

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

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 -

(style of cause continued on next page)

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

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I. OVERVIEW

1. The Canadian Association of Petroleum Producers (**CAPP**) represents Canadian oil and natural gas producers that produce approximately 80% of Canada's oil and natural gas. CAPP and its members are committed to the production of safe, secure, reliable, affordable, and responsibly produced energy and are an important part of a national industry that produces sustainable energy with over \$100 billion in revenues per year from oil and natural gas production.

2. CAPP and its members are concerned that the *Impact Assessment Act* (the **IAA**)¹ and the *Physical Activities Regulations* (the **Regulations**)² will create barriers that impact the viability of the Canadian oil and natural gas industry and will hinder the development of projects, like LNG facilities, that will be an important part of reducing carbon emissions.

3. The creation of these additional barriers arises from the extension of the IAA and Regulations beyond the traditional bounds of federal jurisdiction and into areas of provincial authority over public lands, local works and undertakings, and the development and management of non-renewable natural resources.³

4. Canada, Alberta, and all of CAPP's members share a desire for environmentally responsible development. For decades, the federal and provincial governments have shared responsibility for regulating environmental matters and courts have endorsed this balanced and cooperative approach.

5. But the Supreme Court has also recognized the potential for federal overreach in this area. In *Friends of the Oldman River Society v Canada (Minister of Transport)*, the Supreme Court of Canada warned that federal environmental legislation could impermissibly infringe on provincial jurisdiction if federal powers were too broadly construed.⁴ Justice McLachlin (as she then was) echoed this concern in her dissent in *Westcoast Energy Inc v Canada (National Energy Board)*,

¹ *Impact Assessment Act*, SC 2019, c 28, s. 1 [the **IAA**].

² *Physical Activities Regulations*, SOR/2019-285 [the **Regulations**].

³ *Constitution Act, 1867*, (UK) 30 & 31 Vict c 3, reprinted RSC 1985, App II No 5, ss. 92(5), 92(10), and 92A(1).

⁴ *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3 at para. 71 [**Oldman River**].

finding that conferring federal jurisdiction by means of only a glancing relationship would fundamentally alter the constitutional balance.⁵

6. The IAA and the Regulations are grounded in this "glancing relationship" and represent an extension of federal power into areas that decisions like *Oldman River* did not contemplate. A finding that the federal government has jurisdiction to regulate the entirety of projects that only touch on areas of federal responsibility will foster a regulatory framework that frustrates investment, development, and innovation.

II. ARGUMENT

A. The purpose and effects of the IAA and the Regulations

7. The IAA and the Regulations are tightly linked in their operation.⁶ Without the list of designated projects in the Regulations, the IAA would be framework legislation of limited application. To that end, this Court should consider both enactments together.⁷

8. To determine the validity of the IAA and the regulatory regime it creates, the first question is: what does the law do and why?⁸ While a consideration of both a law's purpose and its effects will help provide the answer,⁹ the effects of a law can be "a more reliable guide to its constitutional validity than its apparent or stated intention."¹⁰ In addition, the manner in which a law actually "sets out to achieve its purpose" can reveal its "total meaning".¹¹ Once the character of the law—its pith and substance—has been identified, the next step is to determine which "heads of legislative power" the law falls under.

9. The IAA sets out its purpose in s. 6. However, this is the start, not the end of the inquiry; a more proper characterization of the IAA is revealed on considering the various factors that inform the impact assessment and public interest determination. These include, among other things: the purpose of and need for the designated project; alternative means of carrying out the designated

⁵ *Westcoast Energy Inc v Canada (National Energy Board)*, [1998] 1 SCR 322 at para. 93.

⁶ IAA, ss 2, *sub verbo* "designated project", 7, 8, 9, and 109(b).

⁷ *MiningWatch Canada v Canada*, 2010 SCC 2 at para. 31.

⁸ *Quebec (Attorney General) v Canadian Owners and Pilots Association*, 2010 SCC 39 at para. 17.

⁹ *Reference re Securities Act*, 2011 SCC 66 at para. 63.

¹⁰ *Reference re Environmental Management Act (British Columbia)*, 2019 BCCA 181 at para. 14 [*BC Pipeline Reference*].

¹¹ *Reference re Firearms Act (Canada)*, 2000 SCC 31 at para. 18.

project; alternatives to the designated project; the extent to which the designated project contributes to sustainability; comments received from the public; and the extent to which the effects of the designated project hinder or contribute to the Government of Canada's ability to meet its environmental obligations.¹²

10. Given the broad meaning of "effects within federal jurisdiction" and the prohibitory effect of the statutory scheme, these factors ensure that most, if not all, designated projects included in the Regulations must reflect federal priorities and objectives as a pre-condition of approval. In this way, they fail to address the interests of the province where the designated project will take place.

11. The IAA and the Regulations then operate together to achieve Parliament's purpose by subjecting a certain class of projects, regardless of jurisdiction, to a *de facto* prohibition pending the outcome of a discretionary federal screening or impact assessment process. This effect of the IAA and Regulations informs the understanding of its legislative purpose. In addition, the effects of the IAA and the Regulations on *in situ* oil sands extraction facilities (*in situ* facilities) and LNG facilities illustrate the extent of the IAA and Regulations' reach into traditional areas of provincial authority.

B. The unique role of the environment in the division of powers does not justify the overly broad approach to environmental protection set out in the IAA

12. Canadian courts have long recognized the difficulties that environmental protection presents to federalism. This is primarily because the constitutional division of powers does not address the environment. Instead, both levels of government share authority over environmental matters. This creates "considerable [jurisdictional] overlap"¹³ and ultimately gives rise to interjurisdictional conflict and regulatory uncertainty. These concerns are particularly acute where the policy objectives of the federal and provincial governments do not align.

13. In dealing with these types of interjurisdictional conflicts, a key principle is subsidiarity. In the last two decades, subsidiarity has emerged as an important principle in constitutional jurisprudence, providing that "law-making and implementation are often best achieved at a level

¹² IAA, ss 16(2), 22(1), 63.

¹³ *Oldman River* at 64. See also *BC Pipeline Reference* at para 12.

of government that is not only effective, but also closest to the citizens affected and thus most responsive to their needs, to local distinctiveness, and to population diversity."¹⁴

14. The structure of the constitutional division of powers itself reflects this principle, assigning to each level of government legislative powers that it is best positioned to use in a manner that is responsive to those most closely affected.¹⁵ To the extent that each head of power has a core content, it follows that those core powers have been allocated to the level of government best positioned to act in respect thereof. As the Alberta Court of Appeal recognized, giving effect to this principle is one way to properly allocate jurisdiction in regard to environmental matters.¹⁶

C. The effect of the IAA and the Regulations: *In Situ* Facilities

15. The oil sands are critical to Alberta and Canada's prosperity and the bulk of this important resource will be developed through *in situ* production methods.¹⁷ It is no surprise that the regulation of *in situ* facilities forms an essential element of Alberta's ability to properly exercise its jurisdiction over the development and management of its natural resources.¹⁸ But by virtue of their inclusion in ss. 32 and 33 of the Regulations, certain *in situ* facilities are "designated projects" for the purposes of the IAA and the IAA prohibits their development unless the Impact Assessment Agency first determines that an impact assessment is not needed or the Minister or the Governor in Council determines the designated project is in the public interest.¹⁹

16. The inclusion of *in situ* facilities on the Designated Projects List is somewhat unusual. There are no obvious ties to federal jurisdiction and, historically, *in situ* facilities did not typically require a federal environmental assessment.²⁰ This is likely because, while oil and gas facilities did appear in the *Comprehensive Study List Regulations*,²¹ the nature of *in situ* facilities meant that they generally did not involve requirements for federal permitting based on affirmative federal

¹⁴ *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40 at para. 3.

¹⁵ *Reference re Impact Assessment Act*, 2022 ABCA 165 at paras 149-151 [*Alberta Reference*].

¹⁶ *Ibid.*.

¹⁷ Factum of the Attorney General of Alberta at para. 21 [*Alberta Factum*].

¹⁸ *Constitution Act, 1867*, s 92A(1); *Reference re Greenhouse Gas Pollution Pricing Act*, 2020 ABCA 74 at para. 266.

¹⁹ IAA, ss. 7, 10, 16, 17, and 60-63.

²⁰ Kristensen Affidavit at para. 88.

²¹ *Comprehensive Study List Regulations*, SOR/94-638.

regulatory duties or require independent federal decision making, which were the triggers for environmental assessments under *EARPGO*²² and *CEAA 1992*.²³

17. The Regulations reflect the notion that *in situ* facilities engage effects that are within provincial jurisdiction, and recognize that there is little about *in situ* facilities that would typically engage federal regulation, as the Regulations state that they only apply to *in situ* facilities that are:

(a) not within a province in which provincial legislation is in force to limit the amount of greenhouse gas emissions produced by oil sands sites in the province; or

(b) within a province in which provincial legislation is in force to limit the amount of greenhouse gas emissions produced by oil sands sites in the province and that limit has been reached.²⁴

18. In only applying to *in situ* facilities in provinces without certain types of GHG legislation, the Regulations suggest that the jurisdictional hook that the federal government relies on to regulate the assessments of *in situ* facilities is their GHG emissions. As such, the question of whether *in situ* facilities are subject to a federal environmental assessment does not arise from their potential impact on typical areas of federal jurisdiction like fisheries, bird migration, or Indigenous lands. Rather, it relies on an asserted jurisdiction over GHG emissions that has recently been subject to significant litigation at this Court. An understanding that the federal jurisdiction asserted over *in situ* facilities is grounded in emissions accords with Parliament's stated reason for including *in situ* facilities in the Regulations, which was the potential extra-jurisdictional effects of their associated GHG emissions.²⁵

19. This approach to *in situ* facilities is problematic for three reasons. First, it creates uncertainty. There is currently no clarity as to what would constitute sufficient legislation to move *in situ* facilities out of the designated project list. Presumably that is only something that would be

²² *Oldman River* at para. 75.

²³ *Law List Regulations*, SOR/94-636.

²⁴ Regulations, ss. 32-33.

²⁵ IAA, s 7(1)(b); Regulations, ss. 32-33 (the carve-out for provinces that have enacted oil sands

emissions caps). See also Alberta Factum at para 80, citing the *Discussion Paper on the Proposed Project List*.

determined as part of the screening process, which would create an initial delay for the *in situ* facility project.

20. Second, due to the shared and overlapping nature of environmental responsibility, the broad meaning of "effects within federal jurisdiction",²⁶ and the lack of any clear materiality thresholds, it is likely that most designated projects will engage the s. 7 prohibition in some manner. This is particularly likely with *in situ* facilities. The concern is that GHG emissions, due to their transient nature, are effects that will always trigger the s. 7 prohibition. As a result, facilities that the provinces once regulated for the primary purpose of developing their non-renewable natural resources will now be subject to a federal impact assessment that will delay or preclude that project from advancing. This effect is not limited to *in situ* facilities and likely extends to a broad range of local resource development and infrastructure projects found in all provinces, including mines and metal mills, oil sands mines, fossil fuel-fired power generating facilities, and refineries.²⁷

21. Third, when federal jurisdiction is arrived at through something like GHG emissions which are an effect of the industry itself rather than an effect of a particular project, a decision by the federal government to not approve the project will mean that it cannot move forward. While a project that interfered with an aspect of federal jurisdiction like a fishery could conceivably be reworked to avoid that impact, it is not currently possible to build an *in situ* facility and generate no GHG emissions. What this means is that, with federal jurisdiction grounded in something like GHG emissions, the decision on whether a project should proceed really becomes a decision on whether the industry itself fits within federal priorities, rather than the impact of the individual project.

22. In this way, subject to a discretionary federal approval, the "default position"²⁸ of the IAA is likely to prohibit the development of a wide range of major projects, including *in situ* facilities, regardless of ultimate jurisdictional competence or locality. This is not an incidental or ancillary effect; rather, it relies on an extremely broadly framed trigger of "effects within federal jurisdiction" to usurp provincial jurisdiction.

²⁶ IAA, ss. 2, *sub verbo* "effects within federal jurisdiction", and 7.

²⁷ Regulations, ss. 18, 19, 24, 25, 30-33, 37, and 38.

²⁸ *BC Pipeline Reference* at para. 97.

23. The reliance by Parliament on GHG emissions is also important. This Court has confirmed that Parliament does not possess general jurisdiction to regulate GHG emissions. This is a matter that lies beyond the jurisdictional competence of the federal government and over which federal authorities lack any affirmative regulatory duties.²⁹ Pursuant to the reasoning in *Oldman River*, this would not be sufficient to ground federal jurisdiction to require federal impact assessments of *in situ* facilities.

D. Natural Gas and LNG Facilities

24. Similar issues arise with LNG facilities. While CAPP agrees that LNG facilities have traditionally been subject to federal environmental assessments, the broad scope of the IAA and Regulations has the potential to delay and discourage investment in LNG facilities.

25. Canada is one of the world's largest producers of natural gas. In order to ship this resource overseas, natural gas extracted in Alberta and British Columbia must be shipped to the coast where it will be cooled in LNG facilities to -161°C and then loaded onto ships to be sent to distant markets.

26. LNG is in high demand as a bridge fuel (i.e. a fuel used to achieve GHG reduction during the transition between coal-fired power and a renewable based alternative), and this demand is expected to continue over the coming decades. While Asian markets continue to demand LNG, European markets have also begun to propose LNG import capacity to decrease their reliance on Russian natural gas. The export of natural gas provides a positive opportunity to reduce global emissions. Canada's proposed LNG facilities are projected to have the lowest emissions intensity in the world due to the use of clean energy for these projects.³⁰ In addition, natural gas has lower carbon emissions than coal, which provides an early opportunity for emission reductions through the conversion of coal power plants to natural gas in Canada and around the world.³¹

27. LNG facilities are large projects that take years to build. Natural Resources Canada tracks major projects across Canada in its annual Major Projects Inventory, which provides a snapshot of projects in Canada that are under construction or planned for the next 10 years. The Major Projects

²⁹ See *Reference re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at para. 123; *Oldman River* at para. 47. See also *Quebec (Attorney General) v IMTT-Québec inc*, 2019 QCCA 1598 at paras. 224-227.

³⁰ International Energy Agency, Canada 2022 Energy Policy Review [**IEA Report**] at p. 67.

³¹ *Ibid.*, at pp. 248 and 268.

Inventory shows that the number of LNG facilities being constructed or planned in Canada is in significant decline.³² So while the world is looking for more Canadian natural gas, Canada continues to lack the ability to export it.

28. One of the most significant hurdles for Canadian LNG facilities are long construction timelines driven by regulatory requirements. Regulatory requirements driven by different levels of government are an area that has been noted as a potential drag on LNG investment in Canada. The International Energy Agency made comments to this effect in its latest report noting that Canada's decentralized decision making on environmental matters made it especially important for all levels of government to be able to properly coordinate.³³ The Conference Board of Canada expressed similar views when it noted that regulatory bottlenecks are constraining the development of LNG capacity in Canada.³⁴

29. The issues that Alberta has identified in its Factum with the creation of fully overlapping jurisdiction by the IAA and the Regulations are likely to further contribute to these bottlenecks. This has the potential to lengthen these delays and further suppress investment in Canadian LNG facilities.

30. As the Alberta Court of Appeal identified, the practical effect of the IAA is that major projects like LNG facilities are likely to be faced with overlapping regulatory processes that will create additional costs and require additional time to complete such projects.³⁵ For example, projects that had historically faced distinct assessments, focused on discrete areas of the project, may now be faced with overlapping assessments of the entire project. In an area like LNG facilities, where, in response not only to climate change, but to geopolitical threats, the world needs rapid development of these types of facilities, the potential delays caused by the IAA are significant.

E. Conclusion

31. CAPP does not dispute that many major projects have and will continue to require assessments by both federal and provincial governments. Such overlapping jurisdiction is not, in and of itself, unconstitutional. However, as this Court has warned, a crucial part of Canadian federalism is that the roles of each level of government be as clearly delineated as possible. For

³² Natural Resources: Major Projects Planned or Under Construction — 2021 to 2031 at p. 4.

³³ IEA Report at p. 48.

³⁴ Conference Board of Canada, *A Rising Tide: Economic Impacts of LNG in Canada* at p. 4.

³⁵ *Alberta Reference* at paras. 358-359.

CAPP and its members, such delineation promotes certainty and efficiency, which facilitates the development of key natural resources. Without a clear and certain regulatory framework, the environmentally responsible development of Canada's oil and gas resources and the prosperity that this offers to all Canadians, will suffer, and projects like LNG facilities, which could play an important role in reducing emissions worldwide, will grind to a halt. As such, CAPP asks this Court to carefully consider the extent of federal reach into provincial resource development and to ensure that it is properly grounded in the federal government's enumerated powers.

III. COSTS

32. CAPP seeks no order as to costs and asks that no costs be awarded against it.

IV. REQUEST FOR ORAL ARGUMENT

33. CAPP requests 5 minutes of oral argument.

RESPECTFULLY SUBMITTED this 21st day of December, 2022

ESTIMATED TIME FOR ARGUMENT – 5 minutes.

BURNET, DUCKWORTH & PALMER LLP

Per:



Robert Martz and Anna Seefeldt
Counsel for the Intervener, Canadian
Association of Petroleum Producers

V. TABLE OF AUTHORITIES

Legislative Authorities		Language		Paragraph Ref
1.	<i>Comprehensive Study List Regulations</i> , SOR/94-638	<u>English</u>	<u>French</u>	
2.	<i>Constitution Act, 1867</i> , 30&31 Victoria, c 3 (UK)	<u>English</u>	<u>French</u>	3, 15
3.	<i>Impact Assessment Act</i> , SC 2019, c 28	<u>English</u>	<u>French</u>	2, 6, 7, 9, 15, 18, 20
	Preamble	<u>English</u>	<u>French</u>	2
	s. 2	<u>English</u>	<u>French</u>	6, 7, 20
	s. 7	<u>English</u>	<u>French</u>	9, 18, 20
	s. 10	<u>English</u>	<u>French</u>	15
	s. 16	<u>English</u>	<u>French</u>	9, 15
	s. 17	<u>English</u>	<u>French</u>	15
	s. 22	<u>English</u>	<u>French</u>	15
	s. 60	<u>English</u>	<u>French</u>	15
	s. 61	<u>English</u>	<u>French</u>	15
	s. 62	<u>English</u>	<u>French</u>	9, 15
	s. 63	<u>English</u>	<u>French</u>	15
4.	<i>Law List Regulations</i> , SOR/94-636	<u>English</u>	<u>French</u>	17
5.	<i>Physical Activities Regulations</i> , SOR/2019-285	<u>English</u>	<u>French</u>	2, 17, 20
	s. 18	<u>English</u>	<u>French</u>	20
	s. 19	<u>English</u>	<u>French</u>	20
	s. 24	<u>English</u>	<u>French</u>	17, 20
	s. 25	<u>English</u>	<u>French</u>	17, 20
	s. 30	<u>English</u>	<u>French</u>	20
	s. 31	<u>English</u>	<u>French</u>	20
	s. 32	<u>English</u>	<u>French</u>	20
	s. 33	<u>English</u>	<u>French</u>	20
	s. 37	<u>English</u>	<u>French</u>	20
	s. 38	<u>English</u>	<u>French</u>	20

Cases	Paragraph Ref
6. <u><i>114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)</i>, 2001 SCC 40</u>	13
7. <u><i>Friends of the Oldman River Society v Canada (Minister of Transport)</i>, [1992] 1 SCR 3</u>	4, 12, 16
8. <u><i>MiningWatch Canada v Canada</i>, 2010 SCC 2</u>	7
9. <u><i>Quebec (Attorney General) v Canadian Owners and Pilots Association</i>, 2010 SCC 39</u>	8
10. <u><i>Quebec (Attorney General) v IMTT-Québec inc</i>, 2019 QCCA 1598</u>	23
11. <u><i>Reference re Environmental Management Act (British Columbia)</i>, 2019 BCCA 181</u>	8, 12, 22
12. <u><i>Reference re Firearms Act (Canada)</i>, 2000 SCC 31</u>	8
13. <u><i>Reference re Greenhouse Gas Pollution Pricing Act, 2020 ABCA 74</i></u>	15
14. <u><i>Reference re Greenhouse Gas Pollution Pricing Act, 2021 SCC 11</i></u>	23
15. <u><i>Reference re Impact Assessment Act, 2022 ABCA 165</i></u>	14, 30
16. <u><i>Reference re Securities Act (Canada)</i>, 2011 SCC 66</u>	8
17. <u><i>Westcoast Energy Inc v Canada (National Energy Board)</i>, [1998] 1 SCR 322</u>	4

Secondary Sources	Paragraph Ref
18. <u>Conference Board of Canada, <i>A Rising Tide: Economic Impacts of LNG in Canada</i></u>	26
19. <u>International Energy Agency, <i>Canada 2022 Energy Policy Review</i></u>	28
20. <u>Natural Resources: <i>Major Projects Planned or Under Construction — 2021 to 2031</i></u>	27, 28