CASE COMMENTS

CHRONIQUES DE JURISPRUDENCE

Federal Environmental Jurisdiction After *Oldman*

Steveu A. Kennett*

The Supreme Court of Canada's decision in the *Oldman* case confronted the complex issue of environmental jurisdiction under the Canadian Constitution. In particular, it upheld federal authority to conduct an environmental assessment of a major irrigation dam constructed by the Government of Alberta. The implications of the case, however, go beyond the particular facts. The author argues that La Forest J.'s reasoning supports a distinction between "comprehensive" and "restricted" federal environmental jurisdiction. The author examines the basis for this distinction, the judicial means of enforcing the limits implicit in "restricted" jurisdiction, and the implications of this distinction for the division of powers. Federal environmental jurisdiction under the "peace, order and good government" power and the difficulties of conducting environmental assessments where there is overlapping jurisdiction are also discussed in light of the *Oldman* decision.

Dans l'affaire *Oldman*, la Cour suprême du Canada a dû se pencher sur la question constitutionnelle du partage des compétences en matière d'environnement. Plus particulièrement, elle a décidé que le gouvernement fédéral peut procéder à une étude des conséquences pour l'environnement de la construction par le gouvernement de l'Alberta d'un important barrage d'irrigation. Mais la portée de la décision va au-delà des faits du litige. L'auteur prétend que le raisonnement du juge La Forest crée une distinction entre une compétence « large » et une compétence « restreinte » du fédéral en matière d'environnement. L'auteur examine la source de la distinction, les possibilités pour les tribunaux de faire respecter les limites de la compétence restreinte et l'incidence de la décision sur le partage des compétences. La compétence environnementale fédérale fondée sur le pouvoir en matière de « paix, ordre et bon gouvernement » et les problèmes qui surgissent lorsqu'il y a chevauchement de compétences sont également examinés à la lumière de l'arrêt *Oldman*.

*Research Associate, Canadian Institute of Resources Law, Calgary, Alberta.

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Introdnction

The *Oldman*[1] decision is the most recent Supreme Court of Canada pronouncement on environmental jurisdiction under the *Constitution Act, 1867*.[2] In reviewing the constitutional basis for a federal environmental assessment (EA) of the Oldman River Dam, La Forest J.[3] acknowledges the difficulty of addressing environmental issues within the framework of the Canadian Constitution:

> It must be recognized that the environment is not an independent matter of legislation under the *Constitution Act, 1867*. It is a constitutionally abstruse matter which does not comfortably fit within the existing division of powers without considerable overlap and uncertainty.[4]

[1] *Friends of the Oldman River Society* v. *Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, 88 D.L.R. (4th) 1 [hereinafter *Oldman* cited to S.C.R.].

[2] *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3 (formerly *British North America Act, 1867*).

[3] The Court split 8 to 1 in *Oldman* with La Forest J. writing for the majority and Stevenson J. dissenting. On the constitutional questions, however, Stevenson J. concurred with La Forest J.

[4] *Oldman*, *supra* note 1 at 64.

The constitutional difficulties raised by environmental jurisdiction, however, are not simply the result of an awkward fit between "environment" as an area of government activity and the enumerated heads of power. Federalism itself is a source of tension. The integration of economic and environmental decision-making recommended by the *Brundtland Report*[5] and the complex interrelationships brought to light by an ecosystem perspective on environmental issues[6] suggest the need for a comprehensive approach to policy-making and regulation. Federalism, however, allocates responsibilities to different levels of government, thus risking fragmentation.[7] This tension is especially relevant to EA, where a principal objective is to take account of the full range of a project's environmental consequences in the early stages of decision-making.

Oldman was the first of a recent series of EA cases[8] to reach the Supreme Court of Canada. The decision was well received by advocates of more rigorous and comprehensive environmental assessment in Canada.[9] One reason for satisfaction was the Court's expansive view of the topics to be included in EA. In interpreting the *Guidelines Order*[10] which established the Environmental Assessment Review Process (EARP), La Forest J. rejects the view that "environmental quality is confined to the biophysical environment alone" and states that "the potential consequences for a community's livelihood, health and other social matters from environmental change are integral to decision-making on matters affecting environmental quality."[11] La Forest J. also quotes from the recommendations of the *Report of the National Task Force on Environment and Economy*[12] which followed the *Brundtland Report* in emphasizing the importance of integrating economic and environmental planning.[13]

La Forest J. leaves no doubt, however, that the holistic[14] view of EA is

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[5]World Commission on Environment and Development, *Our Common Future* (Oxford: Oxford University Press, 1987) at 9, 310-12 [hereinafter *Brundtland Report*].

[6]J.W. MacNeill, P. Winsemius & T. Yakushiji, *Beyond Interdependence: The Meshing of the World's Economy and the Earth's Ecology* (New York: Oxford University Press, 1991) at 4, 8-9, 58-59; J.W. MacNeill, *Environmental Management* (Ottawa: Information Canada, 1971) at 10-14.

[7]M. Walters, "Ecological Unity and Political Fragmentation: The Implications of the Brundtland Report for the Canadian Constitutional Order" (1991) 29 Alta. L. Rev. 420.

[8]In particular, the Rafferty-Alameda project in Saskatchewan bas been the subject of EA litigation. See *e.g. Canadian Wildlife Federation Inc. v. Canada (Minister of the Environment)*, [1989] 3 F.C. 309, [1989] 4 W.W.R. 526 (T.D.), aff'd [1990] 2 W.W.R. 69, 99 N.R. 72 (F.C.A.) [hereinafter *Canadian Wildlife Federation*]. For an EA case concerning the James Bay hydroelectric project, see *Quebec (A.G.) v. Canada (National Energy Board)*, [1991] 3 F.C. 443, 83 D.L.R. (4th) 146 (C.A.).

[9]G. York, "Decision leaves dam vulnerable" *The [Toronto] Globe and Mail* (24 January 1992) A5. Native and environmental groups participated in the *Oldman* litigation.

[10]*Environmental Assessment and Review Process Guidelines Order*, SOR/84-467 [hereinafter *Guidelines Order*]. The *Guidelines Order* was established pursuant to the *Department of the Environment Act*, R.S.C. 1985, c. E-10, s. 6.

[11]*Oldman*, *supra* note 1 at 37.

[12]Canadian Council of Resource and Environment Ministers, *Report of the National Task Force on Environment and Economy* (Ottawa: The Task Force, September 24, 1987) at 2 [hereinafter *CCREM Report*].

[13]*Oldman*, *supra* note 1 at 37.

[14]La Forest J. remarks that "the environment is comprised of all that is around us and as such must be a part of what actuates many decisions of any moment" (*ibid.* at 70).

"subject, of course, to the *constitutional imperatives.*" [emphasis added][15] The implications of these constitutional imperatives for federal environmental jurisdiction are the focus of this paper. This paper reviews the facts and lower court decisions and provides an overview of the issues and decision in the Supreme Court of Canada. The constitutional basis of federal environmental jurisdiction following *Oldman* is analyzed and this analysis is applied to the "peace, order and good government"[16] power. EA jurisdiction following *Oldman*, and the constitutional dilemma posed by EA, are then discussed. In the concluding section, the central constitutional implication of *Oldman* for environmental protection in Canada is noted and its consequences for cooperative federalism and EA are summarized.

I. The Facts and Lower Conrt Decisions

The origins of the dispute lay in the Government of Alberta's decision to construct an irrigation dam on the Oldman River. The project, which was opposed by Natives and environmentalists, had been the subject of a provincial EA. Federal approval was also required, however, under the *Navigable Waters Protection Act*[17] and this approval was granted without a federal EA.

Litigation was initiated by the Friends of the Oldman River Society to require the federal departments of Transport and Fisheries and Oceans to conduct an EA under the EARP *Guidelines Order*. The *Guidelines Order* requires federal departments with decision-making authority over a proposal having environmental consequences for an area of federal responsibility to conduct an EA. By linking the EA to a decision-making authority, EA recommendations could be implemented by a refusal of permission to proceed with the project or by attaching conditions to project approval.

The application in the Trial Division of the Federal Court was for an order in the nature of *certiorari* to quash the federal approval and an order in the nature of *mandamus* requiring an EA.[18] Jerome A.C.J. held that the Minister of Transport was not bound to apply the *Guidelines Order* in granting approval under the *Navigable Waters Protection Act* and that, in fact, to do so would exceed his statutory jurisdiction. The Minister of Fisheries and Oceans also lacked jurisdiction to apply the *Guidelines Order* since his department had not undertaken the project and exercised no power of approval. Jerome A.C.J. also distinguished *Canadian Wildlife Federation*,[19] which had required a federal EA for the Rafferty-Alameda Dam. The federal Minister of the Environment's prior approval was necessary for the Rafferty-Alameda Dam and that Minister's statutory duties included the consideration of environmental factors. In contrast, the *Navigable Waters Protection Act* allowed for approval of the Oldman River Dam after the project had commenced and Jerome A.C.J. found that the Min-

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[15] *Ibid.* at 37.

[16] *Constitution Act, 1867*, s. 91 (introductory words).

[17] R.S.C. 1985, c. N-22.

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

[19] *Supra* note 8.

ister of Transport's statutory duties did not extend to environmental considerations. Finally, Jerome A.C.J. exercised his discretion not to grant relief on grounds of delay and unnecessary duplication if a federal EA were ordered.

The decision was reversed by the Federal Court of Appeal.[20] Stone J.A. found the *Guidelines Order* to be applicable to the dam and held that it expanded the statutory authority of the Minister of Transport to allow him to undertake an environmental assessment prior to reaching his decision on the project. In addition, the Minister of Fisheries and Oceans was found to be a "decision making authority" for the Oldman River Dam and was therefore bound by the *Guidelines Order*. Stone J.A. concluded that a federal EA was mandatory and that the *Navigable Waters Protection Act* binds the Crown in right of Alberta. He also overturned the trial judge's decision on the issue of discretion to grant the relief requested. Leave to appeal was granted by the Supreme Court of Canada[21] and the case was argued in February 1991.

II. Overview of the Issues and the Supreme Court of Canada Decision

Five issues were addressed by the Supreme Court of Canada in *Oldman*.[22] The first concerned the statutory validity of the *Guidelines Order* and, in particular, its authorization under section 6 of the *Department of the Environment Act*[23] and its consistency with the *Navigable Waters Protection Act* and the *Fisheries Act*.[24] The second issue was the applicability of the *Guidelines Order* in *Oldman* — specifically, whether it applied to the project and whether the *Navigable Waters Protection Act* was binding on the Crown in right of Alberta. The third issue was whether compliance with the *Guidelines Order* was mandatory. Fourth, the Federal Court of Appeal's interference with the trial judge's discretion in declining to grant the remedies sought was challenged. The fifth issue was whether the breadth of the *Guidelines Order* offended section 92 of the *Constitution Act, 1867*.

The majority judgment was written by La Forest J. for eight members of the Court. Stevenson J. dissented on three points: Crown immunity, interference with discretion and costs. The five issues were addressed by the majority as follows.

First, the *Guidelines Order* was validly enacted under the *Department of the Environment Act*. It does not conflict with the *Navigable Waters Protection Act* in that it simply enlarges the Minister of Transport's statutory powers when evaluating a proposal under that Act.[25]

Second, the *Guidelines Order* applies to the approval of the Oldman River Dam by the federal Minister of Transport since the affirmative regulatory duty

[20] *Friends of the Oldman River Society* v. *Canada (Minister of Transport)*, [1990] 2 F.C. 18, 68 D.L.R. (4th) 375 (C.A.).
[21] [1990] 2 S.C.R. x.
[22] *Oldman*, *supra* note 1 at 32-33. The issues are grouped somewhat differently in the judgment.
[23] *Supra* note 10.
[24] R.S.C. 1985, c. F-14.
[25] *Oldman*, *supra* note 1 at 33-42.

imposed by the *Navigable Waters Protection Act* makes that Minister an "initiating department," thus triggering the EA requirement. The *Navigable Waters Protection Act* is also binding on the Crown in right of Alberta with the result that the dam cannot be built without the consent of the Minister of Transport.[26] La Forest J. found, however, that the *Fisheries Act* does not create an equivalent regulatory scheme and therefore the Minister of Fisheries and Oceans is not bound by the *Guidelines Order*.[27]

On the third issue, the Court concluded that the *Guidelines Order* is not merely an administrative directive but rather constitutes a regulatory scheme enacted as subordinate legislation which is mandatory. The Minister of Transport is therefore required to assess the environmental impact of the dam on behalf of the Government of Canada.[28]

Fourth, the Federal Court of Appeal did not err in interfering with the trial judge's discretion. La Forest J. notes that opponents of the dam had made a sustained legal effort to challenge the approval process and that, despite the ongoing proceedings, construction had continued. There was no evidence of prejudice to Alberta caused by delay in bringing the action.[29]

Finally, the Court held that the *Guidelines Order* is constitutionally valid. The *Guidelines Order* can be characterized as a means of facilitating decision-making based on the particular heads of power used to regulate the project and as a procedural or organizational device governing the internal operations of the Government of Canada.[30]

Of these five issues, the constitutional one may have the greatest long-term impact since it is not dependent on the particular statutory scheme.[31] It is also relevant to environmental jurisdiction beyond the EA context. This paper will focus on the implications of *Oldman* for Parliament's constitutional jurisdiction regarding the environment in general and EA in particular.

III. *Oldman* and the Constitutional Basis for Federal Environmental Jurisdiction

The discussion of the *Oldman* decision's implications for federal environmental jurisdiction is divided into six sections. First, the approach to environmental jurisdiction taken by La Forest J. will be described. That approach, it is argued, supports a distinction between "comprehensive" and "restricted" federal jurisdiction. The second and third sections discuss comprehensive and restricted federal environmental jurisdiction respectively. Fourth, the "pith and substance" of legislation and the doctrine of colourability are reviewed as a means of

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[26] *Ibid.* at 43-48, 59-62.

[27] This element of the decision precludes the use of the *Fisheries Act* as a legislative basis for compelling the federal government to conduct EAs.

[28] *Oldman*, *supra* note 1 at 36-38, 48.

[29] *Ibid.* at 79-80.

[30] *Ibid.* at 73-74.

[31] *Canadian Environmental Assessment Act*, S.C. 1992, c. 37, modifies certain triggering mecbanisms for federal EA and introduces greater ministerial discretion.

enforcing judicial limits on restricted jurisdiction. In the fifth section, the implications of this analysis for the division of powers are noted. Finally, the argument is briefly summarized.

A. *The* Oldman *Deeision's Approach to Environmental Jurisdiction*

La Forest J.'s approach to environmental jurisdiction contains three principal elements. The first concerns the place of "environment" in the constitutional division of powers. Second, La Forest J. identifies the focus of inquiry for defining legislative competence relating to the environment. Third, he notes the importance of the "nature" of particular heads of power for the extent of jurisdiction. Based on La Forest J.'s approach, it is argued here that a distinction should be made between comprehensive and restricted federal environmental jurisdiction.

The first element in La Forest J.'s approach reflects the established view[32] that:

> [T]he *Constitution Act, 1867* has not assigned the matter of "environment" *sui generis* to either the provinces or Parliament. The environment, as understood in its generic sense, encompasses the physical, economic and social environment touching several of the heads of power assigned to the respective levels of government.[33]

This passage emphasizes that environmental legislation is not identified as a separate matter in the *Constitution Act, 1867* and that it may be enacted under various heads of power.

The second element follows directly from the first. La Forest J.'s approach to environmental jurisdiction requires "looking first at the catalogue of powers in the *Constitution Act, 1867* and considering how they may be employed to meet or avoid environmental concerns."[34] Environmental regulation is not an "independent"[35] matter of jurisdiction but rather is a function of the exercise of particular heads of power.

The third element of La Forest J.'s approach is summarized as follows:

> [T]he exercise of legislative power, as it affects concerns relating to the environment, must ... be linked to the appropriate head of power, and since the nature of the various heads of power under the *Constitution Act, 1867* differ [*sic*], the extent to which environmental concerns may be taken into account in the exercise of a power may vary from one power to another. For example, a somewhat different

[32]See *e.g.* W.R. Lederman, "Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation" (1975) 53 Can. Bar Rev. 597 at 610; G.A. Beaudoin, "La protection de l'environnement et ses implications en droit constitutionnel" (1977) 23 McGill L.J. 207; P.W. Hogg, *Constitutional Law of Canada*, 3d ed. (Toronto: Carswell, 1992) at 463, 730.

[33]*Oldman*, *supra* note 1 at 63. La Forest J. also quotes, *ibid.* at 63-64, from D. Gibson, "Constitutional Jurisdiction over Environmental Management in Canada" (1973) 23 U.T.L.J. 54 at 85: "'[E]nvironmental management' could never be treated as a constitutional unit under one order of government in any constitution that claimed to be federal, because no system in which one government was so powerful would be federal."

[34]*Oldman*, *ibid.* at 65.

[35]*Ibid.* at 64.

> environmental role can be played by Parliament in the exercise of its jurisdiction over fisheries than under its powers concerning railways or navigation since the former involves the management of a resource, the others activities.[36]

The point is not simply that certain heads of power support federal environmental jurisdiction while others do not. Rather, the "environmental role" of Parliament is related to the "nature" of heads of power; there are thus different roles and natures to be considered. La Forest J. illustrates this point with the distinction between jurisdiction over "resources" and "activities."

It is suggested in this paper, however, that a different distinction be used to determine the extent of federal environmental jurisdiction in particular cases. The following two sections present a distinction between activities over which Parliament has "comprehensive" environmental jurisdiction and activities which, because they merely touch on or have consequences for an area of federal competence, are subject to only "restricted" jurisdiction. While this distinction is not made explicitly by La Forest J. in *Oldman*, it appears to be implicit in his analysis and choice of examples.

B. Comprehensive Federal Jurisdiction

This section describes the basis of comprehensive environmental jurisdiction. La Forest J.'s interprovincial railway example in *Oldman* is then used to illustrate this type of jurisdiction and two other examples of comprehensive federal jurisdiction are noted.

The starting point for discussing comprehensive jurisdiction is the recognition that the exercise of environmental jurisdiction involves the regulation of *activities* that have consequences for the environment. Rather than identifying broad subject matters of jurisdiction, such as water or air, the proposed approach focuses on the relationship between constitutional heads of power and the particular activities to be regulated. Comprehensive federal jurisdiction means that Parliament can regulate an activity in terms of all of the activity's environmental consequences. This jurisdiction exists, it is suggested, where the activity is referred to directly or by implication in a federal head of power.

Comprehensive jurisdiction is illustrated in *Oldman* by the interprovincial railways example. The activities of building and operating interprovincial railways are within the legislative competence of Parliament since these railways are referred to directly in the Constitution's enumeration of federal powers.[37] To illustrate the extent of this jurisdiction, La Forest J. quotes from the *National Transportation Act, 1987*,[38] which lists a range of factors to be considered in regulation.[39] He then concludes that "it cannot be seriously questioned that Parliament may deal with biophysical environmental concerns touching upon the operation of railways so long as it is legislation relating to railways.

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[36]*Ibid.* at 67-68.

[37]Parliament has jurisdiction over interprovincial railways under ss. 92(10)(a) and 91(29) of the *Constitution Act, 1867.*

[38]R.S.C. 1985 (3d Supp.), c. 28, s. 3.

[39]*Oldman*, *supra* note 1 at 65-66.

This could involve issues such as emission standards or noise abatement provisions."[40]

La Forest J. leaves no doubt that federal regulatory authority may take into account the full range of environmental considerations when, for example, approving new rail lines. Exploring this example, he states:

> [O]ne might postulate the location and construction of a new line which would require approval under the relevant provisions of the *Railway Act*, R.S.C. 1985, c. R-3. That line may cut through ecologically sensitive habitats such as wetlands and forests. The possibility of derailment may pose a serious hazard to the health and safety of nearby communities if dangerous commodities are to be carried on the line. On the other hand, it may bring considerable economic benefit to those communities through job creation and the multiplier effect that it will have in the local economy. The regulatory authority might require that the line circumvent residential districts in the interests of noise abatement and safety. In my view, all of these considerations may validly be taken into account in arriving at a final decision on whether or not to grant the necessary approval. To suggest otherwise would lead to the most astonishing results, and it defies reason to assert that Parliament is constitutionally barred from weighing the broad environmental repercussions, including socio-economic concerns, when legislating with respect to decisions of this nature.[41]

Parliament thus has a comprehensive environmental jurisdiction regarding interprovincial railways.

Comprehensive environmental jurisdiction is illustrated by two other examples. The first concerns another direct reference to an activity in a federal head of power. Parliament has jurisdiction over "navigation and shipping" under subsection 91(10) of the *Constitution Act, 1867*. The resulting comprehensive jurisdiction over shipping supports legislation regulating pollution from ships.[42] As an activity within comprehensive federal jurisdiction, all environmental consequences of shipping can be regulated by Parliament.[43]

A second example is an activity referred to by implication in a federal head of power.[44] The courts have interpreted subsection 92(10)(a), which gives Parliament jurisdiction over interprovincial "works and undertakings," as placing the construction and operation of interprovincial pipelines under federal authority.[45] Unlike interprovincial railways, pipelines are not referred to directly in subsection 92(10)(a). This head of power includes them, however, by implica-

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[40]*Ibid.* at 66.

[41]*Ibid.*

[42]*Canada Shipping Act*, R.S.C. 1985, c. S-9, Part XV.

[43]This argument is also supported by *Whitbread* v. *Walley*, [1990] 3 S.C.R. 1273, 77 D.L.R. (4th) 25, which held that "maritime law" is an area of exclusive federal jurisdiction. Pollution from shipping might be considered part of "maritime law."

[44]Activities referred to by implication are identified through judicial interpretation of heads of power. The importance of interpretation in identifying these activities is best illustrated by the generally worded "peace, order and good government" power. This topic is discussed below in the section entitled "*Oldman* and Federal Environmental Jurisdiction under 'Peace, Order and Good Government.'"

[45]*Campbell-Bennett Ltd.* v. *Comstock Midwestern*, [1954] S.C.R. 207, [1954] 3 D.L.R. 481; *Sask. Power Corp.* v. *TransCanada Pipelines*, [1979] 1 S.C.R. 297, 88 D.L.R. (3d) 289; Hogg, *supra* note 32 at 582, 713.

tion.[46] Consequently, federal legislation may address all of their environmental effects.

In summary, La Forest J.'s discussion of interprovincial railway jurisdiction in *Oldman* provides the basis for an argument that where comprehensive jurisdiction exists by virtue of explicit or implied reference to an activity in a federal head of power, Parliament may fully regulate that activity from an environmental perspective. While that example has a prominent place in La Forest J.'s judgment, comprehensive jurisdiction does not provide the answer to the constitutional issue raised by the *Oldman* facts. The next section argues that dam-building on the Oldman River gives rise to only "restricted" federal environmental jurisdiction.

C. Restricted Federal Jurisdiction

This section identifies the basis for restricted environmental jurisdiction of Parliament. La Forest J.'s example of "navigation and shipping" legislation in *Oldman* and the Oldman River Dam itself are used as illustrations. Another example of restricted jurisdiction, based on constitutional jurisprudence regarding the *Fisheries Act*, is then noted.

Restricted federal jurisdiction exists where an activity has consequences for an area of federal competence. The extent of jurisdiction over the activity is restricted to addressing these consequences.

In *Oldman*, La Forest J.'s discussion of environmental legislation enacted under the federal "navigation and shipping" power illustrates restricted jurisdiction.[47] La Forest J. notes that "some provisions of the *Navigable Waters Protection Act* are aimed directly at biophysical environmental concerns that affect navigation."[48] For example, section 21 prohibits the throwing or depositing of specified materials and "like rubbish" which "is liable to interfere with navigation in any water, any part of which is navigable or that flows into any navigable water."[49] Section 22 prohibits throwing or depositing material which "is liable to sink to the bottom in any water, any part of which is navigable or that flows into any navigable water, where there are not at least twenty fathoms of water at all times."[50]

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[46]It might also be argued that although the word "pipelines" does not appear in s. 92(10)(a) of the *Constitution Act, 1867*, the words "other works and undertakings connecting the province with any other or others of the provinces, or extending beyond the limits of the province" constitute the naming of a category of activities which includes the construction and operation of interprovincial pipelines. The reference to interprovincial pipelines in this section could thus be seen, either directly, or by implication, as a reflection of the fact that the relevant language is less precise than the word "railways" but more precise than "peace, order and good government." Of course, whether interprovincial pipelines are viewed as being referred to directly or by implication in s. 92(10)(a), they are nonetheless subject to comprehensive federal jurisdiction.

[47]*Oldman, supra* note 1 at 66-67. This discussion is immediately following the interprovincial railway example but the fundamental distinction between the two is not clearly identified in the judgment.

[48]*Ibid.* at 66.

[49]*Ibid.* at 67.

[50]*Ibid.*

This exercise of federal environmental jurisdiction differs significantly from the interprovincial railway example. That example concerned legislation regulating the construction and operation of railways enacted under a railways head of power. In contrast, the *Navigable Waters Protection Act* provisions do not regulate activities of "navigation and shipping" but rather are directed at the "throwing or depositing" of materials which affects navigation and shipping.[51] Throwing or depositing — the activity having harmful environmental effects — is addressed in the legislation, but only in terms of environmental effects relevant to navigation. Federal environmental jurisdiction over throwing or depositing material into water is therefore restricted. In the railway example, all environmental effects of building and operating interprovincial railways may be regulated by federal legislation.

Construction of the Oldman River Dam is another activity under restricted federal environmental jurisdiction. Unlike interprovincial railways, dams are not referred to, directly or by implication, in any federal head of power.[52] Federal jurisdiction over dam-building is thus restricted to regulating this activity in terms of its consequences for federal heads of power.

This analysis of restricted jurisdiction is consistent with *Fowler* v. *R.*[53] and *Northwest Falling Contractors Ltd.* v. *R.*,[54] cited by La Forest J. in *Oldman*,[55] which are leading cases on federal environmental jurisdiction based on the fisheries power. In *Fowler*, subsection 33(3) of the *Fisheries Act*, which prohibited the deposit of certain material into waters frequented by fish, was found to be *ultra vires* Parliament. Martland J. stated:

> Subsection 33(3) makes no attempt to link the proscribed conduct to actual or potential harm to fisheries. It is a blanket prohibition of certain types of activity, subject to provincial jurisdiction, which does not delimit the elements of the offence so as to link the prohibition to any likely harm to fisheries. Furthermore, there was no evidence before the Court to indicate that the full range of activities caught by the subsection do, in fact, cause harm to fisheries. In my opinion, the prohibition in its broad terms is not necessarily incidental to the federal power to legislate in respect of sea coast and inland fisheries and is *ultra vires* of the federal Parliament.[56]

Northwest Falling, in contrast, upheld a *Fisheries Act* provision prohibiting the deposit of "deleterious" substances. The word "deleterious" provided the nexus between the environmentally harmful activity of depositing substances into water and federal fisheries jurisdiction. Federal jurisdiction over the activity of depositing material into water is thus restricted in that it can only regulate that activity in terms of its effects for fisheries (or other areas of federal responsibility).

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[51]Although the activity regulated is throwing and depositing material in navigable waters, the legislation is in "pith and substance" about "navigation and shipping" and thus is constitutionally valid under s. 91(10) of the *Constitution Act, 1867*.

[52]Dam-building is within provincial jurisdiction under the "property and civil rights" or "matters of a merely local or private nature" powers (ss. 92(13) and 92(16) of the *Constitution Act, 1867*).

[53][1980] 2 S.C.R. 213, 113 D.L.R. (3d) 513 [hereinafter *Fowler* cited to S.C.R.].

[54][1980] 2 S.C.R. 292, 113 D.L.R. (3d) 1 [hereinafter *Northwest Falling*].

[55]*Oldman*, *supra* note 1 at 68.

[56]*Supra* note 53 at 226.

The argument for restricted jurisdiction can be summarized by returning to the dam-building example. Parliament has authority with respect to dam-building if the dam has consequences for areas of federal jurisdiction such as fisheries, navigation or Indians and lands reserved for Indians.[57] This jurisdiction is based on these consequences, not on authority over the activity itself. As a result, the extent of jurisdiction is restricted to addressing these consequences. Put another way, legislation relating in "pith and substance" to fisheries, navigation and shipping, or Indians and lands reserved for Indians may have incidental[58] implications for dam-building because of the consequences of this activity.

To make restricted environmental jurisdiction operational in constitutional law, the courts must enforce the limits on Parliament's authority. The next section examines enforcement techniques.

D. *Enforcement of the Constitutional Limits on Restricted Jurisdiction*

This section identifies the problem of judicial enforcement of restricted jurisdiction. The "pith and substance" characterization of legislation and the doctrine of colourability are then reviewed. Both constitute means of ensuring that the limits of restricted jurisdiction are respected.

Restricted jurisdiction implies judicially enforceable limits on legislation. Federal regulation of an activity is restricted to addressing its environmental effects for areas of federal jurisdiction. However, the regulatory authority of Parliament is not restricted in the sense that the powers exercised are weak or ineffective. In the case of dam-building, for example, federal fisheries and navigation authority gives Parliament the power to veto or attach stringent conditions to certain projects. Given that a veto can be exercised, how can it be kept within constitutional bounds?

Continuing with the dam-building example, a federal veto should not be exercised on the sole ground of harm to riparian cottonwood forests, unless a significant link is established between the cottonwoods and fish or fish habitat, or another area of federal jurisdiction. Since Parliament has neither comprehensive jurisdiction over dam-building nor jurisdiction with respect to forests, it has no constitutional basis for regulating this environmental effect of the dam.

One method of judicial control is the "pith and substance" or "dominant or most important characteristic" analysis of legislation.[59] Using the dam and cottonwoods example, legislation regulating dam-building to protect the trees would be unconstitutional since it is not, in "pith and substance," concerned with a matter of federal jurisdiction. The situation is analogous to the finding in *Fowler* that the *Fisheries Act* provision regulating the depositing of certain

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[57]Jurisdiction over "Indians, and lands reserved for the Indians" is provided by s. 91(24) of the *Constitution Act, 1867*.

[58]Although "incidental" in constitutional terms, these powers are not insignificant since they confer on Parliament a potential veto over the project.

[59]*Oldman*, *supra* note 1 at 62-63. See Hogg, *supra* note 32 at 377-79 for a discussion of "pith and substance" characterization of laws.

material into water frequented by fish could not be upheld under the fisheries power since the depositing was not linked to harm to fisheries.

The doctrine of colourability is a second means of enforcing the limits on restricted jurisdiction. In *Oldman*, La Forest J. acknowledges the potential intrusion on provincial authority of restricted federal jurisdiction over dam-building:

> I am not unmindful of what was said by counsel for the Attorney General for Saskatchewan who sought to characterize the *Guidelines Order* as a constitutional Trojan horse enabling the federal government, on the pretext of some narrow ground of federal jurisdiction, to conduct a far ranging inquiry into matters that are exclusively within provincial jurisdiction.[60]

La Forest J. addresses this concern by stating that under the *Guidelines Order* the mandate given to a federal EA is only

> to examine matters directly related to the areas of federal responsibility affected. Thus, an initiating department or panel cannot use the *Guidelines Order* as a *colourable* device to invade areas of provincial jurisdiction which are unconnected to the relevant heads of federal power. [emphasis added][61]

The use of the word "colourable" to describe an expansion beyond the bounds of restricted jurisdiction has a particular constitutional meaning.[62]

The issue of colourability was discussed in *Reference Re The Upper Churchill Water Rights Reversion Act*.[63] The case involved a challenge to Newfoundland legislation expropriating the assets of a hydroelectric company operating on the Churchill River. The legislation was presented as a valid exercise of the provincial power to expropriate property. On the basis of evidence related to the intergovernmental dispute over the hydroelectric project, McIntyre J. found that the Act's subject matter was the power contract with Quebec and that it affected extraprovincial civil (*i.e.* contractual) rights, a matter beyond provincial jurisdiction. He found the legislation to be "a colourable attempt to interfere with the Power Contract ..."[64]

The legislation could have been viewed as unconstitutional on "pith and substance" reasoning; its "dominant and most important characteristic" was the power contract, not land expropriation. The reference to "colourable" is, however, a useful addition to the analysis. It makes clear that the form of legislation is not controlling of constitutional characterization and that judges will look behind form when enforcing constitutional limits.

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[60] *Oldman, ibid.* at 71-72.

[61] *Ibid.* at 72.

[62] The doctrine of colourability may also be used to invalidate federal legislation regulating activities subject to comprehensive jurisdiction, if that legislation is found to be a colourable device for intervening in areas of provincial jurisdiction. La Forest J. refers to colourability when discussing the range of environmental considerations which may be taken into account in the exercise of federal jurisdiction over interprovincial railways. He states that: "Absent a *colourable purpose* or a lack of *bona fides*, these considerations will not detract from the fundamental nature of the legislation. A railway line may be required to locate so as to avoid a nuisance resulting from smoke or noise in a municipality, but it is nonetheless railway regulation" [emphasis added] (*ibid.* at 69).

[63] [1984] 1 S.C.R. 297, 8 D.L.R. (4th) 1 [hereinafter *Churchill Falls* cited to S.C.R.]. This case is discussed in E. Edinger, Case Comment (1985) 63 Can. Bar Rev. 203.

[64] *Churchill Falls, ibid.* at 333.

Federal authorities could therefore be required to show that regulation of activities subject to restricted jurisdiction is reasonably linked to consequences for areas of federal authority. Controls on dam-building which are unconnected to federal heads of power, such as fisheries or navigation and shipping, would be struck down on "pith and substance" and colourability grounds. In this way, the distinction between restricted and comprehensive jurisdiction could be enforced. The next section considers four general implications of this distinction.

E. Division of Powers Implications of the Comprehensive-Restricted Distinction

This section reviews four general implications of the interpretation of *Oldman* presented in this paper. The first three of these implications concern the general relationship between constitutional heads of power and jurisdiction over activities which affect the environment. The fourth implication concerns the relative authority of Parliament and the provincial legislatures regarding the environment.

First, a head of power may give rise to either comprehensive or restricted jurisdiction depending on the activity at issue. For example, the federal "navigation and shipping" power supports comprehensive environmental jurisdiction over shipping activities and restricted jurisdiction over activities, such as the depositing of certain materials into navigable waters, which affect shipping and navigation. Equally, the federal "sea coast and inland fisheries" power supports comprehensive environmental jurisdiction over the operation of fisheries and restricted jurisdiction over activities that have consequences for fisheries.

Second, comprehensive federal jurisdiction over an activity does not preclude that activity from having a provincial (or "double") aspect.[65] If the activity has consequences for matters of provincial competence it would also be within restricted provincial jurisdiction.[66] For example, provincial legislation protecting forests might apply to the construction or operation of an interprovincial work or undertaking if that activity had consequences for forests. Comprehensive jurisdiction over an activity, therefore, does not imply exclusive jurisdiction.

Third, activities over which one level of government has only restricted jurisdiction will generally be within the comprehensive jurisdiction of the other.[67] For example, while the depositing of material into inland waters is

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[65]See Hogg, *supra* note 32 at 381-83 for a discussion of legislation having a "double aspect."

[66]It appears that a provincial law of general application applies to federal undertakings unless the law "affects a vital part of the management and operation of the undertaking." See *Quebec (Commission du Salaire Minimum)* v. *Bell Telephone Co.*, [1966] S.C.R. 767 at 774, 59 D.L.R. (2d) 145. The state of the law in this area is discussed by Hogg, *ibid.* at 395-403.

[67]Categories of activities could be defined so broadly that no one level of government has comprehensive jurisdiction over all aspects. An example is a mining "activity" or "project" which involves one activity under comprehensive provincial jurisdiction (*e.g.* mine construction) and another under comprehensive federal jurisdiction (*e.g.* construction of an interprovincial railway). This example is discussed below in the section entitled "*Oldman* and Environmental Assessment."

within restricted federal jurisdiction if it has consequences for fisheries, this activity is within comprehensive provincial jurisdiction by virtue of the "property and civil rights" power. For every activity which affects the environment, therefore, one level of government will usually have the broad authority over environmental effects described in La Forest J.'s interprovincial railway example.[68]

The fourth implication of this analysis concerns the general approach to federal and provincial environmental jurisdiction. There can be no presumption that the provinces enjoy a privileged constitutional authority over the "environment" as a subject matter. In fact, it is probably unhelpful to view the environment as a category for jurisdictional purposes. It may be, in practice, that the provinces possess the preponderance of environmental jurisdiction in Canada by virtue of provincial proprietary rights over land and natural resources[69] and jurisdiction under heads of power such as "property and civil rights," "matters of a merely local or private nature" and "municipal institutions."[70] There is no suggestion in *Oldman*, however, that federal environmental authority, whether comprehensive or restricted, should be curtailed out of deference to a more general provincial environmental responsibility.

The Court specifically notes that once federal jurisdiction over an activity is established, the fact that the legislation has incidental implications for areas of provincial responsibility is no constitutional bar.[71] Legislation regarding interprovincial railways, even if directed at their environmental consequences, remains in "pith and substance" railways legislation.[72] In addition, the Court explicitly rejects the argument that dam-building is a "provincial" activity which is immune from federal environmental controls.[73] In support of this point, La Forest J. quotes the following passage from Dickson C.J. in *Alberta Government Telephones* v. *Canada (Canadian Radio-television and Telecommunications Commission)*:[74]

> It should be remembered that one aspect of the pith and substance doctrine is that a law in relation to a matter within the competence of one level of government may validly affect a matter within the competence of the other. Canadian federalism has evolved in a way which tolerates overlapping federal and provincial legislation in many respects, and in my view a constitutional immunity doctrine is neither desirable nor necessary to accommodate valid provincial objectives.[75]

Thus, the environmental legislation of each level of government is of equal constitutional legitimacy, provided that it is grounded in the respective heads of power of Parliament or the provincial legislatures.[76]

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[68]The incentives to regulate all of these effects may, of course, be weak. Provinces, for example, might be unconcerned about the transboundary effects of activities. Nonetheless, a province's legislature has constitutional authority to regulate its industries so as to reduce or eliminate environmental effects in other provinces.

[69]*Constitution Act, 1867*, s. 109.

[70]Jurisdiction over "municipal institutions" is provided for in the *Constitution Act, 1867*, s. 92(8).

[71]*Oldman*, *supra* note 1 at 62.

[72]*Ibid.* at 69.

[73]*Ibid.* at 68.

[74][1989] 2 S.C.R. 225 at 275, 61 D.L.R. (4th) 193.

[75]*Oldman*, *supra* note 1 at 68-69.

[76]In the case of a conflict, federal legislation prevails by virtue of the doctrine of paramountcy. See Hogg, *supra* note 32 at 417-34.

The implications of the restricted/comprehensive distinction reviewed in this section can be summarized as follows. First, a single head of power may give rise to both comprehensive and restricted jurisdiction, depending on the activity to be regulated. Second, comprehensive jurisdiction is not exclusive jurisdiction. Third, every activity affecting the environment will be within the comprehensive jurisdiction of one level of government. Finally, the authority of Parliament and provincial legislatures to legislate for environmental protection is limited only when the activity to be regulated is subject to restricted jurisdiction.

F. Summary

The approach to federal environmental jurisdiction outlined above focuses on the relationship between particular heads of power and the activities to be regulated. A distinction between comprehensive and restricted federal jurisdiction was proposed, based on whether the activity which affects the environment is referred to directly or by implication within a head of federal power, or merely has consequences for a matter of federal jurisdiction. Specific examples of both comprehensive and restricted jurisdiction were also discussed. The pith and substance and colourability approaches were then outlined as means of judicially enforcing the limits on restricted jurisdiction. Finally, four general implications of the analysis were noted. In the next section, the analysis of *Oldman* is applied to federal environmental jurisdiction under the "peace, order and good government" power.

IV. *Oldman* and Federal Environmental Jurisdiction under "Peace, Order and Good Government"

There are three reasons for discussing *Oldman* and federal environmental jurisdiction based on the "peace, order and good government" (POGG) power. First, the "national concern" branch of POGG has been proposed as a basis for federal environmental jurisdiction.[77] The application of POGG thus raises the tension between federalism and a holistic approach to environmental protection. Second, the most significant recent Supreme Court of Canada statement on federal environmental jurisdiction prior to *Oldman* was *R.* v. *Crown Zellerbach Canada Ltd.*,[78] a case where the basis of federal jurisdiction was POGG. Third, another recent subject of EA litigation, the Rafferty-Alameda project, involves federal regulation of an international and interprovincial river.[79] The constitutional basis for the federal role in Rafferty-Alameda is POGG.

This section begins with an example of comprehensive environmental jurisdiction based on POGG. The *Crown Zellerbach* and Rafferty-Alameda cases are then used to illustrate restricted federal environmental jurisdiction.

Comprehensive environmental jurisdiction occurs when the activity which affects the environment is referred to directly or by implication in a federal head

[77]See *e.g.* Gibson, *supra* note 33 at 84-85; 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 at 656-60.

[78][1988] 1 S.C.R. 401, 48 D.L.R. (4th) 161 [hereinafter *Crown Zellerbach* cited to S.C.R.].

[79]*Supra* note 8.

of power. Since "peace, order and good government" identifies no activities directly, comprehensive jurisdiction requires judicial determination that activities are included within this power.

This situation is illustrated by the Supreme Court of Canada's identification of "aeronautics" as a matter of federal jurisdiction under POGG.[80] Aeronautics includes the design, building and operation of airports and the operation of aircraft and the air transport system. These activities are therefore included by implication in the "peace, order and good government" power and are subject to the comprehensive environmental jurisdiction of Parliament.

POGG can also give rise to restricted environmental jurisdiction, as illustrated by *Crown Zellerbach*.[81] The issue was whether the dumping of woodwaste into British Columbia coastal waters could be regulated under the federal *Ocean Dumping Control Act*.[82] The Court split 4 to 3, with the majority holding that the legislation applied on the grounds that "[m]arine pollution, because of its predominantly extra-provincial as well as international character and implications, is clearly a matter of concern to Canada as a whole."[83] The majority also concluded that marine pollution has sufficient scientific unity and distinctiveness to make it a suitable matter for federal POGG jurisdiction.[84] The minority found the legislation to be inapplicable to dumping in British Columbia waters where no extraprovincial effects could be demonstrated. While the minority left considerable scope for federal environmental legislation under POGG, the presence of interjurisdictional externalities was central to its definition of "national concern."[85]

Whatever reasoning is adopted, Parliament would have only restricted environmental jurisdiction. On the majority approach, federal jurisdiction over activities, such as the dredging and logging operations in *Crown Zellerbach*, is restricted to their environmental consequences for the marine ecosystem (as well as consequences for any other areas of federal competence). If the minority theory of POGG jurisdiction were accepted, federal environmental jurisdiction over these activities would be restricted to addressing their extraprovincial effects. In neither case could comprehensive environmental jurisdiction, as exists over aeronautics or interprovincial railways, be exercised by Parliament.

A similar analysis applies to the Rafferty-Alameda case. As in *Oldman*, the activity in question is dam-building. The river affected, however, crosses pro-

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[80] *Johannesson* v. *West St. Paul (Rural Municipality of)*, [1952] 1 S.C.R. 292, [1951] 4 D.L.R. 609. See Hogg, *supra* note 32 at 584-88.

[81] *Crown Zellerbach* has been analyzed elsewhere. See A.R. Lucas, Case Comment on *R.* v. *Crown Zellerbach Canada Ltd.* (1989) 23 U.B.C. L. Rev. 355; J.B. Hanebury, "Environmental Impact Assessment in the Canadian Federal System" (1991) 36 McGill L.J. 962 at 1011-17; S.A. Kennett, *Managing Interjurisdictional Waters in Canada: A Constitutional Analysis* (Calgary: Canadian Institute of Resources Law, University of Calgary, 1991) at 199-204.

[82] S.C. 1974-75-76, c. 55, now *Canadian Environmental Protection Act*, R.S.C. 1985 (4th Supp.), c. 16, Part VI.

[83] *Crown Zellerbach*, *supra* note 78 at 436.

[84] *Ibid.* at 436-38.

[85] Kennett, *supra* note 81 at 203-04.

vincial and international boundaries. The source of federal decision-making authority, which triggers the EA responsibility under EARP, is the *International River Improvements Act*.[86] The constitutional basis for this Act is POGG, on the theory that international relations are matters of national concern and projects such as dams, which affect the flow of rivers into the United States, may have important international implications. Jurisdiction is thus restricted to addressing the dam's consequences in areas of federal competence.[87]

The exact scope of the restriction is, however, open to debate following *Crown Zellerbach*. Based on the majority reasoning, it might be argued that, like "marine pollution," "international river pollution" or "environmental effects on international rivers" are distinct matters of national concern having "predominantly extra-provincial as well as international character and implications"[88] and a necessary scientific unity and distinctiveness, based on the ecological unity of a drainage basin. On this analysis, restricted federal environmental jurisdiction would support regulation of all environmental implications of the dam for the international river.[89]

The minority reasoning in *Crown Zellerbach* would lead to a different result. If the subject matter of POGG jurisdiction is confined to the transboundary consequences of the dam, federal environmental jurisdiction would be restricted to addressing those consequences and would not extend to purely intraprovincial effects on the river ecosystem.

The application of *Oldman* to federal environmental jurisdiction based on POGG shows that this head of power can support both comprehensive and restricted environmental jurisdiction. The scope of regulation under restricted jurisdiction depends on how the matter of national concern is defined.

V. *Oldman* and Environmental Assessment

In assessing the implications of *Oldman*, the final topic to be addressed is EA. *Oldman* is one illustration of the centrality of EA in the debate about environmental protection and sustainable development in Canada. EA is promoted as a proactive policy instrument for anticipating and minimizing or eliminating the negative environmental consequences of activities.[90] The benefits of pre-

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

[87] An argument might be made that, like aeronautics, dam-building and other major works on international (and perhaps interprovincial) rivers are matters of "national concern" and by necessary implication included within POGG. If this argument were accepted, federal environmental jurisdiction over these activities would, of course, be comprehensive. This significant allocation of jurisdiction to Parliament would appear, however, to go beyond that necessary to protect the legitimate federal interest in regulating the transboundary effects of these projects.

[88] *Crown Zellerbach, supra* note 78 at 436.

[89] It is far from clear that the Supreme Court of Canada would adopt this approach given the implications for provincial jurisdiction. The same reasoning, if applied to projects on interprovincial rivers, would lead to a considerable increase of federal authority. For discussion and criticism of the majority judgment in *Crown Zellerbach*, see Lucas, *supra* note 81 at 358-63, 368-69; Kennett, *supra* note 81 at 203-04.

[90] Canadian Environmental Assessment Research Council, *Evaluating Environmental Impact Assessment: An Action Prospectus* (Ottawa: Department of Supply and Services, 1988) at 1;

venting environmental damage rather than attempting to clean up after the fact, and the need to integrate economic and environmental decision-making if sustainable development is to be achieved, point to a significant role for EA. In addition, EA has been the subject of considerable litigation in Canada[91] and is seen as an effective weapon by environmentalists and other groups concerned with the consequences of proposed developments. There is also important new federal legislation on the subject.[92]

This section examines federal EA in light of the *Oldman* analysis. The discussion is organized around four points. First, where Parliament has comprehensive jurisdiction, EA is unproblematic. Second, in cases of restricted jurisdiction, the *Oldman* reasoning and constitutional logic imply limitations on federal EA. Third, the constitutional limitations on EA in areas of restricted jurisdiction are to some extent inconsistent with the basic objectives of EA. Fourth, reconciling the logic of federalism with the logic of EA requires a cooperative "political" approach rather than relying on a purely "constitutional" definition of federal and provincial jurisdiction.

The first point is that EA is unproblematic in the case of comprehensive jurisdiction over an activity since federal authority extends to all environmental and other effects. Parliament can therefore require that all of these effects be taken into account when regulating the activity. La Forest J.'s references in *Oldman* to a holistic approach to EA and the broad latitude for EA implied by his discussion of interprovincial railways illustrate EA under comprehensive environmental jurisdiction.

The second point centres on the implications of restricted jurisdiction for federal EA. The issue is whether a federal EA of a project over which Parliament has only restricted jurisdiction must be limited to an investigation of the environmental effects of the project for areas of federal authority. There are indications in *Oldman* that the references to holistic EA do not mean that wherever Parliament is entitled to act on environmental questions, the scope for EA is unbounded. These indications are in La Forest J.'s general discussion of EA jurisdiction and his specific comments on a federal EA for the Oldman River Dam.

At a general level, La Forest J. states:

> Because of its auxiliary nature, environmental impact assessment can only affect matters that are "truly in relation to an institution or activity that is otherwise within [federal] legislative jurisdiction;" see *Devine* v. *Quebec (Attorney General)*, [1988] 2 S.C.R. 790 at p. 808. Given the necessary element of proximity that must exist between the impact assessment process and the subject matter of federal jurisdiction involved, this legislation can, in my view, be supported by the particular head of federal power invoked in each instance.[93]

Brundtland Report, *supra* note 5 at 222; *CCREM Report*, *supra* note 12 at 3, 5. For a discussion of the limitations of EA, see P.S. Elder & W.A. Ross, "How to Ensure that Developments are Environmentally Sustainable" in J.O. Saunders, ed., *The Legal Challenge of Sustainable Development* (Calgary: Canadian Institute of Resources Law, University of Calgary, 1990) at 124.

[91]*Supra* note 8.

[92]*Supra* note 31.

[93]*Oldman*, *supra* note 1 at 72.

While the precise constraint imposed by this passage depends on what it means for EA to "affect matters," it is clear that EA must be closely linked to heads of federal jurisdiction.[94]

Significantly, La Forest J.'s specific references to the topics to be addressed by a federal EA in *Oldman* are invariably limited to the particular areas of federal competence which are affected by the dam.[95] For example, La Forest J. states:

> In the case of the *Guidelines Order*, Parliament has conferred upon one institution (the "initiating department") the responsibility, in the exercise of its decision-making authority, for assessing the environmental implications on all areas of federal jurisdiction potentially affected. Here, the Minister of Transport, in his capacity of decision maker under the *Navigable Waters Protection Act*, is directed to consider the environmental impact of the dam on such areas of federal responsibility as navigable waters, fisheries, Indians and Indian lands, to name those most obviously relevant in the circumstances here.[96]

As noted above,[97] La Forest J. specifically addresses the argument that the *Guidelines Order* might be used by the federal government "to conduct a far ranging inquiry into matters that are exclusively within provincial jurisdiction."[98] His response is that the EA mandate extended only to the examination of "matters directly related to the areas of federal responsibility affected" with the result that the *Guidelines Order* could not operate as "a colourable device heads of federal power."[99] The "constitutional imperatives"[100] of restricted juris-

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[94] In *Devine* v. *Quebec (A.G.)*, [1988] 2 S.C.R. 790 at 807-08, 55 D.L.R. (4th) 641, the Supreme Court of Canada stated that:

> provincial legislative jurisdiction with respect to language is not an independent one but is rather "ancillary" to the exercise of jurisdiction with respect to some class of subject matter assigned to the province by s. 92 of the *Constitution Act, 1867*. ... We adopt the following passages of the opinion of Professor Hogg [*Constitutional Law of Canada*, 2d ed. (Toronto: Carswell, 1985) at 804-05] as a statement of the law on this question, *i.e.*, that:
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>> ... language is not an independent matter of legislation (or constitutional value); that there is therefore no single plenary power to enact laws in relation to language; and that the power to enact a law affecting language is divided between the two levels of government by reference to criteria other than the impact of law upon language. On this basis, a law prescribing that a particular language or languages must or may be used in certain situations will be classified for constitutional purposes not as a law in relation to language, but as a law in relation to the institutions or activities that the provision covers.
>>
>> ... for constitutional purposes language is ancillary to the purpose for which it is used, and a language law is for constitutional purposes a law in relation to the institutions or activities to which the law applies.
>
> In order to be valid, provincial legislation with respect to language must be truly in relation to an institution or activity that is otherwise within provincial legislative jurisdiction.

[95] La Forest J. mentions effects on fisheries, navigation and Indians and lands reserved for Indians. See *Oldman*, *supra* note 1 at 39, 44, 67, 73.

[96] *Ibid.* at 73.

[97] *Supra* notes 60-61 and accompanying text.

[98] *Oldman*, *supra* note 1 at 71-72.

[99] *Ibid.* at 72.

[100] *Ibid.* at 37.

diction are thus central to La Forest J.'s discussion of the extent of EA in *Oldman*.

The constitutional logic of this approach is relatively clear. Since Parliament has no head of power which supports legislation in "pith and substance" about dams, its regulatory authority is limited to addressing the consequences of dams for areas of federal responsibility. This limitation applies to the decision-making process informing the exercise of that authority. While Parliament can, of course, veto the dam, respect for the limits of restricted jurisdiction requires that it only do so for reasons related to its areas of authority.

The technique to enforce these limits is the doctrine of colourability. As a purely administrative matter, *Oldman* suggests that the federal government can gather information about the environmental impact of a project.[101] If the full range of environmental effects enters into the decision-making process through a comprehensive EA, however, there is a risk that the exercise of regulatory authority in an area of restricted jurisdiction will be colourable. Reliance on an EA to veto a project where no negative consequences for matters of federal jurisdiction are shown or to attach to conditions unrelated to areas of federal jurisdiction would constitute regulation through the EA process which would not be permissible by direct legislative prohibition. It is suggested that such federal action would be colourable and unconstitutional.

This constitutional conclusion, however, raises the third point: the tension between the objectives of EA and the limitations resulting from restricted jurisdiction. The problem is that EA, as a decision-making process, goes beyond a mere inquiry into the environmental consequences of an activity. It can, and perhaps should, involve a "holistic" assessment of the entire range of a project's effects.[102]

Consider the example of a dam with consequences for federal fisheries. Assume that, unlike the present situation,[103] the federal EA process is triggered by the requirement of a licence under the *Fisheries Act* to construct the dam. Given that Parliament has only restricted jurisdiction, how can a holistic assessment be conducted to guide the exercise of a potential veto over the project? While in some cases it may be possible to conclude that the effects on fisheries are unacceptable in any circumstances and therefore that the dam should not be built, it is also possible that the decision-maker would want to examine the overall benefits and costs of the project. Perhaps a limited impact on fisheries would be justified if the dam had significant flood-control or irrigation benefits, but not if the dam's effectiveness for irrigation would be undermined by increased evaporation and it also destroyed important wetlands.

A federal EA which examined only fisheries would not provide the basis for this type of decision-making. However, once the EA considers the full range of environmental effects, it risks transforming restricted jurisdiction (based on

[101] *Ibid.* at 73-75.

[102] A "holistic" assessment would consider the short-term and long-term consequences of the activity and would take into account both quantifiable and non-quantifiable costs and benefits.

[103] *Oldman*, *supra* note 1 at 48-50.

the dam's consequences for fisheries) into *de facto* comprehensive jurisdiction, enabling the federal government to base its refusal to issue a *Fisheries Act* licence on its view of the dam's costs in areas of provincial jurisdiction.

This dilemma highlights the difficulty of environmental regulation in a federal state. Since the "environment" is so pervasive, it necessarily cuts across categories in the division of powers. The resulting fragmentation, however, impedes the comprehensive approach which environmental issues demand.

While the distinction between comprehensive and restricted jurisdiction works reasonably well in defining each level of government's regulatory authority over activities which affect the environment, difficulties arise when a government undertakes an EA for an activity over which it has restricted environmental jurisdiction. It is, of course, possible to conduct a limited EA to ascertain a project's effects on fisheries, for example, and on this basis decide whether these effects are acceptable and what, if any, conditions should be attached if the project is approved. This limited investigation is, however, incompatible with the holistic assessment which is a major objective of EA as part of a decision-making process.

The fourth point in this section is to identify two possible responses to this dilemma. Both responses require a degree of political cooperation. They demonstrate that while the division of powers may make holistic EA awkward in certain circumstances, the Constitution does not preclude this decision-making technique.

First, since one level of government will generally have comprehensive jurisdiction for every activity, that government could be relied upon to undertake a full EA. Applying this response to the dam example, for instance, the province would have authority to regulate the project in terms of all environmental effects, without constitutional constraints on its EA inquiry. The provincial EA would be the only forum for a holistic assessment of the project, and the federal government could participate by making submissions regarding fisheries and other areas of federal jurisdiction. Parliament would retain legislative authority to regulate the fisheries implications of the dam and could conduct its own investigations and set its own standards with respect to the impact on fish and fish habitat.

There are two disadvantages to this response. First, it is inadequate where a project involves two or more activities, one subject to comprehensive provincial jurisdiction and the other to comprehensive federal jurisdiction. A mining development might raise this problem.[104] The province would have comprehensive jurisdiction over mine construction and operation and the construction of service roads within its territory. If an interprovincial or international slurry pipeline or railway were required to transport the ore, however, activities associated with this aspect of the development would be within comprehensive federal jurisdiction. As a result, the mining project as a whole, including both the

[104] The following fact situation parallels the open-pit copper mine which has been proposed for the Tatshenshini Valley in British Columbia.

mine and the pipeline or railway, would not be within the comprehensive jurisdiction of a single level of government. No one government could conduct a holistic EA of the entire project. A second disadvantage of relying on the level of government having comprehensive jurisdiction to conduct the EA is the possible conflict of interest if that government, or one of its agencies, is the proponent of the project.

The second response is a joint federal-provincial EA of activities where both levels of government have jurisdictional interests. A joint assessment would confront all regulatory issues at once and could address possible trade-offs which might be ignored by a narrowly based inquiry. It could therefore generate a common information base for all regulatory decisions. It would even be possible, through interdelegation, to confer decision-making authority on a joint panel.[105] A holistic EA could thus be undertaken by both levels of government without the risk that EA would become a colourable instrument of wide-ranging environmental regulation in the case of restricted jurisdiction.

In addition to the constitutional point, joint EA has administrative and practical advantages. It would minimize cost and duplication for governments, proponents of projects and intervenors. A joint panel might be more independent than one appointed by a single government, especially if that government is the project's sponsor. Cooperation could extend to the establishment of a permanent federal-provincial body to conduct EA. A federal-provincial EA agency could develop expertise and a reputation for impartiality and would, even if subject to certain political checks, constitute a significant improvement over current EA panels.[106]

To conclude, the constitutional constraint on the use of EA in the exercise of federal regulatory authority depends on whether jurisdiction over the activity in question is comprehensive or restricted. Comprehensive jurisdiction permits full EA. If jurisdiction is restricted, however, constitutional logic dictates a restricted scope for EA to avoid the colourable use of decision-making authority to regulate aspects of the project beyond federal control. The problem with this approach is that the logic of EA makes it difficult to conduct an adequate holistic assessment on the basis of such a limited inquiry. The available responses are reliance on the government having comprehensive jurisdiction to conduct the EA or the establishment of a joint EA process, possibly through interdelegation.

VI. Conclusion: Federalism and the Environment

This paper has examined environmental jurisdiction under the Canadian Constitution in light of *Oldman*. After reviewing the facts and lower court decisions in *Oldman* and the issues dealt with by the Supreme Court of Canada, the approach to federal environmental jurisdiction adopted by the Court was explored using a distinction between comprehensive and restricted jurisdiction.

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[105]For a discussion of interdelegation, see Hogg, *supra* note 32 at 353-58.

[106]The idea for this type of joint panel originates with A.W. Scarth, Q.C., Thompson Dorfman Sweatman, Winnipeg (personal correspondence). Mr. Scarth acted as counsel in the Rafferty-Alameda litigation.

This distinction was also applied to POGG and its implications for EA were considered. The discussion leads to two general conclusions.

First, the broader the view taken of the environment, the less logical it is to consider "environment" as a relevant category for defining constitutional jurisdiction. If the environment is the biophysical and socio-economic context within which human activities occur,[107] environmental considerations are pervasive in the regulation of all activities. Decision-making must take account of interrelationships within ecosystems and the integration of environmental and economic planning necessary for sustainable development. As the *Brundtland Report* argued, environmental considerations must enter into all decision-making.

The constitutional implication of this perspective is the recognition that authority to regulate environmental effects is ancillary to jurisdiction over activities which cause these effects. As a result, both levels of government in Canada have a strong constitutional grounding for environmental legislation and a holistic approach to regulation is possible in the case of comprehensive jurisdiction. When jurisdiction over the activity is restricted, however, there are constitutional limits on environmental regulation and EA.

The second conclusion is that federal-provincial cooperation is required if EA is to achieve its full potential when both levels of government have jurisdictional interests regarding an activity. As part of a decision-making process, EA involves considering the broad range of environmental consequences of a proposed project and making a holistic assessment. Arguably, EA is most effective where it is most comprehensive. Given the pervasiveness of environmental effects and the division of legislative authority inherent in federalism, EA inevitably encounters constitutional constraints at a certain point. These constraints limit the scope of a government's EA when it has only restricted jurisdiction over an activity.

It is suggested that the appropriate response to this constitutional constraint is intergovernmental cooperation to establish joint and impartial EA. The Constitution sets limits on the operation of Canada's political institutions but it cannot ensure that they operate in an optimum fashion. Improved environmental decision-making, including the effective use of EA, requires an innovative approach to institutional arrangements at the political level. If Canada is to meet the challenge of achieving sustainable development, innovation of this type is essential.

[107]La Forest J. suggests that both elements could be addressed when considering environmental quality in an EA. See *Oldman*, *supra* note 1 at 36-37.