File No. 40195

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

BETWEEN:

ATTORNEY GENERAL OF CANADA

APPELLANT

AND:

ATTORNEY GENERAL OF ALBERTA

RESPONDENT

AND:

(Title of Proceedings continued on next page)

FACTUM OF THE INTERVENER, INDIAN RESOURCE COUNCIL

(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

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PART I: OVERVIEW AND STATEMENT OF FACTS

1. The Indian Resource Council ("IRC") – an entity representing over 130 First Nations across Canada[1] who produce or have the potential to produce oil and gas – aims to dispel simplistic myths that create a false dichotomy between the development of natural resources and the protection of the environment and Indigenous rights.[2]

2. When the purpose and the legal and practical effects of the *Impact Assessment Act*[3] and the *Physical Activities Regulations*[4] (collectively, the "*IAA*") are considered, it is evident that the *IAA* allows the federal government to prevent physical activities unrelated to federal jurisdiction from proceeding. It presumes that certain extractive resource projects, such as oil and gas production, are inherently adverse to Indigenous peoples.

3. The *IAA* achieves a federal veto over activities by first self-defining federal jurisdiction to include anything possibly connected or related to, however indirectly, the lives of Indigenous peoples.[5] The *IAA* then prohibits proponents from proceeding with a "physical activity" if the activity might affect, whether positively or negatively, Indigenous peoples.[6] This prohibition continues until such time that it is determined that an impact assessment is not required,[7] or if one is required, a decision is made that the possible adverse effects or incidental adverse effects are in the public interest.[8]

4. While the *IAA* speaks of reconciliation,[9] the *IAA* is a misguided attempt in achieving reconciliation by overreaching Parliament's authority under s. 91(24) of the *Constitution*

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[1] This factum uses "Aboriginal", "First Nation", and "Indigenous" interchangeably to refer to the same group of peoples. "Indian" is used when required for the specific legislative use of that term.
[2] Affidavit of Stephen K. Buffalo, sworn September 13, 2022 for motion for intervention of Indian Resource Council [Buffalo Affidavit] at paras 3-5 and 8.
[3] SC 2019, c 28, s 1 ["***IAA***"].
[4] SOR/2019-285.
[5] *IAA*, *supra* note 3, s 2 "effects and "effects within federal jurisdiction".
[6] *Ibid,* s 7.
[7] *Ibid,* ss 7(3)(a) and 16(1).
[8] *Ibid*, ss 7(3)(b) and 60-65.
[9] *Ibid*, Preamble.

Act, 1867[10] in order to legislate the presumption that Indigenous peoples cannot determine for themselves what is in their own best interests.

PART II: IRC'S STATEMENT OF POSITION

5. The position of IRC, with respect to the questions at issue in this Appeal, are as follows:

   a. The pith and substance of the *IAA* is not to provide for impact assessments, but rather the pith and substance of the *IAA* is to actually prevent or prohibit particular projects from proceeding; and

   b. The self-defined federal jurisdiction in the *IAA* as it relates to Indigenous peoples of Canada is too broad to be classified as being connected to Parliament's legislative authority under s. 91(24) of the *Constitution Act, 1867*.

PART III: STATEMENT OF ARGUMENT

Legal effect of the self-defined jurisdiction over Indigenous peoples

6. The Majority of the Alberta Court of Appeal made no error when it noted that:

> Under the *Act*, Parliament has regulated what it has defined as "effects within federal jurisdiction" from a designated project and what it characterizes as "adverse effects within federal jurisdiction" from that project. It has self-defined "effects within federal jurisdiction" as various changes or impacts to the environment, health, social or economic matters from or by a designated project. That is the hook Canada claims anchors its jurisdiction over intra-provincial designated projects that do not otherwise require a federal permit. However, while those changes or impacts may be "effects within federal jurisdiction" for purposes of the *Act*, that does not make all of them effects within federal jurisdiction for purposes of the division of powers."[11] [emphasis in the original]

7. Contrary to Canada's assertion, the *IAA* is not restricted to matters within federal jurisdiction under the *Constitution Act, 1867*.[12] The *IAA* self-defines "effects within federal jurisdiction" to essentially include every aspect of the lives of Indigenous peoples.[13]

8. These "effects" include various impacts on the Indigenous peoples of Canada resulting from any change to the environment – impacts on (i) physical and cultural heritage; (ii) the current

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[10] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91(24), reprinted in RSC 1985, App II, No. 5.

[11] *Reference re Impact Assessment Act*, 2022 ABCA 165 [***Re IAA***] at para 17.

[12] Factum of the Appellant, the Attorney General of Canada, at para 13.

[13] *Re IAA, supra* note 11 at para 169.

use of land and resources for traditional purposes; or (iii) any structure, site or thing that is of historical, archaeological, paleontological or architectural significance. Further, according to the *IAA*, federal jurisdiction includes any change occurring in Canada to the health, social or economic conditions of the Indigenous peoples of Canada, whether or not the change is caused by a change in the environment.[14]

9. This self-defined jurisdiction with respect to Indigenous peoples is limitless. Based on this definition, it is difficult to conceive of any proposed project or physical activity that will not affect Indigenous peoples, whether positively or negatively, and thus permit the federal government to claim jurisdiction under the *IAA*.

10. If a project is not listed in the *Physical Activities Regulations*,[15] s. 9(1) of the *IAA* grants the Minister broad discretion to designate a project.[16] As drafted, the exercise of the Minister's discretion under s. 9(1) is not restricted to physical activities that "may cause adverse effects within federal jurisdiction."[17] Section 9(1) also permits the Minister to designate a physical activity that has "adverse direct or incidental effects" on federal jurisdiction or effects on federal jurisdiction that are of "public concern".

11. The Minister's authority under s. 9(1) imports a novel area of federal legislative power connected to public concern.[18] Public concern, related to changes in the "social, health and economic" conditions of Indigenous peoples, allows for non-Indigenous busy bodies to purport to speak on behalf of First Nations on what they think is in the First Nations' interests.

12. Section 9(2) of the *IAA* states that prior to making an order designating a physical activity, the Minister "may" consider the **adverse** impacts that a physical activity may have on the rights of Indigenous peoples.[19]

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[14] *IAA*, *supra* note 3, s 2 "effects within federal jurisdiction" (c) and (d).
[15] *Supra* note 4.
[16] *IAA*, *supra* note 3, s 9(1).
[17] *Ibid*, s 2 "effects within federal jurisdiction".
[18] *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3 at 68-69, 1992 CanLII 110 (SCC).
[19] *IAA*, *supra* note 3, s 9(2).

13. Designation of a project as physical activity has consequences, such as prohibitions on a proponent from proceeding without federal approval,[20] federal oversight in the form of binding conditions,[21] and the possibility of the imposition substantial fines for offences under the *IAA*.[22]

14. The exercise of the Minister's discretion under s. 9 of the *IAA* need not address the beneficial or favourable impacts that a physical activity may have on the rights of Indigenous peoples. A single adverse impact is sufficient to trigger the exercise of the Minister's discretion without any need to consider the beneficial impacts.

15. In providing for a Ministerial designation order, the *IAA*'s silence with respect to the consideration of any positive health, economic and social impacts of projects on Indigenous peoples reflects the false narrative that IRC works to correct.

Legal effect of prohibition under s. 7 is to prevent beneficial projects from proceeding

16. When the *IAA*'s self-definition of federal jurisdiction with respect to Indigenous peoples is read together with the prohibitions under s. 7(1)(c)[23] and s. 7(1)(d)[24], it is clear that Parliament has implemented legislation granting a federal veto power over projects, regardless of any project benefits that a First Nation may realize.

17. For a physical activity already designated – or in the event that the Minister exercises his designation power under s. 9(1) – section 7(1)(c) applies to prohibit a proponent from carrying out the physical activity if that activity may cause any effects to Indigenous peoples of Canada and results from a change in the environment.[25]

18. The prohibition on proponents under s. 7(1)(d) expands the prohibition to include any change to the health, social and economic conditions of Indigenous peoples.[26] The Alberta

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[20] *Ibid*, s 7.
[21] *Ibid*, s 64.
[22] *Ibid*, s 144.
[23] *Ibid*, s 7(1)(c).
[24] *Ibid*, s 7(1)(d).
[25] *Ibid*, s 7(1)(c).
[26] Note: *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52, s 5(1)(c)(i) the inclusion of the "health and socio-economic conditions" of Indigenous peoples was connected to a change in the environment unlike s 7(1)(d) of the *IAA*.

Court of Appeal correctly noted "[t]his expands the scope of this prohibition to an almost unlimited extent."[27]

19. Importantly, the s.7(1)(d) prohibition applies whether or not the purported changes to the "health, social or economic" conditions of Indigenous peoples are negative changes or positive changes.

20. The s. 7 prohibition remains in effect until such (indeterminate) time that a determination is made that no impact assessment is required,[28] or if one is required, that the Minister or the Governor in Council makes the determination that "the adverse effects within federal jurisdiction – and the adverse direct or incidental effects - … are in the public interest."[29]

21. Not only is the s. 7 prohibition premised on purported effects to "federal jurisdiction" that the *IAA* has self-defined, no prior approval or decision by a federal decision maker is required to trigger ss. 7(1)(c) and (d). Nor does the physical activity need to be connected to federal lands, such as Indian reserve lands, in order for the federal government to impose the prohibition.

22. The Alberta Court of Appeal was live to the legal effect on First Nations of the prohibitions in s. 7, and specifically the reality that not all First Nations view hydrocarbon development as a negative.[30] Before the Alberta Court of Appeal, IRC submitted that the *IAA* does more than just provide for impact assessment of individual projects; it grants both *de jure* and *de facto* veto power over any particular project if the Governor in Council determines that "the adverse effects within federal jurisdiction – and the adverse direct or incidental effects- … are in the public interest".[31] The Alberta Court of Appeal agreed with this assessment.[32]

23. The *IAA* permits the federal government to stop a project based on its views of what is in the "public interest", regardless of whether a First Nation consents to the project or enters into an agreement with the project proponent or the provincial government, and would stand to

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[27] *Re IAA*, *supra* note 11 at para 302.
[28] *IAA*, *supra* note 3, ss 7(3)(a) and 16(1).
[29] *Ibid*, ss 60-64.
[30] *Re IAA*, *supra* note 11 at para 309.
[31] *IAA*, *supra* note 3 at ss 60-64.
[32] *Re IAA*, *supra* note 11 at para 314.

benefit from the project proceeding.[33] Thus, the Alberta Court of Appeal concluded that the prohibition in ss. 7(1)(c) and (d) smacks of paternalism.[34]

24. Admittedly, s. 7(4) of the *IAA* allows for a proponent to continue with an activity that may be causing a change and if the activity has been consented to by a First Nation, but only if the change "is not adverse" to the health, social or economic conditions of the Indigenous peoples.[35] As noted by the Majority, the proponent and the affected Indigenous entity would be precluded from entering into an agreement that would allow for any "adverse" change, and the project would be prevented even if there were overall benefits to the community that outweighed the adverse effects.[36] Further, the First Nation loses the right to determine whether the appropriate balance between adverse impacts and benefit has been achieved.

25. Perhaps the *IAA* seeks to improve reconciliation with Indigenous peoples,[37] however, IRC's position is that the *IAA* is guided by a fundamentally flawed assumption: that Indigenous peoples are victims of resource development.

26. To produce hydrocarbons, or other natural resources, is not inherently an adverse change to the health, social and economic conditions of Indigenous peoples, but rather has been shown to result in positive change to the lives of Indigenous peoples.[38]

27. Before the Alberta Court of Appeal, IRC submitted that the right to produce minerals on First Nations' lands, including hydrocarbons, is as much an Aboriginal right as hunting, fishing and gathering rights; all are protected under s. 35 of the *Constitution Act, 1982*.[39] The Aboriginal right to benefit from hydrocarbon production includes the right of First Nations to improve their own health, economic and social conditions through the creation of

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[33] *Ibid* at para 315.
[34] *Ibid* at para 316.
[35] *IAA, supra* note 3, s 7(4).
[36] *Re IAA, supra* note 11 at para 310.
[37] *IAA*, *supra* note 3 at Preamble.
[38] Buffalo Affidavit, *supra* note 2 at para 16; *AltaLink Management Ltd v Alberta (Utilities Commission)*, 2021 ABCA 342 [***AltaLink***] at paras 59-71.
[39] *Constitution Act, 1982*, s 35, being Schedule B to the Canada Act 1982 (UK), 1982, c 11; *Re IAA*, *supra* note 11 at para 314.

economic activity and the realization of economic rents from the production of hydrocarbons.[40]

Practical effect of creating an overburden on the regulatory approval of projects

28. The Alberta Court of Appeal correctly considered the practical effects of the *IAA*: it creates uncertainty and delay in the regulatory process, in concluding that the main purpose of the *IAA* was not to assess environmental impacts within federal jurisdiction.[41]

29. For on-reserve oil and gas production, Canada has an existing legislative regime to address environmental and other impacts: the *Indian Oil and Gas Act*[42] and the *Indian Oil and Gas Regulations*.[43] These *Regulations* require environmental reviews for on-reserve oil and gas exploration.[44] The *Regulations* permit the Minister to require that environmental protection measures be followed.[45] Further, any contractual dispositions by Canada of the right to explore for, exploit, treat, process, or produce oil and gas on-reserve specifically incorporate all "laws of the relevant province… that relate to the environment…".[46]

30. Ultimately, the difference between Canada's existing on-reserve legislative regime and the *IAA* is, under the *IAA*, Canada has a new power to veto the production of on-reserve oil and gas production for reasons not connected to environmental impacts at all, but rather the purported effects of public concern, or otherwise. This creates uncertainty and delay as project proponents and First Nations attempt to navigate overlapping legislative regimes.

31. For off-reserve activity, proponents can and do reduce risk and uncertainty by working with First Nations. The *IAA* permits the federal government to override this important work by vetoing projects that the government views are not in the public interest. Risk and uncertainty lead to reduced investment in Canada's oil and gas sector which directly and dramatically affect oil and gas producing First Nations. Reduced revenues require First Nations to cut back on self-funded education, infrastructure, health and cultural projects. First Nations

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[40] Buffalo Affidavit, *supra* note 2 at para 24; *Southwind v Canada*, 2021 SCC 28 at para 2; *R v Marshall*, 1999 CanLII 665(SCC) at para 59, [1999] 3 SCR 456.
[41] *Re IAA*, *supra* note 11 at paras 356-365 and para 169.
[42] RSC 1985, c I-7.
[43] SOR/2019-196.
[44] *Ibid* , s 29(3).
[45] *Ibid*, s 29(4).
[46] *Ibid,* s 27(1)(c).

should be entitled to supplement and improve these programs when they have the ability to do so.[47]

The IAA is not classified under s. 91(24) of the Constitution Act, 1867

32. The Alberta Court of Appeal correctly determined that the subject matter of the *IAA* does not fall within Parliament's jurisdiction under s. 91(24) of the *Constitution Act, 1867*.[48]

33. This Court has stated that the classification stage of analysis may require interpreting the scope of the claimed head of power.[49] This is a necessary step in the classification of the *IAA*, because Canada's view of the scope of its jurisdiction under s. 91(24), turns back the historical clock to a time when Canada's discretionary power over First Nations was based on overt paternalism. The *IAA* continues this paternalism and does so without any corresponding responsibility or accountability.

34. The scope of Canada's jurisdiction over "Indians" under s. 91(24) has not been developed greatly by the courts.[50] Greckol JA, in writing her minority opinion, cited from this Court in *Daniels*[51] to state that the purpose of s. 91(24) was to support the "expansionist goals of Confederation, including the building of a national railway, which required a relationship between the federal government and Aboriginal groups."[52]

35. IRC submits that the historic purpose of s. 91(24) doesn't translate well to the modern era of Aboriginal and Treaty rights recognition, honour of the Crown and reconciliation.

36. In its factum, Canada speaks of its broad legislative jurisdiction over "Indians, and Lands reserved for Indians" under s. 91(24) and argues that ss. 7(1)(c) and (d) of the *IAA* fill the need for Canada's "protection of Indigenous peoples from exploitation by ensuring their participation in the assessment of designated projects".[53] This statement is based on the erroneous presumption by Canada that all First Nations remain victims of resource

[47] Buffalo Affidavit, *supra* note 2 at paras 25-26.
[48] *Re IAA*, *supra* note 11 at para 396.
[49] *Ibid* at para 173.
[50] *Delgamuukw v British Columbia,* 1997 CanLII 203 (SCC), [1997] 3 SCR 1010 at para 177 (Lamer CJ).
[51] *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 at para 25.
[52] *Re IAA*, *supra* note 11 at para 644.
[53] Factum of the Appellant, the Attorney General of Canada, at para 140.

development and are vulnerable to being exploited, and thus remain in need of Canada's protection.

37. First Nations are no longer the children of Canada, in need of Canada's protection from economic development. Many First Nations participate themselves in the oil and gas industry and themselves are involved in the exploitation of resources.[54] Further, it should be accepted that economic development that supports Indigenous peoples is in the public interest, not against it.[55]

38. What history shows is that First Nations more often than not require protection from the government. Thus the enactment of s. 35 of the *Constitution Act, 1982*. As Dickson CJ wrote in *Sparrow*:

> … Our history has shown, unfortunately all too well, that Canada's aboriginal peoples are justified in worrying about government objectives that may be superficially neutral but which constitute *de facto* threats to the existence of aboriginal rights and interests. By giving aboriginal rights constitutional status and priority, Parliament and the provinces have sanctioned challenges to social and economic policy objectives embodied in legislation to the extent that aboriginal rights are affected. Implicit in this constitutional scheme is the obligation of the legislature to satisfy the test of justification. …[56]

39. Such is the situation with the *IAA*. Under the guise of "protection" the *IAA* works to prevent First Nations from achieving economic self-determination.

40. To suggest that s. 91(24) provides exclusive legislative authority for Canada to protect Indigenous peoples is an overstatement when one considers the judicial development of s. 35 of the *Constitution Act 1982*. This Court has made clear that both the provincial and federal Crowns have obligations to Indigenous peoples under s. 35, specifically that both levels of government have an obligation to uphold the honour of the Crown and to consult with and potentially accommodate First Nations whose Aboriginal or Treaty rights may stand to be impacted by a proposed project.[57]

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[54] *Ermineskin Cree Nation v Canada (Environment and Climate Change)*, 2021 FC 758 at para 87, citing *Rio Tinto Alcan Inc. v Carrier Sekani Tribal Council*, 2010 SCC 43 at para 34.
[55] *AltaLink*, *supra* note 39 at para 59.
[56] *R v Sparrow*, 1990 CanLII 104, [1990] 1 SCR 1075 at 1110.
[57] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 150; *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48 at para 37.

41. From a subsidiarity perspective this makes sense: it is the level of government contemplating an action that may impact Aboriginal or Treaty rights whose obligation it is to ensure that its actions are performed in a manner that upholds the honour of the Crown.[58] For a proposed project located entirely within a province that does not engage a federal authority or federal lands, such as Indian reserve lands, the duty to consult properly lies with the provincial Crown, not the federal.

42. Canada cannot rely on s. 91(24) to create a veto over projects that may impact the rights of Indigenous peoples. The *IAA* purports to do just this: to allow Canada to use possible impacts on the rights of Indigenous peoples as a means to prevent projects from proceeding.

43. Canada cannot say the IAA is grounded under s. 91(24) based on the welfare of Indigenous peoples when s. 7 of the *IAA* permits Canada to prevent a project from proceeding even if the First Nation has consented to possible adverse effects. Concern for the welfare of Indigenous peoples would entail permitting First Nations to exercise their inherent right to self-determination and to choose for themselves what is in their interests as Indigenous peoples.

PART IV: COSTS SUBMISSIONS

44. IRC does not seek costs and asks that no costs be awarded against it.

PART V: ORDER SOUGHT

45. IRC requests permission to present oral argument not exceeding five minutes. IRC takes no position on the disposition of the Appeal.

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[58] *Ibid; 114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson Town*, 2001 SCC 40 at para 3; *Re IAA*, *supra* note 11 at para 149.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of December, 2022.

RAE AND COMPANY

Per: ___________________________

L. Douglas Rae
Brooke Barrett

Counsel for the Intervener, Indian Resource Council

PART VII: TABLE OF AUTHORITIES AND LEGISLATION

	Cases	**Paragraph reference in factum**
1.	*114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40, [2001] 2 SCR 241	41
2.	*AltaLink Management Ltd v Alberta (Utilities Commission)*, 2021 ABCA 342	26, 37
3.	*Daniels v. Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, [2016] 1 SCR 99	34
4.	*Delgamuukw v. British Columbia*, 1997 CanLII 302 (SCC), [1997] 3 SCR 1010	34
5.	*Ermineskin Cree Nation v. Canada (Environment and Climate Change)*, 2021 FC 758	37
6.	*Friends of the Oldman River Society v. Canada (Minister of Transport)*, 1992 CanLII 110 (SCC), [1992] 1 SCR 3	11
7.	*Grassy Narrows First Nation v. Ontario (Natural Resources)*, 2014 SCC 48, [2014] 2 SCR 447	40, 41
8.	*R v Marshall*, 1999 CanLII 665 (SCC), [1999] 3 SCR 456	27
9.	*R. v. Sparrow*, 1990 CanLII 104 (SCC), [1990] 1 SCR 1075	38
10.	*Reference re Impact Assessment Act*, 2022 ABCA 165	6, 7, 18, 22, 23, 24, 27, 28, 32, 33, 34, 41
11.	*Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 SCR 650	37
12.	*Southwind v Canada*, 2021 SCC 28	27
13.	*Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44, [2014] 2 SCR 257	40, 41

	Legislative Authorities	Language		Paragraph reference in factum
14.	*Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52	English	French	18
	a) s 5(1)(c)(i)	English	French	
15.	*Constitution Act, 1867* (UK), 30 & 31 Vict, c 3	English	French	4
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16.	*Constitution Act, 1982*, s 35, being Schedule B to the Canada Act 1982 (UK), 1982, c 11	English	French	27
17.	*Impact Assessment Act*, SC 2019, c 28, s 1	English	French	2, 3, 4, 8, 10, 12, 13, 16, 17, 18, 20, 22, 24, 25
	a) Preamble	English	French	
	b) s 2	English	French	
	c) s 7 s 7(1)(c) s 7(1)(d) s 7(3)(a) s 7(3)(b) s 7(4)	English	French	
	d) s 9(1) s 9(2)	English	French	
	e) s 16(1)	English	French	
	f) s 60	English	French	
	g) s 61	English	French	
	h) s 62	English	French	
	i) s 63	English	French	
	j) s 64	English	French	
	k) s 65	English	French	
	l) s 144	English	French	
18.	*Indian Oil and Gas Act*, RSC 1985, c I-7	English	French	29
19.	*Indian Oil and Gas Regulations*, SOR/2019-196	English	French	29

	a) s 27(1)(c) b) s 29(3) c) s 29(4)	English English	French French	
20.	*Physical Activities Regulations*, SOR/2019-285	English	French	2, 10