SCC File Number: 40195

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE ALBERTA COURT OF APPEAL)

IN THE MATTER of An Act to enact the *Impact Assessment Act* and the *Canadian Energy Regulator Act*, to amend the *Navigation Protection Act* and to make consequential amendments to other Acts, SC 2019, c 28 and the Physical Activities Regulations, SOR/2019-285

AND IN THE MATTER of a Reference by the Lieutenant Governor in Council to the Court of Appeal of Alberta under the *Judicature Act*, RSA 2000, c J-2, s 26

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

- and –

ATTORNEY GENERAL OF ALBERTA

Respondent

- and –

(Title of proceedings continued on next page)

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. In order to be constitutionally valid, the pith and substance of environmental assessment legislation must fall within a head(s) of power assigned to the enacting legislature by the *Constitution Act, 1867*.[1] The constitutional structure is clear enough to allow each level of government to enact and implement effective environmental assessment legislation that does not exceed constitutional authority. The problem with the *Impact Assessment Act*[2] and its associated *Physical Activities Regulations*[3] is that, in an effort to achieve maximum flexibility, the scheme exceeds the federal heads of power provided for in the Constitution.

2. In the present circumstances, the *IAA* and the Regulations have the capacity to operate *ultra vires* the authority of Parliament in regulating certain intra-provincial projects. The powers granted to the federal executive by the *IAA* exceed the limits imposed by the Constitution, and the availability of judicial review is not an adequate remedy given the extent of the infringement.

3. The *IAA* has exceeded federal jurisdiction. Statutory definitions of terms such as "effect" and "sustainability"; mandatory factors for considerations that reach well outside the federal heads of power; and the ability of the Minister to designate projects outside the designated project list all highlight the scheme's unreasonable expansion.

4. Furthermore, the Regulations do not sufficiently limit the scope of the *IAA*, and could impermissibly regulate outside federal constitutional limits in the context of intra-provincial projects. The constitutional hooks on which Canada hangs its impact assessment scheme are simply not strong enough to support the regulatory weight in the context of intra-provincial projects.

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[1] RSC 1985, App II, No 5— *An Act for the Union of Canada, Nova Scotia, and New Brunswick, and the Government thereof; and for the Purposes connected therewith* [the "**Constitution**"].
[2] *Impact Assessment Act*, SC 2019, c 28 ["***IAA***"].
[3] *Physical Activities Regulations*, SOR/2019-285 [the "**Regulations**"].

B. Statement of Facts

5. Newfoundland and Labrador adopts the facts as generally stated by the parties.

PART II – RESPONSE TO QUESTIONS IN ISSUE

6. Newfoundland and Labrador takes the following positions with respect to the questions in issue as raised by Canada:

   (a) The impact assessment scheme as premised by the combined effect of the *IAA* and its Regulations are *ultra vires* the legislative authority of the Parliament of Canada under the Constitution.

PART III– ARGUMENT

A. Pith and Substance Doctrine

7. A decision of this Court that has recently pronounced on the pith and substance doctrine is *References re Greenhouse Gas Pollution Pricing Act* ["*Re GGPPA*"].[4] The Court stated that the goal of the first step of the pith and substance analysis is to determine the dominant characteristic of the legislation in question, which involves looking at both the legislative purpose and its effects.

8. The purpose can be determined from both intrinsic and extrinsic sources, and effects refer to both legal and practical effects. The Court wrote:

> First, the pith and substance of a challenged statute or provision must be described as precisely as possible. A vague or general description is unhelpful, as it can result in the law being superficially assigned to both federal and provincial heads of powers or may exaggerate the extent to which the law extends into the other level of government's sphere of jurisdiction… However, precision should not be confused with narrowness. Instead, the pith and substance of a challenged statute or provision should capture the law's essential character in terms that are as precise

[4] 2021 SCC 11 ["***Re GGPPA***"]

> as the law will allow… It is only in this manner that a court can determine what the law is in fact "all about".[5]

9. The test's second step is the classification exercise, and the authorities note the importance of keeping these stages separate from one another. The *Re GGPPA* Court was specifically alive to this concern:

> [The] characterization and classification stages of the division of powers analysis are and must be kept distinct. In other words, the pith and substance of a statute or a provision must be identified without regard to the heads of legislative competence. As Binnie J. noted in Chatterjee v.Ontario (Attorney General) 2009 SCC 19, [2009] 1 S.C.R. 624, at para. 16, a failure to keep these two stages of the analysis distinct would create "a danger that the whole exercise will become blurred and overly oriented towards results"[6]

10. When the test is properly applied to the *IAA* and its Regulations, it is clear that the scheme is *ultra vires* Parliament and impermissibly intrudes on provincial jurisdiction.

(i) Purpose

11. Canada argues that the dominant purpose of the *IAA* is to safeguard against adverse environmental effects in relation to matters within federal jurisdiction.[7] Newfoundland and Labrador states that it supports the conclusions drawn in the Alberta Court of Appeal decision and Alberta's factum. The scheme's purpose is regulate the environment in reference to designated projects. These projects are so designated due to their connection to an enumerated federal head of power, because they have acquired a federal dimension due to production capacity of certain physical activities, or because they have been so designated by the Minister.

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[5] *Re GGPPA* at para 52.
[6] *Ibid* at para 56.
[7] Canada Factum at para 18.

12. The dominant purpose of the *IAA* does not need to target all activities identified by the federal executive[8] in order to be constitutionally invalid. Only certain types of industrial activities are targeted under the scheme, but more attention ought to be paid to the reasons *why* these activities are targeted, as these provide key insight to the dominant purpose of the legislation for the pith and substance analysis.

13. In circumstances like our own, when legislation grants expansive and multifaceted powers to the federal executive, it can be difficult to determine: (a) what the purpose of the legislation actually *is*; or, (b) where a purpose can be determined, whether the granted legislative powers are appropriately connected to the legislative purpose.

14. Many of the *IAA* assessment powers are so broad as to only have a tenuous connection to the legislation's purpose, and thereby ultimately lose their constitutional grounding. The quantitative limits in the Regulations are arbitrarily drawn; the scheme is unacceptably broad in the intra-provincial context and it regulates activities over which Parliament does not have constitutional authority.

(ii) Effects

15. The purpose of the legislative scheme is relatively clear, but significant questions arise respecting the effects of the legislation as it actually operates. Here, the question becomes less "does the *IAA* regulate projects properly governed by provincial Legislatures," and more "does the *IAA* have effects that are outside the prescribed limits of the federal government's constitutional authority, and do those effects have an impact that is more than incidental on provincial heads of power." Newfoundland and Labrador submits that it does and they do.

16. The breadth of the *IAA* and associated Regulations raise constitutional concerns. The *IAA* has multiple statutory definitions, such as those for "effects" and "sustainability," that do little to mitigate the types of physical activities that trigger the legislation's prohibitive

[8] See *Reference re Impact Assessment Act*, 2022 ABCA 165 at para 31.

conditions, in addition to mandating consideration of a wide variety of disparate factors that duplicate much of what provincial legislation already does.

17. Further, far from acting as a mechanism of constraint, narrowing the applicability of the *IAA*, [9] the Regulations apply to such a wide variety of designated activities that the infringing effect on provincial heads of power are not merely incidental but unconstitutional. To characterize the Regulations as "limiting" in effect is inaccurate; this argument relies on the supposition that the federal government would theoretically have the constitutional authority to assess *every* physical activity in a province, whether public or private, large or small, environmentally significant or negligible, to determine whether it may possibly have an effect on a federal head of power.

18. This is a necessary conclusion should one accept that the *IAA*'s legislative triggers and the Regulations are expressions of a "restraint" on Parliament's authority. The question presently before the Court is a matter of determining where the line ought to be drawn. The *IAA* is not like the legislation in *Re GGPPA,* which was a tailored legislative instrument with targeted effects[10]. The *IAA* is wide-ranging and oversteps constitutional limits.

1. <u>The impact of the "effects" definition creates a cascading chain reaction placing the *IAA* outside constitutional limits</u>

19. The *IAA* contains many broad statutory definitions, the combined effect of which results in the legislation applying to a broad and disparate series of activities. So long as the federal government is regulating within its constitutional authority, there is nothing obviously wrong with legislation of broad application. The practical effect, however, is that the legislation was drafted without any limits on federal reach which leaves a province to monitor and potentially challenge federal regulating activity on every project.

20. The problem of breadth is exemplified in part by the three statutory definitions applicable to variations of the term "effects." The term "effects within federal jurisdiction" appears

[9] See Canada Factum at para 114.
[10] See *Re GGPPA* at paras 38 and 204

tailored to powers that traditionally would generally be considered expressions of Parliamentary regulation within its constitutionally ascribed heads of power, but issues arise with the other two definitions under section 2:

> ***direct or incidental effects*** means effects that are directly linked or necessarily incidental to a federal authority's exercise of a power or performance of a duty or function that would permit the carrying out, in whole or in part, of a physical activity or designated project, or to a federal authority's provision of financial assistance to a person for the purpose of enabling that activity or project to be carried out, in whole or in part. (*effets directs ou accessoires*)
>
> ***effects*** means, unless the context requires otherwise, changes to the environment or to health, social or economic conditions and the positive and negative consequences of these changes. (*effets*)

21. The combined effect of "effect" paired with "direct or incidental effect" is problematic. The latter term refers to "effects" that may have either a direct *or* an incidental "effect" connected to a federal authority's exercise of power—a term defined to refer to *any* change in the environment (or to health, social economic conditions and the positive and negative consequences of those changes). It has been deliberately designed to have as broad applicability as possible.

22. The effect of the term "effect" exemplifies the issue with the *IAA* as a whole—there are no constraints built into the legislation. To the contrary, the interaction of these various statutory terms results in potential for considerable overreach. Assurances that judicial review exists to right instances where the federal authority oversteps legislative intent[11] is a wholly inadequate response to the charge that, as a matter of design, the *IAA* imposes no internal restraints on the federal executive's authority. It should not be easier to go offside the Constitution than enabling legislation.

[11] Canada Factum at paras 72-74

23. Where an impact assessment has been deemed necessary for a designated project, *all* effects of the project are assessed and commented upon by the federal Impact Assessment Agency in the resulting impact assessment report. The considerations are not limited to considerations of matters that may have an effect on federal heads of power:

> **Final report submitted to Minister**
>
> **28 (2)** After taking into account any comments received from the public, the Agency must, subject to subsection (5), finalize the report with respect to the impact assessment of the designated project and submit it to the Minister no later than 300 days after the day on which the notice referred to in subsection 19(4) is posted on the Internet site.
>
> **Effects set out in report**
>
> **28 (3)** The report must set out the effects that, in the Agency's opinion, are likely to be caused by the carrying out of the designated project. It must also indicate, from among the effects set out in the report, those that are adverse effects within federal jurisdiction and those that are adverse direct or incidental effects, and specify the extent to which those effects are significant.

24. Requiring the report to list *all* "effects" that are "likely to be caused," given the breadth of the term's statutory definition, results in the *IAA* overstepping the limits of federal constitutional authority when the report is in connection to an intra-provincial project. Canada asserts that, once a project engages a federal hook, the entire project may be subject to assessment,[12] but it does not follow that *every* effect of a project may be considered and reported on regardless of the fact that those specific effects may not have a connection to a federal head of power.

25. This argument is not an instance of allowing the second step of the pith and substance test to blend with the first. It does not involve reasoning from conclusions and looking at provisions in the abstract, disconnected from context in the whole of the legislative scheme. By mandating that all effects must be recorded, and by distinguishing direct or incidental effects (those linked at least nominally to federal heads of power) the *IAA*

[12] See Canada Factum at para 52(d); and *MiningWatch Canada v Canada (Minister of Fisheries and Oceans)*, 2010 SCC 2 at para 41.

reporting requirements acknowledge and encourage the consideration of factors that do not fall within federal jurisdiction.

26. Section 60 indicates that the Minister is required to take the whole of the report into account:

> **Minister's decision**
> **60 (1)** After taking into account the report with respect to the impact assessment of a designated project that is submitted to the Minister under subsection 28(2) or at the end of the assessment under the process approved under section 31, the Minister must
>
> **(a)** determine whether the adverse effects within federal jurisdiction — and the adverse direct or incidental effects — that are indicated in the report are, in light of the factors referred to in section 63 and the extent to which those effects are significant, in the public interest; or
>
> **(b)** refer to the Governor in Council the matter of whether the effects referred to in paragraph (a) are, in light of the factors referred to in section 63 and the extent to which those effects are significant, in the public interest.

27. Canada asserts that the legislation indicates that the factors in the decision-making phase are "restricted" to federally-linked effects. It is constitutionally permissible for various levels of government to have incidental effects on one another, but the problem with the *IAA* is the absence of any kind of interpretative aid in determining where the line can be drawn between "effects" and "effects within federal jurisdiction." This is especially the case when the Minister is required to determine whether a project is in the "public interest." Technically speaking, the Minister is asked to determine whether the adverse effects are in the public interest in light of certain mandatory factors, but the *effect* of the decision is a determination of whether or not a project will be approved.

28. The public interest is another statutorily defined factor in the assessment, which in the context of the *IAA* includes:

> **Factors — public interest**
> **63** The Minister's determination under paragraph 60(1)(a) in respect of a designated project referred to in that subsection, and the Governor in Council's determination under section 62 in respect of a designated project referred to in that subsection, must be based on the report with respect to the impact assessment and a consideration of the following factors:
>
> **(a)** the extent to which the designated project contributes to sustainability;
>
> **…**
>
> **(e)** the extent to which the effects of the designated project hinder or contribute to the Government of Canada's ability to meet its environmental obligations and its commitments in respect of climate change.

29. Paragraphs 63(a) and (e) are constitutionally questionable. With respect to the latter, climate change has not been established as a federal head of authority, neither in *Re GGPPA* nor any other case. Further, Canada's factum does not argue that this is what the *IAA* does. Therefore, making climate change a mandatory consideration of the project approval process, when it does not meet the statutory definition of adverse "direct or incidental effects" is inappropriate.

30. More problematic, however, is that the "effects" under consideration are unqualified. This means that all changes are examined, not just those affecting federal heads. Per section 60(1)(a), the public interest assessment ought only to be properly conducted in reference to effects in federal jurisdiction, but 63(e) explicitly requires that all "effects" of a project be analyzed. There is an inherent tension between these two sections and, on the face of paragraph 63(e) at least, the Minister's determination is by design made in connection to effects and factors outside the proper limits of the federal decision-making authority.

2. "Sustainability" is a mandatory consideration in the public interest determination but it is vague and excessively broad

31. "Sustainability" is another defined term in the legislation and, like "effects," the definition does not appear to confine decision-making authority, but rather unfetter it. Per section 2,

> ***sustainability*** means the ability to protect the environment, contribute to the social and economic well-being of the people of Canada and preserve their health in a manner that benefits present and future generations. (*durabilité*)

32. Instead of assisting in interpreting the meaning of the term, the definition provided in the *IAA* provides little guidance to project proponents, administrative decision makers, courts, or the public as to what considerations must actually be taken into account under the public interest per 63(a) and how to weigh them. The words used are vague and indeterminate, and the result is that the term has no utility as an interpretative aid.

33. What it means to "protect the environment" is not clear-cut. It is reasonable that different levels of government may have different priorities respecting environmental protection, and different—though still scientifically valid—standards and goals to ensure environmental protection. Additionally, what it means to contribute to the "social and economic well-being" of the people of Canada is uncertain and debatable. Reasonable questions arise when one asks the appropriate manner in which to weigh "protecting the environment" against contributing to the "economic well-being" of the people of Canada, particularly when those values are asserted to come into conflict.

34. There will always be a value judgment when it comes to assessing which projects are approved and which ones are not. The reasonableness standard of judicial review protects decisions of administrative decision makers when they fall within a range of acceptable outcomes in the legislative context,[13] but consideration and reliance of factors *ultra vires* to Parliamentary authority can never be acceptable.

[13] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 15.

35. The factors in the consideration of how "sustainability" is defined do not fall within the federal heads of power as cited in Canada's factum. The term is not and cannot be restricted to effects within federal jurisdiction. Therefore, while section 60(1) may state that only effects within federal jurisdiction have merit for the decision of whether a project will be approved, the factors and considerations the legislation mandates the Minister to consider in the public interest are broader.

36. There appears to be a contradiction between sections 60(1) and 63(a), a contradiction which, given the frequency with which "sustainability" occurs in the *IAA*, permeates other parts of legislation. The term is a mandatory consideration at various stages under the scheme. The repeated emphasis on considering factors outside federal authority suggests that the legislation actually does more than is constitutionally allowable.

37. The *IAA* requests the Minister do an impossible thing; it is illogical to require consideration of effects outside the allowable scope of constitutional authority and then to hold that those considerations cannot affect the outcome of the ultimate decision. The *IAA* professes to mandate this, but it is difficult to see how it is practically possible to consider and disregard an effect all at once.

3. The *Impact Assessment Act* mandatory factors are *ultra vires* Parliamentary authority in the intra-provincial context

38. The Court in this matter is being asked to, essentially, determine whether the *IAA* has gone too far from federal authority. Canada argues that various heads of power, acting either in isolation or coordination (but with one, at least, always engaged), allows the Impact Assessment Agency to assess a designated project along any criteria it chooses. Given the breadth of mandatory considerations in the legislation, it becomes much more difficult to confidently assert that all these considerations fall within its animating purpose.

39. Subsection 22(1) sets out the mandatory factors for consideration after an impact assessment has been deemed necessary. These mandatory considerations include:

> **Factors — impact assessment**

> **22 (1)** The impact assessment of a designated project, whether it is conducted by the Agency or a review panel, must take into account the following factors:
>
> **(d)** the purpose of and need for the designated project;
>
> **(h)** the extent to which the designated project contributes to sustainability;

40. "Need," like "sustainability," is a value-driven consideration. Canada argues that it is constitutionally permissible for the federal executive to engage an assessment of need as a consequence of an incidental effect on federal authority to regulate with respect to any one of a number of specifically enumerated heads of power. Despite their mandatory consideration, the "need" and "sustainability" factors are impermissibly vague. Practically any decision respecting a designated project could reasonably be justified by either emphasizing or deemphasizing its need or its lack thereof against vague and broad sustainability considerations.

41. The mandatory considerations are insufficiently connected to federal heads of power. Canada argues that different heads of power are engaged in different circumstances. There is no suggestion that the constitutional whole is somehow "more" than the sum of its parts—in other words, when a constitutional hook has been engaged, it must be, the logic goes, sufficient to support the entirety of the resulting regulatory regime.

42. This is not a circumstance like section 16(2)(g), which grants the Impact Assessment Agency authority to consider *any* factor it considers relevant when determining the necessity of an impact assessment (which factors, Canada argues, must nevertheless be limited to the dominant purpose of the *IAA* in order to be reasonable on judicial review[14]). While the scope of the 22(1) factors may be adjusted in accordance with subsection (2), they all nevertheless remain mandatory.

43. When a decision is made respecting a project under section 60, the Minister is to take into account only effects that have been deemed likely to impact federal heads of

[14] Canada Factum at paras 72-75

authority. The report that has been generated, however, nevertheless will contain significant aspects unrelated to the constitutional head of power justifying the *IAA*'s constitutionality.

44. In order to be constitutional, the decision making authority endowed by the *IAA* must be linked to the federal heads of power, and factors outside those heads must not be so significant to render the federal link superficial. This is not a circumstance as Canada characterizes it: one where, if a decision maker acts in error, that error can be rectified on judicial review. The legislation, rather, has structural flaws: it permits decision makers, at different instances, to have discretion that is both too wide to be constitutionally acceptable while also mandating considerations not properly within their authority.

4. <u>"Public concerns" is not a basis on which the federal executive can assume constitutional authority it would not otherwise have</u>

45. The *IAA* goes too far in its allowable considerations. The authority to regulate many things does not equate the authority to regulate *every* thing. The Minister's authority to designate projects outside the designated projects list in the Regulations under section 9 is particularly problematic, most obviously in the role played by "public concerns."

46. Under subsection 9(1) the Minister may, either on request or their own initiative "designate a physical activity that is not prescribed by regulations… if, in his or her opinion… public concerns related to those[15] effects warrant the designation." Public concerns would not be sufficient to assert federal authority over a project where that authority would not otherwise exist but for that concern, but this is the effect the provisions likely have.

47. The Regulations encompass a broad range of physical activities that Canada asserts represent those most likely to have adverse federal effects.[16] Again, Canada appears to be arguing that, by merit of a potential effect on a federal head of power, it has the

[15] "Adverse effects within federal jurisdiction or adverse direct or incidental effects."
[16] Canada Factum at para 114.

authority to regulate with relative impunity, with no *de minimis* requirement. It seems unreasonable, however, to suggest that there is *no* limit to federal authority in this context.

48. If a project was likely to have an adverse federal effect, it would stand to reason that it would have been designated in the Regulations. If an activity has not been designated, it has been implicitly recognized as less likely to have an adverse federal effect. Under section 9, there is no legislative requirement for the proposed activity to actually *have* an adverse federal effect, only public concerns that it *may* have such an effect, in order to warrant assessment.

49. Public concerns are not an appropriate ground on which a government can assume constitutional authority. The rule of law requires that the law be knowable. When public concerns are a standard on which a Minister may gain legislative authority, then the standard cannot be known. In conjunction with the reasons previously discussed, this represents another aspect of the totality in which the *IAA* has overstepped acceptable constitutional limits.

(iii) The *Physical Activities Regulations* are *ultra vires* in many circumstances of their application

50. In its factum, Canada has not attributed adequate importance to the Regulations. It writes that the pith and substance of the scheme is properly found in the *IAA*'s triggering mechanisms,[17] but the legislation—notwithstanding the Minister's designation authority—relies on the Regulations to do the heavy lifting.

51. It is not appropriate to look at the Regulations exclusively as a scoping mechanism[18] when the presence of the designated project list ought to properly centre them as an essential step in assessing the constitutionality of the scheme as a whole.

[17] Canada Factum at para 83-85.
[18] Canada Factum at para 114.

52. Generally speaking, there are two broad classes of physical activities described in the Regulations' Schedule: those that only *qualitatively* describe certain types of activities, and those descriptions that also include a *quantitative* aspect. Unsurprisingly, these activities tend to align with traditionally federal and potentially provincial heads of power, respectively.

53. For examples of the "merely" qualitative descriptions, sections 1 to 11 all describe certain activities taking place in national parks or federally protected areas. These descriptions do not reference any quantitative criteria; activities as a whole are regulated. For example, damming bodies of water in national parks is regulated *in toto*:

> **6** The construction, operation, decommissioning and abandonment, in a national park, of a new dam or structure for the diversion of water for the purpose of supplying water outside the park, of recreation or of electrical power generation.

54. These types of provisions are demonstrably different than the provisions that, when they occur entirely within a province, would traditionally have fallen within provincial jurisdiction. Here, the descriptions are linked to objective production targets. For example, consider the section describing mining activities:

> Mines and Metal Mills
>
> **18** The construction, operation, decommissioning and abandonment of one of the following:
>
> **(a)** a new coal mine with a coal production capacity of 5 000 t/day or more;
>
> **(b)** a new diamond mine with an ore production capacity of 5 000 t/day or more;
>
> **(c)** a new metal mine, other than a rare earth element mine, placer mine or uranium mine, with an ore production capacity of 5 000 t/day or more;
>
> **(d)** a new metal mill, other than a uranium mill, with an ore input capacity of 5 000 t/day or more;
>
> **(e)** a new rare earth element mine with an ore production capacity of 2 500 t/day or more;
>
> **(f)** a new stone quarry or sand or gravel pit with a production capacity of 3 500 000 t/year or more.

55. This section is emblematic of the Regulations' approach to potentially intra-provincial projects. The scheme does not apply to operations that produce fewer tonnes of minerals than specified. The resulting conclusion suggests the scheme as a whole is concerned only with operations that are clearly in federal jurisdiction *or* projects that reach a certain size. In order for these provisions to be valid, Canada will need to demonstrate that projects—once they reach a prescribed size—allow Parliament to assume jurisdictional authority.

56. Canada's argument, however, is that the Regulations instead limit the scope of the *IAA*'s application. While it argues that the designated project list identifies those projects that are "most likely" to have an adverse effect on a federal head of power, the choosing of a threshold nevertheless is arbitrary.

57. Canada argues that, because all activities may *potentially* have a federal impact, all activities are assessable. No qualitative aspect is necessary, and *any* quantitative threshold is constitutionally allowable. This would, in effect, assign the "environment" as a head of power under federal jurisdiction, which is counter to *Friends of the Oldman River Society v Canada (Minister of Transport)*[19] and the principles of cooperative federalism. This is not the correct approach, and the structural differences between the "qualitative" and "quantitative" sections of the Regulations in part reflects this.

58. In order to be a constitutionally valid target for regulation, an activity must engage a federal head, either due to an inherent qualitative aspect, or because it has *assumed* a federal dimension as a result of its quantitative output. There is no inherent connection between the quantitative Regulations and the federal heads of power. Canada argues that it assumes regulatory authority because these are the projects that are "most likely" to affect federal heads of power. This at least assumes the potential that a designated intra-provincial project may ultimately *not* affect a federal head.

59. Canada says that the *IAA* triggers are a necessary safeguard that protects the constitutionality of the scheme in these circumstances. To accept this argument, one

[19] *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3.

would need to agree that, from a provincial and constitutional perspective, there is federal authority to halt a project during the initial assessment period when ultimately there is no valid federal authority to regulate.

60. With respect, the federal government is precluded from having this capacity due to the underlying constitutional foundation. A government cannot regulate an activity over which it has no jurisdiction authority, even temporarily.

(iv) Conclusion on pith and substance

61. The scheme created under the *IAA* and Regulations has the dominant purpose of creating an environmental assessment system premised on designated projects. These projects are designated in reference either to their inherent links to a federal head of power, because they are of a size such that they have been deemed likely to affect a federal head of power, or because the Minister has identified them.

62. When designated projects are intra-provincial, and when they do not ultimately engage a federal head of power, the *IAA* goes too far in its regulation of areas over which it has no control. Additionally, the exceptionally broad powers of the *IAA* are not assignable under a federal head of power, a conclusion supported by the many mandatory considerations in the scheme's various stages that do not have clear federal grounding.

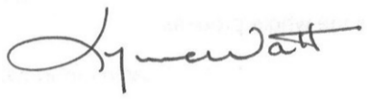
63. Finally, the impact on areas within provincial jurisdiction is more than incidental. The impact of the *IAA* restricts the provinces from appropriately exercising their constitutional authority in a manner consistent with the principles of cooperative federalism. The *IAA* simply goes too far.

64. Environmental regulatory legislation must be flexible so as to respond to various and emerging circumstances but it must still be constitutionally compliant. The *IAA* overreaches; and its constitutional hooks are too frail to support the weight of the regulatory presence in the intra-provincial context.

PART IV– COSTS

65. The Intervener Attorney General of Newfoundland and Labrador does not seeks costs and submits that the ordinary rule that costs are not awarded against an Intervener should apply.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21st day of December, 2022



for:

Marc Lewis
Justin S.C. Mellor
Counsel for the Intervener, Attorney General of Newfoundland and Labrador

PART VII – TABLE OF AUTHORITIES & LEGISLATION

Case Law:	**Paragraph References**
Canada (Minister of Citizenship and Immigration) v Vavilov, 2019 SCC 65	34
Friends of the Oldman River Society v Canada (Minister of Transport), [1992] 1 SCR 3	57
MiningWatch Canada v Canada (Minister of Fisheries and Oceans), 2010 SCC 2	24
Reference re Impact Assessment Act, 2022 ABCA 165	12
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Statutes, Regulations, Legislation:	
An Act for the Union of Canada, Nova Scotia, and New Brunswick, and the Government thereof; and for the Purposes connected therewith, RSC 1985, App II, No 5	1
Impact Assessment Act, SC 2019, c 28	1, 20, 23, 26, 28, 31, 39, 46
Physical Activities Regulations, SOR/2019-285	1, 50, 53, 54