SCC File No. 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:

THE ATTORNEY GENERAL OF CANADA

Appellant

- and -

THE ATTORNEY GENERAL OF ALBERTA

Respondent

[style of cause continued on next page]

FACTUM OF THE INTERVENER, THE ATTORNEY GENERAL OF MANITOBA

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

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TABLE OF CONTENTS

Page No.

PART I
OVERVIEW OF POSITION AND STATEMENT OF FACTS

1. Environmental impact assessments are an essential tool to inform and assist decision-makers when balancing factors and determining whether and how to allow a resource development or infrastructure project. But who may require such an assessment, and who gets to make the decision about whether and how to proceed with a project?

2. Alberta's forceful concern is that the current federal impact assessment regime takes the decision away from provincial authorities when it rightly rests with them. Thus, a centralised power with its own policies and motivations, which may often be remote from regional concerns, will effectively control matters otherwise wholly within provincial competence.

3. Manitoba shares this concern. The environment, as a matter of shared jurisdiction between the coordinate legislative powers of Parliament and the Legislatures, cannot be reposed too greatly in one government. This would concentrate power improperly.

4. The imposition of sweeping powers to stay, regulate, conditionally allow or ultimately deny a project according to federal policies and priorities, in circumstances where Canada possesses no decision-making power in respect of the project is objectionable. This, combined with the power to scope-in wholly provincial projects by executive decision or according criteria disconnected from federal powers, is an unconstitutional incursion into the authority of provinces to develop their natural resources and regulate local works and undertakings.

5. The jurisdiction to require an assessment must be tethered to a decision-making authority. This may flow from any of the heads of power relied on by Canada to support the IAA. But as an adjunct to decision-making authority, an environmental impact assessment regime cannot be allowed to become more than the sum of its constitutional parts.

6. The environment is everyone's concern. So is the proper functioning of our federation. Both require balance. The IAA tips the balance too far and ought to be found *ultra vires*.

PART II
OVERVIEW OF THE ATTORNEY GENERAL OF MANITOBA'S POSITION ON THE QUESTIONS IN ISSUE

7. In this factum, Manitoba addresses the following reference questions:

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, S.C. 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?

8. Manitoba submits both questions should be answered in the affirmative. The jurisdiction to require an impact assessment must be tethered to an existing federal decision. Allowing the designation of projects on, for example, the basis of perceived impacts of greenhouse gas emissions or impacts on s. 35 rights is not supported by the heads of power Canada relies on. This is not a cooperative scheme and should not be upheld as such. Ultimately, the current federal impact assessment regime puts the decision on whether and how to proceed with an otherwise wholly provincial project in the hands of the federal executive. The decision on whether the public interest supports allowing the project, and what conditions may apply, flows from federal policies and priorities. This creates federal paramountcy for policies and priorities, and cannot be supported by the division of powers.

9. The IAA regime as it applies to wholly provincial projects is therefore *ultra vires.*

PART III
STATEMENT OF ARGUMENT

A. INTRODUCTION AND PRINCIPLES

10. Manitoba's submissions are focused on ss. 2, 7, 9, 16, and 22 of the IAA, in combination with the *Regulations*, and the decision-making factors found in ss. 60 to 64 of the IAA.[1] These are the provisions which assert federal involvement in otherwise provincial matters. Together, we refer to these provisions as the IAA regime.

11. There are many well-known doctrines of constitutional interpretation advanced and relied on by the parties to this reference. Manitoba does not intend to repeat all of these in this factum. However, we set out below six principles that we submit this Court should consider when gauging the constitutionality of the impugned provisions.

12. These principles are:

- **The environment is everyone's concern.**
- **Cooperative federalism cannot be imposed.**
- **Policies and priorities do not confer jurisdiction.**
- **The proper "trigger" is a constitutional essential.**
- **Greenhouse gasses are not a head of power.**
- **Section 35 of the *Constitution Act, 1982* is not a head of power.**

13. These are each discussed below. We then turn to the pith and substance of the IAA regime.

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[1] *Impact Assessment Act*, SC 2019, c. 28, s. 1; *Physical Activities Regulation*, SOR/2019-285.

B. SIX PRINCIPLES

1. The environment is everyone's concern.

14. The environment is not a legislative power allocated to a jurisdiction. Rather, it is a matter of shared jurisdiction addressed through a number of heads of power, both federal and provincial.[2] Manitoba acknowledges that there is constitutional room for overlap, double aspect and, most importantly, cooperation and harmonization.

15. Manitoba has comprehensive and effective environmental impact assessment and protection legislation: *The Environment Act.*[3] Manitoba regularly assesses the potential environmental impacts of provincial development projects and takes measures to protect the environment. This includes addressing climate change through the greenhouse gas emissions and energy efficiency of a proposed development:

> **Climate change considerations**
> 12.0.2 When considering a proposal, the director or minister must take into account — in addition to other potential environmental impacts of the proposed development — the amount of greenhouse gases to be generated by the proposed development and the energy efficiency of the proposed development.[4]

16. In some respects, the IAA regime assumes the worst of the provinces. By asserting the powers it does, it suggests that provinces are unable or unwilling to properly assess and control the impacts of projects within their jurisdiction. Why else enact a regime designed to sweep up major provincial developments?

17. It is incorrect that a provincial environmental impact assessment process is incapable of addressing federal concerns, or that provincial decisions will fail to give proper weight to these issues. Absent federal jurisdiction, development projects would not go unregulated, nor would

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[2] *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 (*Oldman River*) at 63-67.
[3] *The Environment Act*, C.C.S.M. c. E125.
[4] *The Environment Act*, C.C.S.M. c. E125, s. 12.0.2.

there be jurisdictional voids. Provincial regulators regularly and competently address the types of environmental impacts the IAA regime attempts to. Manitoba submits it is well within provincial environmental protection jurisdiction to do so.

18. There is constitutional peril in attempting to overtake the provinces' ability to deal with environmental impacts. As this Court observed in *Oldman River*:

> "environmental management" does not, under the existing situation, constitute a homogeneous constitutional unit. Instead, it cuts across many different areas of constitutional responsibility, some federal and some provincial. And it is no less obvious that "environmental management" could never be treated as a constitutional unit under one order of government in any constitution that claimed to be federal, because no system in which one government was so powerful would be federal.[5]

19. The environment is a shared responsibility between partners. This requires cooperation and coordination, not the superimposition of one partner's agenda.

2. Cooperative federalism cannot be imposed.

20. Following the decision in *Oldman River*, Professor Hogg commented that the case for a single, harmonized environmental assessment agency with delegated power from each level of government was clear.[6] That vision is the ultimate expression of cooperative federalism. In the absence of that level of cooperation, however, a federation must make space for varied approaches.

21. As this Court has observed, "[c]ooperative federalism …'accommodates overlapping jurisdiction and encourages intergovernmental cooperation', and therefore discourages courts from interfering with cooperative regulatory schemes…"[7]

22. At the same time, this Court has cautioned that "co-operative federalism…can neither

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[5] *Oldman River* at 63-64, citing Gibson, "Constitutional Jurisdiction over Environmental Management in Canada" (1973), 23 *U.T.L.J.* 54, at p. 85. Emphasis added.
[6] Peter W. Hogg & Wade K. Wright, *Constitutional Law of Canada*, 5th ed. supplemented (Toronto: Thomson Reuters, 2021) (loose-leaf updated 2021) (Hogg) at § 30.32;.
[7] *Reference Re Pan-Canadian Securities Regulation*, 2018 SCC 48 at paras. 17-18.

override nor modify the division of powers itself…."[8] Cooperative federalism cannot create jurisdiction where there is none.

23. Manitoba recognises Canada's important role in protecting the environment. This role becomes central in international and interprovincial matters and in federal development projects or those on federal lands.

24. Manitoba also recognises the need for cooperation in matters relating to protecting the environment when jurisdictional boundaries are involved. In some ways, arguing about who has jurisdiction to require an assessment and craft conditions to protect the environment is like a gathering of fire chiefs arguing about who gets to aim the hose, while the house stands burning. At the same time, snatching the hose away from one another is no solution.

25. Similarly, it is no solution for Canada to impose itself as super-regulator of the environment. Cooperative federalism is one aspect of federalism, and this Court rightly ought to be hesitant to find a cooperative scheme *ultra vires*. But the very nature of cooperation is that it cannot be imposed. True cooperation must be born from negotiation and agreement between equal and coordinate governments.

26. Manitoba welcomes federal participation in provincial processes to assess provincial projects that may have impacts on areas of federal concern. Manitoba even has equivalency provisions and allows for joint reviews.[9] The ultimate decision on how to use provincial resources on provincial lands, however, must rest with the province.

27. As the dissenting justice at the Alberta Court of Appeal noted, prior versions of federal assessment legislation allowed exemptions from federal assessment if the project was already under going an equivalent assessment. However, "[u]nder the *IAA*, even if a different jurisdiction carries out the impact assessment, it appears that there will always be a federal decision to approve

[8] *Rogers Communications Inc v Châteauquay (City),* 2016 SCC 23 at para 39.
[9] *Environment Act*, s. 13.1(1) and (2).

or deny the project."[10]

28. While the IAA does signal the intention to cooperate with other jurisdictions in some ways, always reserving the final decision to Canada does not amount to cooperation in spirit or in fact. As such, the principle of cooperative federalism should not be used to uphold the IAA regime.

3. Policies and priorities do not confer jurisdiction.

29. Federal paramountcy applies when federal and provincial laws conflict. But there is no doctrine of federal *policy* paramountcy. Federal policies and priorities are not superordinate to provincial ones. What Canada sets as a priority, or conceives of as important to the governing of federal works and undertakings, cannot be imposed upon the provinces through an impact assessment.

30. There is nothing wrong with a government legislating and administering in harmony with its priorities. There is something very wrong – constitutionally wrong – with one government pressing those priorities on another, who may not share them. A government's goals or visions do not equate with legislative competence under the division of powers. Put another way, policy goals confer no jurisdiction.

31. Examples of federal policy and priorities which animate the IAA regime abound. Among others, these include considerations of the broadly defined concept of "sustainability"; "Canada's ability to meet its environmental obligations and its commitments in respect of climate change"; "any other matter" a federal agency may deem relevant; and, perhaps most strikingly, "the intersection of sex and gender with other identity factors."[11]

32. Even the dissenting justice in the Alberta Court of Appeal had to admit that decision-

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[10] *Reference re Impact Assessment Act*, 2022 ABCA 165 at para. 718, per Greckol JA. Emphasis added.
[11] *Impact Assessment Act*, ss. 2, 22(1)(ii) and (s), 63(a) and (e).

making under the regime would be informed by effects on matters that were not *actually* within federal legislative jurisdiction: a perceived negative effect on something not within federal jurisdiction "may inform concepts like sustainability that are used to determine whether adverse federal effects are deemed to be acceptable in the circumstances."[12] Considerations outside federal jurisdiction may include things "of which the Minister or Governor in Council may disapprove."[13]

33. Put another way, negative effects on matters for which Canada has no competence to enact or enforce laws - broad and aspirational goals or policy priorities[14] - will inform decisions on whether and how a provincial project can proceed. If the federal executive approves or disapproves of a policy matter relating to a project, it will affect the balancing of the public interest, and the permissions granted for the project.[15]

34. The existence of the power to deny a provincial project, or impose conditions that make development impracticable, on the basis of federal priorities and policies instead of legislative competence is *ultra vires*. The IAA imbues its ultimate decision-making with just that power.[16] Jurisdictions may well agree on policy approaches to matters of environmental protection. But they may not. In such circumstances, as a matter of constitutional law, federal *policy* cannot become paramount.

4. <u>The proper "trigger" is essential.</u>

35. While Canada and the dissenting justice at the Alberta Court of Appeal reject the need for a decision-based trigger to engage an impact assessment, Manitoba submits it is essential. The need for a federal decision to trigger an environmental assessment flows from this Court's decision in *Oldman River*. It remains an essential component of a properly constructed impact assessment regime. The reason for this is that environmental assessments do not manifest from their own

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[12] *Reference re Impact Assessment Act*, 2022 ABCA 165 at para. 701.
[13] *Ibid*.
[14] *Impact Assessment Act,* s. 22(1)(s).
[15] *Impact Assessment Act*, s. 63.
[16] *Impact Assessment Act,* s. 63.

legislative head of power. Rather, they are auxiliary to the exercise of other powers. A federal decision "is a necessary condition to engage the process".[17]

36. The *Guidelines Order* at issue in *Oldman River* applied to "any proposal ….that may have an environmental effect on an area of federal responsibility".[18] "Proposal" was defined as including "any initiative, undertaking or activity for which the Government of Canada has a decision making responsibility."[19] Federal environmental assessment duties were "superadded" to other statutory powers reposed in a federal minister.[20] This is very different from an assessment scheme being *superimposed* upon another government's jurisdiction.

37. This Court described an impact assessment as a planning tool to support federal decision-making, but one that was limited to avoid colourable incursions into provincial jurisdiction:

> As a planning tool it has both an information-gathering and a decision-making component which provide the decision maker with an objective basis for granting or denying approval for a proposed development; see M. I. Jeffery, *Environmental Approvals in Canada* (1989), at p. 1.2, {SS} 1.4; D. P. Emond, *Environmental Assessment Law in Canada* (1978), at p. 5. In short, environmental impact assessment is simply descriptive of a process of decision-making.
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> …..
>
> However, on my reading of the *Guidelines Order* the "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.[21]

38. While the scheme in *Oldman River,* "merely added to the matters that federal decision-makers

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[17] *Oldman River* at 73. Emphasis added.

[18] *Oldman River* at 44, citing *Environmental Assessment and Review Process Guidelines Order,* SOR/84-467, s. 6(b).

[19] *Oldman River* at 47.

[20] *Oldman River* at 39.

[21] *Oldman River* at 72. Emphasis added.

should consider" the IAA creates those decision-makers and their decisions. Rather than informing a choice to allow or disallow a licence or permit, the IAA creates decisions about projects that would not otherwise be subject to a federal decision. And projects that *could not* be subject to one:

> 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 CanLII 20 (SCC), [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.[22]

39. Manitoba submits that a decision-based trigger for a federal review is the only way to appropriately restrain the expansion of federal jurisdiction and to firmly root the targeted effects, and powers over them, within federal heads of power. That way an assessment is "truly in relation to an *institution* or *activity* that is otherwise within [federal] legislative jurisdiction."[23]

40. This is consistent with this Court's decision in *Moses*, where a constitutionally sound federal impact assessment requirement for a provincial project was also predicated on a federal decision:

> 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.[24]

41. The mining project could not "lawfully proceed without a fisheries permit."[25]

42. Quebec argued it would be unconstitutional for the federal Minister to refuse to issue the

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[22] *Oldman River* at 72.
[23] *Ibid*. Emphasis added.
[24] *Quebec (Attorney General) v. Moses,* 2010 SCC 17 (*Moses*) at para. 36.
[25] *Moses* at para. 53.

fisheries permit pending compliance with the *CEAA*, since a treaty and provincial process allowed the project. This Court rejected that argument, observing that "[t]he federal laws, the provincial laws and the James Bay Treaty fit comfortably together, and each should be allowed to operate within its assigned field of jurisdiction."[26]

43. Thus, what was endorsed as constitutional, what "fit comfortably together" from a jurisdictional perspective, was a federal environmental assessment when a federal permit decision to allow a negative impact on fish habitat was required by statute.

44. To escape the need for a decision-based trigger, Canada relies on Professor Hogg's statement that following *Oldman River* Canada has the authority to assess "any project that has any effect on any matter within federal jurisdiction".[27] Professor Hogg's comments, if read literally and without context, go far beyond what this Court held in *Oldman River*. This observation was made in the context of a federal decision having being held as a *necessary* predicate to engage the assessment process.

45. Manitoba takes no issue with the proposition that federal legislation like the IAA may flow from several heads of power. Each head relied on by Canada in its factum is unquestionably a proper area of exclusive federal authority.[28] In each of those areas, it is agreed that Canada can - and has - legislated to protect the environment to the extent that head of power allows.

46. A key limitation, however, is that the impact assessment process cannot become more than the sum of its constitutional parts. This is exactly the defect of the IAA: rather than supporting decision-making, it imposes a decision making-power where there is none.

47. Manitoba submits that, in order to be constitutional in its application to an otherwise

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[26] *Moses* at para. 13.
[27] Peter W. Hogg & Wade K. Wright, *Constitutional Law of Canada*, 5th ed. supplemented (Toronto: Thomson Reuters, 2021) (loose-leaf updated 2021) (Hogg) at § 30.32; Canada's Factum at para. 107.
[28] Canada's Factum at para. 120.

provincial project, the IAA must support an existing decision mechanism anchored in a federal head of power. The necessary corollary of this is that the criteria used to scope-in provincial projects must be anchored in the same way. Manitoba submits ss. 7 and 9 of the IAA, as well as the scoping-in criteria in the *Regulations* are not so anchored. For example, it is unclear how a new road that is 74 km long *prima facie* does not fall within federal authority to assess, while a road that is 75 km, does.[29] This relates to no known head of power.

5. Greenhouse gasses are not a head of power.

48. It is obvious that one of the main animating purposes of the IAA regime is to address greenhouse gas emissions. While not stated explicitly, the many references to Canada's climate goals and international obligations, as well as scoping-in criteria that appear to target major greenhouse gas-emitting projects, makes this clear.[30]

49. Moreover, a May 2019 "Discussion Paper on the Proposed Project List" published by the Government of Canada asserted that:

> Projects that process or consume large quantities of oil and gas have impacts in areas of federal jurisdiction *due to their greenhouse gas emissions*.[31]

50. Further, certain large projects were "determined as having the greatest potential for adverse environmental effects in areas of federal jurisdiction, *primarily due to their potential for greenhouse gas emissions*, as well as, potential effects on fish and fish habitats."[32]

51. Greenhouse gas emissions in a province is not an area of federal jurisdiction. There is no head of power relied on by Canada in this appeal that is said to provide this power. Were it otherwise, the federal government might well control, and place conditions on, every conceivable

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[29] *Physical Activity Regulations*, s. 51
[30] For example, *Physical Activity Regulations*, s. 30 *ff.*
[31] Canada, *Discussion Paper on the Proposed Project List: A Proposed Impact Assessment System* (May 2019) at 10. Emphasis added.
[32] *Ibid*.

human activity, right down to if and how citizens may mow their lawns in Winnipeg.

52. Federal jurisdiction over greenhouse gasses in necessarily narrow, extending only to "establishing minimum national standards of GHG price stringency to reduce GHG emissions".[33] Despite this, the IAA regime may designate projects on the basis of their potential emissions, may place mandatory conditions on projects to limit emissions and, ultimately may decide the effects of a project are not in the public interest because of their emissions.[34]

53. The IAA regime seeks to regulate indirectly matters that Canada cannot regulate directly.

6. Section 35 of the *Constitution Act, 1982* is not a head of power.

54. Canada misconstrues the extent of its authority under s. 91(24) of the *Constitution Act, 1867.* Not every effect upon Indigenous people or rights is a matter of federal legislative authority.

55. By the logic of IAA, however, anything a province or provincially regulated entity does that may touch upon Indigenous people – whether on federal or provincial lands – will be subject to an assessment and conditions. In Manitoba's submission, the IAA seeks to use s. 35 as a basis for legislative jurisdiction. This cannot be so. Section 35 does not provide any legislative power.

56. For example, s. 9(2) of the IAA requires that in determining whether to designate a physical activity that is not prescribed by the *Regulations*, the minister "may consider adverse impacts that a physical activity may have on the rights of the Indigenous peoples of Canada — including Indigenous women — recognized and affirmed by section 35 of the *Constitution Act, 1982*…"[35]

57. Section 35 is not a federal-only provision. It is equally a provincial provision. Rather than a source of jurisdiction, s. 35 acts as a limit on the legislative power of both levels of government,

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[33] *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at para. 207.
[34] *Impact Assessment Act*, s. 63.
[35] *Impact Assessment Act*, s. 9(2).

but also as a requirement to justify infringements in a manner consistent with the honour of the Crown. Where potential infringements relate to a provincial activity, the Crown in right of the province must fulfil the duties imposed by s. 35, including ensuring minimal impairment, consultation and accommodation.[36]

58. Under the IAA ss. 2, 7 and 9(2), virtually any provincial physical activity which touches on Indigenous land use, for example, even of wholly provincial Crown lands, could be swept into the regime. Manitoba submits this is inconsistent with this Court's decisions in *Tsilhqot'in* and *Grassy Narrows.*[37]

59. *Tsilhqot'in* established that in light of s. 35, there was no room left for the idea "that Aboriginal rights are at the core of the federal power" in s. 91(24):[38]

> The s. 35 framework applies to exercises of both provincial and federal power: *Sparrow*; *Delgamuukw*. As such, it provides a complete and rational way of confining provincial legislation affecting Aboriginal title land within appropriate constitutional bounds. The issue in cases such as this is not at base one of conflict between the federal and provincial levels of government — an issue appropriately dealt with by the doctrines of paramountcy and interjurisdictional immunity where precedent supports this — but rather how far the provincial government can go in regulating land that is subject to Aboriginal title or claims for Aboriginal title. …[39]

60. If the IAA applies to provincial activities affecting s. 35 rights it would undo the "complete and rational" mechanism under s. 35 which is entrusted to the provincial Crown. Indeed, it would effectively remove the justificatory right of the province, or supersede it with a federal impact assessment which would determine if the effects of the provincial activity on s. 35 rights are in the public interest: see IAA ss. 7(c), 22(1)(c); 63(d). This amounts to federal oversight of the provinces' relationship with Indigenous people.

61. *Grassy Narrows* established that lands controlled by Ontario which were subject to Treaty

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[36] *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 (*Tsilhqot'in*) at paras. 118 and 139.
[37] *Tsilhqot'in*; *Grassy Narrows First Nation v. Ontario (Natural Resources)*, 2014 SCC 48.
[38] *Tsilhqot'in* at para. 140.
[39] *Tsilhqot'in* at para. 152. Emphasis added.

3, and on which Ontario issued development licences, were not subject to federal approval. Ontario did not need federal authorisation to take up those lands for development purposes. What it did need to do was ensure that s. 35 rights were attended to in the process:

> I conclude that Ontario has the authority to take up lands in the Keewatin area so as to limit the harvesting rights set out in Treaty 3. By virtue of ss. 109, 92A, and 92(5) of the *Constitution Act, 1867*, Ontario alone has the ability to take up Treaty 3 land and regulate it in accordance with the treaty and its obligations under s. 35 of the *Constitution Act, 1982*.[40]

62. Under the IAA however, this would also be undone. If an Ontario-issued development licence would impact the Indigenous use of lands and resources, it would be subject to designation under s. 7(1)(c) and ultimate federal executive decision-making and conditions, based on a federal view of the public interest. This is entirely inconsistent with this Court's holding that: "Ontario has exclusive authority under the *Constitution Act, 1867* to take up provincial lands for forestry, mining, settlement, and other exclusively provincial matters. Federal supervision is not required by the Constitution."[41]

63. Indeed,

> s. 92A gives the Province exclusive power to make laws in relation to non-renewable natural resources, forestry resources, and electrical energy. Together, these provisions give Ontario the power to take up lands in the Keewatin area under Treaty 3 for provincially regulated purposes, such as forestry….
>
> Thus, s. 91(24) does not require Ontario to obtain federal approval before it can take up land under Treaty 3.[42]

64. As such, while Canada purports to rely on s. 91(24) to institute a regime for federal approval of impacts on Indigenous rights, this Court has already held that approval is not required. Those rights are not at the core of s. 91(24). Rather, they are situated within s. 35. The Crown in right of the province carries the obligation to act consistently with s. 35 in cases of provincially

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[40] *Grassy Narrows* at para. 4. Emphasis added.
[41] *Grassy Narrows* at para. 30. Emphasis added.
[42] *Grassy Narrows* at paras. 31 and 37

regulated projects.[43]

65. In Manitoba's submission, the IAA regime seeks to rely on s. 35 as a source of legislative power to impose a review and decision-making regime over provincial projects. This is constitutionally unnecessary "federal approval or supervision".[44] Since virtually any provincial resource development project will touch on the rights of Indigenous people of the province, the IAA's net is cast far too wide. Moreover, s. 35 simply does not grant the authority for it.

C. THE PITH AND Substance OF THE IAA REGIME

66. Manitoba submits the pith and substance of the IAA regime is to designate what Canada considers major development projects and assess and regulate those projects according to federal policies and priorities, regardless of whether they fall within provincial jurisdiction or otherwise involve federal decisions.

67. This Court has described the pith and substance analysis many times. The Court first determines the main thrust of the impugned provisions in light of the law's purpose and effects. The Court then determines whether the matter falls within a head of power allocated to the enacting jurisdiction.[45] The pith and substance must be articulated as precisely as possible so that it reflects the true nature of what Parliament did and intended.[46]

1. Purpose

68. The IAA's preamble and purpose clauses both disclose that the enactment aims to foster sustainability and support "Canada's ability to meet its environmental obligations and its commitments in respect of climate change".[47] The purpose of an enactment can also be understood from the mischief the enacting legislature sought to address. In Manitoba's submission, one of the

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[43] *Grassy Narrows* at para. 50.
[44] *Grassy Narrows* at para. 53.
[45] *Reference re Securities Act,* 2011 SCC 66 at paras. 63–64.
[46] *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11, at para. 69.
[47] *Impact Assessment Act*, preamble and s. 6(1)(a).

mischiefs the IAA and its immediate predecessor[48] sought to address was to enable a review and create a decision-making authority over projects where previously there was none. This explains the shift from decision-based to project-based triggers.

69. When what was then Bill C-69 was before the Standing Committee on Environment and Sustainable Development on May 3, 2018, the federal Minister of the Environment explained the purpose of the bill:

> The Government of Canada is committed to ensuring that *Canada's major projects* are developed in a way that is informed by rigorous science, evidence, and [I]ndigenous knowledge. *They must also be consistent with Canada's climate plan*, protect our rich natural environment, respect the rights of [I]ndigenous peoples, and support our economy.
>
> Our priority remains to effectively advance both Canada's economic progress and our environmental responsibilities. These values are at the core of Bill C-69. …
>
> Bill C-69 *restores robust oversight* and thorough impact assessments that take into consideration not only the negative environmental effects of a project, but also the environmental, economic, health and social impacts.
>
> Impact assessments will also consider how projects are *consistent with our environmental obligations and climate change commitments*, including with the Paris Agreement.[49]

70. These comments show that Canada wished to impose a thorough and robust oversight approach to what it calls "Canada's major projects" (which may well be a province's major projects). Those projects must be "developed in a way" that matches Canada's priorities, including its Climate Action Plan and international commitments. This is whether or not Canada possesses any direct regulatory responsibility for the matter.

71. Drawing from this, the purpose can be described as being to provide for "robust oversight" over all "major projects" to ensure consistency with federal policies and priorities. The scheme of

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[48] *Canadian Environmental Assessment Act, 2012,* SC 2012, c 19.

[49] House of Commons, Standing Committee on Environment and Sustainable Development, *Evidence*, 42-1, No 110 (3 May 2018) at 1-2 (Hon Catherine McKenna).

designation under ss. 7 and 9 of the IAA, along with the *Regulations*, allows this purpose to be realised in respect of provincially regulated projects.

2. Effects

72. Both the legal and practical effects of a law are analysed in determining its pith and substance. A law's legal effects are revealed by asking "how the legislation as a whole affects the rights and liabilities of those subject to its terms". Practical effects "flow from the application of the statute [and] are not direct effects of the provisions of the statute itself."[50]

73. The effects of the IAA regime, both legal and practical are to impose a federal decision-making responsibility upon provincial development projects where none otherwise exists. A corollary effect is to allow federal priorities and policies to determine the course of provincial matters. The effect is also to diminish the constitutional right of the provinces to regulate matters within their jurisdictions, including the right to embody the Crown in connection with s. 35 rights.

3. Classification

74. This Court has affirmed that heads of power must be approached flexibly, but cannot be construed to infinitely expand jurisdiction. The principle of federalism must be respected.[51]

75. Because they do not necessarily flow from individual heads of power, environmental impact assessments are vexing to classify. The "solution" for this Court in *Oldman River* was to examine the constitutional division of powers, and consider how the powers specifically apply to the environment:

> In my view the solution to this 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

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[50] *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11at paras. 70 and 77.
[51] *Ward v. Canada (Attorney General)*, 2002 SCC 17 at para. 30.

> may affect the environment, either by acting or not acting. This can best be understood by looking at specific powers. [52]

76. Canada proposes that the IAA relates to four distinct heads of power: s. 91(12)(Sea Coast and Inland Fisheries), s. 132 (Imperial Treaties), s. 91(24)(Indians and Lands Reserved for Indians) and s. 91(POGG). The POGG power relates only to interprovincial and extraterritorial matters, which Manitoba does not dispute.[53] It must then be considered whether the remaining heads of power can be construed to provide legislative competence for the IAA regime.

77. Manitoba submits that none of the specific powers advanced by Canada, either individually or collectively, comprises authority to designate and impose a federal assessment process on a wholly provincial project over which Canada exercises no other regulatory or decision-making authority. Ultimately, this regime requires a project in provincial jurisdiction to be subject to federal policies and priorities. It gives Canada the final decision on all designated projects. This, it is submitted it is *ultra vires* ss. 91(12), 91(24) and 132 of the *Constitution Act, 1867*.

D. CONCLUSION

78. In Manitoba's submission, jurisdiction over provincial development projects cannot be conjured out of federal policies, action plans, international commitments and the desire to control all major projects. Rather, it must be found in the existing federal heads of power. It is not.

79. Manitoba ultimately agrees with the following conclusion of the Majority of the Alberta Court of Appeal:

> [347] Put succinctly, even where the federal government has no decision-making authority with respect to an intra-provincial designated project, the federal executive can stop – that is veto – that project unless it decides that the intra-provincial designated project is in the public interest based on federal priorities and policies. That is beyond Parliament's jurisdiction under Canada's Constitution.[54]

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[52] *Oldman River* at 65.
[53] Canada's Factum paras. 120 and 136 to 138.
[54] *Reference re Impact Assessment Act*, 2022 ABCA 165 at para. 347.

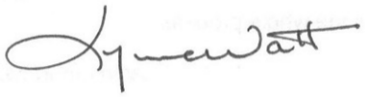
PART IV
SUBMISSIONS ON COST

80. Manitoba seeks no costs on this appeal and asks that none be granted against it.

PART V
ORDERS SOUGHT

81. Manitoba submits that the reference questions should be answered in the affirmative.

ALL OF WHICH IS RESPECTFULLY SUBMITTED on December 20, 2022.



for:

Charles Murray,
Counsel for the Intervener, the
Attorney General of Manitoba

PART VII
LIST OF AUTHORITIES

Cases:	**Paragraph No(s).**
Friends of the Oldman River Society v. Canada (Minister of Transport), [1992] 1 SCR 3	14, 18, 35, 36, 37, 38, 39, 75
Quebec (Attorney General) v. Moses, 2010 SCC 17	40, 41, 42
References re Greenhouse Gas Pollution Pricing Act, 2021 SCC 11	52, 67, 72
Reference re Impact Assessment Act, 2022 ABCA 165	27, 31, 32, 79
Reference re: Pam-Canadian Securities Regulation, 2018 SCC 48	21
Reference re: Securities Act, 2011 SCC 66	67
Rogers Communications c. v. Châteauquay (City), 2016 SCC 23	22
Tsilhqot'in Nation v. British Columbia, 2014 SCC 44	57, 59
Grassy Narrows First Nation v. Ontario (Natural Resources), 2014 SCC 48	58, 61, 62, 63, 64, 65
Ward v. Canada (Attorney General), 2002 SCC 17	74

Legislation:	**Paragraph No(s).**
Canadian Environmental Assessment Act 2012, SC 2012, c 19	68
Impact Assessment Act, SC 2019, c. 28, s. 1	10, 33, 34, 52, 56, 68
The Environment Act, C.C.S.M. c. E125 (English) s. 12.0.2 (French) s. 12.0.2	15, 26

Physical Activities Regulations SOR/2019-285 (English) s. 30, 51 (French) s. 30, 51	47, 48

Secondary Sources:	**Paragraph No(s).**
Canada, *Discussion Paper on the Proposed Project List: A Proposed Impact Assessment System* (May 2019)	49
Peter W. Hogg & Wade K. Wright, *Constitutional Law of Canada*, 5th ed. supplemented (Toronto: Thomson Reuters, 2021) (loose-leaf updated 2021) (Hogg) at § 30.32	20, 44
House of Commons, Standing Committee on Environment and Sustainable Development, *Evidence*, 42-1, No. 110	69