



Annual Legal Update: Federal/Provincial Turf Wars Over Environmental Regulation

Presented to: Environmental Managers Association of BC

January 31, 2024

Outline

- 1) The Supreme Court of Canada's (SCC's) decision in the *Impact Assessment Act* Reference case – mostly outside federal jurisdiction (“*ultra vires*”).
- 2) The Federal Court's ruling on Canada's plastics regulation – *ultra vires*.
- 3) Other recent federal/provincial conflicts over environmental governance.

Background: The Division of Powers

- As between the federal Parliament, and the provincial legislatures, the division of power to legislate is set out in the Canadian Constitution.
- *The Constitution Act, 1867* – division of powers, primarily in sections 91 and 92, a few others
- *The Constitution Act, 1982* – includes the Canadian Charter of Rights and Freedoms, and also recognizes and affirms the Rights of the Aboriginal Peoples in Canada
 - **35 (1)** The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

Background: The Division of Powers

Canada's Legislative Authority

91 ... 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; and for greater Certainty, ...the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

1. Repealed.
- 1A. The Public Debt and Property.End note(45)
2. The Regulation of Trade and Commerce.
- 2A. Unemployment insurance.End note(46)
3. The raising of Money by any Mode or System of Taxation.
4. The borrowing of Money on the Public Credit.
5. Postal Service.
6. The Census and Statistics.
7. Militia, Military and Naval Service, and Defence.
8. The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of Canada.
9. Beacons, Buoys, Lighthouses, and Sable Island.
10. Navigation and Shipping.
11. Quarantine and the Establishment and Maintenance of Marine Hospitals.
12. Sea Coast and Inland Fisheries.
13. Ferries between a Province and any British or Foreign Country or between Two Provinces.
14. Currency and Coinage.
15. Banking, Incorporation of Banks, and the Issue of Paper Money.
16. Savings Banks.
17. Weights and Measures.
18. Bills of Exchange and Promissory Notes.
19. Interest.
20. Legal Tender.
21. Bankruptcy and Insolvency.
22. Patents of Invention and Discovery.
23. Copyrights.
24. Indians, and Lands reserved for the Indians.
25. Naturalization and Aliens.
26. Marriage and Divorce.
27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.
28. The Establishment, Maintenance, and Management of Penitentiaries.
29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

132 ... Powers ...for performing the Obligations of Canada or of any Province thereof, as Part of the British Empire, towards Foreign Countries, arising under Treaties between the Empire and such Foreign Countries.

Provincial Legislative Authority

92 In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

1. Repealed.
2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.
3. The borrowing of Money on the sole Credit of the Province.
4. The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers.
5. The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.
6. The Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province.
7. The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.
8. Municipal Institutions in the Province.
9. Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.
10. Local Works and Undertakings other than such as are of the following Classes:
 - a. Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province:
 - b. Lines of Steam Ships between the Province and any British or Foreign Country:
 - c. Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.
11. The Incorporation of Companies with Provincial Objects.
12. The Solemnization of Marriage in the Province.
13. Property and Civil Rights in the Province.
14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.
15. The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.
16. Generally all Matters of a merely local or private Nature in the Province.

92A: Laws respecting non-renewable natural resources, forestry resources and electrical energy

Background: Key Federal Powers

The Parliament of Canada has the power to legislate regarding:

- Navigation and Shipping
- Sea Coast and Inland Fisheries
- The Criminal Law
- Interprovincial works and undertakings
- “Indians, and Lands reserved for the Indians”
- Laws for the Peace, Order, and Good Government of Canada (“POGG”) – national concern doctrine
- Imperial Treaties (s. 132)
- Works for the General Advantage of Canada (s. 92(10(c)))

Background: Key Provincial Powers

The provincial legislatures have the power to legislate regarding:

- Local Works and Undertakings (other than ...) (s. 92(10))
- Property and Civil Rights in the Province
- The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon
- Municipal Institutions in the Province
- Generally all Matters of a merely local or private nature
- Laws in relation to exploration, development, conservation, and management of non-renewable natural resources, forestry resources and electrical energy (s. 92A)

Background: Where does the “Environment” fit?

- Shared jurisdiction.
- As the SCC has just reaffirmed in the *IAA* decision:
 - The environment is an “aggregate of matters” that does not comfortably fit within Canada’s division of powers.
 - Environmental management “cuts across many different areas of constitutional responsibility”
 - Shared federal and provincial responsibility for environmental impact assessment is “neither unusual nor unworkable”. Rather, it is a central feature of environmental decision making in Canada.

Background: Where does the “Environment” fit?

- Shared jurisdiction, watched over by the courts. Some key cases:
 - 1980: *Fowler v The Queen*
 - 1988: *R. v. Crown Zellerbach Canada Ltd.*
 - 1992: *Friends of the Oldman River Society v. Canada (Minister of Transport)*
 - 1997: *R. v. Hydro-Québec*
 - 2019: *Reference re Environmental Management Act (British Columbia)* (BCCA)
 - 2021: *References re Greenhouse Gas Pollution Pricing Act (GGPPA Ref.)*
 - 2023: *Reference re Impact Assessment Act*

Shared Jurisdiction and “Co-operative” Federalism

- The environment, and other regulated subjects, could have multiple aspects, some of which may be federal and some provincial.
- This tension is common in other federations also (e.g. USA, AUS). Not uniquely a Canadian problem.
- Canadian courts use several legal doctrines to analyze the constitutionality of legislation.
- There isn't necessarily one, indisputably right answer - reasonable people can disagree, based on what they see as the “dominant characteristic” (or “pith and substance”) of the legislation.
 - E.g. in the IAA Reference, SCC justices split 5:2

The *Impact Assessment Act* Reference: the SCC's decision and next steps

The *IAA Reference*: Overview

- Canada has a long history of federal EA legislation: EARPGO, *CEAA 1992*, *CEAA 2012*, *IAA*.
- Concern about Canada's ability to approve projects in a timely manner. We have the natural resources but struggle to get projects approved quickly enough to benefit from business/economic cycles.
- The federal *Impact Assessment Act* (IAA) was enacted on June 21, 2019, followed in August 2019 by the *Physical Activities Regulations* (a.k.a. Projects List)
- The Government of Alberta initiated a "Reference" to the Alberta Court of Appeal (ABCA), seeking the ABCA's opinion on whether the IAA and the *Regulations* are constitutional.
- In May 2022, the ABCA found the IAA and the *Regulations* are unconstitutional (*ultra vires*). The federal government appealed.
- On October 13, 2023, a majority of the SCC (5) found most of the IAA and the *Regulations* are unconstitutional. Two (2) justices dissented in part, finding it constitutional in entirety.
- The federal government has promised to amend the IAA, and has issued policy guidance on how the IAA will operate in the interim.
- At that time there were 23 projects in the federal impact assessment process under the IAA.

IAA Reference: The IAA

- The IAA “is essentially two acts in one” (para. 32):
 1. The scheme for “designated projects”.
 2. The scheme for activities on federal lands or carried out/funded by federal authorities outside Canada - a less significant part of the IAA - was determined to be constitutional, and is not our focus today.
- The “designated projects” scheme (paras. 34-49):
 - Applies to projects designated via the *Regulations* (the “Project List”) or by the Minister. In theory, designated projects are identified based on their potential for “effects within federal jurisdiction”.
 - Three phases for the review:
 - Planning (including screening decision)
 - Impact Assessment
 - Public Interest Decision (with conditions and compliance monitoring)

IAA Reference: the Division of Powers analysis

- Courts use a two-step process to determine whether legislation lies within the authority of the legislature that enacted it: (i) Characterization and (ii) Classification.
 1. Characterization Step:
 - Court must consider the law's *purpose* and *effects* in order to identify its “**pith and substance**” or “dominant characteristic”.
 - Reasonable people may arrive at different answers, as occurred among the SCC justices in this decision.
 2. Classification Step:
 - Court then determines which constitutional “head(s) of power” the law's pith and substance falls into.
 - Sometimes classification is tricky, e.g. for environmental matters.

IAA Reference: 1. Characterization

- SCC Majority - Purpose: The designated project scheme of the *IAA*
“articulates a broad array of purposes, including protecting the environment and fostering sustainability; satisfying Canada’s environmental obligations; assessing and regulating the broad effects of certain physical activities, such as effects on health, social and economic conditions; facilitating the participation of Indigenous peoples and the public; and establishing an efficient and transparent process.” (para 91)
- SCC Majority - Effects: The designated project scheme of the *IAA*
“establishes a comprehensive information-gathering and regulatory process. From the designation stage through to the ultimate public interest determination, the *IAA* places broad temporary holds on the designated project. Following the public interest determination, the *IAA* continues to regulate the designated project with a view to mitigating or preventing its effects.” (para 108)

IAA Reference: 1. Characterization (cont.)

- The Majority noted two general practical effects of the scheme (paras. 105-107):
 1. The scheme results in delays of indeterminate duration - a prohibition on carrying out a designated project until allowed under the IAA - and the timeline for a decision can be extended by the federal government.
 2. The impact assessment process requires the Agency, the project proponent, federal authorities and other implicated jurisdictions to expend resources.
 - The Majority was skeptical of the claims regarding reduction of red tape, and the “one project, one assessment” concept e.g. via Substitution.

IAA Reference: 1. Characterization (cont.)

- SCC Majority: The pith and substance of the “designated projects” scheme is: ***to assess and regulate designated projects with a view to mitigating or preventing their potential adverse environmental, health, social and economic impacts.*** (para. 109)

IAA Reference: 2. Classification

- Classifying environmental legislation is difficult, as the environment is an “aggregate of matters” that can touch on several areas of jurisdiction (para. 114).
- Environmental assessment of physical activities may have a “double aspect” – meaning that it can be regulated from both a federal perspective and a provincial one. A particular project may be regulated by both the federal and provincial governments, but each government must stay within its own jurisdiction (paras. 120-121).
- The Majority described two types of heads of power for environmental matters:
 - Powers related to **activities**. E.g. federal powers over navigation and shipping, or interprovincial railways & pipelines; and provincial powers over local works, property and civil rights in the province, and matters of a local nature (para. 124).
 - Powers related to **management of a resource**. E.g. federal power over fisheries; and provincial powers over non-renewable natural resources, forestry resources, and electrical energy (para. 125).
- Some powers can cover both activities & resources, depending on the facts. (para 126)

IAA Reference: 2. Classification (cont.)

- Where the federal government has jurisdiction to legislate in respect of a particular **activity**, it has broad discretion to regulate that activity and its effects (para. 131).
- But where the federal government does not have the jurisdiction to regulate the *activity*, it is limited to regulating only the federal aspects of the activity, such as the *impacts* of the activity on federal heads of power (para. 131).
- The SCC Majority found that the “designated project” scheme treats all designated projects in the same way, regardless of whether the federal government’s jurisdiction comes from the activity or the impacts (para. 132).

IAA Reference: 2. Classification (cont.)

- The federal government relied on 4 heads of power for the “designated project” scheme: 1) sea coast & inland fisheries; 2) “Indians, and Lands reserved for the Indians”; 3) imperial treaties; & 4) the national concern branch of the POGG power. (para 133)
- The SCC Majority rejected the federal government’s position, and concluded that there are two overarching problems with “designated project” IA scheme:
 1. Even if you assume that the “effects within federal jurisdiction” are all federal, they do not, in reality, drive the scheme’s decision-making functions. (paras. 135, 141-178)
 2. The so-called “effects within federal jurisdiction” are not what they claim to be (paras. 136, 179-189). They are defined too broadly.
- As a result “the scheme invites the federal government to make decisions in respect of projects that it has no jurisdiction to regulate, at least from the perspective of the heads of power upon which it relies.” (para 138)

IAA Reference: 2. Classification (cont.)

- 1st overarching issue: the **screening decision** and the **ultimate decision** are not sufficiently rooted in the possibility of adverse federal effects.
 - **Project designation stage** – not problematic to designate projects that seem primarily provincial in nature, such as mining or oil & gas. Not an enclave of exclusivity. May need to engage in assessment to know if there may be federal effects. (paras. 142-147)
 - **Screening decision stage** – decides whether the designated project will require an IA. The Agency must take into account the possibility of adverse effects within federal jurisdiction **and an open-ended list of other factors, all of seemingly equal importance**. Result: an IA could be required for reasons other than impacts on areas of federal jurisdiction. (paras. 148-154) **Problem!**
 - **Impact assessment stage** – it is fine for the information gathering and assessment to consider matters that are not federal in nature. Here, Assessment ≠ Decision-making. (paras. 157-161)
 - **Public-interest decision** - must consider the adverse effects within federal jurisdiction **and other factors in s. 63**, not all of which are federal. The problem is **how those factors are used**. This transforms a determination of whether adverse federal effects are in the public interest, into a determination of whether the project as a whole is in the public interest.” (para. 166) **Problem!**

IAA Reference: 2. Classification (cont.)

- 1st overarching issue (cont.)
 - **Public-interest decision** (cont.)
 - The central problem is not the s. 63 factors themselves, but rather the manner in which they drive the decision-making. (para. 169)
 - S. 63 allows the decision maker to **blend their assessment of adverse federal effects with other adverse effects** that are not federal. **The non-federal effects can become the underlying basis for the conclusion that the federal effects are not in the public interest.** (para. 169)
 - This is different from CEAA 2012, where the question was whether the adverse federal effects were “justified in the circumstances”. Non-federal aspects could justify approval of a project despite its adverse federal effects. Non-federal aspects were on the positive side of the ledger. The SCC says this was fine, because “it is self-evident that adverse federal effects, considered in isolation, would rarely (if ever) be in the public interest.” (paras. 174-175)
 - In the IAA, non-federal aspects could be used on “either side of the ledger” (positive or negative) – as a justification for approval, or to amplify concerns and give a negative decision.
 - The problem is less salient for *activities* that fall within federal jurisdiction, but the IAA doesn’t distinguish between projects with federal activities vs. projects with federal effects.

IAA Reference: 2. Classification (cont.)

- 2nd overarching issue: the so-called “**effects within federal jurisdiction**” are defined too broadly, and go “far beyond” the limits of federal legislative jurisdiction. (paras. 179-189)
- The over-breadth of the defined term manifests in 2 ways:
 1. The definition is central to the scheme’s decision-making functions (paras. 181-182)
 - **Project designation stage** – allows projects to be designated based on potential adverse effects that can’t be federally regulated. (Could lead to designation for the wrong reason.)
 - **Screening decision stage** – SCC didn’t identify a specific problem flowing from the definition.
 - **Impact assessment stage** – SCC didn’t identify a specific problem flowing from the definition.
 - **Public-interest decision** – allows Minister to find the adverse defined effects not to be in the public interest; or to impose conditions in relation to the defined effects (not entirely federal).
 2. The defined effects form the basis of the s. 7 prohibition against carrying out a designated project (without passing through the IAA successfully) if it would have any of the defined effects (no matter how insignificant). Goes beyond federal power. (paras. 180,

IAA Reference: 2. Classification (cont.)

- 2nd overarching issue (cont.):
- SCC Majority gave an example of the over-breadth of the defined “effects within federal jurisdiction”: the inclusion of “a change to the environment” that would occur in a province other than the one where the project is carried out, i.e. **interprovincial changes to the environment**. E.g. GHG emissions that cross provincial borders.
 - SCC Majority described this as an “astonishingly” broad clause, capturing “an unlimited range of interprovincial environmental changes” (paras. 183-184)
 - Government of Canada said this falls under the POGG power – “national concern”
 - SCC Majority says the defined interprovincial effects aren’t specific enough as to type and scale of effect. The IAA prohibits even insignificant or positive interprovincial changes to the environment. (para 186)
 - SCC Majority says GC didn’t apply the SCC’s recently clarified “national concern” test (in the *References re GHG Pollution Pricing Act – GGPPA Reference*) (para 189)

IAA Reference: the SCC's conclusion

- SCC Majority: The “designated project” scheme cannot be classified under federal jurisdiction. The scheme and the associated *Regulations* are unconstitutional (*ultra vires*).
- SCC Majority said it wasn't close: the scheme “plainly overstepped the mark” (para. 216). The dissenting justices characterized the scheme differently, & found it to be constitutional.
- SCC Majority: The IA scheme must be consistently focused on federal matters. (para 206)
 - Projects ought to be designated based on their *potential* effects on areas of federal jurisdiction.
 - The Agency's screening decision must be rooted in the possibility of adverse federal effects.
 - The public interest decision must focus on the acceptability of the adverse federal effects.
 - The scheme must ensure that, where the **activity** itself doesn't fall within federal jurisdiction, the decision does not veer toward regulating the project as a project, but regulating the federal effects – the regulated effects must align with federal legislative power.

IAA Reference: what's next?

- The SCC's decision was released on October 13, 2023. The SCC Majority rules.
- However, a Reference case does not lead the court to “strike down” the legislation. Instead, the Court only provides an “opinion”, and so the *IAA* remains in force, but courts won't enforce the current designated projects regime.
- On October 26, 2023, the federal government announced that it would move quickly to amend the *IAA*. It has not yet done so, and there have been no updates as to progress. The federal government also provided guidance on the application of the *IAA* in the interim. Key parts of the interim guidance include:
 - The Agency will assess all projects currently under assessment and provide an “opinion” on whether they impact areas of federal jurisdiction;
 - The Minister's discretionary authority to designate projects will be paused until amended legislation is in force;
 - The Agency remains prepared to provide an opinion on whether a full impact assessment is warranted.

Canada's Regulation of Plastics: the Federal Court's ruling, and what now?

Background: Federal plastics regulation

- In June 2019, Canada announced its intention to “ban harmful single-use plastics and to hold companies responsible for plastic waste”. The news release said that the measures “will be grounded in scientific evidence and will align, where appropriate, with similar actions being taken in the European Union and other countries.”
- The news release included quotes from the Prime Minister and key Ministers:
 - Justin Trudeau: *“Canadians know first-hand the impacts of plastic pollution, and are tired of seeing their beaches, parks, streets, and shorelines littered with plastic waste.”*
 - Catherine McKenna: *“We’ve all seen the disturbing images of fish, sea turtles, whales, and other wildlife being injured or dying because of plastic garbage in our oceans. Canadians expect us to act. That’s why our government intends to ban harmful single-use plastic products where science warrants it.”*
- Legal observers wondered: what legislative power(s) will the Government rely on?

Background: Federal plastics regulation

- The courts have recognized that the federal government does have *some* authority to regulate substances that cause environmental pollution.
- **Criminal Law Power:** In *R v Hydro Quebec* (1997), the Supreme Court of Canada ruled that the federal government can regulate “toxic” substances under the *Canadian Environmental Protection Act* (CEPA)
 - A law will be supported by the Criminal Law power where it has three elements: (1) a criminal law purpose, (2) a prohibition, and (3) a penalty. The SCC has ruled that the protection of the environment is an appropriate Criminal Law purpose.
- **POGG Power:** The Court has also ruled that the federal government can regulate environmental pollution that is sufficiently “single, distinct, and indivisible” and there is a provincial inability to regulate effectively. For example, marine pollution (*R. v. Crown Zellerbach Canada Ltd*, 1988) and greenhouse gas emissions (*Reference re Greenhouse Gas Pollution Pricing*, 2021).

Background: Federal plastics regulation

- In May 2021, Cabinet issued an order adding **Plastic Manufactured Items (PMI)** to the list of “toxic” substances in Schedule 1 of the *Canadian Environmental Protection Act (CEPA)*.
 - **PMI:** “any items made of plastic formed into a specific physical shape or design during manufacture.... They can include final products, as well as components of products.” **This is very broad!**
- The listing of PMI allowed Cabinet to create the *Single-use Plastic Prohibition (SUPPR)*, which will ultimately ban the manufacture, import, export, and sale of many types of Single-use Plastics. *SUPPR* came into force in December 2022 but are being implemented in a series of steps. In December 2023, the *SUPPR* ban was extended to the sale of checkout bags, cutlery, foodservice ware, stir sticks, and straws. (“Toxic” items?)
 - Some provinces have been moving in parallel with *SUPPR*. For example, B.C. has been imposing its own prohibitions on single use plastics on the same time frame.

RPUC v Canada

- Cabinet’s order adding PMI to the list of “toxic” substances was challenged in court on the basis that it was “unreasonable” and unconstitutional: see *Responsible Plastic Use Coalition v. Canada (Environment and Climate Change)*, 2023 FC 1511 (***RPUC v Canada***).
- While the litigation over the Cabinet order was taking place, the federal government enacted legislation repealing and then re-enacting Schedule 1 of *CEPA*. This somewhat protected the listing of PMI from the reach of the Court.
- *SUPPR* have also been challenged in court, in a separate proceeding.

RPUC v Canada: CEPA and “toxics”

- Toxic substances are regulated under Part 5 of *CEPA*. “Toxic” is defined in s. 64:
 - 64 For the purposes of this Part and Part 6, except where the expression “inherently toxic” appears, a substance is toxic if it is entering or may enter the environment in a quantity or concentration or under conditions that
 - a) have or may have an immediate or long-term **harmful effect on the environment or its biological diversity**;
 - b) constitute or may constitute a **danger to the environment** on which life depends; or
 - c) constitute or may constitute a **danger in Canada to human life or health**
- The intention of this provision is to capture only substances that are toxic “in a real sense”.
- S. 90 of *CEPA* provides that where Cabinet is “satisfied” that a substance is toxic, it can make an order adding the substance to the list of toxic substances in Schedule 1.
- Examples on the list include: Chlorobiphenyls, Asbestos, Lead, Chlorofluorocarbons, benzene.
 - Compare PMI: “**any items made of plastic** formed into a specific physical shape or design during manufacture....”

RPUC v Canada: Unreasonable Order

- So, did Cabinet have a reasonable basis for being satisfied that PMI are “toxic”? No. The FC ruled that the evidence before Cabinet did not provide a reasonable basis for it to conclude that *all* PMI are “toxic”. Problems:
 - Inadequate evidence: Cabinet had relied almost entirely on a federal Science Assessment – a literature review – that was “not intended to quantify the risks of plastic pollution”, was “not intended to substitute for chemical risk assessment”, and noted “significant data gaps”. In fact, the Assessment only noted a small number of specific examples where a few specific types of plastic pollution had caused harm to the environment.
 - Refusal to investigate: Federal Ministers refused repeated requests to establish a Board of Review under *CEPA* to examine the nature and extent of the danger posed by PMI before issuing the order.
 - Self-contradiction: A Government Discussion Paper released alongside the Assessment clearly acknowledged that some PMI are not harmful.
- The Court emphasized that Cabinet’s conclusion that PMI was toxic “was ***devoid of consideration of the extreme variability in the shape and type of plastics used to make items and of plastic’s variable properties***”.
- The Court also concluded that the refusal to establish a Board of Review was unreasonable.

RPUC v Canada: Unconstitutional Order

- The Federal Court also ruled that Cabinet did not have the jurisdiction to issue the order adding PMI to the list of toxic substances.
- The federal government tried to support the order on the basis of its Criminal Law power. The Court ruled that the Order did not have a Criminal Law purpose.
- The protection of the environment is undoubtedly an appropriate criminal law purpose; however, **Cabinet had “no reasonable apprehension” that *all* PMI are harmful to the environment**, undermining the supposed connection between the order and this purpose.

*“[PMI] is a broad category of items that include items with no reasonable apprehension of environmental harm. **The broad and all-encompassing nature of the category of PMI poses a threat to the balance of federalism** as it does not restrict regulation to only those PMI that truly have the potential to cause harm to the environment.”*

Federal plastics regulation: what's next?

- Because the federal government enacted legislation repealing and re-enacting Schedule 1, PMI remains listed as toxic even though Cabinet's order was set aside. However, this listing now has a major asterisk.
- The listing of PMI as toxic is the legal grounding for the *SUPPR*. As a result, the regulations now have a major asterisk.
- The federal government has appealed the Federal Court's decision.
- The legal challenge to the *SUPPR* was on pause while the *RPUC v Canada* case was playing out. No steps have been taken since the Court's decision in November. Unless the federal government's appeal is successful, or something else changes, the *SUPPR* are at real risk of being struck down. But they remain in force for now.

Federal plastics regulation: new registry

- In addition to *SUPPR*, the federal Government is also pursuing the creation of a Federal Plastics Registry under *CEPA*. This step does not necessarily require that PMI be listed under Schedule 1, and so it is not subject to the same asterisk as the *SUPPR*.
- On December 30, 2023, the Government released a Notice of Intent to establish the Registry. This kicked off a 45-day consultation period, which will end on February 13, 2024.
- Once the Registry is in place, producers of plastic products will be required provide the Minister of the Environment with information about the lifecycle of plastics in Canada.

Other Federal/Provincial conflicts over environmental jurisdiction

Other flash points to watch in 2024

- New methane regulations, announced December 4, 2023.
- New regulatory framework for GHG emissions from the oil and gas sector (cap and trade), announced December 7, 2023.
- The carbon tax:
 - Many provinces have been up in arms since the federal government revised its policy in late October 2023 to exempt home heating oil – largely to the benefit of Atlantic Canada – but did not exempt other heating fuels commonly used in other provinces.
 - Saskatchewan has suggested that it will not collect the tax on natural gas going forward – a direct and purposeful breach of federal law. This would be an extraordinary precedent. Saskatchewan will make its final decision in February, and other provinces will be watching.

Conclusion

- This concludes our presentation on:
 1. The Impact Assessment Act reference case
 2. The Federal Court's ruling on Canada's plastics regulation
 3. Other federal/provincial conflicts over environmental governance
- Questions?



THANK YOU FOR LISTENING



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