

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF 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

B E T W E E N :

ATTORNEY GENERAL OF CANADA

Appellant

- and -

ATTORNEY GENERAL OF ALBERTA

Respondent

(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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PART I. OVERVIEW AND STATEMENT OF FACTS

1. The *Impact Assessment Act*¹ (“IAA”) and *Physical Activities Regulations*² (“Regulations” or “Project List”) are a valid exercise of federal legislative authority under the *Constitution Act, 1867*,³ including the authority to consider the effects of greenhouse gas (“GHG”) emissions on the environment and human health throughout the entire federal impact assessment regime.
2. The Canadian Association of Physicians for the Environment (“CAPE”) agrees with the statement of facts set out by the Appellant, and emphasizes the following additional background.
3. This Court has observed that environmental protection is one of the greatest challenges of our time, that it is a problem which requires action by all levels of government, and that Canada must have the ability to meet its international environmental commitments.⁴
4. This Court has observed that climate change presents an existential threat to the environment and human life in Canada and that the harmful effects of GHG emissions: (1) do not respect political boundaries; (2) are being acutely felt in Canada’s north, along its coastlines, and by Indigenous peoples; and (3) represent a collective action problem and no single jurisdiction can fully address the harm on its own.⁵
5. Canada has made international commitments to reduce GHG emissions under the *Paris Agreement* as a means to deal with the problem of climate change.⁶
6. CAPE submits the GHG emissions of a proposed project may have adverse effects on several areas of federal responsibility, and Parliament is constitutionally entitled to conduct an impact assessment to gather information and make informed decisions that avoid or mitigate such adverse effects.

¹ *Impact Assessment Act*, [SC 2019, c 28, s 1](#) [IAA].

² *Physical Activities Regulations*, [SOR/2019-285](#) [Regulations or Project List].

³ *Constitution Act, 1867*, [30 & 31 Victoria, c 3](#) (UK) [*Constitution Act, 1867*].

⁴ *Friends of the Oldman River Society v Canada (Minister of Transport)*, [\[1992\] 1 SCR 3](#) at para 1 [Oldman River]; *R v Hydro-Québec*, [\[1997\] 3 SCR 213](#) at para 127 [Hydro-Québec]; *114957 Canada Ltée (Spraytech, Société d’arrosage) v Hudson (Town)*, [2001 SCC 40](#) at para 3; *British Columbia v Canadian Forest Products Ltd*, [2004 SCC 38](#) at para 7.

⁵ *References re Greenhouse Gas Pollution Pricing Act*, [2021 SCC 11](#) at paras 2, 7–12, 171 [References re GGPPA].

⁶ *Ibid* at para 13.

PART II. POSITION ON THE ISSUES

7. CAPE intervenes on two questions in this appeal: (1) whether the decision under appeal (the “Majority Opinion”) erred in its characterization of the pith and substance of the *IAA* and *Regulations*, and (2) whether the Majority Opinion erred in its classification of the *IAA* and *Regulations*.

8. The proper characterization of the *IAA* and *Regulations* is to establish a federal impact assessment process to designate specific major projects for review to identify potential benefits and potential adverse effects on matters that fall within federal jurisdiction and to determine whether such effects are in the public interest.

9. The exercise of authority in the *IAA* and *Regulations* falls within multiple enumerated heads of federal legislative power in the *Constitution Act, 1867*, including fisheries (section 91(12)), treaty obligations (section 132), and Indigenous peoples (section 91(24)), as well as extra-provincial effects under the national concern branch of the Peace, Order and Good Government (“POGG”) power (section 91). This is the case for the entire federal impact assessment regime, including consideration of GHG emissions and climate change.

10. This Court has recognized that the environment is “a constitutionally abstruse matter which does not comfortably fit within the existing division of powers without considerable overlap and uncertainty.”⁷ Provincial legislatures have the authority to regulate some local aspects of GHG emissions and climate change. However, it is inconsistent with the Canadian constitutional order to suggest that these provincial powers somehow subordinate Parliament’s authority to regulate the harmful effects of GHG emissions on areas within federal power.

11. In the absence of a real fact scenario, this Court’s analysis should be guided by the presumption of constitutionality and the principle of cooperative federalism.

⁷ *Oldman River*, *supra* note 4 at 64.

PART III. STATEMENT OF ARGUMENT

A. Contextualizing Climate Change and the Federal Impact Assessment Regime

12. Federal impact assessment has included climate change considerations and GHG emissions for many years, including, for example, with respect to large oil sands projects.⁸ This has typically taken place cooperatively with provinces, including Alberta.⁹ The *IAA* and *Regulations* bring needed clarity to this aspect of federal impact assessment by expressly requiring consideration of Canada’s ability to meet its climate change commitments.¹⁰ This is an important reference point against which the effects of a designated project’s GHG emissions can be understood in relation to GHG emissions reduction imperatives and climate change impacts. This appeal is an opportunity to confirm the constitutionality of this aspect of the federal regime.

13. The Majority Opinion accepted that climate change presents an existential threat to Canada, but it also concluded that the *IAA* itself presents another existential threat, thereby implying that inclusion of climate change in the federal assessment process will undermine federalism. But this cannot be. The federal government cannot abdicate responsibility for the implications of GHG emissions for core areas of its jurisdiction, including with respect to proposed projects located in a single province that are likely to have effects on areas of federal responsibility.

B. Characterization Analysis

14. CAPE submits that the characterization of the *IAA* and its *Regulations* is as follows: to establish a federal impact assessment process to designate specific major projects for review to identify potential benefits and potential adverse effects on matters that fall within federal jurisdiction and to determine whether such effects are in the public interest. This characterization is sufficiently precise, and includes a basis for assessing GHG emissions and climate change within the federal regime.

15. The characterization in the Majority Opinion is vague and overly broad and suggests that the *IAA* seeks to regulate GHG emissions generally, such that “there would be almost no aspect of

⁸ *Pembina Institute for Appropriate Development v Canada (Attorney General)*, 2008 FC 302.

⁹ David V Wright, “The New Federal Impact Assessment Act: Implications for Canadian Energy Projects” (2021) 59 *Alta L Rev* 67 at 80–81.

¹⁰ *IAA*, *supra* note 1, ss 22, 63.

a province’s economy and the daily lives of the citizens of a province into which it could not intrude”.¹¹ The catalogue of examples referenced by the majority, such as “eating beef”, “drinking dairy” and “the number of children per family”,¹² are not activities within the purpose or effect of the *IAA* and *Regulations* and overstates the scale of impact on the ability of provinces to exercise their constitutional powers over local activities within their territories.

16. CAPE’s characterization recognizes that the *IAA* and *Regulations* are substantially self-limiting. The designation includes only very large projects (defined primarily by quantitative thresholds) which are “most likely to have adverse [f]ederal [e]ffects”.¹³ This would include, for example, oil, gas, and coal facilities with high GHG emissions set out in the Project List.¹⁴ Notably, descriptions of the *in situ* projects on the list, which seemed to be of most concern in the Majority Opinion,¹⁵ defer to the provinces by recognizing whatever GHG-emissions limit a province has legislated (including any provincial decision to raise the cap).¹⁶

C. Classification Analysis

17. CAPE supports the thrust of the classification submissions of Canada to say that the effects with which the *IAA* is concerned fall *within* heads of federal power under the *Constitution Act, 1867*.¹⁷ CAPE submits that the constitutional basis for the federal impact assessment regime, that basis being the potential for adverse effects on areas of federal responsibility, also serves as the constitutional basis for consideration of climate change and GHG emissions from designated projects to trigger the entire federal impact assessment regime under the *IAA*,¹⁸ including for making a public-interest determination and establishing appropriate conditions, mitigation measures, and follow-up programs.¹⁹ This includes the effects of GHG emissions on areas of federal power relating to fisheries, migratory birds, Indigenous peoples, and federal lands, as well

¹¹ *Reference re Impact Assessment Act*, 2022 ABCA 165 at para 189 [*Reference re IAA ABCA*].

¹² *Ibid* at para 294.

¹³ Factum of the Appellant (dated August 30, 2022) at para 114.

¹⁴ *Regulations*, *supra* note 2, *Schedule*, cl 30–33, 37–38.

¹⁵ *Reference re IAA ABCA*, *supra* note 11 at paras 131–134, 291–296.

¹⁶ *Regulations*, *supra* note 2, *Schedule*, cl 32–33.

¹⁷ Factum of the Appellant (dated August 30, 2022) at paras 35–43.

¹⁸ *IAA*, *supra* note 1, ss 7-8.

¹⁹ *Ibid*, ss 63-65.

as extra-provincial effects as supported by the national concern branch of POGG. CAPE's submission focuses on the examples of fisheries, Indigenous peoples, and extra-provincial effects.

1) Effects of GHG Emissions on Federal Fisheries Power

18. Climate change, including sea level rise and changes to the ocean's acidity, is having and will continue to have profound effects on Canada's seacoast fisheries. Effects of proposed projects' GHG emissions on areas of federal jurisdiction, such as fish and fish habitat, were identified by the federal government as a concern when developing the Project List.²⁰ Significantly, this Court has explicitly noted that "Canada's coastline, the longest in the world, is also being affected disproportionately by climate change, as it experiences changes in relative sea level and rising water temperatures, as well as increased ocean acidity and loss of sea ice and permafrost".²¹

19. Under the *Constitution Act, 1867*, legislative responsibility for sea coast and inland fisheries falls to Parliament pursuant to section 91(12). Under the *IAA* and *Regulations*, assessment of projects that may affect fisheries or fish habitat is properly rooted in Parliament's authority to legislate for the protection of fish and regulation of their environment under section 91(12).²²

20. Section 91(12) of the *Constitution Act, 1867* includes authority to legislate for the protection of fish and fish habitat.²³ While section 91(12) does not provide Parliament with jurisdiction over all aspects of fish, the types of impacts contemplated in *IAA* section 7(1)(a)(i) are directed to matters which indisputably fall within section 91(12)—i.e. the preservation of fish and the protection of fish habitat from potential changes caused by proponents of designated projects. This satisfies the need for a clear constitutional link, as articulated in *Northwest Falling Contractors Ltd v The Queen*.²⁴

21. When the GHG emissions of a designated project are linked to harm to fish or fish habitat, Parliament has jurisdiction to consider those adverse effects under the *IAA*.

²⁰ Factum of the Respondent (dated November 23, 2022) at para 62.

²¹ *References re GGPPA*, *supra* note 5 at para 11.

²² Factum of the Appellant (dated August 30, 2022) at paras 120, 130–131.

²³ *Northwest Falling Contractors Ltd v The Queen*, [1980] 2 SCR 292 at 300-301.

²⁴ *Ibid.*

2) *Effects of GHG Emissions on the Rights and Interests of Indigenous Peoples*

22. A proposed project's GHG emissions may have adverse effects on Indigenous peoples. Such effects were acknowledged in general terms by this Court in the *References re Greenhouse Gas Pollution Pricing Act*:

This irreversible harm would be felt across the country and would be borne disproportionately by vulnerable communities and regions, *with profound effects on Indigenous peoples*, on the Canadian Arctic and on Canada's coastal regions.²⁵

23. Section 91(24) of the *Constitution Act, 1867* supports the inclusion in the IAA of effects on the rights and interests of Indigenous peoples. Section 91(24) gives Parliament legislative authority over "Indians" and "Lands reserved for the Indians". This includes legislating in relation to Aboriginal and treaty rights, including rights that are recognized and affirmed by section 35(1) of the *Constitution Act, 1982*.²⁶ The types of impacts contemplated in IAA sections 7(1)(c) and (d) are directed to matters which indisputably fall within section 91(24) and section 35(1).

24. When the GHG emissions of a designated project are linked to harm to Indigenous peoples, Parliament has jurisdiction to consider those adverse effects under the IAA.

3) *POGG Power and Extra-Provincial Effects of GHG Emissions*

25. This Court has recognized that GHG emissions have the potential to cause extra-provincial harm.²⁷ This Court has also recognized that "the effects of climate change do not have a direct connection to the source of the GHG emissions"²⁸ and that provinces and territories "with low GHG emissions can experience the effects of climate change that are grossly disproportionate to their individual contributions to Canada's and the world's total GHG emissions".²⁹ This Court has accepted that individual provinces and "individual sources of emissions" cause measurable harm and may have tangible extra-provincial effects and contribute to global climate change.³⁰

²⁵ *References re GGPPA*, *supra* note 5 at para 206 (emphasis added).

²⁶ *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 178; *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 151.

²⁷ *References re GGPPA*, *supra* note 5 at para 187.

²⁸ *Ibid* at para 12.

²⁹ *Ibid*.

³⁰ *References re GGPPA*, *supra* note 5 at paras 188-189.

26. The *IAA* does not regulate GHG emissions generally. Rather, it requires consideration of the extra-provincial effects of GHG emissions from designated projects under sections 7(1)(b)(ii) and 7(1)(b)(iii). CAPE submits that this is a matter of national concern and therefore within federal legislative authority under the national concern branch of the POGG power in section 91 of the *Constitution Act, 1867*.

27. This Court has on many occasions confirmed that the interprovincial effects of pollution, as opposed to the local effects, is a matter of national concern over which Parliament has jurisdiction to regulate.³¹ The constitutional difference between extra-provincial and local is explained by the fact that within the Canadian constitutional order, provincial jurisdiction is territorially limited.³²

28. For reasons similar to those relating to interprovincial effects, this Court has also recognized that Parliament has legislative authority over environmental effects that occur outside Canada. In *Reference re Newfoundland Continental Shelf*, this Court held that Parliament has legislative jurisdiction over natural resources on the continental shelf offshore under POGG, recognizing that “Newfoundland’s legislative competence, like that of all the other provinces, is confined to legislation operating within the provinces”.³³

29. The provisions of the *IAA* and *Regulations* that allow consideration of the extra-provincial effects of GHG emissions are a recognized matter of national concern. This is unlike *References re GGPPA*, where the majority of this Court applied a three-step test to recognize a new matter of national concern, that being the establishment of minimum national standards of GHG price stringency to reduce GHG emissions.³⁴

³¹ *Interprovincial Co-Operatives Ltd et al v R*, [1976] 1 SCR 477 [*Interprovincial Co-Operatives*]; *R v Crown Zellerbach Canada Ltd*, [1988] 1 SCR 401 at 445–446 (per LaForest J in dissent, but not on this point) [*Crown Zellerbach*]; *Hydro-Québec*, *supra* note 4 at para 76; *References re GGPPA*, *supra* note 5 at para 195.

³² *Newfoundland and Labrador (Attorney General) v Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4 at paras 210-211 (per Brown J and Rowe J in dissent).

³³ *Reference re Newfoundland Continental Shelf*, [1984] 1 SCR 86 at 127-128.

³⁴ *References re GGPPA*, *supra* note 5 at paras 167-211.

30. *Interprovincial Co-Operatives* made clear that the territorial constraints on provincial powers necessitates Parliament’s jurisdiction over the extra-provincial effects of pollution.³⁵ In that case, a majority agreed that one province (Manitoba) could legislate for the protection of its property but, in respect of injury by acts performed outside its territory, the matter was outside its legislative authority.³⁶ The injured province was restricted to remedies available at common law or under federal legislation.³⁷ In other words, there is a “provincial inability” facing provinces on the receiving end of the effects of interprovincial pollution to regulate to protect themselves. On the other hand, a majority also agreed that provinces could not authorize harms beyond their own borders — at least insofar as civil liability for such harms was concerned.³⁸ As a logical consequence, Pigeon J found that the power to legislate in relation to “a pollution problem that is not really local in scope but truly interprovincial” is within federal jurisdiction.³⁹ While this Court did not expressly refer to POGG in *Interprovincial Co-Operatives*, when considering the case in *References re GGPPA*, Wagner CJ recognized, “the application of that power explains the result”.⁴⁰

31. In *Crown Zellerbach*, a majority of this Court found marine pollution to be a matter of national concern because of its predominantly extra-provincial character and implications.⁴¹ The majority also relied on the provincial inability test, with the “interrelatedness of the intraprovincial and extra-provincial aspects of the matter” in that case requiring a single uniform legislative treatment.⁴² That the federal legislation implemented treaty obligations relating to a matter of “predominantly extra-provincial as well as international character and implications” was also relevant to the majority.⁴³

32. The Respondent points to provincial legislation as evidence that it does regulate pollution, including GHG emissions.⁴⁴ Specifically, the Respondent asserts that Alberta’s *Environmental*

³⁵ *Interprovincial Co-Operatives*, *supra* note 31 at 499, 512-514, 520, 525-526.

³⁶ *Ibid* at 498-499, 511, 516.

³⁷ *Ibid* at 511, 515-516.

³⁸ *Ibid* at 511.

³⁹ *Ibid* at 514.

⁴⁰ *References re GGPPA*, *supra* note 5 at para 99.

⁴¹ *Crown Zellerbach*, *supra* note 31 at 436.

⁴² *Ibid* at 434.

⁴³ *Ibid* at 436.

⁴⁴ Factum of the Respondent (dated November 23, 2022) at para 6 (referencing the Record).

*Protection and Enhancement Act*⁴⁵ subjects a broad range of local works and undertakings to environmental impact assessment pursuant to which a list of factors, including GHG emissions, are considered.⁴⁶ This merely confirms that the local effects associated with GHG emissions from a proposed local work or undertaking are properly within provincial power to consider.

33. CAPE submits that an individual province cannot be left to determine whether the effects of GHG emissions associated with a designated project and the associated threat of extra-provincial harm are appropriately externalized to other provinces and countries. Parliament must have the power to do what the provinces cannot do to protect themselves. This Court has stated that “a provincial failure to act directly threatens Canada as a whole” and that “any province’s failure to act threatens Canada’s ability to meet its international obligations, which in turn hinders Canada’s ability to push for international action to reduce GHG emissions”.⁴⁷

D. Presumption of Constitutionality

34. The Majority Opinion failed to give proper consideration to the presumption of constitutionality. This Court has ruled that if the text of impugned legislation is capable of bearing a meaning that is constitutionally valid, then the courts must give it that meaning.⁴⁸ Stated another way, “[w]hen faced with two plausible characterizations of a law”, courts should favour the one “which supports the law’s constitutional validity”.⁴⁹

35. This appeal is primarily concerned with the *existence* of federal authorities set out in the *IAA* and *Regulations* based on multiple federal heads of power. Specific constitutional concerns regarding the *exercise* of that power, including with respect to GHG emissions and climate change, should be addressed on a case-by-case basis in judicial review on the exercise of executive authority under the *IAA* and *Regulations*.

⁴⁵ *Environmental Protection and Enhancement Act*, RSA 2000, c E-12.

⁴⁶ Factum of the Respondent (dated November 23, 2022) at paras 8.

⁴⁷ *References re GGPPA*, supra note 5 at para 190.

⁴⁸ *Desgagnés Transport Inc v Wärtsilä Canada Inc*, 2019 SCC 58 at para 28.

⁴⁹ *Siemens v Manitoba (Attorney General)*, 2003 SCC 3 at para 33.

E. Cooperative Federalism

36. The Majority Decision erred by discounting the longstanding principle of cooperative federalism in favour of outdated, watertight compartments of federal and provincial jurisdiction.

37. Federalism presumes that Parliament intends for its laws to co-exist with provincial laws. This is particularly true in the context of environmental protection, where this Court has long favoured a cooperative approach. Under cooperative federalism, courts are to adopt a harmonious reading of statutes enacted by federal and provincial governments which allows for them to operate concurrently.

38. Alberta and Canada have for many years engaged in joint processes that assess potential impacts within their respective spheres, including with respect to GHG emissions and climate change. The *IAA* and *Regulations* continue this approach by setting out a process for joint assessments by the provinces and federal government, or by the provincial process substituting for the federal one.

PART IV. REQUEST TO PRESENT ORAL ARGUMENT

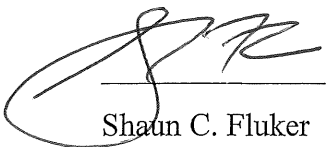
39. CAPE respectfully requests permission to present oral argument at the appeal hearing.

PART V. COSTS

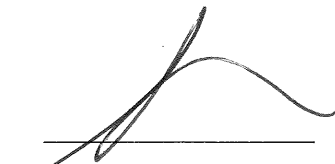
40. CAPE does not seek costs and respectfully requests this Court awards no costs against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

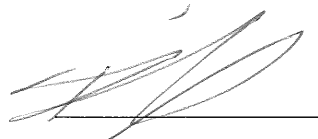
Dated at Calgary, Alberta, this 19th day of December, 2022.



Shaun C. Fluker



Sharon L. Mascher



David V. Wright

Counsel for the Intervener Canadian Association of Physicians for the Environment

PART VII. TABLE OF AUTHORITIES

Legislation and Regulations		Paragraph Reference in Factum
1	<i>Impact Assessment Act</i> , SC 2019, c 28, s 1 , ss 7-8, 22, 63	1, 7, 8, 9, 12, 13, 14, 15, 16, 17, 19, 20, 21, 23, 24, 26, 29, 35, 38
2	<i>Physical Activities Regulations</i> , SOR/2019-285, Schedule , cl 30–33, 37–38	1, 7, 8, 9, 12, 14, 15, 16, 18, 19, 29, 35, 38
3	<i>Constitution Act, 1867</i> , 30 & 31 Victoria, c 3 (UK), ss 91, 132	1, 9, 19, 20, 23, 26
4	<i>Constitution Act, 1982</i> , Schedule B to the Canada Act 1982 (UK), 1982, c 11, s 35(1)	23
5	<i>Environmental Protection and Enhancement Act</i> , RSA 2000, c E-12	32
Jurisprudence		Paragraph Reference in Factum
6	<i>Friends of the Oldman River Society v Canada (Minister of Transport)</i> , [1992] 1 SCR 3	3, 10
7	<i>R v Hydro-Québec</i> , [1997] 3 SCR 213	3, 27
8	<i>114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)</i> , 2001 SCC 40	3
9	<i>British Columbia v Canadian Forest Products Ltd</i> , 2004 SCC 38	3
10	<i>References re Greenhouse Gas Pollution Pricing Act</i> , 2021 SCC 11	4, 18, 22, 25, 27, 29, 30, 33
11	<i>Pembina Institute for Appropriate Development v Canada (Attorney General)</i> , 2008 FC 302	12
12	<i>Reference re Impact Assessment Act</i> , 2022 ABCA 165	15, 16
13	<i>Northwest Falling Contractors Ltd v The Queen</i> , [1980] 2 SCR 292	20
14	<i>Delgamuukw v British Columbia</i> , [1997] 3 SCR 1010	23
15	<i>Tsilhqot'in Nation v British Columbia</i> , 2014 SCC 44	23
16	<i>Interprovincial Co-Operatives Ltd et al v R</i> , [1976] 1 SCR 477	27, 30
17	<i>R v Crown Zellerbach Canada Ltd</i> , [1988] 1 SCR 401	27, 31
18	<i>Newfoundland and Labrador (Attorney General) v Uashaunnuat (Innu of Uashat and of Mani-Utenam)</i> , 2020 SCC 4	27
19	<i>Reference re Newfoundland Continental Shelf</i> , [1984] 1 SCR 86	28
20	<i>Desgagnés Transport Inc v Wärtsilä Canada Inc</i> , 2019 SCC 58	34
21	<i>Siemens v Manitoba (Attorney General)</i> , 2003 SCC 3	34
Texts, Articles and Case Comments		Paragraph Reference in Factum
22	David V Wright, “The New Federal Impact Assessment Act: Implications for Canadian Energy Projects” (2021) 59 Alta L Rev 67	12