S.C.C. File No. 40195

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

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

B E T W E E N :

ATTORNEY GENERAL OF CANADA

Appellant

- and -

ATTORNEY GENERAL OF ALBERTA

Respondent

[*Style of cause continued next page*]

FACTUM OF THE INTERVENER, ADVOCATES FOR THE RULE OF LAW

(Pursuant to Rule 37 of the *Rules of the Supreme Court of Canada*, S.O.R./2002-156)

MCCARTHY TÉTRAULT LLP
Suite 5300, TD Bank Tower
Toronto, ON M5K 1E6

Brandon Kain (bkain@mccarthy.ca)
Holly Kallmeyer (hkallmeyer@mccarthy.ca)
Asher Honickman (ahonickman@jhbarristers.com)
Tel.: (416) 601-7821
Fax: (416) 868-0673

Counsel for the Intervener,
Advocates for the Rule of Law

[*Style of cause continued*]

- and -

ATTORNEY GENERAL OF SASKATCHEWAN, ATTORNEY GENERAL OF MANITOBA, ATTORNEY GENERAL OF NOVA SCOTIA, ATTORNEY GENERAL OF NEW BRUNSWICK, ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL OF QUEBEC, ATTORNEY GENERAL OF NEWFOUNDLAND AND LABRADOR, ATTORNEY GENERAL OF PRINCE EDWARD ISLAND, ATTORNEY GENERAL OF ONTARIO, INDIAN RESOURCE COUNCIL, FILE HILLS QU'APPELLE TRIBAL COUNCIL AND PASQUA FIRST NATION (JOINTLY), WORLD WILDLIFE FUND CANADA, NATURE CANADA AND WEST COAST ENVIRONMENTAL LAW ASSOCIATION (JOINTLY), CANADIAN ASSOCIATION OF PETROLEUM PRODUCERS, CANADIAN TAXPAYERS FEDERATION, ATHABASCA CHIPEWYAN FIRST NATION, BUSINESS COUNCIL OF ALBERTA, ECOJUSTICE CANADA SOCIETY, WOODLAND CREE FIRST NATION, MIKISEW CREE FIRST NATION, HYDRO-QUEBEC, CANADIAN CONSTITUTION FOUNDATION, INDEPENDENT CONTRACTORS AND BUSINESSES ASSOCIATION, AND ALBERTA ENTERPRISE GROUP (JOINTLY), CANADIAN ASSOCIATION OF PHYSICIANS FOR THE ENVIRONMENT, ADVOCATES FOR THE RULE OF LAW, OCEANS NORTH CONSERVATION SOCIETY, CANADIAN ENVIRONMENTAL LAW ASSOCIATION, ENVIRONMENTAL DEFENCE CANADA INC. AND MININGWATCH CANADA INC. (JOINTLY), EXPLORERS AND PRODUCERS ASSOCIATION OF CANADA, FIRST NATIONS MAJOR PROJECTS COALITION, CENTRE QUEBECOIS DU DROIT DE L'ENVIRONNEMENT, AND LUMMI NATION

Interveners

ORIGINAL TO: **THE REGISTRAR**
Supreme Court of Canada
301 Wellington Street
Ottawa, ON K1A 0J1

COPIES TO:

ATTORNEY GENERAL OF CANADA
Department of Justice Canada
Civil Litigation Section
50 O'Connor Street, 5th Floor
Ottawa, ON K1A 0H8

Christopher M. Rupar
Dayna Anderson
Bruce Hughson
Kerry Boyd
James Elford
Tel: (613) 670-6290
Fax: (613) 954-1920
Email: christopher.rupar@justice.gc.ca

Counsel for the Appellant,
Attorney General of Canada

BENNETT JONES LLP
4500, 855 – 2nd Street SW
Calgary, AB T2P 4K7

E. Bruce Mellett
Bradley Gilmour
Sean Assie
Christine Enns
Tel: (403) 298-3319
Fax: (403) 265-7219
Email: mellettb@bennetjones.com

JUSTICE AND SOLICITOR GENERAL
11th Floor Oxford Tower
10025 – 102 A Avenue
Edmonton, Alberta T5J 2Z2

Christine Enns
Email: Christine.enns@gov.ab.ca

Counsel for the Respondent,
Attorney General of Alberta

GOWLING WLG (CANADA) LLP
2600 - 160 Elgin Street
Ottawa, ON K1P 1C3

D. Lynne Watt

Tel: (613) 786-8695
Fax: (613) 788-3509
Email: lynne.watt@gowlingwlg.com

Ottawa Agent for the Respondent,
Attorney General of Alberta

ATTORNEY GENERAL OF SASKATCHEWAN
Constitutional Law
820 – 1874 Scarth Street
Regina, SK S4P 4B3

Thomson Irvine, Q.C.
Noah Wernikowski
Tel: (306) 787-6307
Fax: (306) 787-9111
Email: tom.irvine@gov.sk.ca

Counsel for the Intervener,
Attorney General of Saskatchewan

GOWLING WLG (CANADA) LLP
160 Elgin Street
Suite 2600
Ottawa, ON K1P 1C3

D. Lynne Watt

Tel: (613) 786-8695
Fax: (613) 788-3509
Email: lynne.watt@gowlingwlg.com

Agent for the Intervener,
Attorney General of Saskatchewan

DEPARTMENT OF JUSTICE
Constitutional Law
1230 - 405 Broadway
Winnipeg, MB R3C 3L6

Charles Murray
Tel: (204) 945-2852
Fax: (203) 945-0054
Email: charles.murray@gov.mb.ca

Counsel for the Intervener,
Attorney General of Manitoba

GOWLING WLG (CANADA) LLP
160 Elgin Street
Suite 2600
Ottawa, ON K1P 1C3

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

Agent for the Intervener,
Attorney General of Manitoba

ATTORNEY GENERAL OF NEW BRUNSWICK
Constitutional Unit, Legal Services Branch
P.O. Box 6000, Stn. A
Fredericton, NB E3B 5H1

Isabel Lavoie-Daigle
Tel: (506) 453-2222
Fax: (506) 453-3275
Email: isabell.lavoiedaigle@gnb.ca

Counsel for the Intervener,
Attorney General of New Brunswick

GOWLING WLG (CANADA) LLP
160 Elgin Street
Suite 2600
Ottawa, ON K1P 1C3

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

Agent for the Intervener,
Attorney General of New Brunswick

ATTORNEY GENERAL OF NOVA SCOTIA
Department of Justice (NS)
1690 Hollis Street, 8th Floor
Halifax, NS B3J 2L6

Edward A. Gores, Q.C.
Tel: (902) 424-4024
Fax: (902) 424-1730
Email: Edward.gores@novascotia.ca

Counsel for the Intervener,
Attorney General Nova Scotia

GOWLING WLG (CANADA) LLP
160 Elgin Street
Suite 2600
Ottawa, ON K1P 1C3

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

Agent for the Intervener,
Attorney General of Nova Scotia

ATTORNEY GENERAL OF BRITISH COLUMBIA
1001 Douglas Street, 6th Floor
PO Box 9280 Stn. Prov. Govt.
Victoria, BC V8W 9J7

J. Gareth Morley
Tel: (250) 952-7644
Fax: (250) 356-9154
Email: gareth.morley@gov.bc.ca

Counsel for the Intervener,
Attorney General of British Columbia

BORDEN LADNER GERVAIS LLP
World Exchange Plaza
100 Queen Street
Suite 1300
Ottawa, ON K1P 1J9

Nadia Effendi
Tel: (613) 787-3562
Fax: (613) 230-8842
Email: neffendi@blg.com

Agent for the Intervener,
Attorney General of British Columbia

MINISTÈRE DE LA JUSTICE DU QUÉBEC
Direction du droit constitutionnel et autochtone
1200, route de l'Église, 4e étage
Québec, QC G1V 4M1

Frédéric Perreault
Tel: (418) 643-1477 Ext: 20785
Fax: (418) 644-7030
Email:
frederic.perreault@justice.gouv.qc.ca

Counsel for the Intervener,
Attorney General of Quebec

NOËL ET ASSOCIÉS, S.E.N.C.R.L.
225, montée Paiement
2e étage
Gatineau, QC J8P 6M7

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

Agent for the Intervener, Attorney General of Quebec

ATTORNEY GENERAL OF NEWFOUNDLAND AND LABRADOR
4th Floor, East Block, Confederation Bldg.
P.O. Box 8700
St. John's, Newfoundland & Labrador
A1B 4J6

Justin S.C. Mellor
Tel: (709) 729-0163
Fax: (709) 729-2129
Email: jmellor@gov.nl.ca

Counsel for the Intervener,
Attorney General of Newfoundland & Labrador

GOWLING WLG (CANADA) LLP
160 Elgin Street
Suite 2600
Ottawa, ON K1P 1C3

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

Agent for the Intervener,
Attorney General of Newfoundland & Labrador

ATTORNEY GENERAL OF PRINCE EDWARD ISLAND
Shaw Building, 4th Floor South
95 Rochford Street, P.O. Box 2000
Charlottetown, PEI C1A 7N8

Jessica Gillis
Tel: (902) 368-5064
Fax: (02) 368-4563
Email: meaghanshughes@gov.pe.ca

Counsel for the Intervener,
Attorney General of Prince Edward Island

GOWLING WLG (CANADA) LLP
160 Elgin Street
Suite 2600
Ottawa, ON K1P 1C3

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

Agent for the Intervener,
Attorney General of Prince Edward Island

ATTORNEY GENERAL OF ONTARIO
Constitutional Law Branch
720 Bay Street, 4th Floor
Toronto, ON M7A 2S9

Joshua Hunter
Yashoda Ranganathan
Tel: (647) 908-7465
Fax: (416) 326-4015
Email: Joshua.hunter@ontario.ca
yashoda.ranganathan@ontario.ca

Counsel for the Intervener,
Attorney General of Ontario

RAE AND COMPANY
900 - 1000 5th Avenue S.W.
Calgary, Alberta
T2P 4V1

L. Douglas Rae
Brooke Barrett
Tel: (403) 264-8389
Fax: (403) 264-8399
Email: lorddoug@raeandcompany.com

Counsel for the Intervener,
Indian Resource Council

GOWLING WLG (CANADA) LLP
2600 - 160 Elgin Street
Ottawa, Ontario
K1P 1C3

Matthew Estabrooks
Tel: (613) 786-0211
Fax: (613) 788-3573
Email:
matthew.estabrooks@gowlingwlg.com

Ottawa Agent for the Intervener,
Indian Resource Council

MAURICE LAW
602 12th Avenue S.W., Suite 100
Calgary, Alberta
T2R 1J3

Ryan Lake
Geneviève Boulay
Tel: (403) 266-1201 Ext: 236
Fax: (403) 266-2701
Email: rlake@mauricelaw.com

Counsel for the Interveners,
File Hills Qu'Appelle Tribal Council and Pasqua
First Nation (jointly)

NANDA & COMPANY
10007 - 80 Avenue NW
Edmonton, Alberta
T6E 1T4

Martin Olszynski
Avnish Nanda
Tel: (780) 801-5324
Fax: (587) 318-1391
Email: avnish@nandalaw.ca

Counsel for the Intervener,
World Wildlife Fund Canada

WEST COAST ENVIRONMENTAL LAW
700 - 509 Richards Street
Vancouver, British Columbia
V6B 2Z6

Anna Johnston
Tel: (604) 601-2508
Fax: (604) 684-1312
Email: ajohnston@wcel.org

Counsel for the Interveners,
Nature Canada and West Coast Environmental Law Association (jointly)

BURNET, DUCKWORTH & PALMER
2400, 525 - 8 Avenue S.W.
Calgary, Alberta
T2P 1G1

Robert L. Martz
Tel: (403) 260-0393
Fax: (403) 260-0332
Email: rmartz@bdplaw.com

Counsel for the Intervener,
Canadian Association of Petroleum Producers

CREASE HARMAN LLP
1070 Douglas Street
Unit 800
Victoria, BC V8W 2C4

R. Bruce E. Hallsor
Josh A. Bloomenthal
Tel: (250) 388-5421
Fax: (250) 388-4294
Email: Bhallsor@crease.com

Counsel for the Intervener,
Canadian Taxpayers Federation

SUPREME ADVOCACY LLP
100- 340 Gilmour Street
Ottawa, Ontario
K2P 0R3

Marie-France Major

Tel: (613) 695-8855 Ext: 102
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

Ottawa Agent for the Intervener,
Canadian Taxpayers Federation

WOODWARD & COMPANY LAWYERS LLP
200 - 1022 Government Street
Victoria, British Columbia
V8W 1X7

Eamon Murphy
Tara McDonald
Tel: (250) 383-2356
Fax: (250) 380-6560
Email: eamon@woodwardandcompany.com

Counsel for the Intervener,
Athabasca Chipewyan First Nation

SUPREME ADVOCACY LLP
100- 340 Gilmour Street
Ottawa, Ontario
K2P 0R3

Marie-France Major

Tel: (613) 695-8855 Ext: 102
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

Ottawa Agent for the Intervener,
Athabasca Chipewyan First Nation

OSLER, HOSKIN & HARCOURT LLP
Suite 2700, Brookfield Place
225 - 6th Avenue S.W.
Calgary, Alberta
T2P 1N2

Maureen E. Killoran, K.C.
Sean Sutherland
Brodie Noga
Tel: (403) 260-7000
Fax: (403) 260-7024
Email: mkilloran@osler.com

Counsel for the Intervener,
Business Council of Alberta

OSLER, HOSKIN & HARCOURT LLP
Suite 1900
340 Albert Street
Ottawa, ON K1R 7Y6

Geoffrey Langen

Tel: (613) 787-1015
Fax: (613) 235-2867
Email: glangen@osler.com

Ottawa Agent for the Intervener,
Business Council of Alberta

ECOJUSTICE CANADA SOCIETY
216 - 1 Stewart Street
Ottawa, Ontario
K1N 7M9

Joshua Ginsberg
Anna McIntosh
Tel: (613) 903-5898 Ext: 700
Fax: (613) 916-6150
Email: jginsberg@ecojustice.ca

Counsel for the Intervener,
Ecojustice Canada Society

ALBERTA COUNSEL
800, 9707-110 Street, NW
Edmonton, Alberta
T5K 2L9

Robert Reynolds, K.C.
Tel: (780) 652-1282
Fax: (780) 652-1312
Email: r.reynolds@albertacounsel.com

Counsel for the Intervener,
Woodland Cree First Nation

GOWLING WLG (CANADA) LLP
160 Elgin Street
Suite 2600
Ottawa, ON K1P 1C3

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

Agent for the Intervener,
Woodland Cree First Nation

JFK LAW CORPORATION
340-1122 Mainland Street
Vancouver, British Columbia
V6B 5L1

Tim Dickson
Mae Price
Tel: (604) 687-0549
Fax: (607) 687-2696
Email: tdickson@jfklaw.ca

Counsel for the Intervener,
Mikisew Cree First Nation

SUPREME ADVOCACY LLP
100- 340 Gilmour Street
Ottawa, Ontario
K2P 0R3

Marie-France Major

Tel: (613) 695-8855 Ext: 102
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

Ottawa Agent for the Intervener,
Mikisew Cree First Nation

MCCARTHY TÉTRAULT, S.E.N.C.R.L., S.R.L.
1000 rue de la Gauchetière Ouest, Bureau 2500
Montréal, Quebec
H3B 0A2

Dominique Amyot-Bilodeau
Jean Lortie
Mathieu Bernier-Trudeau
Simon Bouthillier
Tel: (514) 397-4100
Fax: (514) 875-6246
Email: damyotbilodeau@mccarthy.ca

Counsel for the Intervener,
Hydro-Quebec

BORDEN LADNER GERVAIS LLP
Centennial Place, East Tower
1900-520 3rd Ave SW
Calgary, Alberta
T2P 0R3

Brett R. Carlson
Aidan N. Paul
Peter Banks
Tel: (403) 232-9500
Fax: (403) 266-1395
Email: bcarlson@blg.com

Counsel for the Intervener,
Canadian Constitution Foundation

GALL LEGGE GRANT ZWACK LLP
1199 West Hastings Street
Suite 1000
Vancouver, BC V6E 3T5

Peter A. Gall, K.C.
Tel: (604) 891-1152
Fax: (604) 669-5101
Email: pgall@glgzlaw.com

Counsel for the Interveners,
Independent Contractors and Businesses
Association, and Alberta Enterprise Group (jointly)

CAZASAIKALEY LLP
350 - 220 Laurier Ave. West
Ottawa, Ontario
K1P 5Z9

Albert Brunet
Tel: (613) 565-2292 Ext: 214
Fax: (613) 565-2087
Email: abrunet@plaideurs.ca

Ottawa Agent for the Interveners,
Independent Contractors and Businesses
Association, and Alberta Enterprise
Group (jointly)

UNIVERSITY OF CALGARY
2500 University Drive NW
Calgary, Alberta
T2N 1N4

Shaun Fluker
David V. Wright
Tel: (403) 220-4939
Fax: (403) 282-8325
Email: sfluker@ucalgary.ca

Counsel for the Intervener, Canadian Association
of Physicians for the Environment

CHAMP AND ASSOCIATES
43 Florence Street
Ottawa, Ontario
K2P 0W6

Bijon Roy

Tel: (613) 237-4740
Fax: (613) 232-2680
Email: broy@champlaw.ca

Ottawa Agent for the Intervener,
Canadian Association of Physicians for
the Environment

ARVAY FINLAY LLP
360 - 1070 Douglas Street
Victoria, British Columbia
V8W 2C4

David W.L. Wu
Tel: (604) 696-9828
Fax: (888) 575-3281
Email: dwu@arvayfinlay.ca

Counsel for the Intervener,
Oceans North Conservation Society

GOWLING WLG (CANADA) LLP
160 Elgin Street
Suite 2600
Ottawa, ON K1P 1C3

Jeffrey W. Beedell
Tel: (613) 786-0171
Fax: (613) 563-9869
Email: jeff.beedell@gowlingwlg.com

Agent for the Intervener,
Oceans North Conservation Society

CANADIAN ENVIRONMENTAL LAW ASSOCIATION
130 Spadina, Suite 301
Toronto, ON M5V 2L4

Richard D. Lindgren
Joseph F. Castrilli
Tel: (416) 960-2284
Fax: (416) 960-9392
Email: lindgren@lao.on.ca

Counsel for the Interveners,
Canadian Environmental Law Association,
Environmental Defence Canada Inc. and
Miningwatch Canada Inc. (jointly)

GOWLING WLG (CANADA) LLP
160 Elgin Street
Suite 2600
Ottawa, ON K1P 1C3

Jeffrey W. Beedell

Tel: (613) 786-0171
Fax: (613) 563-9869
Email: jeff.beedell@gowlingwlg.com

Agent for the Interveners,
Canadian Environmental Law Association, Environmental Defence Canada Inc. and Miningwatch Canada Inc. (jointly)

BURNET, DUCKWORTH & PALMER
2400, 525 - 8th Avenue SW
Calgary, Alberta
T2P 1G1

Kylan Kidd
Tel: (403) 260-0109
Email: kkidd@bdplaw.com

Counsel for the Intervener,
Explorers and Producers Association of Canada

JURISTES POWER
401 West Georgia Street
Suite 1660
Vancouver, British Columbia
V6B 5A1

Ryan Beaton
Tel: (604) 260-4462
Fax: (604) 259-6007
Email: rbeaton@juristespower.ca

Counsel for the Intervener,
First Nations Major Projects Coalition

POWER LAW
50 rue O'Connor
Bureau 1313
Ottawa, Ontario
K1P 6L2

Jonathan Laxer
Tel: (613) 907-5652
Fax: (613) 907-5652
Email: jlaxer@powerlaw.ca

Ottawa Agent for the Intervener,
First Nations Major Projects Coalition

CENTRE QUÉBÉCOIS DU DROIT DE L'ENVIRONNEMENT
454, avenue Laurier Est
Montréal, Quebec
H2J 1E7

David Robitaille
Marc Bishai
Tel: (514) 991-9005
Fax: (514) 844-7009
Email: david.robitaille@uottawa.ca

Intervener, Centre quebecois du droit de l'environnement

POWER LAW
50 rue O'Connor
Bureau 1313
Ottawa, Ontario
K1P 6L2

Jonathan Laxer
Tel: (613) 907-5652
Fax: (613) 907-5652
Email: jlaxer@powerlaw.ca

Ottawa Agent for the Intervener,
Centre quebecois du droit de l'environnement

DGW LAW CORPORATION
201 - 736 Broughton Street
Victoria, British Columbia
V8W 1E1

John W. Gailus
Courtenay Jacklin
Tel: (250) 361-9469
Fax: (250) 361-9429
Email: john@dgwlaw.ca

Counsel for the Intervener,
Lummi Nation

SUPREME LAW GROUP
1800 - 275 Slater Street
Ottawa, Ontario
K1P 5H9

Moira Dillon

Tel: (613) 691-1224
Fax: (613) 691-1338
Email: mdillon@supremelawgroup.ca

Ottawa Agent for the Intervener,
Lummi Nation

TABLE OF CONTENTS

PART I—OVERVIEW

1. The constitutional division of powers forms the bedrock of the federal system and preserves the autonomy of the provinces by protecting local governance.[1] In approaching this appeal, this Court should consider how different interpretations of the division of powers affect the balance between the two levels of government. Cooperation between the Parliament and the provinces is best served by greater clarity of exclusive powers. To this end, ARL makes two interrelated submissions, rooted in the need for predictability and legal certainty of the division of powers.

2. ***First***, the exclusivity principle embodied in the text of ss. 91-92A(1) of the *Constitution Act, 1867* prohibits different levels of government from asserting concurrent, as opposed to limited overlapping, jurisdiction. While each level may legislate regarding the specific aspects of a fact situation under its exclusive heads of power (limited overlapping jurisdiction), neither may legislate regarding the specific aspects of a fact situation under the other level's exclusive heads of power (concurrent jurisdiction), except insofar as legislation under its heads of power has incidental effects upon the latter. The double aspect and cooperative federalism doctrines relied upon by the Appellant[2] and dissenting judgment below[3] cannot be used to alter this fundamental structural feature of the Constitution.

3. ***Second***, where ss. 91-92A(1) of the *Constitution Act, 1867* confer jurisdiction over particular activities upon one level of government, the exclusivity principle prohibits the other level of government from regulating the activity itself (e.g., Parliament could not enact legislation whose dominant focus is the authorization of *in situ* oil wells). Instead, the other level of government may only regulate the activity's effects upon its own exclusive heads of power, and only then to the extent that those exclusive heads of power are significantly affected by it (e.g. Parliament could stipulate the fashion in which oil is transported between *in situ* oil wells across provincial lines). To do otherwise would amount to an assertion of concurrent rather than limited overlapping jurisdiction, which is contrary to the basic premise of Canadian federalism.

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[1] *Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters*, 2009 SCC 53, ¶29-30; *Canadian Western Bank v. Alberta*, 2007 SCC 22, ¶22; *Reference re Secession of Quebec*, [1998] 2 SCR 217 at 251.
[2] Factum of the Appellant, ¶1, 119, 148.
[3] *Reference re Impact Assessment Act*, 2022 ABCA 165, ¶538, 543-546, 549, 649, 730, 734, 741, 759.

PART II—STATEMENT OF ARGUMENT

A. The Exclusivity Principle Prohibits Concurrent, As Opposed to Limited Overlapping, Jurisdiction

4. It is fundamental to the scheme of federalism established under the *Constitution Act, 1867* that "[e]ach level of government − Parliament, on the one hand, and the provincial legislatures, on the other − has ***exclusive*** authority to enact legislation with respect to certain subject matters".[4] As this Court explained in the *Pan-Canadian Securities Reference*:

> … The distribution of legislative power between Parliament and the provincial legislatures is set out in Part VI of the *Constitution Act, 1867*. Since ***neither level of government has the power to legislate in respect of matters that fall within the exclusive competence of the other***, the sovereignty of Parliament and of the provincial legislatures has been limited in Canada since Confederation. This was explained by… the Privy Council in *Hodge*…:
>
> > When the *British North America Act*… enacted that there should be a legislature for Ontario, and that its legislative assembly should have exclusive authority to make laws for the Province and for provincial purposes in relation to matters enumerated in sect. 92, it conferred… authority as plenary and as ample within the limits prescribed by sect. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. ***Within these limits of subjects and area the local legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion, would have had under like circumstances***…
>
> Given this constitutional division of powers, therefore, neither Parliament nor the provincial legislatures have the authority to enact laws that touch on all subject matters. Rather, the effect of parliamentary sovereignty in the context of Canadian federalism is that ***Parliament and the provincial legislatures are supreme with respect only to matters that fall within their respective spheres of jurisdiction.***[5]

5. The exclusivity principle[6] follows directly from the written text of the *Constitution Act, 1867*, which is the starting point and principal constraint for constitutional interpretation,[7] "especially… with regard to the division of powers".[8] The constitutional text – "which could have been different but is not"[9] – contains several "references to 'exclusivity' throughout ss. 91 and 92".[10] This Court

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[4] *Alberta (A.G.) v. Moloney*, 2015 SCC 51, ¶14, *emphasis added*.
[5] *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48, ¶56, *underlining in original, other emphasis added*.
[6] Asher Honickman, "Watertight Compartments: Getting Back to the Constitutional Division of Powers" (2017) Alta. L.R. 226 at pp. 227-231, ARL's Book of Authorities ("**ABOA**") Tab 1.
[7] *Quebec (A.G.) v. 9147-0732 Québec inc.*, 2020 SCC 32, ¶8-9.
[8] *Quebec (A.G.) v. Canada (A.G.)*, 2015 SCC 14, ¶18.
[9] *Bell Canada v. Quebec (Commission de la Santé et de la Sécurité du Travail)*, [1988] 1 SCR 749 at 840.

emphasized that in *Canadian Western Bank*, where it noted that other constitutional doctrines (e.g., interjurisdictional immunity) are derived from it:

> … The opening paragraph of ***s. 91*** refers to the "***exclusive*** [l]egislative [a]uthority of the Parliament of Canada" in relation to matters coming within the listed "[c]lasses of [s]ubjects"… Equally, ***s. 92*** (headed "***Exclusive*** Powers of Provincial Legislatures") is introduced by the words "In each Province the Legislature may ***exclusively*** make Laws in relation to Matters coming within the Classes of Subjects next herein-after enumerated"… The notion of ***exclusivity and the reciprocal notion of non-encroachment by one level of legislature on the field of exclusive competence of the other*** gave rise to Lord Atkin's famous "watertight compartments" metaphor, where he wrote of Canadian federalism that "[w]hile the ship of state now sails on larger ventures and into foreign waters she still retains the watertight compartments which are an essential part of her original structure"… ***Its modern application expresses a continuing concern about risk of erosion of provincial as well as federal competences***…[11]

6. Accordingly, "our Constitution is based on an allocation of ***exclusive*** powers to both levels of government, not ***concurrent*** powers".[12] Subject to a small handful of exceptions where the text of the *Constitution Act, 1867* is clear (i.e., exportation of natural resources from one province to another in ss. 92A(2) and (3), old age pensions and supplementary benefits in s. 94A, and agriculture and immigration in the provinces in s. 95), the powers allocated to each level of government are exclusive rather than concurrent. This includes the federal and provincial powers set out in ss. 91-92, as well as the provincial powers over natural resources in s. 92A(1).

7. In light of the exclusivity principle, it is important that this Court clarify the effect of other constitutional doctrines, particularly the double aspect and cooperative federalism ones relied on by the Appellant and the dissenting judgment below. The jurisprudence has occasionally suggested that one or the other of these doctrines may authorize "concurrent jurisdiction" or "concurrent federal and provincial powers",[13] and that in constitutionally amorphous areas such as the environment or healthcare, "concurrent jurisdiction" exists.[14]

8. This jurisprudence wrongly conflates ***concurrent*** jurisdiction, which is not permitted under ss. 91-92A(1), with ***limited overlapping*** jurisdiction, which is. There can be "***overlap*** in the exercise

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[10] *Canadian Western Bank v. Alberta*, 2007 SCC 22, ¶34.
[11] *Canadian Western Bank v. Alberta*, 2007 SCC 22, ¶34, *emphasis added*.
[12] *Canadian Western Bank v. Alberta*, 2007 SCC 22, ¶32, *emphasis added*.
[13] *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, ¶129; *Rogers Communications Inc. v. Châteauguay (City)*, 2016 SCC 23, ¶85 (per Gascon J., concurring).
[14] *R. v. Hydro-Québec*, [1997] 3 SCR 213, ¶153; *Carter v. Canada (A.G.)*, 2015 SCC 5, ¶53.

of provincial and federal powers…. as long as each level of government properly pursues objectives that fall within its jurisdiction".[15] However, limited overlap means that each level of government may legislate regarding the specific aspects of a fact situation under ***its*** exclusive heads of power. It does not permit one level to legislate regarding the specific aspects of a fact situation under the ***other*** level's exclusive heads of power, as concurrent jurisdiction would permit (although legislation under its own heads of power may have incidental effects upon the latter).

9. This Court has recognized a distinction between limited overlapping and concurrent jurisdiction in other contexts,[16] and it is reflected in the limits imposed upon the double aspect and cooperative federalism doctrines. As stated in the *Securities Reference*:

> Canadian constitutional law has long recognized that the same subject or "matter" may possess both federal and provincial aspects. This means that a federal law may govern a matter from one perspective and a provincial law from another. The federal law pursues an objective that in pith and substance falls within Parliament's jurisdiction, while the provincial law pursues a different objective that falls within provincial jurisdiction… This concept, known as ***the double aspect doctrine, allows for the concurrent application of both federal and provincial legislation, but it does not create concurrent jurisdiction over a matter (in the way, for example, s. 95 of the Constitution Act, 1867 does for agriculture and immigration).***[17]

10. The same point was made by Beetz J. in *Bell (1989)*:

> The double aspect theory is neither an exception nor even a qualification to the rule of exclusive legislative jurisdiction. ***Its effect must not be to create concurrent fields of jurisdiction***, such as agriculture, immigration and old age pensions and supplementary benefits, in which Parliament and the legislatures may legislate on the same aspect. On the contrary, ***the double aspect theory can only be invoked when it gives effect to the rule of exclusive fields of jurisdiction.*** As its name indicates, it can only be applied in clear cases where the multiplicity of aspects is real and not merely nominal.
>
> …
>
> Professor Hogg contrasts exclusive powers with ***"concurrent" powers. This can only be a way of speaking***. Professor Hogg ***likely intends to refer to the overlapping of federal and provincial legislation which may result from*** the exercise of an ancillary power by

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[15] *Alberta (A.G.) v. Moloney*, 2015 SCC 51, ¶15, *emphasis added*.
[16] *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (A.G.)*, 2004 SCC 39, ¶8-9.
[17] *Reference re Securities Act*, 2011 SCC 66, ¶66, *underlining in original, other emphasis added*. **See also:** *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11, ¶377 (per Brown J., dissenting), ¶567 (per Rowe J., dissenting).

> Parliament or the application of ***the double aspect theory***; however… these are not concurrent powers such as the fields of agriculture or immigration.[18]

11. The same point applies to cooperative federalism, which "accommodates ***overlapping*** jurisdiction", but "may be used neither to '***override nor [to] modify*** the division of powers itself'".[19]

B. Exclusivity Means that When One Level of Government Has Power Over an Activity, Only It Can Regulate the Activity Itself

12. Certain heads of power in ss. 91-92A(1) of the *Constitution Act, 1867* give exclusive jurisdiction over specific ***activities*** to one level of government. As this Court said in *Desgagnés*:

> …[T]he text and scheme of the *Constitution Act, 1867* [is that] some powers are very broadly worded, others quite specific; ***some refer to legal concepts, others to activities***, objects or persons…
>
> …
>
> …***[Section] 91(10)*** does not assign "maritime law" to Parliament but rather "***navigation and shipping***"… This is significant. ***The head of power is not defined by reference to a discrete area of law — like criminal law (s. 91(27)) or bankruptcy and insolvency (s. 91(21)) — but instead covers activities***. …[20]

13. These activity-based heads of power extend well beyond navigation and shipping in s. 91(10). They include the "areas of activity referred to in the cases as undertakings" – e.g., "aviation, ports, interprovincial rail and federal communications works"[21] under POGG and ss. 91(29) and 92(10)(a) – as well as local works and undertakings under s. 92(10), and the exploration, development, conservation and management of natural resources under s. 92A(1).

14. The fact that exclusive powers over specific activities are conferred upon each level of government is significant when assessing the validity of legislation like the *IAA*, which involves an activities-based regulatory regime in the context of the constitutionally amorphous subject of the environment.[22] In *Oldman River*, this Court observed that the validity inquiry will be influenced by

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[18] *Bell Canada v. Quebec (Commission de la Santé et de la Sécurité du Travail)*, [1988] 1 SCR 749 at 766, 842-843, *underlining in original, other emphasis added*.
[19] *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48, ¶18, *emphasis added*. **See also:** *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11, ¶50.
[20] *Desgagnés Transport Inc. v. Wärtsilä Canada Inc.*, 2019 SCC 58, ¶42, 44, *underlining in original, other emphasis added*.
[21] *Canada (A.G.) v. PHS Community Services Society*, 2011 SCC 44, ¶60.
[22] The *Impact Assessment Act* defines "designated projects" as designated "physical activities": *Impact Assessment Act*, S.C. 2019, c. 28, at s. 2.

the activities which fall within the enacting government's heads of power:

> It must be noted that the exercise of legislative power, as it affects concerns relating to the environment, must, as with other concerns, be linked to the appropriate head of power, and since the nature of the various heads of power under the *Constitution Act, 1867* differ, ***the extent to which environmental concerns may be taken into account in the exercise of a power may vary from one power to another. For example, a somewhat different environmental role can be played by Parliament in the exercise of its jurisdiction over fisheries than under its powers concerning railways or navigation since the former involves the management of a resource, the others activities***. …
>
> … What is important is to determine whether either level of government may legislate. One may legislate in regard to provincial aspects, the other federal aspects. Although ***local projects will generally fall within provincial responsibility, federal participation will be required if the project impinges on an area of federal jurisdiction*** as is the case here.[23]

15. Where the *Constitution Act, 1867* provides one level of government with power over a specific activity, then only that level may regulate the activity itself. The other level of government cannot have concurrent jurisdiction over the activity *qua* activity, because the exclusivity principle prevents this. By conferring power over the activity upon the first level of government, the *Constitution Act, 1867* has given it sovereignty over the permissibility and characteristics of the activity as an activity. The other level can only have limited overlapping jurisdiction to address the activity's effects upon its own exclusive heads of power, and only then to the extent that those exclusive heads of power are significantly affected by it.

16. By way of example, a province has exclusive jurisdiction over the activity that is an *in situ* oil well within the province (*per* ss. 92(10), 92(13), 92(16), 92(A)(1)(a) and 92(A)(1)(b)), whereas the federal government has exclusive jurisdiction over the activity that is an interprovincial railway (per ss. 91(29) and 92(10)(a)). If such an activity has a significant adverse effect upon a head of power possessed by the other level of government (*e.g.*, if the *in situ* oil well significantly and adversely affects inland fisheries, thereby engaging the federal power in s. 91(12)), the other level of government could regulate such effects. As a further example, while Parliament could not regulate the working conditions of oil workers on an *in situ* oil well, it could stipulate that oil being transported across provincial lines is secured in a particular fashion.

17. However, the other level of government could only regulate in relation to the effects which the activity has upon its specific heads of power. It could not regulate the underlying activity itself,

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[23] *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 SCR 3 at 67-69, *emphasis added.*

such as by enacting legislation whose dominant focus is upon whether the activity will be permitted, as opposed only to whether the activity's effects upon its heads of power will be prohibited. That would amount to an assertion of concurrent rather than limited overlapping jurisdiction.

C. Exclusivity Protects the Balance of Power and Encourages Cooperation

18. Taken too far, a doctrine of cooperative federalism that accommodates concurrency will have devastating consequences for the balance of power between the federal and provincial levels of government. Overreliance on concurrency expands federal power while constraining provincial power because the steps that follow the validity analysis tend to favour federal legislation over provincial legislation. The two doctrines which operate as a check on concurrency – interjurisdictional immunity and paramountcy – functionally limit provincial power in their own way.

19. The nature of the doctrine of interjurisdictional immunity is disputed,[24] but in practice it has applied to limit provincial power. In theory, the doctrine of interjurisdictional immunity applies to both provincial and federal legislation. If valid legislation at one level of government nonetheless impairs the core of the other level's heads of power, the legislation will be rendered inapplicable to the extent of the inconsistency. In practice, however, this Court has only ever applied the doctrine of interjurisdictional immunity to render provincial legislation inapplicable.[25]

20. By its nature, the doctrine of federal paramountcy can only apply to render provincial legislation inoperable. As a result, where courts determine that a matter is subject to concurrent powers, federal paramountcy actually renders Parliament supreme in those matters to the extent that there is a conflict between the levels of government.[26]

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[24] See for example: *Desgagnés Transport Inc. v. Wärtsilä Canada Inc.*, 2019 SCC 58 at ¶161 (Wagner C.J. and Brown J. concurring).

[25] See for example: *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44 at ¶57-70; *Carter v. Canada (Attorney General)*, 2015 SCC 5 at ¶49-53. **See also**: Asher Honickman, "Watertight Compartments: Getting Back to the Constitutional Division of Powers" (2017) Alta. L.R. 226 at pp. 238-239.

[26] See: Bruce Ryder, "Equal Autonomy in Canadian Federalism" (2011) 54 S.C.L.R. (2d) 566 at pp. 594-595, ABOA Tab 2; Eugenie Brouillet, "The Supreme Court of Canada: The Concept of Cooperative Federalism and Its Effect on the Balance of Power" in Nicholas Aroney & John Kincaid eds, *Courts in Federal Countries: Federalists or Unitarists?* (Toronto: University of Toronto Press, 2017) at pp. 157-158, ABOA Tab 3; Eugenie Broulliet and Bruce Ryder, "Key Doctrines in Canadian Legal Federalism" in Peter Oliver, Patrick Macklem and Nathalie Des Rosiers (eds), *The Oxford*

21. As a result, a trend toward concurrency will tend to preserve valid federal legislation but limit valid provincial legislation. Valid federal legislation will rarely, if ever, be rendered inapplicable or inoperable for overstepping on the class of subjects assigned to provinces. By contrast, valid provincial legislation is vulnerable under either or both of interjurisdictional immunity and federal paramountcy.

22. The trend toward concurrency may create a disincentive for provinces and Parliament to cooperate. If, on the basis of concurrency-based doctrines, Parliament may legislate on matters falling within s. 92, there is no need to cooperate with provinces for Parliament to achieve its legislative objectives because, as explained above, valid federal legislation will be paramount to provincial legislation.

23. By contrast, reaffirming the principle of exclusivity could encourage cooperation between federal and provincial governments.[27] The greater clarity of exclusive powers, and the accompanying legal certainty, may facilitate negotiations between levels of government. Rather than relying on an expansive approach to concurrency and the trump card of federal paramountcy, Parliament would need to cooperate with provinces to achieve joint objectives.

24. Indeed, in *Reference Re Board of Commerce Act 1919 and the Combines and Fair Prices Act 1919*, Viscount Haldane endorsed clearly defined powers as a mechanism to achieve of intergovernmental cooperation:

> … [H]owever important it may seem to the Parliament of Canada, that some such policy as that adopted in the two Acts in question should be made general throughout Canada, their Lordships do not find any evidence that the standard of necessity referred to has been reached, ***or that the attainment of the end sought is practicable, in view of the distribution of legislative powers enacted by the Constitution Act, without the co-operation of the provincial legislatures***.[28]

25. Likewise, Lord Atkin observed – in the same decision which became known for the watertight compartments analogy – that certain legislative objectives may only be realized through cooperation:

Handbook of the Canadian Constitution (Oxford: Oxford University Press, 2017) at pp. 428-431, ABOA Tab 4.

[27] Asher Honickman, "Watertight Compartments: Getting Back to the Constitutional Division of Powers" (2017) Alta. L.R. 226 at pp. 250-251, ABOA Tab 1.

[28] *Reference Re Board of Commerce Act 1919 and the Combines and Fair Prices Act 1919*, [1921] UKPC 107 at 6, *emphasis added*.

> In totality of legislative powers, Dominion and Provincial together, [Canada] is fully equipped. But the legislative powers remain distributed and if in the exercise of her new functions derived from her new international status she incurs obligations they must, so far as legislation be concerned when they deal with provincial classes of subjects, be dealt with by the totality of powers, ***in other words by co-operation between the Dominion and the Provinces***.[29]

26. In modern times, this Court has similarly recognized that the division of powers supports cooperation:

> … [F]ederalism was the legal response of the framers of the Constitution to the political and cultural realities that existed at Confederation. It thus represented a legal recognition of the diversity of the original members. The division of powers, one of the basic components of federalism, was designed to uphold this diversity within a single nation. Broad powers were conferred on provincial legislatures, while at the same time Canada's unity was ensured by reserving to Parliament powers better exercised in relation to the country as a whole. Each head of power was assigned to the level of government best placed to exercise the power. ***The fundamental objectives of federalism were, and still are, to reconcile unity with diversity, promote democratic participation by reserving meaningful powers to the local or regional level and to foster co-operation among governments and legislatures for the common good***.[30]

27. In this way, a constitutionalist approach to the division of powers is actually more likely to promote cooperation than the murkiness of concurrency-based cooperative federalism. While this Court has accommodated ***limited overlapping*** jurisdiction by invoking cooperative federalism,[31] it should not allow the doctrine of cooperative federalism to override the division of powers by permitting concurrent jurisdiction beyond the exceptions enumerated in the *Constitution Act, 1867*.[32]

PART III—SUBMISSIONS CONCERNING COSTS

28. ARL requests that no costs be awarded either for or against it.

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

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[29] *Canada (Attorney General) v. Ontario (Attorney General)*, [1937] UKPC 6 at 10, *emphasis added*.
[30] *Canadian Western Bank v. Alberta*, 2007 SCC 22, ¶22, *emphasis added*.
[31] *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11, ¶50; *Reference re Genetic Non-Discrimination Act*, 2020 SCC 17, ¶22; *Reference re Securities Act*, 2011 SCC 66, ¶57.
[32] *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48, ¶18; *Rogers Communications Inc. v. Chateauguay (City)*, 2016 SCC 23, ¶39.

McCarthy Tétrault LLP
Brandon Kain
Holly Kallmeyer
Asher Honickman

PART IV—TABLE OF AUTHORITIES

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