SCC File No: 38682

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

BETWEEN:

ATTORNEY GENERAL OF BRITISH COLUMBIA

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

and

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(Pursuant to Rules 37 & 42 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. Protection of the environment is *the* major challenge of our time. As this Court has held, both levels of government have an "all-important duty to make full use of their legislative powers" to respond to this exigent issue, and courts are tasked to "progressively [define] the extent to which these powers may be used to that end."

2. British Columbia, through its proposed amendments to the *Environmental Management Act* (the "Proposed Amendments"), is endeavoring to protect its environment and communities from a highly toxic substance that, if spilled, could cause catastrophic harm.

3. The constitutionality of the Proposed Amendments must be assessed in light of the quasi-constitutional and underlying constitutional principle of environmental protection that is reflected in the legislation. In short, the constitutional status of environmental protection requires this Court to: expansively define British Columbia's jurisdictional authority to enact the Proposed Amendments; restrict the application of the interjurisdictional immunity doctrine; and narrowly scope federal laws so as not to usurp the ability of British Columbia to comply with its duty to protect the environment.

B. Statement of facts

4. Ecojustice relies on the facts as set out by the Attorney General of British Columbia ("AGBC"),[1] supplemented by the facts set out hereafter.

5. The Proposed Amendments target Heavy Oil,[2] which is a highly toxic substance that, if released, may cause catastrophic harm and persist in the environment in perpetuity.[3] The 2010 Line 6B incident near Marshall, Michigan serves as an example of the serious environmental repercussions associated with a Heavy Oil spill. The pipeline ruptured and released 3.2 million litres of dilbit into the Kalamazoo River and surrounding wetlands. Aquatic and floodplain

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[1] Factum of the Attorney General of British Columbia, filed August 9, 2019 ["AGBC Factum"].
[2] Agreed Statement of Facts ["ASF"], Appellant's Record ["AR-BC"], Vol 23, Tab 14, p 4570.
[3] Affidavit of Kate Logan, affirmed September 28, 2018 ["Logan Affidavit"], Ex. B, AR-BC, Vol 20, Tab 9, pp 3967, 3989.

habitats were oiled, as were birds, mammals, turtles, and other wildlife.[4] And, years after the spill, up to 636,000 litres of dilbit remain in the river bed because the environmental costs of further clean up were deemed to outweigh the benefits.[5] The true extent of the environmental damage caused by the spill may not be known for decades.[6]

6. British Columbia is set to experience a significant increase of Heavy Oil transport and storage within its borders through the now reapproved Trans Mountain Pipeline Expansion Project (the "TMX Project"). The TMX Project will result in nearly 500,000 additional barrels of Heavy Oil per day traversing some of British Columbia's most important and sensitive ecosystems,[7] including the Fraser River estuary, which is one of the most biologically productive and ecologically significant estuaries in the world.[8]

PART II – POSITION ON QUESTIONS IN ISSUE

7. It is Ecojustice's position that the Proposed Amendments are within the constitutional authority of British Columbia, applicable to interprovincial undertakings, and operative in light of federal legislation.

PART III – STATEMENT OF ARGUMENT

8. There is no question that British Columbia is entitled to enact legislation to protect its lands, air, waters, and communities from hazardous substances under subsections 92(5), 92(13) and 92(16) of the *Constitution Act, 1867*.[9]

9. The only legal issues in dispute are therefore whether the Proposed Amendments were enacted to protect the environment, apply to interprovincial undertakings, and operate in light of existing federal legislation.

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[4] ASF, AR-BC, Vol 23, Tab 14, pp 4595-4596, paras 101-102.
[5] Logan Affidavit, Ex. B, AR-BC, Vol 20, Tab 9, p 3943.
[6] Logan Affidavit, Ex. B, AR-BC, Vol 20, Tab 9, p 3967.
[7] Logan Affidavit, Ex. B, AR-BC, Vol 20, Tab 9, pp 3942-3945.
[8] Affidavit of Daniel Stevens, sworn/affirmed September 28, 2018 ["Stevens Affidavit"], Ex. C, AR-BC, Vol 22, Tab 10, p 4354.
[9] *Constitution Act, 1867* (UK), 30 & 31 Vict., c. 3, reprinted in RSC 1985, App. II, No. 5.

10. In order to resolve these issues, it is first necessary to understand the legal context that governs the assessment of laws dedicated to protecting the environment. Namely, environmental protection is a quasi-constitutional matter that should be elevated to an unwritten constitutional principle.

11. Once so recognized, the division of powers analysis must then be informed by three key considerations. First, British Columbia is acting in accordance with its *duty* to protect public rights by enacting the Proposed Amendments.[10] Second, federalism has evolved in a way that promotes overlapping jurisdiction, especially with respect to the superordinate matter of environmental protection.[11] Third, federal jurisdiction and laws must be scoped narrowly so as not to usurp British Columbia's authority to comply with its constitutional obligation to protect its environment and communities from potentially catastrophic harm.[12]

A. Protecting the environment is a quasi-constitutional matter

12. Quasi-constitutional matters are those that embody key Canadian values and play an essential role in a free and democratic society.[13] By way of example, this Court recently reaffirmed that protection of "a good reputation of the individual" is of fundamental importance to our democratic society and is therefore of quasi-constitutional status.[14]

13. This Court has repeatedly indicated that protecting the environment is also of quasi-constitutional status by recurrently recognizing the matter to be of "superordinate importance", representing a "fundamental value in Canadian society".[15]

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[10] *R v. Hydro-Québec*, [1997] 3 SCR 213 [*Hydro-Québec*] at para 86; *British Columbia v. Canadian Forest Products Ltd*, 2004 SCC 38 [*Canfor*] at paras 74-81; *Imperial Oil Ltd v. Québec (Minister of the Environment)*, 2003 SCC 58 at para 38.
[11] *Hydro-Québec*; *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town*), 2001 SCC 40 [*Spraytech*]; *Canadian Western Bank v Alberta*, 2007 SCC 22 [*CWB*] at paras 22-24, 72.
[12] *CWB* at para 74; *Castonguay Blasting Ltd. v Ontario (Environment)*, 2013 SCC 52 [*Castonguay*] at para 9.
[13] *Éditions Écosociété Inc v. Banro Corp*, 2012 SCC 18 [*Banro*] at para 57; *Douez v. Facebook, Inc*, 2017 SCC 33 at para 58.
[14] *Banro* at para 57, citing *Hill v. Church of Scientology of Toronto*, [1995] 2 SCR 1130 at paras 120-21.
[15] *Ontario v. Canadian Pacific Ltd*, [1995] 2 SCR 1031 [*Canadian Pacific*] at para 55: "[e]veryone is aware that individually and collectively, we are responsible for preserving the natural environment … environmental protection has emerged as a fundamental value in Canadian society"; *Hydro-Québec* at para 85; *Friends of the Oldman River Society v. Canada*

14. Simply put, it would be an untenable proposition that other matters – e.g., protecting a reputation – are bestowed with greater recognition and protection than the bedrock on which the written Constitution stands – that is, an environment that supports self and societal preservation and perpetuation.[16] As this Court has rightly recognized, each level of government has an "all-important duty to make full use of the legislative powers respectively assigned to them in protecting the environment…"[17] because "the future of every Canadian depends on [it]". [18]

B. Environmental protection should be elevated to an underlying constitutional principle

15. Ecojustice respectfully submits that, given this Honourable Court's jurisprudence and the unprecedented state of environmental degradation, environmental protection should be elevated to an underlying constitutional principle.

16. In 1938, members of this Court for the first time identified principles underlying the Constitution.[19] In *Saumur v Québec (City),* Justice Rand described these principles as "the primary conditions of … community life within a legal order."[20] This Court in *Reference re-Secession of Québec* subsequently described the principles as "vital unstated assumptions" that are critical to informing and sustaining the written word of the Constitution.[21]

17. Because these principles are the architecture and lifeblood of the Constitution, observance of them is essential to the ongoing process of constitutional development and evolution of our Constitution as a living tree.[22] In other words, although the underlying principles are not explicitly enumerated in the Constitution, it would be impossible to conceive of our constitutional structure without them.

(Minister of Transport), [1992] 1 SCR 3 [*Oldman River*] at 16; *Spraytech* at para 1; *Canfor* at para 7.

[16] *Oposa et al v. Factoran et al*, 224 SCRA 792 (1993) (Supreme Court of the Philippines) at 9.

[17] *Hydro-Québec* at para 85.

[18] *Spraytech* at para 1; *Canfor* at para 7.

[19] *Reference Re Alberta Statutes*, [1938] SCR 100.

[20] *Saumur v. Quebec (City),* [1953] 2 SCR 299 [*Saumur*] at 329.

[21] *Reference re-Secession of Québec*, [1998] 2 SCR 217 [*Secession Reference*] at para 49.

[22] *Secession Reference* at paras 49-52.

18. There is no doubt that environmental protection constitutes an unwritten norm essential to Canada's history, identity, values and legal systems. [23] Former Chief Justice McLachlin, writing extra-judicially, suggested as such when she wrote that governments cannot enact laws that harm its citizens indirectly through degradation of the environment.[24]To paraphrase this Court's holding in *Manitoba Language Rights,* a protected environment is an indispensable element of civilized life, whereas a degraded environment is inconceivable to human capacity and inconsistent with human society.[25] Or, as Professor Collins rightly explains: "a constitution not grounded in a healthy, sustainable environment is a paper temple – a mere recitation of rights with no real guarantees of their survival over time."[26]

C. Environmental protection's constitutional status informs the division of powers analysis

i. Underlying constitutional principles inform the interpretation of laws and delineation of jurisdiction

19. The framers of Canada's Constitution in 1867 could not have conceived of human-induced environmental harm on the scale that would threaten the primary conditions of community life within a legal order. Nor could they have understood the importance of entrenching environmental protection at that time.

20. Where courts have perceived serious threats to the fundamental values and norms of human society that cannot be resolved by resort to the written Constitution, they have protected against those threats by identifying and relying on organizing principles that fill in the constitutional gap.[27] This is precisely the situation faced with respect to environmental

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[23] Rt Hon Beverley McLachlin, "Unwritten Constitutional Principles: What is Going On?" (2006) 4 NZ. J. Pub. & Int. L. 147 at 149 ["McLachlin"].
[24] McLachlin at 150.
[25] *Re Manitoba Language Rights*, [1985] 1 SCR 721 [*Manitoba Language Rights*] at para 60.
[26] Lynda Collins, "Safeguarding the Longue Durée: Environmental Rights in the Canadian Constitution" (2015) *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 71 at 539.
[27] Harry J. Wruck, "The Time Has Arrived for a Canadian Public Trust Doctrine Based upon the Unwritten Constitution" 10 Geo. Wash. J. Energy & Envtl. L. 66 (forthcoming December 2019) ["Wruck"] at 40.

degradation, because "without a viable environment, there can be no legal system; nature literally constitutes law (and every other human institution)."[28]

21. This Court in *Secession Reference* explained how underlying principles may be invoked by courts to assist in resolving the issue(s) before it. While they should "not be taken as an invitation to dispense with the written text of the Constitution",[29] these principles are "invested with a powerful normative force, and are binding upon both courts and governments."[30]

22. In this appeal, the underlying constitutional principle of environmental protection should be invoked to assist in the interpretation of the Proposed Amendments and delineation of sphere of respective jurisdictions,[31] as part of the development of the Constitution as a living tree.[32]

23. Ultimately, the constitutional status of environmental protection should inform this Court's analysis in order to arrive at an outcome that complies with it.[33] This means that the analysis should be conducted with a mind to ensuring each level of government is afforded the necessary jurisdiction to protect public rights to the environment and legislate in accordance with fundamental tenets of environmental law, including the polluter pays[34] and precautionary principles.[35]

ii. The dominant characteristic of the Proposed Amendments is environmental protection

24. When a constitutional issue relating to the environment – an abstruse, unassigned subject matter – comes before the court where both the federal and provincial legislatures are entitled to

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[28] Lynda Collins & Lorne Sossin, "In Search of an Ecological Approach to Constitutional Principles and Environmental Discretion in Canada" (2019) 52:1 UBC L. Rev. 293 ["Collins & Sossin"] at 317; Wruck at 36.
[29] *Secession Reference* at para 53.
[30] *Secession Reference* at para 54.
[31] *Secession Reference* at para 52.
[32] *Secession Reference* at para 52.
[33] Collins & Sossin at 324-325; *Manitoba Language Rights.*
[34] *Orphan Well Association v. Grant Thornton Ltd*, 2019 SCC 5 at para 29; Jerry V. DeMarco, "The Supreme Court of Canada's Recognition of Fundamental Environmental Values: What Could Be Next in Canadian Environmental Law?" (2007) 17 J. Env. L. & Prac. 159 [DeMarco] at 14-17.
[35] *Spraytech* at paras 30-32; DeMarco at 17-20.

legislate (as in this appeal), the court must work to characterize laws in furtherance of the constitutional status of environmental protection.[36]

25. The Court below characterized the Proposed Amendments as the regulation of the TMX Project. In doing so, the Court failed to address how protection of the environment as a quasi-constitutional matter and an underlying constitutional principle should inform its assessment.

26. Ecojustice agrees with the AGBC that the true dominant characteristic of the Proposed Amendments is protecting British Columbia's environment and communities from a potentially catastrophic Heavy Oil spill. The Proposed Amendments accomplish this by empowering the Province to ensure in all cases that there will be an adequate regime in place to prevent, respond to, and recover from Heavy Oil spills. Disasters like the Exxon Valdez spill leave no doubt that a robust regulatory regime is critical to preventing and recovering from similar catastrophes.[37]

27. Moreover, the dominant characteristic can also be discerned from the fact that the Proposed Amendments invoke important tenets of domestic and international environmental law, including the precautionary principle.[38] The Proposed Amendments incorporate the precautionary principle and operationalize the constitutional status of environmental protection by ensuring the decision-maker has the authority to implement safeguards and a responsive regulatory scheme where current measures are insufficient. This, and the incorporation of other tenets, including polluter pays[39] and recovery for loss of non-use value,[40] supports a finding that the Proposed Amendments are truly focused on protecting British Columbia's environment.

iii. The Proposed Amendments are within British Columbia's jurisdiction

28. It is to be presumed that the Proposed Amendments are within the legislative jurisdiction of British Columbia.[41]

29. This presumption of constitutionality is bolstered by the fact that the Proposed Amendments are addressing the constitutional matter of environmental protection, which means

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[36] *Hydro-Québec* at para 86.
[37] *R v. Wholesale Travel Group Inc*, [1991] 3 SCR 154 at para 26.
[38] *Spraytech* at paras 30-32; *Castonguay* at para 42; *Morton v Canada (Fisheries and Oceans)*, 2015 FC 575 at paras 41-43.
[39] Proposed Amendments, s 22.1(a)(b); DeMarco at 14-17.
[40] Proposed Amendments, ss 22.4(e), 22.5(b)(ii); DeMarco at 10-11.
[41] *Severn v. The Queen*, [1878] 2 SCR 7.

preserving British Columbia's resources and its communities' livelihoods, health, and cultures. Save for limited exceptions, only the provinces are granted the constitutional authority to enact legislation respecting these issues, which are matters of property and civil rights, public land management, and of a local nature.[42] This is particularly the case here where there is a disproportionate impact on British Columbia if a hazardous Heavy Oil spill occurs within its borders.[43]

30. Justice La Forest in *Hydro-Québec* recognized that both provincial legislatures and Parliament have an "all-important duty… to make full use of the legislative powers respectively assigned to them in protecting the environment…". And, in recognition of this duty, La Forest J. further held that the judiciary is burdened to expansively define the scope of power each level of government has to legislate over the abstruse but superordinate matter of environmental protection.[44]

31. These statements are apposite for this appeal – the Proposed Amendments, representing an effort by British Columbia to comply with its duty, must be recognized to fall within its Constitutional authority.

iv. The Proposed Amendments apply to interprovincial undertakings

32. Recognition of the constitutional status of environmental protection necessitates an acceptance of the critical role both levels of government have to play in protecting the environment even where interprovincial undertakings are at issue.

33. This Court has made it clear that federalism (another underlying principle) has evolved in a way that promotes overlapping federal and provincial jurisdiction, especially with respect to the superordinate issue of environmental protection.[45] The interjurisdictional immunity doctrine is simply not applicable in cases of this kind where both levels of government have a duty to protect the environment through an expansive use of their respective powers. The underlying principle or quasi-constitutional status of environmental protection demands nothing less.

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[42] *Constitution Act, 1867,* s. 92(5), 92(13), 92(16).
[43] *Coastal First Nations v British Columbia (Environment),* 2016 BCSC 34 at para 53.
[44] *Hydro-Québec* at para 86.
[45] *Oldman River* at 16; *Spraytech*; *Hydro-Québec* at para 85; *Canadian Pacific* at para 55.

v. Federal legislation does not render the Proposed Amendments inoperative

34. In light of the constitutional status of environmental protection, the federal government shoulders a weighty burden to demonstrate a true conflict or frustration of purpose in the application of the paramountcy doctrine.[46] Every effort must be made to interpret the federal legislative regime so as not to interfere with British Columbia's jurisdiction to enact the Proposed Amendments.[47] To do otherwise would usurp the authority of the province to comply with its constitutional obligation to protect its environment.[48]

35. It should also be recognized that there is a clear need for multiple safety nets even if there is some overlap in order to anticipate, prevent, and attack the potential for environmental degradation.[49] The Proposed Amendments accomplish this by, for example, imposing stronger conditions than those available under the *Pipeline Safety Act*,[50] which is the federal government's main legislation with respect to protecting the environment from hazardous substances transported in interprovincial pipelines. These conditions create both an incentive and a deterrence to those covered by the Proposed Amendments to take appropriate measures to ensure Heavy Oil spills do not occur.

36. First, under the *PSA*, unless the claimant proves fault or negligence, the limit of liability is $1 billion.[51] The Proposed Amendments on the other hand has no limit of liability and there is no need to prove fault or negligence.[52] Given the experience from past spills,[53] it is important not to cap liability irrespective of the severity of the accident. Otherwise, the environment may be left to suffer in perpetuity.[54]

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[46] *CWB* at para 75.
[47] *CWB* at paras 72-74.
[48] *Hydro-Québec* at para 86.
[49] See e.g., *Spraytech* at paras 3, 36-39, 41.
[50] *Pipeline Safety Act*, SC 2015, c 21 [*PSA*].
[51] *PSA*, s 48.12(5)(a).
[52] Proposed Amendments, s 22.5(b)(ii).
[53] See e.g., costs associated with the 2010 Enbridge Line 6B pipeline (Affidavit of Thomas Gunton, Affirmed September 28, 2018, Ex. A, AR-BC, Vol. 20, Tab 8, 3873-3874); *Exxon Shipping Co v. Baker*, 554 US 471 (2008) Exxon spent $2.1 billion in cleanup costs alone in response to the 1989 Valdez supertanker spill.
[54] Logan Affidavit, Ex. B, AR-BC, Vol 20, Tab 9, pp 3942-3945, 3967, 3989.

37. Second, under the Proposed Amendments First Nations and local governments can claim damages as well as costs for restoration, economic loss, ecological recovery, and any loss of non-use value where an oil spill occurs. The *PSA* has no such provision, making it difficult, if not impossible, for these parties to recover damages and restore the environment to pre-spill conditions.

38. Third, unlike the *PSA,* the Proposed Amendments empower the director to require an applicant to provide information relating to risks to human health and the environment arising from a spill, as well as an estimate of the monetary value of those impacts. These conditions will force proponents to consider taking additional measures to prevent a spill.

D. Conclusion

39. Nearly three decades ago this Court recognized protection of the environment to be one of the major challenges of our time. In the intervening years human-induced environmental degradation has increased to the point of now threatening ecological systems and democratic institutions. As a *living* tree, Canada's Constitution must be responsive to this crisis.

40. British Columbia, through the Proposed Amendments, is endeavoring to comply with its duty to protect its environment and communities from a highly toxic substance that, if spilled, could cause catastrophic harm. As such, the constitutional nature of environmental protection must inform this Court's analysis of the validity, applicability, and operability of the legislation.

PART IV – COSTS

41. As an intervener, Ecojustice submits that costs should not be awarded to or against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at the city of Vancouver, in the province of British Columbia, this 20th day of November, 2019.

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Kegan Pepper-Smith
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