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:

ATTORNEY GENERAL OF CANADA

APPELLANT

-and-

ATTORNEY GENERAL OF ALBERTA

RESPONDENT
(Continued)

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Part I - Overview and Statement of Facts

1. Mikisew Cree First Nation ("**Mikisew**"), a northern Alberta nation dramatically impacted by Alberta's ongoing exploitation of the oil sands, intervenes in this appeal to urge this Court to uphold the constitutionality of the *Impact Assessment Act*[1] (the "**IAA**" or the "**Act**"), and the *Physical Activities Regulations*[2] (the "**Regulations**").

2. Mikisew confines its submissions to the constitutionality of ss. 7(1)(c) and (d) of the Act and ss. (c) and (d) of the definition of "effects within federal jurisdiction", which trigger the application of the Act and enable the federal government to consider and address impacts from "designated projects" on Indigenous interests (the "**Indigenous Effects Provisions**"). Contrary to the finding of the majority of the Alberta Court of Appeal ("**ABCA**"), those provisions fall squarely within Parliament's broad jurisdiction under s. 91(24) of the *Constitution Act, 1867* ("Indians, and Lands reserved for Indians").[3]

3. In maintaining that the Indigenous Effects Provisions are *ultra vires* s. 91(24), the ABCA majority and Alberta make a number of errors of law and logic. First, they treat s. 91(24) as if it is limited to its "core", despite the core of a power constituting its "basic, minimum and unassailable content",[4] not its full scope. Second, they wrongly conflate the distinct questions of whether a federal law is valid (i.e. *intra vires*) and whether a provincial law is applicable (i.e. not subject to interjurisdictional immunity), when the answer to the latter question says nothing about the former. Alberta also incorrectly treats the existence of a provincial duty to consult under s. 35(1) of the *Constitution Act, 1982*[5] as if it means that the federal government necessarily lacks jurisdiction under s. 91(24) over the same subject matter.

4. The Indigenous Effects Provisions fit comfortably within the federal government's jurisdiction under s. 91(24). The *IAA* provides an important means of ensuring that an intra-provincial designated project's effects on Indigenous peoples and interests will be considered;

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[1] *Impact Assessment Act,* SC 2019, c. 28, s. 1 [***IAA***].
[2] *Physical Activities Regulations*, SOR/2019-285.
[3] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s. 91(24).
[4] *Canadian Western Bank v. Alberta,* 2007 SCC 22 [***Canadian Western Bank***] at para 50.
[5] *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

without the Act, many such effects could go unassessed under the relevant provincial regime. The *IAA* is constitutional and should be upheld.

Part II - Issues

5. Mikisew agrees with Canada's statement of the issues raised in this appeal. Mikisew's submissions will focus on why ss. 7(1)(c) and (d), and ss. (c) and (d) of the definition of "effects within federal jurisdiction" are validly enacted pursuant to the federal government's jurisdiction under s. 91(24) ("Indians, and Lands reserved for Indians").

Part III - Statement of Argument

Section 7(1)(c) and (d) fall within the scope of s. 91(24)

6. The Indigenous Effects Provisions allow the federal government to consider impacts from designated projects on Indigenous people, and more specifically on: their physical and cultural heritage;[6] their use of lands and resources for traditional purposes;[7] sites or structures of historical, archaeological, paleontological or architectural significance;[8] and their health and socio-economic conditions (together, "**Indigenous Interests**").[9]

7. Accordingly, the Indigenous Effects Provisions enable the federal government to consider, address, and/or avoid impacts from designated projects on Indigenous Interests. Such interests include Aboriginal and Treaty rights (which most obviously fall within the scope of "current use of lands and resources for traditional purposes"),[10] but they also extend beyond such rights to include, for instance, Indigenous peoples' health and socio-economic conditions.

8. The Indigenous Effects Provisions fall squarely within the federal government's jurisdiction under s. 91(24), which provides Parliament with exclusive jurisdiction to make laws

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[6] *IAA* s. 7(1)(c)(i).
[7] *IAA* s. 7(1)(c)(ii).
[8] *IAA* s. 7(1)(c)(iii).
[9] *IAA* s. 7(1)(d).
[10] These provisions are almost identical to s. 5(1)(c) under the *IAA*'s predecessor, the *Canadian Environmental Assessment Act, 2012,* SC 2012, c 19, s 52 [***CEAA* 2012**]. In *Taseko Mines Limited v. Canada (Environment)*, 2017 FC 1100 [***Taseko***] at para 150 the court found that the purpose of those provisions was to allow the federal government to draw out potential impacts of designated projects on Aboriginal and Treaty rights.

in relation to "Indians, and Lands reserved for Indians". As the level of government vested with primary constitutional responsibility for securing the welfare of Canada's Indigenous people,[11] the federal government's jurisdiction under this head of power is broad,[12] and extends to "all matters affecting their welfare and civil rights."[13] While the full extent of the federal government's authority under s. 91(24) has not been examined comprehensively, it has been observed to include:

a. Aboriginal and Treaty rights;[14]

b. Aboriginal title lands;[15]

c. Reserve land;[16]

d. Indian status and registration, band membership, and Chief and Council elections;[17]

e. Inter-personal relationships between Indigenous persons, such as adoptions or family relationships;[18]

f. The division of family property on reserve land (*Derrickson*);[19] and

g. The well-being of Aboriginal children, families and peoples.[20]

9. As recently recognized by the Quebec Court of Appeal, the federal government has "[legislated] in just about every area of Aboriginal life without these initiatives having been defeated by the courts."[21]

10. The Constitution's assignment of these powers to the federal government is not accidental; rather, "it reflects the decisions made by the framers of Confederation as to what laws should be

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[11] *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 [***Delgamuukw***] at para 176.
[12] *Reference to the Court of Appeal of Quebec in relation with the Act respecting First Nations, Inuit and Métis children, youth and families*, 2022 QCCA 185 [***Bill C-92 Reference QCCA***] at para 322.
[13] *Re Kane*, 1939 CanLII 244 (NS SC) at 392, cited by Jack Woodward, Q.C., *Aboriginal law in Canada*, (accessed 26 September 2022), (Toronto: Thomson Reuters Canada) § 3.10, at para 3.180. Thomson Reuters Proview [**Book of Authorities, "BOA", Tab 1**].
[14] *Delgamuukw* at paras 177–178; *R v Morris*, 2006 SCC 59 at para 43.
[15] *Delgamuukw* at para 176.
[16] *Morin v. Canada*, 2000 CanLII 15539 (FC) at paras 11-12.
[17] *Four B Manufacturing Ltd. v. United Garment Workers*, [1980] 1 SCR 1031 p. 1048
[18] *Canadian Western Bank* at para 61.
[19] *Derrickson v. Derrickson*, [1986] 1 SCR 285, at paras 42-43.
[20] *Bill C-92 Reference QCCA* at paras 333 and 345.
[21] *Bill C-92 Reference QCCA* at para 325.

considered by Parliament in the *national* interest, and what should be decided by provincial legislatures on the basis of *local* interests."[22] The federal Crown, as the more distant level of government, was – and remains – more likely to respect the reserves and treaties and to protect against encroachment of settlers and exploitation by colonial governments.[23] As the Federal Court recognized in *Daniels,* s. 91(24) is the product of the framers' desire for a coordinated approach to all Indigenous peoples, rather than "balkanized colonial regimes", and the need to deal with "rapid and forcible expansion in the west" by way of Euro-Canadian settlement and the railway.[24]

11. Reflecting its rationales, s. 91(24) has a wide scope. It encompasses interests that are unique to Indigenous peoples, such as Aboriginal and Treaty rights, as well as Indigenous languages and culture more broadly. It also includes interests that are shared in common with non-Indigenous persons. The ABCA majority focused on those latter interests, noting at paragraph 303 of their judgment that some effects from intra-provincial projects relate to Indigenous peoples "*as people and residents of the subject province* and are not related to their "Indianness".[25] No doubt that is so for some effects, but it is decidedly not the case for others. But even with respect to the commonly-held interests, for Indigenous people such interests are "often uniquely at risk in ways that the interests of non-indigenous people are not."[26] Simply observing that some effects are felt by Indigenous and non-Indigenous people alike without going further to consider how they are actually experienced is to ignore Indigenous people's deep history of exclusion from and unique vulnerability to local politics. That vulnerability continues today, with Indigenous communities

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[22] *Reference re Environmental Management Act (British Columbia)*, 2019 BCCA 181 at para 64.
[23] Peter W Hogg, *Constitutional Law of Canada*, 5th ed, (date accessed 24 September 2022), (Toronto: Thomson Reuters Canada), § 28.1. Thomson Reuters ProView [**BOA, Tab 3**]. See also, John Borrows & Micheal Coyle, *The Right Relationship: Reimagining the implementation of Historical Treaties,* Chapter 1: Canada's Colonial Constitution (Toronoto: University of Toronto Press, 2017) [**BOA, Tab 2**], and Kerry Wilkins, View of Life Among the Ruins: Section 91(24) after Tsilhqot'in and Grassy Narrows, Alberta Law Review, [**Wilkins**] pp. 95-98.
[24] *Daniels v. Canada*, 2013 FC 6 at para 539.
[25] *Reference re Impact Assessment Act*, 2022 ABCA 165 [**Appeal Decision**], at para 303, AGC Record, Vol 1, Tab 1, pp. 94-95.
[26] *Taseko* at para 153 (underlining in original).

being disproportionately impacted by the effects of natural resource developments.[27] The rationale for federal jurisdiction over this head of power remains vital.

Section 91(24) is not limited to its "core"

12. One reason the ABCA majority finds the *IAA* to be invalid is because the *IAA* encompasses effects on Indigenous peoples that "are not related to their 'Indianness'".[28] "Indianness" is a term used to refer to the "core" of the s. 91(24) jurisdiction over "Indians",[29] which is relevant when considering whether a provincial law is inapplicable because of the doctrine of interjurisdictional immunity.

13. But of course constitutional heads of power – including s. 91(24) – are not limited to their cores. The core of a head of power is the "basic, minimum and unassailable content" that is immune from the application of legislation enacted by the other level of government.[30] The core is necessarily more limited than the full extent of a head of power. Just because a matter lies outside of the core federal power does not necessarily mean it falls outside of the federal government's jurisdiction.

14. In limiting the scope of s. 91(24) to the core of that power – Indianness – Alberta and the ABCA majority wrongly conflate the question of whether federal legislation is *valid* (*intra vires*) with the question of whether provincial legislation is *applicable* (not precluded by interjurisdictional immunity). "To say that some matter lies outside the core of a head of federal power is not necessarily to say that it lies beyond the reach of federal authority; it is, however, to say that it lies within the reach of provincial legislative authority."[31] But of course the question in this reference is not the reach of provincial jurisdiction; it is rather the ambit of federal jurisdiction,

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[27] *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at paras 11, 187, 206; *Wet'suwet'en Treaty Office Society v British Columbia (Environmental Assessment Office)*, 2021 BCSC 717 at paras 101-102.

[28] Appeal Decision at para 303, AGC Record, Vol 1, Tab 1, pp. 94-95.

[29] See Appeal Decision at para 156 where the majority states that "[t]he "core" of s 91(24) refers to matters going to "Indianness"." AGC Record, Vol 1, Tab 1, p. 55. See also *Delgamuukw* at para 181 for Lamer CJ's articulation of the core of the power as relating to "Indianness".

[30] *Canadian Western Bank* at para 50.

[31] Wilkins, p. 115.

and considering whether ss. (c) and (d) of the *IAA*'s definition of "effects within federal jurisdiction" lie within the core of s. 91(24) or not will not advance that determination.

Section 91(24) is not limited by provincial legislation of general application

15. The ABCA majority concluded that the prohibition backing ss. 7(1)(c) and (d) of the *IAA* "contradicts the fundamental principle that provincial laws of general application apply to "Indians and Lands Reserved for Indians".[32] The majority appears to have reached this conclusion based on the Court's ruling in *Tsilhqot'in* that the doctrine of interjurisdictional immunity does not preclude provincial legislation from applying to land subject to Aboriginal and Treaty rights.[33] But that holding in *Tsilhqot'in* does not support the majority's conclusion.

16. This Court's holding in *Tsilhqot'in* that the doctrine of interjurisdictional immunity does not apply to s. 35 rights does not alter the distribution of powers under ss. 91 and 92; it neither diminishes Parliament's jurisdiction under s. 91(24) nor transfers it to the provinces. Rather, the import of the holding is that, when the two levels of government have overlapping jurisdiction in respect of a matter with a double aspect, the doctrine of interjurisdictional immunity is not available to resolve any conflict that may arise. As stated by Justice Greckol, writing in dissent in the ABCA in this proceeding, "the applicability of provincial legislation to Indigenous peoples says nothing about the validity of federal legislation like the *IAA*."[34]

17. The ABCA majority, and Alberta before this Court,[35] again appear to conflate provincial applicability (i.e. not subject to interjurisdictional immunity) with federal invalidity (i.e. *ultra vires*) – a plain error of law. Validity and applicability are distinct concepts going to distinct questions: whether a law falls within one level of government's jurisdiction, on the one hand, and whether a provincial law impermissibly intrudes on federal jurisdiction, on the other.

18. The ABCA's majority's conflation of the questions of provincial applicability with federal invalidity appears to have been driven by an assumption that if provincial environmental laws apply to Aboriginal and Treaty rights, then federal laws do not. Alberta makes a similar assumption at footnote 138 (paragraph 128) of its factum in referencing this Court's decision in *NIL/TU,O*

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[32] Appeal Decision at para 303, AGC Record, Vol 1, Tab 1, pp. 94-95.
[33] *Tsilhqot'in Nation v British Columbia,* 2014 SCC 44 [***Tsilhqot'in***] at para 150.
[34] Appeal Decision at para 651, AGC Record, Vol 1, Tab 1, pp. 179-180.
[35] Factum of the Respondent, the Attorney General of Alberta ("**Alberta's Factum**"), at para 124

Child and Family Services Society v. B.C. Government and Service Employees' Union.[36] Such reasoning proceeds on an outdated vision of the division of powers as watertight compartments, contrary to the model of cooperative federalism this Court has embraced in recent decades, as elaborated upon in *Canadian Western Bank*.[37] Indeed, when this Court in *Tsilhqot'in* held that the doctrine of interjurisdictional immunity no longer applies to Aboriginal and Treaty rights, it did so in the context of a matter that the Court noted had both federal and provincial aspects – forestry on Aboriginal title lands – and it expressly followed *Canadian Western Bank* in permitting the concurrent application of legislation from both levels of government.[38]

19. Environmental assessment regimes are indeed an apt example of cooperative federalism in action. As this Court observed almost three decades ago, overlapping assessment processes are "neither unusual nor unworkable".[39] There is a long history of the federal government and provincial governments coordinating their environmental assessment regimes so that impacts to each jurisdiction's interests are assessed through relatively timely procedures. One of the *IAA*'s purposes is to "promote cooperation and coordinated action between provincial and federal governments",[40] and to that end it has a number of mechanisms to facilitate cooperation with the provinces, including the requirement to offer to cooperate with provinces on assessments,[41] the ability to substitute a provincial assessment for a federal assessment,[42] and the ability to establish a joint provincial-federal assessment.[43]

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[36] Alberta's Factum, at para 128, citing *NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union*, 2010 SCC 45, and *Canada (Attorney General) v. Northern Inter-Tribal Health Authority Inc*, 2020 FCA 63 at para 24.
[37] *Canadian Western Bank*, see in particular para 37.
[38] *Tsilhqot'in* at paras 128–129 and 149–151.
[39] *Quebec (Attorney General) v Canada (National Energy Board),* [1994] 1 SCR 159 at para 62; see also *Reference re Environmental Management Act (British Columbia)*, 2019 BCCA 181, at para 103, where the Court of Appeal noted that environmental protection is a "diffuse field in which both levels of government play important roles": aff'd 2020 SCC 1.
[40] *IAA*, s. 6(e).
[41] *IAA*, s. 21.
[42] *IAA*, s. 31.
[43] *IAA*, s. 39.

20. There is nothing about concurrent environment assessments over some projects that renders provincial jurisdiction "subordinate"[44] or "meaningless".[45] Provinces' jurisdiction to approve or deny a project, or approve it with conditions, remains entirely intact. The concurrent existence of a federal assessment simply reflects the reality that an industrial project does not take place within a provincial enclave but also affects federal interests.

Relationship between s. 35 and s. 91(24)

21. Section 35 of the *Constitution Act, 1982* recognizes and affirms existing Aboriginal and Treaty rights. As recognized by the ABCA majority, this section does not create or confer jurisdiction, and it has no impact on pre-existing legislative authority.[46] Rather, it places a limit on how each level of government can impact Aboriginal and Treaty rights when legislating under their respective heads of power,[47] and it gives rise to a duty to a consult when Crown decisions may impact s. 35 rights.[48]

22. At paragraphs 130-132 of its factum, Alberta conflates consultation under s. 35(1) with *vires* under s. 91(24) when referring to Canada's position in *Mikisew Cree First Nation v. Canadian Environmental Assessment Agency.*[49] Once again, such conflation is wrong in law; the fact that one level of government owes a duty to consult in respect of an activity does not mean the other level of government does not have its own jurisdiction over that activity.

23. In *Mikisew 2022*, Mikisew is challenging the federal Environment Minister's decision not to designate a project under s. 14(2) of *CEAA 2012*, such that it would undergo a federal assessment (an equivalent provision is found in s. 9 of the *IAA*). Mikisew asserts the decision was unreasonable and was subject to a duty to consult that was not fulfilled. Canada and the proponent, Canadian Natural Resources Ltd., take the opposite positions – that the Minister's decision was reasonable, and that a duty to consult did not arise, or that it was fulfilled if it did.[50] No party in the case asserts

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[44] Alberta's Factum, at para 129.
[45] Appeal Decision at para 304, AGC Record, Vol 1, Tab 1, p. 95.
[46] Appeal Decision at para 158, AGC Record, Vol 1, Tab 1, p. 55.
[47] *Tsilhqot'in* at para 142; Wilkins, p. 107; Appeal Decision at para 161, AGC Record, Vol 1, Tab 1, p. 56.
[48] *Tsilhqot'in* at paras 17, 78.
[49] *Mikisew Cree First Nation v. Canadian Environmental Assessment Agency*, 2022 FC 102 [***Mikisew* 2022**].
[50] *Mikisew* 2022 at paras 1-5.

that Canada somehow lacks the jurisdiction to designate this intra-provincial project for a federal assessment. The case concerns the validity of the administrative decision, not the legislative framework.

24. One of the factual issues in *Mikisew 2022* is that Alberta will conduct its own environmental assessment of the project, and Alberta owes a duty to consult in respect of the project approval decision. But contrary to Alberta's submission in this reference, just because a province will conduct its own assessment of a project and will consult affected First Nations in relation to the project does not mean the federal government lacks its own jurisdiction to undertake its own assessment.

25. The relevance of *Mikisew 2022* is instead that it is an example of the federal government using its discretion under its environmental assessment legislation to decline to undertake its own assessment in light of its view that a province would adequately address a project's impacts through the provincial assessment. The particular discretion at issue in that case relates to designating an activity for a federal assessment that does not meet the thresholds for a designated project prescribed by the regulations. But the IAA also provides the Agency with a discretion that works the other way: s. 16 requires the Agency to decide whether a project that does meet the prescribed thresholds and so is a "designated project" does not require an impact assessment.

26. Section 16 is a statutory safeguard aimed at better ensuring that a federal impact assessment is not conducted where it is not required. As with most other statutory discretions, the decision the statute mandates must be made reasonably, and it may be quashed on judicial review where it is not. The same point applies, of course, to the Governor in Council's determinations as to whether the project is in the public interest (s. 62) and what conditions should be attached to any positive decision statement (s. 64). Those decision-making powers must be exercised reasonably – that is, in a manner that is justified, transparent and intelligible[51] – and they may be judicially reviewed and set aside where they are not.

27. At paragraphs 132-133 of its factum, Alberta sets up an *in terrorem* hypothetical – that Canada could exercise its powers under the *IAA* to unreasonably assess and block a project "no matter how minor" the effects on federal interests. But any statutory power can be exercised

[51] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at paras 81, 86, 94 and 98–100.

unreasonably; that is precisely why the rule of law requires the availability of judicial review.[52] The mere potential for the unreasonable exercise of a statutory discretion does not render the overarching statutory framework unconstitutional.

Absence of federal power could lead to Indigenous Interests not being assessed

28. While the unreasonable decision-making under the *IAA* that Alberta fears can be addressed on judicial review, the result that Alberta seeks – the complete withdrawal of federal assessments of "intra-provincial designated projects" – could create gaps in the assessment of Indigenous interests without an available mechanism for filling them. For instance, an oil sands project proposed entirely within Alberta's borders might potentially entail impacts on:

a. Aboriginal and Treaty rights;

b. Indigenous peoples' socio-economic conditions, such as disproportionate effects on Indigenous women from the influx of workers needed to develop the mine;

c. Indigenous peoples' health from the release of contaminants;

d. Navigation on rivers (such as the Athabasca River) from water withdrawals; and

e. National parks (such as Wood Buffalo National Park) as a result both of water withdrawals decreasing the amount of water reaching the park and of contaminants being deposited in the park.

29. Alberta would need to consult and potentially accommodate Indigenous nations with respect to impacts on Aboriginal and Treaty rights. But the impacts to other federal interests that fall outside of the duty to consult could go completely unassessed if Alberta chose not to include them within the scope of its assessment. Alberta would have no duty to assess or mitigate those effects, and Canada would have no mechanism for assessing and mitigating them itself. In short, with the *IAA* in place, any unreasonable application of it can be disciplined through judicial review. But the withdrawal of the *IAA* would leave the problem of provincial regimes failing to assess impacts to federal interests without a solution.

Parts IV & V - Costs and Order Requested

30. Mikisew does not seek costs and asks that no costs be awarded against it. Mikisew also requests the right to present oral argument.

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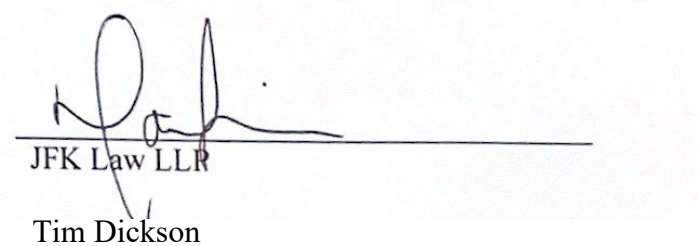
[52] *Dunsmuir v. New Brunswick*, 2008 SCC 9 at paras 27–31.

All of which is respectfully submitted this 20th day of December, 2022.



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Canadian Western Bank v. Alberta, 2007 SCC 22	3, 8, 13, 18
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John Borrows & Micheal Coyle, *The Right Relationship: Reimagining the implementation of Historical Treaties,* Chapter 1: Canada's Colonial Constitution (Toronoto: University of Toronto Press, 2017)	10
Kerry Wilkins, View of Life Among the Ruins: Section 91(24) after Tsilhqot'in and Grassy Narrows, Alberta Law Review (2017) 55:1 91	10, 14, 21
Peter W Hogg, *Constitutional Law of Canada*, 5th ed, (date accessed 24 September 2022), (Toronto: Thomson Reuters Canada), § 28.1. Thomson Reuters ProView	10
Legislation	***Section(s)***
Canadian Environmental Assessment Act, 2012, SC 2012, c 19, s 52	
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