Court 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

– and –

(Title of proceedings continued on next page)

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PART I - OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. With minor exceptions, federal and provincial authority to make laws under the *Constitution Act, 1867* is said to be "exclusive."[1] But in practice, Canadian federalism requires a significant amount of overlap. The same activities and persons are often subject to the laws of both levels of governments so long as the "matter" or "pith and substance" of those laws are in relation to different "aspects". Long ago, the courts recognized that the ship of state could not be subdivided into "watertight compartments",[2] and that the undertakings regulated by one level of government are not "enclaves" from the laws of the other.[3] This is particularly true in the environmental realm, which Justice La Forest characterized thirty years ago as a "constitutionally abstruse matter which does not comfortably fit within the existing division of powers without considerable overlap and uncertainty."[4]

2. The Attorney General of British Columbia ("British Columbia") submits that while considerable overlap remains necessary, it is possible to reduce the uncertainty. The *Constitution Act, 1867* – most of which was written a century before modern environmental regulation – does not define jurisdiction over the "environment" as such: instead, it provides both Parliament and the provincial legislatures with jurisdiction over industries and activities that affect the environment (what British Columbia will call "activity jurisdiction") and over things (natural resources, public health) that are put at risk by the environmental effects of those activities ("impact jurisdiction"). Overlap is necessary because national activities have local impacts and *vice versa.* Problems are considered "environmental" because the relationship between activity and impacts is complicated. There will thus always be a possibility that different constitutional activity or impact jurisdictions will arise from the same fact situation, such as a project. But overlap must not go so far as to create total concurrency – which, given the rule of federal paramountcy, would amount to the legislative

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[1] Exceptions: *Constitution Act, 1867,* ss. 92A (2)-(4) (interprovincial trade and indirect taxation of non-renewable resources, forestry resources and electrical energy generation and production), 94A (old age pensions), 95 (agriculture and immigration).
[2] *Canada (Attorney General) v. Ontario (Attorney General),* [1937] 1 D.L.R. 673 at 684, rejected *R. v. S. (S.),* [1990] 2 S.C.R. 254 at p. 291.
[3] *Cardinal v. Alberta (Attorney General),* [1974] S.C.R. 695 at p. 703; *Construction Montcalm Inc. v. Quebec (Minimum Wage Commission),* [1979] 1 S.C.R. 754 at p. 774.
[4] *Friends of the Oldman River Society v. Alberta,* [1992] 1 S.C.R. 3 [*Oldman River*] at p. 64.

union rejected in 1867.[5]

3. The difficult issue raised by this Reference is the *scope* and *limits* of impact jurisdiction when the other level of government has activity jurisdiction over a project. On the one hand, if the government with impact jurisdiction cannot impose any conditions on projects that affect interests falling within its constitutional sphere, this would effectively amend the Constitution by eviscerating impact jurisdiction, returning to the days of "watertight compartments" and "enclaves". On the other hand, if having *any* impact jurisdiction, however minor, included the power to decide *whether the project is in the public interest*, that would go too far. If applied symmetrically, every project could be vetoed by either level of government irrespective of the degree to which its interests were impacted; if applied only to benefit the *federal* government, it would be contrary to the principle that the two levels of government are co-ordinate sovereigns.

4. British Columbia says the case law regarding provincial environmental assessment of federal undertakings provides a solution. The level of government with jurisdiction over the activity, as opposed to its impacts, is the only one that can decide whether the activity is, on balance, in the public interest. But *so long as it defers to this decision*, the impact jurisdiction can decide how the activity's effects on interests within its sphere should be mitigated. The *process* of impact assessment is a procedural/operational tool, so each level of government can require proponents to undergo impact assessment so it can make the decisions entrusted to it.

5. Applying these principles, the *IAA*[6] is perfectly constitutional. The fact that it uses a project list approach does not make it different from the federal environmental assessment legislation approved by this Court in 1992. The constitutional constraints that protect provincial autonomy are on the scope of particular assessments, not on the enabling legislation.

B. Statement of Facts

6. British Columbia takes no position on the facts.

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[5] *Bell Canada v. Quebec (Commission de la Santé et de la Sécurité du Travail),* [1988] 1 S.C.R. 749 at para. 37.

[6] *Impact Assessment Act,* being Part 1 of an *Act to enact the Impact Assessment Act and the Canadian Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts,* S.C. 2019, c. 28 [*IAA*].

PART II - STATEMENT OF POSITION

7. British Columbia submits that the *IAA* and the *Physical Activities Regulations*[7] are constitutional, but assessments carried out under the *IAA* of activities within provincial jurisdiction must defer to provincial assessments that the project is in the public interest and therefore must not result in ultimately prohibiting the project, either expressly or in effect.

PART III - STATEMENT OF ARGUMENT

A. The Dilemmas of Environmental Federalism and the Nature of Impact Assessment

8. The concept of the "environment" in the modern sense did not exist in 1867, although the problems we now consider environmental did. The Constitution therefore does not assign jurisdiction over the "environment" as such, but over certain classes of activities (undertakings, industries) and over resources and public health, which was understood at the time to be an aspect of property and civil rights. The insight that led to modern environmentalism is that human activity, including economic activity, affects physical and biological systems, which in turn affect other human activities. Environmental law differs from traditional tort or criminal law precisely because the relationship between activities and impacts is mediated by systems. Activities and the impacts of those activities may therefore be of different geographic scope and legal characterization.

9. Because it is impossible for humans to exist – let alone prosper – without making changes in their environment, environmental laws have to balance and manage the negative and positive effects of activities. One environmental policy instrument governments use to balance these effects is *impact assessment.* Instead of providing a single rule for a certain kind of environmental harm or risk, impact assessment works project-by-project while centralizing into one agency decision-making over a variety of impacts. Impact assessment can lead either to denial of permission to proceed with the project (if the result of the assessment is that the costs, including environmental costs, outweigh the benefits) or to conditions on the project (if there are ways to minimize harm and risk of harm while allowing the project to go forward and thereby obtain its benefits).

10. The fact that the relationship between activities and impacts is complex has jurisdictional implications. The principle of subsidiarity – that legislative action is best taken by the government

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

that is closest to the citizens affected[8] – gives fairly straightforward answers when both the activities and impacts are at the local or national level. But what happens when activities intended to have national (or international) benefits – like an interprovincial railway – have local effects? Or when activities that are important to local economies or amenities have effects on a national (or international) scale?

11. One option would be that the level of government with responsibility for the *activity* makes *all* the decisions, while the laws of the jurisdiction suffering the impacts would have no power at all (the "enclave" option). A second possibility would be to require both to say "yes" (the "double veto" option). A third would be to allow the central government to say no to provincial undertakings that have impacts in its jurisdiction, but not allow the sub-national government to say "no" to federal undertakings (the "asymmetric" option). There are more unusual possibilities, such as giving all authority to the impact jurisdiction, requiring both to say "no" or giving the sub-national governments the final call in all cases.

12. None of these options are acceptable in the Canadian context. Canadian federalism provides for co-ordinate sovereignty, so any rule must be symmetrical. It does not divide up jurisdiction solely based on activity, so jurisdiction over impact must have some effect. But it also does not favour either a norm of development or non-development, so neither the dual "yes" nor the dual "no" is an appropriate answer. The key is to recognize impact and activity authority are *differentiated*: only the activity jurisdiction can say "yes" or "no" based on in its judgment of the overall public interest, but the impact jurisdiction has authority to mitigate impacts by imposing conditions that are consistent with this "yes" or "no".

B. Symmetry is a Principle of Federalism

13. Parliament and provincial legislatures share the plenary sovereignty of the Parliament of the United Kingdom in accordance with the written text of the Constitution (primarily sections 91 and 92 of the *Constitution Act, 1867*) as given life by the animating principles of the Constitution – most notably, in this context, the principle of federalism. In *Assisted Human Reproduction,* Justices LeBel and Deschamps defined the federalism principle as the principle that the powers of

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[8] *Reference re Assisted Human Reproduction Reference,* 2010 SCC 61 [*Assisted Human Reproduction*] at para. 183.

the levels of government are "co-ordinate, not subordinate".[9] In other words, the federal and provincial legislatures and executives are *equally* sovereign.[10]

14. If each sphere of sovereignty is distinct, then the powers of one must be interpreted in light of the powers of the other – this has been called the "mutual modification", balance or "non-evisceration principle."[11] Since sovereignty is co-ordinate, these limitations must be symmetrical: if provincial authority in one aspect is limited by federal authority in another, the same limitation must apply when the shoe is on the other foot.

15. This symmetry principle was explicitly recognized in *Canadian Western Bank.* At paragraph 35, the Court recognized that interjurisdictional immunity – as it had been applied in the jurisprudence – had produced "somewhat 'asymmetrical' results."[12] The doctrine required reform because this asymmetry was inconsistent both with the flexibility and co-ordination required by modern Canadian federalism and undermined the principle of subsidiarity.[13] The post-*Canadian Western Bank* interjurisdictional immunity doctrine is now symmetric: excessive claims for immunity of federal undertakings have been rejected while the core of provincial authority is now equally protected from being impaired by federal legislation.[14]

16. The majority below recognized the symmetry principle, but drew the wrong conclusion as a result of a faulty premise. It correctly said, "If Parliament could validly exercise jurisdiction over matters otherwise within provincial jurisdiction because of 'any effects' on federal matters, a provincial Legislature could presumably validly exercise jurisdiction over matters within federal jurisdiction because of 'any effect' on provincial matters."[15] Leaving aside the imprecision of the use of the term "matters" – "matter" is a term of art in Canadian constitutional law, referring to the dominant purpose and effect of a *law* – this is the well-established double aspect doctrine, according to which both Parliament and the provincial legislatures can validly exercise jurisdiction

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[9] *Assisted Human Reproduction,* para. 182.
[10] *Hodge v. R.,* (1883-84) 9 A.C. 117 at p. 132; *Liquidators of the Maritime Bank v. New Brunswick (Receiver-General),* [1892] A.C. 437 at 443.
[11] *Reference re Securities Act*, 2011 SCC 66 at para. 7.
[12] *Canadian Western Bank v. Alberta,* 2007 SCC 22 [*Canadian Western Bank*] at para. 35.
[13] *Canadian Western Bank* at para. 45.
[14] *Canadian Western Bank* at para. 35.
[15] *Reference re* Impact Assessment Act, 2022 ABCA 165 at para. 250 [*Decision Below*].

over a *fact situation* so long as the matter or "aspect" is distinct. [16] Since a project is not a "matter" but a "fact situation", there is no contradiction if both the laws of both levels of government applies to one project, so long as they do so with different dominant purposes/effects.

17. The majority went wrong when it drew the conclusion that if provincial matters could encompass federal projects, this would imply a province could "hold up construction of […] a new airport or inter-provincial pipeline for years […] and then, if it decided that the project was not in the public interest based on provincial policies and priorities, ultimately stop it from proceeding."[17] The *reductio* only works if provincial impact assessment in fact allows provinces to stop federal projects from proceeding. If this is *not* the case – as British Columbia will show – the argument does not follow.

18. But while the majority was wrong about the *implications* of the symmetry principle, they were correct that it must constrain solutions to the problem of overlap of environmental assessment if the two levels of government are to be equal. What is good for the goose is good for the gander. The question is what are the aspects under which environmental assessment laws are enacted?

C. The Three Aspects of Impact Assessment: Procedural Jurisdiction, Undertaking Jurisdiction and Impact Jurisdiction

19. In *Oldman River,* Justice La Forest identified three such aspects. He recognized that impact assessment laws have two "dimensions", procedural and substantive. He then subdivided the substantive "dimension" over the "environment" by stating it can be viewed from the perspective of the activity creating the environmental harm or risk or from the perspective of the environmental or health value that is at risk. Justice La Forest called this latter aspect "management of a resource",[18] but British Columbia submits it is better thought of as "impact jurisdiction" (since, in some contexts, resource management involves impacts). There are three aspects of impact assessment legislation: procedural, activity and impact.

20. According to *Oldman River,* the "procedural or organizational" aspect "coordinates the process of assessment". Its pith and substance is "the regulation of the institutions and agencies of

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[16] *Desgagnés Transport Inc. v. Wärtsilä Canada Inc.*, 2019 SCC 58 at para. 84; *References re Greenhouse Gas Pollution Pricing Act,* 2021 SCC 11 [*GGPPA References*] at para. 125.
[17] *Decision Below* at para. 250.
[18] *Oldman River* at p. 67.

the Government of Canada as to the manner in which they perform their administrative duties." The contrast is with the *substance* of federal environmental assessment legislation, which is in relation to various heads of power under section 91.[19]

21. The key limitation on the federal procedural/operational aspect of environmental is that it cannot be used as a "colourable device to invade areas of provincial jurisdiction which are unconnected to the relevant heads of power"[20] and that when it is invoked because a proposal *affects* an area of federal jurisdiction, the environmental effects to be studied can *only* be those which may have such an impact.[21] However, whatever the triggering mechanism for the assessment, the federal Parliament is free to provide that the authority must consider all effects on areas of federal jurisdiction on a project-by-project basis: this is just a corollary of Parliament's its control over the federal executive, which he locates under POGG.[22] Impact assessment in its procedural aspect is a "planning tool" with an "information-gathering" and "decision-making" component – independent of the *basis* on which decisions can be made.[23]

22. The paradigmatic example of an "activities" jurisdiction is federal authority over interprovincial railways under s. 92(10)(a). Justice La Forest emphasizes that Parliament and its delegates must be able to take into account *all* impacts – national or local, economic or environmental – in coming to a "final decision on whether or not to grant" approval of a proposed interprovincial railway (and by implication any other federal work or undertaking).[24]

23. The classic example of federal "management of a resource" jurisdiction is federal authority over fisheries under s. 91(27) of the *Constitution Act, 1867.* (British Columbia notes it is specifically the *impact* of industrial and other polluting activity on fish stocks, as opposed to fish harvesting itself, that is referenced.) As Justice La Forest pointed out, the Supreme Court had not given Parliament the same *carte blanche* when exercising this authority as with interprovincial transportation undertakings. While prohibition of deleterious substances in places where they may

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[19] *Oldman River* at pp. 73-74.
[20] *Oldman River* at p. 72.
[21] *Oldman River* at p. 72.
[22] *Oldman River* at p. 73.
[23] *Oldman River* at p. 71.
[24] *Oldman River* at p. 66.

enter waters frequented by fish was constitutional,[25] a prohibition on deposit of "slash, stumps or other debris" was not.[26] The former was limited to minimizing deleterious effects, as demonstrated on a case-by-case basis, as opposed to a blanket decision about whether an activity should take place at all. The latter goes beyond the proper sphere of the impact jurisdiction.

24. In *Oldman River,* Justice La Forest briefly, but importantly, underlined that these principles apply symmetrically: provinces in their jurisdiction over local works and undertakings can consider environmental concerns when deciding whether they are overall in the public interest, saying, "The provinces may similarly act in relation to the environment under any legislative power in s. 92" and noting that authority over local works and undertakings under s. 92(10) would included consideration of environmental impacts, implicitly including those which, viewed *qua* impact, are within federal authority.[27]

25. Justice La Forest's dictum that in "legislating regarding a subject, it is sufficient that the legislative body legislate on that subject. The practical purpose that inspires the legislation and the implications that body must consider are another thing"[28] must be placed in this context. It should not be read as saying that once the federal government has *any* reviewing authority, it may make its own public interest determination. This is *only* true if there is federal *activity* jurisdiction, as in Justice La Forest's example of interprovincial railways causing local nuisances.

26. Justice La Forest cautions that there must always be a necessary element of "proximity" between the *content* of the impact assessment and the source of federal substantive jurisdiction[29] and that to go beyond this connection would be a "colourable device to invade areas of provincial jurisdiction."[30] This nuance was consistent with the facts of *Oldman River* itself: the dam was already under construction and the only issue remaining was what "mitigative" measures could be taken to ameliorate deleterious impacts on fish, navigability and Indigenous lands and resources.[31]

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[25] *Northwest Falling Contractors Ltd. v. The Queen,* [1980] 2 S.C.R. 292.
[26] *Fowler v. The Queen,* [1980] 2 S.C.R. 213.
[27] *Oldman River* at p. 68.
[28] *Oldman River* at p. 69.
[29] *Oldman River* at p. 73.
[30] *Oldman River* at p. 72.
[31] *Oldman River* at p. 80.

27. In his case comment on *Oldman River,* Steven Kennett argues that it supports a distinction between "comprehensive" federal jurisdiction (as in the railway example) and "restricted" federal jurisdiction (as in the fisheries example).[32] Comprehensive jurisdiction arises when the federal government "can regulate an *activity* in terms of *all* of the activity's environmental consequences."[33] Restricted federal jurisdiction (of which navigation and fisheries are the federal examples) applies when an activity within provincial competence has consequences for an area of federal competence.[34] Kennett's approach is symmetrical: provinces can have comprehensive or restricted jurisdiction as well. In Kennett's view, there must be "judicially enforceable limits" on restricted jurisdiction, but this does not mean such authority is "weak or ineffective."[35] Kennett's principal criticism of Justice La Forest's discussion was that it left unclear exactly how the courts are to police these limits and he raised questions about the adequacy of the doctrine of colourability in this regard.

28. In short, *Oldman River,* read symmetrically, states the following propositions:

a. Neither Parliament nor the provincial legislatures have plenary authority over environmental assessment, and the extremes of total and zero overlap must both be avoided.

b. The *procedural* aspect of environmental assessment is in relation to the organization of the federal or provincial executive, as the case may be, and is well within the authority of that level of government. Environmental regulation can either be done by multiple agencies with subject matter jurisdiction across projects or by a single agency addressing each project on a case-by-case basis while considering all relevant subject matters. Impact assessment laws coordinate the process of assessment within the executive on a project basis for some category of activities (including "projects"). This procedural aspect is in relation to the institutions and agencies of the executive government and can be upheld either under the preamble to s. 91 or under s. 92(16). This aspect centralizes in one agency powers that either

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[32] Steven Kennett, "Federal Environmental Jurisdiction After Oldman*"* (1993) 38:1 McGill Law Rev. 180.
[33] Kennett at p. 187.
[34] Kennett at p. 189.
[35] Kennett at pp. 191-3.

are or *could be* given to other agencies. It does not create new powers.

c. Jurisdiction over an activity – the quintessential example of which is federal authority over interprovincial railways – gives rise to a substantive authority to consider all its impacts. Inevitably a decision must be made whether the proposed activity is overall in the public interest, considering all its positive and negative consequences. Federal examples of activity jurisdiction are use of federal lands, interprovincial and international transportation and communication undertakings (s. 92(10)(a)), works declared to be for the general advantage of Canada (s. 92(10(c)), the military (s. 91(7)) and radio and aeronautics (peace, order and good government (POGG)). Provincial examples include local works and undertakings (s. 92(10)), use of provincial lands, and non-renewable natural resources, forestry resources and generation and production of electricity (s. 92A(1)). The level of government with activity jurisdiction has to be able to consider *all* the impacts of a project to determine whether it is ultimately in the public interest.

d. Jurisdiction over what Justice La Forest called "management of a resource" – the quintessential example of which is federal authority over fisheries – gives rise to real, but constrained authority. Both Parliament and provincial legislatures are given jurisdiction in relation to impacts or effects of activities. These include provincial jurisdiction over public health (s. 92(13)), Crown and private lands (ss. 92(5) and 92(13)) and the conservation aspect of 92A jurisdiction. These also include impacts on federal lands (s. 91(1A)), on navigation (91(10)), on conservation of fisheries (91(12), on impacts on Indigenous lands and resources (91(24)) and in other provinces and countries (POGG). The level of government with *impact* jurisdiction has to be able to consider how a specific impact can be acceptably managed or mitigated. The key constraint must be deference to the decision-making authority of the other level of government as to whether the project is in the overall public interest.

D. Provinces Have Constrained Impact Jurisdiction Applying to Federal Activities

29. In the three decades since *Oldman River,* this Court has never come back to the question of the *constitutional* limits of the scope of federal impact assessment. Both the British Columbia and

Quebec courts have addressed the converse situation of provincial impact jurisdiction and federal activities. Both have rejected the extremes of total or zero overlap. In light of the symmetry principle, the correct approach when the province has impact jurisdiction must apply in the context before this Court now. British Columbia will argue that this is to give the impact jurisdiction the power to require impact assessment, but constraining it by requiring it to defer to the activity jurisdiction's judgment of the public interest.

30. Very shortly after *Oldman River,* this Court made it clear that provinces *have* impact jurisdiction over federally-regulated activities, including federal undertakings. In 1995, this Court dismissed – from the bench – an appeal by the Canadian Pacific Ltd. of a conviction under a provincial environmental statute for causing smoke pollution in a controlled burn on its right-of-way, even though it had obtained all statutorily-required federal permits.[36] The application of provincial air pollution laws was thought to be obvious – and in light of Justice La Forest's remarks three years earlier about the appropriateness of federal regulation of local nuisances by interprovincial railways, it was equally obvious that the fact situation called for the double aspect doctrine. In this century, in *Canadian Western Bank,* the Court upheld the "line of cases that have applied provincial environmental law to federal entities engaged in activities regulated federally."[37] Air pollution and toxic spills could be addressed both from the perspective of the activity (federal) and the impact (in this case, provincial).

31. This Court's jurisprudence has also made clear that there are limits on provincial impact jurisdiction when federal activities are involved. Provincial and local governments cannot restrict the height of projects on port land,[38] determine the locations of aerodromes[39] or cellphone towers,[40] or regulate specifically in relation to the interprovincial or international transportation of heavy oil.[41] These decisions have been made under the doctrines of pith and substance, interjurisdictional immunity and federal paramountcy. The common ground is that provinces cannot decide whether

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[36] *Ontario v. Canadian Pacific Ltd.,* [1995] 2 S.C.R. 1028.
[37] *Canadian Western Bank* at para. 66.
[38] *British Columbia (Attorney General) v. Lafarge Canada Inc*., 2007 SCC 23.
[39] *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39 [*COPA*]; *Quebec (Attorney General) v. Lacombe*, 2010 SCC 38.
[40] *Rogers Communications Inc. v. Châteauguay (City),* 2016 SCC 23.
[41] *Reference re Environmental Management Act,* 2020 SCC 1, upholding 2019 BCCA 181 [*EMA Reference*].

federal works and undertakings are in the public interest, either explicitly or by rendering them impracticable, but they can require them to mitigate their impacts in areas of provincial jurisdiction.

32. This Court has not specifically addressed provincial environmental assessment of federal activities, but the British Columbia courts have. The leading case is *Coastal First Nations.*[42] Justice Koenigsberg rejected Northern Gateway Pipelines Inc. challenge to the validity of British Columbia's *Environmental Assessment Act* when applied to an interprovincial transportation undertaking, but imposed significant constraints on the *content* of provincial environmental assessment. The federal aspect in relation to an interprovincial pipeline is clearly an *activity* jurisdiction, since an interprovincial pipeline is a federal transportation undertaking, exactly like an interprovincial railway. But as Justice Koenigsberg recognized, some matters of "regulating environmental impacts within provincial boundaries" come within provincial heads of power.[43] These are exactly analogous to federal fisheries jurisdiction as applied to forestry activities at issue in *Fowler* and *Northwest Contractors* and referred to by Justice La Forest in *Oldman River*.

33. The key holding of *Coastal First Nations* is that the provincial environmental assessment applies to impacts from a federal undertaking on provincial "interests", but that the province must defer to the federal determination as to whether the undertaking should go ahead.[44] The province can impose conditions that go beyond those required by the federal assessment process, so long as they rationally advance provincial interests[45] and do not frustrate the federal approval.[46]

34. In the *EMA Reference,* Justice Newbury questioned *Coastal First Nations* to the extent that it stated that the provincial *Environmental Management Act* "fully" applies to federal undertakings.[47] However, she agreed that provincial environmental assessment statutes are "laws of general application" and held that to the extent they are not prohibitive, they were distinct from the law before her that was ultimately invalidated by this Court.[48] In its most recent pronouncement, the British Columbia Court of Appeal has continued to apply the core of *Coastal First Nations,*

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[42] *Coastal First Nations v. British Columbia,* 2016 BCSC 34 [*Coastal First Nations*].
[43] *Coastal First Nation* at para. 51.
[44] *Coastal First Nations* at para. 55.
[45] *Coastal First Nations* at para. 72.
[46] *Coastal First Nations* at para. 73.
[47] *EMA Reference* at para. 51.
[48] *EMA Reference* at para. 96.

namely that the British Columbia *Environmental Assessment Act* applies to an inter-provincial pipeline project (and by extension to other federal undertakings with impacts in British Columbia), but with the constitutional constraints that the assessment cannot interfere with the federal decision to allow the project, either explicitly or in effect.[49]

35. It is worth noting that the practical effect of *Coastal First Nations* has been that very controversial federal undertakings have nonetheless obtained provincial environmental assessment certificates, along with other provincial permits. This is because these decisions do *not* require or authorize the province to determine whether the project is overall in the public interest but do allow it to require the mitigation of impacts.

36. The Quebec Court of Appeal took a somewhat different approach in *IMTT-Québec*[50], although it too rejected an enclave theory of federally-regulated activities. It held that some, but not all, provisions of Quebec's *Environmental Quality Act*[51] are applicable to activities connected to navigation and shipping in the port of Quebec. Holding that the development, use and regulation of activities related to navigation and shipping on federal lands is at the "core" of federal jurisdiction under section 91(1A) and 91(10) of the *Constitution Act, 1867,* the Court held that s. 20 of the *EQA* – prohibiting "release into the environment of a contaminant", except as allowed by provincial law – applied, but s. 22 – prohibiting carrying out certain projects without first undergoing provincial environmental impact assessment – impaired the core of the federal power.

37. The Court in *IMTT-Québec* correctly recognized that *Oldman River* had established that impact assessment is a "decision-making tool" that organizes executive authority the substantive basis of which can come from any head of power, and that this principle applies as much to provincial as to federal assessment.[52] It was also correct to say that if a level of government has *no* decision-making jurisdiction with respect to a project or activity, an environmental assessment is futile and unconstitutional.[53]

38. In British Columbia's respectful view, the Court of Appeal was too quick to reject the

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[49] *Squamish Nation v. British Columbia (Environment),* 2019 BCCA 321 at para. 10.
[50] *Attorney General of Quebec v. IMTT-Québec inc*., 2019 QCCA 1598 [*IMTT-Québec*].
[51] *Environmental Quality Act,* RSQ c. Q-2 [*EQA*].
[52] *IMTT-Québec* at paras. 223-225.
[53] *IMTT-Québec* at para. 226.

Attorney General of Quebec's submission that there should be a presumption that conditions imposed in provincial assessment would not frustrate projects and activities approved by the federal authority – and if that failed to be the case, a court could correct the *assessment* without invalidating the legislation requiring it. The error was in saying the province has *no* "constitutional jurisdiction to approve projects on federal public property used for purposes or activities under exclusive federal jurisdiction".[54] The province had no jurisdiction to *refuse* such projects, but it surely had the authority to approve it with conditions, since this is precisely what it does under s. 20. The possibility of migration of toxic substances was the issue in the permit, and the company could not operate without one. The province clearly could therefore approve activities on federal public property. What it could not do was second guess the federal assessment concerning its overall public interest. In other words, the province had no activity jurisdiction, but it had *impact* jurisdiction.

39. Because the Court in *IMTT-Québec* failed to consider the *Coastal First Nations* approach, it came too quickly to the conclusion that provincial environmental assessment would *necessarily* impair the core federal jurisdiction of deciding whether navigation-related activities on federal land go ahead.

40. The line *IMTT-Québec* draws between permits and impact assessment is incompatible with *Oldman River,* which views impact assessment as, in its procedural aspect, a way of organizing substantive jurisdiction. The *IMTT-Québec* Court's concern about "discretionary authority" has subsequently been addressed by this Court in the *GGPPA References.* Discretionary authority is inevitable in environmental law, as in other areas of complex regulation (including, of course, discharge permits). If the federal or provincial executive oversteps by using its legislative authority in a way that is inconsistent with the division of powers, then these *administrative acts* are unconstitutional and can be corrected by the courts without invalidating the legislative scheme as such.[55] The British Columbia experience shows that as long as the ground rules are clear, this will only exceptionally be necessary even when the provincial government has expressed opposition to the project and has stated as much to the federal authority.

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[54] *IMTT- Québec*at para. 220-221.
[55] *GGPPA* at para. 220, Wagner C.J.; Rowe J. (in dissent) at para. 615.

41. If *Coastal First Nations* is preferred over *IMTT-Québec*, then the Majority derived the wrong conclusion (that federal assessment of provincially-regulated activities is impermissible) from the symmetry principle because their premise was wrong. Provincial assessment of federally-regulated activities does *not* amount to a veto, so by symmetry neither should federal assessment of provincially-regulated activities. On the other hand, if *IMTT-Québec* is preferred, then the Majority's reasoning would indeed follow. If provinces cannot engage in impact assessment of federally-regulated activities, the same must be true when the shoe is on the other foot. But if this is the right conclusion, then *Oldman River* would have to be overruled.

42. It is necessary for this Court to resolve these differences. British Columbia says the right way to do this is to assert *Coastal First Nations* to the extent of the inconsistency. The alternative would be to choose between the symmetry principle and *Oldman River*. In British Columbia's submission, the co-ordinate nature of the two levels of government is the fundamental principle.

E. *Coastal First Nations* Can Be Understood Under Double Aspect Rule or, Alternatively, Interjurisdictional Immunity

43. British Columbia submits that the *Oldman River* and *Coastal First Nations* principle is rooted in the double aspect doctrine. The fact situation (project) is the same, but the purpose for addressing it is different. Statutory provisions, regulations and specific decisions must all be analyzed based on whether they are rooted in the operational/procedural, activity or impact aspects of environmental assessment. These aspects each come with different "normative bases"[56] and therefore different constitutional constraints. The activity aspect can be used to determine whether a project is all-things-considered in the public interest, while the impact aspect can be used to determine what further conditions ought to be placed on a project to address the interest of the impact jurisdiction. The procedural aspect can be used to ensure that an appropriate process for information gathering and decision making takes place before the impacts.

44. It would be destabilizing to root the constraints on provincial jurisdiction set out in *Coastal First Nations* in the paramountcy doctrine – since that is the one division-of-powers doctrine in Canadian law that is explicitly asymmetric. This is why paramountcy is used cautiously in Canadian constitutional law: as a last resort and when there is a very clear conflict, rather than

[56] *Assisted Human Reproduction* at para. 185, 286.

merely supplemental rules. If it is the basis for the constraints on provincial environmental assessment of federal undertakings, the result would be to unbalance the federation.

45. An alternative approach – seen both in *Coastal First Nations* and *IMTT-Québec* – would be to root the permissibility of provincial environmental regulation of federal activities in the double aspect doctrine, but its constraints in interjurisdictional immunity. British Columbia would not oppose this approach, so long as it is clear that interjurisdictional immunity protects provincial activities from federal overreach. *Canadian Western Bank* recognized this as *possible,* but the courts have not yet actually used this doctrine to protect core provincial jurisdiction,

46. If the Court were inclined to do so here, a basis for a distinction between provincial activity and impact jurisdiction can be found in *Insite,* where the Court refused to recognize interjurisdictional immunity as a basis for protecting core provincial jurisdiction over healthcare against federal criminal prohibitions, but left open the possibility that things might be different for local works and undertakings, as opposed to a "broad and amorphous area of jurisdiction" like health.[57] The distinction between activity and impact jurisdiction would be critical to the development of a symmetrical interjurisdictional immunity doctrine in the environmental sphere. The sole post-*Canadian Western Bank* use of interjurisdictional immunity in this sphere was in the *COPA* case. It protected federal authority over the location of aerodromes form provincial authority over impacts on agricultural land. Applied symmetrically, the constraints in *Coastal First Nations* would apply to any exercise of (valid) impact jurisdiction by either level of government: if the effect would be to impair the core of the activity jurisdiction's authority – a core that can be identified with the decision as to whether the project will go ahead.

47. However, because interjurisdictional immunity is a disfavoured doctrine and because its operation in favour of core provincial jurisdiction is so underdeveloped, it is more straightforward to explain the *Coastal First Nations* rule as exemplifying the principle of double aspect in the area of impact assessment. The double aspect and pith and substance doctrines apply not just to statutes as a whole, but also to enactments and orders under statutes, including the conclusions of assessment processes[58] If the refusal of an environmental assessment approval is, in its dominant

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[57] *Canada (Attorney General) v. PHS Community Services,* 2011 SCC 44 [*Insite*] at para. 60.
[58] *Ward v. Canada (Attorney General)*, 2002 SCC 17 at para. 16.

purpose and effect, in relation to a head of power assigned to the other level of government, then *this* is *ultra vires,* while the underlying statute is not. On this analysis, a requirement under a (valid) environmental assessment statute of the impact jurisdiction that in purpose or effect appropriated the decision about the overall public interest in a project from the activity jurisdiction would be in pith and substance in relation to the head of power conferring activity jurisdiction. By contrast, a requirement that imposed practicable conditions that mitigated impacts on interests within that jurisdiction's scope of authority would be in relation to the head of power conferring impact jurisdiction.

F. The *IAA* is Constitutional but its Application is Constrained

48. Applying this analysis to the *IAA,* the first is to characterize its dominant purpose and effect ("pith and substance", "aspect" or "matter"). The second is to classify that matter within one or more of the classes of subjects set out in the Constitution.

49. In its procedural aspect, British Columbia says the matter of the *IAA* is to facilitate decision making under federal heads of power for major projects. The reference to "federal heads of power" in this formulation of the matter does not conflate the classification and characterization analysis, because the dominant procedural purpose and effect is to organize decision-making authority that does or could otherwise exist on a project-by-project basis. As with the Guidelines Order considered in *Oldman River,* the scope of that decision-making is constrained to the substantive constitutional jurisdiction of the federal level of government.

50. This purpose is made explicit in s. 6(1)(b) of the *IAA* ("to protect the components of the environment, and the health social and economic conditions that are within the legislative authority of Parliament from adverse effects caused by a designated project"). Section 7 sets out the triggers which make a federal assessment necessary because of federal impact jurisdiction: changes to fish or fish habitat, changes to aquatic species, changes to migratory birds, changes on federal lands, changes in other provinces or countries, impacts on the physical and cultural heritage, use of lands and resources or significant structures of Indigenous peoples as a result of a change to the environment, and effects on the health, social or economic conditions of Indigenous peoples. These impacts, subject to the ordinary principle of *de minimis,* come within federal jurisdiction under the preamble to s. 91, s. 91 (1A), s. 91 (12), s. 91(24) or s. 132 of the *Constitution Act, 1867.*

51. In its procedural aspect, the matter of the *IAA* comes within Parliament's authority over the federal executive, traditionally located in the introductory clause of s. 91. To be sure, the fact that the *IAA* itself is described from its procedural aspect means that specific *orders* under it must be considered from a substantive aspect. *Their* dominant purpose and effect must be considered and classified either under a federal head of power or a provincial one. The key constraint is that – in cases where provinces have activity jurisdiction – impact assessment is confined to those impacts and cannot second guess a provincial public interest determination. With this constraint on *orders* under it, the *IAA* falls easily within *Oldman River.*

52. The major post- *Oldman River* statutory development in federal assessment legislation was in 2012, when automatic triggering of federal assessment was replaced by a "project list" set out in regulation.[59] There was no longer a distinct statutory basis for the substantive jurisdiction (whether activity- or impact-based) that would also apply to projects not listed. The 2012 changes do not materially change the *procedural or operational* aspects discussed in *Oldman River.*

53. Nor do they change the *substantive* dimension, but merely relocate it. *Oldman River* recognized that environmental assessment also has substantive aspects, subdivided between activities and "management of a resource". Under the Guidelines Order at issue in *Oldman River,* these substantive aspects were incorporated by reference from other statutes. The difference now is that since 2012 the substantive aspects for designated projects have to be considered under the impact assessment statute itself.

54. This difference does not make a difference. It cannot matter whether there already *is* a federal decision-making function somewhere else, but whether there *could be*. If Parliament could separately enact in the *Fisheries Act* that discharges in water that are potentially toxic to fish require permits and in a separate environmental assessment statute that a project of a certain nature requiring such a permit is subject to environmental assessment, then Parliament can cut to the chase and require environmental assessment of discharges potentially toxic to fish from projects of that type. Canadian division-of-powers jurisprudence has always looked at the "pith and substance", not the form, of a law. It has never been concerned whether a scheme is found in one statute or two. If Alberta is correct, Parliament would just have to create a separate statute requiring

[59] *Canadian Environmental Assessment Act*, 2012, S.C. 2012, c. 19, s. 52.

designated projects to obtain permits for their impact on fisheries, migratory birds, Indigenous lands, other provinces and countries and any other federal interest and then override the permit process with an impact assessment process. That makes no constitutional sense.

55. Alberta's arguments that the *IAA* necessarily gives the federal government the final say over provincial undertakings are unpersuasive. The existence of a prohibition on undertaking a project *prior to* an assessment is properly understood as procedural: if the prohibition did not exist, then the proponent could ignore the assessment altogether. Statements that federal decision-making is guided by the principle of "sustainability" should not create constitutional suspicion. The division-of-powers is neutral about substantive values, and the federal government can surely exercise whatever powers it would otherwise have based on a norm of sustainability. In context, the federal Minister's comment during the debates on Bill C-69 that cabinet's decisions would be "final" was *relative to other parts of the federal government* and says nothing about whether the federal authority gets final determination of when a provincial undertaking should go ahead. On that question, the constitutional constraints set out in *Coastal First Nations* should govern.

G. Canada Is Wrong That Once Triggered, an Impact Assessment Can Determine the Overall Public Interest of a Provincial Undertaking

56. To the extent Canada's submissions suggest that once there *is* a federal adverse impact, the federal authorities can decide whether the *project as such* is in the public interest, British Columbia disagrees.

57. A federal adverse impact only creates *impact* jurisdiction. The lesson of *Coastal First Nations* is that this is sufficient basis to require a proponent to undergo the assessment process and to impose conditions that mitigate impacts, but it must be the activity jurisdiction that decides whether the project is in the overall public interest. It would clearly violate the symmetry principle if a different rule applied when the federal government is the impact jurisdiction.

58. Canada has a trump card, equivalent to the notwithstanding clause, in that it can use s. 92(10)(c) to declare what would otherwise be a local work or undertaking "for the general advantage of Canada". This would give it activity jurisdiction. Section 92(10)(c), like some other aspects of the *Constitution Act, 1867* is in tension with the principle of federalism and has thus fallen into disuse. Any decision to do this would obviously be controversial. But that is as it should

be. If Canada wants to take not only impact jurisdiction but also activity jurisdiction, it has the option of doing so – but as with the notwithstanding clause or the disallowance power, it must do so in a maximally politically transparent way. What Canada should not be able to do is to transform impact jurisdiction into activity jurisdiction by stealth.

H. Summary and Conclusion

59. The Canadian Constitution does not provide either the federal or provincial government with plenary authority over environmental assessment. Rather, it creates a number of heads of power relevant to environmental risk – some over the source of the risk and some over what is at risk. It also gives each legislature the authority to organize the constitutionally-appropriate tasks of its executive as it sees fit.

60. *Oldman River* set out three aspects of environmental assessment: it is a way of organizing executive power, it is a way of exercising jurisdiction over activities and it is a way of exercising jurisdiction over impacts. It distinguished the force of the two substantive bases for environmental assessment, with activity jurisdiction giving authority to consider whether a project is all-things-considered in the public interest, while impact jurisdiction allows for mitigating impacts, but not to override that judgment when the Constitution entrusts it elsewhere. *Coastal First Nations* applied these principles in the situation of provincial environmental assessment of federal undertakings with provincial impacts.

61. The same principles should be applied when there is federal assessment of provincial works and undertakings – and other projects that are within what we have called provincial activities jurisdiction. If this is done, the *IAA* can be upheld consistently with Canada's federal balance.

PART IV - SUBMISSIONS ON COSTS

62. British Columbia does not ask for costs and asks that no costs be awarded against it.

PART V - ORAL ARGUMENT

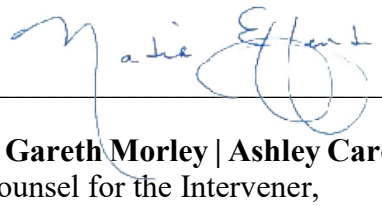
63. As permitted by the order of Justice Brown, dated November 3, 2022, British Columbia intends to make oral submissions of no more than 10 minutes.

PART VI – SUBMISSIONS ON PUBLICATION

64. N/A

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 21st DAY OF DECEMBER 2022

Per:



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PART VII - TABLE OF AUTHORITIES

Caselaw:

Cases	Paragraph Reference
Attorney General of Quebec v. IMTT-Québec Inc., 2019 QCCA 1598	36-42
Bell Canada v. Quebec (Commission de la Santé et de la Sécurité du Travail), [1988] 1 S.C.R. 749	2
British Columbia (Attorney General) v. Lafarge Canada Inc., 2007 SCC 23	31
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Ontario v. Canadian Pacific Ltd., [1995] 2 S.C.R. 1028	30
Quebec (Attorney General) v. Lacombe, 2010 SCC 38	31

Cases	Paragraph Reference
Quebec (Attorney General) v. Canadian Owners and Pilots Association, 2010 SCC 39	31, 46
R. v. S. (S.), [1990] 2 S.C.R. 254	1
Reference re Assisted Human Reproduction Reference, 2010 SCC 61	10, 13, 43
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References re Greenhouse Gas Pollution Pricing Act, 2021 SCC 11	16, 40
Reference re Securities Act, 2011 SCC 66	14
Rogers Communications Inc. v. Châteauguay (City), 2016 SCC 23	31
Squamish Nation v. British Columbia (Environment), 2019 BCCA 321	34
Ward v. Canada (Attorney General), 2002 SCC 17	47

Legislation

Legislation	Paragraph
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	throughout
Canadian Environmental Assessment Act, 2012, S.C. 2012, c. 19	51
Constitution Act, 1867, ss. 91, 92A (2)-(4), 94A, 95	throughout
Environmental Quality Act, RSQ c. Q-2 [*EQA*].	36-40
Physical Activities Regulations, SOR/2019-285	7

Secondary Authorities

Secondary Authority	Paragraph
Steven Kennett, "Federal Environmental Jurisdiction After Oldman" (1993) 38:1 McGill Law Rev. 180	27