Federalism and the Environment:

A Look at Jurisdiction through the lens of the Decommissioning of a Railroad in Algonquin Provincial Park

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> As North America's only transcontinental railroad, CN is committed to conducting its business in a manner that protects the environment and ensures the safety and health of its employees and the public. The company takes all practical steps to prevent or abate all forms of pollution which result from its operations and to minimize its requirements for energy. (Statement from the CN website).[1]

Introduction

Canada is a federal state, which means governmental power is distributed between a central authority (federal Parliament) and regional authorities (provincial Legislatures).[2] The main division of these powers is set out in s. 91 and 92 of the *Constitution Act, 1867*.[3] Not all potential subjects are set out explicitly in s.91 or 92, however the flexible wording of the sections have allowed the courts to create analogies. The result is a judiciary active in on-going constitutional interpretation. With respect to the environment, the courts have held that it is too general a topic to fall exclusively within any listed power.[4] The Supreme Court of Canada (SCC) has characterized the environment as *sui generis* (legally unique) in this respect:

> 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 (para 85).[5]

The courts have concluded that due to its broad and unique character, the environment must therefore be legislated and regulated through one of the listed heads of power.[6]

This characterization of the environment arguably has the potential to lead to a cooperative approach with respect to environmental regulation and protection. The current reality however, is a piecemeal approach that allows governments to point fingers at each other, while avoiding responsibility. One such example is railroad decommissioning. According to the Minister of Transportation[7] over 18,471 route-kilometres of track have been decommissioned in Ontario since 1980. Nevertheless, there is currently no specific federal legislation to guide this

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[1] Online: CN Official Web site <http://www.cn.ca/safetyenvironment/environment/en_seenvironment.shtml>.
[2] Peter W. Hogg, *Constitutional Law of Canada*, Student Ed. (Toronto, Carswell, 2002) at 104.
[3] *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.
[4] *Friends of Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3,7 C.E.L.R. (N.S.) 1 at para. 63-64, 70 (*Friends of the Oldman River*)
[5] *Ibid.* at para 85.
[6] Joseph F. Castrilli, "The Ontario Forest, Land Use, and Mining Initiatives of 1999 and The Management of Public Land in Canada in The 21st Century: One Step Forward, Two Steps Back" 43 C.E.L.R. (N.S.) 11
[7] Personal Letter to Algonquin Eco Watch, May 20 2002

process. This is due to the fact that the federal government sees the point of abandonment as the point at which their jurisdiction ends, i.e. once the abandonment is approved under the requisite legislation "the rail line ceases to be a line of rail." Their claim therefore is that jurisdiction over the decommissioning process which is post abandonment falls to the "same provincial land laws and municipal zoning by-laws and ordinances" that apply to the lands abutting the rail right-of-way. In actual reality, rail companies have been left to decommission their lines with little interference or regulation from either level of government. Generally this means the removal of significant assets occurs (rail steel, ties, spikes and metal) while the remediation of the liabilities (spill sites and contaminates) does not. This essay will explore this issue in detail, through a specific case example involving the decommissioning of a rail line within the North Eastern section Algonquin Park Provincial Park (see Appendix A).

The purpose of this essay is to summarise the issues surrounding the decommissioning process of this particular railway, ultimately addressing both the ownership and jurisdictional issues over the land. The essay will begin with an overview of the History of the right-of-way, followed by a section dedicated to the review of the main on-going environmental issues. These sections will serve as a backdrop to legal analysis of the ownership and jurisdictional issues, ultimately demonstrating that 1) The current ownership of the land is not as straight forward as CN contends and 2) despite what the Federal government says, they do have jurisdiction over the decommissioning process of the railroad under the division of powers.

A Brief History of the Algonquin Railway

Algonquin Provincial Park (hereafter Algonquin *or* the Park) is the oldest and largest Provincial Park in Ontario, protecting over 7,700 square kilometres of natural environment.[8] The land that now forms Algonquin was formally set-aside in 1893.[9] The railway right-of-way that cuts across the North-Eastern portion of the Park has an equally long history, that begins with the incorporation of a company called the James Bay Railway Company (JBR) in 1895[10] and 'ends' with it's abandonment by Canadian National Railway (CN) in 1995. The complicated history of

[8] Michael W.P. Runtz. *The Exploreer's Guide to Algonquin Park.*(Toronto: Stoddart Publishing, 1993) at 1.
[9] *Ibid.*

this small piece of rail right-of-way is important, as it links those most recently involved with the land, to those who originally constructed the railway. The history of the line is summarised below.

The Early Years: The James Bay Railway Company

Upon incorporation, the JBR was authorized by 'special act'[11] to construct a line from Parry Sound in the Province of Ontario to the French River, heading north on the east side of Lake Wahnapitae eventually reaching James Bay.[12] Plans were submitted for the proposed lines, and at various dates between January 26th, 1904 to December 14th 1904 all of the requirements "of the several Railway Acts" applicable to the pre-construction were met.[13] Shortly thereafter, under *The Canadian Northern Act, 1904*, The JBR was amalgamated with the Northern Extension Railway and the Canadian Northern Railway Company (CNoR).[14] On July 20, 1905 an act that was officially titled *The James Bay Railway Act, 1905* was assented to, authorizing the construction of additional lines.[15] Section 3.(b) of this Act set out the portion of the line that was eventually surveyed and built within the boundaries of Algonquin Park:

> 3. The Company may construct the following lines of railway:
> (b.) from a point on or near the French river, thence easterly, passing through or near Ottawa and Hawkesbury, to Montreal, branching on Montreal island to enter Montreal from both the north-east and south-west[16]

This *The James Bay Railway Act, 1905* was enacted under the authority of the 1903 incarnation of the *Railway Act* as seen in s.6 below:

> Subject to the provisions of sections 281 to 283, both inclusive, of *The Railway Act, 1903*, the Company (referring to JBRC) may enter into agreements with the Quebec, New Brunswick and Nova Scotia Railway Company for any of the purposes specified in the said section 281, and the

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[10] 58 & 59 Victoria (Canada), 1895, c.50
[11] As defined by the *Railway Act* of the time, "Special Act", when used with reference to a railway, means: any Act under which the company has authority to construct or operate a railway, or that is enacted with special reference to such railway, whether heretofore or hereafter passed, and includes (a) all such Acts. At the time, all time extensions, line grants etc. were made via special act.
[12] *Reference re: Canadian Pacific Railway Co. Act* (Canada) (1905), 36 S.C.R. 42 at para 5
[13] *Ibid.* at para 8.
[14] *The Canadian Northern Act, 1904*, bonds; amalgamation with Northern Extension Ry. and James Bay Ry., 1904, c. 60
[15] *An Act respecting the James Bay Railway Company*. 4-5 Edward VII. Chap. 110. [1905] 337. s.1.
[16] *Ibid.* at s.3(b).

> Company may lease its lines or leased lines, or any of them, to the Canadian Northern Railway Company, or give that company running powers there over.[17]

The act did not further specify the route the line should take, nor did it grant any specific expropriation power to the company. As seen in Section 6, statutory provision was made in s.6 for the lease of lines specifically to the Canadian Northern Railway Company (CNoR). Also of importance is s.2 of the same act, which dictated that JBR was permitted to change its name at a later date, with the permission of the Governor in Council. S.2 clearly dictated that such change of name would not "in any way impair, alter or affect the rights or liabilities" of the said company, or effect any "suit or proceeding now pending, or judgement existing either by, or in favour of, or against the Company."[18] This is important because in 1907 the JBR officially became the "Canadian Northern *Ontario* Railway Company (CNOR)," the Ontario portion of what was to become Canada's third transcontinental rail line under the Canadian Northern Railway Company (CNoR).[19]

The Canadian Northern Railway Expansion & The Birth of CN

CNoR was incorporated in 1899 as an alternative to the Canadian Pacific Railway (CPR), providing service to areas of land in the prairies that had been ignored by CPR.[20] A series of political events at the end of the century, fuelled by national optimism, led to permission being granted to both the CNoR and the Grand Trunk Railway to create two additional transcontinental railway lines across Canada. Accordingly, CNoR embarked on a massive construction and purchasing campaign, aimed at stitching together a line from coast to coast.[21] From 1905 on, all CNoR properties within Ontario, including JBR, were built under or merged with the CNoR banner with the ultimate goal of forming a transcontinental route. Thus the original JBR route,

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[17] *ibid.* at s.6.
[18] *Ibid.* at s.2.
[19] *The Canadian Northern Ontario Railway Act, 1906-7*, name changed to "Canadian Northern Ontario Railway Company"; 1895, c. 50, new s. 5; lines authorized; time extended, 1907, c. 72 Online: The Department of Justice <http://laws.justice.gc.ca/en/privlaw/78970/2907.html>,
[20] Online: Railroad Histories <http://www.globalserve.net/~robkath/railcnor.htm>.
[21] *Ibid.*

was renamed the CNOR and was integrated into the main CNoR line running through southern Ontario.[22]

The CNoR line began transcontinental service in 1915 but unfortunately for CNoR, competition between the various companies across the country had outpaced population and demand. Having been dependant on the sale of Federal and Provincially backed government guaranteed bonds in American and overseas markets, to fund many of their initiatives, the situation became critical with the onslaught of the war.[23] With financial markets essentially frozen, the company needed significant financial help. In response, and with the advice of many railway commissioners of the day, in 1917 the Federal government took complete control of the CNoR and all of its components.[24] The following year the CNoR was combined with a group of 15 railways already owned by the government, which included the National Transcontinental and the Intercolonial. This group of holdings was authorized to be called "Canadian National Railways."[25] The Canadian National Railway Company Limited (CN) was soon after officially incorporated by parliament through an act passed on June 6, 1919. With the acquisition of Grand Trunk Railway itself in 1923, CN as we have come to know it today, was fully formed.[26]

Modern Developments: Privatization

Times have changed since the 1920's, and CN has been forced to adapt. Pressure from the trucking industry among other factors, lead to a decision in 1995 by the Federal government to privatize CN. The idea was that investor-ownership would give CN money raising power through the ability to sell equity, and would inject market discipline and a greater incentive to succeed.[27] On November 28, 1995, CN's shares were listed on the Montreal, Toronto and New York stock exchanges, all being sold within a day. The Federal Government made $2.2 billion dollars in the transaction, which they describe as the largest and most successful privatization in Canadian

[22] Online: CNR Research Site <http://home.att.net/~cnr.ontario.research/Subdivisions/Beachburg/Index.html>.
[23] *Supra* note 20.
[24] *Ibid.*
[25] Online: CN Official Web site, History Section <http://www.cn.ca/companyinfo/history/en_AboutOurStory.shtml>.
[26] *Ibid.*
[27] *Ibid.*

history.[28] Indeed, the years following privatization were some of the most successful for CN. This however, is not the end of the story.

The portion of the original JBR line created under the authority of s. 3(b) of *The James Bay Railway Act, 1905*[29] that cut through the North Eastern corner of Algonquin Park had begun service with the rest of the CNoR transcontinental route in 1915. This portion of the line was known as the Beachburg Subdivision and included 120km of track.[30] This portion of the line was in service through to 1995, shortly after CN was privatized. As part of the privatization process, CN aimed to make itself as efficient as possible. This meant assessing the age and efficiency of various parts of the line. The cost to upgrade and maintain the Beachburg Subdivision was determined to be too great. CN subsequently made an application on Dec 12, 1995, under the *National Transportation Act* and the *Railways Lines Abandonment Regulations* to abandon the line.[31] CN was authorized to abandon this section of the line by an order issued by the Canadian Transport Agency on April 18, 1996, which declared the authorization active from 30 days of the order.[32] The Federal government claims that this means that the line was officially abandoned as of May 18, 1996 so ending their jurisdiction. [33]

Decommissioning the Line

The use of the Beachburg Subdivision section of track was discontinued on May 18, 1996 as scheduled. At this time, CN hired a contractor to remove rails, ties, and prepare the site for decommissioning.[34] Decommissioning of the CN line continued into 1997. No apparent supervision of this work was conducted either by CN, the Federal government, or the Ontario Ministry of Natural Resources. In May of 1997, arguably in an attempt to demonstrate due

[28] *Ibid.*
[29] *Supra* note 15.
[30] Personal communication between Algonquin Eco Watch and Karen Visentin, a Lawyer in Private Practice that specializing in Railway Decomissioning. Email Thurs April 1/04
[31] 1995-12-12 CNR applies to the abandonment from Pembroke to Nipissing
[32] CTA Order No. Order No. 1996-R-152.
[33] Letter Dec 7, 2001 From Algonquin Eco Watch, The Wildlands League, The Federation of Ontario Naturalists, The Sierra Club, The Sierra Legal Defence Fund, and World Wildlife Fund to the Office of the Commissioner of the Environment and Sustainable Development, The Environmental Commissioner's Officer, and the Superintendent of Algonquin Park. Pg 1.
[34] Algonquin EcoWatch, "The Algonquin Eco Watcher", Vol 1, Number 1, Spring/Summer 1999 pg 2

diligence[35], CN Real Estate Management (CNREM) retained Conor Pacific Environmental Technologies Inc. (Conor Pacific) to conduct 17 Phase II Environmental Site Assessments (ESAs) along the line.[36]

The current industry standard for ESA includes three phases of assessment. Phase I is primarily an information search, the aim of which is to collate information relevant to both past and present environmental conditions and potential sources of liability; and to identify areas that may require further investigation.[37] In Phase II all necessary sampling and testing is done to establish the character and extent of the environmental contamination at the sites of concern identified in Phase I. In Phase III the information gathered in Phases I and II is assessed, with the objective of developing an appropriate remedial action plan.[38]

In the case of Phase II assessment done by Conor Pacific for CNREM various Ontario regulations and guidelines were used as interpretive tools, including the Ministry of the Environment and Energy (MOEE) *Guideline for the Clean-up of Contaminated Sites in Ontario* (*GUCSO, 1997).* As seen in Appendix B in Tables 3 – 6 exceedances in surface soils and groundwater of heavy metals and petroleum products were found at multiple locations. The town of Brent, a former division point where diesel locomotive servicing occurred adjacent to the shore of Cedar Lake, is one of the worse examples of contamination. Despite these findings, a phase III ESA was never commissioned or completed for any of the listed sites, and as of 2001 no mitigative measures had been taken.[39] CN claims that the land no longer belongs to them, having reverted to the province after the point of abandonment, and that they are therefore not responsible for the clean-up of the on-going environmental contamination.

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[35] The ESA is a standard tool for the protection of property owners, and managers, from environmental liability. It is particularly useful tool prior to property transfer as a way to demonstrate due diligence. It is therefore interesting to note that the ESA's in this case were done post "Abandonment."
[36] Conor Pacific – E1516.0, C.N. Real Estate Management – Executive Summary, i. DRAFT Dealt with 17 Phase 2 Environmental Site Assessments of the C.N. Beachburg Subdivision between Miles 89.10 and 187.90 in accordance with an earlier proposal dated Nov, 1996
[37] Online: Fisher Environmental: Canadian Environmental Consulting Firm, <http://www.fisherenvironmental.com/site_ass.html>.
[38] *Ibid.*
[39] Algonquin Eco Watch, Letter Dec 7, 2001 pg 2

The Question of Jurisdiction

CN's current position is that it never owned the right-of-way in fee simple, and therefore once the abandonment was complete (May 18, 1996) the land automatically reverted to the province who had always had underlying title of the crown land. The province asserts that they are not interested in acquiring the property from CN until proper environmental remediation is completed. As already mentioned, the federal government also claims no jurisdiction over the land or the remediation process, despite the fact that the company was government owned for most of its life. From a Business law perspective, the Federal government acquired $2.2 billion through the sale of the company. Arguably included in this purchase price are both assets and liabilities. Assuming that the new owners of CN knew what they were getting, the environmental liability should have been transferred to the company. Through the operation of federal legislation and policy however, the federal government seems to have managed to transfer liability to the provinces. From a constitutional perspective however, this essay will demonstrate that this is in fact not the case. Before these issues can be directly addressed, it is important to understand the environmental contamination that is at stake. The next section of this essay will summarise the environmental issues that are specifically affecting Algonquin Provincial Park due to this scenario.

Environmental Issues

The Beachburg right-of-way (hereafter right-of-way) passes through 6 different watersheds, runs immediately alongside 9 lake trout lakes and crosses more than 40 potential brook trout nursery creeks as it traverses Algonquin Park. Self-sustaining brook and lake trout lakes are becoming increasingly rare in south-central Ontario and are particularly sensitive to environmental disturbance. Of additional concern are headwater areas, such as those surrounding Little Cauchon Lake through which the right-of-way passes. Headwaters typically have low volume water flow (flushing rate) due to their location near the height-of-land in a watershed, and consequently are less able to dilute the effects of incoming deleterious substances. This section will review the most pertinent sources of on-going contamination that flow from the right-of-way into the surrounding environment including headwater areas, and fish spawning habitat. The on-going

contamination from these sources is allowed to continue directly through the way the environment has been treated under the division of powers.

Deteriorating Culverts

The right-of-way essentially follows the height-of-land adjacent to the Petawawa and Amable du Fond Rivers, home to some of the most productive brook trout and lake trout waters in North America. There are an estimated 200 culverts passing beneath the rail bed within Algonquin Park, many of which are raised at the point of outflow. This means that fish are not able to reach the upper portions of the creeks that flow through them. Many of these culverts are placed in headwater brook trout nursery creeks. Their deterioration could obstruct upstream migration of brook trout fry, negatively affecting natural reproduction of this important species.[40]

Residual Waste Petroleum Products

There are spill sites as well as greasers and mechanical servicing facilities along the right-of-way, all of which need to be rehabilitated to ensure that long-term petroleum contamination will not occur. Greasers were devices that lubricated train wheels on curves. The sites where they were situated continue today to leak petroleum into the surrounding substrate as they have done for the last 60 years.[41] High levels of diesel fuel and grease have been found at points along the right-of-way. One example is Brent Station, where repairs were conducted when the line was active. If sites like this are not cleaned up, Petroleum products will be left to seep into adjacent water bodies such as Cedar Lake for generations to come. The seepage from these greaser sites has put lake trout spawning areas at risk, threatening interference with the natural spawning success of that species.

Creosote Impregnated Ties & Trestles

Trestles and ties constructed of creosote-treated timber can be found along the right-of-way. Many ties were discarded along the sides of the right-of-way during normal maintenance over the years. In many cases these ties are still there, often not even on the right-of-way itself, leaching Creosote into adjacent lands and water over time In addition, some trestles were not removed

[40] Algonquin Eco Watch, *The Algonquin Eco Watcher,* Vol 1, Number 1, Spring/Summer 1999 pg 2

during the decommissioning process and still span waterways along the right of way. These are also made of Creosote timbers, which will eventually enter and contaminate the water if not removed.

Contaminated Rail Bed Slag

A layer of slag 10-15 cm deep caps the entire C.N right-of-way within Algonquin Park. This slag originated in mines in the Sudbury Basin and ranges in size from dust to approximately 10cm in diameter.[42] Tests have been done on the composition of the slag for Algonquin Eco Watch[43] at Laurentian University in Sudbury. These tests clearly demonstrated that nickel, cadmium, cobalt and chromium, all known carcinogens, are present in concentrations that exceed acceptable levels. This is in addition to unacceptable levels of lead, a dangerous toxin.[44] There are three main concerns with respect to these contaminants, 1) that over time these trace elements will leach into adjacent fish bearing waters, 2) that erosion and bulldozing during the decommissioning process has caused damage to fish habitat and spawning areas through the introduction of slag to surrounding water bodies,[45] and 3) that they will be ingested directly by animals, such as birds. Birds are at particular risk because they constantly ingest grit to aid in their gizzard function and recent studies have shown that ingestion of grit can result in exposure to toxic trace elements such as cadmium.[46]

Clearly there are a number of significant sources of on-going environmental contamination along the right-of-way. As we will see more closely in the next section, these environmental problems have been allowed to further proliferate because of the debate over jurisdiction. The following

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[41] Algonquin Eco Watch, Letter Dec 7, 2001 pg 1
[42] Algonquin Eco Watch, *The Algonquin Eco Watcher*, Vol 2, Number 1, Spring/Summer 2000 pg 1
[43] Algonquin Eco Watch, a non-profit charitable organisation dedicated to protecting the integrity of the ecosystems of Algonquin Park, has been working on the issues discussed in since the planned decommissioning of the line was brought to their attention in July 1997.
[44] *Supra* note 42
[45] Mike Wilton, Sarah Ingwersen and David Euler, "Environmental Pressures to be Considered in The Management of the Algonquin Ecosystem: A Position Paper for Algonquin Eco Watch" (1999) unpublished.
[46] L.I.Bendell-Young and J.F. Bendell, "Grit Ingestion as a source of Metal Exposure in the Spruce Grouse, (Denragopus Canadensis)" (1999)

section will address both the contentions surrounding the ownership and jurisdiction over the right-of-way, in an attempt to pave the way forward towards an environmental solution.

Jurisdiction & Ownership: Positions of the Parties Involved

Algonquin Eco Watch[47], a non-profit charitable organisation dedicated to protecting the integrity of the ecosystems of Algonquin Park, has been working on the issues discussed in this essay since the planned decommissioning of the Beachburg Subdivision was brought to their attention in July 1997.[48] Since July, 1997, Algonquin Eco Watch has expended considerable time and effort investigating the environmental risks, and trying to mobilize both the Federal and Provincial Governments, in addition to CN, towards dealing directly with the issue. The result to date has been a jurisdictional pass-off, with no party being willing to take responsibility. The first part of this section will summarise the positions of the parties involved, including the Federal and Ontario Government in addition to CN. The second half will clarify the reality of both the ownership and jurisdiction surrounding the decommissioning of the right-of-way, ultimately demonstrating that 1) The current ownership of the land is not as straight forward as CN contends and 2) despite statements to the contrary from the Federal government, it does have jurisdiction over the decommissioning process of the railroad under the division of powers.

The Perspective of the Federal Government

Algonquin Eco Watch first contacted the Superintendent of Algonquin Park in the fall of 1997. After lobbying CN and receiving no response, an application for an investigation was submitted to the Environmental Commissioner of Ontario, under the Environmental Bill of Rights. This was done on April 2, 2001 by Algonquin Eco Watch, and their supporters.[49] On July 18, 2001 they were informed that no investigation would be conducted. In May 2001 three additional petitions were filed with the Federal Ministers of the Environment, Transport, and Fisheries and Oceans respectively. This was done through the office of the Auditor General and the Commissioner of

[47] Online: Algonquin Eco Watch <www.algonquin-eco-watch.com>.
[48] Mr. Ray Sawchuk, long time leaseholder at Daventry, on Little Cauchon Lake, Algonquin Park approached Algonquin Eco Watch due to his increasing concern over how the Decommissioning was taking place
[49] Including: The Wildlands League, the Federation of Ontario Naturalists, and Dianne Saxe

the Environment and Sustainable Development. The purpose of the petitions was to highlight to the ministers the apparent lack of commitment on the part of CN to complete the decommissioning of their main line through Algonquin Provincial Park in an environmentally responsible and timely manner, in the hope that someone would take action. A field site inspection did take place on Oct 15 2001. Representatives of the three Ministries were shown examples of: slag, deteriorating/perched culverts, points where the bulldozing had knocked slag into creeks and onto spawning beds, petroleum product contamination and deteriorating creosote-impregnated trestles. All three Ministries subsequently declined action against the CN. For example, in a letter to Algonquin Eco Watch dated March 8, 2002 the Minister of Fisheries stated:

> "Based on the site visit conducted on October 15, 2001, and other information obtained during the Fisheries and Oceans Canada (DFO) assessment of the complaint, it has been determined that fish habitat has not been harmfully altered, disrupted or destroyed as described in subsection 35(1) of the Fisheries Act as a result of the decommissioning of the CNR rail line in Algonquin Park (emphasis added)."[50]

The perspective of the Federal government is best summarised in a letter sent to Algonquin Eco Watch on May 20 2002 by the Minister of Transportation:

> "[N]either the *National Transportation Act, 1987* nor the *Canada Transportation Act* contain provisions relating to the removal of track assets from the abandoned right-of-way lands or its future uses…once a rail line has been discontinued it is no longer a line of railway under federal transportation legislation. Therefore, the abandoned right of-way lands are subject to the same provincial land laws and municipal zoning by-laws and ordinances as the lands abutting the rail lands Since 1980, 18,471 route-kilometres of track have been abandoned in Canada. The decommissioning of these lines has all been done in accordance with provisions under provincial and municipal laws. These laws have proven to be very efficient in ensuring an environmentally responsible process and will hopefully continue to do so in the case of future abandonment."

Concluding that

> "[S]ince CN and Algonquin Park authorities have agreed to the terms and conditions of the decommissioning based on the laws and regulations in place at the time, those authorities would be best placed to address Issues."

Algonquin Eco Watch, frustrated by this lack of action, eventually sent a letter to the Prime Minister urging the enactment of appropriate environmental legislation to address decommissioning of rail lines in the future. This letter was forwarded to the Minister of Transport, who responded on Feb 19, 2003:

[50] Correspondence sent to Alongquin Eco Watch from Robert G. Thibault, DFO, March 8 2002.

> I appreciate your [Referring to Algonquin Eco Watch] view that the provincial and municipal laws have not proven sufficient in the case of the decommissioning of the rail line in Algonquin Provincial Park. However, since rail lines are not subject to federal jurisdiction after abandonment, it would not be possible to develop a federal environmentally responsible protocol that would apply after the operation of the line were discontinued.

These letters clearly demonstrate that the Federal Government does not want responsibility for any part of the contaminated right-of-way. They also demonstrate that the Federal Governments solution to this problem is to pass-off jurisdiction to the Province and municipalities. The fallacies of this position will be further addressed later in this essay.

The Position of the Provincial Government & CN

The Provincial government, on the one hand, has taken the stance that they do not want the land in question to revert to their possession until it has been adequately cleaned up. Counter to the position iterated by the Federal Minister of Transportation described in the last section that stated that CN and Algonquin Park "agreed to the terms and conditions of the decommissioning" stands a letter sent Jan 8, 2002 from the Algonquin Park superintendent, to the Minister of the Environment. In this letter the superintendent clearly states: "we are not satisfied with the CN abandonment and CN is fully aware of this." This letter also further clarifies the position of the Ontario government stating that the Ontario Ministry of Natural Resources was prepared to acquire the right-of-way from CN only *after* appropriate clean up.

CN on the other hand, has taken a position similar to that of the Federal government. From their perspective, the land reverted to the province once the land was officially abandoned. They assert that underlying title in the Crown land always remained with the Crown, which in this case is the province. Clearly they are concerned about the cost of having to deal with environmental clean-up of the right away, but they are likely equally concerned about the precedent it would set for other rail lands in their possession. The perspective of CN as compared to the province highlights the issue of ownership over the right-of-way. The following subsection will deal with this issue specifically.

Ownership of the Right-of-Way

The term "right-of-way" is often used to describe the land on which a railway is constructed.[51] The true meaning of this term in property law is "the legal right, established by usage, or by grant, of a person or persons to pass and repass through grounds or property belonging to another."[52] This definition clearly does not apply to land owned in fee simple (full title), yet the term right-of-way is still often used in the railway context regardless of the nature of ownership.

Much of the land that railroads are built is owned in fee simple, expropriated at the time of construction, and held by the company in full. In the case of fee simple ownership, the courts have made it very clear that when rail lands are owned in this way, once the land is abandoned it remains in the possession of the rail company.[53] Post-abandonment, they are free to keep or dispose of it as they wish.[54] Yet even in this case, railway companies have taken only limited responsibility.[55]

The second most common form of ownership associated with rail lands is one that is more true to the property law definition of a right-of-way. More specifically, it is the process through which rail companies acquire crown land for construction of their lines. The courts have explicitly held that underlying Crown title remains in Crown land that has been taken up as part of a rail right-of-way.[56] For example, in the case *Canada (A.G.) v. Canadian Pacific Limited* (*'the Kettle Valley Case'*) the British Columbia Court of Appeal stated that "because of the restraint on alienation in the Railway Act, Crown land taken under that Act for railway purposes must, once it ceases to be used for railway purposes, be restored to Canada."[57] The court held that throughout

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[51] *Insurance Corp. of British Columbia v. Routley* [1995] B.C.J. No. 2559 para 34.
[52] *Ibid.*
[53] *Wotherspoon v. Canadian Pacific Ltd. Para 53.* [1987] 1 S.C.R. 952, 39 D.L.R. (4th) 169
[54] *Bonnyville Adjacent Landowners Group v. Bonnyville* (Municipal District No.87)[2003] A.J. No. 972 at para 1, 5.
[55] Supra note 51 at para 8 –10, 25(6). Specifically in this case the rail company (C.P.) would not investigate nor respond to complaints of the public using motorized vehicles on the right of way beyond posting use at your own risk signs, and that C.P. Rail would take no steps in attempting to restrict or control these types of activities. This despite the fact that the Rail company had full knowledge of the types of activities occurring on their property, which eventually lead to the accident at bar in the case.
[56] *Canadian Pacific Rail Co. v. R.* [1931] ALL E.R. Rep. 113, [1931] A.C. 414 at pg 114.
[57] *(Canada (A.G.) v. Canadian Pacific Limited,* [1986] B.C.J. No. 407, quoted in *Squamish Indian Band v, Canadian Pacific Ltd* [2002] B.C.J. No. 1943at para 2.

all the various incarnations of the Railway Act, one consistency was the restriction on the alienation of crown land."[58]

In 2002 the British Columbia Court of Appeal used this reasoning in a case called *Squamish Indian Band v, Canadian Pacific Ltd* to demonstrate that when a right-of-way that had originally been on an Indian reserve was abandoned, it not only reverted to the Crown based on the Crown's underlying interest, but it did so in trust for the first nations people in effect reviving the reserve land.[59] The case was decided again based on the alienation restriction iterated in the applicable version of the Railway Act. A similar provision is found in the *Railway Act, 1985* that was the governing statute at the time the Beachburg Subdivision was abandoned:

> 134. (1) No company shall take possession of, use or occupy any lands vested in the Crown without the consent of the Governor in Council.
>
> (2) Any railway company may, with that consent, on such terms as the Governor in Council prescribes, take and appropriate for the use of its railway and works so much of the lands of the Crown lying on the route of the railway that have not been granted or sold as is necessary for that railway, and also so much of the public beach or bed of any lake, river or stream, or of the land so vested covered with the waters of any lake, river or stream as is necessary for making, completing and using its railway and works.
>
> (3) The company may not alienate any lands taken, used or occupied pursuant to subsection (2). [60]

Despite the complicated facts in *Squamish Indian Band v, Canadian Pacific Ltd* the court still found both at the Supreme Court level and at the Court of Appeal, that the restraint on alienation clearly applied to the acquisition of land in question.[61] They explicitly upheld the reasoning of *the Kettle Valley Case* "that the restriction on alienation necessarily implies that the land expropriated from the Crown would revert to the Crown upon ceasing to be used for railway purposes."[62] The court supports this decision by turning to what would have been reasonably understood by the effected parties of the day under the given statute, based on the common law of the time.[63]

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[58] *Ibid.*
[59] *Squamish Indian Band v, Canadian Pacific Ltd* [2002] B.C.J. No. 1943at para 95.
[60] R.S.C. 1985, c. R-3; REPEALED by S.C. 1996, c. 10, s. 185(1), effective July 1, 1996 (SI/96-53)
[61] *Supra*, note 59.
[62] *Ibid.* at para 120.
[63] The court quotes the British case of *Mulliner v. Midland Railway Company* (1879), 11 Ch. D. 611. at 619-20 and *United States v. Union Pac. Ry. Co.*, 353 U.S. 112, 1 L. Ed. 2d 693 (1956).

It seems that the argument made by CN with respect to the Beachburg subdivision is accurate, that upon abandonment, the land would revert to the province under s. 92(5), which gives them jurisdiction over public lands within the province. The character of underlying title is that it operated automatically, as seen by the above cases. This is a principle that has been entrenched since 1888 in the context of Aboriginal law, and still operates in that context today. [64] The Federal government has clearly stated that CN abandoned the line in accordance with all Acts and regulations in force at the time, which seems to suggest that CN position is correct. There are however some difficulties with this position, that will be highlighted here as deserving future attention.

1) the Right-of-way is explicitly excluded from Algonquin Park by Provincial Regulation

S. 2 of *The Provincial Parks Act Regulation R.R.O. 1990, Reg. 951* delineates the individual provincial park boundaries within Ontario. With respect to Algonquin park, the following is explicitly exempted:

> 2. A provincial park named in this section consists of the following land:
>
> …. ALGONQUIN PROVINCIAL PARK
>
> In the Territorial District of Nipissing and in the County of Halliburton containing 772,300 hectares, more or less, described as follows: …
>
> ….Excepting therefrom in the Territorial District of Nipissing,
>
> (a) in the geographic Township of Pentland,
> (i) Lot 8, Concession XIV,
> (ii) Lot 8, Concession XV
> *(iii) The right-of-way and station grounds of the Canadian National Railway Co., and*
> (iv) those parts of Lot 9, concessions XIV and XV, containing 45.03 acres (18.223 hectares), more or less, designated as parts 1, 3, 4, 5 and 6 on a plan of survey deposited in the Land Registry Office for the Registry Division of Nipissing as Plan 36R-2853
>
> (b) that part of Lot 2, Concession XII, in the geographic Township of Deacon, containing 1.89 acres (0.765 hectares), more or less, designated as Part 2 on Plan Misc. 206 registered in the Land Registry Office for the Registry Division of Nipissing
>
> *Also excepting therefrom any lands patented before July 1, 1977.* (emphasis added).

Clearly based on s.2 (a) (iii) above, the right-of-way and station grounds of CN are explicitly left outside of the "land" contained in the provincial park. The meaning of this exclusion is not entirely clear. The regulation specifically says "right-of-way." It is not clear how this provincial

[64] *St. Catherine's Milling and Lumber Company v. The Queen on the information of The Attorney General of Ontario*, [1888] 14 A.C. 46 (P.C.) see also *Smith v. Queen* [1983] S.C.R.

regulation, which clearly falls within the jurisdiction of the provincial government to make, interacts with federal legislation regarding the abandonment of railways. On one hand, this arguably is an attempt by the Provincial Government to respect the exclusive Federal jurisdiction over interprovincial railways and related works and undertakings, a concept that will be discussed further in the next section. On the other hand, it raises further questions with regards to the ownership of the land. It of course could still be argued that the land whether inside or outside of the provincial park is still Crown land, and therefore ownership reverts to the province automatically either way. Even this point is confounded by another important issue.

2) At least some of the land comprising the right-of-way *is* owned in Fee Simple by CN

The procedure that would have originally been followed when constructing the Beachburg subdivision would have been to first lay the line, and then have it surveyed. In some cases, Crown patents would have been acquired.[65] It appears that only one patent was ever actually issued on the Beachburg line, for the Pentland portion.[66] It also appears that CN may also have defacto ownership of Brent station, which was acquired in the 1980's through expropriation, as hotels and other buildings were built on this site.[67] Further details of the status of Crown patents on the line could not be verified, due to the location of the relevant documents.[68] These examples suggest however that the simple claim that the land has reverted to the province may be problematic, and should not be assumed.

CN would have environmental obligations with respect to any land over which they had fee simple ownership, regardless of how that ownership was acquired. This is particularly important with respect to sections of the line such as Brent Station, which was highlighted earlier as being one of the most contaminated points on the line. Further research should be done to clarify the exact nature of ownership for each section of the Beachburg Subdivision to ensure that CN is not able to simply escape responsibility through the defacto operation of the Federal

[65] Personal communication with Jackie Campbell, relaying information attained from Henry Checko and his MNR-Parks group, Email Thurs April 1/04
[66] *Ibid.*
[67] Personal communication between Algonquin Eco Watch and Karen Visentin, a Lawyer in Private Practice that specializing in Railway Decommissioning. Email Thurs April 1/04
[68] Documents pertaining to Crown Patents that might exist were only located at Northern Land Registry Offices, and I was not able to acquire or confirm any further details in this respect.

Railway Act. The next section will further address the role of the Federal government, with respect to their positions regarding environmental jurisdiction and liability over the decommissioning of the line.

Environmental Jurisdiction & Liability of the Federal Government

The distribution of legislative powers in Canada is one of the factors that must be considered when assessing the many important social, political, economic, and cultural problems of our country.[69] Under s.91 and s. 92 of *The Constitution Act, 1867,* there are multiple Federal as well as Provincial powers that could be implicated in this case. For example, under s.92 (5), (13) and (16) respectfully, the provinces have power over "The management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon, Property and Civil Rights in the Province, & Generally all Matters of a merely local or private Nature in the Province."[70] Taken together, these powers clearly give the provinces broad and sweeping jurisdiction over the environment for a variety of purposes.[71] The federal government also has a number of powers under s.91 that could be implicated in this case, including the ability to regulate federal lands under s.91. (1A.), the peace order and good governance (POGG) clause found in the Preamble of s. 91, and the criminal law power s. 91(27).[72] Arguably the most important federal power at issue in this case, is one found under s.92. which reads as follows:

> 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; -
>
> > 10. Local Works and Undertaking 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 Province, or extending beyond the Limits of the Province (emphasis added)

When read in conjunction with s. 91(29):

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[69] W.R. Lederman, "The Balanced Interpretation of the Federal Distribution of Legislative Powers in Canada "in Lederman, Continuing Canadian Constitutional Dilemmas (Toronto: Butterworths, 1981). Part II(a).
[70] *Constitution Act, 1867*, ss. 92(5), 92(13), 92(16) 109.
[71] *Supra* note 6.
[72] *Supra* note 69 at s. 91(1A) (The Public Debt and Property), s. 91 *Preamble(* POGG Power), s.91 (27) (The Criminal Law…)

> 91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and Good Government of Canada, in relation to all Matters not coming with the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces …. That is to say, -
>
> > 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

The effect of these sections is to bring exclusive Federal jurisdiction over interprovincial railways. Though it could be argued that the Federal government would have the power to legislate with regards to the environmental issues flowing from railway decommissioning under their POGG power, criminal law power, or indirectly through the portions of decommissioning that might effect fisheries,[73] using their jurisdiction over interprovincial railways is the most direct way. This is the essence of the jurisdictional problem. Provinces cannot legislate directly with respect to heads of power that are explicitly allocated to the Federal government. As early as 1899 this fact was recognised by the House of Lords in a case called *Union Colliery Co. of B.C. v. Bryden*:

> The abstinence of the Dominion Parliament from legislating to the full extent of its powers could not have the effect of transferring to any provincial legislature the legislative power which had been assigned to the Dominion by S. 91 of the Act of 1867.[74]

In the case of the Beachburg Subdivision, the History of this portion of the line clearly brings it within the ambit of s.92(10)(a). A fact which is supported by the Supreme Court of Canada itself with respect to characterizing the CN line generally.[75]The federal government however, has interpreted their own jurisdiction to end at the point of abandonment. In *Brotherhoods of Railway Employees v. New York Central Railroad Co*. abandonment of a rail line was defined as "the complete closing down of railway operations, the ceasing to be a railway"[76] This however is not consistent with the way s.92(10)(a) has been interpreted. The test regarding the ambit of this section has recently been reiterated by the Supreme Court of Canada (SCC):

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[73] In *R v. Crown Zellerbach* (1988) a majority of the Supreme Court of Canada upheld the Federal Ocean Dumping Control Act, on the basis that marine pollution was a matter of national concern under the Peace Order and Good Governance Provision of the Federal Government. Likewise in *R v Hydro-Quebec* (1997) the Supreme Court of Canada agreed that the protection of the environment was a public purpose that would support a federal law under the criminal-law power

[74] *Union Colliery Co. of B.C. v. Bryden*, [1899] A.C. 580, 68 L.J.P.C. at 588.

[75] *United Transportation Union v. Central Western Railway Corp*.[1990] 3 S.C.R. 1112 at para 45.

[76] *Brotherhoods of Railway Employees v. New York Central Railroad Co*. [1958] S.C.R. 519

> ... Whatever the terminology adopted, the courts say again and again in these cases that for a work or undertaking to fall under federal jurisdiction under paragraph 92(10(a), it must either be *an interprovincial work or undertaking (the primary instance) or be joined to an interprovincial work or undertaking through a necessary nexus (the secondary instance).* [Emphasis added][77]

Referring to 92(10)(a) the Saskatchewan Court of Appeal described the physical tracks "and right-of-way of the railway" as being "said to connect the province with other or others of the provinces."[78] This suggests the right-of-way may be enough to qualify as an interprovincial work in the primary instance under the test iterated above, in the alternative, the decommissioning of a railway (which is explicitly an interprovincial work in this case) would arguably meet the necessary nexus under the secondary instance. A fact which is supported by the approach that the federal government has taken to defining Federal works in legislation. For example, in the Canadian Environmental Assessment Act (CEAA S.C. 1992, c.37) defines a "project" as follows:

> 2. (1) ...
>
> (a) in relation to a *physical work*, any proposed construction, operation, modification, *decommissioning*, abandonment or other undertaking in relation to that physical work, or… (Emphasis added) [79]

CEAA further defines "Undertakings" associated with physical works as including all activities related to that work "during all steps of the life cycle of the physical work".[80] Clearly the decommissioning of a rail line would fall within this type of definition, and therefore would also be likely to fall within s.92(10)(a), a fact supported by one of the earliest interpretations made of this section. In 1899, the House of Lords made it clear that:

> The Parliament of Canada has, in the opinion of their Lordships, exclusive right to prescribe regulations for the construction, repair *and alteration* of the railway and for its management (emphasis added)....[81]

Arguably the alteration of a railway, includes deconstruction and in connection with the deconstruction, jurisdiction over the environmental regulation of that process. Environmental

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[77] *National Energy Board (Re)*,[1988] 2 F.C. 196 at p. 216 *in United Transportation Union v. Central Western Railway Corp*. [1990] 3 S.C.R. 1112 at para 58.
[78] *Canadian Pacific Railway v. Saskatchewan* (Attorney General) [1948] 1 D.L.R. 580 at para 20.
[79] *Canadian Environmental Assessment Act* S.C. 1992, c. 37 (CEAA). S. 2 (1)(a)
[80] Online: CEAA - How to Determine if the Act Applies. 1.1 Overview of Determining if the Act Applies. <http://www.ceaa-acee.gc.ca/012/004/Act-Applies_e.pdf>.
[81] *C.P.R. v. Notre Dame de Bonsecours Parish* [1899] A.C. 367, 68 L.J.P.C. 54

jurisdiction over interprovincial railways was in fact specifically supported by the SCC in the recent case *Friends of the Oldman River Society v. Canada (Minister of Transport)* (hereafter *Friends of the Oldman River*). [82] The court used the example of the interprovincial railway explicitly to demonstrate the operation of s.91(10)(a) with respect to environmental jurisdiction, as seen below:

> A revealing example is the federal Parliament's exclusive legislative power over interprovincial railways under ss. 92(10)(a) and 91(29) of the Constitution Act, 1867. The regulation of federal railways has been entrusted to the National Transportation Agency pursuant to the National Transportation Act, 1987, which enjoys a broad mandate …. (which) gives some insight into the scope of Parliament's legislative jurisdiction over railways and the manner in which it is charged with the responsibility of weighing both the national and local socio-economic ramifications of its decisions. *Moreover, 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.*[83]

The SCC continues with the example and specifically postulates that one necessary consideration of 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) would be whether that line might cut through "ecologically sensitive habitats such as wetlands and forests" in addition to other economic and social factors, stating:

> 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.[84]

It stands to reason that if the federal government can consider legislating for the environment with respect to how rail lines are created, logically one would assume they can also legislate with regards to how rail lines are taken apart. It clearly can be argued that the decommissioning of a railway meets the necessary nexus to fall within the ambit of a federal work and undertaking, and more specifically the jurisdiction of s. 92(10)(a). Further to this point, and based on the above case law it is likely that decommissioning could be successfully argued to still be part of a "railway" or in the alternative, meets the requirement under "other federal work or undertaking" in the same section. The claim made by the Federal Government iterated earlier, that railway

[82] [1992] 1 S.C.R. 3 para 87
[83] *ibid.*

decommissioning occurs under Provincial legislation and Municipal by-laws is clearly not an accurate portrayal of their jurisdiction under the division of powers. When one looks at established doctrines of constitutional interpretation, this point becomes even clearer.

Under the well known Doctrine of Federal Paramouncy, if a validly enacted Federal law (referring to a law enacted in "Pith and Substance" under a relevant head of power under s.91) is found to be inconsistent with a validly enacted provincial law, this Doctrine stipulates the provincial law must yield, rendering it inoperative to the extent of the inconsistency.[85] In the case of Federal law regarding a federal work or undertaking the Doctrine of Federal Paramouncy would equally operate to force any conflicting provincial law to be read down.[86] The important point to note with respect to fields of jurisdiction that are listed in s.91 and s.92 is the concept of exclusivity. Exclusivity dictates that the heads of power listed under s.91 and s.92, were not only intended to grant the listed power to the given jurisdiction of the listed government, but also to deny jurisdiction over that power to the other level of government.[87] This means that even when a government has chosen not to legislate in an area falling under their exclusive jurisdiction, that area remains theirs to legislate in regardless. [88] The courts treated s.92(10)(a) in precisely this manner.

The doctrine of paramouncy is one way to attack the jurisdiction of a legislating body under the principle of inter-jurisdictional immunity. A second way of attacking a law, is to claim that while it is valid in most of its applications, it still falls outside of the jurisdiction of the legislative body that enacted it in certain ways. One common example is when a validly enacted provincial law of general application, applies also to a Federal work or undertaking. Depending on the breadth and effect of that law, it may be read down in its applicability. Environmental regulation over Federal works and undertakings operates in the same way.

As previously mentioned, the judiciary has determined that the environment is a matter of concurrent constitutional jurisdiction. They have also determined that due to its *sui generis*

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[84] *Ibid* at para 88.
[85] *Supra* note 2 at 418.
[86] Ibid at 380.
[87] *Ibid* at 385.
[88] *Supra* note 73 at 588

nature, legislation with respect to the environment can only be enacted pursuant to other constitutional heads of power. This means that environmental jurisdiction with respect to certain subjects can fall into the exclusive jurisdiction of one government or another based on the way the Division of Powers works. Provincial legislation can still indirectly affect Federal matters, but only in a highly restricted way.[89]

> "It is now well settled that undertakings engaged in interprovincial or international transportation or communication, which come within Federal jurisdiction under the exceptions to s. 92(10) of the Constitution Act, 1867, are immune from otherwise valid provincial laws which would …affect a vital part of the management and operation of the undertaking."[90]

This vital part test was first iterated in the *Quebec Minimum Wage Case* wherein the Bell Telephone Company was found immune from Provincial minimum wage laws, despite the fact that there were no federal minimum wage laws at the time.[91] Similarly under this test, an international bus line has been found immune from provincial regulation as to routes and rates, while the setting of speed limits and other rules of the road were found still competent of the province.[92] The most recent iteration of the vital part test is as follows: that where provincial laws purport to apply *directly* to a federal undertaking (or in effect apply directly), then they will be read down.[93] If they apply only *indirectly*, the law will be in applicable only if it impairs the undertaking.[94]

Even under this version of the test, the province would be incapable of directly enacting environmental regulations pertaining to the construction or decommissioning of an interprovincial railway, as such legislation would likely be found a court to "directly effect a federal undertaking" or in the alternative, meet the impairment test. If Provincial occupational health and safety laws have been found not to apply to Federal undertakings, it is likely that Environmental laws enacted by the Province would follow suit.[95] Not only is the Federal government responsible

[89] *Supra* note 2 at 385.
[90] *Ibid.* at 379 – 380.
[91] *Commission du Salaire Minimum v. Bell Telephone Co.* [1966] S.C.R. 767 (Hereafter *Qubec Minimum Wage* case).
[92] *Registrar of Motor Vehicles v. Can. American Transfer* [1972] S.C.R. 811.
[93] *Irwin Toy v. Quebec* [1989] 1 S.C.R. 927.
[94] *Supra* note 2 at 382.
[95] *Bell Canada v. Quebec* [1988] 1 S.C.R. 749.

for enacting environmental legislation to govern the decommissioning of railway, they are exclusively so.

An Alternate Route to Federal Jurisdiction: CEAA[96]

The Canadian Environmental Assessment Act (CEAA S.C. 1992, c.37) came into force in 1992.[97] It is applicable to all those works and undertakings that trigger the act after that time, which includes the decommissioning process of the Beachburg subdivision. A detailed analysis regarding the applicability of CEAA to the case in question is beyond the scope of this paper, however mention of it should be made in that it does offer the potential of an interim solution to the absence of Federal legislation regarding the specific decommissioning of railways, and more particularly could offer a right of action against the Federal government in this case. As previously seen, the definition of a project under CEAA includes decommissioning. For CEAA to apply however, the legislation would have to be triggered. Regulations created under CEAA dictate specifically which acts of the Federal Government will require an environmental assessment.[98] A detailed review of the listed triggers could be made to make a case that the Federal government had a responsibility to conduct a Federal Environmental Assessment in the case of the decommissioning of the Beachburg subdivision, and did not. In addition or alternatively, the Federal government could be pressured to add the decommissioning of interprovincial railway lines specifically those activities requiring comprehensive review under the Act.

Conclusion

The purpose of this essay was to summarise the issues surrounding the decommissioning process of the Beachburg subdivision within Algonquin Park, as an example how the nature of Federalism risks fragmentation with respect to the environment.[99] As we have seen, there are

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[96] *Supra* note 78.
[97] *Bow Valley Naturalists Society v. Canada (Minister of Canadian Heritage) (C.A.)* [2001] 2 F.C. 461 at para. 14.
[98] *Canadian Environmental Assessment Act, Law List Regulations* SOR/94-636 P.C. 1994-1685 7 October, 1994
[99] M. Walters, "Ecological Unity and Political Fragmentation: The Implications of the Brundtland Report for the Canadian Constitutional Order" (1991) 29 Alta. L. Rev. 420

many environmental sources of contamination that remain undressed, while the parties involved continue to dispute ownership and jurisdiction over the land. These issues are also not as clear-cut as some of the parties involved would have us believe. Not only is the ownership of the land not as straightforward as CN contends, the position of the Federal government with respect to their jurisdiction is simply arguably wrong in law. The assertion that decommissioning falls under the general jurisdiction of the province is incompatible with the explicit allocation of railways and federal undertakings under s.92(10)(a) of *The Constitution Act, 1867*. A more comprehensive and cooperative approach to policymaking and regulation of the environment is clearly needed.[100] Without a change in approach, there is a risk that governments will continue to use the *sui generis* nature of environmental jurisdiction under the charter to avoid responsibility. Forcing the Federal government to recognise their responsibility with respect to the Decommissioning of the Beachburg Subdivision will simply be one small step in the right direction. It is time we moved forward cooperatively, and forced our governments to do the same.

[100] Steven A. Kennett Federal Environmental Jurisdiction After Oldman (Case comment/chronique de jurisprudence) (1993) 38 McGill L.J. 180

Appendix A: Map of the Algonquin Right-of-Way

Appendix B: Contamination Results from the Phase II ESA