Court 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

ATTORNEY GENERAL OF ALBERTA, ATTORNEY GENERAL OF SASKATCHEWAN, ATTORNEY GENERAL OF ONTARIO, PROCUREURE GÉNÉRALE DU QUÉBEC

Interveners

FACTUM OF THE RESPONDENT, ATTORNEY GENERAL OF CANADA

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

Attorney General of Canada
Department of Justice
British Columbia Regional Office
840 Howe Street, Suite 900
Vancouver, British Columbia
V6Z 2S9

Per: Jan Brongers
BJ Wray
Tel: (604) 666-0110 / (604) 666-4304
Fax: (604) 666-1585
E-Mail: jan.brongers@justice.gc.ca / bj.wray@justice.gc.ca

Counsel for the Respondent, Attorney General of Canada

Attorney General of Canada
Department of Justice
National Litigation Sector
50 O’Connor Street, 5th Floor
Ottawa, Ontario
K1A 0H8

Per: Christopher Rupar
Tel: (613) 670-6290
Fax: (613) 954-1920
E-Mail: crupar@justice.gc.ca

Agent for the Respondent, Attorney General of Canada

Court 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

ATTORNEY GENERAL OF ALBERTA, ATTORNEY GENERAL OF SASKATCHEWAN, ATTORNEY GENERAL OF ONTARIO, PROCUREURE GÉNÉRALE DU QUÉBEC

Interveners

FACTUM OF THE RESPONDENT, ATTORNEY GENERAL OF CANADA

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

Counsel for the Appellant, Attorney General of British Columbia

Arvay Finlay LLP
1512 – 808 Nelson Street
Vancouver, British Columbia
V6Z 2H2
Per: **Joseph J. Arvay, Q.C.**
Catherine Boies Parker
Tel: (604) 696-9828
Fax: 1-888-575-3281
E-Mail: jarvay@arvayfinlay.ca
cboiesparker@arvayfinlay.ca

Ministry of the Attorney General (British Columbia)
6th Floor, 1001 Douglas Street
Victoria, British Columbia
V8W 9J7
Per: **J. Gareth Morley**
Tel: (250) 952-7644
Fax: (250) 356-0064
E-Mail: gareth.morley@gov.bc.ca

Agent for the Appellant, Attorney General of British Columbia

Michael J. Sobkin
331 Somerset Street West
Ottawa, Ontario
K2P 0J8

Court 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

ATTORNEY GENERAL OF ALBERTA, ATTORNEY GENERAL OF SASKATCHEWAN, ATTORNEY GENERAL OF ONTARIO, PROCUREURE GÉNÉRALE DU QUÉBEC

Interveners

FACTUM OF THE RESPONDENT,
ATTORNEY GENERAL OF CANADA
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

Counsel for the Intervener, Attorney General of Alberta

Gall Legge Grant Zwack LLP
1000 – 1199 West Hastings Street
Vancouver, British Columbia
V6Z 2H2

Per: Peter A. Gall, Q.C.
Andrea L. Zwack
Tel: (604) 891-1152
Fax: (604) 669-5101
E-Mail: pgall@glgzlaw.com / azwack@glgzlaw.com

Agent for the Intervener, Attorney General of Alberta

Gowling WLG (Canada) LLP
160 Elgin Street, Suite 2600
Ottawa, Ontario
K1P 1C3

Per: D. Lynne Watt
Tel: (613) 786-8695
Fax: (613) 788-3509
E-Mail: lynne.watt@gowlingwlg.com

Counsel for the Intervener, Attorney General of Saskatchewan

Ministry of Justice (Saskatchewan)
Constitutional Law
820 – 1874 Scarth Street
Regina, Saskatchewan
S4P 4B3

Per: Thomson Irvine, Q.C.
Katherine Roy
Tel: (306) 787-0206
Fax: (306) 787-9111
E-Mail: tom.irvine@gov.sk.ca
katherine.roy@gov.sk.ca

Agent for the Intervener, Attorney General of Saskatchewan

Gowling WLG (Canada) LLP
160 Elgin Street, Suite 2600
Ottawa, Ontario
K1P 1C3

Per: D. Lynne Watt
Tel: (613) 786-8695
Fax: (613) 788-3509
E-Mail: lynne.watt@gowlingwlg.com

Counsel for the Intervener, Attorney General of Ontario

Ministry of the Attorney General (Ontario)
720 Bay Street, 4th Floor
Toronto, Ontario
M7A 2S9

Per: Josh Hunter
Padraic Ryan
Tel: (416) 326-0131
Fax: (416) 326-4015
E-Mail: joshua.hunter@ontario.ca
padraic.ryan@ontario.ca

Agent for the Intervener, Attorney General of Ontario

Juristes Power Law
130 Albert Street, Suite 1103
Ottawa, Ontario
K1P 5G4

Per: Maxine Vincelette
Tel: (613) 702-5573
Fax: (613) 702-5573
E-Mail: mvincelette@powerlaw.ca

Counsel for the Intervener, Procureure Générale du Québec

Ministère de la justice du Québec
1200, route de l'Église, 4e étage
Quebec City, Quebec
G1V 4M1

Per : Frédéric Perreault
Tel : (418) 643-1477, ext. 20785
Fax : (418) 644-7030
E-Mail : frederick.perreault@justice.gouv.gc.ca

Agent for the Intervener, Procureure Générale du Québec

Noël & Associés
111, rue Champlain
Gatineau, Quebec
J8X 3R1

Per : Pierre Landry
Tel : (819) 503-2178
Fax : (819) 771-5397
E-Mail : p.landry@noelassocies.com

TABLE OF CONTENTS

PART I – OVERVIEW AND STATEMENT OF THE FACTS 1
A. OVERVIEW 1
B. STATEMENT OF FACTS 2
i. Trans Mountain Expansion Project 2
ii. Canada's Interprovincial Oil Transportation Regulatory Regime 7
iii. British Columbia's Proposed Heavy Oil Legislation 12
iv. The Reference to the British Columbia Court of Appeal 15
PART II – RESPONDENT'S POSITION ON QUESTIONS IN ISSUE 15
PART III – ARGUMENT 16
A. QUESTION ONE: BC'S PROPOSED LEGISLATION IS *ULTRA VIRES* 16
i. Division of Powers Analytical Framework 17
ii. Characterization: The Pith and Substance of the Proposed Legislation is the Regulation of Interprovincial Oil Transportation 20
iii. Classification: The Pith and Substance of the Proposed Legislation is Within Parliament's Exclusive Jurisdiction Over Interprovincial Undertakings 24
iv. The Double Aspect Doctrine is Not Engaged by the Proposed Legislation 26
v. The Proposed Legislation is Not Saved by the Ancillary Powers Doctrine 27
B. QUESTION TWO: BC'S PROPOSED LEGISLATION IS INAPPLICABLE TO INTERPROVINCIAL UNDERTAKINGS 31
C. QUESTION THREE: BC'S PROPOSED LEGISLATION CONFLICTS WITH EXISTING FEDERAL LEGISLATION 35
D. CONCLUSION 39
PART IV – COSTS 40
PART V – NATURE OF ORDER SOUGHT 40
PART VI – SUBMISSIONS ON CASE SENSITIVITY 40
PART VIII – TABLE OF AUTHORITIES 41

PART I – OVERVIEW AND STATEMENT OF THE FACTS

A. OVERVIEW

1. Against the backdrop of its opposition to the federally-approved expansion of the Trans Mountain Pipeline, the Government of British Columbia ("BC") proposed a regulatory regime that would prohibit any increases in heavy oil shipments unless they are authorized by a provincial official. Concerned that such a regime cannot be lawfully enacted by the province, the Government of BC commenced a reference asking the Court of Appeal for British Columbia ("BCCA") to opine on the regime's constitutionality before attempting to legislate it into force.

2. The BCCA advised the Government of BC that its concern is well-founded. A unanimous panel of five judges concluded that the province's proposed regime is indeed unconstitutional because its pith and substance relates to the regulation of interprovincial undertakings, a subject assigned to Parliament by the *Constitution Act, 1867*. The BCCA's conclusion that the law is invalid made it unnecessary for the BCCA to consider the subsidiary reference questions regarding its hypothetical applicability and operability in respect of interprovincial undertakings.

3. The Government of BC now disagrees with this assessment, and asks this Court to provide its proposed regime with the judicial seal of approval that it was denied by the BCCA.

4. However, the Government of BC's criticism of the BCCA's opinion and its request that the draft legislation ought to be found constitutionally valid are without merit. The BCCA correctly held that the proposed legislation is not an environmental law of general application, but rather a regime whose intent and sole effect is to set conditions for, and if necessary prohibit, increased volumes of heavy oil in BC. Since heavy oil can only enter the province through the Trans Mountain Pipeline and the national railways, the proposed law's dominant characteristic is to prohibit them from transporting increased volumes of heavy oil through BC, or to only permit them to do so in accordance with conditions set by the province. In this way, the proposed law allows the Government of BC to effect control over the operations of these federal undertakings.

5. Furthermore, the Government of BC is wrong to suggest that its constitutional inability to regulate interprovincial heavy oil transport creates an unacceptable "enclave" of federal authority that endangers the environment. To the contrary, exclusive federal jurisdiction over transportation

undertakings whose routes transcend individual provinces is a deliberate feature of our nation's constitutional framework. This feature ensures that the authorization of such undertakings, as well as decisions regarding what goods they can carry and what carriage conditions apply, is done in a manner that reflects the concerns of all Canadians, not just those who live in a particular province.

6. Indeed, as noted by the BCCA, the Trans Mountain Pipeline expansion ("TMX Project") is not only a "British Columbia project"; it is a project that affects the country as a whole and which the federal government is entrusted to regulate in the national interest. The Government of Canada does just that by exercising its authority under a regulatory framework adopted by Parliament to comprehensively oversee the safe and efficient operation of interprovincial pipelines and railways. BC's proposed regime would give the province a veto over Canada's exercise of this authority. This would place federal undertakings and those who rely upon the services they provide at the mercy of provincial officials who would wield that veto power. Such a disruption to the division of powers set out in the *Constitution Act, 1867* cannot be countenanced.

7. Accordingly, the BCCA's opinion that the Government of BC's proposed heavy oil permit regime is unconstitutional should be affirmed. In the alternative, even if a province could validly enact such a regime, the Court should confirm that it would be inapplicable or inoperable in respect of all interprovincial undertakings, including the Trans Mountain Pipeline, by virtue of the doctrines of interjurisdictional immunity and paramountcy.

B. STATEMENT OF FACTS

i. Trans Mountain Expansion Project

8. The TMX Project is a proposed interprovincial petroleum pipeline transportation system designed to transport heavy oil and diluted bitumen from the oil sands in Alberta to port facilities in BC for the purpose of exporting this Canadian petroleum to foreign markets.[1]

---

[1]Agreed Statement of Facts ["ASF"], paras. 388-389, 391-393 **[Appellant Record ("AR")-BC Part 2, v.23, pp. 4648-4649]**; *Reference re Environmental Management Act (BC),* 2019 BCCA 181 ["BCCA Reasons"], paras. 32-33 **[AR Part 1, p. 24]**.

9. The proponent of the TMX Project is Trans Mountain Pipeline ULC and Trans Mountain Pipeline L.P. (collectively "TM").[2] TM also owns the operating certificates for the existing Trans Mountain pipeline system ("TMPL System") that transports a range of petroleum products from Sherwood Park, Alberta to multiple delivery locations in BC and to Washington State.[3] In addition, oil transported on the TMPL System is loaded on to third-party tankers at the Westridge Marine Terminal in Burnaby, BC for export.[4] The current TMPL system has been in operation since 1953 and has a capacity of 300,000 barrels per day ('bbls/d").[5]

10. The TMX Project is intended to expand the capacity of the existing TMPL System to 890,000 bbls/d.[6] This would be accomplished by twinning the TMPL System so that it consists of two pipelines: the existing "Line 1" and a new "Line 2".[7] The expanded Line 1 will have a capacity of 350,000 bbls/d and will primarily transport refined petroleum and light crude. Line 2 will have a capacity of 540,000 bbls/d and will primarily transport heavy crude and blended bitumen.[8]

(i) The Regulatory Approval Process

11. An application for approval of the TMX Project was submitted by TM to the National Energy Board ("NEB") on December 16, 2013.[9]

12. The NEB issued its report and recommendations regarding the TMX Project on May 19, 2016 (the "2016 NEB Report").[10] The NEB Report recommended that the Governor in Council ("GIC") approve the TMX Project subject to the imposition of 157 conditions.[11]

---

[2] ASF, paras. 360, 361, 394 **[AR-BC Part 2, v.23, pp. 4644, 4650]**.
[3] ASF, para 372 **[AR-BC Part 2, v.23, p. 4646]**.
[4] ASF, paras. 362, 372. **[AR-BC Part 2, v.23, pp. 4644, 4646]**.
[5] ASF, paras. 371, 373 **[AR-BC Part 2, v.23, pp. 4645-4646]**; BCCA Reasons, para. 32 **[AR Part 1, p. 24]**.
[6] ASF, para. 391 **[AR-BC Part 2, v.23, p. 4649]**; BCCA Reasons, para. 32 **[AR Part 1, p. 24]**.
[7] ASF, para. 392 **[AR-BC Part 2, v.23, p. 4649]**.
[8] ASF, paras. 392, 393 **[AR-BC Part 2, v.23, p. 4649]**.
[9] ASF, paras. 394, 406 **[AR-BC Part 2, v.23, pp. 4650, 4652]**.
[10] ASF, paras. 395, 440 **[AR-BC Part 2, v.23, pp. 4650, 4659]**.
[11] ASF, paras. 445, 446 **[AR-BC Part 2, v.23, pp. 4659-4660]**.

13. On November 29, 2016, the GIC approved the TMX Project as recommended by the NEB.[12] The GIC's Order in Council ("2016 OIC") directed the NEB to issue a Certificate of Public Convenience and Necessity ("CPCN") for the TMX Project to permit its construction and eventual operation.[13] On December 1, 2016, the NEB issued the CPCN, subject to the 157 conditions outlined in the 2016 NEB Report.[14]

14. The TMX Project was also subject to review by the Environmental Assessment Office ("EAO") of BC[15] and, as the BCCA noted, TM "co-operated in the EAO's review process of the project over several years".[16] On December 8, 2016, the EAO issued its summary assessment report recommending that an Environmental Assessment Certificate ("EAC") be issued in relation to the TMX Project subject to 37 conditions.[17] The BC Government issued an EAC for the TMX Project in accordance with the EAO's recommendation on January 10, 2017.[18] The BCCA noted that on the next day, the two provincial ministers charged with the review of the EAO reports issued a press release stating in part:

> Today we issued an EA Certificate for the project, understanding that all interprovincial pipelines are under federal jurisdiction. We have looked at areas where we can improve the project by adding conditions that will build upon those already established by the federal government.[19]

15. The 2016 NEB Report and the 2016 OIC were challenged by way of judicial review applications before the Federal Court of Appeal ("FCA"). On August 30, 2018, the FCA quashed the 2016 OIC, for two reasons: (1) the improper exclusion by the NEB of marine shipping as a component of the Project; and (2) the inadequacy of the Crown's Indigenous consultation. The

---

[12] ASF, para. 463 **[AR-BC Part 2, v.23, p. 4663]**.
[13] ASF, paras. 397, 464 **[AR-BC Part 2, v.23, pp. 4650, 4663]**; Order in Council P.C. 2016-1069, November 29, 2016.
[14] AGC Reference Record ["AGC RR"], Vol. 3, Tab 8: Affidavit of Michael Davies, sworn September 29, 2018 at 964 **[AR-AGC Part 2, v.3, p. 964]**.
[15] ASF, para. 474 **[AR-BC Part 2, v.23, p. 4664]**.
[16] BCCA Reasons, para. 34 **[AR Part 1, p. 24]**.
[17] ASF, paras. 480-482 **[AR-BC Part 2, v.23, p. 4665]**.
[18] ASF, para. 483 **[AR-BC Part 2, v.23, p. 4666]**; BCCA Reasons, para. 35 **[AR Part 1, p. 25]**.
[19] BCCA Reasons, para. 35 **[AR Part 1, p. 25]**.

FCA found no other flaws in the NEB's process or assessment, and rejected all of the other arguments presented by the applicants.[20]

16. Following the FCA's decision, the GIC directed the NEB to reconsider its assessment of the TMX Project within 155 days.[21] On February 22, 2019, the NEB issued its reconsideration report on the TMX Project ("2019 NEB Report"). While the NEB found that the marine shipping component of the Project would cause significant adverse environmental effects, it also found that in light of the considerable benefits of the TMX Project and measures to mitigate the effects, they can be justified in the circumstances. As such, the NEB recommended approval of the Project subject to 156 conditions, and made 16 further recommendations to the GIC on further measures outside of the NEB's regulatory authority.[22]

17. On June 18, 2019, the GIC accepted the NEB's recommendations and issued an Order in Council directing the NEB to issue a CPCN for the TMX Project subject to all of the NEB's conditions, although some of these were amended to accommodate potential impacts on Indigenous peoples.[23]

18. Judicial reviews were also brought in respect of BC's assessment of the TMX Project, and were dismissed by the BC Supreme Court. On appeal, the BCCA fundamentally agreed with the court below that upheld the validity of the EAC, although it did order the BC EAO to reconsider the EAC conditions in light of the new 2019 NEB Report.[24]

(ii) Political Opposition by British Columbia to the TMX Project

19. The present government of BC was formed following the provincial election of May 9, 2017. It is a minority government led by the BC New Democratic Party ("NDP") supported by the BC Greens pursuant to a Confidence and Supply Agreement ("CSA"). Under the terms of the CSA,

---

[20] ASF, para. 467 **[AR-BC Part 2, v.23, p. 4663]**; *Tsleil-Waututh Nation v. Canada,* 2018 FCA 153 at paras. 5-7.
[21] Order in Council P.C. 2018-1177, September 20, 2018.
[22] Order in Council P.C. 2019-0820, June 18, 2019 ["June 18, 2019 OIC'].
[23] June 18, 2019 OIC.
[24] ASF, paras. 489-491 **[AR-BC Part 2, v.23, pp. 4670-4671]**; *Vancouver v. British Columbia,* 2018 BCSC 843, appeal allowed in part 2019 BCCA 322; *Squamish Nation v. British Columbia,* 2018 BCSC 844, appeal allowed in part 2019 BCCA 321.

the caucuses of the two parties agreed to "employ every tool available to the new government" to stop the TMX Project.[25]

20. Following receipt of legal advice that it would be unconstitutional for the BC Government to legislate directly to stop the TMX Project, the BC Government announced that it would focus instead on developing other measures to "defend BC's coast".[26] BC ultimately proposed legislation designed to prevent increases in heavy oil shipments through BC.[27] That regime is described further below at paragraphs 42 to 50.

(iii) Political Opposition by Burnaby to the TMX Project

21. Like the present government of BC, the municipal government in Burnaby is opposed to the TMX Project.[28] TM experienced significant delays in obtaining municipal permits from Burnaby in relation to the TMX Project. This situation culminated in TM seeking relief from the NEB from the need to comply with Burnaby's permit requirements.[29] The NEB effectively agreed that Burnaby was exercising its permitting authority unconstitutionally since its delay in issuing permits was impeding construction of a federally approved project.[30] The NEB therefore relieved TM from its obligation to comply with Burnaby's permitting regime. Burnaby's attempts to appeal the NEB decision were denied by the FCA and this Court.[31]

---

[25] BCCA Reasons at para. 36 **[AR Part 1, pp. 25-26]**; ASF, paras. 513-529 **[AR-BC Part 2, v.23, pp. 4684-4687]**. See also British Columbia, Official Report of Debates of the Legislative Assembly (Hansard), 41st Parl., 3rd Sess., Issue 104 (14 March 2018) at 3534 (Hon. G. Heyman).

[26] BCCA Reasons at para. 36 **[AR Part 1, pp. 25-26]**; ASF, paras. 530-537 **[AR-BC Part 2, v.23, pp. 4687-4689]**.

[27] ASF, para. 536 **[AR-BC Part 2, v.23, p. 4688]**; B.C. Order of the Lieutenant Governor in Council No. 211, April 25, 2018.

[28] ASF, para. 538 **[AR-BC Part 2, v.23, p. 4689]**.

[29] ASF, paras. 539-553 **[AR- BC Part 2, v.23, pp. 4689-4692]**.

[30] ASF, para. 546 **[AR-BC Part 2, v.23, pp. 4690-4691]**; NEB Order MH-081-2017, January 18, 2018.

[31] ASF, paras. 548-551 **[AR-BC Part 2, v.23, p. 4691-4692]**.

ii. Canada's Interprovincial Oil Transportation Regulatory Regime

22. When the BCCA adjudicated this reference, Canada's legislative framework for regulating interprovincial transportation of petroleum was set out in the following statutes:[32]

> *Canadian Environmental Assessment Act*, *2012*, S.C. 2012, c. 19, s. 52 and *Regulations Designating Physical Activities (Project List),* (SOR/2012-147)
>
> *Canada Transportation Act*, S.C. 1996, c. 10
>
> *National Energy Board Act*, R.S.C., 1985, c. N-7 and *National Energy Board Act Part VI (Oil and Gas) Regulations* (SOR/96-244); *National Energy Board Onshore Pipeline Regulations* (SOR/99-294)
>
> *Pipeline Safety Act (An Act to amend the National Energy Board Act and the Canada Oil and Gas Operations Ac*t), S.C. 2015, c. 21
>
> *Railway Safety Act*, R.S.C. 1985, c. 32 (4th Supp.) and *Railway Operating Certificate Regulations* (SOR/2014-258)
>
> *Transportation of Dangerous Goods Act, 1992*, S.C. 1992, c. 34 and *Transportation of Dangerous Goods Regulations* (SOR/2019-101)

23. This comprehensive regulatory regime requires, among other things, the identification of: (1) risks to health and the environment; (2) impacts of releases of substances; and (3) measures put in place to prevent, detect, and respond to such releases. The federal regulatory regime also includes requirements with respect to the provision of compensation in the event of a release.

(i) Federal Regulation of Interprovincial Oil Pipelines

24. With respect to the federal regulation of interprovincial oil pipelines, the BCCA noted:

> In summary, there is in place a complex web of federal statutes and regulations that apply to all aspects of interprovincial pipelines, including environmental assessment, operational oversight, spill and accident responses, and financial liability and compensation for harm done by spills. The 'polluter pays' principle is clearly an important part of these laws […].[33]

---

[32] BCCA Reasons at para. 20 **[AR Part 1, p. 16]**. On August 28, 2019, the *Canadian Environmental Assessment Act, 2012* and the *National Energy Board Act* were repealed and replaced by the *Impact Assessment Act* and the *Canadian Energy Regulator Act*. This is discussed further at paragraph 34 below.

[33] BCCA Reasons at para. 27 **[AR Part 1, p. 20]**.

25. At the time of the BCCA's judgment, the *National Energy Board Act* ("*NEB Act*") was the primary federal legislative enactment that regulated the interprovincial transportation of petroleum by pipeline. Its purpose was to ensure that federally-regulated pipelines are designed, constructed, operated, and abandoned in a manner that is safe for the public and the environment.[34]

26. The *NEB Act* established the NEB for the purpose of effectively and prudently regulating Canada's growing energy industry to overcome the communicative and organizational difficulties that would arise if numerous separate agencies were to be responsible for such regulation.[35] This was recognized by the BCCA when it wrote that: "[a]t the end of the day, the NEB is the body entrusted with regulating the flow of energy resources across Canada to export markets."[36]

27. Pipeline companies regulated by the *NEB Act* were required to seek NEB authorization or approval for various activities, including: (1) the construction and operation of international and interprovincial pipelines in Canada; (2) exports of crude oil and natural gas; and (3) the establishment of pipeline tolls and tariffs.[37]

28. The *NEB Act* also imposed a common carrier obligation on pipeline companies to "receive, transport and deliver <u>all oil</u> offered for transmission" by suppliers, subject only to such exemptions, conditions or regulations as the NEB may prescribe.[38]

29. Furthermore, the NEB was authorized to order companies to repair, reconstruct, or alter a pipeline, and to direct that it not be operated until such work is done. The NEB also could make regulations governing the design, construction, operation and abandonment of a pipeline, as well

---

[34] ASF, para. 167 **[AR-BC Part 2, v.23, p. 4611]**; House of Commons Debates, 41st Parl., 2nd Sess., Vol. 147, No. 162 (26 January 2015) at 10558, 10560 (Hon. G. Rickford).
[35] ASF, paras. 165-166 **[AR-BC Part 2, v.23, pp. 4610-4611]**; BCCA Reasons at paras. 21-22 **[AR Part 1, pp. 16-17]**; House of Commons Debates, 22nd Parl., 2nd Sess., Vol 2, (25 February 1955) at 1530-1531 (H.C. Green).
[36] BCCA Reasons at para. 104 **[AR Part 1, p. 58]**; ASF, paras. 165-166 **[AR-BC Part 2, v.23, pp. 4610-4611]**; House of Commons Debates, 22nd Parl., 2nd Sess., Vol 2, (25 February 1955) at 1530-1531 (H.C. Green).
[37] *National Energy Board Act*, RSC 1985, c N-7 ["*NEB Act*"], Parts 2, 4 and 6; now the *Canadian Energy Regulator Act* at Part 2, 3 and 7.
[38] *NEB Act,* s 71 (now *Canadian Energy Regulator Act,* s 239).

as providing for the protection of property, the environment, the public and employees in the construction, operation and abandonment of a pipeline.[39]

30. In June 2016, the federal *Pipeline Safety Act* ("*PSA*") came into force, modifying the regulatory regime so that it:

(a) enshrined in law the "polluter pays" principle, under which companies have unlimited liability when at fault or negligent (*NEB Act*, ss. 48.11 and 48.12(1));

(b) provided governments with the ability to pursue pipeline operators for the loss of non-use value relating to public resources (*NEB Act*, s. 48.12(1)(c));

(c) introduced absolute liability for pipeline oil spills up to set limits ($1 billion for companies operating major oil pipelines) without proof of fault or negligence (*NEB Act*, s. 48.12(4) and (5)).

(d) required companies to demonstrate that they have financial resources to match at a minimum their level of absolute liability, and that a portion of these resources will be readily accessible to help ensure rapid incident response (*NEB Act*, s. 48.13(1))

(e) authorized the NEB to reimburse federal, provincial, municipal and Aboriginal governments for measures taken to respond to incidents (*NEB Act*, s. 48.15); and

(f) allowed for the NEB to take control of incident response if a company operating a pipeline is unwilling or unable to shoulder its responsibilities (the costs of which are to be recovered fully from industry) (*NEB Act*, s. 48.16). [40]

31. The NEB was also responsible for conducting Environmental Assessments (EAs) for the pipeline projects it regulated in accordance with the *NEB Act* and the *Canadian Environmental Assessment Act 2012* ("*CEAA 2012*"). Following completion of an EA, the NEB was required to produce a report containing its assessment of project-related impacts on the environment, whether such projects will be required by the present and future public convenience and necessity, and what terms and conditions should apply to the project. That report would then be provided to the GIC to assist it with discharging its statutory obligation to make a final decision on project approval.[41]

---

[39] ASF, para. 179 **[AR-BC Part 2, v.23, p. 4615]**; *NEB Act,* s 48 (now *Canadian Energy Regulator Act,* ss 95-97).
[40] *NEB Act,* ss 48.11, 48.12, 48.13, 48.15, and 48.16 (now *Canadian Energy Regulator Act*, ss 136, 137, 138, 140, and 141).
[41] ASF, paras. 185, 188 **[AR-BC Part 2, v.23, p. 4616]**; *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, ss 15(b) and 52, and *NEB Act* (EAs of major pipeline projects are now

32. In addition, regulations made under the *NEB Act*, such as the *National Energy Board Onshore Pipeline Regulations,* SOR/99-294 ("*OPR*"), required that companies design safety management, environmental protection, emergency management, third-party crossing, public awareness, and integrity management programs, which are reviewed by the NEB.[42] As the BCCA noted, the OPR "imposes various obligations on pipeline companies, many of which obligations related to environmental protection and the minimization of spills" and these requirements apply to the pipeline "from cradle to grave".[43]

33. The NEB was also empowered to conduct ongoing pipeline monitoring, inspections, and site visits to confirm compliance with regulatory requirements.[44] Where necessary, the NEB could issue mandatory compliance orders or use other appropriate tools to enforce these requirements.[45]

34. On August 28, 2019, the *NEB Act* and *CEAA, 2012* were repealed and replaced by the *Canadian Energy Regulator Act* ("*CERA*") and the *Impact Assessment Act* ("*IAA*"), respectively.[46] The new legislation creates the Canadian Energy Regulator to assume most of the regulatory functions that were performed by the NEB. It also creates the Impact Assessment Agency of Canada, whose responsibilities include performing EAs of larger pipeline projects. As noted by the BCCA, an objective of the new legislation is to implement "an impact assessment and regulatory system that Canadians trust and that protects the environment and the health and safety of Canadians."[47] Together, the *CERA* and the *IAA* continue to provide a robust and comprehensive regulatory regime for all interprovincial petroleum transportation by pipeline in Canada.

---

prepared by the Impact Assessment Agency pursuant to the *Impact Assessment Act* and the *Canadian Energy Regulator Act,* ss 182-186).

[42] ASF, para. 180 **[AR-BC Part 2, v.23, p. 4615]**.

[43] BCCA Reasons at para. 26 **[AR Part 1, p. 20]**.

[44] ASF, para. 182 **[AR-BC Part 2, v.23, p. 4615]**.

[45] ASF, para. 182, 190-191 **[AR-BC Part 2, v.23, pp. 4615, 4617]**; BCCA Reasons at para. 23 **[AR Part 1, p. 19]**.

[46] *An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protect Act and to make consequential amendments to other Acts*, SC 2019, c 28.

[47] BCCA Reasons, para. 24 **[AR Part 1, p. 19]**.

(ii) Federal Regulation of Interprovincial Transportation of Oil by Rail

35. The federal regulatory framework for interprovincial railway transportation is set out in the *Canada Transportation Act* ("*CTA*"), the *Railway Safety Act* ("*RSA*") and the *Transportation of Dangerous Goods Act, 1992,* ("*TDGA*").[48]

Canada Transportation Act ("CTA")

36. Parts III and IV of the *CTA* prescribe a regime for certifying companies to construct and operate railways. Sections 113 to 116 of the *CTA* impose common carrier obligations on the railways by requiring them to accept, receive, carry, and deliver <u>all goods</u>, and set out a means for shippers to complain should railways not fulfill these obligations.[49] In practice, this means that the railways cannot pick and choose the goods they transport and are limited in the requirements they can place on shippers.[50]

37. Interprovincial railways require federal certificates of fitness in order to be constructed or operated. The Canadian Transportation Agency will not issue such certificates unless the railway demonstrates that it has adequate liability insurance coverage associated with construction and operation of the railway.[51] Furthermore, following the tragic accident in Lac-Mégantic in 2013, the *CTA* was amended by Bill C-52 (*Safe and Accountable Rail Act*) in 2015 to:

> (a) specify the risks that are to be covered by the insurance coverage for the operation of a railway, risks that must include matters such as death, damage to property and risks associated with leak, pollution, or contamination (s. 92(1.1.));
>
> (b) specify minimum levels of insurance, which are set out in Schedule IV of the Act and are based on the type and volume of goods, including dangerous goods, moved by a railway company in a calendar year; and
>
> (c) establish a liability and compensation regime in case of railway accidents involving crude oil and other designated goods (Division VI.2, Part III).[52]

---

[48] ASF, para. 197 **[AR-BC Part 2, v.23, p. 4618]**.
[49] ASF, para. 199 **[AR-BC Part 2, v.23, p. 4618]**.
[50] AGC RR, Vol. 7, Tab 14: Affidavit of James (Jim) Kozey, sworn September 27, 2018 at 2711 **[AR-AGC Part 2, v.7, p. 2711]**; AGC RR, Vol. 1, Tab 4: Affidavit of Patrick Brady, sworn October 1, 2018 at 363-364 **[AR-AGC Part 2, v.1, pp. 363-364]**; AGC RR, Vol. 3, Tab 6: Affidavit of James Cairns, sworn September 28, 2018 at 923 **[AR-AGC Part 2, v.3, p. 923]**.
[51] *Canada Transportation Act*, SC 1996, c 10, ["*CTA*"] ss 90 to 94.2.
[52] ASF, para. 201 **[AR-BC Part 2, v.23, pp. 4618-4619]**.

Railway Safety Act ("RSA")

38. The *RSA* provides for the regulation of the safety and security of railway transportation. The *RSA* applies to all railway companies subject to the legislative authority of Parliament as well as provincially regulated railway entities while they operate on federal track.[53]

39. The *RSA* also contains provisions that deal with the construction and operation of railways. This includes a certification process as well as a number of regulatory authorities for ensuring compliance with the safety and security regime established by the *RSA*.[54]

Transportation of Dangerous Goods Act ("TDGA")

40. The *TDGA* applies to essentially all movement of dangerous goods in Canada by any mode of transportation other than pipelines.[55] The *TDGA* is focused on preventing releases of dangerous goods under normal conditions of transport while ensuring an appropriate response capability exists in the event of an actual or anticipated release.[56]

41. Section 5 of the *TDGA* contains a general prohibition on the transport of dangerous goods unless the transporter complies with the prescribed safety requirements. These include ensuring that dangerous goods are properly classified and transported in appropriate means of containment, that there be proper documentation, safety marks, training, reporting and, in some cases, Emergency Response Assistance Plans associated with the movement of dangerous goods.[57]

iii. British Columbia's Proposed Heavy Oil Legislation

42. In April 2018, the Government of BC proposed legislation that would amend the provincial *Environmental Management Act* ("*EMA*") by adding Part 2.1, titled "Hazardous Substance

---

[53] ASF, para. 202 **[AR-BC Part 2, v.23, p. 4619]**.
[54] ASF, para. 203 **[AR-BC Part 2, v.23, p. 4619]**.
[55] ASF, para. 207 **[AR-BC Part 2, v.23, p. 4619]**.
[56] *Transportation of Dangerous Goods Act, 1992*, SC 1992, c 34 ["*TDGA*"], ss 5, 7, 14 and 18.
[57] Parts 2 to 8 of the *Transportation of Dangerous Goods Regulations,* SOR/2019-101 ["*TDGR"*].

Permits" ("Proposed Legislation").[58] The definition of "permit" in s. 1(1) of the *EMA* does not apply to a "Hazardous Substance" permit.[59]

43. The only "Hazardous Substance" identified in the Proposed Legislation is "Heavy Oil",[60] defined in the Schedule to the Proposed Legislation as follows:

> (a) a crude petroleum product that has an American Petroleum Institute ("API") gravity of 22 or less, or
>
> (b) a crude petroleum product blend containing at least one component that constitutes 30% or more of the volume of the blend and that has either or both of the following: (i) an API gravity of 10 or less, and/or (ii) a dynamic viscosity at reservoir conditions of at least 10,000 centipoise.[61]

44. Subsection 22.3(1) of the Proposed Legislation prohibits all businesses from increasing the volumes of Heavy Oil they transport or possess in BC unless they first obtain a permit from the provincial government. As the BCCA observed, "[t]he 'default' position of the law is to prohibit the possession of all heavy oil in the Province above the Substance Threshold […]."[62]

45. This "Substance Threshold" is the largest annual volume of Heavy Oil that a business transported or possessed in each of the years 2013 to 2017.[63] Accordingly, existing businesses who have moved or possessed Heavy Oil in BC within the last four years are only subject to the Proposed Legislation if they increase their volumes of Heavy Oil in the future.[64] Furthermore, Heavy Oil on ships is completely exempted from the Proposed Legislation.[65]

46. The BCCA noted that under s. 22.4 of the Proposed Legislation, the provincial Director of Waste Management is given "very broad" discretion on whether to issue permits exempting

---

[58] B.C. Order of the Lieutenant Governor in Council No. 211, Appendix, April 25, 2018 ["Proposed Legislation"] **[AR Part 1, p. 60]**.
[59] Proposed Legislation, s. 22.2 **[AR Part 1, p. 60]**.
[60] BCCA Reasons at para. 41 **[AR Part 1, p. 27]**.
[61] ASF, para. 1 **[AR-BC Part 2, v.23, p. 4570]**; Proposed Legislation, Schedule to s. 22.3(1). **[AR Part 1, p. 60]**.
[62] BCCA Reasons, para. 97 **[AR Part 1, p. 55]**.
[63] Proposed Legislation, s. 22.3 and Schedule to s. 22.3(1) **[AR Part 1, p. 60]**.
[64] BCCA Reasons, para. 42 **[AR Part 1, p. 28]**.
[65] Proposed Legislation, s. 22.3 **[AR Part 1, p. 60]**; BCCA Reasons, para. 42 **[AR Part 1, p. 28]**.

businesses from the prohibition on moving or storing increased volumes of Heavy Oil.[66] The Director has a similarly broad discretion on what conditions should be applied to these permits.[67]

47. In particular, before issuing a permit, the Director may require the applicant to:

(a) provide information documenting, to the satisfaction of the Director, the risks to human health or the environment that are posed by a release of "Heavy Oil", as well as an explanation of the impacts and costs of a release;

(b) demonstrate, to the satisfaction of the Director, that appropriate measures are in place to prevent, minimize, and respond to releases of "Heavy Oil";

(c) demonstrate, to the satisfaction of the Director, financial capacity to respond and compensate in respect of releases of "Heavy Oil";

(d) establish funds for or make payments to local or First Nation governments in order to ensure these governments have the capacity to respond to releases of "Heavy Oil"; and

(e) agree to compensate any person, local government or First Nation government for damages resulting from a release of "Heavy Oil".[68]

48. Furthermore, s. 22.5 provides that the Director may, at any time, impose any or all of the following conditions on a permit:

(a) conditions requiring the holder to implement and maintain measures to prevent, minimize and respond to releases of "Heavy Oil";

(b) conditions requiring the holder to respond to releases of "Heavy Oil" in a manner specified by the Director; and

(c) conditions requiring the holder to compensate any person, local government or First Nation government for damages resulting from a release of "Heavy Oil".[69]

49. The Director also has the discretion to suspend or cancel permits if a holder does not comply with the conditions attached to the permit.[70]

50. For enforcement purposes, the Proposed Legislation contemplates the issuance of restraining orders by the BC Supreme Court. Also, a person who contravenes s. 22(3) commits an offence and is liable on conviction to a fine of up to $400,000 and/or 6 months imprisonment.[71]

---

[66] BCCA Reasons, para. 46 **[AR Part 1, p. 29]**.
[67] Proposed Legislation, s. 22.4 **[AR Part 1, pp. 60-61]**.
[68] Proposed Legislation, s. 22.4 **[AR Part 1, pp. 60-61]**.
[69] Proposed Legislation, s. 22.5 **[AR Part 1, p. 61]**.
[70] Proposed Legislation, s. 22.6 **[AR Part 1, p. 62]**.
[71] Proposed Legislation, ss. 22.7, 22.8 **[AR Part 1, p. 62]**.

iv. The Reference to the British Columbia Court of Appeal

51. On April 25, 2018, the Government of BC initiated a reference proceeding before the BCCA seeking an opinion on the constitutionality of the Proposed Legislation. BC requested answers to the following questions:

(a) Is the Proposed Legislation within the legislative authority of the Legislature of BC?

(b) If the answer to (a) is yes, would the Proposed Legislation be applicable to hazardous substances (i.e., "Heavy Oil") brought into BC by means of interprovincial undertaking?

(c) If the answers to (a) and (b) are yes, would existing federal legislation render all or part of the Proposed Legislation inoperative?[72]

52. The reference was heard by a five-judge panel of the BCCA over five days from March 18 to 22, 2019. On May 24, 2019, the BCCA rendered its unanimous opinion that the Proposed Legislation was unconstitutional. The BCCA said that it was not within the authority of the BC Legislature to enact the Proposed Legislation because it is targeted legislation that in pith and substance relates to the regulation of an interprovincial undertaking, namely, the TMX Project:

> Both the law relating to the division of powers and the practicalities surrounding the TMX project lead to the conclusion, then, that the pith and substance of the proposed Part 2.1 is to place conditions on, and if necessary, prohibit, the carriage of heavy oil through an interprovincial undertaking.[73]

53. Accordingly, the BCCA answered "no" to the first reference question. As the two other reference questions were posed conditionally such that answers were only being sought by BC if the Court concluded that the Proposed Legislation was valid, the BCCA did not opine on either question.[74]

PART II – RESPONDENT'S POSITION ON QUESTIONS IN ISSUE

54. The primary issue on appeal is whether the BCCA erred by opining that the Proposed Legislation would not be a valid exercise of the province's constitutional authority and that therefore the answer to the first reference question is "no".

---

[72] Proposed Legislation **[AR Part 1, p. 60]**.
[73] BCCA Reasons, para. 105 **[AR Part 1, p. 58]**.
[74] BCCA Reasons, paras. 92, 106 **[AR Part 1, pp. 53, 58]**.

55. On this issue, the BCCA did not err. The Proposed Legislation is in pith and substance an attempt to regulate interprovincial undertakings, a subject matter that falls under the exclusive jurisdiction of the Parliament in Canada. The first reference question was therefore correctly answered "no" by the BCCA.

56. The issues of interjurisdictional immunity and paramountcy that are the subject of the other two reference questions only arise on appeal if the Court concludes that the BCCA erred in its assessment of the Proposed Legislation's constitutional validity. Should that occur, answers are sought from the Court in respect of these questions:

(a) Would the Proposed Legislation be applicable to hazardous substances (i.e., Heavy Oil) brought into BC by means of interprovincial undertakings?

(b) If the answer to (a) is yes, would existing federal legislation render all or part of the Proposed Legislation inoperative?

57. If the second reference question must be addressed, it should be answered "no". The Proposed Legislation would not be applicable to Heavy Oil brought into BC by means of an interprovincial undertaking, pursuant to the doctrine of interjurisdictional immunity.

58. If the third reference question must be addressed, it should be answered "yes". The Proposed Legislation would be inoperative pursuant to the paramountcy doctrine since it conflicts with and frustrates the purpose of the federal legislation that regulates interprovincial undertakings.

PART III – ARGUMENT

A. QUESTION ONE: BC'S PROPOSED LEGISLATION IS *ULTRA VIRES*

59. As the BCCA explained in the opening paragraph of its decision, the fundamental question upon which the Government of BC had sought its advice was to ascertain "which level or levels of government" may regulate the planned TMX Project to minimize the risks it poses to the environment. The BCCA also noted that BC's position was that "it may regulate the pipeline in the interests of the environment – not exclusively, but to the extent that it may impose conditions on, and even prohibit, the presence of 'heavy oil' in the Province unless a director under the *Environmental Management Act* issues a 'hazardous substance permit' under the proposed addition that is the subject of the reference." Ultimately, however, the BCCA advised the Government of BC that such Proposed Legislation would "cross the line" between a

constitutionally acceptable environmental law of general application and constitutionally unacceptable regulation of federal undertakings because its true pith and substance is the latter.[75]

60. The Attorney General of BC ("AGBC") now takes issue with this advice. While the AGBC concedes that there is a "federal aspect" to the Proposed Legislation in that it entails the regulation of interprovincial undertakings, the AGBC argues that the BCCA failed to find that it also has an alleged "provincial aspect", namely, "the protection of the environment from accidental releases of hazardous substances and imposition of civil liability for responding to those releases". The AGBC then asserts that the BCCA ought to have recognized that this "double aspect" allows the province to validly enact the Proposed Legislation, and that the question of whether it in fact applies and operates in respect of federal undertakings like the Trans Mountain Pipeline is to be dealt with later once provincial officials exercise their new permitting authority. In the alternative, the AGBC argues that the Proposed Legislation ought to have been upheld under the "ancillary powers" doctrine. [76]

61. The Attorney General of Canada ("AGC") disagrees. A careful examination of the terms and structure of the Proposed Legislation, along with contextual evidence of the circumstances surrounding its development, demonstrate that the BCCA correctly concluded that the dominant characteristic of the Proposed Legislation is the regulation of oil transportation on interprovincial undertakings, a subject matter that falls within the federal government's exclusive constitutional jurisdiction. Furthermore, neither the doctrines of double aspect nor ancillary powers would operate to save the unconstitutional Proposed Legislation.

i. <u>Division of Powers Analytical Framework</u>

62. This Court recently restated the well-established two-stage analytical framework for reviewing legislation on federalism grounds in *Reference re Pan-Canadian Securities Regulation.* The first stage, known as "characterization", is to determine the law's true subject matter – its "pith and substance". The second stage, known as "classification", is to determine whether the subject

---

[75] BCCA Reasons, paras. 1, 101 **[AR Part 1, p. 4, 56-57]**.

[76] AGBC Factum, paras. 7, 45, 46, 77-78, 80, 82-84, 90, 94, and 105. **[AGBC Factum 3, 12, 22-24, 26-27, 30]**.

matter of the challenged legislation falls within the head of power being relied on to support its validity.[77]

63. To determine its pith and substance, the purpose and effect of the legislation must be examined.[78] Purpose may be determined with reference to both intrinsic evidence and extrinsic evidence.[79]

64. The legislation's effect may be ascertained through an understanding of its terms. However, this does not end the analysis. As Professor Hogg noted in *Constitutional Law of Canada*: "…the search for pith and substance will not remain within the four corners of the statute if there is reason to believe that the direct legal effects of the statute are directed to the indirect achievement of other purposes. In such a case, said Lord Maugham L.C. in the *Alberta Bank Taxation Reference,* 'the Court must take into account any public general knowledge of which the Court would take judicial notice, and may in a proper case require to be informed by evidence as to what the effect of the legislation will be.'"[80]

65. If an examination of the legislation's purpose and effect demonstrates that its pith and substance relates to a matter outside of the legislative competence of the enacting level of government, the legislation will be found to be *ultra vires*.[81] This will be the case even if the legislation appears in form to relate to a matter within the enacting legislature's competence. In *Quebec (Attorney General) v. Canada (Attorney General)*, this Court explained:

---

[77] *Reference re Pan-Canadian Securities Regulation,* 2018 SCC 48 ["*Pan-Canadian*"] at para. 86.
[78] *Pan-Canadian* at para. 86.
[79] *Kitkatla Band v. British Columbia,* 2002 SCC 31 ["*Kitkatla*"] at para. 53; *Canadian Western Bank v. Alberta,* 2007 SCC 22 ["*Canadian Western Bank*"] at para. 27; BCCA Reasons at para. 13 **[AR Part 1, pp. 11-12]**.
[80] Peter W. Hogg, *Constitutional Law of Canada,* 5th ed. (Toronto: Thomson Reuters Canada Limited, 2014) ["Hogg"] at 15-16 **[AGC BOA, Tab 1]**, citing *Kitkatla Band v. B.C.,* [2002] 2 SCR 146 at para. 54 and *Attorney General of Alberta v. Attorney General of Canada,* [1939] AC 117, 1938 CanLII 251.
[81] *Canadian Western Bank* at para. 26.

> Courts must be careful not to endorse a "colourable" statute, that is one that in form appears to relate to a matter within the legislative competence of the enacting order of government, but in substance addresses a matter falling outside its competence.[82]

66. This Court's 1999 judgment in *R. v. Morgentaler (No. 3)* is illustrative. Professor Hogg describes this case as a "remarkable application of the colourability doctrine", even though the Court said that it did not formally need to be invoked.[83] At issue was the constitutionality of Nova Scotia legislation whose stated purpose was to prohibit the privatization of certain specified medical services. Notwithstanding the province's constitutional authority to regulate health care, this law was struck down. As there was extrinsic evidence that the legislation was in fact prompted by concern over Dr. Morgentaler's intention to open a private abortion clinic in Nova Scotia, the Court held that the law was in pith and substance an *ultra vires* criminal law measure adopted by the province to combat "the perceived public harm or evil of abortion clinics".[84] Mr. Justice Sopinka explained:

> The "colourability doctrine" in the distribution of powers is invoked when a law looks as though it deals with a matter within jurisdiction, but in essence is addressed to a matter outside jurisdiction... There is no need to invoke the doctrine in this case because while the Act states in its title and s. 2 that its aim is to prohibit the privatization of medical services, there are doubts about the legislation's *vires* on its face due to the fact that it appears to occupy ground historically occupied by the criminal law. Moreover, the ordinary approach to pith and substance entitles the Court to look beyond the terms of the legislation. As Rand J. declared in the *Margarine Reference*...a statement of purpose is at most "a fact to be taken into account, the weight to be given to it depending on all the circumstances".[85]

67. In other words, as was noted by the BCCA in the case at bar, "on occasion it will be found that the stated intention or the *apparent* purpose of a statute is a 'smokescreen' for a matter lying outside the jurisdiction of the enacting government." Accordingly, "the *effects* of a law can be a more reliable guide to its validity than its apparent or stated intention…especially where there is reason to believe the enacting government may be attempting to do indirectly what it cannot do directly." [86]

---

[82] *Quebec (Attorney General) v. Canada (Attorney General),* 2015 SCC 14 at para. 31; *Reference re Upper Churchill Water Rights,* [1984] 1 SCR 297; Hogg at 15-19 **[AGC BOA, Tab 1]**.
[83] Hogg at 15-20 **[AGC BOA, Tab 1]**.
[84] *R. v. Morgentaler (No. 3),* [1993] 3 SCR 463 ["*Morgentaler*"] at 512.
[85] *Morgentaler* at 496.
[86] BCCA Reasons, at paras. 13 and 14. **[AR Part 1, pp. 11-12]**

ii. Characterization: The Pith and Substance of the Proposed Legislation is the Regulation of Interprovincial Oil Transportation

(i) Intrinsic Evidence

68. The starting point for the characterization analysis is a review of the "intrinsic evidence", namely, the text of the Proposed Legislation itself.

69. In this case, that text begins with a "purposes" clause (s. 22.1) that says generally that the Proposed Legislation is intended to protect BC's environment, human health, and well-being, as well as the economic, social and cultural vitality of communities in that province.

70. While these purposes are expressed broadly, the mechanism that will ostensibly be used to give effect to them is narrow. It is a "requirement for hazardous substance permits" (s. 22.3) which prohibits the possession of "hazardous substances" unless the province issues a permit allowing such possession. However, by virtue of the Schedule to the Proposed Legislation, the only substance that is subject to this requirement is "Heavy Oil", which has been defined in a way that captures only heavy crude oil, bitumen and diluted bitumen. No other type of petroleum or petroleum product is captured by the Proposed Legislation, notwithstanding the risks that their accidental discharge into the environment may pose.

71. The Schedule also imposes a threshold volume of Heavy Oil at which the hazardous substance permit requirement would be triggered. Only those businesses that increase the volumes of Heavy Oil that they transport or store in BC beyond the largest amount they possessed during each of the years 2013 to 2017 would be subject to the prohibition contained in the Proposed Legislation. This exemption for existing volumes of Heavy Oil applies notwithstanding the risks that their accidental discharge into the environment may pose.

72. The Proposed Legislation also contains an exemption for Heavy Oil on ships (s. 22.3(2)), notwithstanding the risks that their accidental discharge into the environment may pose.

73. In addition to its narrow scope in terms of the substances and circumstances to which it would apply, the Proposed Legislation is also remarkable for its lack of clearly defined measures for addressing the risk of environmental harm from accidental discharges of Heavy Oil. Instead, the Proposed Legislation simply prohibits possession of increased volumes of Heavy Oil while

giving the provincial Director of Waste Management broad discretion on whether to issue permits exempting businesses from the prohibition (s. 22.4), and on whether conditions should be attached to these permits (s. 22.5).

74. It is true that ss. 22.4 and 22.5 set out a list of general pre-conditions that the Director might require an applicant to satisfy in order to obtain a permit as well as the types of conditions that might be attached to such permits. However, the Proposed Legislation does not provide any real indication of what an applicant would have to provide to the Director in order to have any reasonable certainty that it would be issued a permit to transport increased quantities of Heavy Oil, nor does it indicate what conditions would likely apply to such shipments if the Director chooses to allow them. There was also no extrinsic evidence before the BCCA regarding how the Director might exercise the discretionary authority bestowed by the Proposed Legislation.

(ii) Extrinsic Evidence

75. Significant extrinsic evidence was, however, before the BCCA regarding the background and circumstances surrounding the development of the Proposed Legislation, notably in relation to Heavy Oil generally, and to the TMX Project in particular.

76. Three important propositions can be drawn from the extrinsic evidence regarding Heavy Oil. First, the Heavy Oil that would be captured by the Proposed Legislation originates almost exclusively outside of BC, namely, from the oil sands in Alberta and Saskatchewan.[87] Second, the Heavy Oil that would be captured by the Proposed Legislation is not refined in BC.[88] Third, all Heavy Oil that transits through BC by pipeline is destined for export.[89] In other words, the Proposed Legislation seeks to regulate only the transportation of a product that neither originates nor is consumed in BC, and which is only shipped on interprovincial undertakings.[90]

77. With respect to the TMX Project, three additional propositions can be drawn from the extrinsic evidence. First, the purpose of the TMX Project is to triple the capacity of the existing

---

[87] ASF, paras. 216, 220-223, 227-231 **[AR-BC Part 2, v.23, pp. 4621-4624]**.
[88] ASF, para. 241 **[AR-BC Part 2, v.23, p. 4625]**.
[89] ASF, paras. 252-253, 263, 273, 377, 380-384 **[AR-BC Part 2, v.23, pp. 4626-4628, 4630, 4647-4648]**.
[90] BCCA Reasons, at paras. 32, 56-57 **[AR Part 1, pp. 24, 35-36]**.

Trans Mountain Pipeline so as to carry increased quantities of bitumen, blended bitumen and Heavy Oil extracted in Alberta through BC so that it may be exported internationally.[91] Second, the only pipeline that would be captured by the Proposed Legislation is the TMX Project.[92] Third, the TMX Project has been the subject of intense opposition by the Government of BC.[93]

78. Indeed, on multiple occasions, members of the Government of BC made statements to the effect that they are opposed to the TMX Project and are searching for legal "tools" that could be used to prevent it from being built.[94] However, they received legal advice that it would be unconstitutional for the province to directly legislate a stop to the TMX Project.[95] Accordingly, the Government of BC reframed its objective to "defending our Coast" by controlling the flow of Heavy Oil through the province.[96]

79. These efforts led to the development of the Proposed Legislation. Instead of expressly banning the expansion of the existing Trans Mountain Pipeline, it prohibits any business from increasing the quantities of Heavy Oil that it transports without first obtaining the approval of the provincial government. As the Premier of BC explained:

> The Federal Government suggests that the existing flows were approved and permitted by the Federal Government. We did not have the authority to stop them and we are asserting our ability to ensure that the increases don't happen in the future.[97]

80. The potential use of a permitting scheme as a "tool" to block pipeline projects is illustrated by TM's experience with the City of Burnaby – a municipal government that is also staunchly opposed to the TMX Project.[98] Ultimately, TM had to seek relief from the NEB from the need to comply with Burnaby's permitting requirements because of the city's dilatory processing of its applications. That relief was granted by the NEB, who remarked as follows:

---

[91] ASF, paras 357, 391-393 **[AR-BC Part 2, v.23, pp. 4643-4644, 4649]**.
[92] ASF, para. 387 **[AR-BC Part 2, v.23, p. 4648]**.
[93] ASF, paras. 513-537 **[AR-BC Part 2, v.23, pp. 4684-4689]**.
[94] ASF, paras. 513-529 **[AR-BC Part 2, v.23, pp. 4684-4687]**.
[95] ASF, paras. 530-537 **[AR-BC Part 2, v.23, pp. 4687-4689]**.
[96] ASF, paras. 530-531 **[AR-BC Part 2, v.23, p. 4687]**; BCCA Reasons, at para. 36 **[AR Part 1, pp. 25-26]**.
[97] ASF, para. 536 (emphasis added) **[AR-BC Part 2, v.23, p. 4688]**.
[98] ASF, paras. 538-551 **[AR-BC Part 2, v.23, pp. 4689-4691]**.

> In the Board's view, the parties' negative relationship, and the overall climate of Burnaby's public opposition to the Project, may have had a general chilling effect on Burnaby's ability or willingness to work efficiently and cooperatively with Trans Mountain. This despite the fact that there was no direct political interference.[99]

(iii) Conclusion on Characterization

81. Viewed holistically, all of these facts demonstrate that the true purpose and effect of the Proposed Legislation is to regulate the operation of interprovincial undertakings that transport oil between provinces.

82. They also demonstrate that the dominant characteristic of the Proposed Legislation is not environmental protection, any more than the true purpose and effect of Nova Scotia's legislation that was considered in *R. v. Morgentaler (No. 3)* was regulating access to privatized health care. Instead, the Proposed Legislation is primarily designed to provide a mechanism – a "tool in the toolbox" – that could impede additional Heavy Oil originating from outside of BC from being transported through the province generally, and thereby frustrate the TMX Project in particular.

83. This is the only way to make sense of the Proposed Legislation given how it has been drafted, which is not in the form of a law of general application designed to protect the local environment. Rather, it selectively targets businesses who move a narrowly defined type of petroleum – Heavy Oil – and then only those businesses who wish to increase the volume of Heavy Oil they transport, except for those who move Heavy Oil by ship.

84. Also, the Proposed Legislation does not set out any specific measures for minimizing the risk of environmental damage from Heavy Oil spills. It does not prescribe how to remediate or provide compensation in respect of such damage. Instead, it just prohibits Heavy Oil shipment increases subject to the possibility of obtaining a conditional exemption from this prohibition from a provincial official.

85. Finally, the Legislation has been proposed within the context of a political environment where the provincial government had undertaken to attempt to find measures to stop the TMX

---

[99] NEB Order MH-081-2017, January 18, 2018, p. 12.

Project, an undertaking whose only purpose is to increase the volume of Heavy Oil that the existing interprovincial Trans Mountain Pipeline has transported in the past.

iii. Classification: The Pith and Substance of the Proposed Legislation is Within Parliament's Exclusive Jurisdiction Over Interprovincial Undertakings

86. By operation of ss. 91(29) and 92(10)(a) of the *Constitution Act, 1867,* the federal Parliament has exclusive jurisdiction over interprovincial works and undertakings, including pipelines and railways that cross provincial borders.[100]

87. This Court has explained the rationale for bestowing such jurisdiction on the Government of Canada in *Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters* as follows:

> The fact that works and undertakings that physically connected the provinces were subject to exceptional federal jurisdiction is not surprising. For example, it would be difficult to imagine the construction of an interprovincial railways system if the railway companies were subject to provincial legislation respecting the expropriation of land for the railway right of way or the gauge of the line of railway within each province. If the legislature of the province did not grant railway companies the power of expropriation or if they refused to agree to a uniform gauge, the development of a national railway system would have been stymied.[101]

The Court added that exclusive federal jurisdiction "prevent[s] fragmentary legislative authority that might stymie" interprovincial transportation undertakings, the maintenance of which is "a vital factor in securing the economic and political viability of Canada as a federal union."[102]

88. That said, a provincial legislature may validly enact legislation that has incidental effects on interprovincial undertakings, such as local environmental protection laws of general application. However, the validity of such laws depends on the extent to which they relate to provincial heads of power. Also, the characterization of such laws must always be other than targeting

---

[100] *Campbell-Bennett-Limited v. Comstock Midwestern Limited,* [1954] S.C.R. 207 ["*Comstock*"] at 211.

[101] *Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters,* 2009 SCC 53 ["*Consolidated Fastfrate*"] at para. 37.

[102] *Consolidated Fastfrate* at paras. 36 and 68. See also BCCA Reasons at paras. 63 and 64 **[AR Part 1, pp. 38-39]**.

interprovincial undertakings. If a law, in purpose or in effect, is best characterized as regulating an interprovincial undertaking, it is valid only if enacted by the federal Parliament. [103]

89. This Court's decision in *Rogers Communications Inc. v. Châteauguay (City)* is apposite. At issue in that case was the validity of a municipality's use of its power under provincial legislation to establish a reserve over land that would prevent a telecommunication company from building an antenna system within the city. The Court found that notwithstanding the municipality's claim to have passed the regulation for the valid provincial purpose of addressing health concerns from exposure to radio frequencies, extrinsic evidence revealed that the real purpose of the regulation was to block the company's project. It was therefore found to be constitutionally invalid:

> Thus the pith and substance of the notice of a reserve is not the protection of the health and well-being of residents or the development of the territory but, rather, the choice of the location of radiocommunication infrastructure. Even if the adoption of a measure such as this addressed health concerns raised by certain residents, it would clearly constitute a usurpation of the federal power over radiocommunication.[104]

90. Furthermore, while a province may sometimes legislate to address the effects of federal undertakings on property within a province, that authority is limited. This principle is illustrated by a pair of 1899 decisions of the Judicial Committee of the Privy Council ("JCPC"): *Canadian Pacific Railway v. Notre Dame de Bonsecours* and *Madden v. The Nelson and Fort Sheppard Railway Company*.[105] In *Notre Dame de Bonsecours,* it was held that a provincial legislature has the authority to require an interprovincial railway to remove debris from a railway ditch, but not to regulate the structure of the ditch. In the *Madden* case decided just four months later, provincial legislation requiring interprovincial railways to erect cattle fences upon their roadway was found to be *ultra vires* the province.

91. In the case at bar, the Proposed Legislation is designed to regulate whether and under what conditions Heavy Oil can be transported by interprovincial pipelines and railways on their

---

[103] Hogg at 21-8 to 21-10, 30-24 **[AGC BOA, Tab 1]**; BCCA Reasons at para. 12 **[AR Part 1, pp. 10-11].**

[104] *Rogers Communications Inc. v. Châteauguay (City),* 2016 SCC 23 ["*Rogers*"] at para. 46.

[105] *Canadian Pacific Railway v. Notre Dame de Bonsecours (Parish),* [1899] AC 367 (JCPC); *Madden v. The Nelson and Fort Sheppard Railway Company (British Columbia),* [1899] AC 626 (JCPC).

respective rights of way. It therefore "crosses the line" of provincial authority under ss. 92(13) and (16) over to that of federal authority under ss. 91(29) and 92(10) of the *Constitution Act, 1867*.

92. In sum, a review of the terms of the Proposed Legislation, along with the extrinsic evidence surrounding its development, demonstrate that it is designed to give the Government of BC the authority to regulate interprovincial oil transportation generally, and to potentially prevent increased flows of Heavy Oil on interprovincial undertakings specifically. It is therefore unconstitutional, and the BCCA was correct to so conclude.

iv. The Double Aspect Doctrine is Not Engaged by the Proposed Legislation

93. In its argument before this Court, the AGBC does not take issue with the BCCA's opinion that the pith and substance of the Proposed Legislation is regulating interprovincial undertakings, a federal subject matter. Instead, the AGBC's concern is that the BCCA did not find that the regime also has a second pith and substance that is said to be provincial: "protecting the environment from accidental releases of hazardous substances and liability for responding to those releases". The AGBC says that the Court should therefore have found the Proposed Legislation valid pursuant to the "double aspect" doctrine.[106] This is the constitutional doctrine that provides that subjects which in one aspect and for one purpose fall within a federal head of power, may in another aspect and for another purpose fall within a provincial head of power.[107] However, the AGBC's objection is unfounded, for two reasons.

94. First, the double aspect doctrine applies only where the federal and provincial aspects of the law are of roughly equal importance.[108] Examples include driving prohibitions (federal aspect: criminal law; provincial aspect: highway safety) and insider trading laws that apply to federally incorporated companies (federal aspect: corporate law; provincial aspect: securities law).[109] Such a limit on the doctrine is necessary in order to guard against the risk that the exclusive legislative

---

[106] AGBC Factum at paras. 7, 45, 46, 77, 78, 80, 90, 94, and 105.
[107] *Rogers* at paras 50-52; *Friends of the Oldman River Society v. Canada,* [1992] 1 SCR 3 at 68-69.
[108] *Multiple Access Ltd. v. McCutcheon,* [1982] 2 SCR 161 at 181-182; *Rogers* at paras. 50 to 52; BCCA Reasons at para. 16 **[AR Part 1, p. 13]**.
[109] *Bell Canada v. Quebec (Commission de la Santé et de la Sécurité du Travail),* [1988] 1 SCR 749 ["*Bell Canada*"] at 765-766.

powers listed in ss. 91 and 92 of the *Constitution Act, 1867* could be combined into a single concurrent field of powers governed solely by the rule of paramountcy of federal legislation.[110]

95. As is explained above, the dominant purpose of the Proposed Legislation is the regulation of Heavy Oil transportation by interprovincial undertakings, which falls within the core of exclusive federal jurisdiction. This federal aspect clearly eclipses the purported provincial aspect of local environmental protection, particularly given the Proposed Legislation's focus on simply controlling increases in Heavy Oil movements rather than also establishing concrete measures for addressing accidental discharges of hazardous substances.

96. Second, the double aspect doctrine only applies where the federal and provincial laws regulate different aspects of the same activity. It cannot apply where both legislators have legislated for the same purpose and in the same aspect.[111] In this case, the Proposed Legislation purports to regulate Heavy Oil transportation on interprovincial undertakings in the interest of protecting the environment, an aspect which Parliament had already regulated for the same purpose through the legislation explained above at paragraphs 22 to 41.

97. In sum, as this is not a clear case "where the multiplicity of aspects is real and not merely nominal", the double aspect doctrine does not apply.[112]

v. <u>The Proposed Legislation is Not Saved by the Ancillary Powers Doctrine</u>

98. The AGBC also argues, in the alternative, that in the event the Proposed Legislation is not in pith and substance within provincial jurisdiction, it can nevertheless be upheld under the ancillary powers doctrine because of its connection to the existing *Environmental Management Act* ("*EMA*").[113] However, as the substance and effects of the Proposed Legislation are considerably different from those of the existing provisions of the *EMA*, this argument is also

---

[110] *Bell Canada* at 766.
[111] *Bell Canada* at 853.
[112] *Bell Canada* at 766.
[113] AGBC Factum at paras. 105 to 109.

unfounded. The Proposed Legislation and the *EMA* do not have the requisite nexus in order for the ancillary powers doctrine to apply.

99. In particular, the Proposed Legislation has its own unique purpose clause, suggesting that its goal differs from the other parts of the *EMA*.[114] Also, the Proposed Legislation has an interpretation provision which defines "permit" differently from the rest of the *EMA*,[115] sets out its own decision-making structure whereby a director has unique powers to issue, deny, suspend, and cancel such permits,[116] and imposes distinct consequences for contravening the Proposed Legislation that differ from those of the *EMA*.[117]

100. Perhaps most significantly, however, the Proposed Legislation would only regulate Heavy Oil in transit, a valuable commodity for which there is consumer demand. The existing *EMA* does not regulate any goods similar to petroleum destined for market; rather, its focus is on managing unwanted deleterious material (e.g., waste, litter, sewage, effluent, emissions, contaminants, pollutants, etc.).[118]

101. This Court has explained that the test for applying the ancillary powers doctrine entails a three-step analysis of the following questions:

(a) Do the impugned provisions intrude into a federal head of power, and to what extent?

(b) If the impugned provisions intrude into a federal head of power, are they nevertheless part of a valid provincial legislative scheme?

(c) If the impugned provisions are part of a valid provincial legislative scheme, are they sufficiently integrated with the scheme?[119]

The extent of the intrusion found at step one determines the threshold required to establish sufficient integration at step three. This Court has held that "[t]he required degree of integration increases in proportion to the seriousness of the encroachment", and that while a "slight"

---

[114] Proposed Legislation, s. 22.1 **[AR Part 1, p. 60]**.
[115] Proposed Legislation, s. 22.2 **[AR Part 1, p. 60]**; Cf. *Environmental Management Act* ("*EMA*"), SBC 2003, c 53, s 1(1)("permit").
[116] Proposed Legislation, ss. 22.3 to 22.6 **[AR Part 1, pp. 60-62]**.
[117] Proposed Legislation, ss. 22.7 to 22.8 **[AR Part 1, p. 62]**; *EMA,* s. 120.
[118] *EMA,* esp. Parts 2-7.
[119] *Kitkatla* at para. 58; *Kirkbi AG v. Ritvik Holdings Inc.,* 2005 SCC 65 ["*Kirkbi*"] at para. 21.

encroachment can be justified by a "rational functional connection", a "particularly serious" encroachment requires "strict necessity" to be justified.[120]

102. This Court has also noted the following non-exhaustive factors for determining the significance of an intrusion:

> (a) Scope of the Impugned Head of Power: If a provision "intrudes upon a broad head of power, the intrusion will generally be less serious because it does not overwhelm the jurisdiction of the other level of government. Conversely, an intrusion on a narrow legislative competency will be more serious because it threatens to obliterate that head of power."
>
> (b) Nature of the Impugned Provision: "An intrusion will be less serious when the impugned provision is meant to coexist with legislation enacted by the other level of government."
>
> (c) History of Legislative Activity: "A history of legislation in the area supports the legitimacy of the impugned provisions and suggests they will not prove unduly intrusive on the other level of government."[121]

103. When applied, these factors all suggest that the Proposed Legislation is significantly intrusive and that the "strict necessity" test must be applied. First, the intrusion is upon a narrow legislative competency, namely, the exclusive federal authority to regulate interprovincial undertakings. Second, the Proposed Legislation is not designed to coexist with the applicable federal legislation; rather, its purpose is to ensure that the Government of BC can exercise a veto over increased shipments of Heavy Oil on federal undertakings that would otherwise be authorized pursuant to federal legislation. Third, BC has no history of legislating in relation to the control of the movement of goods on interprovincial undertakings.

104. The Proposed Legislation is not strictly necessary for, or integral to, the *EMA*. When enacted in 2003, the *EMA* effected an amalgamation of the previous *Waste Management Act* and *Environment Management Act* whose purposes were to regulate waste discharge, pollution, air quality, contaminated site remediation, and environmental emergencies. When the legislation was introduced, the then Minister of Water, Land and Air Protection explained the purpose of the *EMA* as follows:

> [Hon J. Murray]. "The primary objective of the new act is the shift to a more risk-and results-based system of regulating waste discharges. … The second objective of the act is to add

[120] *Quebec (Attorney General) v. Lacombe,* 2010 SCC 38 ["*Lacombe*"] at para. 42.
[121] *Reference re Assisted Human Reproduction Act,* 2010 SCC 61 at paras. 129-131.

> modern regulatory tools. These are area-based management, economic instruments and administrative penalties. … The third objective of the act is to centralize decision-making authority. … Finally, the act will implement the first round of amendments to improve the regulation of contaminated sites. The contaminated-site remediation regime is complex and expensive and is perceived as imposing unfair liability on private parties.[122]

105. While the *EMA* sets out a permit system to regulate the intentional discharge of unwanted deleterious material into the environment, the Proposed Legislation is aimed at creating a different type of permit system to regulate possession and transportation of a valuable good that is not intended to be discharged into the environment. There was no evidence before the BCCA that the efficacy of the existing system that has functioned for many years is dependent upon the proposed new system. In fact, there is no indication that the introduction of the latter would have any tangible impact upon the former. Therefore, the constitutionally invalid Proposed Legislation cannot be validated under the ancillary powers doctrine.

106. Even if the AGBC's ancillary powers argument were to be assessed on the basis of the "rational, functional connection test", the result would be the same. As noted by this Court, "it is not enough that the [impugned provisions] be merely 'tacked on' to admittedly valid legislation." They must be "functionally related to the general objective of the legislation, and to the structure and content of the scheme."[123] For the reasons set out above, this does not describe the relationship between the Proposed Legislation and the existing *EMA*.

107. Furthermore, the Proposed Legislation can be readily distinguished from other provisions which have been upheld as functionally connected to a statutory scheme. For example, in *General Motors v. City National Leasing,* a provision of competition legislation which created a private right of action to enforce other provisions in that law was found by this Court to have satisfied the functional relationship test. The provision was described as "an integral, well-conceived component of the economic regulation strategy" contained in the statute. It was "intimately linked"

---

[122] British Columbia, Official Report of Debates of the Legislative Assembly (Hansard), 37th Parl., 4th Sess., Vol. 16, No. 12 (08 October 2003) (Hon. J. Murray) at 7270.
[123] *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 SCR 641 ["*General Motors*"] at 683.

to the statute and only took on meaning by reference to the statute's other provisions, having "no independent content."[124]

108. In the case of the Proposed Legislation, on the other hand, it is effectively a stand-alone statute, one that the Government of BC proposes to "tack on" to the *EMA* with the apparent hope that the assumed validity of the latter will give an imprimatur of validity to the former. However, because the link between the two is weak and tenuous, the ancillary powers doctrine cannot save the constitutionally invalid Proposed Legislation.[125]

B. QUESTION TWO: BC'S PROPOSED LEGISLATION IS INAPPLICABLE TO INTERPROVINCIAL UNDERTAKINGS

109. In the event the Court disagrees with the submissions above and opines that the BCCA should have found the Proposed Legislation to be *intra vires,* it is nevertheless inapplicable to interprovincial undertakings such as the federally-regulated pipelines and railways. This flows from the principle of interjurisdictional immunity which prevents the legislature of one level of government from impairing the other's ability to exercise the legislative authority bestowed upon it by the *Constitution Act, 1867.*

110. It is well-established that the application of interjurisdicitional immunity involves two steps: (1) a determination of whether the legislation adopted by one level of government trenches on the core power of the other government; and (2) if so, a determination of whether the effect of the legislation is sufficiently serious to trigger the application of interjurisdicitonal immunity.[126] Laws that violate the doctrine remain otherwise valid, but are read down so that they do not apply to the extra-jurisdictional matter.

111. Regulating the nature and volume of goods that flow through interprovincial undertakings is at the core of Parliament's s. 92(10)(a) power. The Proposed Legislation purports to prohibit certain goods from being transported unless a provincial official, in his or her discretion, permits such transportation under conditions of his or her choosing. This constitutes a significant

---

[124] *General Motors* at 684; *Kirkbi* at paras. 33 and 35; BCCA Reasons at para. 9 **[AR Part 1, p. 8]**.
[125] *Lacombe* at para. 45.
[126] *Rogers* at paras. 59, 70; *Quebec (Attorney General) v. Canadian Owners and Pilots Association,* 2010 SCC 39 ["*COPA*"] at paras. 26-27; *Canadian Western Bank* at para. 33; Hogg at 15-28 **[AGC BOA, Tab 1]**.

impairment of Canada's ability to regulate the transportation of goods by interprovincial undertakings.

112. It is true that interjurisdictional immunity generally only applies in situations covered by precedent.[127] With respect to the present situation, there are ample precedents for the application of the doctrine to interprovincial transportation undertakings as well as analogous federal undertakings, including precedents involving the Trans Mountain pipeline itself.[128]

113. Three precedents decided by this Court are particularly instructive, as they involved provincial laws and measures that were remarkably similar to the Proposed Legislation in terms of their impact on exclusive federal jurisdiction: *Rogers*, *Quebec (Attorney General) v. Canadian Owners and Pilots Association* ("*COPA*") and *Commission de transport de la Communauté urbaine de Québec v. Canada* ("*CTCUQ"*).[129]

114. As discussed earlier, *Rogers* concerned a wireless communication provider that had received federal authorization under the *Radiocommunication Act* to install an antenna system on a property located in Châteauguay, Quebec. Citing health and safety concerns, the municipality passed a resolution prohibiting all construction on the property for two years. This Court found that in addition to being *ultra vires,* the municipal resolution also ran afoul of the doctrine of interjurisdicitional immunity as it "compromised the orderly development and efficient operation of radiocommunication and impaired the core of the federal power over radiocommunication in Canada."[130]

115. In *COPA*, two private citizens built an aerodrome on land near Shawinagan which had been zoned as agricultural by the province of Quebec. While the aerodrome had been registered under the federal *Aeronautics Act*, the province ordered the owners to return their land to its original state pursuant to Quebec's agricultural land legislation. That law prohibited the use of agricultural land for any purpose other than agriculture, unless the landowner first obtained a provincial permit.

---

[127] *COPA* at para. 36; *Canadian Western Bank* at para. 77.
[128] *Comstock, Burnaby (City) v. Trans Mountain Pipeline ULC,* 2015 BCSC 2140. See also: *Ontario v. Winner,* [1954] 4 DLR 657 (JCPC).
[129] *Rogers, COPA,* and *Commission de transport de la Communauté urbaine de Québec v. Canada (National Battlefields Commission)*, [1990] 2 SCR 838 ["*CTCUQ*"].
[130] *Rogers* at para. 71.

This Court found the legislation to be inapplicable to the aerodrome because of interjurisdictional immunity:

> I conclude that [the provincial legislation] does impair the federal power to decide when and where aerodromes should be built. It prohibits the building of aerodromes in designated agricultural regions unless prior authorization has been obtained from the [provincial government]. As the facts of this case illustrate, the effect may be to prevent the establishment of a new aerodrome or require the demolition of an existing one. This is not a minor effect on the federal power to determine where aerodromes are built.[131]

116. The question before the Court in *CTCUQ* was whether the federal National Battlefields Commission was prohibited from operating a bus service within Quebec City unless it was done through the holder of a permit issued by the provincial government. This Court concluded that the provincial permit system was constitutionally inapplicable to the National Battlefields Commission, noting in particular that: "[a]pplication of the permit system would appear to place the [National Battlefields] Commission at the mercy of the largely discretionary decisions of the Commission des transports du Québec on fundamental aspects of the service."[132]

117. Like the provincial bus permit regime at issue in *CTCUQ* - one that included the power to impose operating conditions on bus transportation providers - the Proposed Legislation would have a "massive and intrusive impact…on the vital and essential aspects" of federal pipelines and railways if it was to apply to them.[133] In particular, the Proposed Legislation would afford BC an effective veto over whether interprovincial undertakings can transport Heavy Oil in quantities greater than what they have shipped in the past. Accordingly, it is undeniable that the Proposed Legislation impermissibly intrudes upon the core of Canada's authority under ss. 91(29) and 92(10)(a) of the *Constitution Act, 1867*.

118. The AGBC's primary argument on this question is its assertion that the Proposed Legislation merely regulates "discharges from federally-regulated undertakings", a matter which BC alleges to not be within the core of Parliament's constitutional jurisdiction.[134] However, this is an erroneous characterization of the Proposed Legislation. As explained above at paragraphs 68 to 92, the Proposed Legislation in fact purports to provide the province of BC with the authority to

---

[131] *COPA* at paras. 46-47.
[132] *CTCUQ* at 859.
[133] *CTCUQ* at 858.
[134] AGBC Factum at para. 115.

determine whether and how national pipelines and railways can transport a specific good. This goes to the core of federal jurisdiction over the operation of interprovincial undertakings.

119. In addition, while professing not to argue that it is premature to assess the applicability of the Proposed Legislation to federal undertakings, the AGBC also says that such an analysis cannot presently take into account the possibility that an interprovincial pipeline or railway may be denied a Heavy Oil permit, or subjected to operating conditions that could impair the core of federal authority. Instead, the AGBC asserts that if such a scenario were to transpire, "the NEB or the courts can address it".[135] In other words, the AGBC says that since relief from a Director's permitting decision may be available from a federal regulatory tribunal or from a court exercising judicial review authority, the answers to BC's reference questions must be premised on the hypothesis that the Director's authority will never be exercised in a manner that might impede a federal undertaking.

120. The BCCA characterized this argument as "disingenuous" when it was the Province of BC who had initiated the reference seeking that court's opinion.[136] It is also unfounded, for two reasons.

121. First, while it can be assumed that the permitting power will be exercised in good faith, it cannot be assumed that the province's discretionary authority to refuse to authorize shipments of increased volumes of Heavy Oil, or to attach onerous conditions that would make such shipments impossible or impractical, will never be exercised. As this Court has noted, "the constitutionality of a statutory provision cannot rest on an expectation that the Crown will refrain from doing what it is permitted to do."[137]

122. The Quebec Court of Appeal recently affirmed this proposition. In *Québec v. IMMT-Québec Inc.*, the Government of Quebec's argument that provincial environmental legislation can apply to a transshipment business operating in the Port of Quebec City because it should be assumed that the provincial authority will be restrained in the exercise of its powers was rejected as follows:

---

[135] AGBC Factum at paras. 6, 46, 90, 104.
[136] BCCA Reasons at para. 96 **[AR Part 1, p. 55]**.
[137] *Lavalle, Rackel & Heintz v. Canada,* 2002 SCC 61 at para. 45.

> The AGQ nevertheless argues that the courts must assume that the provincial authorities will exercise their discretionary powers so as not to interfere with the federal head of power and will therefore not withhold their authorization or impose conditions that would frustrate the projects and activities under exclusive federal jurisdiction. This argument does not withstand analysis, because its direct result would be to circumvent the exclusive federal jurisdiction over federal public property used for federal purposes.[138]

123. Second, there are many jurisprudential examples of cases in which this Court and other appellate courts have effectively found provincial or municipal permitting regimes to be either invalid, inapplicable or inoperable notwithstanding the hypothetical possibility that the province or municipality might have chosen not to exercise its discretionary permitting powers in a way that would impair or frustrate federal authority over the operations of federal undertakings.[139] Also, in none of these cases was it suggested that it would be premature to impugn the underlying regimes because of a lack of certainty regarding how the permitting power might be exercised.[140]

124. In sum, the Proposed Legislation would impair a core of Parliament's jurisdiction over federal undertakings, in this case the ability to authorize and regulate the transportation of Heavy Oil by such enterprises. Accordingly, even if the Proposed Legislation is found to be *intra vires*, it would not apply to federally regulated interprovincial undertakings.

C. QUESTION THREE: BC'S PROPOSED LEGISLATION CONFLICTS WITH EXISTING FEDERAL LEGISLATION

125. In the event the Court disagrees with the submissions above and opines that the Proposed Legislation is both constitutionally valid and applicable to interprovincial undertakings, it is nevertheless inoperable. This flows from the doctrine of federal paramountcy, which provides that

---

[138] *Procureure générale du Québec c. IMTT-Québec Inc.*, 2019 QCCA 1598, at para. 220.

[139] *Registrar of Motor Vehicles v. Canadian American Transfer Ltd.,* [1972] SCR 811 at 816-817; *CTCUQ* at 850; *British Columbia (Attorney General) v. Lafarge Canada Inc.,* 2007 SCC 23 ["*Lafarge*"] at para. 75; *COPA* at para 47. See also: *Canada Post Corporation v. Hamilton (City),* 2016 ONCA 767 ["*Canada Post*"] at paras. 79-83.

[140] To the extent that the BC Supreme Court found otherwise in *Coastal First Nations v. British Columbia*, 2016 BCSC 34, it is contrary to the authoritative jurisprudence of this Court and therefore wrongly decided on this point.

where there is an inconsistency between validly enacted but overlapping provincial and federal legislation, the provincial legislation is inoperative to the extent of the inconsistency.[141]

126. The doctrine applies to two different forms of inconsistency: (1) operational conflict between federal and provincial laws, where one enactment says "yes" and the other says "no"; and (2) frustration of federal purpose, where dual compliance may be possible, but the provincial law is incompatible with the purpose of federal legislation.[142]

127. The two forms of inconsistency are present in this case. The Proposed Legislation directly conflicts with both the federal regime that regulates interprovincial pipelines (described above at paragraphs 24 to 34) and the federal regime that regulates railways (described above at paragraphs 35 to 41). The Proposed Legislation also frustrates the purpose of both federal regimes.

128. The Proposed Legislation directly conflicts with the common carrier provisions found at s. 71(1) of the *NEB Act*[143] which requires pipeline companies to "receive, transport and deliver all oil offered for transmission by means of its pipeline", and at ss. 113-115 of the *CTA* which require railways to "furnish…adequate and suitable accommodation for the receiving and loading of all traffic offered for carriage on the railway", and to "receive, carry and deliver" such traffic "without delay". Given that the Proposed Legislation prohibits pipeline companies and railways from possessing Heavy Oil in quantities greater than what they have moved in the past unless granted permission by BC, pipelines and railways who are not issued unconditional provincial permits will not be able to comply with both the federal common carrier provisions and BC's Proposed Legislation.

129. The AGBC's response to this argument is twofold. First, he says that such a direct conflict can be avoided if the pipeline or railway takes "reasonable steps" and "succeeds" in obtaining a provincial Heavy Oil permit. Alternatively, he says that if the pipeline or railway "fails" to obtain a provincial Heavy Oil permit, there will be no conflict because the federal undertaking will then

---

[141] *COPA,* para. 62; *Canadian Western Bank,* paras. 69 and 73.
[142] *COPA* at para. 64; *Law Society of British Columbia v. Mangat,* 2001 SCC 67 at paras. 68-73; *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, 2005 SCC 13 at paras. 11-12; *114957 Canada Ltd. (Spraytech) v. Hudson (Town),* 2001 SCC 40 at para. 35; *Canada Post* at paras. 3-5.
[143] Now *Canadian Energy Regulator Act*, s 239.

have a "lawful excuse" for refusing to transport the Heavy Oil.[144] Neither of these propositions are well-founded.

130. The first proposition is tantamount to arguing that the fact that the Proposed Legislation allows for the possibility of exempting a federal undertaking from a prohibition on conduct mandated under federal legislation means that the paramountcy doctrine does not apply. Such an argument was rejected in *Alberta v. Moloney,* where this Court found that a province's power to suspend a driver's licence until payment of an outstanding judgment debt was inoperative in a federal bankruptcy situation:

> Neither can the question under the operational conflict branch of the paramountcy test be whether it is possible to refrain from applying the provincial law in order to avoid the alleged conflict with the federal law. To argue that the province is not required to use s. 102 in the context of bankruptcy, <u>or that it can choose not to withhold the respondent's driving privileges</u>, leads to a superficial application of the operational conflict test…. In fact, this would be tantamount to rendering the provincial law inoperative to the extent of the conflict even before a conflict is found. Under the doctrine of paramountcy, this is precisely the remedy that courts grant once a conflict is found; it is not a tool courts can use to avoid finding a conflict.[145] (our emphasis, not in original)

131. The AGBC's second proposition is that since the Proposed Legislation would provide a pipeline or a railway that fails to obtain a Heavy Oil permit with a "lawful excuse" for non-compliance with its common carrier obligation, the paramountcy doctrine does not apply. However, this argument is circular and, if accepted, would allow provinces to routinely defeat the paramountcy doctrine in most cases of direct conflict. For example, a hypothetical provincial statute could prohibit residents of a province from disclosing personal information absent provincial authorization. As the federal *Statistics Act* requires all Canadians to answer all questions on the census,[146] such a provincial law would create a direct conflict between the two statutes. If the AGBC's argument is correct, however, there would be no conflict because the provincial law creates a "lawful excuse" for not answering the federal census. Accordingly, it is self-evident that the notion that a conflicting provincial statute can remain operable because it necessarily "excuses"

---

[144] AGBC Factum at paras. 127-130.
[145] *Alberta v. Moloney,* 2015 SCC 51 at paras. 69-70. See also: *Lafarge* at para. 75; *Canada Post* at paras. 79 to 83.
[146] *Statistics Act*, RSC 1985, c S-19, ss 7, 8, 23, 31.

a breach of a federal statute would render the operational conflict branch of the paramountcy doctrine meaningless.

132. Furthermore, neither the *Patchett & Sons* nor the *Gold Seal Ltd.* cases are authority for the notion that a provincial statute can provide a "lawful excuse" for breaching federal common carrier obligations.[147] In *Patchett,* a railway that could not move goods because its employees refused to cross a picket line was found not to have breached its common carrier obligation because it was unreasonable to expect compliance on the facts of that case. In *Gold Seal,* the shipper was found not to have breached its common carrier obligation because the transportation of liquor was unlawful under a federal statute (the *Canada Temperance Act*) that prohibited the importation of alcohol into provinces where it could not be sold under provincial law. In neither of these cases was there a provincial statute prohibiting transportation of the goods in question.

133. In addition to this direct conflict, the Proposed Legislation also frustrates the purpose of the federal pipeline and railway regulatory regimes. As explained above, that purpose is to establish comprehensive national regulatory regimes to oversee the construction and operation of interprovincial pipelines and railways. These regimes include the regulation of the products these undertakings carry, and the terms and condition of their transport. They also includes measures to ensure their safe transportation, including the obligation to remediate and provide compensation under the "polluter pays" principle.[148]

134. The Proposed Legislation, however, purports to limit the volumes and types of petroleum that pipelines and railways can carry, unless a permit is granted by BC. Such provincial permits may impose conditions that could conflict with those mandated under the federal regime. Interprovincial oil transport would no longer be subject to a uniform national regime that reflects the federal assessment of the national public interest, as Parliament intended. This would frustrate a key purpose of the *NEB Act* (and its successor legislation), the *CTA,* the *RSA,* and the *TDGA*, as well as the federal regulatory infrastructure established thereunder.

---

[147] AGBC Factum at paras. 128-129; *Patchett & Sons Ltd. v. Pacific Great Eastern Railway Co.,* [1959] SCR 271; *Gold Seal Ltd. v. Dominion Express Co.,* (1921), 62 DLR 62 (SCC).
[148] See paragraphs 22 to 41, above.

135. The AGBC argues in response, without any apparent jurisprudential support, that the Proposed Legislation can only engage the frustration branch of paramountcy if it is established that "Parliament intended to create an exhaustive code that would preclude the application of provincial environmental laws."[149] However, this is an overstatement of the doctrine.[150] The third question posed in BC's reference is not whether <u>any</u> provincial or municipal law could ever operate in relation to an interprovincial transportation undertaking. It properly asked whether the <u>Proposed Legislation</u> would be rendered inoperative by existing federal legislation. For the reasons set out above, the answer is yes. The fact that some provincial environmental laws of general application may not conflict with federal pipeline or railway legislation does not render the paramountcy doctrine automatically inapplicable, as the AGBC suggests.

136. This is particularly the case because the federal pipeline and railways regimes are not merely permissive. Rather, these regimes provide for positive entitlements, namely, the obligation to transport goods in accordance with the federal regulatory framework.[151] This was effectively recognized in *Burnaby (City of) v. Trans Mountain,* where Macintosh J. of the BC Supreme Court applied the doctrine of paramountcy (as well as interjurisdictional immunity) to find that municipal bylaws were inoperable with respect to the Trans Mountain pipeline, writing: "In the result, power over interprovincial pipelines rests with Parliament. The *NEB Act* is comprehensive legislation enacted to implement that power."[152]

137. In sum, the Proposed Legislation would be inoperable with respect to interprovincial undertakings as it conflicts with the comprehensive federal pipeline and railway regulatory regimes that already oversee whether and how these undertakings may transport goods across provincial borders.

D. CONCLUSION

138. A vital feature of Canada's constitutional landscape is the exclusive jurisdiction of the federal government to authorize and regulate the operation and management of all interprovincial

---

[149] AGBC Factum at para. 132.
[150] See Hogg at pp. 16.10 to 16-14 **[AGC BOA, Tab 1]**.
[151] *Alberta (Attorney General) v. Moloney,* 2015 SCC 51 at para. 26; *NEB Act,* s 73(h) (now s. 313(h) of the *Canadian Energy Regulator Act*); *Canada Transportation Act,* SC 1996, c 10, s 90.
[152] *Burnaby (City) v. Trans Mountain ULC*, 2015 BCSC 2140 at para. 60.

undertakings, including the TMX Project. The Proposed Legislation's true purpose and effect is to wrest this jurisdiction from Parliament under the guise of purporting to protect the environment. The BCCA properly concluded that it is constitutionally impermissible for the Government of BC to attempt to do so.

PART IV – COSTS

139. No costs should be awarded in respect of this appeal.

PART V – NATURE OF ORDER SOUGHT

140. The AGC requests the Court to dismiss this appeal and to affirm that the answer to the first reference question is: "No, the Proposed Legislation is not within the legislative authority of the Legislature of BC."

141. In the alternative, if the Court allows this appeal and answers the first reference question in the affirmative, the AGC requests that the answer to the second reference question be as follows: "No, the Proposed Legislation is not applicable to hazardous substances brought into BC by means of interprovincial undertakings."

142. In the further alternative, if the Court allows this appeal and answers the first two reference questions in the affirmative, the AGC requests that the answer to the third reference question be as follows: "Yes, existing federal legislation renders the Proposed Legislation inoperative."

PART VI – SUBMISSIONS ON CASE SENSITIVITY

143. The AGC agrees with the AGBC's submissions on case sensitivity.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated this 2nd day of October, 2019.

Jan Brongers

BJ Wray

Counsel for the Respondent,
Attorney General of Canada

PART VIII – TABLE OF AUTHORITIES

		Cited at Paras.
Statutes and Legislation		
Canadian Energy Regulator Act, SC 2019, c 28, s10, ss 95-97, 136-138, 140-141, 182-186, 239, Parts 2, 3, 7	*Loi sur la Régie canadienne de l'énergie*, LC 2019, ch 28, art 10, ss 95-97, 136-138, 140-141, 182-186, 239, Parts 2, 3, 7	22, 27-31, 34, 128, 136
Canadian Environmental Assessment Act, 2012, SC 2012, c 19, ss 15(b), 52	*Loi canadienne sur l'évaluation environnementale* (2012) (L.C. 2012, ch. 19, art. 52), ss 15(b), 52	22, 31, 34
Canada Transportation Act, SC 1996, c 10, ss 90 to 94.2, 113 to 116	*Loi sur les transports au Canada* (L.C. 1996, ch. 10), ss 90 to 94.2, 113 to 116	22, 35-37, 128, 134, 136
Environmental Management Act, SBC 2003, c 53, s 1(1)		42, 59, 98-100, 104-106, 108
National Energy Board Act, RSC, 1985, c N-7, ss 48, s 71, Parts 2, 4, 6	*Loi sur l'Office national de l'énergie* (L.R.C. (1985), ch. N-7), ss 48, s 71, Parts 2, 4, 6	22, 25-32, 34, 128, 134, 136
National Energy Board Act Part VI (Oil and Gas) Regulations (SOR/96-244)	*Règlement de l'Office national de l'énergie concernant le gaz et le pétrole (partie VI de la Loi)* (DORS/96-244)	22
National Energy Board Onshore Pipeline Regulations (SOR/99-294)	*Règlement de l'Office national de l'énergie sur les pipelines terrestres* (DORS/99-294)	22, 32
Pipeline Safety Act (An Act to amend the National Energy Board Act and the Canada Oil and Gas Operations Act), SC 2015, c 21	*Loi sur la sûreté des pipelines* (L.C. 2015, ch. 21)	22, 30
Railway Operating Certificate Regulations (SOR/2014-258)	*Règlement sur les certificats d'exploitation de chemin de fer* (DORS/2014-258)	22
Railway Safety Act, RSC 1985, c 32 (4th Supp.)	*Loi sur la sécurité ferroviaire* (L.R.C. (1985), ch. 32 (4e suppl.))	22, 35, 38-39, 134
Regulations Designating Physical Activities (Project List), (SOR/2012-147)	*Règlement désignant les activités concrètes* (DORS/2012-147)	22

		Cited at Paras.
Statistics Act, RSC 1985, c S-19, ss 7, 8, 23, 31	*Loi sur la statistique* (L.R.C. (1985), ch. S-19)	131
Transportation of Dangerous Goods Act, 1992, SC 1992, c 34, ss 5, 7, 14, 18	*Loi de 1992 sur le transport des marchandises dangereuses* (L.C. 1992, ch. 34) ss 5, 7, 14, 18	22, 35, 40-41, 134
Transportation of Dangerous Goods Regulations (SOR/2019-101), Parts 2 to 8	*Le Règlement sur le TMD a été codifié pour y inclure la modification* DORS/2019-101 (plan d'intervention d'urgence), Parts 2 to 8	22, 41

Cases	
114957 Canada Ltd. (Spraytech) v. Hudson (Town), 2001 SCC 40	126
Alberta (Attorney General) v. Moloney, 2015 SCC 51	130, 136
Attorney General of Alberta v. Attorney General of Canada, [1939] AC 117, 1938 CanLII 251	64
Bell Canada v. Quebec (Commission de la Santé et de la Sécurité du Travail), [1988] 1 SCR 749	94, 96-97
British Columbia (Attorney General) v. Lafarge Canada Inc., 2007 SCC 23	123, 130
Burnaby (City) v. Trans Mountain Pipeline ULC, 2015 BCSC 2140	112, 136
Campbell-Bennett-Limited v. Comstock Midwestern Limited, [1954] SCR 207	86, 112
Canada Post Corporation v. Hamilton (City), 2016 ONCA 767	123, 126, 130
Canadian Pacific Railway v. Notre Dame de Bonsecours (Parish), [1899] UKPC 22	90
Canadian Western Bank v. Alberta, 2007 SCC 22	63, 65, 110, 112, 125
Coastal First Nations v. British Columbia, 2016 BCSC 34	123
Commission de transport de la Communauté urbaine de Québec v. Canada (National Battlefields Commission), [1990] 2 SCR 838	113, 116-117, 123
Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters, 2009 SCC 53	87
Friends of the Oldman River Society v. Canada, [1992] 1 SCR 3	93
General Motors of Canada Ltd. v. City National Leasing, [1989] 1 SCR 641	106-107
Gold Seal Ltd. v. Dominion Express Co., (1921), 62 DLR 62	132

Kirkbi AG v. Ritvik Holdings Inc., 2005 SCC 65	101, 107
Kitkatla Band v. British Columbia, 2002 SCC 31	63, 101
Lavalle, Rackel & Heintz v. Canada, 2002 SCC 61	121
Law Society of British Columbia v. Mangat, 2001 SCC 67	126
Madden v. The Nelson and Fort Sheppard Railway Company (British Columbia), [1899] AC 626	90
Multiple Access Ltd. v. McCutcheon, [1982] 2 SCR 161	94
Ontario v. Winner, [1954] 4 DLR 657	112
Patchett & Sons Ltd. v. Pacific Great Eastern Railway Co., [1959] SCR 271	132
Procureure générale du Québec c. IMTT-Québec Inc., 2019 QCCA 1598	122
Quebec (Attorney General) v. Canada (Attorney General), 2015 SCC 14	65
Quebec (Attorney General) v. Canadian Owners and Pilots Association, 2010 SCC 39	110, 112-113, 115, 123, 125-126
Quebec (Attorney General) v. Lacombe, 2010 SCC 38	101, 108
R. v. Morgentaler (No. 3), [1993] 3 SCR 463	66, 82
Reference re Assisted Human Reproduction Act, 2010 SCC 61	102
Reference re Environmental Management Act (BC), 2019 BCCA 181	8-10, 14, 19-20, 22, 24, 26, 32-34, 43-46, 52-53, 59, 63, 67, 76, 78, 87-88, 94, 107, 120
Reference re Upper Churchill Water Rights, [1984] 1 SCR 297	65
Reference re Pan-Canadian Securities Regulation, 2018 SCC 48	62-63
Registrar of Motor Vehicles v. Canadian American Transfer Ltd., [1972] SCR 811	123
Rogers Communications Inc. v. Châteauguay (City), 2016 SCC 23	89, 93-94, 110, 113-114
Rothmans, Benson & Hedges Inc. v. Saskatchewan, 2005 SCC 13	126
Squamish Nation v. British Columbia, 2018 BCSC 844	18
Squamish Nation v. British Columbia, 2019 BCCA 321	18
Tsleil-Waututh Nation v. Canada, 2018 FCA 153	15
Vancouver v. British Columbia, 2018 BCSC 843	18
Vancouver v. British Columbia, 2019 BCCA 322	18

Orders in Council and Proclamations	
Order in Council P.C. 2016-1069, November 29, 2016	13
B.C. Order of the Lieutenant Governor in Council No. 211, April 25, 2018	20, 42
Order in Council P.C. 2018-1177, September 20, 2018	16
Order in Council P.C. 2019-0820, June 18, 2019	16-17
NEB Decisions	
NEB Order MH-081-2017, January 18, 2018	21, 80
Hansards	
British Columbia, Official Report of Debates of the Legislative Assembly (Hansard), 37th Parl., 4th Sess., Vol. 16, No. 12 (08 October 2003) (Hon. J. Murray) at 7270	104
British Columbia, Official Report of Debates of the Legislative Assembly (Hansard), 41st Parl., 3rd Sess., Issue 104 (14 March 2018) at 3534 (Hon. G. Heyman)	19
House of Commons Debates, 22nd Parl., 2nd Sess., Vol 2, (25 February 1955) at 1530-1531 (H.C. Green)	26
House of Commons Debates, 41st Parl., 2nd Sess., Vol. 147, No. 162 (26 January 2015) at 10558, 10560 (Hon. G. Rickford)	25
Secondary Sources	
Peter W. Hogg, *Constitutional Law of Canada,* 5th ed. (Toronto: Thomson Reuters Canada Limited, 2014) 15-16; 15-19 to15-20; 15-28; 16-10 to 16—14; 21-8 to 21-10; 30-24	64, 65, 66, 88, 110, 135