

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 APPELLANT
THE ATTORNEY GENERAL OF CANADA

(Pursuant to Rule 42 of the Rules of the Supreme Court of Canada, SOR/2002-156)

ATTORNEY GENERAL OF CANADA

Department of Justice Canada
Civil Litigation Sector
50 O'Connor Street, Suite 500
Ottawa, ON K1A 0H8
Fax: 613-954-1920

Per: Christopher Rupar
Dayna Anderson
Bruce Hughson
Kerry Boyd
James Elford

Tel: 613-670-6290

E-mail: christopher.rupar@justice.gc.ca

Counsel for the Attorney General of Canada

**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, and
ATTORNEY GENERAL OF ONTARIO**

Interveners

ORIGINAL TO:

REGISTRAR

Supreme Court of Canada
301 Wellington Street
Ottawa, ON K1A 0J1

COPIES TO:

Bennett Jones LLP

4500, 855 2nd Street SW
Calgary, AB T2P 4K7
Fax: (403) 265-7291

**Per: Bruce Mellett
Bradley Gilmour
Sean Assie**

Tel: (403) 298-3319
Email: mellettb@bennetjones.com

Justice and Solicitor General

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

Per: Christine Enns

Email: Christine.enns@gov.ab.ca

Counsel for the Respondent, Attorney
General of Alberta

Attorney General of Ontario

4th Floor, McMurty-Scott Building
720 Bay Street
Toronto, ON M7A 2S9
Fax: (416) 326-4015

Per: Yashoda Ranganathan

Joshua Hunter

Tel: (647) 637-0883
Email: yashoda.ranganathan@ontario.ca

Counsel for the Intervener, Attorney General
of Ontario

Gowling WLG (Canada) LLP

Suite 2600, 160 Elgin Street
Ottawa, Ontario K1P 1C3
Fax: (613) 788-3509

Per: D. Lynne Watt

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

Agent for the Respondent, Attorney
General of Alberta

**Attorney General of Saskatchewan
Constitutional Law**
820 – 1874 Scarth Street
Regina, SK S4P 4B3

**Per: Thomson Irvine
Noah Wernikowski**
Tel: (306) 787-6307
Email: tom.irvine@gov.sk.ca

Counsel for the Intervener, Attorney General
of Saskatchewan

**Ministère de la Justice du Québec
Direction du droit constitutionnel et
autochtone**
1200, route de l'Église, 4e étage
Québec, Quebec G1V 4M1
Fax: (418) 633-7030

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

Counsel for the Intervener, Attorney General
of Quebec

**Department of Justice
Constitutional Law**
1230 - 405 Broadway
Winnipeg, Manitoba R3C 3L6
Fax: (203) 945-0054

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

Counsel for the Intervener, Attorney
General of Manitoba

Gowling WLG (Canada) LLP
Suite 2600, 160 Elgin Street
Ottawa, Ontario K1P 1C3
Fax: (613) 788-3509

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

Agent for the Intervener, Attorney
General of Saskatchewan

Noël et Associés, s.e.n.c.r.l.
225, montée Paiement, 2e étage
Gatineau, Quebec J8P 6M7
Fax: (819) 771-5397

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

Agent for the Intervener, Attorney General
of Quebec

Gowling WLG (Canada) LLP
160 Elgin Street, Suite 2600
Ottawa, Ontario K1P 1C3
Fax: (613) 788-3509

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

Agent for the Intervener, Attorney General
Manitoba

Attorney General of British Columbia
1001 Douglas Street, 6th Floor
PO Box 9280 Stn Prov Govt
Victoria, British Columbia V8W 9J7
Fax: (250) 356-9154

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

Counsel for the Intervener, Attorney General
of British Columbia

**Attorney General of New Brunswick
Constitutional Unit, Legal Services
Branch**
P.O. Box 6000, Stn. A
Fredericton, New Brunswick E3B 5H1
Fax: (506) 453-3275

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

Counsel for the Intervener, Attorney
General of New Brunswick

**Attorney General of Nova Scotia
Department of Justice (NS)**
1690 Hollis Street, 8th Floor
Halifax, Nova Scotia B3J 2L6
Fax: (902) 424-1730

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

Counsel for the Intervener, Attorney
General Nova Scotia

Borden Ladner Gervais LLP
World Exchange Plaza
100 Queen Street, suite 1300
Ottawa, Ontario K1P 1J9
Fax: (613) 230-8842

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

Agent for the Intervener, Attorney General
of British Columbia

Gowling WLG (Canada) LLP
160 Elgin Street, Suite 2600
Ottawa, Ontario K1P 1C3
Fax: (613) 788-3509

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

Agent for the Intervener, Attorney General
of New Brunswick

Gowling WLG (Canada) LLP
160 Elgin Street, Suite 2600
Ottawa, Ontario K1P 1C3
Fax: (613) 788-3509

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

Agent for the Intervener, Attorney General
of Nova Scotia

Attorney General of Newfoundland and Labrador

4th Floor, East Block, Confederation Bldg.
P.O. Box 8700
St. John's, Newfoundland & Labrador
A1B 4J6
Fax: (709) 729-2129

Per: Justin S.C. Mellor

Tel: (709) 729-0163
Email: jmellor@gov.nl.ca

Counsel 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, Prince Edward Island
C1A 7N8
Fax: (902) 368-4563

Per: Jessica Gillis

Tel: (902) 368-5064
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, Ontario K1P 1C3
Fax: (613) 788-3509

Per: D. Lynne Watt

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

Agent for the Intervener, Attorney General
of Newfoundland & Labrador

Gowling WLG (Canada) LLP

160 Elgin Street, Suite 2600
Ottawa, Ontario K1P 1C3
Fax: (613) 788-3509

Per: D. Lynne Watt

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

Agent for the Intervener, Attorney General
of Prince Edward Island

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 A. Notice of Constitutional Question

PART I - OVERVIEW AND FACTS

1. OVERVIEW

1. The narrow “silo” approach to determining a division of powers issue was rejected by this Court in *Oldman River*. Specifically with respect to the environment, this Court held that federal authority flows from whether a proposed project has effects that impinge on an area of federal jurisdiction.¹ The Majority of the Alberta Court of Appeal erred by failing to apply this analytical framework and instead relying on discredited reasoning by categorizing resource projects as “provincial” or “federal”. In so doing, they ignored principles of co-operative federalism and the shared jurisdiction over the environment between levels of government.

2. The correct approach to determining the constitutionality of the *Impact Assessment Act*² (*IAA*) and the *Physical Activities Regulations*³ (*Regulations*) is an effects-based approach. Where a proposed project may have effects that impact areas of federal jurisdiction, those projects are proximate to a federal head of power and Parliament may validly legislate. Whether or not a proposed project will have adverse effects within federal jurisdiction cannot be determined without examining the specific context of each proposed project. Without a factual matrix arising from a proposed project, it is challenging, if not impossible, to consider the constitutional make-up of that project.

3. The *IAA* regime addresses the complexity of overlapping environmental constitutional jurisdiction through a combination of the *Regulations*’ project list and the *IAA*’s various “triggers”.⁴ It provides a process for determining in advance whether any specific proposed project will cause adverse effects on an area of federal jurisdiction. The stepped *IAA* process allows a determination of which projects are subject to a federal impact assessment and prevents overreach.

4. The Majority ignored this scheme and dismissed the federal effects analysis. Contrary to the Majority’s view, the *IAA* and *Regulations* do not provide a federal veto over “provincial projects”. Rather, the pith and substance of the *IAA* is to safeguard against adverse environmental effects in relation to matters within federal jurisdiction under the *Constitution Act, 1867*. The pith and

¹ *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3 at 68-69 [*Oldman River*].

² *Impact Assessment Act*, SC 2019, c 28, s 1 [*IAA*].

³ *Physical Activities Regulations*, SOR/2019-285 [*Regulations*].

⁴ *IAA*, *supra* note 2, ss 7, 8, 82 and 83.

substance of the *Regulations* is to identify projects with the greatest potential for adverse federal effects for the purpose of determining whether an impact assessment is warranted.

5. The *IAA* and *Regulations* restrict federal assessments to projects that have effects in relation to federal subject matters. They do this by carving out projects, at a preliminary stage, from the requirement for a federal assessment where it is determined that there are no expected adverse federal effects. In addition, where a federal assessment does take place, federal conditions are limited to mitigating those federal effects.

2. STATEMENT OF FACTS

A. The *IAA* and the *Regulations*

1) Overview

6. In 2019, Parliament replaced the *Canadian Environmental Assessment Act, 2012*⁵ (*CEAA 2012*) with the *IAA*, the full title of which is “An Act respecting a federal process for impact assessments and the prevention of significant adverse environmental effects”. On August 8, 2019, the Governor in Council (GiC) promulgated the *Regulations*.

7. To protect against adverse effects in areas of federal jurisdiction, the *IAA* creates a statutory impact assessment regime as an “effective means of integrating scientific information and Indigenous knowledge into decision-making processes” in respect of “designated projects”.⁶ The impact assessment regime is made up of a series of steps that are, generally, as follows:

- (a) first, it must be determined if a physical activity or activities falls within the *IAA*’s scope as a “designated project” under the *IAA* pursuant to the *Regulations* or a s 9 Ministerial order;⁷
- (b) second, in the planning phase, if a physical activity or activities fall within the *IAA*’s scope as a designated project, the Agency considers whether the project may cause adverse effects within federal jurisdiction or adverse direct or incidental effects

⁵ [SC 2012, c 19, s 52 \[CEAA 2012\]](#), as repealed by [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, s 9](#).

⁶ [Reference re Impact Assessment Act, 2022 ABCA 165](#) at 475 (Greckol JA) [ABCA Reasons], citing from *IAA, supra* note 2, *Preamble* (Appellant’s Record, Vol I at 139 [AR]).

⁷ *IAA, supra* note 2, ss [2](#) (“designated project”) and [9](#); *Regulations, supra* note 3, s [2](#) and [Schedule](#).

(collectively Adverse Federal Effects) to determine whether an impact assessment is required; as part of this process, the public is invited to provide comments, potentially impacted Indigenous peoples are offered consultation, and federal authorities with specialist or expert information or knowledge are asked to provide that information and knowledge to the Agency;⁸

- (c) third, if the Agency determines a designated project requires an impact assessment, information is collected for the purpose of conducting the impact assessment and a report is prepared and submitted to the Minister;⁹ if the Agency determines an impact assessment is not required, then the project can proceed without any further *IAA* requirements;¹⁰
- (d) fourth, if an impact assessment is required, a decision must be made, in consideration of the mandatory factors, on whether the Adverse Federal Effects indicated in the report are in the public interest;¹¹ and
- (e) fifth, if it is determined that the Adverse Federal Effects are in the public interest, then conditions in relation to those effects (and with which the proponent of the designated project must comply) are established and a decision statement is issued.¹²

2) *IAA's Purpose*

8. The *IAA's* purpose is set out in s 6, and includes:

(b) to protect the components of the environment, and the health, social and economic conditions that are within the legislative authority of Parliament from adverse effects caused by a designated project;

...

(d) to ensure that designated projects that require the exercise of a power or

b) de protéger les composantes de l'environnement et les conditions sanitaires, sociales et économiques qui relèvent de la compétence législative du Parlement contre les effets négatifs importants de tout projet désigné;

...

d) de veiller à ce que les projets désignés dont la réalisation exige l'exercice, par une

⁸ *IAA*, *supra* note 2, ss [10-16](#).

⁹ See for example: *ibid*, ss [18-28](#).

¹⁰ *Ibid*, s [7\(3\)\(a\)](#).

¹¹ *Ibid*, ss [60-63](#).

¹² *Ibid*, ss [64-65](#).

performance of a duty or function by a federal authority under any Act of Parliament other than this Act to be carried out, are considered in a careful and precautionary manner to avoid adverse effects within federal jurisdiction and adverse direct or incidental effects;

(e) to promote cooperation and coordinated action between federal and provincial governments — while respecting the legislative competence of each — and the federal government and Indigenous governing bodies that are jurisdictions, with respect to impact assessments;...

autorité fédérale, d'attributions qui lui sont conférées sous le régime d'une loi fédérale autre que la présente loi soient étudiés avec soin et prudence afin qu'ils n'entraînent pas d'effets relevant d'un domaine de compétence fédérale qui sont négatifs ou d'effets directs ou accessoires négatifs;

e) de promouvoir, en ce qui touche les évaluations d'impact, la collaboration des gouvernements fédéral et provinciaux, dans le respect des compétences de chacun, et du gouvernement fédéral et des corps dirigeants autochtones qui sont des instances, ainsi que la coordination de leurs activités; ...

9. This purpose clause must be read in conjunction with s 2 of the *IAA*, which defines “effects within federal jurisdiction” as meaning, with respect to a physical activity or designated project, changes to fish and fish habitat, aquatic species, migratory birds or any other component of the environment that is set out in Schedule 3. “Effects within federal jurisdiction” also include a change to the environment in a province other than the one in which the physical activity or the designated project is to be carried out. In respect of the impact on “Indigenous peoples of Canada”,¹³ “effects within federal jurisdiction” include changes to the environment on physical and cultural heritage, the current use of lands and resources for traditional purposes or any structure, site or thing that is of historical, archaeological, paleontological or architectural significance. Finally, these effects also include any change occurring in Canada to the health, social or economic conditions of the Indigenous peoples of Canada and any change to a health, social or economic matter that is within the legislative authority of Parliament that is set out in Schedule 3.

10. Section 2 defines the “environment” for purposes of the *IAA*. Importantly, s 2 also defines “direct or incidental effects” as follows:

¹³ As defined in the *IAA*, *supra* note 2, [s 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*)

effets directs ou accessoires
 Les effets qui sont directement liés ou nécessairement accessoires soit aux attributions que l'autorité fédérale doit exercer pour permettre l'exercice en tout ou en partie d'une activité concrète ou la réalisation en tout ou en partie d'un projet désigné, soit à l'aide financière accordée par elle à quiconque en vue de permettre l'exercice en tout ou en partie de l'activité ou la réalisation en tout ou en partie du projet désigné. (*direct or incidental effects*)

3) The IAA's trigger and scoping mechanisms reflect the exercise of federal jurisdiction

11. The general purpose of the *Regulations* is to capture only projects that are likely to have Adverse Federal Effects of some significance because of their type and magnitude.¹⁴ The regime regulates environmental *effects* that may be caused by projects designated in the *Regulations* or under s 9 of the *IAA*.

12. The scope of the Minister's power to designate projects reflects the purpose of the *IAA*. Pursuant to s 9, the Minister may designate a physical activity by order, if in the Minister's opinion, either the carrying out of that physical activity may cause adverse "effects within federal jurisdiction" or adverse "direct or incidental effects", or public concerns related to those effects warrant the designation. Two "pre-conditions" for the designation limit the *IAA*'s application to where there are adverse effects on areas of federal jurisdiction - namely if the physical activity may cause (i) adverse "effects within federal jurisdiction" or (ii) adverse "direct or incidental effects".

13. The *IAA* provides separate triggers that cause it to apply to a project. The ss 7 and 8 triggers only apply to "designated projects." These triggers create a process which narrows and focuses the application of the *IAA* on exercises of valid federal jurisdiction.

¹⁴ [Regulations](#), *supra* note 3, [Regulatory Impact Analysis Statement, 2019: Canada Gazette, Part II, Volume 153, Number 17, 5661 at 5663 and 5678 \[RIAS\]](#).

14. Section 8 of the *IAA* sets out a “decision based” trigger by prohibiting a federal authority from exercising any power or performing any duty or function that permits a designated project to be carried out, and from providing financial assistance, unless (a) the Impact Assessment Agency of Canada (Agency) decides that no impact assessment is necessary, or (b) following an impact assessment, the decision-maker decides that the designated project’s effects are in the public interest.

15. Section 7 of the *IAA* sets out an “effects based” trigger. It does not link back to any particular federal decision-making authority, but arises due to the impact a designated project may have on the listed “effects within federal jurisdiction”.

16. Subject to s 7(3), s 7(1) prohibits the proponent of a designated project from doing any act or thing that may cause an enumerated effect, including a change to “components of the environment that are within the legislative authority of Parliament” such as a change to fish or fish habitat or aquatic species or migratory birds or certain impacts on the Indigenous Peoples of Canada. It is, therefore, limited to effects that have a federal foundation. Section 7 does not set out every possible iteration of those effects due to the complexity and breadth of possible environmental effects and the projects that may cause them. The wording of s 7 clearly limits the prohibition to where there is a foundation of federal jurisdiction.

4) Adverse Federal Effects determine whether an impact assessment is required

17. Sections 10 to 15 provide that a proponent of a designated project must participate in the planning phase including by providing a project description. Subsection 16(2) requires the Agency to decide whether an impact assessment is necessary, by considering the possibility that the designated project may cause Adverse Federal Effects, any adverse impact on the rights of Indigenous peoples, and comments from the public, a “jurisdiction”, or Indigenous group that is consulted under s 12.

5) The impact assessment phase is aimed at gathering and assessing information to support the final decision on Adverse Federal Effects

18. If the Agency determines that an impact assessment is necessary, s 19 requires the proponent to provide the Agency with an impact statement, including the information required in the Agency’s Notice of Commencement. Pursuant to ss 25 to 29, the Agency must conduct the impact

assessment of the designated project and prepare a report that sets out the effects that are likely to be caused by the designated project and specifically indicate those that are Adverse Federal Effects and specify the extent to which those effects are significant (per s 28(3)). Where an assessment is completed by a review panel, the report prepared in that process must set out the same (per s 51(1)(d)(ii)). In both cases, the reports are provided to the ultimate decision-maker for the purpose of supporting the public interest decision at the heart of the impact assessment process.

6) The decision-making phase is restricted to Adverse Federal Effects

19. Following the completion of an impact assessment report, the Minister (s 60(1)(a)), or GiC if referred by the Minister (s 62), must decide whether the Adverse Federal Effects that are indicated in the report are in the public interest, in light of the factors in s 63 and the extent to which those effects are significant. Whatever is considered in rendering this decision does not alter the essential nature of the public interest determination. Both the Minister and the GiC must make their public interest determination in light of the impact assessment report and the factors outlined in s 63, including the significance of the Adverse Federal Effects.

20. Section 64 provides that if the Minister or GiC determines that the Adverse Federal Effects are in the public interest, the Minister must establish any appropriate conditions in relation to those effects only, including mitigation measures and a follow-up program, and possibly an adaptive management plan. Finally, under ss 65 and 66 the Minister must issue and make public a “decision statement” with detailed reasons for the determination made under ss 60 or 62, including any conditions.

21. Additional provisions of the *IAA* apply to non-designated projects to be carried out on federal lands or outside Canada. While those provisions were not examined in any detail by the Court of Appeal, for completeness it should be noted that ss 82 and 83 essentially limit the carrying out of “projects” on federal lands and the carrying out of projects outside Canada by, or financed by, a federal authority.

B. Parliament’s History of Legislation to Protect the Environment

22. Parliament has an established history of legislating to protect the environment,¹⁵ including through federal environmental assessment legislation in relation to subjects within federal jurisdiction. Each iteration of Parliament’s environmental assessment legislation has required the review of some projects that the Majority would consider “intra-provincial”, while still respecting constitutional boundaries.¹⁶

23. In 1984, pursuant to the *Department of the Environment Act*,¹⁷ the GiC promulgated the *Environmental Assessment and Review Process Guidelines Order*¹⁸ (*EARPGO*). Broadly, *EARPGO* required all federal departments and agencies with decision-making authority for any “proposal” (defined as any initiative, undertaking or activity that may have an “environmental effect” on an area of federal responsibility) to screen the proposal to determine whether it may

¹⁵ Some examples include: [Canada Water Act, RSC, 1985, c C-11](#); [Canadian Environmental Protection Act, 1999, SC 1999, c 33](#); [Fisheries Act, RSC, 1985, c F-14](#) [**Fisheries Act**]; [Transportation of Dangerous Goods Act, 1992, SC 1992, c 34](#); [Species At Risk Act, SC 2002, c 29](#) [**SARA**]; [Migratory Birds Convention Act, 1994, SC 1994, c 22](#) [**MBCA**]; and formerly the [National Energy Board Act, RSC, 1985, c N-7](#), as repealed by [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, s 44](#).

¹⁶ See for example: *Oldman River*, *supra* note 1 (federal review of an intra-provincial dam under the *Environmental Assessment and Review Process Guidelines Order*, SOR/84-467); [MiningWatch Canada v Canada \(Fisheries and Oceans\), 2010 SCC 2](#) [**MiningWatch**] (federal review of an intra-provincial open pit mine and mill under the [Canadian Environmental Assessment Act, SC 1992, c 37](#) [**CEAA 1992**], as repealed by [the Jobs, Growth and Long-term Prosperity Act, SC 2012, c 19, s 66](#); and [Adam v Canada \(Environment\), 2014 FC 1185](#) (duty to consult related to federal review of the proposed expansion of an intra-provincial open-pit oil sands mine under *CEAA 2012*).

¹⁷ [Department of the Environment, RSC, 1985, c E-10, s 6](#).

¹⁸ SOR/84-467 [**EARPGO**] (ABOA, Tab 2).

give rise to any potentially adverse environmental effects and review the proposal where those effects could be significant.¹⁹

24. Parliament next passed the *Canadian Environmental Assessment Act*²⁰ (*CEAA 1992*). *CEAA 1992* had a broader scoping mechanism than *EARPGO* and applied, or was “triggered”, by exercises of federal jurisdiction. This included where the federal government proposed a project, provided financial assistance to a project, issued a permit or authorization for a project from a list as prescribed by regulation, or where a project involved federal lands.²¹

25. *CEAA 1992* provided for a review of projects that “triggered” its application unless specifically excluded.²² An “Environmental effect” included any change the project could cause in the environment as well as the health and socio-economic effects of that change.²³ Environmental assessments considered a variety of factors in the public interest.²⁴

26. In addition to the general scoping provisions, *CEAA 1992* provided a mechanism for referring projects that did not require a specific federal decision to a mediator or review panel for environmental assessment if the Minister of the Environment was of the opinion that the project may cause significant adverse environmental effects outside of Canada, on federal lands, or in another province.²⁵

27. *CEAA 1992* was replaced by *CEAA 2012*,²⁶ which reduced the number of federal environmental assessments by narrowing its application to designated projects, much like the *IAA*. Only projects designated in regulations or by ministerial order were considered for possible environmental assessment.²⁷ The designated project list under *CEAA, 2012* was later used as the starting point for development of the *Regulations*.²⁸

¹⁹ *Oldman River*, *supra* note 1 at 17-18.

²⁰ *CEAA 1992*, *supra* note 16.

²¹ *Ibid*, s 5.

²² *Ibid*, s 7.

²³ *Ibid*, s 2.

²⁴ *Ibid*, s 16.

²⁵ *Ibid*, ss 46-48.

²⁶ *CEAA 2012*, *supra* note 5.

²⁷ *Ibid*, ss 2, 10, 14(2) and 84(a).

²⁸ RIAS, *supra* note 14 at 5661 and 5663-5669; [Regulations Designating Physical Activities, SOR/2012-147, Schedule](#), ss 9 and 12 and Regulatory Impact Analysis Statement, as amended in [Regulations Amending the Regulations Designating Physical Activities, SOR/2013-186, s 3, Schedule, s 8](#), and [Regulatory Impact Analysis Statement](#). See also the: [Comprehensive Study List](#)

28. *CEAA 2012* added an effects-based trigger and related prohibition that would prevent proponents from doing an act or thing in connection with carrying out designated projects. The prohibition applied if the act or thing could cause an environmental effect within federal jurisdiction, unless no assessment was required or the proponent complied with the conditions included in a decision statement following an assessment.²⁹

29. *CEAA 2012* also prohibited federal entities from exercising any power or function that could permit a designated project to be carried out, until either a decision was made that no assessment was required or a decision statement was issued.³⁰ The defined environmental effects were essentially identical to the effects now set out in ss 7(1)(a) – (c) of the *IAA*.³¹

C. Alberta’s Reference Questions

30. In September 2019 and May 2020, in accordance with the *Alberta Judicature Act*,³² the Lieutenant Governor in Council of Alberta referred two questions to the Alberta Court of Appeal:

- a. Is Part 1 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, unconstitutional in whole or in part, as being beyond the legislative authority of the Parliament of Canada under the Constitution of Canada?
- b. Is the *Physical Activities Regulations*, SOR/2019-285, unconstitutional in whole or in part by virtue of purporting to apply to certain activities listed in the Schedule thereof that relate to matters entirely within the legislative authority of the Provinces under the Constitution of Canada?³³

[Regulations](#), [SOR/94-638](#), [Schedule](#), ss [11](#) and [12](#) and Regulatory Impact Analysis Statement (ABOA, Tab 6).

²⁹ *CEAA 2012*, *supra* note 5, s [6](#).

³⁰ *Ibid*, s [7](#).

³¹ *Ibid*, ss [2\(1\)](#) (“environmental effects”) and [5\(1\)](#).

³² [Judicature Act](#), [RSA 2000, c J-2](#), s [26\(1\)](#).

³³ Order in Council, OC 160/2019 dated September 9, 2019, as amended by Order in Council, OC 159/2020 dated May 13, 2020 (AR, Vol II at 1 and 16).

D. Alberta Court of Appeal's Opinion

1) Majority Opinion

31. The Majority of the Court of Appeal held that the pith and substance of the *IAA* is “the establishment of a federal impact assessment and regulatory regime that subjects all activities designated by the federal executive to an assessment of all their effects and federal oversight and approval” that intrudes “fatally into provincial jurisdiction”³⁴ and would amount to the *de facto* expropriation of provincial natural resources and proprietary interests by Canada.³⁵ The Majority summarized its conclusions on the “impermissible” federal overreach, and the hollowing out of provincial powers at paragraph 373.

32. The Majority stated that the issue is not what “triggers” the *IAA*, but rather whether the subject matter of the *IAA* is properly classified under one or more federal heads of power.³⁶ They dismissed the argument that Parliament has jurisdiction to regulate the federal effects of designated projects under several heads of federal power.³⁷ They also held that the *IAA* would subordinate various provincial powers to federal authority and was a “profound invasion into provincial legislative jurisdiction and provincial proprietary rights”. The Majority found the “federal jurisdictional overreach is manifest”.³⁸

33. The Majority applied a siloed approach to the division of powers. Specifically, the Majority held:

Under this *Act*, the federal government is aggrandizing onto itself decisions vis à vis intra-provincial designated projects which the citizens of individual provinces rightly expect – and the Constitution requires – will be made by those directly accountable to those citizens, and that is the provincial government of the province in which they live.

If upheld, the *IAA* would reduce the plainly applicable provisions of s 92A, s 92(5), s 92(10), s 92(13), s 92(16) and s 109 to a subordinate status to federal authority. The unavoidable effect of the *IAA* would be the centralization of the governance of Canada to the point this country would no longer be recognized as a real federation. This is not what the framers of our Constitution intended.

³⁴ ABCA Reasons, *supra* note 6 at para 372 (AR, Vol I at 111).

³⁵ *Ibid* at paras 375-377 (AR, Vol I at 113-114).

³⁶ *Ibid* at para 381 (AR, Vol I at 115).

³⁷ *Ibid* at paras 274, 277-281, 383-4, 386, 390, 392, 394-5 and 397 (AR, Vol I at 87-89 and 115-117).

³⁸ *Ibid* at para 421 (AR, Vol I at 122).

And it is certainly not what provincial governments agreed to either on patriation of the Constitution.

Where natural resources are involved, it is each province that is concerned with the sustainable development of its natural resources, not the federal government. It is the province that owns those natural resources, not the federal government. And it is the province and its people who lose if those natural resources cannot be developed, not the federal government. The federal government does not have the constitutional right to veto an intra-provincial designated project based on its view of the public interest. Nor does the federal government have the constitutional right to appropriate the birthright and economic future of the citizens of a province.³⁹

34. Finally, though not raised by the reference questions, the Majority found that the doctrine of interjurisdictional immunity should apply to protect an unidentified core of relevant provincial heads of power. They concluded that this should work both ways, and without further analysis that it would be unfair if the federal government “with all its constitutional advantages” were permitted to rely exclusively on this doctrine.⁴⁰

2) Dissenting Opinion

35. The dissenting opinion of Justice Greckol concluded that the *IAA* is *intra vires* Parliament as a valid exercise of federal constitutional authority to regulate Adverse Federal Effects.⁴¹ She framed the issues as whether it is constitutional for a federal project-based environmental assessment regime to regulate effects as defined by s 2 “*on purported areas of federal jurisdiction caused by certain designated projects where the projects themselves otherwise fall within provincial jurisdiction*”.⁴²

36. Justice Greckol further noted that most of the designated projects listed in the *Regulations* involved subject matters within s 91 (federal) heads of power were self-evident and beyond dispute, a point also agreed to by the Majority.⁴³ She found the remainder of the designated projects are intra-provincial and *prima facie* within s 92 of the *Constitution Act, 1867*, such as mines and

³⁹ *Ibid* at paras 422-424 (AR, Vol I at 122).

⁴⁰ *Ibid* at para 429 (AR, Vol I at 123-124).

⁴¹ *Ibid* at paras 760-765 (AR, Vol I at 206-207).

⁴² *Ibid* at para 442 (AR, Vol I at 132), emphasis in original.

⁴³ *Ibid* at paras 109 and 599-600 (AR, Vol I at 37-38 and 168).

metals, and oil and gas facilities, but may have effects upon areas of federal jurisdiction, such as fish habitat, federal lands, or Indigenous peoples. In either case, the project-based federal environmental assessment regime in the *IAA* and *Regulations* target effects in federal jurisdiction.⁴⁴

37. In her view, the Majority failed to provide a clear explanation as to why it is “constitutionally impermissible for Canada to move from an environmental assessment process triggered by an external statute rooted in a named federal head of constitutional authority (such as that considered in *Oldman River*) to a project based environmental assessment approach where the environmental assessment legislation is itself rooted in heads of constitutional power, limiting its reach to environmental *effects* in federal jurisdiction, if indeed it does so”.⁴⁵

38. She specifically noted that the environment was a diffuse subject with overlap between the levels of government and that federal review should be for the entire proposed project and not simply the scope of the project that may fall within federal jurisdiction.⁴⁶ She noted that *Oldman River* involved a project wholly within the province of Alberta but with environmental *effects* upon both federal and provincial interests. Therefore, both federal and provincial environmental legislation was implicated.⁴⁷

39. Justice Greckol invoked La Forest J’s description of the environment as “a constitutionally abstruse matter” with considerable overlap and uncertainty.⁴⁸ She pointed out that the “oversight of environmental impacts cannot be the monopoly of one level of government, as environmental impacts are ubiquitous, touching upon a multiplicity of diverse interests.”⁴⁹ She emphasized that the *IAA* and the *Regulations* worked together and are informed by each other and therefore they must be read and interpreted together because there was one legislative scheme to characterize here, and one “pith and substance”.⁵⁰

40. Next, she concluded the pith and substance of the *IAA* is to “establish a federal environmental assessment regime that facilitates planning and information gathering with respect to specific projects to inform decision-making, cooperatively with other jurisdictions, as to whether the

⁴⁴ *Ibid* at para 443 (AR, Vol I at 132-133).

⁴⁵ *Ibid* at para 445 (AR, Vol I at 134).

⁴⁶ *Ibid* at para 444 (AR, Vol I at 133).

⁴⁷ *Ibid* at para 444 (AR, Vol I at 133).

⁴⁸ *Ibid* at para 446 (AR, Vol I at 134).

⁴⁹ *Ibid* at para 447 (AR, Vol I at 134).

⁵⁰ *Ibid* at para 554 (AR, Vol I at 157).

project should be authorized to proceed on the basis that identified adverse environmental effects purported to be within federal jurisdiction are in the public interest”.⁵¹

41. Also, she found each of the “triggers” listed in s 7 to be within federal jurisdiction.⁵² Central to her determination was that s 7 effectively limits the *IAA*’s scope to “effects within federal jurisdiction”.⁵³ Crucially, she also held that:

This also holds true for the projects that are really at issue in this case – those located entirely within a province, and *prima facie* falling within s 92 or 92A of the *Constitution Act, 1867*. Those local or “intra-provincial” projects on the Project List are projects which are being assessed for the purpose of determining whether the effects within federal jurisdiction (e.g., on fish and fish habitat, aquatic species, migratory birds, etc.) caused by the project are in the public interest.⁵⁴

42. In dealing with one of the Majority’s main points concerning Canada’s constitutional jurisdiction to assess a local project, Justice Greckol held there is a difference between “the jurisdiction Parliament has been granted under the *Constitution Act, 1867* with how it chooses to exercise that jurisdiction.”⁵⁵

43. Justice Greckol also commented on the Majority’s view that the *IAA* gave the federal government a “veto” over provincial projects by saying that such a position “fails to recognize the legitimate role of the federal government in assessing projects that cause *effects* within federal jurisdiction”.⁵⁶ In particular, they failed to accept that “the *IAA* has carved out its areas of environmental concern in federal jurisdiction and focused on controlling those effects”.⁵⁷

44. Finally, she dismissed the argument that s 92A(1) of the Constitution creates a provincial enclave that is immune from valid federal assessment. As Justice Greckol pointed out, such an approach would mean that “there is no “federal aspect” to “provincial” natural resource projects which nevertheless impact federal matters, such as fish, because s 92A(1) grants the provinces

⁵¹ *Ibid* at para 593 (AR, Vol I at 166).

⁵² *Ibid* at paras 612-657 (AR, Vol I at 172-181).

⁵³ *Ibid* at para 605 (AR, Vol I at 170).

⁵⁴ *Ibid* at para 606 (AR, Vol I at 170).

⁵⁵ *Ibid* at para 680 (AR, Vol I at 187-188).

⁵⁶ *Ibid* at para 717 (AR, Vol I at 196).

⁵⁷ *Ibid* at para 718 (AR, Vol I at 196).

exclusive jurisdiction over *all aspects* of environmental consequences from exploration and management of natural resources.”⁵⁸

PART II. QUESTIONS IN ISSUE

45. The following questions are raised by this appeal:

A. Is Part 1 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, *intra vires* the legislative authority of the Parliament of Canada under the *Constitution Act, 1867*?

B. Are the *Physical Activities Regulations*, SOR/2019-285, *intra vires* the legislative authority of the Parliament of Canada under the *Constitution Act, 1867*?

C. Did the Alberta Court of Appeal err in its characterization of the pith and substance of the *IAA* and *Regulations*?

D. Did the Alberta Court of Appeal err in its classification of the *IAA* and the *Regulations*?

E. Did the Alberta Court of Appeal err in its application of the doctrine of inter-jurisdictional immunity to disapply the *IAA* and the *Regulations*?

PART III. STATEMENT OF ARGUMENT

A. Characterizing Laws under the Division of Powers: General Principles

46. The *Constitution Act, 1867* exhaustively divides legislative jurisdiction between Parliament and the provincial legislatures. There are two steps to determine whether legislation is supported by a federal or provincial head of power: 1) Characterize the law’s pith and substance; and 2) Classify the pith and substance with reference to the classes of subjects, or heads of power, in ss

⁵⁸ *Ibid* at para 731 (AR, Vol I at 199).

91 and 92 of the *Constitution Act, 1867*.⁵⁹ This analysis applies to both the legislation and regulations.⁶⁰

47. A proper characterization analysis demonstrates that the *IAA*'s pith and substance is to establish a federal environmental assessment process to safeguard against adverse environmental effects in relation to matters within federal jurisdiction. The pith and substance of the *Regulations* are to capture those major projects with the greatest potential for adverse effects on matters within federal jurisdiction (as listed in s 7); and in the exercise of federal regulatory power or funding in other existing federal schemes (s 8); so they can enter into the environmental assessment process in the *IAA*. The pith and substance of the *IAA* and *Regulations* are properly classified as being in relation to multiple federal heads of power under the *Constitution Act, 1867*: s 91(12) (Sea Coast and Inland Fisheries), s 132 (Imperial Treaties),⁶¹ s 91(24) "Indians and Lands Reserved for the Indians",⁶² and the residual portion of s 91 (peace, order and good government, or POGG).

1) Step One: Precisely Identifying the Matter

48. First, the law's pith and substance or "main thrust," is determined, with reference to both its purpose and effects.⁶³ This is considered the "matter" of the law. To establish a law's purpose, the Court may consider intrinsic evidence (such as purpose clauses) and extrinsic evidence (such as Hansard).⁶⁴ The effects of a law include the legal effect of the text and its practical consequences.⁶⁵

⁵⁹ *Ibid* at para 164 (AR, Vol I at 57); [References re Greenhouse Gas Pollution Pricing Act, 2021 SCC 11](#) at paras 47 and 114 [*Re GGPPA*]; [Desgagnés Transport Inc. v Wärtsilä Canada Inc, 2019 SCC 58](#) at paras 30-31 and 38 [*Desgagnés*]; [Quebec \(Attorney General\) v Lacombe, 2010 SCC 38](#) at para 19 [*Lacombe*]; [Reference re Securities Act \(Canada\), 2011 SCC 66](#) at paras 63-66 [*Securities Reference*].

⁶⁰ ABCA Reasons, *supra* note 6 at para 165 (AR, Vol I at 57), citing [R v Morgentaler, \[1993\] 3 SCR 463](#) at 480-481, discussing [Texada Mines Ltd. v Attorney-General of British Columbia, \[1960\] SCR 713](#).

⁶¹ ABCA Reasons, *supra* note 6 at paras 274, 277-281, 386, 390 and 392 (AR, Vol I at 87-89 and 116-117).

⁶² *Ibid* at paras 394-395 (AR, Vol I at 118).

⁶³ *Re GGPPA*, *supra* note 59 at para 51.

⁶⁴ *Ibid*; [Kitkatla Band v British Columbia, 2002 SCC 31](#) at para 53 [*Kitkatla*].

⁶⁵ *Re GGPPA*, *supra* note 59 at para 51; *Securities Reference*, *supra* note 59 at para 64.

Effects may be relevant in so far as they reveal the pith and substance, but merely incidental effects will not disturb the constitutionality of an otherwise *intra vires* law.⁶⁶

2) Step Two: Classifying the Matter within a Head of Power

49. Second, the Court classifies the “matter” with reference to the classes of subjects, or heads of power, listed in ss 91 or 92 of the *Constitution Act, 1867*. This stage of the analysis involves interpreting the scope of the different heads of power.⁶⁷ If a law is not assignable to a head of power possessed by the enacting level of government, it is invalid under the division of powers.

3) Additional Considerations

50. In the *GGPPA Reference*, this Court added three observations to the two step analysis: 1) the pith and substance must always be identified as precisely as possible; 2) the pith and substance formulation can include the “means” of a statute in appropriate circumstances; and 3) the pith and substance analysis should be kept separate from the classification analysis.⁶⁸ Further, when conducting a division of powers analysis, courts must take into account the principle of co-operative federalism, which favours, where possible, the concurrent operation of statutes enacted by governments at both levels.⁶⁹

B. Jurisdiction over the Environment is Overlapping

51. Before applying the analytical framework outlined above, it is important to understand the particular manner in which the power to regulate the environment has been described by this Court. Under the Constitution, the “environment” is not a head of power assigned to either Parliament or

⁶⁶ [Global Securities Corp v British Columbia \(Securities Commission\), 2000 SCC 21](#) at para [23](#) [[Global Securities](#)].

⁶⁷ See for example [Reference re Pan-Canadian Securities Regulation, 2018 SCC 48](#) at para [86](#); [Desgagnés, supra note 59](#) at para [39](#); [Re GGPPA, supra note 59](#) at para [47](#).

⁶⁸ [Re GGPPA, supra note 59](#) at paras [52-56](#).

⁶⁹ [Desgagnés, supra note 59](#) at paras [83-85](#); [Rogers Communications Inc v Châteauguay \(City\), 2016 SCC 23](#) at para [38](#) [[Rogers](#)]; [Canadian Western Bank v Alberta, \[2007\] 2 SCR 3](#) at para [27](#) [[Canadian Western Bank](#)].

provincial Legislatures.⁷⁰ This Court has held that both provincial and federal legislation can impact the environment.

52. In her dissenting opinion, Justice Greckol set out five “important legal points” that prove useful in framing the issues raised in this appeal.⁷¹ They are:

- a. The environment “is a diffuse subject that cuts across many different areas of constitutional responsibility, some federal, some provincial”;⁷²
- b. Some local projects will have both a provincial aspect and a federal aspect;⁷³
- c. Due to this overlap, both federal and provincial environmental assessment regimes can apply to a given project, which has been held to be “neither unusual nor unworkable”;⁷⁴
- d. A federal environmental assessment regime applicable to local projects is permitted to review and assess the *entire project* as proposed by a proponent, rather than simply the scope of the project thought to fall within federal jurisdiction;⁷⁵ and
- e. There is no constitutional imperative that environmental assessment legislation use a particular trigger to initiate a federal assessment, such as the “affirmative regulatory duty” described in *Oldman River*.⁷⁶

53. When assessing the constitutional validity of a provision relating to the environment, it is necessary to consider if the pith and substance of the legislation falls within one or more of the classes of subjects assigned in the *Constitution Act, 1867* to the enacting legislature. If so, it is constitutionally valid.⁷⁷

54. The corollary to this analysis is that legislation whose pith and substance falls within the jurisdiction of the legislature that enacted it may incidentally affect matters beyond the

⁷⁰ *Oldman River*, *supra* note 1 at 63.

⁷¹ ABCA Reasons, *supra* note 6 at para 444 (AR, Vol I at 133).

⁷² [R v Hydro-Québec](#), [1997] 3 SCR 213 at para 112 [*Hydro-Québec*]; see also *Oldman River*, *supra* note 1 at 63-64; [Ontario v Canadian Pacific Ltd](#), [1995] 2 SCR 1031 at paras 17-18 and 39-43 [*Canadian Pacific*].

⁷³ *Oldman River*, *supra* note 1 at 69; [Quebec \(Attorney General\) v Moses](#), 2010 SCC 17 at para 36 [*Moses*].

⁷⁴ [Quebec \(Attorney General\) v Canada \(National Energy Board\)](#), [1994] 1 SCR 159 at 193 [*Quebec v Canada (NEB)*].

⁷⁵ *MiningWatch*, *supra* note 16 at paras 39-42.

⁷⁶ *Moses*, *supra* note 73 at para 13, aff’d g [2008 QCCA 741](#) at paras 93-115.

⁷⁷ *Hydro-Québec*, *supra* note 72 at para 54.

legislature’s jurisdiction without being unconstitutional.⁷⁸ For this reason, the dominant purpose of the legislation is decisive, whereas incidental effects will not disturb the constitutionality of an otherwise *intra vires* law. The pith and substance doctrine is founded on the recognition that it is, in practice, impossible for a legislature to exercise its jurisdiction over a matter effectively without incidentally affecting matters within the jurisdiction of another level of government.⁷⁹

55. This Court has repeatedly emphasized that the environment is not an independent subject-matter under the *Constitution Act, 1867*.⁸⁰ In *Oldman River*, La Forest J. described the environment, in a generic sense, as encompassing “the physical, economic and social environment touching several of the heads of power assigned to the respective levels of government.”⁸¹ As recognized by this Court, Parliament or a provincial legislature can enact legislation directed at preventing detrimental impacts on the environment.⁸²

56. This Court has also recognized that while the existence of environmental assessment regimes at both levels of government may result in overlapping assessments, this is “neither unusual nor unworkable.”⁸³

57. *EARPGO* mirrors the decision-based prohibitions in s 8 of the *IAA* and the sections setting out the processes and administration of the *IAA*. In describing *EARPGO* in this manner, La Forest J. was not looking to mere exercises of federal power. Instead, the interpretive approach involved looking at a specific power in the catalogue of powers in the *Constitution Act, 1867* and considering how they may be “employed to meet or avoid environmental concerns.”⁸⁴

58. Justice La Forest gave the example of the federal regulation of railways, and used the legislative mandate in the *National Transportation Act, 1987* to note the scope of the head of power. He confirmed that Parliament may deal with biophysical environmental concerns touching upon the operation of railways so long as the legislation in question relates to railways. Further,

⁷⁸ *Global Securities*, *supra* note 66 at paras [23-24](#) and [38](#); *Lacombe*, *supra* note 59 at paras [36](#) and [38](#); *Re GGPPA*, *supra* note 59 at para [464](#).

⁷⁹ *Canadian Western Bank*, *supra* note 69 at para [29](#).

⁸⁰ *Oldman River*, *supra* note 1 at 63-64; *Quebec v Canada (NEB)*, *supra* note 74 at 193; *Hydro-Québec*, *supra* note 72 at para [59](#); *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40 at para [33](#) [*Spraytech*].

⁸¹ *Oldman River*, *supra* note 1 at 63-64.

⁸² *Hydro-Québec*, *supra* note 72 at para [112](#).

⁸³ *Quebec v Canada (NEB)*, *supra* note 74 at 193.

⁸⁴ *Oldman River*, *supra* note 1 at 65-66.

he noted the varieties of impacts that a rail line could have and endorsed Parliament's broad authority to consider a variety of factors:

In my view, all of these considerations may validly be taken into account in arriving at a final decision on whether or not to grant the necessary approval. To suggest otherwise would lead to the most astonishing results, and it defies reason to assert that Parliament is constitutionally barred from weighing the broad environmental repercussions, including socio-economic concerns, when legislating with respect to decisions of this nature.⁸⁵

59. This Court recognized that projects could have different aspects, provincial and federal, over which each level of government could validly legislate. It has also recognized that local projects, although otherwise falling within provincial jurisdiction, may also be federal if they impinge on an area of federal jurisdiction.⁸⁶ *La Forest J.* found that because *EARPGO* was auxiliary, the environmental impact assessments could “only affect matters that are ‘truly in relation to an institution or activity that is otherwise within [federal] legislative jurisdiction.’” As the impact assessment process under the *EARPGO* was sufficiently proximate to the subject matter of federal jurisdiction involved, the process could be supported by the particular head of federal power invoked at each instance.⁸⁷

60. The same can be said about the *IAA*. The various “triggers” in the *IAA* establish the necessary proximity to federal heads of powers.

C. The Majority Erred in Step One by Incorrectly Identifying the Pith and Substance of the *IAA* and *Regulations*

61. A proper characterization analysis illustrates the pith and substance of the *IAA* is to safeguard against adverse environmental effects in relation to matters within federal jurisdiction. That is not what the Majority of the Court of Appeal found. Instead, it held that the environment is “not, for constitutional purposes, a superordinate subject matter that transcends or trumps the division of powers.”⁸⁸ The Majority added:

...since the environment is not a head of power, such regulation cannot be based on the environment alone. Neither the environment, nor environmental

⁸⁵ *Ibid* at 66.

⁸⁶ *Ibid* at 68-69.

⁸⁷ *Ibid* at 72.

⁸⁸ ABCA Reasons, *supra* note 6 at para 175 (AR, Vol I at 60).

regulation, is an independent subject matter of jurisdiction for either government level. As a diffuse subject, the environment cuts across several different areas of constitutional responsibility, some provincial, some federal. For both government levels, legislation relating to the environment or environmental protection *must be tied to a specific head of power under the Constitution*. In other words, the legislation must actually fall within the specific characteristics of the head of power under which it is claimed to be justified.⁸⁹

62. While the Majority properly articulated the characterization test, they erred in its application in four significant ways: (1) by artificially narrowing the characterization analysis; (2) by improperly focusing on the *IAA*'s efficacy or practicality; (3) by improperly dismissing the effectiveness of judicial oversight; and (4) by improperly looking at classification as part of its characterization analysis.

1) The Majority Artificially Narrowed the Characterization Analysis

63. The Majority consistently and incorrectly focused on how the *IAA* affects “intra-provincial projects.” They stated: “it must be borne in mind that the starting point is that provincial Legislatures have primary jurisdiction over intra-provincial designated projects”;⁹⁰ and “[n]or is Parliament entitled to require federal oversight and approval of intra-provincial activities otherwise within provincial jurisdiction...”⁹¹

64. The Majority added that “duplication of comprehensive environmental impact assessments” would create a “jurisdictional nightmare for proponents of intra-provincial designated projects.” The resulting consequences for provincial governments would be the loss of “exclusive jurisdiction over those projects, namely constitutional gridlock and improper intrusion into provincial jurisdiction.”⁹² The Majority also rejected the arguments that Parliament has only regulated what it calls “adverse effects within federal jurisdiction”⁹³ and that the scheme only has incidental impacts on provincial powers.⁹⁴ This analysis of the Majority fails to account for the

⁸⁹ *Ibid* at para 178 (AR, Vol I at 60-61). See also *ibid* at para 372 (AR, Vol I at 111).

⁹⁰ *Ibid* at para 229 (AR, Vol I at 76). See also *ibid* at paras 12 and 14 (AR, Vol I at 9).

⁹¹ *Ibid* at para 9 (AR, Vol I at 8).

⁹² *Ibid* at para 259 (AR, Vol I at 83).

⁹³ *Ibid* at para 262 (AR, Vol I at 84).

⁹⁴ *Ibid* at para 263 (AR, Vol I at 84).

Oldman River decision having affirmed the basis for federal assessment of intra-provincial projects for decades under previous legislation.⁹⁵

65. The Majority's view of the provinces' "primary jurisdiction" is contrary to the recognition of the shared jurisdiction that is necessary when dealing with the regulation of the environment. In *Oldman River*, this Court specifically held that such rigid characterizations are not useful: "What is not particularly helpful in sorting out the respective levels of constitutional authority over a work such as the Oldman River dam, however, is the characterization of it as a "provincial project" or an undertaking "primarily subject to provincial regulation" as the appellant Alberta sought to do."⁹⁶

2) The Majority Improperly Focused on the IAA's Efficacy or Practicality

66. Secondly, rather than focus on the pith and substance of the *IAA*, the Majority improperly turned to their own subjective and speculative evaluation of the legislation's efficacy under the guise of looking at the "practical effects" of the *IAA*.⁹⁷ The Majority, citing this Court's decision in *Ward v Canada (Attorney General)*, accepted that reviewing the efficacy of legislation is not relevant to a division of powers analysis as it does not advance the pith and substance inquiry.⁹⁸ However, they also noted that the "practical effects" of the legislation remain a relevant consideration, and explained that the difference between the two concepts is that efficacy "goes to the effectiveness of the means chosen to achieve the identified legislative purpose; practical effects to the actual impact of the legislation on those subject to it."⁹⁹

67. Despite accepting this framework, the Majority's approach focused on the effectiveness of the means chosen and relied on factors like delay,¹⁰⁰ uncertainty¹⁰¹ and investor confidence¹⁰² to support its characterization of the *IAA*.

⁹⁵ *Oldman River*, *supra* note 1; *EARPGO*, *supra* note 18; *CEAA 1992*, *supra* note 16; *CEAA 2012*, *supra* note 5.

⁹⁶ *Oldman River*, *supra* note 1 at 68.

⁹⁷ [Reference re Firearms Act, \[2000\] 1 SCR 783](#) at paras 2 and 18 [*Firearms Reference*].

⁹⁸ ABCA Reasons, *supra* note 6 at para 356 (AR, Vol I at 108); [Ward v Canada \(Attorney General\), 2002 SCC 17](#) at para 26 [*Ward*].

⁹⁹ ABCA Reasons, *supra* note 6 at para 356 (AR, Vol I at 108).

¹⁰⁰ *Ibid* at para 358 (AR, Vol I at 108).

¹⁰¹ *Ibid* at para 362 (AR, Vol I, at 109).

¹⁰² *Ibid* at para 365 (AR, Vol I at 109).

68. The Majority also speculated that the review process set out under the *IAA* could “kill” any intra-provincial project subject to review under the *IAA* through many means with “death by delay” being one of them.¹⁰³ The Majority’s assertion that in “the commercial world, no responsible investor is willing to wait for years, much less indefinitely, for an answer on whether required approvals are forthcoming...”¹⁰⁴ is unsupported by any evidence in the record. There is no evidence that decisions under the *IAA* are indefinite.

69. Therefore, despite its earlier statement that “efficacy” (under the guise of practicality) is not a proper basis to review the constitutional validity of legislation, that is exactly what the Majority did. In doing so, they relied on speculation and an assumed a course of action by federal government officials that has no basis in the evidence.

70. The Majority also speculated on the effect of “uncertainty” in the process imbedded in the *IAA*. The Majority concludes that investors will not invest in Canada because of the “uncertainty” caused by the *IAA* process.¹⁰⁵ Of particular note, the Majority speculated that “it is a given that all regulatory processes will involve some elements of uncertainty about the *outcome*. But under this legislative scheme, the problem is the *process* itself. Uncertainty infects every step of the process.”¹⁰⁶ To that they added:

All of this substantially increases regulatory risk and cannot help but negatively impact investor confidence and capital investment in Canada. Potential investors might well view the *IAA* as the poster child for “invest in this country at your peril”.¹⁰⁷

71. It is a clear error to find legislation unconstitutional based on speculation, innuendo and scenarios that have no basis in fact in the record before the Court. More importantly, even if there was evidence of such delays and uncertainty, that is no basis to find the legislation unconstitutional.

3) The Majority Improperly Dismissed the Effectiveness of Judicial Oversight

72. Thirdly, the Majority failed to recognize that basic administrative law limits infuse all decision-making under the *IAA* and are therefore essential to properly understanding (and thus

¹⁰³ *Ibid* at para 360 (AR, Vol I at 108).

¹⁰⁴ *Ibid* at para 361 (AR, Vol I at 109).

¹⁰⁵ *Ibid* at para 362 (AR, Vol I at 109).

¹⁰⁶ *Ibid* at para 363 (AR Vol I at 109).

¹⁰⁷ *Ibid* at para 365 (AR, Vol I at 109).

characterizing) it. This led the Majority to broaden its pith and substance formulation by erroneously concluding that the *IAA*'s scope is unlimited and permits the regulation of any projects regardless of their effects on federal jurisdiction. The *IAA*'s limits are enforceable through judicial review. However, the Majority goes so far as to conclude that all reviews of decisions under the *IAA* are doomed to fail because there is no "line delimiting" what is unreasonable.¹⁰⁸ As a result it held that "there is no air of reality to the suggestion that the decision by the GiC or Minister to designate certain kinds of intra-provincial activities as designated projects would be subject to a successful judicial review."¹⁰⁹

73. The Majority also offered that a judicial review remedy would essentially be of no use because there was no interim process to be utilized while the review "wound its way through the courts".¹¹⁰ They concluded that "...under this legislative regime, the suggestion of judicial review as a remedy for federal overreach is neither a practical reality let alone a legal one."¹¹¹

74. The Majority's approach is inconsistent with *Vavilov*,¹¹² which affirmed that a reasonableness review is robust, and this Court's finding in the *GGPPA Reference* that basic administrative law limits are essential to properly understanding (and thus characterizing) legislation:

It is notable that the *GGPPA* does not itself define the word "stringency" [...] But this does not mean that the Governor in Council's discretion with respect to listing is "open-ended and entirely subjective": Alta. C.A. reasons, at para. 221. Rather, the Governor in Council's discretion is limited both by the statutory purpose of the *GGPPA* and by specific guidelines set out in the statute for listing decisions [...] In other words, although the Governor in Council has considerable discretion with respect to listing, that discretion is limited, as it must be exercised in accordance with the purpose for which it was given. The Governor in Council certainly does not, therefore, have "absolute and untrammelled 'discretion'" [...] Similarly, the Governor in Council's discretion under the *GGPPA* to make regulations modifying the schedules and, in some cases, provisions of the statute itself does not make the pith and substance of the *GGPPA* broader.¹¹³

¹⁰⁸ *Ibid* at paras 367 and 370 (AR, Vol I at 110-111).

¹⁰⁹ *Ibid* at para 367 (AR, Vol I at 110).

¹¹⁰ *Ibid* at para 370 (AR, Vol I at 110-111).

¹¹¹ *Ibid* at para 371 (AR, Vol I at 111).

¹¹² [*Canada \(Minister of Citizenship and Immigration\) v Vavilov*, 2019 SCC 65](#) at paras [67](#) and [72](#) [*Vavilov*].

¹¹³ *Re GGPPA*, *supra* note 59 at para [73](#).

75. In sum, all of these “factors” that were looked at and relied on by the Majority are irrelevant in determining whether the *IAA* is constitutionally valid legislation. The pith and substance analysis is not concerned with the efficacy of the law, or whether it actually achieves its goals or the purpose could be achieved more effectively in another way. Rather, courts inquire into how the legislation sets out to achieve its purpose to better understand its meaning. The effectiveness of the legislation is a concern “properly directed to and considered by Parliament. Within its constitutional sphere, Parliament is the judge of whether a measure is likely to achieve its intended purposes...”¹¹⁴

4) The Majority Erred by Looking at Classification as Part of Its Characterization Analysis

76. Finally, the Majority erred by engaging in an analysis of Parliament’s jurisdiction as part of its characterization analysis.¹¹⁵ The pith and substance of legislation must be determined “without regard to the heads of legislative competence.”¹¹⁶ This Court has cautioned that conflating the two aspects of the analysis can blur and overly orient the analysis towards results.¹¹⁷

77. When a proper review of the *IAA* is completed, it is clear from the legislation’s scoping, assessment, decision-making, and condition-setting mitigation provisions that the *IAA*’s dominant characteristic is to safeguard against adverse environmental effects in relation to matters within federal jurisdiction. The *IAA* does this by, first, determining whether a project may have Federal Effects before requiring an assessment and, second, reviewing those projects and imposing conditions only related to the Adverse Federal Effects.

¹¹⁴ *Firearms Reference*, *supra* note 97 at para 18. See also: *RJR-MacDonald v Canada*, [1995] 3 SCR 199 at paras 44 and 123; *Anti-Inflation Reference*, [1976] 2 SCR 373 at 424-425; *Ward*, *supra* note 98 at para 26.

¹¹⁵ ABCA Reasons, *supra* note 6 at paras 219-226 and 229-250 (AR, Vol I at 72-81).

¹¹⁶ *Re GGPPA*, *supra* note 59 at para 56.

¹¹⁷ *Chatterjee v Ontario*, 2009 SCC 19 at para 16.

5) The Proper Approach to Step One Characterization

a) The Dominant Purpose of the IAA is Environmental Assessment of Possible Adverse Federal Effects

78. A proper approach to step one of the analysis demonstrates that the *IAA*'s focus and purpose is clearly targeting matters within federal jurisdiction. The dominant purpose of the *IAA* is best discerned by examining the purpose clause and the general structure and operation of the *IAA*.

b) The Stated Purposes of the IAA reflect a focus on Adverse Federal Effects

79. This Court recognized the usefulness of a purpose clause when considering the constitutionality of an enactment.¹¹⁸ The Majority's characterization of the *IAA* ignores the *IAA*'s explicit focus on matters within federal jurisdiction. Courts require "cogent grounds" before imputing to legislation some object other than what is seen on the face of the enactment itself.¹¹⁹

80. Section 6 identifies the purposes of the *IAA* which includes protection of the environment and the health, social and economic conditions within Parliament's legislative authority from adverse effects caused by a designated project. It also establishes an impact assessment regime that takes into account both positive and adverse effects that may be caused by designated projects.

c) The IAA's scoping provisions focus on matters of Federal Jurisdiction

81. The scoping provisions in ss 7, 8, 82 and 83, which act as triggers for the application of the *IAA*, further indicate its dominant purpose. Sections 7 and 8 delineate an initial zone of protection for federal jurisdiction by prohibiting proponents or the federal government from taking steps to advance designated projects which could have Federal Effects without approval, or, if approved, from proceeding unless proponents comply with conditions that will mitigate or avoid Adverse Federal Effects. The Majority focused on s 7 and made little comment on ss 8, 82 and 83.

82. The scoping provisions provide three separate groups of triggers for a federal impact assessment under the *IAA*: a federal decision, effects within federal jurisdiction, and projects on federal lands or outside Canada (the latter not being at issue in this appeal).

¹¹⁸ *Ibid* at para 17.

¹¹⁹ [Abitibi Power and Paper Co v Montreal Trust Co, \[1943\] 4 DLR 1 \(UK JCPC\)](#) at 9.

83. The decision-based trigger, set out in s 8, mirrors the definition of “direct or incidental effects” in s 2. Similar to the *EARPGO* that was found *intra vires* by this Court in *Oldman River*,¹²⁰ this trigger restricts a federal authority from exercising any power or performing any duty or function that could permit a designated project to be carried out, or from providing financial assistance to that end; unless the Agency determines under s 16(1) that no assessment is required or a decision statement is issued under s 65 that the designated project’s Adverse Federal Effects are in the public interest.

84. The effects-based trigger is set out in s 7. Unlike s 8, it does not link back to any particular pre-existing federal decision-making authority. Rather, it triggers the *IAA*’s review provisions where a designated project may cause one of the effects within federal jurisdiction specified in s 7(1). Each effects-based trigger in s 7 mirrors the definition of “effects within federal jurisdiction” in s 2 of the *IAA*. Each of these is tied to areas of federal jurisdiction and, as such, the constitutional validity of this section flows through them.

85. If a proponent is not proposing any course of action with a designated project that may cause Federal Effects, the *IAA*’s prohibitions will not be triggered and the proponent may move ahead with its project without a federal impact assessment. Further, the general enforcement provisions provide recourse in the form of a review by the President of the Agency of an enforcement order requiring compliance with provisions of the *IAA*, including s 7, and an appeal from any decision arising from that review to the Federal Court. Also pursuant to s 7(3), the prohibitions do not apply where either it has been determined by the Agency at a preliminary stage that no impact assessment is required or a decision statement has been issued and the proponent complies with the conditions set out in it that pertain to adverse effects on areas of federal jurisdiction.

86. The *IAA* does not veto so-called “intra-provincial” projects.¹²¹ Section 7 merely places a temporary hold to prevent a proponent from doing any act or thing in connection with the carrying out of a designated project if it may have Federal Effects, pending review.

87. The ss 7 and 8 triggers do not broadly apply to any project in Canada, but only to designated projects. Designated projects are one or more physical activities that are carried out in Canada or

¹²⁰ *EARPGO*, *supra* note 18 at ss 2 (“proposal”) and 6(b) (ABOA, Tab 2).

¹²¹ ABCA Reasons, *supra* note 6 at paras 24, 34 and 245 (AR, Vol I at 11, 13 and 80).

on federal lands and designated by regulations made under s 109(b) of the *IAA* or by a Ministerial order under s 9(1).¹²²

88. Section 9 allows the Minister to designate a physical activity not prescribed by the *Regulations*, but only if the project could cause Adverse Federal Effects,¹²³ or if public concerns related to those effects warrant the designation.¹²⁴ In considering whether to designate a project, the Minister may consider adverse impacts that the activity may have on the s 35 rights of Indigenous peoples of Canada.¹²⁵

89. Whether by the *Regulations* or a s 9 Ministerial order, project designations are constrained by the purpose of the *IAA*, and subject to being challenged on judicial review on administrative or constitutional grounds, or both, if they are not in relation to adverse federal effects.¹²⁶ As this Court has repeatedly held, even if no express limits appear on a statutory grant of authority, decision-makers, including the GiC, may only exercise discretionary powers consistent with the statutory purpose for which they were granted.¹²⁷ Applying a reasonableness standard,¹²⁸ the reviewing court would determine whether the regulation or order falls within the wording of the enabling authority or is inconsistent with the *IAA*'s purpose.¹²⁹

90. Section 6 necessarily informs and constrains the GiC's and Minister's powers to designate projects. Accordingly, the purpose of the *IAA* informs the scope of its regulation-making powers.

¹²² *IAA*, *supra* note 2, s 2 (“designated project”).

¹²³ *Ibid*, s 9(1).

¹²⁴ *CEAA 2012* also permitted the Minister to designate projects: see *supra* note 5, s 14(2). Under *CEAA 2012*, the Minister received approximately 60 requests, and only designated 3 or 4 projects: Senate, Standing Committee on Energy, The Environment and Natural Resources, *Proceedings*, 42-1, No 54 (7 February 2019) at 182 (Brent Parker) (ABOA, Tab 7).

¹²⁵ *IAA*, *supra* note 2, s 9(2).

¹²⁶ *Katz Group Canada Inc v Ontario*, 2013 SCC 64 at paras 24-25 [*Katz*]; *Ontario (Public Safety and Security) v Criminal Lawyers' Association*, 2010 SCC 23 at para 46 [*Criminal Lawyers*]; and *Catalyst Paper Corp v North Cowichan (District)*, 2012 SCC 2 at para 15 [*Catalyst*].

¹²⁷ *Criminal Lawyers*, *ibid* at para 46; *Catalyst*, *ibid* at para 15; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 53, 56 and 65.

¹²⁸ *Vavilov*, *supra* note 112 at paras 53, 55, 57, 66-68, and 111; *Portnov v Canada*, 2021 FCA 171 at para 10.

¹²⁹ *West Fraser Mills Ltd. v British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22 at para 12. See also: *Katz*, *supra* note 126 at para 28.

For “designated projects” that purpose is primarily circumscribed by ss 6(1)(b), 6(1)(d), and 9 of the *IAA*, and the avoidance of Adverse Federal Effects.

91. Sections 82 and 83 provide a trigger primarily limiting: (1) the carrying out of projects on federal lands; and (2) the carrying out of a project outside of Canada by, or financed by, a federal authority, unless the project is not likely to cause significant adverse environmental effects or, if it is, the effects are justified in the circumstances. Sections 82 and 83 mirror ss 6(a), (c), and (d) of *EARPGO*¹³⁰ which were found *intra vires* Parliament by this Court in *Oldman River*.

d) Not all Designated Projects Undergo an Impact Assessment

92. The *IAA* provides an initial screening to determine whether an impact assessment is required. After the proponent provides an initial description of the designated project,¹³¹ the Agency conducts a time-limited proponent and public consultation process.¹³² It then considers the factors in s 16 of the *IAA* and determines whether a designated project has a sufficient federal aspect to warrant an assessment. While there are a number of factors listed that the Agency must consider,¹³³ the key decision-making factors are the possibility that the carrying out of the designated project may cause Adverse Federal Effects.¹³⁴

93. There is a distinction between the scope of legislative jurisdiction and the “relevant considerations” that can inform the reasonable exercise of that discretion as a matter of administrative law.¹³⁵ A federal legislative scheme may validly prescribe that a decision-maker take into account concerns that seem “provincial” in nature, such as economic benefits to a province. Parliament is not asserting that these considerations themselves fall within federal jurisdiction. Rather, Parliament is identifying the relevant considerations for determining whether to prohibit or allow a project that does adversely affect a matter within federal jurisdiction. Such considerations do not detract from the dominant purpose of the scheme absent a colorable purpose

¹³⁰ *EARPGO*, *supra* note 18, ss 6(a), (c) and (d) (ABOA, Tab 2).

¹³¹ *IAA*, *supra* note 2, s [10](#).

¹³² *Ibid*, ss [11-15](#).

¹³³ Including comments from the public and Indigenous groups, and regional or strategic assessments under the *IAA*, *ibid*, ss [92](#), [93](#) or [95](#).

¹³⁴ As defined in the *IAA*, *ibid*, s [2](#), mirroring the prohibitions in ss [7](#) and [8](#).

¹³⁵ *Oldman River*, *supra* note 1 at 69-70.

or a lack of *bona fides* that does not exist here.¹³⁶ The triggers in the *IAA* ensure the necessary proximity to matters within federal jurisdiction.¹³⁷

94. The factors considered must be read in the context of the *IAA* as a whole, and particularly the ultimate decision-making provisions which are limited to considering whether the Adverse Federal Effects are in the public interest, and imposing conditions related to them. This inherent limitation, along with the limitation of the prohibitions in ss 7 and 8 to Federal Effects, and the possibility of a judicial review, necessarily limits the scope of the factors considered under s 16.

95. At the end of the impact assessment process, the Minister receives a report. While the report must set out the likely effects of the designated project, it must, most importantly, indicate from among those effects more broadly, which are Adverse Federal Effects and, of those, which are significant and to what extent.¹³⁸

e) The Decision-Making Provisions focus the outcome to matters within federal jurisdiction

96. An important indicator of the scheme's pith and substance is the scope of decision-making pursuant to the *IAA*. Sections 60 to 64 of the *IAA* prescribe the decision-making triggered by ss 7 and 8. These decision-making and condition-imposing provisions, especially when considered in conjunction with the operation of the scoping provisions, clearly focus on, and are structured to capture only, Adverse Federal Effects.

97. Section 63 requires a review focused on weighing whether the Adverse Federal Effects are in the public interest and the extent to which they are significant.¹³⁹ It is appropriate and constitutionally sound to weigh the broader public interest, including matters within provincial jurisdiction (such as benefits of a project), against the Adverse Federal Effects to see if the adverse federal effects are in the public interest.¹⁴⁰ If the Minister or GiC determine that the Adverse Federal Effects are in the public interest, then the Minister must impose appropriate conditions in

¹³⁶ *Ibid* at 69.

¹³⁷ *Ibid* at 72. See also: Peter W Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2007), § 15:24 (Online: Proview) [**Hogg**] (ABOA, Tab 8).

¹³⁸ *IAA*, *supra* note 2, ss [28\(3\)](#), [33\(2\)](#) and [51\(1\)\(d\)\(iii\)](#).

¹³⁹ *Ibid*, ss [60\(1\)](#) and [62](#).

¹⁴⁰ *Oldman River*, *supra* note 1 at 65-66.

relation to those Adverse Federal Effects. Conditions must address only those Adverse Federal Effects.¹⁴¹

98. The *IAA* requires the Minister to issue to a proponent of a designated project a decision statement informing them of the ss 60(1)(a) or 62 decision, detailed reasons for the decision, and any conditions imposed pursuant to s 64.¹⁴² A proponent can challenge such a decision by judicial review.

99. The ss 82 and 83 triggers do not require an impact assessment process, but rather require the authority itself to decide if the project is likely to cause significant adverse environmental effects.¹⁴³ If so, the project cannot proceed unless the GiC decides that the effects are justified in the circumstances.¹⁴⁴ The difference in the decisions makes sense. In governing its own affairs, Canada takes a broad approach to environmental effects which must be justified, in contrast to the much more narrow decision in relation to designated projects – focused entirely on Adverse Federal Effects.

100. Finally, the *IAA* recognizes that the environment is a matter of both federal and provincial jurisdiction, and other jurisdictions as defined in the *IAA*, and embeds a variety of tools to further co-operative federalism.¹⁴⁵ Section 12 requires the Agency to offer to consult with any jurisdiction that has powers, duties or functions in relation to an assessment of environmental effects of the designated project for the purpose of preparing for a possible impact assessment of a designated project. Section 21 also reflects this approach and requires consultation and cooperation with other jurisdictions. Section 31 provides that the Minister may approve the substitution of another jurisdiction's process where appropriate, including a provincial process. Section 39 permits the establishment of joint review panels with another jurisdiction, including a province.

101. Cooperation with provincial authorities and reduction of duplication is specifically contemplated and can take the form of coordinated assessments by both parties,¹⁴⁶ joint reviews,

¹⁴¹ *IAA*, *supra* note 2, ss [64\(1\)](#) and [\(2\)](#).

¹⁴² *Ibid*, s [65](#).

¹⁴³ *Ibid*, ss [84-89](#).

¹⁴⁴ *Ibid*, s [90](#).

¹⁴⁵ *Ibid*, s [6\(e\)](#).

¹⁴⁶ See for example: *Impact Assessment Cooperation Agreement Between Canada and British Columbia*, August 2019, online (pdf): *Impact Assessment Cooperation Agreement – Gov.bc.ca* <<https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/environmental->

or the substitution of provincial processes for the federal process where appropriate. That approach was encouraged by this Court in the context of *CEAA 1992* when it stated that governments “can, and should, minimize duplication by using the coordination mechanisms provided for in the [Canadian Environmental Assessment] Act.”¹⁴⁷

f) The Effect of the IAA is not to Create a Veto, but to Protect Aspects of the Environment Within Federal Jurisdiction

102. As noted above at paragraph 86, the suggestion that the *IAA* provides a veto over the provincial regulation of natural resource projects ignores the pith and substance of the *IAA*. The prohibitions only restrict a proponent from doing certain things that impact upon federal jurisdiction in certain circumstances including that they comply with conditions set out in s 64 that must be aimed at an area of federal jurisdiction. The prohibitions are limited to acts or things in connection to designated projects that may have Federal Effects. To take a view of the provincial powers over resource development as conferring such broad legislative competence would unduly exclude federal jurisdiction in a manner inconsistent with the jurisprudence since *Oldman River*.

103. As described by this Court in *Quebec (Attorney General) v Lacombe*, the effects of a law include the legal effect of the text as well as practical consequences of the application of the statute.¹⁴⁸ Contrary to what the Majority found, the practical consequences of the *IAA* are focused on protecting those aspects of the environment that are within federal jurisdiction.

104. In terms of legal effect, pursuant to s 7, a proponent of a designated project is at most prohibited from doing any act or thing in connection with the carrying out of a designated project if that act or thing may cause effects within federal jurisdiction. Pursuant to s 8, a federal authority is at most prohibited from exercising its authority in relation to a designated project unless certain requirements are met.

105. Any hold instigated by ss 7 and 8 may only be temporary. The prohibitions do not apply if the Agency decides under s 16 that an impact assessment is not required. If the Adverse Federal Effects are in the public interest, a proponent need comply only with the conditions with respect

[assessments/working-with-other-agencies/agreements-with-the-canadian-environmental-assessment-agency/impact_assessment_cooperation_agreement_signed.pdf](#)>
[[impact_assessment_cooperation_agreement_signed.pdf \(gov.bc.ca\)](#)].

¹⁴⁷ *MiningWatch*, *supra* note 16 at para 41.

¹⁴⁸ *Lacombe*, *supra* note 59 at para 20.

to those Adverse Federal Effects to proceed. The restrictions on conditions to mitigate adverse effects on federal jurisdiction prevents such conditions from becoming a “back door” to regulating areas of provincial jurisdiction. In effect, therefore, s 8 is no different than the regime at issue under *EARPGO* or *CEAA, 1992*, and s 7 is no different than the *CEAA 2012* regime.

106. The *IAA* provisions are constrained by their purpose and function, which are tied to matters within federal jurisdiction. These constraints foreclose reviews where there are no Adverse Federal Effects. The *IAA* is focused on Adverse Federal Effects and conditions mitigating them.¹⁴⁹ Its scope is carefully balanced to ensure the federal government has the opportunity to protect aspects of the environment in relation to matters within federal jurisdiction, in a manner consistent with the precautionary principle, as recognized by this Court.¹⁵⁰

107. The federal role is well summarized in Professor Peter W. Hogg’s observation that “the effect of the *Oldman River* decision is to confer on the federal Parliament the power to provide for environmental assessment of any project that has any effect on any matter within federal jurisdiction.”¹⁵¹

g) The Pith and Substance of the Regulations is to Capture Projects with the Greatest Potential for Adverse Federal Effects

108. As with the *IAA*, the pith and substance of the *Regulations* are to capture those major projects with the greatest potential for adverse effects on matters within federal jurisdiction (as listed in s 7); and in the exercise of federal regulatory power in other existing federal schemes (section 8) so they can enter into the environmental assessment process in the *IAA*.

109. The *Regulations* are ancillary to the operation of the *IAA* regime and cannot be understood outside of that context. The choice of project types to designate is a legitimate policy choice by the federal government that cannot derogate from the *Regulations*’ valid pith and substance. The *Regulations* must be reviewed in the context of the provisions and purposes of the *IAA* to protect areas within federal jurisdiction.

¹⁴⁹ See for example, in the context of *CEAA 2012*: [*Tsleil-Waututh Nation v Canada \(Attorney General\)*, 2018 FCA 153](#) at paras 401-402.

¹⁵⁰ *Spraytech*, *supra* note 80 at paras 31-32.

¹⁵¹ Hogg, *supra* note 137, § 30:32 (ABOA, Tab 8).

h) The Dominant Purpose of the Regulations is to Focus the IAA on Major Projects with the Greatest Potential for Adverse Federal Effects

110. The Regulatory Impact Analysis Statement (RIAS) is an important indicator that can be used to confirm the purpose of a regulation since it is prepared as part of the regulatory process.¹⁵² The RIAS published with the *Regulations* confirms their purpose:

The objective of the Project List is to capture those major projects with the greatest potential for adverse effects in the areas of federal jurisdiction related to the environment, so that they can enter into the impact assessment process. The Project List also provides certainty and clarity to proponents as to which projects are subject to the *IAA*.¹⁵³

111. The provisions of the *IAA* confirm this purpose. As noted earlier, while the provision that empowers the GiC to create the *Regulations* does not explicitly limit what types of “physical activities” can be designated, the *IAA*¹⁵⁴ constrains the GiC’s regulation-making power to list designated projects to those likely to have Adverse Federal Effects. The RIAS supports this understanding.¹⁵⁵

112. The regulation-making power in the *IAA* is not open-ended but must necessarily be exercised in furtherance of the purpose of the *IAA* and within its legislated constraints, to address adverse Federal Effects.

i) The Effects of the Regulations are to Capture Projects Likely to Cause Adverse Federal Effects

113. The effects of the *Regulations* are tied into the operation of the *IAA* as the *Regulations* are what first brings a physical activity within the regime’s ambit. Once designated, the first question of whether an assessment should be conducted is raised. However, beyond that, the question of whether or not a designated project will be subject to an assessment falls wholly within the *IAA*. Where there is insufficient linkage to federal jurisdiction, a reasonable exercise of the Agency’s discretion under s 16(1) will not require an impact assessment.

¹⁵² [Bristol-Myers Squibb Co v Canada, 2005 SCC 26](#) at paras [156-157](#); [Takeda Canada Inc. v Canada, 2013 FCA 13](#) at paras [54-57](#) (dissent) and paras [124-128](#) (majority), leave to appeal to SCC refused, 35276 (13 June 2013); [Synchrude Canada Ltd v Canada, 2016 FCA 160](#) at paras [43-45](#).

¹⁵³ RIAS, *supra* note 14 at [5663](#).

¹⁵⁴ *IAA*, *supra* note 2, ss [6](#), [7](#), [8](#), [9](#), [61](#) and [62](#).

¹⁵⁵ RIAS, *supra* note 14 at [5678](#).

114. The project list actually ensures greater certainty within the broader framework of the *IAA* by limiting the application of the *IAA* to physical activities of certain magnitudes and types rather than applying to all physical activities, which the Agency would then have to screen out. It also limits the scope of the *IAA* by focusing only on those physical activities most likely to have adverse Federal Effects. Overall, the *Regulations* were not expected to significantly change the number of projects subject to federal environmental assessment compared to under *CEAA 2012*.¹⁵⁶

D. The Majority Erred in Step Two by Incorrectly Classifying the “Matter” as not Falling Within Constitutional Heads of Federal Power

1) The Majority’s Unduly Narrow Interpretation

115. To determine the constitutional validity of legislation dealing with the environment, it is necessary to look at the various powers assigned to Parliament and the provincial legislatures by the Constitution to determine if the legislation falls within one or more of the powers assigned to the government that enacted it.¹⁵⁷ This Court has affirmed that Parliament could enact legislation under *several heads of power* at the same time.¹⁵⁸ Given the pith and substance of the *Regulations*, the same classification process and conclusion applies to the *Regulations* as the *IAA* itself.

116. The task is to place the “matter” in this appeal (safeguarding against the enumerated adverse environmental effects) under a head, or heads, of power under the Constitution. This Court in *Oldman River* clearly indicated that regulation of the environment could be spread over several heads of power in both provincial and Federal jurisdiction:

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...¹⁵⁹

¹⁵⁶ *Ibid* at [5676](#).

¹⁵⁷ *Oldman River*, *supra* note 1 at 65; *Hydro-Québec*, *supra* note 72 at para [112](#); *Re GGPPA*, *supra* note 59 at para [533](#).

¹⁵⁸ *Oldman River*, *supra* note 1 at 73; *Firearms Reference*, *supra* note 97 at para [25](#); *Kitkatla*, *supra* note 64 at para [6](#).

¹⁵⁹ *Oldman River*, *supra* note 1 at 67-68 and 72.

117. Regardless of the clear direction from this Court concerning how regulation of the environment is a shared power under the Constitution, the Majority took a very narrow interpretation of the guiding jurisprudence when finding a jurisdictional head of power to support the *IAA*.

118. The Majority added that if upheld, “the *IAA* would reduce the plainly applicable provisions of s 92A, s 92(5), s 92(10), s 92(13), s 92(16) and s 109 to a subordinate status to federal authority. The unavoidable effect of the *IAA* would be the centralization of the governance of Canada to the point this country would no longer be recognized as a real federation.”¹⁶⁰

119. The Majority’s approach to classification runs contrary to the principle of co-operative federalism, the acknowledged shared responsibility of both the provinces and the Federal government for the environment.

2) The *IAA* Falls within Several Heads of Federal Powers

120. The *IAA* relates to multiple heads of federal jurisdiction: s 91(12) (Sea Coast and Inland Fisheries), s 132 (Imperial Treaties)¹⁶¹, s 91(24) “Indians and Lands Reserved for the Indians”¹⁶², and s 91 (POGG). For any given project, one or more federal heads of power may be engaged, depending on the factual context. This precludes a project from categorical predetermination and inflexible scoping. The scoping approach to determining whether an impact assessment is required is not only appropriate, but necessary for effectively legislating to protect the environment in its federal aspects while respecting the division of powers.

121. The effects of each project can and should be considered on their individual merits with respect to whether there is federal jurisdiction to assess them. Factual circumstances in any given case may bring to the fore a federal aspect about which Parliament may legitimately be concerned. For example, in *West Coast Energy*¹⁶³ this Court examined the management and operations of a

¹⁶⁰ ABCA Reasons, *supra* note 6 at para 423 (AR, Vol I at 122).

¹⁶¹ *Ibid* at paras 274, 277-281, 386, 390 and 392 (AR, Vol I at 87-89 and 116-117).

¹⁶² *Ibid* at paras 394-395 (AR, Vol I at 117).

¹⁶³ *Westcoast Energy Inc v Canada (National Energy Board)*, [1998] 1 SCR 322 at paras 64-67 and 78 [*Westcoast*]. The Court also confirmed s 92A of the *Constitution Act, 1867* could not operate to circumscribe Parliament’s jurisdiction over interprovincial natural gas transportation undertakings under s 92(10)(a).

specific pipeline company to ascertain the jurisdictional status of its feeder pipelines and processing facilities. These were located entirely within a province but connected to the pipeline company's interprovincial line, making it sufficiently integrated operationally to be considered part of that federal undertaking. The feeder pipelines and processing facilities were therefore subject to federal environmental assessment legislation.

122. In *Moses*, this Court held that a mining project required a federal environmental assessment due to its potentially harmful impact on fish, notwithstanding certain treaty provisions. The majority stated:

There is no doubt that a vanadium mining project, considered in isolation, falls within provincial jurisdiction under s. 92A of the *Constitution Act, 1867* over natural resources. There is also no doubt that ordinarily a mining project anywhere in Canada that puts at risk fish habitat could not proceed without a permit from the federal Fisheries Minister, which he or she could not issue except after compliance with the *CEAA*. The mining of non-renewable mineral resources aspect falls within provincial jurisdiction, but the fisheries aspect is federal.¹⁶⁴

123. Federal jurisdiction cannot be exhaustively and conclusively defined in a factual vacuum. Often the question is highly contextual, and more than one federal head of power may be engaged. The scope of a federal environmental assessment process that is responsive to the breadth of federal jurisdiction but respectful of provincial jurisdiction requires some inherent flexibility. Environmental protection is a broad subject matter and it is justifiable to use broad language to provide this necessary flexibility.¹⁶⁵ The key point is that in purpose and effect the *IAA* is designed to redress only adverse federal effects. The *IAA*'s provisions are designed to ensure a proper balance, by focusing federal oversight on adverse effects within federal jurisdiction.

3) The impact of “triggers” on the Matter Analysis

124. The error of the Majority in its approach to classification begins with its refusal to accept the role that the *IAA* “triggers” play in the constitutional analysis. These triggers supply the necessary proximity with federal heads of power.

¹⁶⁴ *Moses*, *supra* note 73 at para 36.

¹⁶⁵ *Canadian Pacific*, *supra* note 72 at para 84. See also: [Castonguay Blasting Ltd v Ontario \(Environment\)](#), 2013 SCC 52 at paras 8 and 30-35; *Spraytech*, *supra* note 80 at paras 31-32.

125. The Majority rejected any suggestion that the “triggers” in the *IAA*, primarily sections 7, 8 and 82-83 have any role to play in the classification process. It held that any attempt to equate the “triggers” bringing activities within the *IAA* to federal heads of power was “misplaced”. In their view, the “trigger” which brings an intra-provincial activity within the regulatory scheme under the *IAA* is designation as a designated project.¹⁶⁶ However, ss 7, 8, 82 and 83 anchor federal jurisdiction for the *IAA*. The *Regulations* are part of the scoping mechanism used to determine which projects are reviewed. The *Regulations* do not establish the link to federal jurisdiction or impose prohibitions, but merely limit the scope of the *IAA* by focusing its application to the types of major projects where Adverse Federal Effects are most likely to occur. The Majority conflated the operative impacts of the *IAA* with designations under the *IAA*.

126. As accepted by Justice Greckol in dissent, to appreciate the legislation’s jurisdictional underpinning, this Court must review the triggers which can bring a project within the *IAA*:

In my view, the language used in s 7 is jurisdiction-limiting. It clearly contemplates that the prohibited effects are restricted to those falling within federal jurisdiction, particularly as the effects listed in s 7 are self-defined as being “effects within federal jurisdiction”. It is true that simply defining effects as being within federal jurisdiction does not make it so. However, as catalogued below, I find that each of these s 7 effects fall within a head of federal power under s 91 of the [Constitution Act, 1867](#). In other words, the *IAA* regime applies specifically to *effects* that are changes to the environment within federal jurisdiction.¹⁶⁷

a) Section 8 – federal decision-based trigger

127. As noted earlier, s 8 provides for a “decision-based” trigger for the *IAA*. This requires environmental assessments in the context of federal decision-making powers and spending powers. The trigger in the *IAA* is actually narrower than that in previous environmental legislation such as *EARPGO* in that it is restricted to designated projects, whereas *EARPGO* applied broadly to any “initiative, undertaking or activity” for which Canada had a decision making responsibility. Therefore, this Court’s decision in *Oldman River* which held the *EARPGO* constitutional is instructive in determining of the constitutionality of the *IAA* as it ties to and flows from the s 8 trigger.¹⁶⁸

¹⁶⁶ ABCA Reasons, *supra* note 6 at para 381 (AR, Vol I at 115).

¹⁶⁷ *Ibid* at para 605 (AR, Vol I at 170).

¹⁶⁸ *Oldman River*, *supra* note 1 at 24-26.

b) Sections 82 and 83 – projects on federal lands or outside Canada

128. Sections 82 and 83 prohibitions apply to federal authorities carrying out a project, or exercising a statutory power, duty or function that could permit a project to be carried out, or providing financial assistance to a person for the purpose of carrying out a project, on federal lands or outside of Canada. As accepted by the Majority, there is no doubt as to the constitutionality of the *IAA* as it relates to these triggers.¹⁶⁹ *EARPGO* included similar triggers.¹⁷⁰ Conditions imposed on financial grants pursuant to the federal spending power are clearly within Parliament’s purview.¹⁷¹

c) Section 7 – Effects-Based Triggers

129. The s 7 “triggers” are the gateway for the application of the *IAA*. The dissenting decision of Justice Greckol extensively reviewed these “triggers” and how they anchor themselves to recognized heads of federal power.¹⁷² What the Majority does not accept is that the “triggers” provide the necessary links to the heads of power that support the specific *IAA* provisions allowing for impact assessments and conditions. The Majority also errs by concluding the *IAA* has no “harm” threshold¹⁷³ when in fact the *IAA*’s focus is on the prevention of Adverse Federal Effects.¹⁷⁴

i) Subsection 7(1)(a)(i): Fish and Fish Habitat

130. It is unquestioned that s 91(12) of the *Constitution Act, 1867* provides that “Sea Coast and Inland Fisheries” are within federal jurisdiction. Parliament’s authority extends to the natural resource, the right to exploit it, and the place where the resource is found and the right is exercised.¹⁷⁵ Legislation seeking to protect fisheries by preventing substances deleterious to fish entering waters frequented by fish is a proper concern of legislation under s 91(12).¹⁷⁶ The fisheries

¹⁶⁹ ABCA Reasons, *supra* note 6 at para 382 (AR, Vol I at 115).

¹⁷⁰ *EARPGO*, *supra* note 18, ss 6-9 (ABOA, Tab 2).

¹⁷¹ [Reference Re Canada Assistance Plan \(BC\)](#), [1991] 2 SCR 525 at 566-567; [Eldridge v British Columbia \(Attorney General\)](#), [1997] 3 SCR 624 at para 25; [Auton \(Guardian ad litem of\) v British Columbia \(Attorney General\)](#), [2004] 3 SCR 657 at para 31 and [Appendix B](#); and Hogg, *supra* note 137, § 6:8 (ABOA, Tab 8).

¹⁷² ABCA Reasons, *supra* note 6 at paras 602-659 (AR, Vol I at 169-181).

¹⁷³ *Ibid* at para 262 (AR, Vol I at 84).

¹⁷⁴ *Ibid* at para 633 (AR, Vol I at 175).

¹⁷⁵ [R v Fowler](#), [1980] 2 SCR 213 at 223.

¹⁷⁶ [Northwest Falling Contractors Ltd v R](#), [1980] 2 SCR 292 at 300-301 [*Northwest Falling*]; [Constitution Act, 1867](#), 30 & 31 Vict, c 3, s 91(12) [*Constitution Act, 1867*].

power includes not only conservation and protection, but also general regulation of the fisheries. The fisheries resource includes not just the animals which inhabit the seas, but also embraces commercial and economic interests, aboriginal rights and interests, and the public interest in sport and recreation.¹⁷⁷

131. Subsection 7(1)(a)(i) specifically refers to fish and fish habitat as a Federal Effect under the *IAA* and demonstrates the focus of the operation of the *IAA* on protecting against adverse effects on fish or fish habitat. Such protective legislation falls within the jurisdiction of the federal Parliament.

ii) Subsection 7(1)(a)(ii): Aquatic Species

132. As noted above, in relation to s 7(1)(a)(i), s 91(12) of the *Constitution Act, 1867* provides a basis for federal jurisdiction with regard to the protection of both fish and marine plants as defined in the *Species at Risk Act (SARA)*¹⁷⁸ and the *Fisheries Act*.¹⁷⁹ The power to control and regulate the resource “must include the authority to protect all those creatures which form a part of that system.”¹⁸⁰ Accordingly, Parliament has the jurisdiction to legislate for the protection of aquatic species from adverse environmental impacts.

iii) Subsection 7(1)(a)(iii) Subsection 2(1) of the Migratory Birds Convention Act, 1994

133. Section 132 of the *Constitution Act, 1867* authorizes federal legislation implementing Imperial treaties and includes jurisdiction to enact legislation going beyond the narrow terms of the treaty so long as it is ancillary to the treaty.¹⁸¹

¹⁷⁷ *Ward*, *supra* note 98 at para 41.

¹⁷⁸ *SARA*, *supra* note 15, ss 2 and 47.

¹⁷⁹ *Fisheries Act*, *supra* note 15, s 47.

¹⁸⁰ *Northwest Falling*, *supra* note 176 at 300.

¹⁸¹ *Constitution Act, 1867*, *supra* note 176, s 132; *Hamilton Wentworth (Regional Municipality of) v Canada (Minister of the Environment)*, 2001 FCT 381 at para 165 (aff'd 2001 FCA 347, this point not directly considered), citing: *The King v Stuart*, 1924 CanLII 353 (MBCA). See also *R v JD Irving Ltd*, [2008] CarswellNB 322 (WL Can) at para 45 (NB PC) (Appellant's Book of Authorities, Tab 2 [ABOA]).

134. One such treaty between the British Empire and the United States that remains in force today is the 1916 *Migratory Birds Convention* (Convention).¹⁸² Canada implemented the Convention through the *Migratory Birds Convention Act*.¹⁸³ The Convention was amended by the “Protocol between the Government of Canada and the Government of the United States of America Amending the 1916 Convention between the United Kingdom and the United States of America for the Protection of Migratory Birds in Canada and the United States” signed on December 14, 1995 (Amended Convention).¹⁸⁴ Canada implemented the Amended Convention through the *Migratory Birds Convention Act, 1994 (MBCA)*.¹⁸⁵ Subsection 2(1) of the *MBCA* defines “migratory birds” as birds referred to in the *Amended Convention* and includes sperm, eggs, embryos, tissue cultures, and parts of the birds.¹⁸⁶ The *MBCA* was enacted to implement the *Amended Convention* by protecting migratory birds and nests.¹⁸⁷

135. Subsection 7(1)(a)(iii) of the *IAA* “is properly anchored in Parliament’s authority to legislate for the protection of migratory birds as ancillary to the implementation of an Imperial treaty under section 132 of the Constitution Act, 1867.”¹⁸⁸

iv) Subsection 7(1)(b)(ii): A change to the environment that would occur in a province other than the one in which the act or thing is done

136. This Court has recognized federal jurisdiction anchoring this provision, based on the residuary POGG power included in the preamble of s 91 of the *Constitution Act, 1867*. Examples of federal jurisdiction in this regard include legislating for the prevention of marine pollution¹⁸⁹

¹⁸² *Migratory Birds Convention*, Canada and United States, 16 August 1916, UKTS 1917 No 7 (ABOA, Tab 3).

¹⁸³ *Migratory Birds Convention Act (The)*, SC 1917, c 18 (ABOA, Tab 4).

¹⁸⁴ *Protocol Between the Government of Canada and the Government of the United States of America Amending the 1916 Convention Between the United Kingdom and the United States of America for the Protection of Migratory Birds in Canada and the United States*, 14 December 1995, CTS 1999 No 34 (ABOA, Tab 5).

¹⁸⁵ *MBCA*, *supra* note 15.

¹⁸⁶ *Ibid*, s [2\(1\)](#).

¹⁸⁷ *Ibid*, s [4](#).

¹⁸⁸ *ABCA Reasons*, *supra* note 6 at para 630 (AR, Vol I at 174).

¹⁸⁹ [R v Crown Zellerbach Canada Ltd., \[1988\] 1 SCR 401](#) at 417 and 438; *Constitution Act, 1867*, *supra* note 176, s [91](#).

and the pollution of interprovincial rivers.¹⁹⁰ This Court recently noted that its decisions have “consistently reflected the view that interprovincial pollution is constitutionally different from local pollution...”.¹⁹¹ Subsection 7(1)(b)(ii) facilitates an assessment of whether a project involves adverse effects from these constitutionally distinct forms of interprovincial pollution and, if so, attaching appropriate conditions.¹⁹²

137. Sections 92(13), 92(16) and 92A of the *Constitution Act, 1867* constrain provincial legislative competence to matters arising “in the province.” Therefore, it would be *ultra vires* Alberta to enact legislation directed, in pith and substance, at adverse inter-provincial effects. Provincial legislation can incidentally affect such matters, but only Parliament can legislate with adverse inter-provincial effects being the primary focus, as it is has done with the *IAA*.¹⁹³

v) Subsection 7(1)(b)(iii): A change to the environment that would occur outside Canada

138. Parliament is primarily empowered to directly address extraterritorial matters on the basis of the POGG power. Provincial jurisdiction is directed toward matters within a province.¹⁹⁴ The lack of provincial jurisdiction to directly target matters outside of a province necessarily implies the federal jurisdiction to do so on the basis that the distribution of powers is exhaustive.¹⁹⁵ This Court acknowledged in the *Newfoundland Continental Shelf Reference* that the province of Newfoundland did not have jurisdiction to regulate natural resources within the continental shelf. Parliament alone was competent to address matters outside the province.¹⁹⁶

¹⁹⁰ [Interprovincial Co-operatives Ltd et al v R, \[1976\] 1 SCR 477](#) at [513-514](#) and [520](#).

¹⁹¹ *Re GGPPA*, *supra* note 59 at para [195](#).

¹⁹² ABCA Reasons, *supra* note 6 at para 634 (AR, Vol I at 175). See also: Hogg, *supra* note 137, § 30:32 (ABOA, Tab 8); Martin Olszynski and Nigel Bankes, “Setting the Record Straight on Federal and Provincial Jurisdiction Over the Environmental Assessment of Resource Projects in the Provinces” (Calgary: University of Calgary Faculty of Law Blog, 2019), online: <https://ablawg.ca/2019/05/24/setting-the-record-straight-on-federal-and-provincial-jurisdiction-over-the-environmental-assessment-of-resource-projects-in-the-provinces/>

¹⁹³ ABCA Reasons, *supra* note 6 at paras 633 and 635 (AR, Vol I at 175).

¹⁹⁴ *Constitution Act, 1867*, *supra* note 176, ss [92\(13\)](#), [92\(16\)](#) and [92A](#).

¹⁹⁵ *Ibid*, ss [91](#) and [92](#); and see [Reference re Same-Sex Marriage, \[2004\] 3 SCR 698](#) at para [34](#).

¹⁹⁶ [Re Newfoundland Continental Shelf, \[1984\] 1 SCR 86](#) at [128-129](#).

vi) Subsections 7(1)(c) and (d): A change that affects the Indigenous peoples of Canada

139. Subsection 7(1)(c) refers to a change to the environment that would occur with respect to the Indigenous peoples of Canada, an impact – occurring in Canada and resulting from any change to the environment – on (i) physical and cultural heritage; (ii) the current use of lands and resources for traditional purposes, or (iii) any structure, site or thing that is of historical, archaeological, paleontological or architectural significance. Subsection 7(d) refers to any change occurring in Canada to the health, social or economic conditions of Indigenous peoples of Canada.

140. Subsections 7(1)(c) and (d) fit within the scope of Parliament’s broad legislative jurisdiction over “Indians and Lands reserved for the Indians” in s 91(24) of the *Constitution Act, 1867*. An important aspect of s 91(24) is the protection of and concern for the welfare of Canada’s Indigenous peoples.¹⁹⁷ The subsections ensure the identification and safeguarding of unique Indigenous interests and protection of Indigenous peoples from exploitation by ensuring their participation in the assessment of designated projects’ impacts. The unique position of Indigenous peoples may mean that designated projects affect them differently than other residents of a province because of: Canada’s colonial history, the repercussions thereof, past government policies, a group’s traditional practices or cultural survival, considerations of status or identity, or other reasons. These triggers ensure that these uniquely Indigenous effects are identified and assessed at the earliest stage and, if they exist, ameliorated.

141. The *IAA*’s purposes specifically include promoting communication and cooperation with, and respecting the rights of, Indigenous peoples in the course of conducting impact assessments.¹⁹⁸ For example, s 7(4) facilitates impact benefit agreements by making s 7(1)(d) inapplicable where Indigenous groups have consented to a project involving non-adverse changes.¹⁹⁹

142. Whether one or more of these triggers may be engaged is a highly contextual matter and therefore best examined on a case-by-case basis to ensure a given project falls within the scope of

¹⁹⁷ See for example: [Daniels v Canada, \[2016\] 1 SCR 99](#) at paras 4-5, 13-15 and 49-50; *Canadian Western Bank, supra* note 69 at paras 60 and 61; [Delgamuukw v British Columbia, \[1997\] 3 SCR 1010](#) at para 176; [Mitchell v Peguis Indian Band, \[1990\] 2 SCR 85](#) at 109 and 126; [Renvoi à la Cour d'appel du Québec relatif à la Loi concernant les enfants, les jeunes et les familles des Premières Nations, des Inuits et des Métis, 2022 QCCA 185](#) at paras 322-329.

¹⁹⁸ *IAA, supra* note 2, Preamble and ss 6(1)(e), (f), (g) and (j).

¹⁹⁹ *Ibid*, s 7(4).

the *IAA*. By way of example, in *Oldman River* the majority of this Court noted that the proposed dam had potential impacts on federal interests, including a reserve set aside for a band under the federal *Indian Act*, which was located downstream from the dam site.²⁰⁰

E. The Majority of the Court of Appeal misapplied Section 92A of the *Constitution Act, 1867*

143. In support of its view that the *IAA* is *ultra vires* Parliament’s jurisdiction, the Majority referred to the impact the *IAA* would have on s 92A of the Constitution. The Majority erroneously concluded that the *IAA* violates s 92A²⁰¹ because the “exclusive” powers it grants provincial legislatures are “very broad”²⁰² and that it was passed to “ensure that the approval of projects for the exploration, development, conservation and management of 92A natural resources was vested exclusively in the province that owned them.”²⁰³

144. The language used by the Majority simply ignores the text, context and purpose of s 92A as well as the principle of co-operative federalism. It is inconsistent with the clearly stated findings of this Court noted above that the environment is a shared responsibility between the provinces and the federal government. If the view of the Majority holds, then it would mean that any project, and the effects of any project tied to natural resources, would be immune from any federal regulation of the environment. A return to this “silo” approach to constitutional interpretation is contrary to the dominant tide of constitutional law.

145. The Majority’s approach runs directly counter to this Court’s finding in *Oldman River* that characterizing a project as a “provincial project” is not particularly helpful.²⁰⁴ Section 92A of the *Constitution Act, 1867* does not grant the Province exclusive authority over non-renewable resource projects to the exclusion of the exclusive federal jurisdiction assigned in s 91 of the *Constitution Act, 1867*. Projects do not, by category or type, have effects that exclusively fall within the ambit of one strata of government or another.

²⁰⁰ *Oldman River*, *supra* note 1 at 21-22.

²⁰¹ Section 92A addresses provincial legislative jurisdiction over some matters relating to natural resources.

²⁰² ABCA Reasons, *supra* note 6 at para 79 (AR, Vol I at 28-29).

²⁰³ *Ibid* at para 81 (AR, Vol I at 29).

²⁰⁴ *Oldman River*, *supra* note 1 at 68-69.

146. While s 92A confers exclusive provincial authority with respect to the development and management of natural resources, provinces' areas of exclusive jurisdiction are not inviolable, watertight compartments. Valid federal legislation may incidentally affect matters within provincial jurisdiction. Specific to s 92A, this Court has been clear that the inclusion of s 92A did not alter or diminish Parliament's pre-existing powers.²⁰⁵ Prior to the s 92A amendment in 1982, this Court recognized limits on provincial power over resources that are mainly exported from the province of production.²⁰⁶ The 1982 amendment enabled the provinces to legislate in the areas of interprovincial trade and indirect taxation, but did not otherwise change the division of powers. The 1982 amendment expands provincial jurisdiction by: 1) granting provincial legislatures concurrent jurisdiction to make laws in relation to interprovincial trade in resources (92A(2)); and 2) impose indirect resource taxes (92A(3)).²⁰⁷ But 92A did not otherwise change the division of powers.

147. This Court's existing 92A jurisprudence is consistent with the principles outlined above. As La Forest J. observed in *Ontario Hydro*, s 92A(1) responded to provincial insecurity by restating pre-existing provincial powers in contemporary terms, with the other provisions in s 92A authorizing the provinces, for the first time, to legislate in the areas of interprovincial trade and indirect taxation. As to whether s 92A affected federal legislative authority under POGG, La Forest J. held: "...I cannot believe it was meant to interfere with the paramount power vested in Parliament by virtue of the declaratory power (or for that matter Parliament's general power to legislate for the peace, order and good government of Canada)..."²⁰⁸

148. The *IAA*'s pith and substance is not "in relation to" non-renewable natural resources. "The 'pith and substance' doctrine is founded on the recognition that it is, in practice, impossible for a legislature to exercise its jurisdiction over a matter effectively without incidentally affecting

²⁰⁵ *Westcoast*, *supra* note 163 at paras 80-84; *Constitution Act, 1867*, *supra* note 176, s 92A.

²⁰⁶ *Canadian Industrial Gas & Oil Ltd v Government of Saskatchewan et al*, [1978] 2 SCR 545; *Central Canada Potash Co Ltd et al v Government of Saskatchewan*, [1979] 1 SCR 42.

²⁰⁷ Without this amendment, provincial legislatures would be limited to imposing direct taxes: s 92(2).

²⁰⁸ *Ontario Hydro v Ontario (Labour Relations Board)*, [1993] 3 SCR 327 at 378. See also: *Westcoast*, *supra* note 163 at para 84: "Nothing in s. 92A was intended to derogate from the pre-existing powers of Parliament."

matters within the jurisdiction of another level of government.”²⁰⁹ Federal legislation may validly affect local matters without being unconstitutional.²¹⁰ Moreover, the fact that a matter may present a double aspect (or multiple federal and provincial aspects) does not preclude Parliament from addressing aspects within its constitutional purview.

F. The Majority erroneously held that Provincial interjurisdictional immunity shields provincial undertakings from federal environmental assessment

149. The Majority did not rely upon the doctrine of interjurisdictional immunity as the basis of its opinion. They did say that if the *IAA* was found to be constitutionally valid, then the doctrine of interjurisdictional immunity should be invoked as a matter of “fairness” to protect the “core” of provincial powers under sections 92A (1), 92(5), 92(10), 92(13), 92(16) and 109 of the Constitution. The Majority declined to define what the “core” of each section would be citing the insufficiency of argument before the court on that issue.²¹¹ The Majority did, however, suggest that the doctrine applied equally to protect provincial and federal heads of power.²¹²

150. Notwithstanding the *obiter* nature of these comments by the Majority, a brief response is required should this Court determine it is necessary to look at this doctrine.

151. The scope of the doctrine of interjurisdictional immunity has been defined by this Court as precluding one level of government from impairing the core of the legislative powers allocated to the other:

The doctrine of interjurisdictional immunity protects the “core” of a legislative head of power from being impaired by a government at the other level: *COPA*, at para. 26. Its application involves two steps. The first is to determine whether a statute enacted or measure adopted by a government at one level trenches on the “core” of a power of the other level of government. If it does, the second step is to determine whether the effect of the statute or measure on the protected power is sufficiently serious to trigger the application of the doctrine: *COPA*, at para. 27.²¹³

²⁰⁹ *Canadian Western Bank*, *supra* note 69 at para [29](#).

²¹⁰ *Ibid* at para [28](#).

²¹¹ ABCA Reasons, *supra* note 6 at para 430 (AR, Vol I at 124).

²¹² *Ibid* at para 429 (AR, Vol I at 123-124).

²¹³ *Rogers*, *supra* note 69 at para [59](#).

152. This Court discussed this doctrine in-depth in *Canada (Attorney General) v PHS Community Services Society* and emphasized the need for restraint. In that case it was held that the doctrine is contrary to the dominant trend in constitutional law that encourages the practice of co-operative federalism and concurrent federal and provincial schemes, provided the legislation is directed at a legitimate federal or provincial aspect.²¹⁴

153. Further, while this Supreme Court of Canada has suggested the doctrine could be reciprocal in respect of provincial heads of power, it has since rejected the application of the doctrine to protect provincial legislation from the application of federal legislation.²¹⁵

154. The doctrine should not be applied here. The suggestion that a decision is often best made at the level of government that is closest to the citizens affected by the decisions is not a legal principle, subsidiary or not, upon which an interjurisdictional immunity argument can be based. The *IAA* does not provide that the federal government decides whether or not the benefits of the project justify the impacts. Rather, the *IAA* provides a regime whereby the federal government may legitimately determine whether the Adverse Federal Effects are in the public interest. To conclude otherwise would create a legislative vacuum.

PART IV. SUBMISSIONS CONCERNING COSTS

155. Canada does not seek costs.

PART V. ORDER SOUGHT

156. The Attorney General of Canada asks that this appeal be allowed.

²¹⁴ [Canada \(Attorney General\) v PHS Community Services Society, 2011 SCC 44](#) at paras [61-64](#).

²¹⁵ *Ibid* at paras [67-70](#); [Carter v Canada \(Attorney General\), 2015 SCC 5](#) at paras [49-53](#).

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Ottawa, Ontario, this 30th day of August, 2022.



Christopher Rupa

Dayna Anderson

Bruce Hughson

Kerry Boyd

James Elford

Counsel for the Attorney General of Canada

PART VII. TABLE OF AUTHORITIES

Jurisprudence		Paragraph Reference in Factum
1.	<i>114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)</i> , 2001 SCC 40	55, 106, 123
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13.	<i>Castonguay Blasting Ltd v Ontario (Environment)</i> , 2013 SCC 52	123
14.	<i>Catalyst Paper Corp v North Cowichan (District)</i> , 2012 SCC 2	89
15.	<i>Central Canada Potash Co Ltd et al v Government of Saskatchewan</i> , [1979] 1 SCR 42	146
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17.	<i>Daniels v Canada</i> , [2016] 1 SCR 99	140

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19.	<i>Desgagnés Transport Inc. v Wärtsilä Canada Inc.</i> , 2019 SCC 58	46, 49, 50
20.	<i>Eldridge v British Columbia (Attorney General)</i> , [1997] 3 SCR 624	128
21.	<i>Friends of the Oldman River Society v Canada (Minister of Transport)</i> , [1992] 1 SCR 3	1, 22, 23, 37, 38, 51, 52(a)-(b),(e), 55, 57, 58, 59, 64, 65, 83, 91, 93, 97, 102, 107, 115, 116, 127, 142, 145
22.	<i>Global Securities Corp v British Columbia (Securities Commission)</i> , 2000 SCC 21	48, 54
23.	<i>Hamilton Wentworth (Regional Municipality of) v Canada (Minister of the Environment)</i> , 2001 FCT 381	133
24.	<i>Interprovincial Co-operatives Ltd et al v R</i> , [1976] 1 SCR 477	136
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27.	<i>MiningWatch Canada v Canada (Fisheries and Oceans)</i> , 2010 SCC 2	22, 52(d), 101
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62.	<i>Canada Water Act</i> , RSC, 1985, c C-11	English	Français	22
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64.	<i>Canadian Environmental Assessment Act, 2012, SC 2012, c 19</i> a) s 2 b) s 2(1) c) s 5(1) d) s 6 e) s 7 f) s 10 g) s 14(2) h) s 52 i) s 84(a)	English English English English English English English English English	Français Français Français Français Français Français Français Français Français	6, 22, 27, 28, 29, 64, 88, 105, 106
65.	<i>Canadian Environmental Protection Act, 1999, SC 1999, c 33</i>	English	Français	22
66.	<i>Comprehensive Study List Regulations, SOR/94-638 and Regulatory Impact Analysis Statement</i> a) Schedule b) s 11 c) s 12	English English English	Français Français Français	27
67.	<i>Constitution Act, 1867, 30 & 31 Victoria, c 3 (UK)</i> a) 91 b) 91(12)	English English English	Français Français Français	4, 36, 130, 132, 133, 136, 138, 146

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68.	<i>Department of the Environment Act</i> , RSC, 1985, c E-10 a) s 6	English English	Français Français	23
69.	<i>Environmental Assessment and Review Process Guidelines Order</i> , SOR/84-467 a) s 2 (“proposal”) b) s 6(a)-(d) c) s 7 d) s 8 e) s 9			22, 23, 24, 57, 59, 64, 83, 91, 128
70.	<i>Fisheries Act</i> , RSC, 1985, c F-14 a) s 47	English	Français	22, 132
71.	<i>Impact Assessment Act</i> , SC 2019, c 28 a) Preamble b) s 1 c) s 2 d) s 6 e) s 6(1) (e), (f), (g) and (j) f) s 7 g) s 7(3)(a) h) s 7(4) i) s 9 j) s 9(1) k) s 9(2)	English English English English English English English English English English English	Français Français Français Français Français Français Français Français Français Français Français	2, 3, 4, 5, 7(a)-(e), 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 87, 88, 92, 95, 97, 98, 99, 100, 111, 141

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	a) s 66	English	Français	
73.	<i>Judicature Act</i> , RSA 2000, c J-2	English		30
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75.	<i>Migratory Birds Convention Act (The)</i> , SC 1917, c 18			134
76.	<i>Migratory Birds Convention Act, 1994</i> , SC 1994, c 22 and the <i>Protocol Between the</i>	English	French	22, 134

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77.	<p><i>National Energy Board Act</i>, RSC 1985 c N-7</p> <p>a) as repealed by <i>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</i>, SC 2019, c 28</p> <p>b) s 44</p>	<p>English</p> <p>English</p> <p>English</p>	<p>Français</p> <p>Français</p> <p>Français</p>	22
78.	<p><i>Physical Activities Regulations</i>, SOR/2019-285</p> <p>a) s 2</p> <p>b) Schedule</p>	<p>English</p> <p>English</p> <p>English</p>	<p>Français</p> <p>Français</p> <p>Français</p>	2, 4, 5, 7(a), 11, 27
79.	<p><i>Regulations Designating Physical Activities</i>, SOR/2012-147</p> <p>a) Schedule</p> <p>b) s 9</p> <p>c) s 12</p>	<p>English</p> <p>English</p> <p>English</p>	<p>Français</p> <p>Français</p> <p>Français</p>	27

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80.	Regulatory Impact Analysis Statement to the <i>Impact Assessment Act</i> , SOR/2019-285: <i>Canada Gazette</i> , Part II, Vol 153, No 17 a) p 5661, b) pp 5663-5669, c) p 5676, d) p 5678	English English English English	Français Français Français Français	11, 27, 110, 111, 114
81.	Regulatory Impact Analysis Statement, as amended in <i>Regulations Amending the Regulations Designating Physical Activities</i> , SOR/2013-186 a) s 3 b) Schedule, s 8	English English English	Français Français Français	27
82.	<i>Species at Risk Act</i> , SC 2002, c 29 a) s 2 b) s 47	English English English	Français Français Français	22, 132
83.	<i>Transportation of Dangerous Goods Act</i> , 1992, SC 1992, c 34	English	Français	22

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84.	Senate, Standing Committee on Energy, The Environment and Natural Resources, <i>Proceedings</i> , 42-1, No 54 (7 February 2019) at 182 (Brent Parker)	88

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85.	<p><i>Impact Assessment Cooperation Agreement Between Canada and British Columbia</i>, August 2019, online (pdf): <i>Impact Assessment Cooperation Agreement – Gov.bc.ca</i></p> <p><https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/environmental-assessments/working-with-other-agencies/agreements-with-the-canadian-environmental-assessment-agency/impact_assessment_cooperation_agreement_signed.pdf> [impact_assessment_cooperation_agreement_signed.pdf (gov.bc.ca)].</p>	101
86.	<p>Martin Olszynski and Nigel Bankes, “Setting the Record Straight on Federal and Provincial Jurisdiction Over the Environmental Assessment of Resource Projects in the Provinces” (Calgary: University of Calgary Faculty of Law Blog, 2019), online: <https://ablawg.ca/2019/05/24/setting-the-record-straight-on-federal-and-provincial-jurisdiction-over-the-environmental-assessment-of-resource-projects-in-the-provinces/></p>	136
87.	<p>Peter W Hogg, <i>Constitutional Law of Canada</i>, 5th ed (Toronto: Carswell, 2007), § 6:8, § 15:24 and § 30:32 (Online: Proview)</p>	93, 107, 128, 136

APPENDIX

No.

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

NOTICE OF CONSTITUTIONAL QUESTION

(Pursuant to Rule 33 of the *Rules of the Supreme Court of Canada*, SOR/2002-156)

TAKE NOTICE that the Attorney General of Canada asserts the appeal raises the following constitutional questions:

1. Is Part 1 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, *intra vires* the legislative authority of the Parliament of Canada under the *Constitution Act, 1867*?
2. Are the *Physical Activities Regulations*, SOR/2019-285, *intra vires* the legislative authority of the Parliament of Canada under the *Constitution Act, 1867*?

AND TAKE NOTICE that an attorney general who intends to intervene with respect to this constitutional question may do so by serving a notice of intervention in Form 33C on all other parties and filing the notice with the Registrar of the Supreme Court of Canada within four weeks after the day on which this notice is served.

Dated at Ottawa, Ontario, this 8th day of June, 2022.

SIGNED BY



ATTORNEY GENERAL OF CANADA

Department of Justice Canada
Civil Litigation Sector
50 O'Connor Street, Suite 500
Ottawa, ON K1A 0H8
Fax: 613-954-1920

Per: Christopher Rupar
Dayna Anderson
Bruce Hughson
Kerry Boyd
James Elford

Tel: 613-670-6290
E-mail: christopher.rupar@justice.gc.ca

Counsel for the Appellant

ORIGINAL TO: THE REGISTRAR

COPIES TO:

Bennett Jones LLP
4500, 855 – 2nd Street SW
Calgary, AB T2P 4K7
Fax: (403) 265-7291

Per: Bruce Mellett
Bradley Gilmour
Sean Assie
Tel: (403) 298-3319
Email: mellett@bennettjones.com

Justice and Solicitor General
11th floor Oxford Tower
10025 – 102 A Avenue
Edmonton, AB T5J 2Z2

Per: Christine Enns

Email : christine.enns@gov.ab.ca

Counsel for the Respondent, Attorney General
of Alberta

Woodward & Co. Lawyers LLP
c/o Keltie L. Lambert – Witten LLP
Suite 2500, Canadian Western Bank Place
10303 Jasper Avenue
Edmonton, AB T5J 3N6
Fax: (780) 429-2559

Per: Eamon Murphy

Tel: (780) 428-0501

Email: eamon@woodwardandcompany.com

Counsel for the Athabasca Chipewyan First
Nation

BURNET, DUCKWORTH & PALMER LLP
2400, 525 – 8th Avenue SW
Calgary, AB T2P 1G1
Fax: (403) 260-0332

Per: Robert Martz

Paul G. Chiswell

Brendan Downey

Tel: (403) 260-0393

Email: rmartz@bdplaw.com

Counsel for the Canadian Association of
Petroleum Producers and the Explorers and
Producers Association of Canada

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

Per: Bruce E. Hallsor Q.C.

Hana Felix

Tel: (250) 388-5421

Email: bhallsor@crease.com

Counsel for the Canadian Taxpayers
Federation

Canadian Environmental Law Association
55 University Avenue, 15th Floor
Toronto, ON M5J 2H7
Fax: (416) 960-9392

Per: Richard D. Lindgren

Joseph Castrilli

Tel: (416) 960-2284 ext 7214

Email: r.lindgren@sympatico.ca

Counsel for the Canadian Environmental Law
Association, Environmental Defence Canada
Inc., and MiningWatch Canada, Inc.
ECOJUSTICE SOCIETY OF CANADA
800, 744 – 4th Avenue SW
Calgary, AB T2P 3T4
Fax: (403) 452-6574

Per: Joshua Ginsberg

Anna McIntosh

Tel: (403) 705-0202 ext. 312

Email: jginsberg@ecojustice.ca

Counsel for the Ecojustice Canada Society

BORDEN LADNER GERVAIS LLP
1900, 520 – 3rd Avenue SW
Calgary, AB T2P 0R3
Fax: (403) 232-1395

Per: Michael A. Marion

Brett R. Carlson

Tel: (403) 232-9464

Email: mmarion@blg.com

Counsel for the Canadian Energy Pipeline
Association

GALL LEGGE GRANT ZWACK LLP
1100 – 1199 West Hastings Street
Vancouver, BC V6E 2E9
Fax: (604) 669-5101

Per: Peter A. Gall, Q.C.

Andrea L. Zwack

Tel: (604) 376-0949

Email: pgall@glgzlaw.com

Counsel for the Independent Contractors and
Businesses Association, and Alberta
Enterprise Group

RAE AND COMPANY
900. 1000 – 5th Avenue, SW
Calgary, AB T2P 4V1
Fax: (403) 264-8399

Per: L. Doug Rae

Tel: (403) 264-8389

Email: lorddoug@raeandcompany.com

Counsel for the Indian Resource Council

JFK LAW CORPORATION
340 – 1122 Mainland Street
Vancouver, BC V6B 5L1
Fax: (604) 687-2696

Per: Mae Price

Aria Laskin

Hasleen Sanghera

Tel: (604) 687-0549 ext 104

Email: MPrice@jfkclaw.ca

Counsel for the Mikisew Cree First Nation

WEST COAST ENVIRONMENTAL LAW
200 – 2006 W 10th Ave
Vancouver, BC V6J 2B3
Fax: (604) 684-1312

Per: Anna Johnston

Tel: (604) 340-2304

Email: ajohnston@wcel.org

Counsel for Nature Canada

Attorney General of Ontario
4th Floor, McMurtry-Scott Building

720 Bay Street
Toronto, ON M7A 2S9
Fax: (416) 326-4015

Per: Yashoda Ranganathan
Joshua Hunter

Tel: (647) 637-0883
Email: yashoda.ranganathan@ontario.ca

Counsel for the Attorney General of Ontario

Attorney General of Saskatchewan
Constitutional Law
820 – 1874 Scarth Street
Regina, SK S4P 4B3

Per: Thomson Irvine
Noah Wernikowski

Tel: (306) 787-6307
Email: tom.irvine@gov.sk.ca

Counsel for the Attorney General of
Saskatchewan

ALBERTA COUNSEL
#800, 9707 – 101 Street NW
Edmonton, AB T5K 2L9
Fax: (780) 652-1312

Per: Robert Reynolds Q.C.
Ed Picard

Tel: (780) 652-1311
Email: r.reynolds@albertacounsel.com

Counsel for the Woodland Cree First Nation

Noël et Associés, s.e.n.c.r.l.
225, montée Paiement, 2e étage
Gatineau, Quebec J8P 6M7
Fax: (819) 771-5397

Per: Pierre Landry
Telephone: (819) 503-2178
Email: p.landry@noelassocies.com

Agent for the Attorney General of Quebec

Gowling WLG (Canada) LLP
160 Elgin Street, Suite 2600
Ottawa, Ontario K1P 1C3
FAX: (613) 788-3509

Per: D. Lynne Watt

Telephone: (613) 786-8695

Email: lynne.watt@gowlingwlg.com

Agent for the Attorney General of New
Brunswick, Manitoba, Nova Scotia, Prince
Edward Island and Newfoundland & Labrador

Supreme Advocacy LLP
100- 340 Gilmour Street
Ottawa, Ontario K2P 0R3
FAX: (613) 695-8580

Per: Marie-France Major

Telephone: (613) 695-8855 Ext: 102

Email: mfmajor@supremeadvocacy.ca

Agent for the Attorney General of the Yukon

Borden Ladner Gervais LLP
World Exchange Plaza
100 Queen Street, suite 1300
Ottawa, Ontario K1P 1J9
FAX: (613) 230-8842

Per: Nadia Effendi

Telephone: (613) 787-3562

Email: neffendi@blg.com

Agent for the Attorney General of British
Columbia

Gowling WLG (Canada) LLP
160 Elgin Street, Suite 2600
Ottawa, Ontario K1P 1C3
FAX: (613) 788-3559

Per: Guy Régimbald

Telephone: (613) 786-0197

Email: guy.regimbald@gowlingwlg.com

Agent for the Attorney General of the
Northwest Territories and the Attorney
General of Nunavut