromise of a wide variety of political pressures and points of view.[211] It declares a national policy to encour-

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[200]*Ibid.*

[201]*Ibid.*

[202]*Ibid.* at 27.

[203]*U.S. Constitution*, art. II s. 2, art. VI, cl. 2.

[204]Soper, *supra*, note 192 at 29.

[205]*Ibid.* at 29-30.

[206]*U.S. Constitution*, art. I s. 8.

[207]See the discussion of this in F.R. Anderson, D.R. Mandelker & D.A. Tarlock, *Environmental Protection, Law and Policy* (Boston: Little, Brown & Co., 1984) at 698 and Soper, *supra*, note 192 at 30 & 31.

[208]N. Orloff, *The National Environmental Policy Act* (Washington: Bureau of National Affairs Inc., 1980) at 4.

[209]*Ibid.* at 3.

[210]*National Environmental Policy Act of 1969*, Pub. L. No. 91-190, (1 January 1970) 83 Stat. 852, 42 U.S.C., §§ 4321-47 (1970) [hereinafter *N.E.P.A.* cited to U.S.C.].

[211]Anderson, Mandelker & Tarlock, *supra*, note 207 at 684-86 and F.P. Grad, *Treatise on Environmental Law*, vol. 2 (New York: Matthew Bender, 1989) at 9-01 and D. Ackman, "Highway to

age "productive and enjoyable harmony between man and his environment,"[212] to promote programs designed to prevent damage to the environment and to "enrich the understanding of the ecological systems and natural resources important to the Nation."[213] The federal government, the Act asserts, must assume a continuing responsibility "to improve and coordinate federal plans, functions, programs, and resources"[214] so that it may:

> (1) fulfil the responsibilities of each generation as trustee of the environment for succeeding generations;
> (2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;
> (3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
> (4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity, and variety of individual choice;
> (5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and
> (6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.[215]

The Act provides that an environmental impact statement need be filed only in instances of "major Federal actions significantly affecting the quality of the human environment."[216] The regulations define "major federal action" to include "actions with an effect that may be major and which are potentially subject to federal control and responsibility."[217] "Actions" is defined at some length to include "new and continuing activities, including projects and programs

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Nowhere: N.E.P.A. Environmental Review and the Westway Case" (1987-88) 21 Columbia J. L. & Social Problems 325 at 342-44.

[212] *N.E.P.A.*, § 4321. The reason for the Act is set out in § 4331(a) which states:

> The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments ... to create and maintain conditions under which man and nature can exist in productive harmony, and fulfil the social, economic and other requirements of present and future generations of Americans.

[213] *N.E.P.A.*, § 4321.

[214] *Ibid.*, § 4331(b).

[215] *Ibid.*

[216] *Ibid.*, § 4332(2)(c).

[217] Executive Order No. 11514, 35 Fed. Reg. 4247 (1970), Executive Order No. 11991, (24 May 1977) 42 Fed. Reg. 26967 (25 May 1977), 40 C.F.R.Pts. 1500-1508, Fed. Reg. 55976 (29 November 1978) [hereinafter *N.E.P.A.* regs.] at s. 1508.18.

entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals."[218] Funding assistance in the form of general revenue sharing funds where there is no federal agency control of the subsequent use of such funds does not come within the definition of "actions" nor do judicial, administrative, civil or criminal enforcement actions.[219]

The question of what constitutes a "federal action" has led to some interesting judicial interpretations.[220] Federal funding does not always clearly invoke *N.E.P.A.*'s procedures. Pursuant to the regulations, it is clear that an action undertaken directly by a federal agency, a project specifically funded by the federal government and an activity that may not occur without a federal licence, permit or other approval all make an action "federal."[221] Funding by way of the "block grants" program where funds are disbursed on the basis of state request can be subject to *N.E.P.A.*[222] The construction of power plants, water works and highways have been the proposals most frequently requiring the preparation of environmental impact statements under *N.E.P.A.*[223] Historically, the Courts have held that an agency's jurisdiction would limit the extent of the "federal action," for its authorizing legislation prescribes its jurisdiction to act, license, approve or fund.[224] Therefore, when an agency provides funds for a certain purpose, it is the actual activity funded that is the "federal action" and when a federal

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[218]*Ibid.*, s. 1508.18.

[219]*Ibid.*, s. 1508.18.

[220]*Thompson* v. *Fugate*, 347 F. Supp. 120 (D. Va. 1972) where a final segment of an urban highway was characterized as a major federal project because it formed part of a major route, which had sought federal funding; *Sierra Club* v. *Volpe*, 351 F. Supp. 1002 (N.D. Cal. 1972) where a segment of a highway that had no federal funding whatsoever was found to be a major federal project with a significant environmental impact as it formed, in due course, a part of a larger federally assisted highway route; *Civil Improvement Committee* v. *Volpe*, 459 F. 2d. 957 (4th Cir. 1972) where a city funded road widening project was found to involve no federal action despite its ultimate link with federal roads. See also Grad, *supra*, note 211 at 9-93 to 9-98 where he discusses a housing project to house 450 people which involved a federal mortgage guarantee and an interest grant and which qualified as a major federal action with significant environmental impact. As well he discusses a lease between an Indian village and a real estate developer which qualified in light of the special status of Indian lands. In another instance he points out that an Order permitting abandonment of a short railway line resulted in the necessity of the preparation of an impact statement because it would require greater reliance on the truck transportation of freight, being a more polluting form of transportation.

[221]*N.E.P.A.* regs, s. 1508.18.

[222]Anderson, Mandelker & Tarlock, *supra*, note 207 at 699.

[223]Grad, *supra*, note 211 at 9-85.

[224]W.B. Ellis, T. Turner & J.R. Smith, "The Limits of Federal Environmental Responsibility and Control Under the National Environmental Policy Act" (1988) 18 E.L.R. 10055 at 10057. See, as well, for example, *Gage* v. *U.S. Atomic Energy Commission*, 479 F. 2d 1214 (D.C. Cir. 1973) at 1220 n. 19 and *Kitchen* v. *FCC*, 464 F. 2d 801 (D.C. Cir. 1972).

agency licenses a third party it is the particular activity for which the licence is required that is the "federal action."[225]

The cases have not been clear as to the applicability of the Act when it is known that the proposed federal action will itself have only a minor direct environmental effect but will make possible third party conduct that will have major environmental effects.[226] Faced with such circumstances, the courts have developed two different theories to deal with the problem.[227] The first, a causation approach, holds that where there is a specific "federal action" that causes related non-federal conduct, then the reasonably foreseeable environmental effects of that non-federal conduct may be considered under the *N.E.P.A.* processes.[228] Other cases have held that where "federal action" has the practical ability to control non-federal conduct, the non-federal conduct is thereby "federalized" and deemed part of the "federal action."[229] Two recent decisions indicate a movement to basing "federal action" only upon the jurisdictional ambit of the relevant federal agency, although they have left open the possibility that in certain more extreme circumstances the scope of "federal action" may be found to exceed an agency's jurisdiction.[230]

When deciding if the effect of the major federal action is "significantly affecting the quality of the human environment," consideration is to be given to both the context and the intensity of the effect. The regulations do not provide that only the effect on areas of federal jurisdiction should be considered[231] and "human environment" is defined to include "the natural and physical environ-

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[225]Ellis, Turner & Smith, *ibid.* at 10057. The authors demonstrate this point with an interesting example. If the Environmental Protection Agency considers a pollutant discharge permit application from a planned new plant that cannot operate without the permit, there is federal action in issuing the permit. The issue then arises as to whether the "proposal" for an environmental impact assessment relates to pollutant discharge only or alternately to the construction of the entire plant.

[226]*Ibid.* at 10058. The authors use the example of *Sierra Club* v. *Marsh*, 769 F.2d. 868 (1985) where a federal permit was issued and federal monies were used to construct a causeway to an island in Maine. It was known that construction of the causeway to the previously inaccessible island would result in the ultimate construction of an industrial park there.

[227]Ellis, Turner & Smith, *ibid.*

[228]*Ibid.*

[229]*Ibid.* As an example of this situation the authors review a case where the Court considered whether a federal power administration had to examine the environmental effects of proposed metals manufacturing facilities to which it had agreed to construct electrical lines and supply power. The Court found the entire project had been federalized.

[230]*Natural Resources Defense Council Inc.* v. *United States Environmental Protection Agency*, 822 F.2d. 104 (D.C. Cir. 1987); *Ringsred* v. *Dulth* 828 F.2d 1305 (8th Cir. 1987). See also the discussion in Ellis, Turner & Smith, *ibid.* where the authors consider as well the implications of the "CEQ Findings and Recommendations on Referral for U.S. Environmental Protection Agency concerning proposed amendments to U.S. Army Corps. of Engineers Procedures for Implementing the National Environmental Policy Act" (8 June 1987).

[231]*N.E.P.A.* regs., s. 1508.27.

ment and the relationship of people with that environment."[232] It is unclear whether non-physical consequences by themselves are sufficient to trigger the preparation of an environmental impact statement,[233] but once required the environmental impact statement must include social, economic and other non-physical impacts.[234]

In 1975 *N.E.P.A.* was amended to permit environmental impact statements prepared by a State to be used under certain conditions.[235] The State agency or official preparing the statement has to have state wide jurisdiction, rendering the amendment most useful in relation to highway projects.[236] The regulations promulgated in 1978 required federal agencies to co-operate with local and state agencies to the greatest possible extent to reduce duplication of impact statement requirements.[237] Joint planning, environmental research, public hearings and environmental assessments are all to be undertaken where possible.[238]

A consideration of the effectiveness of *N.E.P.A.* has been on-going since its inception. Interest in reviewing the process is presently undergoing a revival, possibly as a result of its twenty year anniversary.[239] The Act has been described as a law "that is practically devoid of administrative machinery, most general and imprecise in its draftmanship ... and, ... leaves large gaps between its language and its implicit intent."[240] Despite these problems *N.E.P.A.* has been seen as a success story, primarily as a result of the Federal Court's view that it is the starting point for the consideration and resolution of the competing claims of environmental and developmental interests.[241] In 1976 the Committee on Environmental Quality examined the use of the legislation by seventy federal agencies, and concluded the Act had made a substantial contribution to decision-making although it still fell short of its full potential.[242] In 1975 alone there were 30,000 administrative actions where it had to be determined if an environmental impact statement was necessary. Implementation of the Act was widespread at a relatively early stage.[243]

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[232]*Ibid.*

[233]Grad, *supra*, note 211, at 9-65, 9-67, 9-68.1 & 9-69. The Courts have indicated that non-physical impacts alone will be insufficient, but it is possible that the combined effect of minor physical impact with significant non-physical effects would be sufficient.

[234]See *N.E.P.A.*, § 4331(a).

[235]*Ibid.*, § 4332(2)(d).

[236]Grad, *supra*, note 211 at 9-152.

[237]*N.E.P.A.* regs., s. 1506.2.

[238]*Ibid.*

[239]Grad, *supra*, note 211 at 9-285 and Ellis, Turner & Smith, *supra*, note 224.

[240]Grad, *ibid.*

[241]*Ibid.* at 9-207.

[242]*Ibid.* at 9-289.

[243]*Ibid.* at 9-291.

Little has been written about the development of federal-state tensions in relation to *N.E.P.A.*[244] This could be a result of the flood of litigation the Act engendered, leaving commentators and critics with another focus.[245] Most of the legal actions have focused on the issue of satisfactory compliance with *N.E.P.A.* requirements, not jurisdictional concerns.[246] At the same time, the recent trend by the Courts to limit the scope of the environmental impact statement is a concern, particularly in situations where federal-state co-operation is not feasible. Still, the legislation has been widely implemented by the federal government resulting in an effective process and the strong federal presence is accepted by the states, and has likely been instrumental in ensuring their co-operation and participation in the assessment process.

IV. Canadian Constitutional Basis for Federal Jurisdiction Over Environmental Protection

A. *Historical Overview*

It has often been said that the Fathers of Confederation gave no consideration to questions of pollution of the environment in drafting the *Constitution Act, 1867*.[247] Recent research has demonstrated that this in fact was not the case,[248] for the lumbering industry caused environmental problems that were recognized by legislatures prior to Confederation. Most of these problems related to the fouling and obstruction of waterways which resulted in the destruction of important fish habitat.[249] Legislative initiatives to deal with these problems were weak, as a result, in part, of the influence of the lumbering industry which sought to avoid the burden of more expensive alternate forestry and timber practices.[250]

Early legislation prior to Confederation dealt with the throwing of dung, lime and fish offal into waters inhabited by fish and in 1865 sawdust and mill rubbish were also included in the list of prohibited substances.[251] Legislation of

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[244]This is despite whole books being written on *N.E.P.A.*; see, for example, the lengthy section in Grad, *supra*, note 211 and as well Orloff, *supra*, note 208 and R.A. Liroff, *A National Policy for the Environment* (Bloomington: Indiana University Press, 1976).

[245]It has been noted that this flood of litigation is finally slowing, for reasons that are not readily apparent. See D. Bear, "N.E.P.A. at 19: A Primer on 'Old' Law with Solutions to New Problems" (1989) 19 E.L.R. 10060 at 10068.

[246]*Ibid.*

[247]J. Flett, "Environmental Legislation: Putting it All Together" in *Western Canadian Environmental Law and Practice* (Toronto: The Canadian Institute, 1988) 2 and D.P. Emond, *supra*, note 119 at 647.

[248]J.P.S. McLaren, "The Tribulations of Antoine Ratte: A Case Study of the Environmental Regulation of the Canadian Lumbering Industry in the 19th Century" (1984) 33 U.N.B. L.J. 203.

[249]*Ibid.* at 210.

[250]*Ibid.* at 211.

[251]*Ibid.* at 212.

the time dealt as well with impediments to navigation resulting from the development of the forestry industry.[252] At the time of Confederation, therefore, legislators were well aware of the negative environmental effects of mill waste on both fisheries and navigation and it is as a result auspicious that both were established as federal heads of power in the *Constitution Act, 1867*.[253]

B. Environmental Jurisdiction — The Continuing Puzzle

In 1970, in conjunction with a flurry of environmental legislative activity, the federal government commissioned a study on the issue of constitutional jurisdiction over the environment.[254] The problems recognized in that study have been echoed by constitutional writers in subsequent years.[255] There has been considerable disagreement over where the jurisdictional boundaries lie between the two levels of government, making it difficult to describe the jurisdictional framework existing in relation to a particular problem at any specific time.[256]

Examinations of the constitutional problems that affect jurisdiction over environmental matters have taken different approaches. Some writers have utilized a "heads of power" analysis and examined each head of power to see whether or not it is sufficient to ground jurisdiction over certain aspects of environmental concern.[257] Other have used a more functional approach, examining different aspects of environmental concern and then considering what heads of power would support federal or provincial jurisdiction over them.[258] This latter approach is more restrictive, for, as time has shown, the ambit of environmental concerns defies cataloguing. An approach that examines the "heads of power" is more adaptable to subsequent situations as they arise. For this reason that approach will be utilized in examining the heads of power which could provide a grounding for federal jurisdiction to invoke an environmental impact assessment review process. Only the heads of power which have been traditionally seen as having an "environmental" aspect will be touched upon. Arguably every power has an environmental aspect to it,[259] but it is outside the scope of this

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[252]*Ibid.* at 213.

[253]See *Constitution Act, 1867*, s. 91(12) (Sea Coast and Inland Fisheries) and s. 91(10) (Navigation and Shipping).

[254]MacNeill, *supra*, note 20.

[255]See, *e.g.*, A.R. Lucas, "Natural Resource and Environmental Management: A Jurisdictional Primer" in D. Tingley, ed., *Environmental Protection and the Canadian Constitution* (Edmonton: Environmental Law Centre Alberta (Society), 1987) 31 at 39-40; "Constitutional Jurisdiction," *supra*, note 146 at 55 & 57-60; "Protection and Enhancement," *supra*, note 13 at 120-23 and Emond, *supra*, note 119 at 647-52.

[256]MacNeill, *supra*, note 20 at 8 & 9.

[257]See, *e.g.*, Emond, *supra*, note 119.

[258]See, *e.g.*, "Constitutional Jurisdiction," *supra*, note 146.

[259]Banking, for example, can affect the environment by virtue of the location of banks, the kinds of loans given, particularly in the natural resource sector, the security taken and so forth.

paper to examine every power in that light. Further, it is unlikely that a power with a tenuous, obscure or limited tie to environmental concerns will be sufficient to ground an environmental impact assessment process.[260]

The powers granted to the federal and provincial governments can be divided into two categories, conceptual powers and functional powers, with the former including, for example, the criminal law and spending powers and the latter including the right to legislate in relation to sea coast and inland fisheries.[261] As well, proprietary and legislative powers should be distinguished. The former refers to the right of each government to manage its own property.[262] A province, for example, has an inherent power to determine how to dispose of its own assets, which power is enhanced by the assignment to it of the power to legislate in relation to that property.[263] The latter power refers to the right to legislate delegated to each level of government pursuant to the *Constitution Act, 1867*. Environmental concerns, by their very nature, call into play many of the proprietary and legislative powers and it is important to keep in mind certain jurisdictional limitations. The provinces have no ability to legislate in areas of exclusive federal jurisdiction. If the legislation is, though, in pith and substance provincial, it can have some effect on areas under the federal umbrella. If federal and provincial legislation overlap, the latter is inapplicable insofar as it is in direct conflict with valid federal legislation. Lastly, in certain circumstances, one level of government can claim immunity from the legislation of the other level of government.[264]

1. Federal Proprietary Rights

S. 108 of the *Constitution Act, 1867* transfers to the federal government certain public works and property in each province, including canals, public harbours, lighthouses and piers, river and lake improvements, military roads, railways, armouries and lands set aside for public purposes, all of which are set out in the third schedule. Different arrangements were made for the three prairie provinces which were covered by the *Constitution Act, 1930* and attached resource agreements.[265] As well, the federal Crown has rights with respect to Canada's northern territories over which it has both federal and proprietary powers, although many governmental functions have been delegated to the ter-

[260]An exception could be the census and statistics power, s. 91(6). An argument could be made that environmental impact assessment is but a fact-gathering exercise to permit informed federal decision-making. See "Constitutional Jurisdiction," *supra*, note 146 at 81.

[261]Emond, *supra*, note 119 at 656.

[262]R.T. Franson & A. Lucas, *Environmental Law Commentary and Case Digest* (Scarborough: Butterworths, 1978) at 252.

[263]*Ibid.* and *Constitution Act, 1867*, s. 91(1a) & 92(5).

[264]Franson & Lucas, *ibid.* at 253-54 and see also *Friends*, *supra*, note 1 and *Alta. Govt. Telephones* v. *Canada (C.R.T.C.)*, [1989] 2 S.C.R. 225, 61 D.L.R. (4th) 193.

[265]R.S.C. 1985, App. II, No. 26.

ritorial government.[266] International law has given Canada control over the territorial sea,[267] which has been established by Canadian legislation as extending twelve miles,[268] and the Supreme Court of Canada has upheld federal jurisdiction over that area.[269] As well, the Federal Government has ownership rights in Indian reserves, national parks and lands registered in the name of the Crown. These ownership rights may include waterway rights such as in Wood Buffalo National Park where the eastern boundary of the park is the centre line of certain rivers.[270] Property rights may as well be obtained by purchase or by way of expropriation to further a federal purpose within its legislative competence such as defence or inter-provincial railways.[271]

Normally, federal proprietary rights are coupled with federal legislative rights with the result that jurisdictional problems in relation to the establishment of an environmental assessment review process over federal lands would be, in most situations, non-existent.

2. The Spending Power, ss 91(1a) & 91(3)

It has been suggested that this may be one of the most important powers available to the Federal Government in the environmental field.[272] As a former Prime Minster pointed out, the "spending power" has come to have a particular meaning in Canada as it refers to the power of Parliament to make payments to governments, institutions or individuals for purposes over which the Federal Government does not have legislative power.[273] The ambit of this power has been uncertain in light of conflicting views voiced by the Privy Council and the Supreme Court of Canada,[274] but a broad interpretation of the power has been

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[266]*Constitution Act, 1871* R.S.C. 1985, App. II, No. 11, s. 4 [former *British North America Act, 1871*] [hereinafter *B.N.A. Act, 1871*]: "The Parliament of Canada may from time to time make provision for the administration, peace, order, and good government of any territory not for the time being included in any Province."

[267]P.W. Hogg, *Constitutional Law of Canada*, 2d ed. (Toronto: Carswell, 1985) at 586.

[268]*Territorial Sea and Fishing Zones Act*, R.S.C. 1985, c. T-8.

[269]*Re Offshore Mineral Rights of B.C.*, [1967] S.C.R. 792, 65 D.L.R. (2d) 353; *Re Nfld. Continental Shelf*, [1984] 1 S.C.R. 86, 5 D.L.R. (4th) 385. A subsequent exception has been made in relation to the Strait of Georgia. See also *Re Strait of Georgia*, [1984] 1 S.C.R. 388, 8 D.L.R. (4th) 161 which noted as well the definition of inland waters, being harbours, bays, estuaries and other waters lying between the jaws of the land. These waters are within the boundaries of the province.

[270]P.G.C. Ketchum, "Indian Rights to Water in the Prairie Provinces" in H. Rueggeberg & A. Thompson, eds, *Water Law and Policy Issues in Canada* (Vancouver: Westwater Research Centre, 1984) 119 at 142.

[271]*A.G. (Quebec)* v. *Nipissing Central Railway*, [1926] A.C. 715, [1926] 3 D.L.R. 545 (P.C.).

[272]Franson & Lucas, *supra*, note 262 at 260.

[273]P. Trudeau, *Federal-Provincial Grants and the Spending Power of Parliament* (Ottawa: Government of Canada, 1969) at 4.

[274]*Re Employment and Social Insurance Act*, [1936] S.C.R. 427, 3 D.L.R. 644 where Duff C. J. said at 457:

accepted by the Federal Government and, despite occasional grumbling, by the Provinces.[275] Generally speaking, it has been agreed, albeit tacitly, that the federal Parliament may spend or lend its funds to any government, institution or individual it chooses and for any purpose it chooses. In so doing it may attach to any such grant or loan whatever conditions it wishes, including conditions it does not have the power to legislate.[276] This has been the basis of federal-provincial financial activities for the last thirty years[277] and most commentators support this view,[278] although there is little case law to substantiate it.[279]

The spending power can, therefore, be used to support an environmental assessment review process where federal funds are being utilized in relation to a proposal. This would include the expenditure of federal funds to assist a proposal brought forward by a proponent other than the Federal Government. Where the Federal Government itself is the proponent, it should automatically have the right to consider whatever criteria it deems necessary, including compliance with its own environmental assessment review process, before proceeding with its proposal.[280]

3. Other Environmental Heads of Power

Other federal heads of power have been seen as a basis for various federal environmental powers.[281] One of the most frequently discussed is s. 91(12), "Sea Coast and Inland Fisheries." This subsection does not give proprietary rights

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> Parliament by properly framed legislation may raise money by taxation and dispose of its public property in any manner that it sees fit. As to the latter point, it is evident that the Dominion may grant sums of money to individuals or organizations and that the gift may be accompanied by such restrictions and conditions as Parliament may see fit to enact. It would then be open to the proposed recipient to decline the gift or to accept it subject to such conditions.

In the same case the Privy Council in *obiter* said:

> By assuming that the Dominion has collected by the means of taxation a fund, it by no means follows that any legislation which disposes of it is necessarily within Dominion competence. It may still be legislation affecting the classes of subjects enumerated in s. 92 and, if so, would be *ultra vires*. In other words, Dominion legislation even though it deals with Dominion property, may yet be so framed as to invade civil rights within the province, or to encroach upon the classes of subjects which are reserved to provincial competence ([1937] A.C. 355 at 366).

[275]Hogg, *supra*, note 267 at 126.

[276]*Ibid.*

[277]*Ibid.*

[278]*Ibid.* and at 126 n. 51 and authorities cited therein.

[279]*Ibid.* See also *Angers* v. *M.N.R.*, [1957] Ex. C.R. 83, C.T.C. 99; *Central Mortgage and Housing Corp.* v. *Co-Operative College Residences Inc.*, (1975) 13 O.R. (2d) 394, 71 D.L.R. (3d) 183 (Ont. C.A.) which upheld the validity of federal loans for student housing.

[280]Proposal here is being used in the broadest sense to include policies and programs instituted by the federal government.

[281]"Constitutional Jurisdiction," *supra*, note 146 and Emond, *supra*, note 119.

over inland fisheries to the Dominion, as these rights continue to reside with the provinces.[282] Generally, the provinces maintain jurisdiction over proprietary and marketing aspects of fishing within provincial boundaries, including, for example, processing and selling fish once caught, granting private rights to fish and determining the law of private fishing rights.[283] The Federal Government has control over the regulatory aspects of fishing such as the determination of fishing seasons, methods of fishing, pollution measures and public fishing rights.[284] As well, federal rights could extend to include control over development near spawning areas and the regulation of buffer zones to be left by loggers along waters inhabited by fish.[285]

A number of cases have examined the fisheries power in considerable detail and it has been held that the federal power goes no further than what may be necessary for "legislating generally and effectively for the regulation, protection and preservation of the fisheries in the interest of the public."[286] Many developments need substantial amounts of water, rendering this one of the most significant areas of federal decision-making available as a basis for an environmental assessment review process.

Jurisdiction over transportation by water depends on the "navigation and shipping" power and the reservation of jurisdiction over "lines of steam or other ships" and "canals" to the Federal Government.[287] As a result, every navigable body of water in Canada is subject to federal control over all matters concerning navigation.[288] It has been held that this power should be widely construed and where federal legislation exists provincial structures must conform to it. Where no such legislation is in place, the provincial government may not obstruct or hinder navigation.[289] As with fisheries legislation, it is likely the authority of the Federal Government only extends to legislation designed and intended to improve navigation or provide navigation facilities.[290] Jurisdiction over interprovincial trains, buses, trucks, taxis, limousines, pipelines and electricity transmission lines has been granted to the Federal Government pursuant to

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[282]Franson & Lucas, *supra*, note 262 at 258.

[283]"Constitutional Jurisdiction," *supra*, note 146 at 66.

[284]*Ibid.*

[285]Franson & Lucas, *supra*, note 262 at 258.

[286]*R.* v. *Robertson*, [1882] 6 S.C.R. 52, 2 Cart. B.N.A. 65. See also *A.G. Canada* v. *Aluminium Co. of Canada*, (1980) 115 D.L.R. (3d) 495, 10 C.E.L.R. 61 (B.C.S.C.) where Alcan Aluminium was required to leave open its dam for certain periods as provincial jurisdiction over hydro development had to be qualified to give effect to the federal legislative power to protect and conserve fishing resources. See also *Northwest Falling Contractors Ltd.* v. *R.*, [1980] 2 S.C.R. 292, 113 D.L.R. (3d) 1 [hereinafter *Northwest Falling* cited to S.C.R.] and *Fowler* v. *R.*, [1980] 2 S.C.R. 213, 113 D.L.R. (3d) 513 [hereinafter *Fowler* cited to S.C.R.].

[287]*Constitution Act, 1867*, s. 91(10) & 92(10)(a), respectively.

[288]This power is legislated by way of the *Navigable Waters Protection Act.*

[289]*Queddy River Driving Boom Co.* v. *Davidson* (1883), 10 S.C.R. 222.

[290]Emond, *supra*, note 119 at 676.

s. 92(10)(a).[291] It has been noted that as transportation links become more complex, the extra-provincial links multiply, thereby expanding the scope of federal jurisdiction. It could be argued the increasing number of urban freeway systems that link with the TransCanada Highway could provide a basis for some federal jurisdiction in the field of urban transportation.[292]

The trade and commerce power is one more area where environmental considerations can frequently arise in relation to a federal head of power. There have historically been two arms to this power, inter-provincial or international trade, and commerce and general regulation of trade affecting the whole Dominion.[293] This power was originally interpreted quite restrictively, but recently has been treated more broadly, thereby giving the federal government an effective means of regulating inter-provincial trade.[294] Once goods have entered the pathways of inter-provincial trade, they may be federally regulated with the result that even purely intra-provincial transactions may be affected incidentally.[295]

As a result of earlier judicial interpretation of the two arms of this power,[296] it was originally suggested that it is of little use in an environmental context.[297] In light of recent case law[298] such an analysis no longer holds true. As well it is interesting to note that the Federal Government has relied upon the trade and commerce power as one authority for *C.E.P.A.*[299]

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[291]*Constitution Act, 1867*, s. 91(2)(10)(a) and D. Chesman, "Constitutional Aspects of Water Law" in Rueggeberg & Thompson, eds, *supra*, note 270, 470 at 494-95.

[292]"Constitutional Jurisdiction," *supra*, note 146 at 72.

[293]*Constitution Act, 1867*, s. 91(2) and Hogg, *supra*, note 267 at 447. See as well *Citizens' Insurance Co.* v. *Parsons* (1881), 7 App. Cas. 96, 1 Cart. 265 (P.C.) where the two arms of the power are described. Since then numerous cases have considered both arms. For the first arm see *Reference Re Farm Products Marketing Act*, [1957] S.C.R. 198, 7 D.L.R. (2d) 257; *Murphy* v. *C.P.R.*, [1958] S.C.R. 626, 15 D.L.R. (2d) 145; *Caloil* v. *A.G. Canada*, [1971] S.C.R. 543, 20 D.L.R. (3d) 472; *Re Agricultural Products Marketing Act*, [1978] 2 S.C.R. 1198, 84 D.L.R. (3d) 257; *Labatt Breweries of Canada* v. *A.G. Canada*, [1980] 1 S.C.R. 914, 110 D.L.R. (3d) 594 [hereinafter citcd to S.C.R.]. On the second arm see Canada Standard Trademark case, *A.G. Ontario* v. *A.G. Canada*, [1937] A.C. 405; *Dominion Storage* v. *R.*, [1980] 1 S.C.R. 844, 106 D.L.R. (3d) 581; *MacDonald* v. *Vapor Canada*, [1977] 2 S.C.R. 134, 66 D.L.R. (3d) 1; *A.G. Canada* v. *C.N. Transportation*, [1983] 2 S.C.R. 206, 3 D.L.R. (4th) 16; *General Motors of Canada Ltd.* v. *City National Leasing Ltd.*, [1989] 1 S.C.R. 641, 58 D.L.R. (4th) 255 [hereinafter *City National*].

[294]Franson & Lucas, *supra*, note 262 at 263. See also *City National, ibid.*

[295]Franson & Lucas, *ibid.*; *R.* v. *Klassen*, [1960] 20 D.L.R. (2d) 406, 29 W.W.R. 369 (Man. C.A.) and *Caloil* v. *A.G. Canada, supra*, note 293.

[296]See cases cited in *supra*, note 293. Traditionally the objective of the legislation must be economic, not some aspect of management of the environment.

[297]Franson & Lucas, *supra*, note 262 at 264, although in a subsequent article and based on the case of *A.G. Canada* v. *C.N. Transportation Limited*, [1983] 2 S.C.R. 206, 3 D.L.R. (4th) 16, Lucas notes that the second arm may ground a remedy in the form of a civil right of action. See Lucas, *supra*, note 255.

[298]*City National, supra*, note 293.

[299]Trade and commerce plays a limited role and primarily supports the provisions that deal with regulation of the import and export of toxic substances. For a discussion of the constitutional basis

The treaty making power as well offers the potential for grounding some environmental powers. In relation to treaties, two different powers exist, the power to make the treaty and the power to implement it. It is important that these two powers be distinguished. Traditionally, the Federal Government has been seen to have the power to enter into a treaty, but if implementing legislation was required, it would have to be passed by whatever government had jurisdiction over its subject matter.[300] Two of the most important treaties from an environmental viewpoint are the *Migratory Birds Convention*[301] and the *International Boundary Waters Treaty*,[302] both of which have been implemented by federal legislation.[303]

As well, the criminal law power[304] has been utilized as a basis for some environmental powers.[305] This power covers "criminal law in its widest sense" and includes the ordinary ends of "public peace, order, security, health and morality."[306] The outer boundaries of this power are unclear, but it has been pointed out that it is insufficient to support comprehensive legislation on its own of an environmental nature unless the legislation defines pollution specifically as a crime and confines remedial measures to the prohibiting of certain conduct.[307]

All of these powers, and other federal powers as well, can touch on matters of an environmental nature. They may be the basis for decisions which will have environmental consequences or, alternately, they may in fact be the basis for specific decisions that are, themselves, environmental in nature. None of these powers, though, is broad enough to provide the basis for an entire environmen-

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of the Act see A.R. Lucas, "Jurisdictional Disputes: Is Equivalency a Workable Solution?" in D. Tingley, ed., *Into the Future, Environmental Law and Policy for the 1990's* (Edmonton Environmental Law Centre, 1990) 25.

[300]Franson & Lucas, *supra*, note 262 at 264-65.

[301]*Migratory Birds Convention*, R.S.C. 1985, c. M-7 which appends the Convention as a Schedule. In a recent decision of the Federal Court Trial Division, *Western Canada Wilderness Committee* v. *Canada (Min. of the Environment)* [1990] F.C.J. No. 1167 (21 December 1990) (F.C.T.D.), the Court refused an application to apply the Guidelines Order to logging which would destroy the nests of the marbled murrelet. No written reasons were given so the basis for the refusal is as yet unknown.

[302]*International Boundary Waters Act*, R.S.C. 1985, c. I-17.

[303]*Ibid.* and *Migratory Birds Convention*, *supra*, note 301. Both treaties were entered into by Britain on Canada's behalf so the implementing legislation would fall within the ambit of s. 132 of *Constitution Act, 1867*.

[304]*Constitution Act, 1867*, s. 91(27).

[305]See the recently proclaimed *C.E.P.A.* which it has been suggested, can be supported by the criminal law power as well as the federal "peace, order and good government" power. For a discussion of this see A.R. Lucas, "Alberta Environmental Law and Practice Update" in *Proceedings of the Canadian Institute Conference on Environmental Law and Practice*, (Vancouver, May 30-31, 1988) (Vancouver: Canadian Institute, 1988) 32.

[306]Franson & Lucas, *supra*, note 262 at 255.

[307]*Ibid.* at 664.

tal assessment review process. None of them is sufficient on its own to support comprehensive legislation in relation to such a federal environmental assessment review process. The only power that has that potential is the residual power or the "peace, order and good government" power.

C. *Peace, Order and Good Government*

S. 91 of the *Constitution Act, 1867* gives to the Federal Government the power:

> To make laws for the peace, order and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces.

From the language used it is clear that the Federal Government has the residuary power and the intent is that the distribution of legislative powers is exhausted.[308] As a result, with very few exceptions, every possible legislative subject is assigned to either the Federal Parliament or the Provincial Legislatures.[309] Restraining this broad federal power are two strong provincial constitutional powers, s. 92(13), "property and civil rights in the province" and section 92(16), "generally all matters of a merely local or private nature in the province."[310] How the federal residual power relates to the other federal heads of power has been the subject of debate.[311] At issue is whether the residual power comprises what is left after the federal and provincial heads of power are subtracted or if it is the entire federal power of which the enumerated federal heads of power are only examples.[312] It has generally been the practice of the Courts to adopt the first approach and when seeking to establish federal power they have looked first to the enumerated heads of power.[313] Further, some matters enumerated as federal heads of power such as "banking"[314] and "interest"[315] would likely have been held to come within the provincial head of "property and civil rights in the province" if not specifically set out as federal powers.[316] The first approach is therefore the one that will be utilized when considering the role of the residual power in relation to a federal environmental assessment process.[317]

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[308]Hogg, *supra*, note 267 at 339-40 & 369-70 and W.R. Lederman, "Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation" (1975) 53 Can. Bar Rev. 597 at 603.

[309]An exception is the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11. See Hogg, *ibid.*, on this topic at 339-40 & 369-70. See also Lederman, *ibid.* at 603.

[310]*Constitution Act, 1867.*

[311]Hogg, *supra*, note 267 at 371.

[312]*Ibid.*

[313]*Ibid.* at 372.

[314]*Constitution Act, 1867*, s. 91(15).

[315]*Constitution Act, 1867*, s. 91(19).

[316]Hogg, *supra*, note 267 at 371.

[317]Support for this approach can also be found in B. Laskin, "Peace, Order and Good Government, 'Peace, Order and Good Government' Re-examined" (1947) Can. Bar Rev. 1054 and K.

The Courts have generally taken the approach that this power is to be relied upon for matters which do not come within any of the enumerated federal or provincial heads.[318] Three separate branches of this power have developed, the "gap" branch, the "national concern" branch and the "emergency" branch.[319] To ascertain what support this power can give to a wide ranging federal environmental assessment review process the criteria recently established in case law for these branches will be examined.

The most recent Supreme Court of Canada case dealing with the peace, order and good government power in relation to environmental matters is the decision in *Crown Zellerbach*.[320] Prior to that decision it had been assumed by both government and lawyers that federal powers over environmental matters were somewhat constrained.[321] With *Crown Zellerbach* this view underwent a fundamental change and the peace, order and good government power was cast in a new light.

The issue in that case was whether federal legislative jurisdiction to regulate the dumping of substances at sea, as a marine pollution prevention measure, extended to the regulation of all dumping in provincial marine waters. The Defendant corporation was charged under s. 4(1) of the *Ocean Dumping Control Act*[322] after its employees dredged woodwaste from the floor of Beaver Cove and dumped it in deeper waters of the same cove, all of which was done without the necessary permit. There was no evidence to suggest that the woodwaste caused harm to either marine life or to navigation. In the Supreme Court of Canada the federal Appellant relied primarily on the peace, order and good government power as the basis for the legislation. In a four to three decision the Court upheld the legislation on that basis, and in the process provided the most recent analysis of the criteria necessary to invoke the power, particularly in relation to environmental matters.

It was conceded by the province that Parliament had jurisdiction to regulate dumping in waters outside the territorial limits of the province.[323] Further, it was conceded that Parliament could regulate the dumping of polluting substances in provincial waters if such substances were harmful to fisheries or if the dumping

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Lysyk, "Constitutional Reform and the Introductory Clause of Section 91: Residual and Emergency Law Making Authority" (1979) 57 Can. Bar Rev. 531 at 536-39 & 543.

[318]Hogg, *supra*, note 267 at 372.

[319]*Ibid.*

[320]*Supra*, note 15.

[321]A.R. Lucas, "*R.* v. *Crown Zellerbach Canada Limited*" (1989) 23 U.B.C. L. Rev. 355. As Lucas points out, the main federal environmental legislation had been designed to either primarily affect federal lands or had been based on a federal power such as fisheries. Alternately, it had relied upon the criminal law power for jurisdiction. The peace, order and good government power was seen as an uncertain base for environmental legislation.

[322]S.C. 1974-75-76, c. 55.

[323]*Crown Zellerbach*, *supra*, note 15 at 417.

could be shown to cause pollution in extra-provincial waters.[324] This was not the situation here. Speaking for the majority, Justice Le Dain found the legislation appeared to have been enacted in fulfilment of Canada's obligations under the *Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matters*.[325] He noted, though, that the Act was broader than the Convention, as the latter did not seek to control the dumping of substances in the internal marine waters of a state.[326] Further, the practical obligation under the Convention was to control the "dumping of waste ... that is liable to create hazards to human health, (and) to harm living resources and marine life ..."[327]

The federal Attorney General submitted that the control of dumping in provincial marine[328] waters was an "integral part of a single matter of national concern"[329] and therefore came within the peace, order and good government power.[330] The majority of the Court agreed that there was no basis for federal legislative jurisdiction to control marine pollution generally in provincial waters in any of the specified heads of federal jurisdiction in s. 91 of the Constitution whether examined individually or collectively.[331] As a result, the Court was left to examine the peace, order and good government power alone.[332]

Justice Le Dain relied upon the decision of Beetz J. in the *Reference Re Anti-Inflation Act*[333] where he held that the peace, order and good government power should be confined to justifying temporary emergency legislation and legislation dealing with "distinct subject matters which do not fall within any of the enumerated heads of s. 92 and which, by nature, are of national concern."[334] This second branch was then subdivided into situations where federal competence arises because the subject matter did not exist at the time of Confederation and is not merely of a local and private nature and situations where the subject matter "goes beyond local or provincial concern or interest and must from its inherent nature be the concern of the Dominion as a whole."[335] From his review of the Supreme Court of Canada and Privy Council cases examining the power, Le Dain J. found the following criteria were "firmly established":

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[324]*Ibid.* at 417.

[325]Signed by Canada on 29 December 1972.

[326]*Crown Zellerbach, supra*, note 15 at 436-37.

[327]*Ibid.* at 443.

[328]"Marine" meaning salt water versus fresh water.

[329]*Crown Zellerbach, supra*, note 15 at 419.

[330]He did not try to argue that the control of dumping was "ancillary" or "necessarily incidental" to an established head of federal power.

[331]*Crown Zellerbach, supra*, note 15 at 423.

[332]*Ibid.*

[333]*Reference Re Anti-Inflation Act*, [1976] 2 S.C.R. 373, 68 D.L.R. (3d) 452 [hereinafter *Anti-Inflation* cited to S.C.R.].

[334]*Ibid.* 457.

[335]*Labatt Breweries of Canada Ltd.* v. *A.G Canada, supra*, note 293 at 944-45.

(1) The national concern doctrine is separate and distinct from the national emergency doctrine of the peace, order and good government power, which is chiefly distinguishable by the fact that it provides a constitutional basis for what is necessarily legislation of a temporary nature;
(2) The national concern doctrine applies to both new matters which did not exist at Confederation and to matters which, although originally matters of a local or private nature in a province have since, in the absence of national emergency, become matters of national concern;
(3) For a matter to qualify as a matter of national concern in either sense it must have a singleness, distinctiveness, and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution;
(4) In determining whether a matter has attained the required degree of singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern it is relevant to consider what would be the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the intra-provincial aspects of the matter.[336]

This latter factor, the "provincial inability" test, the Court said, is one of the indicia for determining "whether a matter has that character of singleness or indivisibility required to bring it within the national concern doctrine."[337] It does not mean that only one level of government has plenary jurisdiction to deal with any legislative problem to do with the issue, but that the inter-relatedness of the intra-provincial and extra-provincial aspects of the matter might require a single legislative approach.[338]

Marine pollution, the majority of the Court held, because of its "predominately extra-provincial as well as international character and implications," is a matter of concern to Canada as a whole.[339] The question then was whether the control of the dumping of substances into marine waters, including provincial marine waters, was a single, indivisible matter and distinct from the control of dumping of substances in other provincial waters.[340] Justice Le Dain found that the difference between the pollution of fresh water and that of salt water was sufficiently distinct and separate to satisfy the test that the matter have "ascertainable and reasonable limits, insofar as its impact on provincial jurisdiction."[341]

To summarize, the majority of the Court took an area of clear federal proprietary and legislative jurisdiction, extra-provincial marine waters, and found an environmental concern in relation to those waters to be a matter of concern to Canada as a whole. That environmental concern was then upheld pursuant to

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[336]*Crown Zellerbach, supra*, note 15 at 431-32.
[337]*Ibid.* at 434.
[338]*Ibid.*
[339]*Ibid.* at 436.
[340]*Ibid.*
[341]*Ibid.* at 438 where he refers to *Anti-Inflation, supra*, note 333.

the peace, order and good government power and allowed to intrude into provincial areas of jurisdiction even where there were no known adverse effects in order to ensure that the environmental concern as it related to the area of clear federal jurisdiction could be adequately and properly addressed. The limitation imposed on this intrusion was a "scientific" limitation related to the differences between marine and fresh waters. The fact that no adverse effect needed to be shown[342] resulted from the Court's comment that "[t]he nature of the marine environment and its protection from adverse effect from dumping is a complex matter which must be left to expert judgment."[343] The Court could have sought to rely upon the "necessarily incidental" or "ancillary" power doctrines, but chose instead to base this regulatory power to control ocean pollution upon solely the peace, order and good government power.

In dissent, La Forest J. agreed in part with the judgment of the majority. He stated:

> In legislating under its general power for the control of pollution in areas of the ocean falling outside provincial jurisdiction, the federal Parliament is not confined to regulating activities taking place within those areas. It may take steps to prevent activities in a province, such as dumping substances in provincial waters that pollute or that have the potential to pollute the sea outside the province. Indeed, the exercise of such jurisdiction, it would seem to me, is not limited to coastal and internal waters but extends to the control of deposits in fresh water that have the effect of polluting outside a province.[344]

He went on to point out that the federal criminal power in conjunction with the general federal legislative power to deal with extra-provincial matters can do much to prohibit the pollution of internal waters as well as marine waters, both provincial and federal.[345] He stated:

> In fact, as I see it, the potential breadth of federal power to control pollution by use of its general power is so great ... the constitutional challenge in the end may be the development of judicial strategies to confine its ambit ... This has profound implications for the federal-provincial balance mandated by the *Constitution*. The challenge for the courts, as in the past, will be to allow the federal Parliament sufficient scope to acquit itself of its duties to deal with national and international problems while respecting the scheme of federalism provided by the *Constitution*.[346]

The Court could not, he said, take a number of separate kinds of activities, some of which are traditionally within provincial legislative capacity, and consider them to be a "single indivisible matter of national concern lying outside

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[342]As was required pursuant to *Fowler*, *supra*, note 286 and *Northwest Falling*, *supra*, note 286.
[343]*Crown Zellerbach*, *supra*, note 15 at 420.
[344]*Ibid.* at 445.
[345]*Ibid.* at 447.
[346]*Ibid.* at 447-48.

the specific heads of power assigned under the Constitution."[347] To take broad economic, political and social issues and treat them in such a fashion would enable the Courts to effectively "invent new heads of federal power"[348] under the national dimensions doctrine.[349] Environmental control, he held, cannot be allocated to the Federal Government under its general power, for environmental pollution is just too wide spread and results from everything we do. The result would be to effectively gut provincial legislative jurisdiction. Further, he noted, the problem of environmental pollution is not new, it has merely begun to exceed the ability of the earth to absorb and assimilate it.[350] The same considerations applied to the more limited problem being addressed in the specific fact situation before the Court. The subject matter was not discrete enough to found a federal legislative power. Marine waters are not entirely bound by the coast, the line between fresh and salt water is not clearly demarcated and shifts constantly and the pollution in those waters comes from many sources including land and air.[351]

Further, to find that it was of sufficient discreteness would remove from the provinces many of their traditional areas of jurisdiction.[352] The provision, he stated, quite simply over reaches, for it encompasses activities — the deposit of benign substances by local undertakings operating on provincial lands in provincial waters — that all fall within the legislative jurisdiction of the province.[353] The regulated activities do not pollute nor do they have reasonable potential of polluting the ocean. Parliament has extensive powers to deal with ocean pollution but the activity in issue does not come within that definition with the result that the appeal would have been dismissed by the minority.[354]

The difference between the majority and minority decisions is not so much a difference in law but in interpretation of the facts relating to marine pollution.

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[347]*Ibid.* at 452.

[348]*Ibid.*

[349]*Ibid.* at 453 where La Forest J. then goes on to point out that Le Dain J., as a professor had elucidated this very concern in an article "Sir Lyman Duff and the Constitution" (1974) 12 Osgoode Hall L.J. 261 at 293, where he stated:

> As reflected in the *Munro* case, the issue with respect to the general power, where reliance cannot be placed on the notion of emergency, is to determine what are to be considered to be single, indivisible matters of national interest and concern lying outside the specific heads of jurisdiction in sections 91 and 92. It is possible to invent such matters by applying new names to old legislative purposes. There is an increasing tendency to sum up a wide variety of legislative purposes in single, comprehensive designations. Control of inflation, environmental protection, and preservation of the national identity or independence are examples.

[350]*Crown Zellerbach, ibid.* at 455.

[351]*Ibid.* at 456-57.

[352]*Ibid.* at 458.

[353]*Ibid.* at 459.

[354]*Ibid.*

Justice Le Dain found the pollution of salt water to be distinct from the pollution of fresh water. He acknowledged the pollution of fresh waters does contribute to salt water pollution but found marine pollution to be distinctive as a result of the unique scientific characteristics of marine waters. Further, the salt water/ fresh water distinction provides apparent limits on the legislation's impact on provincial jurisdiction. Justice La Forest took an entirely different view of the scientific qualities of marine waters with the result that the necessary discreteness was not established and the Act "could completely swallow up provincial power."[355] Both judgments recognized the potential for significant impact on provincial jurisdiction. Le Dain J., though, found the necessary "ascertainable and reasonable limits ... [on] its impact on provincial jurisdiction"[356] while La Forest J. disagreed. The necessary link between the prohibition and the purpose sought to be achieved was not there with the resulting "profound implications for the federal/provincial balance mandated by the Constitution."[357] Federal power could not extend to the dumping of any substance in marine waters regardless of whether the seabed is within the province or the substance is noxious.[358]

On the basis of the difference of opinion between the decisions in *Crown Zellerbach* being one primarily of factual interpretation and the necessity for a polluting effect, an analysis of the principles upon which the majority and minority appear to agree is useful. All parties, including the counsel for the province, agreed that federal jurisdiction exists to control pollution in areas of the ocean falling outside provincial jurisdiction. In so doing, the federal Parliament may take steps to control or prevent activities in a province, such as the dumping of polluting substances in provincial waters. Further, this jurisdiction extends to the control of deposits in fresh water that can have the effect of polluting elsewhere outside the province.[359] Further, and in more general terms, there is no conflict in the two judgments between the general requirements that must be met in order to rely on the peace, order and good government power in situations other than a "national emergency."[360] Both the majority and the minority agreed that a plenary power cannot be assumed by one order of government merely as a result of the extra-provincial effects that may arise from a provincial failure to deal effectively with the problem.[361] As well, there is agree-

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[355]*Ibid.* at 457.

[356]*Ibid.* at 438.

[357]*Ibid.* at 448.

[358]*Ibid.* at 451.

[359]*Ibid.* at 445 & 417-18.

[360]It could be argued that environmental protection has now required the status of a "national emergency" but as the purpose of this article is to examine the use of the peace, order and good government power to ground a federal environmental assessment review process on a long term basis, the national emergency branch of the power will not be considered.

[361]*Crown Zellerbach, supra*, note 15 at 434. The majority judgment is explicit in this regard and then establishes what appears to be such a plenary power while the minority judgment confirms such an approach by refusing to construe the power anything but narrowly.

ment that any exercise of the peace, order and good government power must have ascertainable and reasonable limits as to its effect and impact on provincial jurisdiction.[362]

From the principles established by the whole Court it appears to be clear that conduct resulting in adverse trans-boundary environmental effects can be subject to federal control, with the result that federal environmental impact assessments in such situations would be *intra vires*.[363] The situation is not so clear if there are trans-boundary environmental effects but they are not obviously adverse. In such a situation federal jurisdiction is more questionable, although on the basis of the majority decision in *Crown Zellerbach*, it could be established.

More complex is the question of whether the *Crown Zellerbach* decision can support an overarching federal environmental impact assessment power.

V. Peace, Order and Good Government, E.I.A. and the Canadian Constitntion

Relying on the peace, order and good government power to assign to the federal government complete jurisdiction over environmental impact assessment in Canada would be a blatant destruction of the present federal system. Any attempt to do so, despite the majority's decision in *Crown Zellerbach*, would likely be overturned.[364] Tying an environmental impact assessment power though to other existing federal heads of power could provide the constitutional limitations necessary to ensure that such a power does not trench on provincial areas of jurisdiction.

Where the federal government is the proponent of the project, proposal or program, where it has the proprietary and legislative rights over the lands involved in a proposal or alternately where it is providing funds pursuant to its spending power, its ability to conduct a far ranging environmental impact assessment review prior to making its commitment to the proposal would appear to be above challenge.[365] The right to consider all matters the federal government deems necessary in exercising its powers in relation to federal money, federal lands and federal proposals exists as a result of its significant if

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[362]The majority judgment states this explicitly, *ibid.* at 438, while the minority judgment graphically illustrates the problem, *supra* at 455, by referred to the "gutting" of provincial legislative jurisdiction.

[363]See also *R.* v. *Inter-provincial Co-Operatives Ltd. et al*, [1976] 1 S.C.R. 477, 53 D.L.R. (3d) 321.

[364]The entire Court agreed that consideration had to be given to the effect the upholding of the peace, order and good government power would have on the constitutional balance of power.

[365]See discussion above at text accompanying notes 265-80 re federal proprietary and legislative rights and the spending power.

not ultimate control over the proposals in each such instance.[366] Where the decision-making power is in relation to a portion or aspect of a proposal and that proposal is within a province, by a provincial government or deals with a provincial resource, it is clear the federal power exercised must only be exercised within strict federal parameters.[367] The fisheries power, for example, could support an environmental impact assessment process that only examined the adverse effect of the proposal on the fisheries resource, which has been held to include marine life and habitat.[368] A wide ranging environmental impact assessment is difficult to support unless the peace, order and good government power can be established as a basis for the consideration of the other "valued ecosystem components,"[369] which components could include matters of a merely local and private nature.[370] Can the residual power, in conjunction with other federal powers, satisfy the requirements of the national concern doctrine established in the *Crown Zellerbach* case and as developed from the earlier case law being:

> a. The matter must be either new and not in existence at Confederation or a matter which, although originally of a local or private nature in the province, has since become a matter of national concern;
> b. It must have a singleness, distinctiveness, and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the constitutional division of powers;
> c. In determining whether the required degree of singleness, distinctiveness and indivisibility has been obtained it is relevant to consider what would be the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the matter's intra-provincial aspects.

A. Is E.I.A. a New Matter or Matter of National Concern?

As pointed out by Justice La Forest, environmental degradation is not a new matter, but rather a matter that has escalated with the passage of time:

> environmental pollution alone is itself all-pervasive. It is a by-product of everything we do. In man's relationship with his environment, waste is unavoidable. The problem is thus not new, although it is only recently that the vast amount of

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[366]See a comment by Justice La Forest in relation to this plenary power in *Crown Zellerbach*, *supra*, note 15 at 450 where he notes that Parliament: "May undoubtedly prohibit the dumping of anything into federal waters."

[367]*Northwest Falling*, *supra*, note 286 and *Fowler*, *supra*, note 286.

[368]*Northwest Falling*, *ibid.* at 300-301.

[369]Beanlands, *supra*, note 145.

[370]There are other potential constitutional justifications for such an environmental assessment power, but they will not be explored within the scope of this paper. It could be argued that environmental impact assessment as part of an overall "sustainable development" policy could be part of the "trade and commerce" power, particularly in light of the more liberal interpretation of that power given recently by the Supreme Court of Canada in *City National*, *supra*, note 293. Alternatively, if environmental impact assessment is seen as a planning tool, it could be argued that it is supported by the federal power to undertake the collection of data and statistics. Further, it could be argued that the environment just is and either level of government is free to consider it when making decisions, as it sees fit.

> waste products emitted into the atmosphere or dumped in water has begun to exceed the ability of the atmosphere to absorb and assimilate it on a global scale.[371]

Similarly, protection of the environment is not a new matter that failed to be considered at Confederation. In fact the indications are that both inland fisheries and navigation may have been designated federals heads of power at least in part as a result of environmental problems.[372] If it is not a new matter, environmental protection would have to be a matter which, although originally of a local or private nature in a province, has since, in the absence of a national emergency, become a matter of a national concern.[373] The aforementioned comments of Justice La Forest would appear to support this approach.

In an article that, in retrospect, appears to have been prescient, Dale Gibson considered the use of the peace, order and good government power in relation to pollution:

> Whenever it can be said that the problem of pollution in Canada has reached a stage at which it would be appropriate to apply a type of regulation that provincial legislations are unable to provide [peace, order and good government applies]. This is not to say that the clause applies simply because the subject is important to everyone in Canada ... [but] because [it] [f]alls outside provincial jurisdiction for some reason, [and is] left to the provincial residue. In my opinion control of serious water and air pollution is a national problem of that kind. Effective governmental action is clearly needed, and if it were left to the individual provinces there would be a substantial risk that fear of losing industry to less demanding provinces might cause some provinces to set lower standards than satisfactory. Since uniform federal standards would therefore provide an approach to pollution control that provincial legislation could not duplicate the problem has, in my opinion, a "national dimension" justifying federal action under the peace, order and good government power. A word of caution should be added, however: the Courts have never in recent years made such a sweeping use of this clause as is proposed, and if they were to do so it would be a constitutional development of major significance.[374]

Environmental impact assessment is tied to environmental protection and as well forms a part of the recent concern with sustainable development. By definition deceptively simple — the use of resources today so their use by future generations is not impaired — sustainable development is in fact a catch word for a host of complex environmental and economic theories, programs and policies.[375] From this concept has come the Canadian *Green Plan*[376] and the report

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[371]*Crown Zellerbach*, *supra*, note 15 at 455. See also McLaren, *supra*, note 248, where he discusses pollution problems as they existed just prior to Confederation.

[372]See discussion above at text accompanying notes 247-53.

[373]*Crown Zellerbach*, *supra*, note 15 at 431-32.

[374]"Constitutional Jurisdiction," *supra*, note 146 at 84-85.

[375]See, *e.g.*, Experts Group, *supra*, note 114; World Commission on Environment and Development, *Our Common Future* (Oxford: Oxford University Press, 1987) and O. Saunders, ed., *The Legal Challenge of Sustainable Development* (Calgary: University of Calgary, 1989).

[376]*Green Plan*, *supra*, note 125.

of the Canadian Task Force on the Environment and the Economy.[377] Both documents support the importance of a broad ranging environmental impact assessment process[378] and emphasize the importance of integrating environmental and economic concerns into the decision-making process.[379] From grassroots recycling groups in Canadian communities to the report of the Canadian Bar Association on sustainable development,[380] the need to consider and act on the issues of sustainable development and environmental protection has become a matter of national concern.[381] The realization and acknowledgement of the "spillover" effects of much of human activity have moved these issues from the merely local to the national. In relation to environmental protection, uniform standards are required if pollution havens are not to be allowed to develop and to ensure the country and its citizens truly do integrate environmental values with those economic so that sustainable development becomes a reality. The challenge should not be underestimated.

Assuming environmental protection and sustainable development, of which environmental impact assessment is a component, have moved from the local to the national stage,[382] does environmental impact assessment itself have the "required degree of singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern"?[383]

B. Distinctiveness and Trenching

1. The Provincial Inability Test

To determine whether environmental impact assessment is distinctive the "provincial inability" test is relevant[384] although it is only one indicia in deciding whether the required degree of distinctiveness has been met. To be considered is the effect "on extra-provincial interests of a provincial failure to deal

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[377]National Task Force on Environment and Economy, "Report on the National Task Force on Environment and Economy" (Canada: Canadian Council of Resource and Environment Ministers, 1987) [hereinafter "Task Force"].

[378]*Green Plan, supra*, note 125 at 160-61 and "Task Force," *ibid.* at 8.

[379]*Green Plan, ibid.* at 3-5 and "Task Force," *ibid.* at 2-3.

[380]Canadian Bar Association Sustainable Development Committee, *Sustainable Development in Canada: Options for Law Reform* (Ottawa: Canadian Bar Association, 1990).

[381]Further, it has become a matter of international concern, see *Our Common Future, supra*, note 375.

[382]I have not tried within the confines of this article to prove extensively the depth of this national concern. If the more limited scope of "ocean pollution" is a matter of national concern and in light of the comments of Justice La Forest that it was just the corner of the overall problem of environmental protection, then environmental protection itself must be seen as a matter of national concern.

[383]*Crown Zellerbach, supra*, note 15 at 432.

[384]*Ibid.* at 434. The majority held this test "relevant," not essential.

effectively with the control or regulation of the intra-provincial aspects of the matter."[385] It is noteworthy that the test talks of the "control and regulation" of the intra-provincial aspects of the matter. Further, *Crown Zellerbach* itself dealt with the control of dumping in provincial waters by the federal government. Both the Guidelines Order and the recently proposed environmental impact assessment legislation[386] provide for a process that results solely in recommendations.[387] As a result, unless the environmental impact assessment process results in a final decision, neither control nor regulation is the mechanism being used federally, with the result that it can be argued this test is not relevant or is inapplicable in considering peace, order and good government as the basis for a federal environmental assessment review process.[388] Regardless, the test can be met.

Just as dumping in provincial waters has the potential to harm federal marine waters, the failure of the provincial government to make environmentally-responsible decisions about development has the potential to harm federal areas of jurisdiction. The inter-relatedness of environmental matters is such that if a project has a provincial environmental effect, it frequently has a federal environmental effect as well.[389] Further, if the peace, order and good government power is invoked only when a federal interest may be affected, for a federal environmental impact assessment to occur the provincially based proposal must have a potential effect on a federal area of jurisdiction. As a result the provincial decision-making undertaken in relation to the proposal will affect federal interests. This approach will be further elucidated when considering whether the distinctiveness test can be met.

2. The Distinctiveness Test

The majority of the Court in *Crown Zellerbach* found the problem of marine pollution met the singleness and distinctiveness test. There was a sufficient inter-relatedness between the intra-provincial and extra-provincial aspects of the matter to require a single legislative approach which approach was circumscribed by the scientific differentiation between marine and fresh waters.[390]

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[385]*Ibid.* at 432.

[386]Bill C-78.

[387]Arguably this is a semantic difference as recommendations may at some point form the basis for a decision.

[388]To drop or modify this test is not without authority. In a recent Supreme Court of Canada decision the majority of the Court expressed the following view in relation to the test to be met regarding the federal "trade and commerce power": "These *indicia* do not, however, represent an exhaustive list of traits that will tend to characterize general trade and commerce legislation. Nor is the presence or absence of any of these five criteria necessarily determinative" (*City National*, *supra*, note 293 at 662-63).

[389]For example, the logging of provincial timber can affect migratory birds and fish habitat, both areas of federal jurisdiction.

[390]*Crown Zellerbach*, *supra*, note 15 at 434.

The Court took the same approach when considering to what extent the power over ocean pollution, if substantiated by the peace, order and good government power, would trench upon traditional provincial powers and upset the constitutional balance. The same constraints being the difference between marine and fresh waters were relied upon as well as the connection between intra-provincial dumping and its potential extra-provincial effects. The fact that the substance might be benign, the majority held, was not a concern as a consideration of such matters should be left to scientific experts and should not be presumed by the Court.[391] In essence, the Court took an area of federal power, created an environmental power tied to that traditional area of federal power and then permitted an intrusion into provincial jurisdiction to the extent thought scientifically necessary to ensure the environmental power could be properly utilized.

The same could be done with an environmental impact assessment power. Starting from a base of traditional federal jurisdiction, an environmental impact assessment power could be created in conjunction with that traditional federal power.[392] The extent of the power would be circumscribed by scientific evidence taking into consideration the fact that environmental impact assessment is a planning tool that can be used to ensure the environmental goals of the nation are met. To do so in an effective manner, environment must be given a broad interpretation and local factors such as socio-economic and community effects may have to be considered. At all times, though, there would be a distinct limitation on the environmental impact assessment power being the original federal power which was its trigger, just as the pollution control power in *Crown Zellerbach* was limited by the original federal power being control of the oceans. This limitation would hold the environmental impact assessment power in check with the result that it would not be a wide spread power that could move unimpeded into traditional areas of provincial jurisdiction. At all times the traditional federal power would limit the incursion into matters of a local and private nature. Like the regulation of the dumping of benign substances, though, the direct extra-provincial effects of considering these local issues may not be readily apparent, but to do a proper environmental impact assessment there must be an ability to include local factors and matters in the process where necessary. That is not to say there are no extra-provincial effects of a provincial failure to consider these matters — in many instances there probably are — but rather that provincial and federal environmental considerations are so interrelated when

[391] *Ibid.* at 420 where Le Dain J. said: "The nature of the marine environment and its protection from adverse effect from dumping is a complex matter which must be left to expert judgment."

[392] The "environmental impact assessment power" would be under the rubric of sustainable development and environmental protection which would be seen as areas of "national concern." That is not to say that such a power in relation to environmental protection and sustainable development satisfies the tests under the peace, order and good government power. They are matters of "national concern" but may not satisfy the requisite constitutional tests. It is not the purpose of this paper to justify those areas of national concern under the peace, order and good government power.

undertaking an environmental impact assessment as to require a single approach. Potential "spillover" effects, considerations of the benefits and the burden to various populations and the necessity for an overall ecological approach to assessment all justify this limited incursion into areas of provincial jurisdiction. The Courts should not be the decision-makers in relation to these matters, for they are complex and should be left to the necessary scientific and other experts. Further, in order to fully assess these effects, there must be an ability to do a complete assessment even though it may result in the discounting as insignificant various of the environmental factors.

Tying this environmental impact assessment power to all federal heads of power can be justified as well on the basis of environmental impact assessment being a matter of national concern. As a matter of national concern its ambit must be broad to ensure that uniform national goals can be met. The way to ensure this occurs is by tying the power to all traditional federal powers so that, where the exercise of those powers will result in environmental impacts, the broad range of those impacts can be considered. Characterizing environmental impact assessment, therefore, as a matter of national concern permits assessments to be done throughout the broad range of federal powers and as well allows the scope of those assessments, once established, to be wide.

As was noted in *City National*, "by their nature remedial provisions are typically less intrusive vis a vis provincial powers."[393] With a process that results in mere recommendations and not an actual "go or no go" decision, an environmental impact assessment power tied to an existing federal power would be seen to intrude even less into provincial areas of jurisdiction. In either situation, though, whether the process results in a decision or recommendations, it will not upset the constitutional balance of powers in the manner envisaged by Justice La Forest in the minority decision in *Crown Zellerbach*. Such a reliance on the peace, order and good government power would meet also his concerns.

Justice La Forest had two primary problems with the validity of the legislation. The first concern he addressed was the ability of an environmental protection power supported by the peace, order and good government power to upset totally the constitutional balance. An overriding federal power in the area of environmental protection would in fact do so. An environmental protection power exercised only in relation to areas of traditionally established federal jurisidiction would not do so as there would be limits on the extension of the power. There could be no environmental impact assessment without a federal constitutional decision-making power to initiate the process. The same would hold true for the federal power in relation to dealing with federal lands, the federal spending power and proposals put forward by the Federal Government. The only environmental impact assessment process that would be initiated solely by the

[393]*City National*, *supra*, note 293 at 360.

peace, order and good government power would be proposals that had inter-provincial or international environmental effects. Where provincially based projects do not require the exercise of a federal decision-making power, there would be no federal environmental impact assessment process.[394] By combining traditional federal heads of power with the peace, order and good government power, environmental impact assessments could be carried out in a broad and comprehensive fashion without trenching unnecessarily on areas of provincial concern.

His second concern was the failure to link the control being exercised to the actual anticipated harm. As in the *Fowler* case[395] there was no requirement that the materials dumped actually caused pollution and, as was pointed out, the movement of rock from one point to another would be controlled under the federal legislation.[396] With an environmental impact assessment the purpose of the assessment is to discover and weigh the impacts and assess the ultimate harm to the environment of the proposal. Along the way many benign factors may be considered,[397] but the ultimate goal of the process is not control, where the process results merely in recommendations.[398] Alternately, if the process does result in a decision rather than merely recommendations, this concern is more cogent, for there is no link between the federal harm and the control mechanism. This concern could be alleviated by drafting the enpowering legislation in such a fashion as to require the consideration of "adverse environment effects." It must not be forgotten that if such a link were established, Justice La Forest envisioned the federal ability to regulate the polluting substance to extend right past the plant gate and into the plant, an obvious move into areas of provincial control.[399]

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[394]Pulp mills have been subject to the process pursuant to decision making powers under the navigation and fisheries powers. With the development of "zero discharge" mills, such as the one proposed at Meadow Lake, Saskatchewan, the right to assess those mills under those decision-making powers would no longer exist.

[395]*Fowler*, *supra*, note 286.

[396]*Crown Zellerbach*, *supra*, note 15 at 459.

[397]With an adequate "scoping" or "screening" process at the start of a major assessment, the consideration of such benign impacts should be minimized.

[398]In some ways this may be merely a semantic difference for at some point the recommendations will or will not be relied upon. If the former occurs some form of "control" will in fact exist.

[399]Alternately, to satisfy the concerns of Justice La Forest, it could be argued that the right to consider environmental protection issues arises in relation to all federal heads of power and any consideration of provincial issues in relation to an environmental impact assessment is an intrusion justified on the basis that it is "ancillary" to or "necessarily incidental" to the exercise of the power in relation to areas of federal concern. Justice La Forest himself makes this point: "A system of monitoring that was necessarily incidental to an effective legislative scheme for the control of ocean pollution could constitutionally be justified." *Crown Zellerbach*, *supra*, note 15 at 450.

Coupling traditional federal constitutional powers with the "necessarily incidental" doctrine and utilizing legislation that referred to a consideration of "adverse environmental effects" would clearly address Justice La Forest's concerns and would leave no need for the peace, order and good

Further, as both the majority and minority pointed out, it is not necessary for plenary power to be given to the federal government; provincial powers can exist as well. In relation to an environmental impact assessment process, as with marine dumping, a strong federal position could give the Federal Government in essence a "veto" power over some activities within a province. Over and above the practical and legal reasons already addressed for allowing such a strong federal power, the American and Australian examples would appear to indicate that where federal power is certain, the co-operation of the individual states in working out a joint process is more assured. In both jurisdictions "environment" and "environmental impact assessments" were broadly defined and strong federal processes were possible. In Australia, where such a process was feasible but not enforced, state co-operation has been piecemeal and there is a lack of uniform standards. In the United States, where the strong federal process has been upheld, the experience with state co-operation appears more positive. Both jurisdictions have, of course, different constitutions but, regardless, their experiences are enlightening.

By establishing a federal environmental impact assessment process that is broadly applicable and wide ranging in the scope of the ultimate assessments carried out, the Federal Government would be forcing the provinces to the negotiating table. A strong jurisdictional stand could result in provincial co-operation and involvement in the process while maintaining uniform standards across the country and control over the allocation of the benefit and the burden of proposals. Further, duplication could be avoided and effective and valuable assessments done so that both levels of government have a complete picture of the environmental ramifications of the decisions to be made.[400] The establishment

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government power other than to justify the assessment of trans-boundary effects. The problem with such an approach, though, is the obvious potential limitations on the scope of an assessment. It would be necessary to establish in each instance that the factors of a merely local and private nature being considered were in fact "necessarily incidental" to the assessment of the adverse environmental effect on an area of federal jurisdiction. For a consideration of the test to be utilized see *City National*, *supra*, note 293 and *Papp* v. *Papp*, [1970] 1 O.R. 331, 8 D.L.R. (3d) 389 (C.A.); *McDonald* v. *Vapour Canada Ltd.*, *supra*, note 293; *R.* v. *Zelensky*, [1978] 2 S.C.R. 940, 86 D.L.R. (3d) 179; *Northern Telecom Ltd.* v. *Communication Workers of Canada*, [1980] 1 S.C.R. 115, 98 D.L.R. (3d) 1; *Multiple Access Ltd.* v. *McCutcheon*, [1982] 2 S.C.R. 161, 138 D.L.R. (3d) 1 and *Clark* v. *Canadian National Railway Co.*, [1988] 2 S.C.R. 680, 54 D.L.R. (4th) 679. See also Hogg, *supra*, note 267 at 334-37.

[400]Some joint assessments have been held under the E.A.R.P. Guidelines Order. See for example Celgar Expansion Review Panel (Pulp Mill), British Columbia 1990-91; Port Hardy-Ferro Chromium Review Panel, British Columbia 1990-91; West Coast Off Shore Exploration Environmental Assessment Panel (Oil & Gas), British Columbia, 1986; Alberta Pacific Pulp Mill Review Panel, Alberta 1990; Low Level Air Defence Review Panel, New Brunswick 1990; Halifax Harbour Cleanup Review Panel, Nova Scotia 1990-91 and Decontamination of Canal Lachine Panel, Quebec 1990-91. As was seen with the Alberta Pacific Review Panel, a joint review does not mean that the impact on both federal and provincial jurisdictions will necessarily be examined. In that case the terms of reference were to examine the impact of the mill on federal areas of jurisdiction

of a strong federal process can be constitutionally grounded and has much to commend it. The proposed federal legislation with its narrow definitions of "environment," "environmental assessments," and "environmental effect," is an abdication of a strong federal position in the environmental impact assessment process and an apparent pandering to provincial complaints of federal trenching into areas of provincial jurisdiction. With the peace, order and good government power coupled with another federal head of power, any such incursion is thereby circumscribed. Environmental effects are so interrelated that constitutionally and practically a leading federal role is readily justified.

Conclusion

The present Guidelines Order, although it fails to define environment, is more readily triggered than the legislation proposed in Bill C-78. Various practical reasons mandate the necessity of a process both broad in its application to proposals and in the ultimate assessments undertaken. Further, the American and Australian examples indicate that without a wide ranging central federal assessment process, the entire system of environmental assessment can become ineffective and ineffectual. There is no need, within the confines of Canada's constitutional system, for this to occur.

The *Crown Zellerbach* decision provides a basis for the establishment of a federal environmental impact assessment power so long as that power is circumscribed by traditional federal heads of power. By combining the peace, order and good government power with these traditional heads of federal power, the national concern doctrine tests can be met and a broad ranging and effective environmental impact assessment process that does not trench unduly on areas of provincial jurisdiction can be established. Ultimately, such an assumption of jurisdiction by the federal government could result in the establishment of a co-operative environmental impact assessment process with the provinces which would ensure that uniform standards across the country are enforced and concerns with "spillover effects" and the sharing of the benefit and the burden of development are met. This is one way in which, as was pointed out by Justice La Forest, the constitutional challenge for the Courts can be met so that

> the federal Parliament [has] sufficient scope to acquit itself of its duties to deal with national and international problems while respecting the scheme of federalism provided by the Constitution.[401]

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despite the fact that the panel was joint. The fact that an assessment is joint, therefore, does not necessarily mean that the assessment is complete.

[401] *Crown Zellerbach*, *supra*, note 15 at 448.