

Constitutional Determinants of Interprovincial Energy Governance

Measuring the Impacts of Energy Infrastructure

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Agenda For Presentation

1. Overview of Chapter
2. Canadian Energy Federalism on Paper
3. Concluding Thoughts

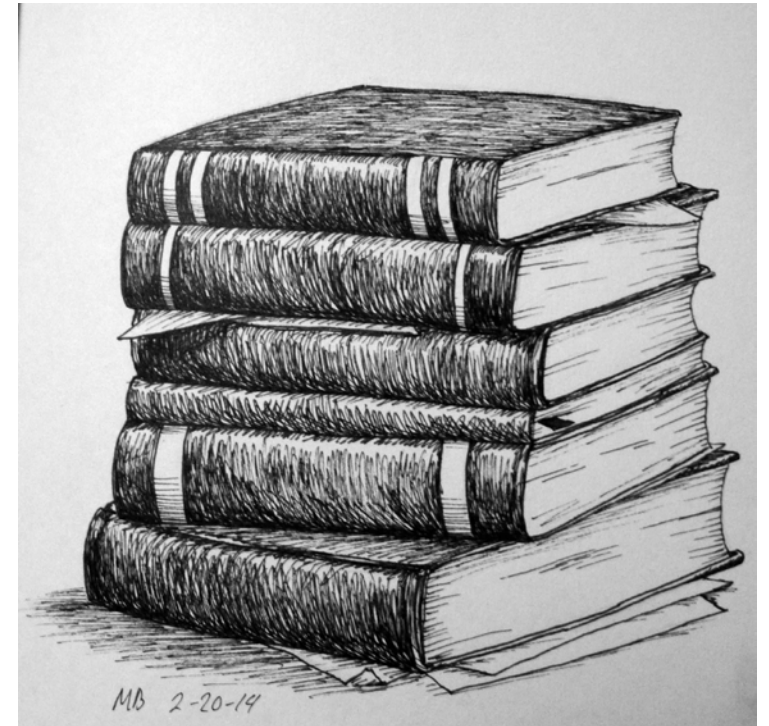


Part 1

Overview of Chapter

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- I. Introduction
- II. The Stakes: Canadian Energy Politics
- III. **Canadian Energy Federalism on Paper**
- IV. Canadian Energy Federalism in Practice
- V. Conclusion

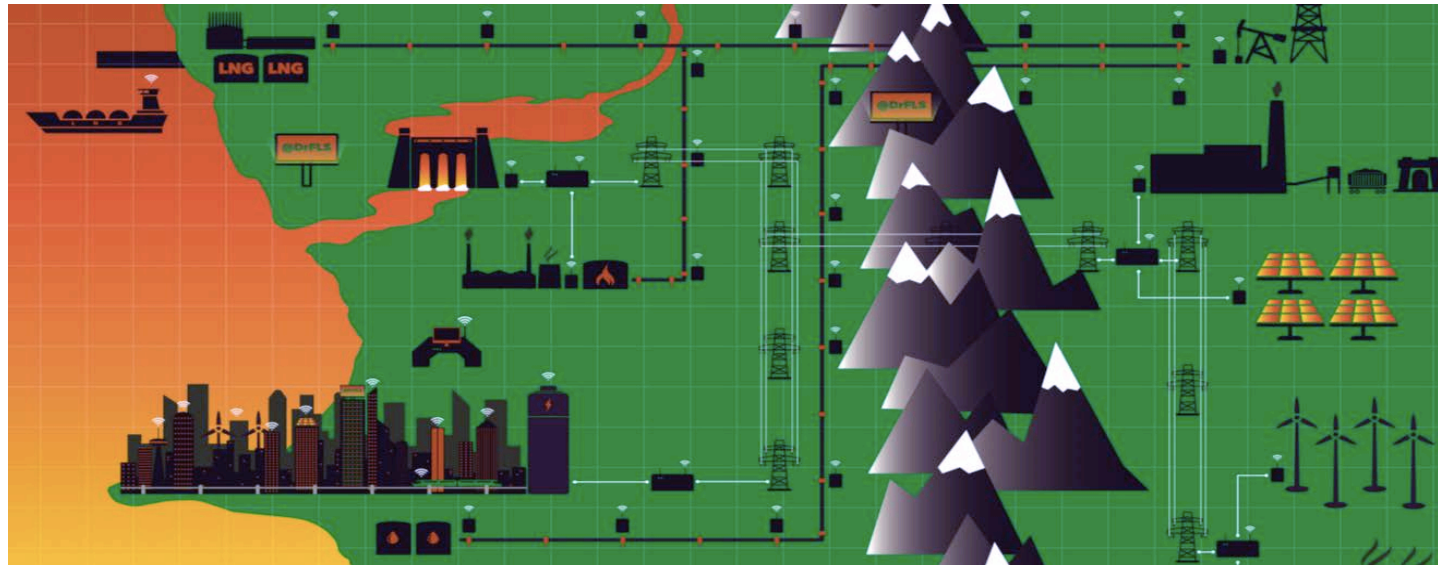


Part 2

Canadian Energy Federalism

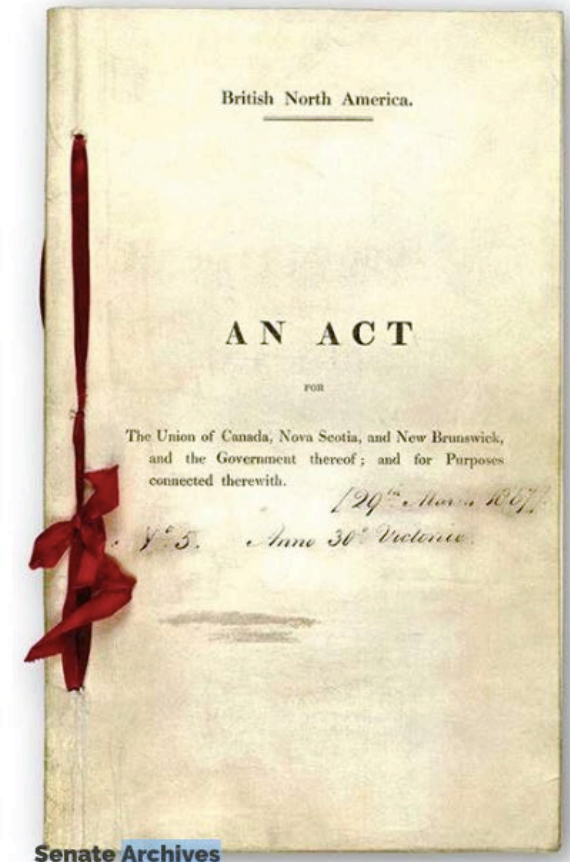
Canadian Energy Federalism

- The evolving compact between governments
 - Designating the authority over:
 - Energy production, transport, and consumption



Legal Elements of Canadian Energy Federalism

1. The Exclusivity Principle
2. Heads of Power
3. Pith and Substance Analysis
4. Double Aspects Doctrine
5. Ancillary Powers Doctrine
6. Doctrine of Interjurisdictional Immunity
7. The Doctrine of Federal Paramountcy
8. The Principle of Cooperative Federalism
9. Indigenous Peoples and Federalism



The Exclusivity Principle

- **Part VI of the Canadian Constitution** grants the exclusive authority to make laws within two respective spheres:
 - **S. 91 (Federal Powers)**
 - “the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated”
 - **S. 92 (Provincial Powers)**
 - “In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated”

Heads of Power For Energy Regulation (Federal)

- S. 91(Preamble)– Peace, Order, and Good Government
- S. 91(2)– The Regulation of Trade and Commerce
- S. 91(3)– Taxation
- S. 91(10)– Navigation and Shipping
- S. 91(12)– Sea Coast and Inland Fisheries
- S. 91(24)– Indians, and Lands reserved for the Indians
- S. 91(27)– Criminal Law
- S. 91(29)– Subjects Expressly Excepted in s.92

Heads of Power For Energy Regulation (Federal)

- **S. 91(29)** – The Subjects expressly excepted are:
 - **S. 92(10)(a)**– Works and Undertakings Extending Beyond the Limits of the Province
 - **S. 92(10)(c)**– Works Declared by Parliament of Canada to be for the general Advantage of
 - Canada or
 - Two or More Provinces

Heads of Power For Energy Regulation (Provincial)

- S. 92(2) – Direct Taxation
- S. 92(5) – Management and Sale of the Public Lands
- S. 92(8) – Municipal Institutions
- S. 92(9) – Licenses for Raising Provincial Revenues
- S. 92(10) – Local Works and Undertakings (Note: exceptions)
- S. 92(13) – Property and Civil Rights
- S. 92(15) – Penalties for Enforcing Provincial Law
- S. 92(16) – Matters of a Local or Private Nature

Heads of Power For Energy Regulation (Provincial)

- 92A(1)(a) – exploration for non-renewable natural resources
 - 92A(1)(b) – development, conservation and management of non-renewable natural resources
 - 92A(1)(c) – development, conservation and management of sites and facilities for the generation and production of electrical energy
-
- **Note:** Exclusive provincial powers are limited to “in the province”

Pith and Substance Analysis

- **Rule:** If a law is not in “pith and substance” a matter under a head of power, the law will have no force or effect
 - **Consider:** *Alberta (Attorney General) v. Moloney*, [2015] 3 SCR 327 and *Reference re Employment Insurance Act (Can.) ss.22 and 23*, [2005] 2 SCR 669

Double Aspects Doctrine

- **Rule:** Both levels of government “ can adopt valid legislation on a single subject” as long as the matter of each statute falls under a respective head of power
- **Note:** Applied during the pith and substance analysis
 - **Consider:** *Canadian Western Bank v. Alberta* , [2007] 2 SCR 3

Ancillary Powers Doctrine

- **Rule:** A validly enacted law can have incidental or ancillary effects on a matter of the other respective sphere of authority
- **Note:** Applied during the pith and substance analysis
 - **Consider:** *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 SCR 641

Ancillary Powers Doctrine

- **Test:** Does the provision amount to a “serious” intrusion of the other sphere of authority?
 1. **Serious intrusion:** if the provision is both incidental to its regulatory scheme and necessary for such scheme to be effective, it is allowable (high bar)
 2. **Minor intrusion:** if it has a “rational, functional connection” (i.e., “sufficiently integrated”) to the regulatory scheme, it is allowable (low bar)

- **Consider:** *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 SCR 641

Double Aspects Doctrine

- **Note:** Until 1989, the “necessarily incidental” test was applied in all cases (i.e., a high bar). The result has been:
 1. Greater uncertainty as to Constitutional authority
 2. Judicial division as to what constitutes a serious intrusion
- **Consider:** *Canada (AG) v Quebec (AG)* [1947] AC 33; *General Motors of Canada Ltd. v. City National Leasing* , [1989] 1 SCR 641; and *Reference re Assisted Human Reproduction Act*, [2010] 3 SCR 457.

Doctrine of Interjurisdictional Immunity

- **Rule:** “Interjurisdictional immunity is premised on the idea that... each level of government enjoys a basic unassailable core of power on which the other level may not intrude”
 - **Consider:** *Tsilhqot’in Nation v. British Columbia*, [2014] 2 SCR 257, 2014 SCC 44

Doctrine of Interjurisdictional Immunity

- **Two-Part Test:**

1. Does the contested legislation “touch on a protected core of power” of the other sphere of authority?
2. Would the application of the contested law “significantly trammel or impair the other’s power”?

- **Consider:** *Tsilhqot’in Nation v. British Columbia*, [2014] 2 SCR 257, 2014 SCC 44

Doctrine of Interjurisdictional Immunity

- **Note:** Interjurisdictional immunity has never been used to “read down” a Federal law
 - **Consider:** *Canadian Western Bank v. Alberta* , [2007] 2 SCR 3

The Doctrine of Federal Paramountcy

- **Rule:** “[T]he federal law prevails when there is a genuine inconsistency between federal and provincial legislation, that is, when the operational effects of provincial legislation are incompatible with federal legislation.”
 - **Consider:** *Alberta (Attorney General) v. Moloney*, [2015] 3 S.C.R. 327

The Doctrine of Federal Paramountcy

- **Test:** “A conflict will arise in one of two situations, which form the two branches of the paramountcy test:
 1. There is an operational conflict because it is impossible to comply with both laws, or
 2. Although it is possible to comply with both laws, the operation of the provincial law frustrates the purpose of the federal enactment”

- **Consider:** *Alberta (Attorney General) v. Moloney*, [2015] 3 S.C.R. 327

The Principle of Co-operative Federalism

- **Rule:** When applying Federal Paramountcy, a court must interpret statutes in a manner that, if at all possible, preserves the otherwise valid statutory provision(s) of a provincial law
 - **Consider:** *Québec (Attorney General) v Canada (Attorney General)*, 2015 SCC 14, [2015] 1 SCR 693; and *Rogers Communications Inc. v. Châteauguay (City)*, [2016] 1 S.C.R. 467

Indigenous Peoples and Federalism

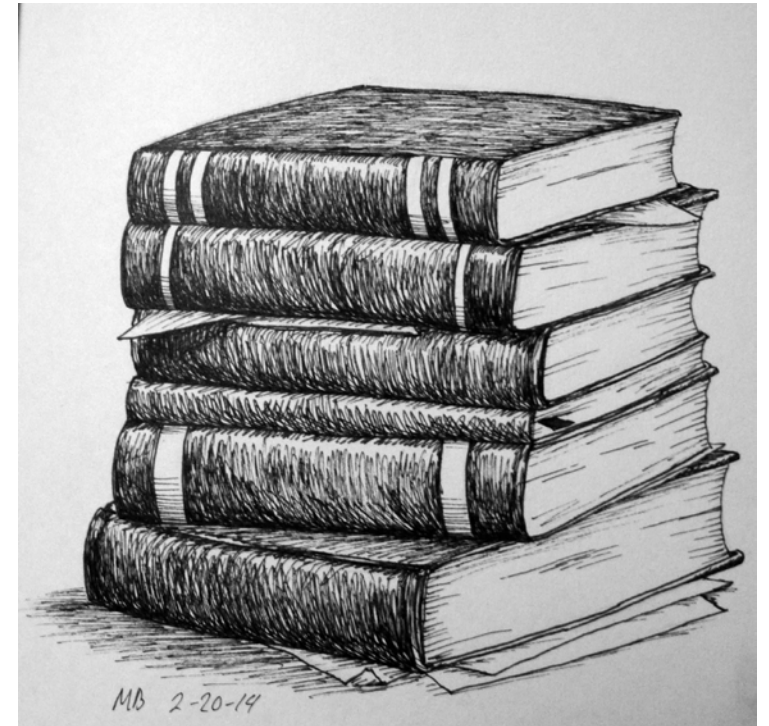
- **Note:** Professor Mascher will be focusing on this topic in the next presentation
 - **Coming up:** “The Relationship between Energy Infrastructure, the Public Interest, and Constitutionally Protected Indigenous Rights” by Professor Sharon Mascher

Part 3

Concluding Thoughts

What's Missing From My Chapter Presentation?

- I. Introduction
- II. The Stakes: Canadian Energy Politics
- III. **Canadian Energy Federalism on Paper**
- IV. Canadian Energy Federalism in Practice
- V. Conclusion



What's missing?

- **Part 2 (Politics):** Adjudicative bodies are having difficulty in rendering decisions on energy issues because of a dearth of legislative direction on:
 1. Indigenous Rights
 2. Environmental Protection
 3. Energy Policy
- **Part 3 (On Paper):** This paper details the above -mentioned Constitutional determinants within the context of energy regulation

What's missing?

- **Part 4 (In Practice):** Examples illustrate two key points:
 1. Canadian Energy Federalism does not always play out as it was planned on paper
 2. Canadian Federalism has become more uncertain over time, because Constitutional law is, and will be, in a state of flux for the foreseeable future

Thank You



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Chapter

- “The Determinants of Canadian Energy Federalism”, in Trevor Tombe and Jennifer Winter, eds., *Measuring the Contribution of Energy Infrastructure: A Practical Guide*