

**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)

**FACTUM OF THE INTERVENERS – INDEPENDENT CONTRACTORS AND
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(Pursuant to Rules 42 of the *Rules of the Supreme Court of Canada*, SOR/2002-156)

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PART I – OVERVIEW

1. This appeal raises the question of whether the expansion of federal powers authorized by *Impact Assessment Act*¹ (“*IAA*”) can be reconciled with the division of powers granting exclusive constitutional jurisdiction to the provinces in relation to local works and undertakings.
2. The crux of the constitutional issue before the Court is whether it is sufficient, in order for the federal government to exercise *comprehensive* legislative jurisdiction over a wholly intraprovincial project, that the project has any impact – however minimal – on a matter over which the federal government can validly legislate.
3. The interveners Independent Contractors and Businesses Association and Alberta Enterprise Group (“*ICBA & AEG*”) submit that answering this question must begin with the fundamental purpose of the division of powers in the *Constitution Act, 1867*.²
4. At the risk of stating the obvious, the *division* of powers does not have, as its fundamental purpose, the *sharing* of powers. To the contrary, the purpose of the division of powers is, to the extent reasonably possible, to *divide* legislative authority between the orders of government.
5. The reason for doing so was, and remains, to preserve the autonomy of both the provinces and the federal government within their respective spheres of jurisdiction, to avoid intergovernmental conflict, and to promote clear lines of democratic accountability and responsibility. Put simply, the division of powers was intended to avoid governments stepping on each other’s toes regarding matters within their areas of exclusive responsibility.
6. This fundamental purpose does not mean that there will be no subjects over which both orders of government may validly legislate, particularly in relation to broad or “diffuse” subjects, like “the environment”, that do not fit comfortably into any single head of power.³ Nor does it mean that a complete and precise separation of legislative authority can ever be perfectly achieved in a complex, modern world.

¹ *Impact Assessment Act*, SC 2019, c 28 (“*IAA*”).

² *Constitution Act, 1867*, 30 & 31 Victoria, c 3 (U.K.).

³ *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 SCR 3 (“*Oldman River*”), at 37, 63-64.

7. But the fact that viewing the division of powers as “watertight compartments” may not be a viable approach does not mean that we should lose sight of the fundamental purpose of the division of powers, being to *divide* exclusive legislative authority between orders of government.

8. In light of this purpose, ICBA & AEG submit that the division of powers contains the necessary tools to assist the Court in identifying reasonably distinct spheres of authority in relation to the regulation of large-scale resource, development, and infrastructure projects, without unduly circumscribing the constitutional authority of either order of government.

9. Specifically, by expressly dividing jurisdiction over works and undertakings, the *Constitution Act, 1867* requires a framework that allows each order of government to be “master of its own house”⁴ in relation to large-scale projects within its express jurisdiction, while still permitting the other order of government to legislate in relation to their sphere of authority.

10. This division can be achieved by developing and adhering to a distinction between “comprehensive” legislative authority over works and undertakings, to be exercised by the legislature given express jurisdiction over the projects *qua* projects, and “restricted” legislative authority over works and undertakings, allowing the other order of government to regulate the work and undertaking only to the more limited extent constitutionally permitted.

11. This will appropriately achieve the balance of legislative authority intended by the express provisions of the *Constitution Act, 1867*, as it equally ensures that provincial legislation cannot effectively usurp the powers granted to Parliament over federally-regulated works and undertakings, and that federal legislation cannot effectively usurp the powers granted to provincial legislatures over provincially-regulated local works and undertakings.

12. Moreover, adhering to this distinction will not only demonstrate fidelity to the underlying purposes of the division of powers, but it will help to achieve those purposes in practice, by avoiding regulatory gridlock, intergovernmental conflict, and jurisdictional uncertainty, of the type that has proliferated in recent years in the area of the regulation of major projects.

⁴ Phrase borrowed from [Reference re Bill 30, An Act to Amend the Education Act \(Ont.\)](#), [1987] 1 SCR 1148, at 1198.

PART II – POSITION ON THE ISSUES ON APPEAL

13. ICBA & AEG submit that:

- a. the Court should develop constitutional doctrines in relation to the regulation of large-scale projects so as to achieve, as much as possible, a clear division of legislative authority between the federal and provincial governments;
- b. this objective can be accomplished in the area of project assessment legislation by developing and adhering to a distinction between “comprehensive” jurisdiction over projects and more limited “restricted” jurisdiction over such projects; and
- c. this approach will maintain the balance between federal and provincial jurisdiction sought to be achieved by the division of powers generally, and section 92(10) specifically, and will help avoid intergovernmental conflict, incessant litigation, and uncertainty in relation to large-scale projects.

PART III – STATEMENT OF ARGUMENT

A. The Distinction Between Comprehensive and Restricted Jurisdiction in Relation to Projects

14. Permitting both the federal and provincial governments to comprehensively regulate the same work or undertaking – such as a large-scale project – results in jurisdictional uncertainty, protracted intergovernmental conflicts, incessant litigation, and the undue obstruction of major infrastructure, development, and resource projects.

15. That is why the Constitution does not permit both orders of government to comprehensively regulate the same work or undertaking; rather, the framers deliberately and expressly divided jurisdiction over works and undertakings between the orders of government in section 92(10) of the *Constitution Act, 1867*.

16. Section 92(10) provides as follows:

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

(...)

10. Local Works and Undertakings other than such as are of the following Classes:

(a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province:

(b) Lines of Steam Ships between the Province and any British or Foreign Country:

(c) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.

17. The clear purpose and intent of section 92(10) is to divide legislative authority in relation to works and undertakings, such that the federal government has exclusive legislative authority in relation to federal works and undertakings, and provincial legislatures have exclusive legislative authority over local works and undertakings that do not fall into the federal categories.

18. As the Court observed in *Oldman River*, this does not mean that provincial works and undertakings are immune from federal laws, or vice versa. That is what the Court meant in stating that it is “not particularly helpful in sorting out the respective levels of constitutional authority over a work” to characterize it as a federal or provincial project.⁵

19. This statement does not mean, and the Court could not have intended it to mean, that there is no constitutionally significant distinction between a federal work or undertaking and a provincial work or undertaking. That there is a constitutionally significant distinction is not only expressly required by section 92(10), it is central to understanding the constitutional division of powers in other areas of this Court’s jurisprudence.⁶

20. The Court’s point in *Oldman River*, then, was not that there is no distinction, but that this distinction does not mean that, once a work or undertaking is properly characterized as provincial or federal, it necessarily settles the constitutionality of legislation seeking to regulate that project. Further analysis may be required before reaching that conclusion.

⁵ *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 SCR 3.

⁶ See e.g. *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 SCR 322; *Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters*, 2009 SCC 53.

21. ICBA & AEG submit that the best way to give effect to the constitutional language and division of powers is to clearly establish that only the provincial government has comprehensive legislative jurisdiction over local works and undertakings, in the same way that only the federal government has comprehensive legislative jurisdiction over federal works and undertakings.⁷

22. An order of government with express constitutional jurisdiction over a work or undertaking under the *Constitution Act, 1867* is entitled to regulate it for any and all purposes; it has comprehensive jurisdiction over the work or undertaking *as such*, including whether to approve the project generally as being in the public interest, as well as the regulation of the core aspects, operations, and management of the project.

23. By contrast, where an order of government does not have express jurisdiction over the project as such, its powers are limited to managing or regulating any impacts within its own regulatory jurisdiction; in this respect, it only has restricted jurisdiction in relation to the project.

24. This distinction has consequences for the scope of authority that can be exercised by the federal government in relation to local works and undertakings, and by the provincial governments in relation to federal works and undertakings. As Professor Kennett explains, using the illustration of a wholly intraprovincial dam:

The argument for restricted jurisdiction can be summarized by returning to the dam-building example. Parliament has authority with respect to dambuilding if the dam has consequences for areas of federal jurisdiction such as fisheries, navigation or Indians and lands reserved for Indians. This jurisdiction is based on these consequences, not on authority over the activity itself. As a result, the extent of jurisdiction is restricted to addressing these consequences.

(...)

The constitutional logic of this approach is relatively clear. Since Parliament has no head of power which supports legislation in “pith and substance” about dams, its regulatory authority is limited to addressing the consequences of dams for areas of federal responsibility. This limitation applies to the decision-making process informing the exercise of that authority. While Parliament can, of course, veto the dam, respect for the limits of restricted jurisdiction requires that it only do so for reasons related to its areas of

⁷ See, e.g., S.A. Kennett, “[Federal Environmental Jurisdiction After Oldman](#)” (1993) 38 McGill L. J. 180.

authority.⁸

25. Federal legislation oversteps this *restricted* jurisdiction when it seeks to exercise *comprehensive* legislative authority in relation to provincially-regulated projects, by enacting legislation for the purpose of dictating whether large-scale projects, including wholly intraprovincial projects, can go ahead at all, and on what terms. This is the power than can only be exercised by provincial governments in relation to local works and undertakings.

26. The same analysis applies to protect federal jurisdiction from provincial overreach in relation to federal works and undertakings, as illustrated by the *Reference re Environmental Management Act* case.⁹

27. There was no question in that case that the provincial government had the power to enact legislation that regulated or affected federal works and undertakings, up to a certain point. As the Court of Appeal noted, “(i)t is clear that federal undertakings are not ‘enclaves’ immune from provincial environmental laws”.¹⁰

28. However, the question was whether the provincial government was seeking to exercise what amounted to *comprehensive* legislative jurisdiction over a federally-regulated pipeline project. In other words, was the provincial government, in effect, seeking to have and exercise ultimate authority over the project itself?

29. As the Court of Appeal held, the province had exceeded the scope of its limited authority in enacting the disputed amendments (Part 2.1), for the following reasons:

[101] In my view, Part 2.1 does cross the line between environmental laws of general application and the regulation of federal undertakings. Even if it were not intended to ‘single out’ the TMX pipeline, it has the potential to affect (and indeed ‘stop in its tracks’) the entire operation of Trans Mountain as an interprovincial carrier and exporter of oil. It is legislation that in pith and substance relates to, and relates *only* to, what makes the pipeline “specifically of federal jurisdiction.” By definition, an interprovincial pipeline is a continuous carrier of liquid across provincial borders. Indeed, in Canada the pipeline

⁸ S.A. Kennett, “[Federal Environmental Jurisdiction After Oldman](#)” (1993) 38 McGill L. J. 180, 200.

⁹ See e.g. [Reference re Environmental Management Act \(British Columbia\)](#), 2019 BCCA 181, aff’d [Reference re Environmental Management Act](#), 2020 SCC 1.

¹⁰ [Reference re Environmental Management Act \(British Columbia\)](#), 2019 BCCA 181, para 93.

owner is subject to conditions of common carriage across those borders: see s. 71(1) of the *National Energy Board Act*. Unless the pipeline is contained entirely within a province, federal jurisdiction is the only way in which it may be regulated. Notwithstanding Mr. Arvay’s contention that there is “nothing wrong with a patchwork”, it is simply not practical — or appropriate in terms of constitutional law — for different laws and regulations to apply to an interprovincial pipeline (or railway or communications infrastructure) every time it crosses a border. Paraphrasing the majority in *Consolidated Fastfrate (2009)*, the operation of an interprovincial pipeline would be “stymied” by the necessity to comply with different conditions governing its route, construction, cargo, safety measures, spill prevention, and the aftermath of any accidental release of oil. Jurisdiction over interprovincial undertakings was allocated exclusively to Parliament by the *Constitution Act* to deal with just this type of situation, allowing a single regulator to consider interests and concerns beyond those of the individual province(s).¹¹ [emphasis added]

30. Although the Court of Appeal did not expressly rely on the distinction between comprehensive and restricted jurisdiction, ICBA & AEG submit that its decision, which was adopted unanimously by this Court in dismissing the Province’s appeal,¹² is wholly consistent with this distinction.

31. Put simply, legislatures with restricted jurisdiction, while they may enact legislation that validly affects projects allocated to the other order of government, cannot enact legislative provisions designed to exercise what amounts to comprehensive jurisdiction over the approval, management and operation of the project, as such.

32. Not only would this be inconsistent with the express division of power in relation to works and undertakings, but it is – as the Court of Appeal noted – “simply not practical” when it comes to the regulation of large-scale projects, which can only be comprehensively regulated by the order of government with express constitutional jurisdiction over the project *qua* project.

B. Maintaining the Constitutionally Required Balance

33. This distinction between *comprehensive* and *restricted* jurisdiction limits the permissible intervention of the federal government in relation to local works and undertakings to regulating the specifically federal impacts of a local project, and, as noted above, the same rule applies to

¹¹ [Reference re Environmental Management Act \(British Columbia\)](#), 2019 BCCA 181, para 101.

¹² [Reference re Environmental Management Act](#), 2020 SCC 1, para 1.

provincial governments in relation to federal works and undertakings.

34. Ensuring this division of authority over works and undertakings is critical to maintaining the autonomy of the provinces, as it enables them to develop and market their own resources, and engage in economic development, without undue obstruction by the federal government.

35. It is equally critical to maintaining comprehensive federal jurisdiction over federal works and undertakings, to ensure that the federal decision-making authority over such works and undertakings is not “hobbled by local interests”.¹³

36. Therefore, the distinction between comprehensive and restricted jurisdiction achieves the necessary balance between the orders of government intended by the *Constitution Act, 1867*, in that it ensures that Parliament cannot regulate provincial works and undertakings to a greater extent than the provinces can regulate federal works and undertakings, and vice versa.

37. Finally, maintaining this division of authority is of great practical importance to the proponents, beneficiaries, and stakeholders of any given project, who need to know which rules, promulgated by which order of government, will apply to the project, without protracted and costly litigation, conflict, and delay, and with clear lines of political accountability.

38. On the above analysis, the *IAA* risks undermining the distinction between comprehensive and restricted jurisdiction in relation to large-scale projects, insofar as it proceeds from what can be a very limited jurisdictional “hook” to the federal government exercising what amounts to comprehensive jurisdiction and decision-making authority over the local work and undertaking, as such, rather than limiting federal intervention to those impacts within federal jurisdiction.

39. This could jeopardize the maintenance of clear and intelligible lines between federal and provincial jurisdiction over works and undertakings, which would undermine both the proper and intended functioning of our federal system, and the need for fair, efficient, accessible, and reasonable processes for the resolution of issues of environmental sustainability and economic development in relation to large-scale projects.

¹³ Phrase borrowed from *British Columbia (Attorney General) v. Lafarge Canada Inc.*, 2007 SCC 23, para 64.

C. Conclusion

40. The jurisdictional uncertainty in relation to the regulation of major infrastructure, development, or resource projects appears to have gotten worse in recent years, as both orders of governments have become more invested in controlling both the economic benefits and environmental or other impacts of large-scale development projects.

41. Given the politically charged nature of such major projects, both orders of government often see it in their interests to have the “final say”, based on their own priorities and assessment of the public interest, which necessarily leads to protracted intergovernmental conflict, incessant litigation, uncertainty, and a lack of political accountability.

42. This is the inevitable consequence, whether it is a province attempting to interfere with the regulation of federal works and undertakings, as in the *Reference re Environmental Management Act* case,¹⁴ or the federal government seeking to exercise comprehensive decision-making authority over intraprovincial works and undertakings, as in the present case.

43. That is why the *Constitution Act, 1867* does not permit both orders of government to have the “final say” in relation to a single, particular work or undertaking; it seeks to distribute that final say, and ultimate determination, to one order of government or the other.

44. While it would be naïve to think that conflicts in this area could be eliminated entirely, this appeal provides the Court with the opportunity to set out clear jurisdictional lines in this area in order to avoid or mitigate such conflicts in the future, by confirming the divided jurisdiction over works and undertakings established in the *Constitution Act, 1867*.

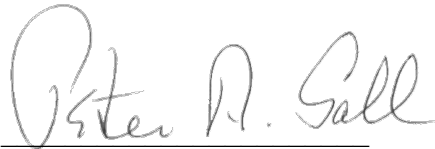
45. ICBA & AEG submit that, in giving effect to this constitutional imperative, the distinction between comprehensive and restricted legislative jurisdiction creates a viable analytical framework that can be used to more clearly delineate the appropriate jurisdictional authority over large-scale projects, without unduly circumscribing the constitutional jurisdiction of either order of government.

¹⁴ [*Reference re Environmental Management Act \(British Columbia\)*, 2019 BCCA 181, aff'd *Reference re Environmental Management Act*, 2020 SCC 1.](#)

PARTS IV & V – ORDERS AND COSTS

46. ICBA & AEG seek no costs and ask that no costs be awarded against them. ICBA & AEG seek the Court's leave to present oral argument during the hearing.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 21st DAY of DECEMBER, 2022.



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PART VI – TABLE OF AUTHORITIES

Cases	Para
<i>British Columbia (Attorney General) v. Lafarge Canada Inc.</i> , 2007 SCC 23	35
<i>Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters</i> , 2009 SCC 53	19
<i>Friends of the Oldman River Society v. Canada (Minister of Transport)</i> , [1992] 1 SCR 3	6, 18- 20
<i>Reference re Bill 30, An Act to Amend the Education Act (Ont.)</i> , [1987] 1 SCR 1148	4
<i>Reference re Environmental Management Act (British Columbia)</i> , 2019 BCCA 181	26-30, 42
<i>Reference re Environmental Management Act</i> , 2020 SCC 1	26-30, 42
<i>Westcoast Energy Inc. v. Canada (National Energy Board)</i> , [1998] 1 SCR 322	19
 Other Authorities	
S.A. Kennett, “ Federal Environmental Jurisdiction After Oldman ” (1993) 38 McGill L. J. 180	24

PART VII – RELEVANT LEGISLATION

[Impact Assessment Act](#), SC 2019, c 28

[Constitution Act, 1867](#), 30 & 31 Victoria, c 3 (U.K.)