SCC File Number: 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)

FACTUM OF THE INTERVENER, WOODLAND CREE FIRST NATION

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

ALBERTA COUNSEL
800, 9707-110 Street, NW
Edmonton, AB T5K 2L9

Robert Reynolds, K.C.
Ed Picard
Telephone: (780) 652-1282
Fax: (780) 652-1312
Email: r.reynolds@albertacounsel.com

Counsel for the Intervener, Woodland Cree First Nation

GOWLING WLG (Canada) LLP
Suite 2600, 160 Elgin Street
Ottawa, Ontario K1P 1C3

D. Lynne Watt
Telephone: (613) 786-8695
Fax: (613) 788-3509
Email: lynne.watt@gowlingwlg.com

Ottawa Agent for the Intervener, Woodland Cree First Nation

(Style of cause continued)

ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF QUEBEC, ATTORNEY GENERAL OF NOVA SCOTIA, ATTORNEY GENERAL OF NEW BRUNSWICK, ATTORNEY GENERAL OF MANITOBA, ATTORNEY GENERAL OF BRITISH COLUMBIA, ATTORNEY GENERAL OF PRINCE EDWARD ISLAND, ATTORNEY GENERAL OF SASKATCHEWAN, ATTORNEY GENERAL OF NEWFOUNDLAND AND LABRADOR, INDIAN RESOURCE COUNCIL, FILE HILLS QU'APPELLE TRIBAL COUNCIL AND PASQUA FIRST NATION, WORLD WILDLIFE FUND CANADA, NATURE CANADA AND WEST COAST ENVIRONMENTAL LAW ASSOCIATION, CANADIAN ASSOCIATION OF PETROLEUM PRODUCERS, CANADAIAN TAXPAYERS FEDERATION, ATHABASCA CHIPEWYAN FIRST NATION, BUSINESS COUNCIL OF ALBERTA, ECOJUSTICE CANADA SOCIETY, WOODLAND CREE FIRST NATION, MIKISEW CREE FIRST NATION, HYDRO-QUÉBEC, CANADIAN CONSTITUTION FOUNDATION, INDEPENDENT CONTRACTORS AND BUSINESSES ASSOCIATION, AND ALBERTA ENTERPRISE GROUP, CANADIAN ASSOCIATION OF PHYSICIANS FOR THE ENVIRONMENT, ADVOCATES FOR THE RULE OF LAW, OCEANS NORTH CONSERVATION SOCIETY, CANADIAN ENVIRONMENTAL LAW ASSOCIATION, ENVIRONMENTAL DEFENCE CANADA INC., AND MININGWATCH CANADA INC., EXPLORERS AND PRODUCERS ASSOCIATION OF CANADA, FIRST NATIONS MAJOR PROJECTS COALITION, CENTRE QUÉBÉCOIS DU DROIT DE L'ENVIRONNEMENT, LUMMI NATION

Interveners

ORIGINAL TO: THE REGISTRAR

COPIES TO:

ATTORNEY GENERAL OF CANADA
Department of Justice Canada
Civil Litigation Sector
50 O'Connor Street, Suite 500
Ottawa, ON K1A 0H8

Christopher Rupar
Dayna Anderson
Bruce Hughson
Kerry Boyd
James Elford
Telephone: (613) 670-6290
Fax: (613) 954-1920
E-mail: christopher.rupar@justice.gc.ca

Counsel for the Attorney General of Canada

BENNETT JONES LLP
4500, 855 – 2nd Street SW
Calgary AB T2P 4K7

E. Bruce Mellett
Bradley S. Gilmour
Sean R. Assie
Adam J. Williams
Telephone: (403) 298-3319 / 3382 / 3362 / 3307
Fax: (403) 265-7219
Email: mellettb@bennettjones.com / gilmourb@bennettjones.com / assies@bennettjones.com
williamsa@bennettjones.com

-and-

JUSTICE AND SOLICITOR GENERAL
11th Floor Oxford Tower, 10025 – 102A Avenue
Edmonton, AB T5J 2Z2

Christine Enns, K.C.
Randy Steele
Telephone: (780) 422-9703
Fax: (780) 643-0852
Email: christine.enns@gov.ab.ca

Counsel for the Respondent, Attorney General of Alberta

ATTORNEY GENERAL OF ONTARIO
4th Floor, McMurty-Scott Building
720 Bay Street
Toronto, ON M7A 2S9

Joshua Hunter
Yashoda Ranganathan
Telephone: (647) 637-0883
Fax: (416) 326-4015
Email: yashoda.ranganathan@ontario.ca

Counsel for the Intervener, Attorney General of Ontario

GOWLING WLG (Canada) LLP
2600, 160 Elgin Street
Ottawa, Ontario K1P 1C3

D. Lynne Watt
Telephone: (613) 786-8695
Fax: (613) 788-3509
Email: lynne.watt@gowlingwlg.com

Ottawa Agent for Counsel for the Respondent, Attorney General of Alberta

MINISTÈRE DE LA JUSTICE DU QUÉBEC, Direction du droit constitutionnel et autochtone
1200, route de l'Église,
4e étage Québec, QC G1V 4M1

Frédéric Perreault
Telephone: (418) 643-1477 Ext: 20785
Fax: (418) 633-7030
Email:
frederic.perreault@justice.gouv.qc.ca

Counsel for the Intervener, Attorney General of Québec

NOËL ET ASSOCIÉS, s.e.n.c.r.l.
225, montée Paiement, 2e étage
Gatineau, QC J8P 6M7

Pierre Landry
Telephone: (819) 503-2178
Fax: (819) 771-5397
Email: p.landry@noelassocies.com

Agent for the Intervener, Attorney General of Québec

ATTORNEY GENERAL OF NOVA SCOTIA
Department of Justice (NS)
1690 Hollis Street, 8th Floor
Halifax, Nova Scotia B3J 2L6

Edward A. Gores, K.C.
Telephone: (902) 424-4024
Fax: (902) 424-1730
Email: Edward.gores@novascotia.ca

Counsel for the Intervener, Attorney General Nova Scotia

GOWLING WLG (Canada) LLP
Suite 2600, 160 Elgin Street
Ottawa, Ontario K1P 1C3

D. Lynne Watt
Telephone: (613) 786-8695
Fax: (613) 788-3509
Email: lynne.watt@gowlingwlg.com

Ottawa Agent for the Intervener, Attorney General of Nova Scotia

ATTORNEY GENERAL OF NEW BRUNSICK
Constitutional Unit, Legal Services Branch
P.O. Box 6000, Stn. A
Fredericton, NB E3B 5H1

Isabel Lavoie-Daigle
Telephone: (506) 453-2222
Fax: (506) 453-3275
Email: isabell.lavoiedaigle@gnb.ca

Counsel for the Intervener, Attorney General of New Brunswick

GOWLING WLG (Canada) LLP
Suite 2600, 160 Elgin Street
Ottawa, Ontario K1P 1C3

D. Lynne Watt
Telephone: (613) 786-8695
Fax: (613) 788-3509
Email: lynne.watt@gowlingwlg.com

Ottawa Agent for the Intervener, Attorney General of New Brunswick

ATTORNEY GENERAL OF MANITOBA
Department of Justice
Constitutional Law
1230 - 405 Broadway
Winnipeg, MB R3C 3L6

Charles Murray
Telephone: (204) 945-2852
Fax: (203) 945-0054
Email: charles.murray@gov.mb.ca

Counsel for the Intervener, Attorney General of Manitoba

GOWLING WLG (Canada) LLP
Suite 2600, 160 Elgin Street
Ottawa, Ontario K1P 1C3

D. Lynne Watt
Telephone: (613) 786-8695
Fax: (613) 788-3509
Email: lynne.watt@gowlingwlg.com

Agent for the Intervener, Attorney General Manitoba

ATTORNEY GENERAL OF BRITISH COLUMBIA
1001 Douglas Street, 6th Floor
PO Box 9280 Stn Prov Govt
Victoria, BC V8W 9J7

J. Gareth Morley
Telephone: (250) 952-7644
Fax: (250) 356-9154
Email: gareth.morley@gov.bc.ca

Counsel for the Intervener, Attorney General of British Columbia

BORDEN LADNER GERVAIS LLP
World Exchange Plaza 100 Queen Street, suite 1300
Ottawa, ON K1P 1J9

Nadia Effendi
Telephone: (613) 787-3562
Fax: (613) 230-8842
Email: neffendi@blg.com

Ottawa Agent for the Intervener, Attorney General of British Columbia

ATTORNEY GENERAL OF PRINCE EDWARD ISLAND
Shaw Building, 4th Floor South
95 Rochford Street, P.O. Box 2000
Charlottetown, PEI C1A 7N8

Ruth DeMone
Telephone: (902) 368-5064
Fax: (902) 368-4563
Email: rmdemone@gov.pe.ca

Counsel for the Intervener, Attorney General of Prince Edward Island

GOWLING WLG (Canada) LLP
Suite 2600, 160 Elgin Street
Ottawa, Ontario K1P 1C3

D. Lynne Watt
Telephone: (613) 786-8695
Fax: (613) 788-3509
Email: lynne.watt@gowlingwlg.com

Ottawa Agent for the Intervener, Attorney General of Prince Edward Island

ATTORNEY GENERAL OF SASKATCHEWAN
Constitutional Law
820 – 1874 Scarth Street
Regina, SK S4P 4B3

GOWLING WLG (Canada) LLP
Suite 2600, 160 Elgin Street
Ottawa, Ontario K1P 1C3

Thomson Irvine, K.C.
Noah Wernikowski
Telephone: (306) 787-6307
Email: tom.irvine@gov.sk.ca

Counsel for the Intervener, Attorney General of Saskatchewan

ATTORNEY GENERAL OF NEWFOUNDLAND & LABRADOR
4th Floor, East Block,
Confederation Bldg., P.O. Box 8700
St. John's, NFLD A1B 4J6

Justin S.C. Mellor
Telephone: (709) 729-0163
Fax: (709) 729-2129
Email: jmellor@gov.nl.ca

Counsel for the Intervener, Attorney General of Newfoundland & Labrador

RAE AND COMPANY
900 - 1000 5th Avenue S.W.
Calgary, AB T2P 4V1

L. Douglas Rae
Brooke Barrett
Telephone: (403) 264-8389
Fax: (403) 264-8399
Email: lorddoug@raeandcompany.com

Counsel for the Intervener, Indian Resource Council

MAURICE LAW
602 12th Avenue SW, Suite 100
Calgary, AB T2R 1J3

Ryan Lake
Geneviève Boulay
Telephone: (403) 266-1201 Ext: 236
Fax: (403) 266-2701
Email: rlake@mauricelaw.com

D. Lynne Watt
Telephone: (613) 786-8695
Fax: (613) 788-3509
Email: lynne.watt@gowlingwlg.com

Ottawa Agent for the Intervener, Attorney General of Saskatchewan

GOWLING WLG (Canada) LLP
Suite 2600, 160 Elgin Street
Ottawa, Ontario K1P 1C3

D. Lynne Watt
Telephone: (613) 786-8695
Fax: (613) 788-3509
Email: lynne.watt@gowlingwlg.com
Ottawa Agent for the Intervener, Attorney General of Newfoundland & Labrador

GOWLING WLG (Canada) LLP
Suite 2600, 160 Elgin Street
Ottawa, Ontario K1P 1C3

Matthew Estabrooks
Telephone: (613) 786-0211
Fax: (613) 788-3573
Email:
matthew.estabrooks@gowlingwlg.com

Ottawa Agent for the Intervener, Indian Resource Council

Counsel for the Intervener, File Hills Qu'Appelle Tribal Council and Pasqua First Nation

NANDA & COMPANY
10007 - 80 Avenue NW
Edmonton, AB T6E 1T4

Martin Olszynski
Avnish Nanda
Telephone: (780) 801-5324
Fax: (587) 318-1391
Email: avnish@nandalaw.ca

Counsel for the Intervener, World Wildlife Fund Canada

WEST COAST ENVIRONMENTAL LAW
700 - 509 Richards Street
Vancouver, BC V6B 2Z6

Anna Johnston
Telephone: (604) 601-2508
Fax: (604) 684-1312
Email: ajohnston@wcel.org

Counsel for the Intervener, Nature Canada and West Coast Environmental Law Association

BURNET, DUCKWORTH & PALMER
2400, 525 - 8 Avenue SW
Calgary, AB T2P 1G1

Robert L. Martz
Telephone: (403) 260-0393
Fax: (403) 260-0332
Email: rmartz@bdplaw.com

Counsel for the Intervener, Canadian Association of Petroleum Producers

CREASE HARMAN LLP
1070 Douglas Street, Unit 800
Victoria, BC V8W 2C4

R. Bruce E. Hallsor
Josh A. Bloomenthal

SUPREME ADVOCACY LLP
100- 340 Gilmour Street
Ottawa, ON K2P 0R3

Marie-France Major
Telephone: (613) 695-8855 Ext: 102

Telephone: (250) 388-5421
Fax: (250) 388-4294
Email: Bhallsor@crease.com

Counsel for the Interveners, Canadian Taxpayers Federation

WOODWARD & COMPANY LAWYERS LLP
200 -1022 Government Street
Victoria, BC V8W 1X7

Eamon Murphy
Tara McDonald
Telephone: (250) 383-2356
Fax: (250) 380-6560
Email: eamon@woodwardandcompany.com

Counsel for the Intervener, Athabasca Chipewyan First Nation

OSLER HOSKIN & HARCOURT LLP
Suite 2700, Brookfield Place
225 - 6th Avenue S.W.
Calgary, AB T2P 1N2

Maureen E. Killoran, K.C.
Sean Sutherland
Brodie Noga
Telephone: (403) 260-7000
Fax: (403) 260-7024
Email: mkilloran@osler.com

Counsel for the Intervener, Business Council of Alberta

ECOJUSTICE CANADA SOCIETY
216 - 1 Stewart Street
Ottawa, ON K1N 7M9

Joshua Ginsberg
Anna McIntosh
Telephone: (613) 903-5898 Ext: 700
Fax: (613) 916-6150
Email: jginsberg@ecojustice.ca

Counsel for the Intervener, Ecojustice Canada Society

Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

Ottawa Agent for Counsel for the Interveners, Canadian Taxpayers Federation

SUPREME ADVOCACY LLP
100- 340 Gilmour Street
Ottawa, ON K2P 0R3

Marie-France Major
Telephone: (613) 695-8855 Ext: 102
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

Ottawa Agent for Counsel for the Intervener, Athabasca Chipewyan First Nation

OSLER HOSKIN & HARCOURT LLP
Suite 1900, 340 Albert Street
Ottawa, ON K1R 7Y6

Geoffrey Langen
Telephone: (613) 787-1015
Fax: (613) 235-2867
Email: glangen@osler.com

Ottawa Agent for Counsel for the Intervener, Business Council of Alberta

JFK LAW CORPORATION
340-1122 Mainland Street
Vancouver, BC V6B 5L1
Telephone: (604) 687-0549
Fax: (607) 687-2696
Email: tdickson@jfklaw.ca

Counsel for the Intervener, Mikisew Cree First Nation

SUPREME ADVOCACY LLP
100- 340 Gilmour Street
Ottawa, ON K2P 0R3

Marie-France Major
Telephone: (613) 695-8855 Ext: 102
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

Ottawa Agent for Counsel for the Intervener, Mikisew Cree First Nation

McCARTHY TÉTRAULT, s.e.n.c.r.l., s.r.l.
1000 rue de la Gauchetière Ouest,
Bureau 2500
Montréal, QC H3B 0A2

Dominique Amyot-Bilodeau
Jean Lortie
Mathieu Bernier-Trudeau
Simon Bouthillier
Telephone: (514) 397-4100
Fax: (514) 875-6246
Email: damyotbilodeau@mccarthy.ca

Counsel for the Intervener, Hydro-Québec

BORDEN LADNER GERVAIS LLP
Centennial Place, East Tower
1900-520 3rd Ave SW
Calgary, AB T2P 0R3

Brett R. Carlson
Aidan N. Paul
Peter Banks
Telephone: (403) 232-9500
Fax: (403) 266-1395
Email: bcarlson@blg.com

Counsel for the Intervener, Canadian Constitution Foundation

GALL LEGGE GRANT ZWACK LLP
1199 West Hastings Street, Suite 1000
Vancouver, BC V6E 3T5

Peter A. Gall, K.C.
Telephone: (604) 891-1152
Fax: (604) 669-5101
Email: pgall@glgzlaw.com

Counsel for the Interveners, Independent Contractors and Business Association, and Alberta Enterprise Group

CAZASAIKALEY LLP
350-220 Laurier Ave West
Ottawa, ON K1P 5Z9

Albert Brunet
Telephone: (613) 565-2292 Ext: 214
Fax: (613) 565-2087
Email: abrunet@plaideurs.ca

Ottawa Agent for Counsel for the Interveners, Independent Contractors and Business Association, and Alberta Enterprise Group

UNIVERSITY OF CALGARY
2500 University Drive NW
Calgary, AB T2N 1N4

Shaun Fluker
David V. Wright
Telephone: (403) 220-4939
Fax: (403) 282-8325
Email: sfluker@ucalgary.ca

Counsel for the Intervener, Canadian Association of Physicians for the Environment

CHAMP AND ASSOCIATES
43 Florence Street
Ottawa, ON K2P 0W6

Bijon Roy
Telephone: (613) 237-4740
Fax: (613) 232-2680
Email: broy@champlaw.ca

Ottawa Agent for Counsel for the Intervener, Canadian Association of Physicians for the Environment

McCARTHY TÉTRAULT LLP
Suite 5300, Toronto Dominion Bank
Toronto, ON M5K 1E6

Brandon Kain
Holly Kallmeyer
Asher Honickman
Telephone: (416) 601-7821
Fax: (416) 868-0673
Email: bkain@mccarthy.ca

Counsel for the Intervener, Advocates for the Rule of Law

ARVAY FINLAY LLP
360 - 1070 Douglas Street
Victoria, BC V8W 2C4

David W.L. Wu
Telephone: (604) 696-9828

GOWLING WLG (Canada) LLP
Suite 2600, 160 Elgin Street
Ottawa, Ontario K1P 1C3

Jeffrey W. Beedell
Telephone: (613) 786-0171
Fax: (613) 563-9869

Fax: (888) 575-3281
Email: dwu@arvayfinlay.ca

Counsel for the Intervener, Oceans North Conservation Society

CANADIAN ENVIRONMENTAL LAW ASSOCIATION
130 Spadina, Suite 301
Toronto, ON M5V 2L4

Richard D. Lindgren
Joseph F. Castrilli
Telephone: (416) 960-2284
Fax: (416) 960-9392
Email: lindgrer@lao.on.ca

Counsel for the Intervener, Canadian Environmental Law Association, Environmental Defence Canada Inc., and Miningwatch Canada Inc.

BURNET DUCKWORTH & PALMER
2400, 525 - 8th Avenue SW
Calgary, AB T2P 1G1

Kylan Kidd
Telephone: (403) 260-0109
Email: kkidd@bdplaw.com

Counsel for the Intervener, Explorers and Producers Association of Canada

JURISTES POWER
401 West Georgia Street
Suite1660
Vancouver, BC V6B 5A1

Ryan Beaton
Telephone: (604) 260-4462
Fax: (604) 259-6007
Email: rbeaton@juristespower.ca

Counsel for the Intervener, First Nations Major Projects Coalition

Email: jeff.beedell@gowlingwlg.com

Ottawa Agent for Counsel for the Intervener, Oceans North Conservation Society

GOWLING WLG (Canada) LLP
Suite 2600, 160 Elgin Street
Ottawa, Ontario K1P 1C3

Jeffrey W. Beedell
Telephone: (613) 786-0171
Fax: (613) 563-9869
Email: jeff.beedell@gowlingwlg.com

Ottawa Agent for Counsel for the Intervener, Canadian Environmental Law Association, Environmental Defence Canada Inc., and Miningwatch Canada Inc.

POWER LAW
50 rue O'Connor, Bureau 1313
Ottawa, ON K1P 6L2

Jonathan Laxer
Telephone: (613) 907-5652
Fax: (613) 907-5652
Email: jlaxer@powerlaw.ca

Ottawa Agent for Counsel for the Intervener, First Nations Major Projects Coalition

CENTRE QUÉBÉCOIS DU DROIT DE L'ENVIRONNEMENT
454, avenue Laurier Est
Montréal, QC H2J 1E7

David Robitaille
Marc Bishai
Telephone: (514) 991-9005
Fax: (514) 844-7009
Email: david.robitaille@uottawa.ca

Counsel for the Intervener, Centre québécois du droit de l'environnement

DGW LAW CORPORATION
201 - 736 Broughton Street
Victoria, BC V8W 1E1

John W. Gailus
Courtenay Jacklin
Telephone: (250) 361-9469
Fax: (250) 361-9429
Email: john@dgwlaw.ca

Counsel for the Intervener, Lummi Nation

POWER LAW
50 rue O'Connor, Bureau 1313
Ottawa, ON K1P 6L2

Jonathan Laxer
Telephone: (613) 907-5652
Fax: (613) 907-5652
Email: jlaxer@powerlaw.ca

Ottawa Agent for Counsel for the Intervener, Centre québécois du droit de l'environnement

SUPREME ADVOCACY LLP
100- 340 Gilmour Street
Ottawa, ON K2P 0R3

Marie-France Major
Telephone: (613) 695-8855 Ext: 102
Fax: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

Ottawa Agent for Counsel for the Intervener, Lummi Nation

TABLE OF CONTENTS

Page

PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. The Woodland Cree First Nation (the "WCFN") wishes to provide a lens through which the *Impact Assessment Act*[1] and *the Physical Activities Regulations*[2] can be viewed. That is the lens of a First Nation wanting to develop its natural resources in a sustainable manner to deliver economic benefits to its members in accordance with the true meaning of the commitments in Treaty 8, a meaningful interpretation of Aboriginal rights under section 35 of the *Constitution Act, 1982*,[3] the principles of Truth and Reconciliation, and Parliament's commitment to Indigenous People in the *United Nations Declaration on the Rights of Indigenous Peoples Act.*[4]

2. The *IAA* serves to limit the ability of the WCFN to develop resources by extending the federal order of government's reach beyond its constitutional limits and creating obstacles to this First Nation in developing its natural resources.

3. Furthermore, while First Nations occupy a unique position in the Canadian constitutional and social mosaic, First Nations are not wards of the federal order of government. First Nations are able to foster relationships with provincial governments to develop natural resources in the province. The lens of subsidiarity, a key component in understanding Canadian federalism, applies to Indigenous people who are residents of a province. The principles of subsidiarity inform an understanding of Canadian federalism which militates against the constitutionality of the *IAA* especially in the context of unwarranted federal intrusions into intra-provincial projects.

B. Statement of Facts

4. The WCFN is a proud and avowedly sovereign First Nation located in North-Central Alberta, composed of four reserves: Cadotte Lake, Simon Lake, Golden Lake, and Marten Lake.[5]

---

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

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

[3] *Constitution Act, 1982,* Schedule B to the Canada Act 1982 (UK), 1982, c 11.

[4] *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2019, c 44 [***UNDRIPA***].

[5] Affidavit of Chief Isaac Laboucan-Avirom, sworn September 22, 2022, at para 5.

5. Like many other First Nations, WCFN relies on its interest in energy projects, especially those located within its borders, to fund and develop important and necessary infrastructure for itself, including safe roads, clean water, schools, healthcare and support for elders.[6]

6. WCFN also relies on sustainable energy projects to provide employment for its members which serves to reduce unemployment. Members of the WCFN work in the energy and supporting sectors, including sub-contracting, catering, trucking and construction.[7] Such projects have directly resulted in increased economic benefits for the members of the WCFN.[8] Over the last decade, WCFN, like many other Indigenous groups, has increasingly participated as an equity owner in energy infrastructure projects.

7. The WCFN appeared as an intervener in the Reference before the Alberta Court of Appeal from which this appeal is taken.

8. The WCFN was granted leave to intervene in this matter by Order of Brown J. on November 3, 2022.

PART II – QUESTIONS IN ISSUE

9. The WCFN agrees with the Attorney General of Alberta that the questions in issue are as stated by the Lieutenant Governor in Council in the Reference before the Alberta Court of Appeal and as replicated by the Attorney General of Alberta in paragraph 13 of its factum.

PART II – RESPONSE TO QUESTIONS IN ISSUE

10. The WCFN submits that the questions in the Reference as stated by the Alberta Lieutenant Governor in Council should be answered in the affirmative.

---

[6] *Ibid* at para 7.

[7] *Ibid* at para 9.

[8] *Ibid* at para 12.

PART III – ARGUMENT

Indigenous peoples have a right to economic development

11. The overall position of the WCFN was clearly articulated by the Alberta Court of Appeal at paragraph 38 of its opinion where it stated:

> The Woodland Cree and the Indian Resource Council further contend that the *IAA* encroaches on the independence of First Nations groups, unduly restricting their ability to exploit their natural resources and represent their peoples. In particular, they argue that the *IAA* infringes on their Aboriginal and treaty rights as protected by s 35 of the Constitution.[9]

12. The architecture of the *IAA* creates obstacles for First Nations wishing to develop natural resources. The legislative regime is stacked against First Nations both in the determination of "public interest" by the Governor in Council, and in the overly broad public participation components of the legislative scheme which allow individuals and organizations to oppose legitimate development.

13. Although the *IAA* states in its preamble that its objectives include demonstrating Canada's commitment to the *United Nations Declaration of the Rights of Indigenous Peoples* by recognizing the rights of Indigenous people and fostering reconciliation, the WCFN submits that, in reality, the *IAA* fulfills neither of these objectives.

14. As the Alberta Court of Appeal stated with respect to the Preamble of Bill C-69 and of the *IAA*:

> The preamble in the Act states that Canada is committed to "ensuring respect for the rights of the Indigenous peoples of Canada … and to fostering reconciliation and working in partnership with them". Restricting what Indigenous peoples are permitted – and not permitted – to do of their own accord through the prohibitions in ss 7(1)(c) and (d) smacks of paternalism. Indigenous peoples have suffered the sting of paternalism since the 19th Century: see for example the history set out in ***McDiarmid Lumber Ltd. v God's Lake First Nation***, 2006 SCC 58 at paras 46-68, [2006] 2 SCR 846. The autonomy of Indigenous peoples includes their ability, via their leadership, to make lawful arrangements with provincial authorities and proponents of intra-provincial designated projects for what they consider to be in their best interests. Section 91(24) provides no constitutional basis for Parliament's imprisoning Indigenous peoples in their own Aboriginal and treaty rights.[10]

---

[9] *Reference re Impact Assessment Act*, 2022 ABCA 165 [***Reference***].

[10] *Ibid* at para 316.

15. The Truth and Reconciliation Commission of Canada found that reconciliation necessarily includes economic development of Indigenous peoples in Canada.[11]

16. In the context of the *Constitution Act, 1982*, the British Columbia Supreme Court in *Redmond v British Columbia (Forest, Lands, Natural Resource Operation and Rural Development*) referred to "the obligations of statutory decision makers in **pursuing the ultimate constitutional objective of reconciliation**".[12]

17. The importance of reconciliation as a fundamental principle in considering Indigenous issues was noted by Feehan JA in a 2021 decision of the Alberta Court of Appeal when he stated at paragraph 115:

> Reconciliation is a primary consideration where constitutionally protected interests are potentially at stake. The fundamental purpose of s 35 of the *Constitution Act, 1982* is to rebuild the relationship between the Crown and Indigenous peoples through reconciliation; legally, morally and socially. The fundamental objective of the modern law of Aboriginal and treaty rights is the reconciliation of Indigenous peoples and non-Indigenous peoples and their respective claims, interests, and ambitions: ***Mikisew Cree***, paras 1, 63. Section 35 supports reconciliation of the assertion of Crown sovereignty over Canadian territory and prior occupation by distinctive Indigenous societies by "bridging Aboriginal and non-Aboriginal cultures": ***R v Van der Peet***, 1996 CanLII 216 (SCC), [1996] 2 SCR 507, paras 42–45, 49–50, 137 DLR (4th) 289. The controlling question in all situations is what is required to effect reconciliation with respect to the interests at stake in an attempt to harmonize conflicting interests, and achieve balance and compromise: ***Taku River***, para 2.[13]

18. The Alberta Court of Appeal considered this position of economic development of Indigenous peoples being restricted by the *IAA* and stated at paragraph 313:

> A number of First Nations oppose the prohibitions in ss 7(1)(c) and (d) and raise arguments related to the legal effects of those provisions. The intervenor Woodland Cree noted that the Truth and Reconciliation Commission found that reconciliation includes the economic development of Indigenous peoples. This Court has previously stressed that economic development on reserve lands is in the public

---

[11] Truth and Reconciliation Commission of Canada*, Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Winnipeg: Truth and Reconciliation Commission of Canada, 2015) at 194-195.

[12] 2020 BCSC 561 at para 17 [emphasis added].

[13] *AltaLink Management Ltd v Alberta (Utilities Commission),* 2021 ABCA 342.

> interest: ***AltaLink Management Ltd v Alberta (Utilities Commission)***, 2021 ABCA 342 at para 59. The Woodland Cree contend the *IAA* reduces their voice in decisions regarding their own natural resources, provides excessively broad public participation rights on their projects and potentially negates their ability to develop their natural resources.[14]

19. The Preamble to the *IAA* states in the sixth recital that "Whereas the Government of Canada is committed to implementing the *United Nations Declaration on the Rights of Indigenous Peoples*…" The WCFN submits that by restricting economic development by First Nations, the *IAA* not only fails to meet the promises of reconciliation but also the terms of the *United Nations Declaration on the Rights of Indigenous Peoples*[15] as adopted by the Parliament of Canada in *UNDRIPA*.

20. *UNDRIP* officially recognizes, emphasizes, and acknowledges the rights of Indigenous peoples to economic development.[16] Article 3 states that Indigenous peoples have the right to self-determination, which includes the ability to freely pursue economic development.[17] Article 4 states that Indigenous peoples, in exercising the right to self-determination, have the right to autonomy and self-governance regarding "ways and means for financing their autonomous functions."[18] Article 5 states that Indigenous peoples have the right to maintain and strengthen their economic institutions while retaining their right to participate fully in the "economic […] life of the State," while Articles 20(1) and 21(1) both confirm the right of Indigenous peoples to maintain, develop, and improve their economic conditions and institutions.[19] Finally, Article 23 again confirms that Indigenous peoples have the right to be actively involved in developing and determining economic and other programmes affecting them and, "as far as possible, to administer such programmes through their own institutions".[20]

21. In particular, Article 26(2) of UNDRIPA affirms these rights by stating:

---

[14] *Reference* at para 313.

[15] *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2019, c 44 [***UNDRIPA***]

[16] *UNDRIP* being the Schedule to *UNDRIPA,* at arts 3-6.

[17] *Ibid* at art 8.

[18] *Ibid*.

[19] *Ibid* at arts 9, 16, and 17.

[20] *Ibid* at art 18.

> Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

22. Treaty rights are another aspect of Aboriginal Rights protected by section 35 of the *Constitution Act, 1982*. As the Court of Appeal stated at paragraphs 159 and 161:

> Section 35 recognizes and affirms "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada". Its purpose is to "facilitate the ultimate reconciliation of prior Aboriginal occupation with *de facto* Crown sovereignty": ***Taku River Tlingit First Nation v British Columbia (Project Assessment Director)***, 2004 SCC 74 at para 42, [2004] 3 SCR 550.[21] ….
>
> The constitutional guarantee of Aboriginal rights in s 35 operates as a limitation on both federal and provincial legislative powers: ***Tsilhqot'in Nation v British Columbia***, 2014 SCC 44 at para 142, [2014] 2 SCR 256 [***Tsilhqot'in Nation***].[22]

23. Treaty rights are fundamental to Indigenous peoples who have signed these instruments with the Crown. It is submitted that these rights should be interpreted in accordance with constitutional jurisprudence devoted to "the living tree". [23]

24. Canadian courts have adopted a dynamic and progressive approach to constitutional interpretation which characterizes the Constitution as a "living tree". That tree firmly roots First Nations in the past but should not confine them or their institutions to forever remain frozen in time, unable to grow:

> …although Canadian constitutional actors have generally rejected originalism when dealing the non-Indigenous dimensions of the constitution, they have embraced it emphatically and damagingly when dealing with Indigenous peoples. Indigenous people have been confined by conceptions of Indigeneity that are frozen in the past and the serve, when transposed into constitutional interpretation, to hamstring Indigenous peoples and their institutions. Instead… one should treat the Canadian constitution as a "living tree" in all its dimensions including those that concern Indigenous peoples. [24]

25. As the Royal Commission on Aboriginal People noted over 25 years ago:

---

[21] *Reference* at para 159.

[22] *Ibid* at para 161.

[23] *Edwards v Canada (Attorney General)*, [1930] AC 124 (PC) at 106-107.

[24] Freya Kodar, "John Borrows' Freedom and Indigenous Constitutionalism: Critical Engagements," (2019) 3:2 Lakehead LJ 99 at 102-103.

> We quote the words of Lord Sankey, of the Judicial Committee of the Privy Council, who described the British North America Act as "a living tree capable of growth and expansion within its natural limits." Just as a country's constitution is organic, being shaped and reshaped continually by the evolving circumstances of human society, the principles of treaties made between nations must also be interpreted as the relationship evolves. In this light, the treaties must also be flexible enough to include new matters that might not have been raised at the time of the original treaty discussion. Treaty relationships, once established or re-established, must be flexible enough to address new items of concern. [footnote omitted] [25]

26. In the *Reference re Same-Sex Marriage,* the Supreme Court of Canada expressly rejected narrower originalist interpretative approaches and reaffirmed the dynamic and progressive "living tree" approach, stating at paragraph 22 that:

> The "frozen concepts" reasoning runs contrary to one of the most fundamental principles of Canadian constitutional interpretation: that our Constitution is a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life. [26]

27. A modern approach to interpreting treaty rights accords with the principles of reconciliation and the commitments undertaken by the Parliament of Canada in *UNDRIPA*. The 12th recital of Preamble to UNDRIPA states:

> Whereas the protection of Aboriginal and treaty rights — recognized and affirmed by section 35 of the *Constitution Act, 1982* — is an underlying principle and value of the Constitution of Canada, and Canadian courts have stated that such rights are not frozen and are capable of evolution and growth;

28. As the Royal Commission on Aboriginal Peoples further noted:

> Old rights and practices take new forms in modern times. Dog sleds are replaced by snowmobiles; Inuit art expands to embrace new media; […] resource exploitation grows from hunting, fishing and trapping to include logging, mining, petroleum extraction and hydro-electric generation […] In all these respects and the many others that make up aboriginal rights, it is important to understand the

---

[25] Canada, Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa, 1996), Volume 2 at 50.

[26] *Reference re Same-Sex Marriage,* 2004 SCC 79.

> contemporary versions of aboriginal peoples' ancient prerogatives that are preserved by s. 35. [27]

Indigenous peoples should not be excluded from the application of the principles of subsidiarity

29. The Alberta Court of Appeal found that subsidiarity was a valuable lens through which to view the *IAA*. The Court of Appeal stated at paragraph 149 of its opinion:

> Subsidiarity has been recognized as an underlying principle of federalism: see Dwight Newman, "Changing Division of Powers Doctrine and the Emergent Principle of Subsidiarity" (2011) 74:1 Sask L Rev 21 at 26-28. Subsidiarity is the principle that "law-making and implementation are often best achieved at a level 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": ***114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)***, 2001 SCC 40 at para 3, [2001] 2 SCR 241. The division of powers generally adheres to this principle: Peter Hogg & Wade Wright, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2007) (loose-leaf updated 2021) at §5:7 [Hogg].[86] It accomplishes this by "distributing power to the government thought to be most suited to achieving the particular societal objective": ***Secession Reference*** at para 58.[87] [28]

30. In contrast to the principles of subsidiarity, the *IAA* shifts jurisdiction from the provincial order of government to the federal order on the premise that, among others, Indigenous peoples and their interests must be shielded from exploitation.[29]

31. This paternalistic reasoning effectively prevents Indigenous groups from engaging with the level of government closest to them on intra-provincial matters wholly unrelated to the "status and rights of Indians".[30] This position fundamentally differs from this Court's statement in *Canadian Western Bank v Alberta* at para 61:

---

[27] Canada, Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa, 1996), Volume 4 at Appendix 5A.

[28] *Reference* at para 149.

[29] Canada Factum at para 140.

[30] *NIL/TU, O Child and Family Services Society v BC Government and Service Employees' Union*, 2010 SCC 45 at para 70.

> [I]n their federal aspect ("Indianness"), Indian people are governed by federal law exclusively, but in their activities as citizens of a province, they remain subject to provincial laws of general application[31]

32. The WCFN agrees with the position of the Attorney General of Alberta that:

> Canada appears to assert that effects of designated projects on Indigenous peoples and their interest are automatically matters falling within federal jurisdiction under Canada's section 91(24) power and which entitled Canada to regulate those effects.[32]

33. In considering these same issues, the Alberta Court of Appeal recognized "regardless of whether Aboriginal or treaty rights are involved, Parliament's jurisdiction under s 91(24) does not include substituting federal authority for the rights of Indigenous peoples to make their own agreements with provincial governments or with proponents of intra-provincial designed projects".[33]

34. Sections 7(1)(c) and (d) of the *IAA* blatantly disregard the rights of Indigenous people to meaningfully interact with their own provincial governments based upon the flawed premise that *any* activities of Indigenous people are inherently governed by federal law. Such a proposition frustrates the rights of Indigenous peoples to make agreements with the provincial government about any intra-provincial project. This premise follows from the Alberta Court of Appeal's conclusion that "Parliament has authorized the federal executive to regulate all intra-provincial designed projects from inception to completion."[34]

35. While subsidiarity does not necessarily override a specific constitutional head of power, the principle is an important tool in interpreting the Constitution.[35] As stated by the Alberta Court of Appeal:

> In recognizing the benefit of the proximity of the government to the people that government serves, subsidiarity invigorates confidence in the electors that their

---

[31] *Canadian Western Bank v Alberta*, 2007 SCC 22 at para 61.

[32] Alberta Factum at para 129.

[33] *Reference* at para 308.

[34] *Ibid* at para 208

[35] Dwight Newman, "Federalism, Subsidiarity, and Carbon Taxes" (2019) 82:2 Sask L Rev 187 at 195.

> voice is heard and valued. As an interpretive principle, therefore, subsidiarity militates strongly against erosion of provincial powers.[36]

36. While the WCFN enjoys a special relationship with the federal Crown, Indigenous people are not enclaves of federal jurisdiction nor wards of the federal government. As a First Nation situated in the province of Alberta, the WCFN has a relationship with the Government of Alberta like other residents of Alberta. This relationship recognizes the unique place of First Nations in the mosaic of Canadian law and society but also accords with the reality and the principles of a federal system. This relationship and the ability of First Nations to relate to the provincial order of government on matters within its constitutional jurisdiction should not be displaced by an overreaching application of section 91(24) of the *Constitution Act, 1867*. While recognizing the importance of Aboriginal rights set out in section 35 of the *Constitution Act, 1982,* Indigenous peoples should not be excluded from the application of the principles of subsidiarity nor the operation of the federal system.

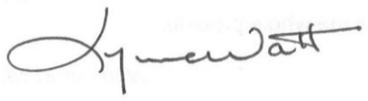
PART IV– COSTS

37. The Intervener Woodland Cree First Nation does not seek costs and submits that the ordinary rule that costs are not awarded against an Intervener should apply.

PART V – ORDER REQUESTED

38. The Intervener Woodland Cree First Nation requests permission to make oral argument at the hearing of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21st day of December 2022.



for:

Robert Reynolds, K.C. / Ed Picard
Counsel for the Intervener, Woodland Cree First Nation

[36] *Reference* at para 151.

PART VII – TABLE OF AUTHORITIES & LEGISLATION

Case Law:			**Paragraph References in Factum**
AltaLink Management Ltd v Alberta (Utilities Commission), 2021 ABCA 342			11
Canadian Western Bank v Alberta, 2007 SCC 22			31
Edwards v Canada (Attorney General), [1930] AC 124 (PC)			21
NIL/TU, O Child and Family Services Society v BC Government and Service Employees' Union, 2010 SCC 45			31
Redmond v British Columbia (Forest, Lands Natural Resource Operation and Rural Development), 2020 BCSC 561			16
Reference re Impact Assessment Act, 2022 ABCA 165			7,9,10,11,14,18, 22, 29, 33, 34
Reference re Same-Sex Marriage, 2004 SCC 79			26
Secondary Sources:			
Canada, Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa, 1996), Volumes 2 & 4			26, 28
Dwight Newman, "Federalism, Subsidiarity, and Carbon Taxes" (2019) 82:2 Sask L Rev 187			35
Freya Kodar, "John Borrows' Freedom and Indigenous Constitutionalism: Critical Engagements" (2019) 3:2 Lakehead LJ 99			24
Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the final Report of the Truth and Reconciliation Commission of Canada* (Winnipeg: Truth and Reconciliation Commission of Canada, 2015)			15
Statutes, Regulations, Legislation:	**Language**		
Constitution Act, 1867, 30&31 Victoria, c 3 (UK)	English	French	33,35
a) s 91(24)	English	French	

Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11 a) s 35(1)	English English	French French	1,16,22,34,35
United Nations Declaration on the Rights of Indigenous Peoples Act, SC 2021, c 14	English	French	1,13,19, 20, 21,26
Impact Assessment Act, SC 2019, c 28, s 1 a) s 6(1)(h) b) s 7(1)(c) c) s 7(1)(d) d) s 11 e) s 27 f) s 99	English English English English English English	French French French French French French	1,2,3, 12,13,18,19,29, 33
Physical Activities Regulations, SOR/2019-285.	English	French	1