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)

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. In 1870 and again in 1905, the federal government kept all the natural resources of the three Prairie provinces, giving itself all of the revenues from those resource revenues, as well as control over land and resource development in the Prairies. The federal government treated Saskatchewan, Alberta, and Manitoba as junior partners in Confederation, paying them allowances, instead of giving them the significant powers and financial resources held by other provinces.[1] It took 25 years of concerted effort by the three Prairie provinces to overturn that injustice.[2]

2. In 1982, concerned about the National Energy Policy and other federal encroachments over western resource policy, Premiers Blakeney and Lougheed insisted on the inclusion of the natural resources amendment in the Patriation package.[3] Section 92A(1) gives the provinces exclusive legislative jurisdiction over the "development, conservation and management" of non-renewable natural resources, forestry resources, and sites and facilities in the province for the generation and production of electrical energy.[4]

3. The Attorney General submits that the new federal *Impact Assessment Act* ("*IAA*") and the associated *Regulations* are simply an attempt to undo those constitutional guarantees, and to claim federal regulatory jurisdiction over the natural resources of the Prairie provinces by way of environmental regulation.[5] To the extent the *IAA* attempts to regulate local works and undertakings and provincial natural resource production in the guise of environmental legislation, it is *ultra vires* the powers of Parliament and thus unconstitutional. The *IAA* is also *ultra vires* to the extent it authorizes

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[1] *Saskatchewan Act*, RSC 1985, App. II, No. 13, ss. 20, 21 ; *Alberta Act*, RSC 1985, App. II, No. 12, ss. 20, 21; *Manitoba Act, 1870*, RSC 1985, App. II, No. 8, ss. 25, 30; *Constitution Act, 1867*, s. 92(5), s. 109.

[2] *Constitution Act, 1930*, RSC 1985, App. II, No. 26, implementing the *Natural Resources Transfer Agreements*; Martin, *The Natural Resources Question: The Historical Basis of Provincial Claims* (Winnipeg: Manitoba King's Printer, 1920; facsimile reproduction, BibiloLife, LLC), at 9-16, 107-127, Book of Authorities, Tab 1 ("BoA").

[3] Meekison and Romanow, "Western Advocacy and Section 92A of the Constitution", in Meekison, Romanow and Moull, *Origins and Meanings of Section 92A: The 1982 Constitutional Amendment on Resources* (Montreal: Institute for Research on Public Policy, 1985), at 24-25, BoA Tab 2.

[4] *Constitution Act, 1867*, s. 92A(1), as enacted by the *Constitution Act, 1982*, s. 50.

[5] *Impact Assessment Act*, SC 2019, c. 28 ("*IAA*"); *Physical Activities Regulations*, SOR/2019-284 ("*Regulations*").

federal decision makers to review a project's negative effects that do not relate directly or incidentally to an area of federal jurisdiction. In addition to these general concerns, the *Regulations* exceed federal authority, by regulating local works and undertakings.

B. Statement of Facts

4. Saskatchewan relies on the facts as stated by the Attorney General of Alberta.

PART II – RESPONSE TO QUESTIONS IN ISSUE

5. Saskatchewan submits that the two constitutional questions posed by the Attorney General of Canada in this Reference should be answered as follows:

(1) The *IAA* is *ultra vires* to the extent it authorizes federal review of projects that do not relate directly or incidentally to areas of federal jurisdiction. It cannot be used to regulate local works and undertakings, assigned to exclusive provincial jurisdiction under s. 92(10) of the *Constitution Act, 1867*, and natural resource facilities, assigned to exclusive provincial jurisdiction under s. 92A(1) of the *Constitution Act, 1867*, unless a clear federal interest is demonstrated in each case.

(2) The *Physical Activities Regulations*, SOR/2019-285 are *ultra vires* because they assert federal regulation over local works and undertakings based on their size or amount of production, a power which the federal Parliament does not have.

PART III - ARGUMENT

A. Provincial Jurisdiction over Natural Resources and Local Works and Undertakings

(1) Section 92A: The Natural Resources Amendment

6. The natural resources amendment, s. 92A of the *Constitution Act, 1867*, is a key part of the analysis in this case. It is important to remember why it was added to the Constitution. In the 1970s, Saskatchewan and Alberta both asserted that they needed explicit constitutional recognition of their power to control their own natural resources. Premier Lougheed summarised the Alberta position as follows:

> The only way there can be a fair deal for the citizens of the outlying parts of Canada is for the elected provincial governments of these parts to be sufficiently strong to offset the political power in the House of Commons of the populated centres. That strength can only flow from the provinces' jurisdiction over the management of their own economic destinies and the development of the natural resources owned by the provinces.[6]

7. Even before the passage of s. 92A, this Court recognised and affirmed the principle that provincial jurisdiction over resource development is essential to provincial financial integrity. In striking down the NEP export tax on natural gas, the Court held:

> The allocation in 1930, by agreement and constitutional amendment, of property to the Crown in the right of the Province of Alberta necessarily carries with it the right of the province to the proceeds of disposition—in the words of Duff J. to "enjoy the fruits of that property". The resources were intended to be an important source of revenue, indeed the basis of the provincial financial integrity, and therefore must be capable of realization.[7]

8. The Attorney General submits that when the federal government agreed to include s. 92A in the Constitution, it accepted that s. 92A would limit the power of the federal government to regulate natural resources. Three of the leading Saskatchewan participants in the Patriation debate summarised the initial draft of the amendment outlined by the Alberta government, with the following conclusion: "This wide-ranging list prompted Ottawa to assert that its acceptance *would virtually remove the federal government from any meaningful role in the field*."[8]

9. Although that statement was commenting on the first, broad Alberta proposal, it is clear that the final wording of s. 92A was a significant change. Meekison and Romanow characterise it as "…the only constitutional amendment contained in the *Constitution Act, 1982*, which on the face of *it alters the division of powers* between the Canadian government and the ten provincial governments."[9]

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[6] Premier Peter Lougheed, opening statement at the Federal-Provincial Conference on the Constitution, Ottawa, October 30 – November 1, 1978; quoted in Romanow, Whyte and Leeson, *Canada … Notwithstanding* (Toronto: Carswell/Methuen, 1984), at 25, BoA Tab 4; see also Moull, "Section 92A of the Constitution Act, 1867", (1983) *Canadian Bar Review* 61:4 715, at 731-732.

[7] *Reference re Exported Natural Gas Tax*, [1982] 1 SCR 1004, at 1080 (emphasis added).

[8] Romanow, Whyte and Leeson, *Canada … Notwithstanding*, at 24, BoA Tab 4 (emphasis added). See also Meekison and Romanow, "Western Advocacy" at 19, BoA Tab 2; Moull, "Section 92A of the Constitution Act, 1867", at 716.

[9] Meekison and Romanow, "Western Advocacy" at 3, BoA Tab 2 (emphasis added).

Another commentator summed up the substantial impact of s. 92A(1) as a "confirmation and enhancement of the legislative powers of the producing provinces."[10]

10. Saskatchewan submits that s. 92A was incorporated into the Constitution to resolve the long-standing disputes over natural resource management.[11] To use the language of former counsel for Saskatchewan, it is "one of the threads of a thousand acts of accommodation" which are the "fabric of a nation," quoted in *Reference re Secession of Quebec*.[12] For Saskatchewan, control over its natural resources is protected by s. 92A to further the federalism principle, recognised by the Supreme Court in the *Secession Reference*, that provincial governments must have autonomy "… to develop their societies within their respective spheres of jurisdiction."[13]

11. This Court has recently confirmed the importance of that diversity as an important principle of federalism: "Federal power cannot be used in a manner that effectively eviscerates provincial power... A view of federalism that disregards regional autonomy is in fact as problematic as one that underestimates the scope of Parliament's jurisdiction …"[14]

12. It is in this context that this Court must review the constitutionality of the *IAA*. The Attorney General submits that the *IAA* is in fact an attempt to reverse the federal concessions over natural resources made in 1930 and 1982, in the guise of environmental legislation.

(2) General Comments on Environmental Jurisdiction

13. The federal government does not have a general environmental jurisdiction which it can use to regulate the construction, operation and maintenance of local works and undertakings in a province, particularly those relating to the development, conservation and management of non-renewable natural resources, forestry resources, and electrical generation facilities. Rather, the provinces have exclusive

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[10] Moull, "The Legal Effect of the Resource Amendment —What's new in Section 92A?", in Meekison, Romanow and Moull, at 47-53 (emphasis added), BoA Tab 3.

[11] Cairns, Chandler and Moull, "The Resource Amendment (Section 92A and the Political Economy of Canadian Federalism" (1985) 23:2 Osgoode Hall LJ 253, at 254, 263.

[12] *Reference re Secession of Quebec*, [1998] 2 SCR 217, at para. 96.

[13] *Reference re Secession of Quebec*, at para. 58.

[14] *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11, para. 49 (citations omitted).

jurisdiction over local works and undertakings as set out in ss. 92(10), 92(13) and 92(16) of the *Constitution Act, 1867*.

14. The federal government's power to regulate environmental issues must be closely linked to the heads of federal power, and cannot be used beyond the scope of those federal heads of power. The federal government cannot regulate the operation of local works and undertakings under the pretense of exercising federal environmental jurisdiction.

15. Saskatchewan submits that this case is the mirror image of the recent unanimous decision of this Court in *Reference re Environmental Management Act (BC)*, which held that the attempt by British Columbia to regulate the shipment of heavy crude oil on an inter-provincial pipeline exceeded provincial jurisdiction. The Court of Appeal held that the province lacked jurisdiction to regulate the internal operations of a federally regulated work or undertaking, and the proposed bill was therefore *ultra vires*. Given that ruling, the Court of Appeal did not find it necessary to consider the issues of inter-jurisdictional immunity or paramountcy.[15] On appeal by British Columbia, this Court unanimously dismissed the appeal from the bench. Speaking for the Court, the Chief Justice stated: "We are all of the view to dismiss the appeal for the unanimous reasons of the Court of Appeal for British Columbia."[16] Saskatchewan submits that judgment means that the reasons of the British Columbia Court of Appeal are now also the reasons of this Court.

16. In the British Columbia case, Saskatchewan successfully argued that provincial environmental jurisdiction did not extend to the construction, management, and operation of an inter-provincial pipeline, because legislative jurisdiction over inter-provincial works and undertakings is exclusively assigned to the federal government. Provincial jurisdiction would apply to matters such as releases into the environment, clean-up requirements, and civil liability, but the province could not regulate the operation of the federally regulated pipeline. That was the core of federal jurisdiction under s. 92(10)(a) and s. 91(29) of the *Constitution Act, 1867*.

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[15] *Reference re Environmental Management Act (BC)*, 2019 BCCA 181, at paras. 105-106.

[16] *Reference re Environmental Management Act (BC)*, 2020 SCC 1.

17. However, s. 92(10)(a) and s. 91(29) make it clear that federal jurisdiction over works and undertakings is exceptional: "exclusive provincial competence is the rule".[17] Federal jurisdiction does not extend to **local** works and undertakings, which are under exclusive provincial jurisdiction. Saskatchewan submits that exactly the same division of powers analysis applies as in the British Columbia case, but this time in favour of the provinces: since the provinces have exclusive jurisdiction over local works and undertakings, the federal government cannot regulate the construction, operation or management of those local works and undertakings. Yet that is exactly what the *IAA* does, and to that extent, it is *ultra vires.*

18. This argument is not based on inter-jurisdictional immunity, but on the basic concept of constitutional *vires*, as analysed by the unanimous British Columbia Court of Appeal, and affirmed unanimously by this Court. In that case, the concept of *vires* favoured exclusive federal jurisdiction over the construction, operation and management of inter-provincial pipelines, and the province could not assert environmental jurisdiction to regulate that same matter. In this case, the provinces have exclusive jurisdiction over the local works and undertakings, supported as well by exclusive jurisdiction over non-renewable natural resources and electricity generation.[18] The federal government does not have jurisdiction to regulate those undertakings, and therefore lacks the power to regulate the environmental aspects of the construction, operation and maintenance of local works and undertakings, as well as the development, conservation and management of non-renewable natural resources.

19. This approach is not a provincial "veto" over federal jurisdiction, nor is it a "silo" approach. It is an assertion that there is no general federal jurisdiction to regulate the environmental aspects of local works and undertakings. The federal government can only regulate matters closely tied to its heads of powers, and cannot assert such a broad environmental jurisdiction as to amount to a general environmental jurisdiction. Nor can it override the provincial power to assess the environmental aspects of local works and undertakings.

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[17] *Northern Telecom v. Communications Workers*, [1980] 1 SCR 115, at 132.

[18] *Constitution Act, 1867*, s. 92A(1).

(3) Environmental Laws Must Be Tied to Specific Heads of Power

20. The leading cases from this Court make it clear that the environment is not itself a subject matter under the division of powers. It is simply too broad and too diffuse to be assigned to one jurisdiction or the other. Rather, each level of government can regulate aspects of the environment which are part of their specific heads of power.[19]

21. Nor does that mean that the environment is an area of shared or concurrent jurisdiction. The opening words of ss. 91 and 92 establish that each government has exclusive jurisdiction over its areas of legislative authority. There are only four areas of concurrent jurisdiction in Canadian constitutional law: the export of non-renewable natural resources from a province to another part of Canada; old age pensions; agriculture; and immigration.[20] Other than these four areas of concurrent jurisdictions, the general principle is exclusivity.[21] This Court has confirmed that while flexibility and cooperation are important to federalism, those values cannot override the constitutional division of powers.[22]

22. Each government's authority to regulate environmental issues therefore must be tied to specific heads of power in their respective areas of jurisdiction. The starting point is not "Does the federal government have power to regulate the environmental aspects of a particular activity?" Rather, the foundational question must be: "Does the federal government have power to regulate that particular activity?" If the answer to that question is "No, that activity is under provincial jurisdiction", then the fact that the federal government is asserting an environmental concern does not expand its powers and allow it to regulate that activity. The first and primary question is not an environmental one, but the basic question of the scope of federal jurisdiction.

23. This analysis does not mean that local works and undertakings are completely immune from federal regulation, any more than federally regulated works and undertakings are completely immune from provincial regulation. Rather, it means that the core of a local work or undertaking, particularly

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[19] *Friends of the Oldman River Society v. Canada (Minister of Transport),* [1992] 1 SCR 3 at 63-66 ["*Oldman*"]; *R v Hydro-Quebec*, [1997] 3 SCR 213, at para. 112; *Reference re Environmental Management Act (*BCCA*)*, para. 12; *References re Greenhouse Gas Pollution Pricing Act*, para. 317.

[20] *Constitution Act, 1867*, ss. 92A(2) , 94A, and 95.

[21] Asher Honickman, "Watertight Compartments: Getting Back to the Constitutional Division of Powers" (2017) 55:1 Alberta L Rev 225, at 227-235.

[22] *References re Greenhouse Gas Pollution Pricing Act*, para. 50.

one dealing with non-renewable natural resources, forestry resources or electricity production, is within exclusive provincial jurisdiction and the federal government cannot intrude on that area. The federal government can regulate aspects that directly relate to areas of federal jurisdiction, but it cannot assert a general environmental jurisdiction, any more than the province of British Columbia could regulate the core federal aspect of an inter-provincial pipeline.

24. This analysis flows from two lines of cases: the cases detailing the limits of provincial jurisdiction in relation to federally regulated works and undertakings, and the line of cases which set out the limits of federal jurisdiction over local works and undertakings.

(4) Provincial Jurisdiction over Local Works and Undertakings

25. It is important to start with the wording of s. 92(10) itself:

> *Subjects of exclusive Provincial Legislation*
> **92.** In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,
>
> …
>
> (10) Local Works and Undertakings other than such as are of the following Classes:[23]

This is a general grant of provincial authority over local works and undertakings. The federal "classes" in (a), (b) and (c) are matters which connect the provinces or internationally, or have been brought under federal jurisdiction by a parliamentary declaration. Federal jurisdiction is exceptional, compared to the broad provincial grant.

26. The division of jurisdiction over works and undertakings is an unusual one, compared to the other subjects in s. 91 and s. 92. Unlike other heads of power, which are generally based on different types of legal subjects (e.g. criminal law compared to civil law; marriage and divorce compared to the solemnization of marriage), the federal government and the provincial government have jurisdiction over certain types of works and undertakings. The division between the two is based on the functional nature of the service they provide. Local works and undertakings are under exclusive provincial jurisdiction, based on the opening words of s. 92(10), coupled with s. 92(13) (property and civil rights) and s. 92(16) (matters of a local nature). A work or undertaking will only come under federal jurisdiction under s. 92(10)(a) and s. 91(29) if it provides a transportation or communication service *and* crosses provincial or international boundaries. It is the inter-provincial nature of a transportation

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[23] *Constitution Act, 1867*, s. 92(10) (emphasis added).

or communication facility which brings it within federal jurisdiction, as explained by John A. Macdonald in the *Confederation Debates*.[24] Justice Newbury recognised this point in *Reference re Environmental Management Act (BC)*: heavy oil is neither federal nor provincial. What mattered was that it was being transported in an inter-provincial pipeline.[25]

27. Many of the cases about works and undertakings have arisen in relation to federally regulated works and undertakings. Two foundational decisions outlining the jurisdictional boundaries over works and undertakings are *Canadian Pacific Railway v Notre Dame de Bonsecours* and *Madden v. Nelson and Fort Sheppard Railway Co.* In *Madden*, the Judicial Committee held that the province could not require a federally-regulated railway to build fences along its right-of-way to protect livestock. That law intruded on the federal government's exclusive jurisdiction to regulate the construction and operation of the railway.[26] However, in *Notre Dame de Bonsecours*, the Judicial Committee held that an inter-provincial railway could be civilly liable under provincial law for damage it caused to others, by failing to clean a drainage ditch.[27]

28. This Court has continued to rely on these cases. In *Construction Montcalm*, Justice Beetz for the majority discussed the two cases and held that the province could not regulate the core operation of a federally regulated work or undertaking, but the province could regulate aspects of the federally regulated work or undertaking that did not come within those core areas.[28] Similarly, the Court has held that provincial environmental emission laws can apply to a federally regulated railway, citing *Notre Dame de Bonsecours.*[29] These cases were also relied on in *Reference re Environmental Management Act (BC)*.[30]

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[24] *Confederation Debates*, 8th Parl., Prov.Canada, 3rd Sess. (6 February 1865), at 40; cited by the British Columbia Court of Appeal in *Reference re Environmental Management Act*, para. 63.
[25] *Reference re Environmental Management Act (*BCCA*)*, paras. 94-95.
[26] *Madden v. Nelson and Fort Sheppard Railway Co*., [1899] UKPC 47, [1899] AC 626, at 628.
[27] *Canadian Pacific Railway v Notre Dame de Bonsecours*, [1899] UKPC 22, [1899] AC 367, at 373-374.
[28] *Construction Montcalm Inc. v. Minimum Wage Commission,* [1979] 1 SCR 754, at 772-773.
[29] *Ontario v. Canadian Pacific Ltd*., [1995] 2 SCR 1028.
[30] *Reference re Environmental Management Act (*BCCA*)*, at paras. 65-67.

29. Saskatchewan submits that this same analysis applies the other way, when the federal government attempts to regulate local works and undertakings. The provinces have exclusive jurisdiction over local works and undertakings. The federal government lacks the power to regulate the core aspects of local works and undertakings, just as the provinces lack the power to regulate the core aspects of federally regulated works and undertakings.

30. Nor do close economic connections between a federally regulated undertaking and a provincially regulated undertaking allow the federal government to expand its jurisdiction to regulate the provincial undertaking. For example, federal jurisdiction over inter-provincial railways does not allow it to regulate grain elevators, in spite of the close economic and functional connection with railways.[31] Nor does Parliament have jurisdiction over railways that are not closely integrated into an inter-provincial railway, even if the short-line has an important economic function, such as providing grain cars for delivery by the inter-provincial railway to the port.[32] Federal jurisdiction over works and undertakings is limited by s. 92(10).

31. The federal environmental jurisdiction in relation to a local work or undertaking is therefore also limited. Just as the province cannot apply its environmental laws to the construction, operation and maintenance of a federally regulate work or undertaking, so too the federal government cannot apply its environmental laws to the core operations of a local work or undertaking. It can only regulate those aspects of the local work or undertaking which have a clear connection to the federal heads of power, rather than assert a broad environmental jurisdiction because of possible effects on matters within federal jurisdiction.

32. This limitation is particularly strong in relation to local works and undertakings in the areas of non-renewable natural resources, forestry resources, and electricity generation. Provincial jurisdiction over local works or undertaking, combined with the subject matter of their operations, means that the federal government cannot regulate those core areas. The federal government once had complete authority over those matters in the three Prairie provinces, but it chose to divest itself of its **proprietary** jurisdiction in 1930, transferring it to the Prairie provinces. Exclusive provincial

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[31] *The King v Eastern Terminal Elevator Co.*, [1925] SCR 434, at 446-448, 456-457.

[32] *United Transportation Union v Central Western Railway Corp.*, [1990] 3 SCR 1112, at 1143-1147.

regulatory jurisdiction was further confirmed by s. 92A, particularly sub-section (1), as part of the Patriation settlement in 1982. Having divested itself of its jurisdiction over natural resources, and recognised the exclusive regulatory power of the provinces in the natural resources amendment, the federal government cannot now try to reclaim a broad regulatory power over natural resources in the guise of environmental regulation.

33. The limited nature of the federal jurisdiction over local works and undertakings is also illustrated by the long line of cases relating to federal jurisdiction over the workplace. Starting with the decision of the Judicial Committee in the *Snider* case in 1925,[33] continuing through the *Stevedoring Reference*,[34] and on to *Northern Telecom*,[35] provincial jurisdiction over the workplace in works and undertakings is the norm, and federal jurisdiction is the exception. The federal government only has jurisdiction over the workplace in works and undertakings which are under federal jurisdiction. Other than those exceptional areas, the provinces have exclusive jurisdiction over the workplace.

34. Nor can the federal government rely on the double aspect doctrine to assert environmental jurisdiction over local works and undertakings. In *Bell Canada*, Justice Beetz for a unanimous Court held that the double aspect doctrine cannot be used to allow both governments to regulate the workplace of a particular undertaking. Doing so would create an area of concurrent jurisdiction over the work or undertaking, contrary to the principle of exclusive jurisdiction set out in ss. 92(10) and 91(29).[36] Similarly, double aspect does not give the federal government environmental jurisdiction over a local work or undertaking.

35. Saskatchewan submits that this long line of well-established cases supports its position on the environmental jurisdiction of the federal government. Just as the federal government's workplace jurisdiction is limited to cases where the federal government has jurisdiction over that work or undertaking, its environmental jurisdiction is similarly limited. If it does not have jurisdiction over the

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[33] *Toronto Electric Commissioners v Snider*, [1925] UKPC 2, [1925] AC 396 (PC).

[34] *Stevedores' Reference (Reference re the Industrial Relations and Disputes Investigation Act)*, [1955] SCR 529.

[35] *Northern Telecom v. Communications Workers*, at 132.

[36] *Bell Canada v. Quebec (Commission de la Santé et de la Sécurité du Travail)*, [1988] 1 SCR 749, at 765-766, 853; *References re Greenhouse Gas Pollution Pricing Act*, para. 128.

work or undertaking, it cannot assert environmental jurisdiction over the construction, operation or maintenance of that work or undertaking, any more than British Columbia could regulate the product carried by an inter-provincial pipeline, and the environmental aspects of the construction, operation or maintenance of that pipeline. The federal government cannot assert environmental jurisdiction to stop a local work "in its tracks", any more than British Columbia could use its environmental jurisdiction to stop a federal pipeline.[37]

B. Limits of Federal Environmental Jurisdiction

(1) Limited Scope of Federal Review

36. Neither Parliament nor the provinces have general jurisdiction over the environment. There is no "environmental jurisdiction." There is only jurisdiction over specifically-assigned heads of power, which includes the authority to regulate environmental *aspects* of these heads of powers, or to regulate them in a manner that is *mindful of* the environment.[38]

37. Even if the federal government has authority to conduct an environmental assessment of a particular project because it may affect an area of federal jurisdiction, the scope of its review is constitutionally limited. The *Constitution Act, 1867* does not authorize the federal government to assess whatever it desires, or considers important. The federal government can only scrutinize the project's effects on areas of federal jurisdiction – such as inland fisheries, Indigenous peoples, and federal lands. It cannot go beyond the areas of federal jurisdiction and conduct a general environmental review.[39]

38. *Oldman* established that the federal environmental review can consider national and local socio-economic factors, but even so, that review must always be tied to federal heads of power. The fact that a particular project may have some impact on a federal head of power does not authorise the federal government to review all environmental aspects of the project: the review must always be tied to federal jurisdiction, and federal environmental regulations must always be limited to the federal aspect of the matter being regulated.[40] If a work or undertaking is under exclusive provincial jurisdiction, the federal government lacks jurisdiction to regulate the internal core aspects of that undertaking, whether

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[37] *Reference re Environmental Management Act (*BCCA*)*, para. 101.
[38] *Oldman* at 63-68; *Quebec (Attorney General) v Moses*, 2010 SCC 17, [2010] 1 SCR 557, at para. 121.
[39] *Oldman*, at 72-73.
[40] *Oldman*, at 66-67.

for environmental reasons or other reasons. Federal environmental concerns are not a magnet which pulls the entire work or undertaking into federal jurisdiction. The federal process can take into account local benefits in assessing whether the matter is in the public interest from a federal perspective, but the federal government cannot consider all aspects of the work or undertaking. To do so would turn the review of federal environmental implications into a general environmental review power, intruding on provincial power to review environmental issues under the provincial heads of power.

39. This Court has recently confirmed that analysis in its decision in *References re Greenhouse Gas Pollution Pricing Act*, citing with approval its earlier decisions that the environment is "not an independent matter of legislation" but rather "a sweeping subject or theme virtually all-pervasive in its legislative implications", that "touch[es] several of the heads of power assigned to the respective levels of government".[41]

(2) Relevant Provisions of the *IAA*

40. Under the *IAA*, all impact assessments must take into account a broad range of factors, many of which lie outside federal jurisdiction. Saskatchewan submits that the federal review process cannot extend to the core operations of a provincially regulated work or undertakings. For example, hiring practices for that work or undertaking, such as "the intersection of sex and gender with other identity factors", relate to the internal operations of the local work or undertaking and cannot be brought under federal jurisdiction by means of environmental review. There is no doubt that the federal government could consider those factors in relation to works and undertakings which are under federal jurisdiction, but it lacks jurisdiction to regulate the operations of local works and undertakings.

41. The impact assessment then results in a report that lands in the hands of the federal decision maker, who decides whether the project is "in the public interest" based on "the adverse effects within federal jurisdiction – and the adverse direct or incidental effects – that are indicated in the report"[42] and a consideration of other factors listed in s. 63 of the *IAA*.

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[41] *References re Greenhouse Gas Pollution Pricing Act*, at para. 317.

[42] *IAA*, s 60 and ss 61-62.

42. The Attorney General of Canada asserts that the phrase "adverse effects within federal jurisdiction – and the adverse direct or incidental effects – that are indicated in the report" is the *IAA*'s saving grace, and restrains decision-making by ensuring decision makers only consider negative effects within federal jurisdiction when deciding whether a particular project is in the public interest.[43] The Attorney General of Canada asserts that the provisions in which the phrase appears clearly instruct federal decision makers to ignore vast sections of the impact assessment report before them, which must canvass a project's positive and negative effects on areas outside federal jurisdiction, when making their decision.

43. Saskatchewan respectfully submits that Canada's interpretation of such "decision-making provisions" is problematic. Why would the *IAA* direct the review agency to review adverse factors outside federal jurisdiction and include those factors in its report, and then direct the federal decision-maker to ignore those aspects of the report in making its decision?[44] While the provisions do refer to "adverse effects within federal jurisdiction", they do not ensure that federal decision makers ignore the aspects of the environmental assessment that do not relate areas of federal jurisdiction. The provisions cannot bear the interpretation Canada puts upon them, and do not ensure federal assessments remain *intra vires*.

44. The *IAA* therefore does not preclude, and in fact directs, federal decision makers to consider factors well outside federal jurisdiction when determining whether a particular project is within the public interest. In this way, the *IAA* differs from its predecessors, which specifically restricted the scope of consideration to matters within federal jurisdiction.[45] As such, it invites unconstitutional interference with provincial jurisdiction. For example, the Impact Assessment Agency of Canada ("IAAC") could initially obtain jurisdiction to review a particular project because it is a "designated project" that "may" affect aquatic species.[46] Even if the resulting impact assessment report concludes the project will not negatively affect any area of federal jurisdiction, the *IAA* empowers the decision

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[43] Factum of the Attorney General of Canada, at paras 92-95.

[44] *IAA*, ss. 60-62.

[45] *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52, ss 5, 19 (repealed). See also the *Guidelines Order* at issue in *Oldman*, at 25-26.

[46] *IAA*, s 7.

maker to determine the project is not in the public interest because the project's proponent has internal workplace policies which the IAAC disapproves of, for example concerning gender diversity.

(3) The Case Law

45. The *IAA* is therefore the "Trojan horse" which La Forest J. cautioned against in *Oldman*. By authorizing federal decision makers to consider effects on matters outside federal jurisdiction, the *IAA* enables and directs "the federal government, on the pretext of some narrow ground of federal jurisdiction, to conduct a far-ranging inquiry into matters that are exclusively within provincial jurisdiction."[47]

46. In *Oldman*, the Trojan horse issue was hypothetical because under the impugned *Guidelines Order*, the decision-maker was "only given a mandate to examine matters directly related to the areas of federal responsibility affected."[48] Where a review was triggered, the *Guidelines Order* only permitted the consideration of environmental effects "which may have an impact on the areas of federal responsibility affected."[49]

47. That the *Guidelines Order* did not instruct the federal review to consider matters outside federal jurisdiction was clearly an important factor in La Forest J's conclusion that it was *intra vires*.[50] His judgment was based on the principle that federal legislative power can only give federal environmental review agencies a mandate to examine matters specifically related to heads of federal responsibility.[51] Indeed, he explicitly stated: "Because of its auxiliary nature, environmental impact assessment can only affect matters that are 'truly in relation to an institution or activity that is otherwise within [federal] legislative jurisdiction' "[52] and that a "necessary element of proximity… must exist between the impact assessment process and the subject matter of federal jurisdiction involved."[53]

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[47] *Oldman,* at 71-72.
[48] *Oldman*, at 71-72.
[49] *Oldman*, at 72.
[50] *Oldman,* at 71-72.
[51] See also *Prairie Acid Rain Coalition v Canada (Minister of Fisheries & Oceans)*, 2004 FC 1265 at para. 234; affirmed 2006 FCA 31.
[52] *Oldman*, at 72, citing *Devine v Quebec (Attorney General)*, [1988] 2 SCR 790 at 808.
[53] *Oldman*, at 72.

48. These principles from *Oldman* have been followed in subsequent cases. In *Quebec (Attorney General) v Canada (National Energy Board)*, this Court considered the scope of a federal environmental review under the *National Energy Board Act*. The Court stressed the importance of constraining federal environmental reviews to respect constitutional boundaries:

> … it is nonetheless important that the jurisdiction of the Board be delineated in a manner that respects these [division of powers] concerns…
>
> In defining the jurisdictional limits of the Board, then, this Court must be careful to ensure that the Board's authority is truly limited to matters of federal concern.[54]

49. In *Friends of the West Country Association v Canada (Minister of Fisheries & Oceans)*, the Federal Court of Appeal upheld the lower court's conclusion that the federal review was inappropriately narrow. Even though he called for a broader review in that case, Rothstein JA explicitly stated that constitutional limits must be respected:

> … given the divided constitutional jurisdiction over environmental assessments between the federal government and the provinces, it follows that the federal responsible authority is to focus its environmental assessment on effects within federal jurisdiction - such as in this case, the effects on Navigation and Shipping, Inland Fisheries, and Indians, and Lands reserved for the Indians.[55]

50. Similarly in *Prairie Acid Rain Coalition v Canada (Minister of Fisheries & Oceans),* the Federal Court stated that "it could not have been Parliament's intent to authorize a Responsible Authority to environmentally assess aspects of a project unrelated to those heads of federal jurisdiction called into play by the project in question." This decision was affirmed by the Federal Court of Appeal, where Rothstein JA also noted that in the context of a federal environmental review, "constitutional limits must be respected." [56]

51. In *Oldman*, this Court stated that Parliament has jurisdiction to consider matters which might normally be considered outside federal jurisdiction – such as nuisance from smoke or noise in a

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[54] *Quebec (Attorney General) v Canada (National Energy Board)*, [1994] 1 SCR 159, at 192-193 (emphasis added).

[55] *Friends of the West Country Assn v Canada (Minister of Fisheries & Oceans*, [2000] 2 FC 263, at para. 38.

[56] *Prairie Acid Rain Coalition v Canada (Minister of Fisheries & Oceans)* (FC), at para. 243; 2006 FCA 31 at para. 31.

municipality – when exercising jurisdiction over railways.[57] This, however, does not establish federal authority to consider environmental effects that do not touch on an area of federal jurisdiction. Regulation of a federal railway in a manner mindful of its effects on areas of provincial jurisdiction, such as noise pollution, is still in substance regulation of a federal railway. That is not true when a federal agency attempts to regulate an *in situ* oil sands extraction facility or a coal mine, located on provincial land. Such regulation ceases to have any connection to a federal head of power and is therefore *ultra vires*.[58]

(4) Summary

52. Saskatchewan submits that the scope of federal environmental review is and always has been limited: federal decision makers are restricted to matters within the scope of federal heads of power. The broad provincial jurisdiction over local works and undertakings, and the exclusive power to regulate the development and operation of non-renewable natural resources, forestry resources and electrical generation, are not within federal jurisdiction and cannot be brought under federal jurisdiction under the guise of environmental regulation. The cases demonstrate this constitutional limit has been assumed in all the landmark cases delineating the scope of such federal review.

53. By requiring federal decision makers to consider factors well outside federal jurisdiction when determining whether a particular project is in the public interest, the *IAA* exceeds these constitutional limits. The *IAA* is accordingly *ultra vires* to the extent it authorizes federal decision makers to review a project's effects that do not relate directly or incidentally to an area of federal jurisdiction. Effects relating only to areas of provincial jurisdiction cannot be part the federal decision-making process.

54. Based on the above principles, the Attorney General submits that the general scope of review is simply too broad and is therefore *ultra vires*, to the extent it brings matters of provincial jurisdiction under federal environmental review.

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[57] *Oldman*, at 66, 69.

[58] Kennett, "Federal Environmental Jurisdiction After Oldman" (1993) 38:1 McGill LJ 180 at 187-193.

C. The Regulations Assert Jurisdiction over Provincial Works and Undertakings

55. The *Regulations* make it very clear how broadly the federal Cabinet has interpreted the powers granted to it under the Act. Saskatchewan submits that large portions of the *Regulations* exceed federal jurisdiction. The federal government does not have power to regulate the local works and undertakings in question, and therefore does not have power to regulate the environmental aspects of those local undertakings. It only has jurisdiction if it first demonstrates some connection to federal jurisdiction. Such jurisdiction cannot be assumed by Regulations.

56. Section 2(1) of the Regulations provides that the physical activities set out in the Schedule are "designated projects" under s. 2 of the *IAA*, which in turn triggers the impact review process. However, it is immediately apparent that many of the physical activities listed in the Schedule are in fact local works and undertakings, and therefore not within federal jurisdiction. Since they are not within federal jurisdiction, the federal government does not have a general power to regulate the construction, operation and maintenance of those works or undertakings, any more than the provinces can regulate the construction, operation and maintenance of federally regulated works and undertakings, such as the inter-provincial pipeline in *Reference re Environmental Management Act*.

57. For example, ss. 18, 19, 24 and 25 of the Regulations assert federal jurisdiction over metal mines, mills, and oil sands mines. Those activities are clearly local works and undertakings coming within exclusive provincial jurisdiction under s. 92(10) of the *Constitution Act, 1867*. They are also examples of facilities related to the exploration, development, conservation and management of non-renewable natural resources in the province. They are therefore under exclusive provincial jurisdiction under s. 92A(1)(a) and (b). The fact that the federal government is only attempting to regulate facilities which have production over certain levels does not give the federal government jurisdiction. It is the nature of the undertaking that decides whether it is under exclusive provincial jurisdiction, not its production volume.[59]

58. Similarly, ss. 30, 31, 32, 33, 37 and 38 all target facilities which produce or refine oil, gas, or other fossil fuels. Those facilities are all local works and undertakings in the province under s. 92(10), and the federal government has no power to regulate their construction, operation and maintenance. To

[59] *The King v Eastern Terminal Elevator Co.*, at 447.

the extent they are related to development, conservation and management of non-renewable natural resources, they are also under exclusive provincial jurisdiction under s. 92A(1)(a) and (b). Again, the fact that the *Regulations* only apply to facilities with production over a certain amount is irrelevant. It is the nature of the work or undertaking, not the amount it produces, which is determinative of federal or provincial jurisdiction.

59. Sections 42 and 43 designate electrical generating facilities. However, those too are under exclusive provincial jurisdiction. Section 92A(1)(c) provides that the provinces have exclusive jurisdiction over the "development, conservation, and management" of electrical generating sites. The amount of electrical production is irrelevant to jurisdiction.

60. Similarly, s. 51 designates the "construction, operation, decommissioning, and abandonment of a new all-season highway" that is more than 75 km long, while s. 54 designates new railway lines over 50 km long, and new or expanded railway yards of more than 50 hectares. However, federal jurisdiction depends on the nature of the railway, not its size: is it an inter-provincial railway, or is it functionally integrated with an inter-provincial railway? If not, the railway or road is under exclusive provincial jurisdiction.[60] Yet the *Regulations* make no attempt to establish any linkage to federal jurisdiction. By basing the designation on length, purely local works and undertakings, such as a highway linking Regina to Saskatoon or a commuter train linking Calgary to Edmonton, would fall under federal environmental jurisdiction.

61. The Attorney General submits that the designation provisions of the Regulations are *ultra vires*. These are local works and undertakings under s. 92(10). The federal government does not have environmental regulatory power over their "construction, operation, decommission and abandonment", any more than the provinces have control over the construction, operation, decommission and abandonment of federally regulated works and undertakings, such as inter-provincial pipelines.

62. This is not to say that any of these projects might have an impact on an area of federal jurisdiction, such as navigable waters or Indigenous hunting and treaty rights. However, to assert

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[60] *United Transportation Union v Central Western Railway Corp*., at 1147.

jurisdiction, the federal law must be tied to an area of federal jurisdiction. The federal government cannot assert jurisdiction based on the size of a project or the amount it produces.

PART IV - COSTS

63. The Intervener Attorney General for Saskatchewan does not seek costs and submits that the ordinary rule that costs are not awarded against an Intervener should apply.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 19th day of December, 2022.

Thomson Irvine KC

for: Noah Wernikowski

PART VII – TABLE OF AUTHORITIES & LEGISLATION

Case Law:	**Paragraph References** (to Memorandum)
Bell Canada v. Quebec (Commission de la Santé et de la Sécurité du Travail), [1988] 1 SCR 749 EN & FR	34
Canadian Pacific Railway v Notre Dame de Bonsecours, [1899] UKPC 22, [1899] AC 367	27, 28
Construction Montcalm Inc. v. Minimum Wage Commission, [1979] 1 SCR 754 EN & FR	28
Devine v Quebec (Attorney General), [1988] 2 SCR 790 EN & FR	47
Friends of the Oldman River Society v. Canada (Minister of Transport), [1992] 1 SCR 3 EN & FR	38, 45, 46, 48, 51
Friends of the West Country Assn v Canada (Minister of Fisheries & Oceans, [2000] 2 FC 263	49
The King v Eastern Terminal Elevator Co., [1925] SCR 434	39,57
Madden v. Nelson and Fort Sheppard Railway Co., [1899] UKPC 47, [1899] AC 626	27
Northern Telecom v. Communications Workers, [1980] 1 SCR 115 EN & FR	17, 33
Ontario v. Canadian Pacific Ltd., [1995] 2 SCR 1028 EN & FR	28
Prairie Acid Rain Coalition v Canada (Minister of Fisheries & Oceans), 2004 FC EN & FR; affirmed 2006 FCA 31	47, 50
Quebec (Attorney General) v Canada (National Energy Board), [1994] 1 SCR 159 EN & FR	48
Quebec (Attorney General) v Moses, 2010 SCC 17, [2010] 1 SCR 557 EN & FR	36
Reference re Environmental Management Act (BC), 2019 BCCA 181	15, 26, 28, 35, 56
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