SCC File Number: 40195

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

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

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

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

- and –

ATTORNEY GENERAL OF ALBERTA

Respondent

- and –

(Title of proceedings continued on next page)

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

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PART I – OVERVIEW AND STATEMENT OF FACTS

1. The case presently before this Court requires consideration of the division of powers under the *Constitution Act, 1867*[1] in the context of environmental impact assessments. In particular, does Parliament have the constitutional power to enact the *Impact Assessment Act*[2] and the regulation enacted thereunder, the *Physical Activities Regulation*?[3] While environmental concerns have been matters of considerable importance to both orders of government and the public at large for some time, climate change has appropriately escalated the level of urgency. Public policy responses are correspondingly important but are not the subject matter of this appeal. The only issue is constitutional compliance.

2. The strength of federalism is its promotion of democratic values in a manner that respects diversity and the importance of providing efficacy to regional populations to influence decisions that affect them uniquely. This element, captured by the interpretive principle of subsidiarity, strengthens and sustains Canadian federalism, and, while at times creating policy-making challenges, also benefits the nation in including a range of perspectives, keeping local decisions in the hands of local governments and ensuring mutual respect. In other words, maintaining the division of powers serves an important greater good that transcends possible difficulties arising from the perceived need for legislative uniformity.

3. In the dissenting opinion of the Alberta Court of Appeal, Greckol J.A., in concluding that the *Act* is *intra vires* Parliament, writes that the "division of powers provides multiple oars and in many instances no assurance that we will all row in the same direction", and that "we risk running aground". The *Constitution Act, 1867*, however, was not intended to ensure that the two orders of government move in the same direction. To the contrary, by providing each order with exclusive powers it was intended to ensure a considerable degree of autonomy.

4. The *Act*'s scope and effect exceed federal jurisdiction and renders constitutional guarantees of the provinces' excusive powers over such things as local works and undertakings and management of natural resources ineffectual. This, despite the fact that Alberta and other provinces, including New Brunswick, have their own effective and comprehensive environmental

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[1] *Constitution Act, 1867* (U.K), 30 & 31 Vict, c 3 (the "*Constitution Act, 1867")*.
[2] *Impact Assessment Act*, SC 2019, c 28 (the "*Act*").
[3] *Physical Activities Regulation*, SOR/2019-285 (the "*Physical Activities Regulation*").

impact assessment laws. Provincial decisions under these valid laws risk becoming redundant as a result of the *Act*. While some may argue for the desirability of this development from a policy perspective, it is the submission of the Attorney General for New Brunswick ("New Brunswick") that it is *ultra vires* Parliament and risks jeopardizing the democratic values on which Canadian federalism was built.

5. New Brunswick takes no issue with the facts as presented by the Attorneys General of Canada and Alberta.

PART II– POSITION OF THE ATTORNEY GENERAL OF NEW BRUNSWICK

6. New Brunswick is intervening on the issues raised by the Attorney General of Canada in the current appeal:

   (a) Is Part I 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 Schedule 2 thereof that relate to matters entirely within the legislative authority of the Provinces under the Constitution of Canada?

7. New Brunswick takes the position that the answer to the questions raised is "yes".

PART III – STATEMENT OF ARGUMENT

A. The Importance of Provincial Autonomy to Canadian Federalism

8. Each Canadian province works towards developing its local economy, strengthening its tax base, continuing to improve living conditions and pursuing sustainable prosperity for their respective citizenry with the means available to it. Lacking the extent of taxation powers of the federal government, and in many cases lacking political influence on national economic policies due to relatively small populations, the provinces are vulnerable to the effects of intrusions on their power to influence their economic conditions. New Brunswick is no exception.

9. The jurisprudence with respect to division of powers within the federation demonstrates that the provinces have been required to remain vigilant against the apparently inherent tendency of the

federal government to expand its reach and centralize policy-making. The federal government has tended to exert control over policies in all areas of the country, possibly based on the notion that it is in an advantageous position to achieve the greater good. In some matters, like national defence for example, this makes good sense. In others, such as the development of local economic development activity, this is not necessarily the case.

10. Provincial economic prosperity benefits not just the local populations, but Canada as a whole. As stated by Fraser C.J. for the majority of the Alberta Court of Appeal in the present matter (the "Alberta CA Decision") at paragraph 21, the "economic life of this country lies largely in the provinces." With provinces able to pursue their own developmental policy decisions, the anticipated result of these vibrant and interconnected economies is a stronger nation. And of course, the provinces do not pursue these policies with abandon. They have each enacted environmental assessment tools to ensure responsible environmental stewardship and sustainable economic development. New Brunswick, for example, is governed by the *Environmental Impact Assessment Regulation* under the *Clean Environment Act* since 1987.[4]

11. The Alberta CA Decision emphasized the importance of decentralized power at paragraph 145:

> Federalism has distinct advantages. It enhances efficiency by decentralizing power. And in doing so, it enhances accountability to the people that governments serve. Moreover, since neither level of government has unlimited power, each serves as a check on the other. In addition, federalism encourages opportunities for innovation and new ways of dealing with old problems especially where provinces or regions face unique challenges. This permits new solutions to be tested locally or regionally first, thereby avoiding the problems invariably inherent in a one size fits all solution for challenges faced by all provinces. Additionally, by its nature, our federal structure creates competitive incentives in the marketplace.

12. The provinces' ability to make effective use of the constitutional division of powers is more than a requirement to improve the local economy; it is recognized by this Court as being an essential element of an effective and functional democracy. In *Reference re Secession of Quebec*[5] this Court stated the following at paragraphs 58 and 66:

> The principle of federalism recognizes the diversity of the component parts of Confederation, and the autonomy of provincial governments to develop their societies within their respective spheres of jurisdiction. The federal structure of

[4] *Clean Environment Act*, RSNB 1973, c C-6.
[5] *Reference re Secession of Quebec*, [1998] 2 SCR 217, [1998] SCJ No 61 ("*Secession Reference*").

> our country also facilitates democratic participation by distributing power to the government thought to be most suited to achieving the particular societal objective having regard to this diversity
>
> ….
>
> A federal system of government enables different provinces to pursue policies responsive to the particular concerns and interests of the people in that province.

13. Federalism, and the degree of autonomy the division of powers guaranteed the provinces, was and remains of essential importance to New Brunswick, a point recognized by this Court. In *Secession Reference* it stated at paragraph 60 that, with respect to Confederation, "Federalism was also welcomed by Nova Scotia and New Brunswick, both of which also affirmed their will to protect their individual cultures and their autonomy over local matters."[6]

14. In *R v Comeau*[7], this Court considered whether s. 121 of the *Constitution Act, 1867* prohibited trade barriers between provinces and again emphasized the regional element of federalism at paragraphs 82 and 85:

> For our purposes, it suffices to state that the federalism principle reminds us of the careful and complex balance of interests captured in constitutional texts. An interpretation that disregards regional autonomy is as problematic as an interpretation that underestimates the scope of the federal government's jurisdiction. […]
>
> …
>
> […] Reading s. 121 to require full economic integration would significantly undermine the shape of Canadian federalism, which is built upon regional diversity within a single nation: *Reference re Secession of Quebec*, at paras. 57-58; *Canadian Western Bank*, at para. 22. **A key facet of this regional diversity is that the Canadian federation provides space to each province to regulate the economy in a manner that reflects local concerns.** [emphasis added]

15. In *References re Greenhouse Gas Pollution Pricing Act*[8], Wagner C.J. wrote for the majority at paragraphs 48 and 49:

> Sections 91 and 92 of the Constitution give expression to the principle of federalism and divide legislative powers between Parliament and the provincial legislatures: *Reference re Securities Act*, 2011 SCC 66, [2011] 3 S.C.R. 837 ("*2011 Securities Reference*"), at para. 54. Under the division of powers, broad

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[6] *Secession Reference*.
[7] *R v Comeau*, 2018 SCC 15, [2018] SCJ No 15 ("*Comeau"*).
[8] *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11, [2021] SCJ No 11 ("*Greenhouse Gas References*")

> powers were conferred on the provinces to ensure diversity, while at the same time reserving to the federal government powers better exercised in relation to the country as a whole to provide for Canada's unity: *Canadian Western Bank*, at para. 22. Importantly, the principle of federalism is based on a recognition that within their spheres of jurisdiction, provinces have autonomy to develop their societies, such as through the exercise of the significant provincial power in relation to "Property and Civil Rights" under s. 92(13). Federal power cannot be used in a manner that effectively eviscerates provincial power: *Secession Reference*, at para. 58; *2011 Securities Reference*, at para. 7. A view of federalism that disregards regional autonomy is in fact as problematic as one that underestimates the scope of Parliament's jurisdiction: *R. v. Comeau*, 2018 SCC 15, [2018] 1 S.C.R. 342, at para. 82.
>
> As this Court observed *in Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at para. 124, courts, as impartial arbiters, are charged with resolving jurisdictional disputes over the boundaries of federal and provincial powers on the basis of the principle of federalism. Although early Canadian constitutional decisions by the Judicial Committee of the Privy Council applied a rigid division of federal-provincial powers as watertight compartments, this Court has favoured a flexible view of federalism -- what is best described as a modern form of cooperative federalism -- that accommodates and encourages intergovernmental cooperation: *2011 Securities Reference*, paras. 56-58. **That being said, the Court has always maintained that flexibility and cooperation, while important to federalism, cannot override or modify the constitutional division of powers. As the Court remarked in *2011 Securities Reference*, "[t]he 'dominant tide' of flexible federalism, however strong its pull may be, cannot sweep designated powers out to sea, nor erode the constitutional balance inherent in the Canadian federal state"**: para. 62. It is in light of this conception of federalism that I approach this case. [emphasis added]

16. Rowe J., writing in dissent at paragraphs 464 and 465, also emphasized the importance of provincial autonomy within the boundaries of the division of powers:

> The Canadian federation guarantees the autonomy of both orders of government within their spheres of jurisdiction. Their relationship is one of coordination of between equal partners, not subordination […].
>
> Autonomy, rather than subordination, entails that the provinces have the right to "legislate for themselves in respect of local conditions which may vary by as great a distance as separates the Atlantic from the Pacific" (*Labour Conventions*, at p. 352). As Professor Pigeon (as he then was) explained:
>
> > The true concept of autonomy is thus like the true concept of freedom. It implies limitations but it also implies free movement within the area bounded by the limitations: one no longer enjoys freedom when free to move in one direction only. <u>It should therefore be realized that autonomy means the right of being different, of acting differently</u>. This is what freedom means for the individual; it is also what it must mean for

> provincial legislatures and governments. There is no longer any real autonomy for them to the extent that they are actually compelled, economically or otherwise, to act according to a specified pattern. Just as freedom means for the individual the right of choosing his own objective so long as it is not illegal, autonomy means for a province the privilege of defining its own policies. [emphasis by Rowe, J.]

17. The strength of the provinces' ability to act within their own sphere of jurisdiction depends in part on the courts recognizing the importance of these benefits of federalism. The greater the erosion of exclusive provincial jurisdiction, the greater the threat to the democratic principles underlying the Canadian federation.

B. Subsidiarity

18. The principle of subsidiarity essentially encourages government decisions affecting individuals to be made as close to them as reasonably possible. It fits well with federalism's objective of distributing power to the provincial level to better reflect diversity and ensure important economic decisions are not unduly remote from the local populations primarily affected. This principle is explained by Peter W. Hogg in *Constitutional Law of Canada*, 5th ed., as follows:

> Subsidiarity is a principle of social organization that prescribes that decisions affecting individuals should, as far as reasonably possible, be made by the level of government closest to the individuals affected. The principle has been adopted in the European Community as a guideline for the division of responsibilities between the Community institutions in Brussels and the national institutions of the member states. In Canada, the principle has rarely been invoked in political discourse, but it does offer some useful ways of thinking about the Constitution of Canada.
>
> One of the primary goals of confederation in 1867 was to preserve a considerable degree of autonomy for the four original provinces. It was critical to the acceptance of the plan by French Canadians that the Legislature of the province of Quebec, in which French speakers would be in a majority, be invested with enough powers to safeguard the French language. New Brunswick and Nova Scotia had existing Legislatures and had enjoyed responsible government since 1848. They wanted their Legislatures to continue to regulate much of the daily life of the people as they had before confederation. The British North America Act, 1867 accordingly invested the provincial Legislatures with authority over such matters as property and civil rights, the courts and the police, municipal institutions, hospitals and education. This was consistent with the principle of subsidiarity.
>
> …

> Despite some departures, the division of powers in the British North America Act, 1867 did generally adhere to what we would now describe as the principle of subsidiarity. The principle was reinforced by the decisions of the courts in the early years of confederation, which established rules that continue to set the pattern of government in modern Canada. The provincial power over property and civil rights was given a broad interpretation, so that it now includes not only the private law of property, contract and torts, but also most of commercial law, consumer law, environmental law, labour law, health law and social-services law. The result is that the laws that impact people most directly on individuals are for the most part provincial. [9]

19. Subsidiarity is expressly included in the *Treaty on European Union*, February 7, 1992[10], but is also relevant to Canadian constitutional law. In his paper "Subsidiarity and the Division of Powers in Canada", P.W. Hogg states that this Court's jurisprudence with respect to powers over property rights, peace, order and good government (i.e., the "provincial inability test" of the national concern doctrine) and trade and commerce are reflective of the subsidiarity doctrine.[11] Also, the *Charter of Rights and Freedoms*,[12] sees the principle of subsidiarity exerting its influence.[13] Professor Hogg concluded that although subsidiarity was not yet in use as a term in Canadian constitutional law (as of 1993, that is):

> Nevertheless, the idea that governmental power affecting individuals should be exercised as far as possible by the level of government nearest to the people is one that has been influential in Canadian constitutional law. It can be identified as an important element of the original design of Canada's federal system in 1867, as shaping the subsequent judicial interpretation of the principal legislative powers, as influencing the development of national shared-cost programs, and as qualifying the civil libertarian values protected by the Charter of Rights.[14]

20. More recently, in his paper "*Federalism, Subsidiarity, and Carbon Taxes*", Dwight Newman, in arguing that subsidiarity should play a role in the determination of the constitutional validity of

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[9] Peter W. Hogg in *Constitutional Law of Canada*, 5th ed. ("*Constitutional Law of Canada*"), at §5:7.
[10] EC, *Consolidated Version of the Treaty on European Union, 2012*, OJ, C 326/13, online (pdf) < https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&format=PDF

[11] P.W. Hogg, "*Subsidiarity and the Division of Powers in Canada*" (1993) 3 NJCL 1-461 341 ("*Subsidiarity and the Division of Powers"*).
[12] *Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (U.K.), 1982
[13] *Subsidiarity and the Division of Powers* at p.355.
[14] *Ibid.*

the *Greenhouse Gas Pollution Pricing Act*, agrees that the principle was instrumental to the framers of the Constitution:

> Notably, the framers operated within a sense of the appropriateness of local matters being assigned away from the central government. Then-recently published political theory by John Stuart Mill, which we know the framers studied, had developed an account of the proper role of local powers related to matters of local concern, seemingly articulated in line with underlying principles analogous to what later came to be called subsidiarity. Subsidiarity has been recognized by many scholars as properly motivating and shaping a federal structure.[15]

Professor Newman describes subsidiarity as a "key structural principle within Canadian constitutionalism" and states that because "it is an interpretive key to the division of powers, it can be used in interpreting the powers".[16]

21. In *114957 Canada Ltée (Spraytech, Société d'arrosage)*,[17] this Court considered the validity of the municipality's restrictions on pesticide use. Writing for the majority, L'Heureux-Dubé J. discussed subsidiarity:

> The case arises in an era in which matters of governance are often examined through the lens of the principle of subsidiarity. This is the proposition that law-making and implementation are often best achieved at a level of government that is not only effective, but also closest to the citizens affected and thus most responsive to their needs, to local distinctiveness, and to population diversity LaForest J. wrote for the majority in *Canada (Procureure générale) c. Hydro-Québec*, [1997] 3 S.C.R. 213 (S.C.C.), at p. 296, that "the protection of the environment is a major challenge of our time It is an international problem, one that requires action by *governments at all levels*" (emphasis added). […][18]

22. LeBel J. echoed the importance of the role of local government, in that case municipal government, writing that the "tradition of strong government has become an important part of the Canadian democratic experience. This level of government usually appears more attuned to the immediate needs and concerns of the citizens".[19]

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[15] Dwight Newman, *Federalism, Subsidiarity, and Carbon Taxes* (2019) 82 Sask L Rev 187 at para. 9.
[16] *Ibid.* at paras. 11 and 12.
[17] *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40, [2001] SCJ No 42 ("*Spraytech*").
[18] *Spraytech* at para 3.
[19] *Spraytech* at para 49.

23. In *Canadian Western Bank v Alberta*,[20] this Court considered whether federally-regulated banks dealing in credit-related insurance must comply with provincial legislation regulating the promotion and sale of insurance. The banks argued that the doctrine of interjurisdictional immunity applied such as to make the banks immune to the provincial legislation. This Court noted that this doctrine has most often been used asymmetrically, protecting federal heads of power and undertakings, and that this tendency "can also be seen as undermining the principles of subsidiarity." [21]

24. In *Québec (Procureur général) c Canada (Procureur général)*,[22] this Court found that federal legislation prohibiting certain aspects of assisted reproduction was *intra vires* its criminal law powers. The Court allowed the appeal, ruling in favour of the federal government. In their dissent, Deschamps and LeBel J.J. found that the pith and substance of the impugned provisions were in fact connected to the provinces' exclusive jurisdiction over hospitals, property and civil rights and matters of a merely local nature. Supporting this finding was the interpretive principle of subsidiarity, which they describe as "an important component of Canadian federalism." [23] They explain its relevance:

> If any doubt remained, this is where the principle of subsidiarity could apply, not as an independent basis for the distribution of legislative powers, but as an interpretive principle that derives, as this Court has held, from the structure of Canadian federalism and that serves as a basis for connecting provisions with an exclusive legislative power. If subsidiarity were to play a role in the case at bar, it would favour connecting the rules in question with the provinces' jurisdiction over local matters, not with the criminal law power […].[24]

25. McLachlin C.J.C., in allowing the appeal, stated that the "idea behind this principle is that power is best exercised by the government closest to the matter"[25], but pointed out that the principle in that case does not go so far as to prevent the federal government from legislating with respect to its exclusive jurisdiction over criminal matters. "The criminal law power may be invoked where

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[20] *Canadian Western Bank v Alberta*, 2007 SCC 22, [2007] SCJ No 22 ("*Canadian Western Bank*").
[21] *Canadian Western Bank* at para 45.
[22] *Québec (Procureur général) c Canada (Procureur général)* , 2010 SCC 61, [2010] SCJ No 61
[23] *Ibid.* at para 183.
[24] *Ibid.* at para 273.
[25] *Ibid.* at para 69.

there is a legitimate public health evil, and the exercise of this power is not restricted by concerns of subsidiarity".[26]

26. Interpretation of the division of powers in an effective and democratic federation requires that courts maintain respect for the importance of local powers over local decisions to the extent provided by the constitutional text. The internationally-recognized principle of subsidiarity captures this intent. While not expressly included in the Canadian Constitution, this Court has affirmed it as an interpretive principle for the division of powers. To maintain the democratic principles on which Canada was founded, New Brunswick submits that this Court should continue to be guided by its tenets. In the present case, of course, this means protecting the provinces' jurisdiction with respect to approval of intra-provincial projects with minimal connection federal heads of power.

C. Division of Powers and the Environment

27. Properly construed, Section 92 of the *Constitution Act, 1867*, provides the provinces with the powers necessary to pursue these objectives.[27] The provinces have exclusive jurisdiction over, for example, local works, property and civil rights, and matters of a merely local or private nature in the province. The addition of Section 92A reflects an intention to strengthen the provinces' control of their natural resources. While in some respects a recent move toward overlapping jurisdiction in some areas detracts from the notion of watertight compartments, exclusive jurisdiction over such local matters must retain a significant meaning consistent with the intentions of the framers of the constitution. If a provincial government sees benefits in a local economic development, federal interference must be well-grounded in an area of federal jurisdiction. It is the submission of New Brunswick that the *Impact Assessment Act*, an enactment of unprecedented breadth and scope in its purported effect on various activities, exceeds the legal boundaries of s. 91 of the *Constitution Act, 1867*, and is therefore *ultra vires* of Parliament.

28. The *Act* is concerned largely with environmental protections. There appears to be no dispute that the environment, not being an enumerated area of jurisdiction in section 91 or 92 and encompassing a broad array of aspects, is not in itself an exclusive jurisdiction of either order of government. As La Forest J. wrote in *Friends of the Oldman River Society v Canada (Minister*

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[26] *Ibid*. at para. 73.
[27] *Constitution Act*, s. 90.

of Transport)[28], it "does not have the requisite distinctiveness to meet the test under the 'national concern' doctrine"[29], but that, instead, it is "a constitutionally abstruse matter which does not comfortably fit within the existing division of powers without considerable overlap and uncertainty".[30] Different elements of environmental matters may be subject to legislation by either order depending on which constitutional power is engaged. La Forest wrote:

> In my view the solution to his case can more readily be found by looking first at the catalogue of powers in the Constitution Act, 1867 and considering how they may be employed to meet or avoid environmental concerns. When viewed in this manner it will be seen that in exercising their respective legislative powers, both levels of government may affect the environment, either by acting or not acting. This can best be understood by looking at specific powers.[31]

The federal government is required to show that the *Act* is consistent with the specific powers granted to it by the constitution.

29. The Alberta CA Decision demonstrates that a particularly contentious aspect of the *Act* is the attempt to regulate the emission of greenhouse gasses from projects, including projects related to fossil fuels extraction (see paragraphs 21, 29 and 520). As with the environment, the federal government does not have a general power to legislate with respect to greenhouse gasses. While this Court's decision in *Greenhouse Gas References* found that legislation that established minimum national standards of greenhouse gas price stringency to reduce emissions was *intra vires* the federal government's power with respect to peace, order and good government (i.e., being a matter of inherent national concern), its effect is limited and does not support a similar finding with respect to the *Act*. As stated by the majority of the Alberta Court of Appeal, at paragraph 185, the *Greenhouse Gas References* decision "did not expand the breadth of 'national concern' any further than carbon pricing. In particular, it did not broaden Parliament's authority to include the regulation of GHG emissions generally."

D. Impact Assessment Act *Undermines Provincial Jurisdiction*

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[28] *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3, [1992] SCJ No 1 ("*Oldman River*").
[29] *Oldman River* at para 85.
[30] *Oldman River* at para 86.
[31] *Oldman River* at para 87.

30. The broad scope of the *Act*, and its considerable procedural requirements and timelines for potential proponents of a designated project, indicate a statutory regime considerably more consequential for provincial powers than that upheld by this Court in *Oldman River*. In that case, this Court found that the *Guidelines Order* issued by the federal government under the *Department of Environment Act*, RSC 1985, c E-10, was within the federal powers. Notably, however, the *Guidelines Order* only imposed a responsibility for initiating an environmental impact assessment process in cases where there existed a federal decision-making responsibility by operation of another federal statute. As stated by La Forest J. this meant that the federal government "must have an affirmative regulatory duty pursuant to an Act of Parliament which relates to the proposed initiative, undertaking or activity". [32]

31. Those concerned with whether the *Guidelines Order* was a "constitutional Trojan horse enabling the federal government, on the pretext of some narrow ground of federal jurisdiction, to conduct a far ranging inquiry into matters that are exclusively within provincial jurisdiction" were comforted with the Courts' affirmation of the division of powers. La Forest, J. wrote that "an initiating department or panel cannot use the Guidelines Order as a colourable device to invade areas of provincial jurisdiction which are unconnected to the relevant heads of federal power."[33]

32. The *Act*, in contrast, bears little resemblance to the *Guidelines Order* considered by this Court in *Oldman River* and in fact does constitute the invasion this Court warned against. No longer is the federal power triggered by an existing "affirmative regulatory duty" with respect to a clear and particular federal power. Instead, the *Act* constitutes a stand-alone assessment regime subjecting designated projects to wide-ranging and prohibitive assessments which leave the viability of intra-provincial projects in doubt. As aptly stated by the majority in the Alberta CA Decision, at paragraph 100, the "environment impact assessment process federally has morphed from the procedural planning tool under the *Guidelines Order* upheld in *Oldman River* into a substantive regulatory regime under the *IAA*."

33. The Alberta Court of Appeal reviewed this legislation by first characterizing its pith and substance then classifying it by reference to federal and provincial heads of powers. It determined that the pith and substance of the *Act* and its regulation is "the establishment of a federal impact

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[32] *Oldman River* at para. 55.
[33] *Oldman River* at para 96.

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", and that it "intrudes fatally into provincial jurisdiction, and the provinces' proprietary rights as owners of their public lands and natural resources" (para. 372).

34. While New Brunswick submits that the "pith and substance" analysis conducted by the Alberta Court of Appeal is the settled and required approach to this division of powers analysis, New Brunswick also submits that subsidiarity remains a relevant interpretive principle. The constitutional intent that decisions affecting individuals should, as far as reasonably possible, be made by the level of government closest to the individuals affected should remain a broad and important principle, and, it is submitted, to the extent the wording of the Constitution will bear, it should inform and guide the division of powers analysis. The majority of the Court of Appeal acknowledged this, not only in their brief discussion at paragraphs 149 to 151, but also implicitly, for example, in their conclusion on classification at paragraphs 422 and 423:

> The division of powers exists for a reason: ***Attorney General of Nova Scotia v Attorney General of Canada***, [1951] SCR 31. Under the *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.
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> 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. And it is certainly not what provincial governments agreed to either on patriation of the Constitution.

35. There are various examples in the *Act* which show a movement contrary to the principle of subsidiarity, the extent of which is to render the statute *ultra vires* of Parliament. For example, in contrast to the regime in *Oldman River*, the *Act*'s *Physical Activities Regulations* designate projects for review regardless of which jurisdiction they are otherwise subject to rather than limiting its scope to those for which there is an existing decision-making responsibility of the federal government. As a result, intra-provincial activities such as mines, power-generating facilities, petroleum refineries and highways are subject to the requirements of the statute from the beginning.

36. Importantly, s. 92A was added to the Constitution by amendment in 1982. This amendment provides the provinces with broad and exclusive jurisdiction over non-renewable natural resources and forestry. This includes exploration for non-renewable natural resources and development, conservation and management of non-renewable natural resources and forestry. Also included is the development, conservation and management of sites and facilities in the province for the generation and production of electrical energy. Despite this, the *Act* purports to provide the federal government with control over these very types of projects, even where no other federal permit or approval is required. There is a serious issue as to how the *Act* can possibly be compatible with the provinces' control over natural resources as guaranteed by s. 92A.

37. The physical activities subject to the *Act* are not limited to those listed in the *Physical Activities Regulations*. Section 9 gives the Minister the power to designate physical activities not prescribed by it if, "in his or her 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." The discretion provided to the Minister under this section is excessively broad, and the same can be said for the range of activities potentially subject to designation.

38. In enacting this section, Parliament removes any predictable boundaries to its jurisdiction. This increases uncertainty for proponents, leaves provinces with even less control over local projects and makes citizens' livelihoods increasingly dependent on this exercise of discretion by the federal executive. As explained in the Factum of the Respondent, Attorney General for Alberta (para. 84 and 85), the federal government has already designated a proposed intra-provincial coal project under this section. Canada's international commitments in respect of climate change and lack of a net positive contribution to sustainability were the reasons for concluding that the projects would cause unacceptable environmental effects. This, despite the fact the proposed project underwent provincial regulatory and approval requirements and that neither climate change nor sustainability are heads of federal jurisdiction.

39. The constitutionality of a statutory provision should not be dependant on the proper exercise of the discretionary power it purports to create. In *R v Hydro-Québec*, Lamer C.J. and Iacobucci J. wrote the following in dissent:

> [T]he constitutional validity of a statute cannot depend on the ebb and flow of existing government practice or the manner in which discretionary powers appear thus far to be exercised. It is the boundaries to the exercise of that discretion and the scope of the regulatory power created by the impugned legislation that are at issue here. It is no answer to a charge that a law is unconstitutional to say that it is only used sparingly. If it is unconstitutional, it cannot be used at all.[34]

40. In addition to the scope of projects designated and to be designated in the future, the scope of effects considered is so broad as to intrude on provincial jurisdiction. Section 7 prohibits proponents of designated projects from doing anything in connection with the carrying out of the project if that act may cause any of the effects listed in the section. "Effects" is defined in the *Act* such that section 7 effectively prohibits proponents from doing anything if it may cause "changes to the environment or to health, social or economic conditions and the positive and negative consequences of these changes." Taking any action, for example, connected to carrying out a project that "may cause" positive changes to the economic conditions of the Indigenous peoples of Canada is prohibited. In contrast to earlier iterations of federal environmental impact assessments, the possible effects need not even be significant (see Alberta CA Decision, paragraph 237).

41. The categories of things on which the effects are prohibited are listed in s. 7(1)(a) to (e), and include, for example changes to fish, aquatic species and migratory birds subject to federal statutory regulation, to the environment outside of the province in which the project is located and to certain aspect of Indigenous peoples in Canada. These mirror the definition of "effects within federal jurisdiction". Defining these things as such, however, does not necessarily make it so.

42. These effects are so broad that prohibiting activities connected with designated projects that may cause them will inevitably intrude on provincial jurisdiction. For example, a province may approve under its own environmental assessment laws a gravel pit or fossil fuel-fired power generating facility, and having acted within its jurisdiction its local citizenry, including Indigenous peoples, could anticipate benefits of such development for the local economy. The province would have jurisdiction over the activity under various heads of powers. While its decision may affect Indigenous peoples, this would not render the province's regulatory approval *ultra vires*, as the province's laws may apply to Indians and land reserved for Indians. To this

[34] *R v Hydro-Québec*, [1997] 3 SCR 213, [1997] SCJ No 76, at para 73.

point, the local government has exercised its decision-making authority to determine the status of an intra-provincial project, and the principle of subsidiarity is well-represented.

43. Despite this, even where there are no other federal approvals required, section 7 prohibits the proponent from doing anything connected with carrying it out if it may cause any changes to the social or economic conditions, positive or negative, to Indigenous peoples. These effects need not be significant. In that case, s. 7 is engaged and the project is stayed. It will remain stayed pending the processes of the *Act*, including the possibility of the requirement of a determination by the federal executive that the project is in the public interest.

44. Also, the same prohibition applies if the possible effect is the emission of greenhouse gases. Section 7 applies to a change to the environment that would occur in another province or outside Canada (s. 7(1)(b)(ii) and (iii)). The broad definition of "environment" in the *Act* would apparently include carbon dioxide emissions. The mere possibility that such emissions may change the environment (i.e., the air) outside of the project's province would trigger the prohibition. It is again notable that Parliament does not have jurisdiction over greenhouse gas emissions generally. This purported power would effectively give the federal government the right to stop intra-provincial projects on the ground that they change the environment in other jurisdictions. This would render the provinces' jurisdiction over natural resources, local works and undertakings, property and civil rights and matters of a merely local nature meaningless in many cases. As stated by this Court in *Greenhouse Gas References*, "Federal power cannot be used in a way that effectively eviscerates provincial power".[35]

45. Federal intrusion into provincial matters is apparent from the outset and continues throughout the *Act*. In the event of an impact assessment, s. 22 prescribes twenty factors to be considered. Many of these have no or little connection to a federal head of power. Indeed, many of them, such as the purpose of, need for and alternatives to the project fall more naturally into provincial jurisdiction.

46. The ultimate decision of whether the project is in the public interest is made by the Minister or Governor in Council based on a report considering the s. 22 factors as well as additional mandatory factors under s. 63. Section 63 includes "the extent to which the designated project

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[35] *Greenhouse Gas Reference* at para. 49.

contributes to sustainability", and "sustainability" is defined as "the ability to protect the environment, contribute to the social and economic well-being of the people of Canada and preserve their health in a matter that benefits present and future generations." The application of this broad test to whether an intra-provincial project should receive a positive public interest determination does not indicate any link to a federal power. Regardless, Parliament purports to give the federal executive the power to stop the project based on these considerations.

47. The overall effect of the *Act* is to give the federal government control of various intra-provincial projects. The federal government claims the power to delay or effectively cancel projects that are entirely within a province, clearly fall within provincial powers and have no other link to federal laws.

E. The Impact Assessment Act in Context of Oldman River

48. The distance between the *Guidelines Order* found to be constitutional in *Oldman River* and the *Act* in the present case is striking. In *Oldman River* the Court considered a prior federal approach which was predictably and rationally linked to an existing "decision making responsibility", a feature which guarded against federal overreach. The *Guidelines Order*, in effect, ensured jurisdictional boundaries. "Proposal" in the *Guidelines Order*, for example, was limited to those "for which the Government of Canada has a decision making responsibility". In the present case, designated projects are untethered from this requirement and include a large number intra-provincial projects with no apparent federal connection. The *Act* is much broader and more consequential than that considered in *Oldman River*.

49. La Forest J. wrote at paragraph 55 of *Oldman River*, in interpreting the provisions of the *Guidelines Order*, that this existing federal "responsibility" focussed on an existing "affirmative regulatory duty pursuant to an Act of Parliament".[36] Importantly, he noted that it "cannot have been intended that the Guidelines Order would be invoked every time there is some potential environmental effect on a matter of federal jurisdiction. Therefore, 'responsibility within the definition of 'proposal' should not be read as connoting matters falling generally within federal jurisdiction." Whether this statement was primarily a matter of statutory interpretation or of broader constitutional principles, it is nonetheless apparent that this Court in *Oldman River* was

[36] *Oldman River* at para 55.

cognizant of the need to avoid overly broad interpretations of federal control over local works and undertakings. The approach in *Oldman River* provides predictability to the proponent as it achieves clarity with respect to the possible federal regulatory issues arising in an intra-provincial proposal. More importantly for the present purposes, however, it preserves the democratic principles served by federalism due to its consistency with the interpretive principle of subsidiarity.

50. Those concerned with federal intrusion into provincial jurisdiction in that case were comforted with the finding that the "Guidelines Order has merely added to the matters that federal decision makers should consider".[37] To the concern that the *Guidelines Order* was a "Trojan horse enabling the federal government, on the pretext of some narrow ground of federal jurisdiction, to conduct a far ranging inquiry into matters that are exclusively within provincial jurisdiction", the response at paragraphs 96 and 97 was that:

> [T]he "initiating department" assigned responsibility for conducting an initial assessment, and if required, the environmental review panel, are only given a mandate to examine matters directly related to the areas of federal responsibility affected. Thus, an initiating department or panel cannot use the Guidelines Order as a colourable device to invade areas of provincial jurisdiction which are unconnected to the relevant heads of federal power.
>
> Because of its auxiliary nature, environmental impact assessment can only affect matters that are "truly in relation to an institution or activity that is otherwise within [federal] legislative jurisdiction"; see *Devine v. Quebec (Attorney General)*, [1988] 2 S.C.R. 790, at p. 808. Given the necessary element of proximity that must exist between the impact assessment process and the subject matter of federal jurisdiction involved, this legislation can, in my view, be supported by the particular head of federal power invoked in each instance.[38]

51. The pith and substance of the Guidelines Order was found to be "nothing more than an instrument that regulates the manner in which federal institutions must administer their multifarious duties affected. Consequently, it is nothing more than an adjunct of the federal legislative powers affected".[39]

52. The *Act* lacks the redeeming features of the *Guidelines Order*. There is no link to affirmative regulatory duties imposed by other laws of Parliament. Its scope is much broader and its

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[37] *Oldman River* at para 96.
[38] *Oldman River* at para 96-97.
[39] *Oldman River* at para 101.

deleterious effect on a province's ability to manage its natural resources, regulate local works and undertakings and improve its local economy and tax base is incomparable.

53. In sum, the *Act* designates projects largely without regard to whether they are matters of federal jurisdiction, and the extent of designations is made indefinite by s. 9. Once designated, a project is stayed and potentially evaluated on a variety of factors which may be only incidentally connected to federal powers or showing no apparent connection at all. This process, which is inevitably lengthy, may then culminate in a decision by the federal executive that the proposed project is not in the public interest, as a result of which it may not proceed. The "public interest" determination of the federal executive is essentially a policy decision based on the priorities of the federal government. A given province has no control over these processes, of course, and is effectively deprived of its ability to foster these local economic developments. The provinces' own environmental assessments will in many cases become irrelevant.

F. Provinces Are Competent to Address Environmental Issues

54. New Brunswick recognizes that there is a temptation in considering environmental policy (as in many other areas) to look towards centralized solutions, and perhaps a skepticism to more localized approaches. This likely holds true in particular for climate change issues. While there is an important role for the Canadian government, the robustness and effectiveness of provincial environmental assessment laws should not be discounted. The Factum of the Attorney General for Alberta describes that province's comprehensive process for environmental assessments, which includes regulation of greenhouse gas emissions. New Brunswick's regulation under the *Clean Environment Act* is also comprehensive and effective, and has ample scope to account for greenhouse gases. An intrusive federal approach is not imperative.

55. Regardless of the policy debates regarding climate change solutions, the rule of law requires that the division of powers be respected and enforced. "To override provincial powers in the name of certain policy objectives is to undermine the federation" (D. Newman, *supra*).[40]

56. As stated by this Court in *Reference re Securities Act*:

> The courts do not have the power to declare legislation constitutional simply because they conclude that it may be the best option from the point of view of

[40] Newman, *Federalism, Subsidiarity, and Carbon Taxes* at para 20.

> policy. The test is not which jurisdiction -- federal or provincial -- is thought to be best placed to legislate regarding the matter in question. The inquiry into constitutional powers under ss. 91 and 92 of the *Constitution Act, 1867* focuses on legislative competence, not policy.[41]

57. This principle was reiterated in *Comeau*, in which this Court stated:

> Thus, the federalism principle does not impose a particular vision of the economy that courts must apply. It does not allow a court to say "This would be good for the country, therefore we should interpret the Constitution to support it." Instead, it posits a framework premised on jurisdictional balance that helps courts identify the range of economic mechanisms that are constitutionally acceptable. The question for a court is squarely constitutional compliance, not policy desirability […]. Similarly, the living tree doctrine is not an open invitation for litigants to ask a court to constitutionalize a specific policy outcome. It simply asks that courts be alert to evolutions in, for example, how we understand jurisdictional balance and the considerations that animate it.[42]

G. Summary

58. In this case, the founding federal principle of protection of regional interests by providing "space to each province to regulate the economy in a manner that reflects local concerns" [43] is particularly applicable. Subsidiarity, which states that decisions should be made by the level of government closest to the individuals affected has been recognized by this Court as an interpretive principle with respect to constitutional division of powers and should guide the analysis in the present case. With the *Act*, federal environmental assessment legislation has crept deeper into provincial domain, with the result that key provincial powers over local economies and environmental protections have been rendered largely illusory. The limits of federal jurisdiction were explained in *Oldman River*. New Brunswick submits that in the present matter this Court should find that those limits have been exceeded and that the *Act* is *ultra vires* Parliament.

PART IV – COSTS

59. New Brunswick does not seek costs and submits that the ordinary rule that costs are not awarded against an Intervener should apply.

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[41] *Reference re Securities Act*, 2011 SCC 66, [2011] SCJ No 66, at para 90.
[42] *Comeau* at para 83.
[43] *Comeau* at para 85.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 16th day of December, 2022

Michael L. Hynes,
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of New Brunswick

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