SCC File No. 40195

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

IN THE MATTER of An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts, SC 2019, c 28 and the Physical Activities Regulations, SOR/2019-285

AND IN THE MATTER of a Reference by the Lieutenant Governor in Council to the Court of Appeal of Alberta under the Judicature Act, RSA 2000, c J-2, s 26

BETWEEN:

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AND:

ATTORNEY GENERAL OF ALBERTA

RESPONDENT

(continued on next page)

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PART I – OVERVIEW OF POSITION

1. Since Confederation, the federal government has undertaken to protect the rights of Indigenous Nations from encroachments by the Provinces. This fiduciary responsibility, initially embedded in the *Royal Proclamation, 1763* (the "*Proclamation*"), continues to this day. Notwithstanding the enactment of section 35 of the *Constitution Act, 1982* ("section 35"), federal legislative jurisdiction over "Indians and Lands Reserved for Indians" continues to play an important role in ensuring the continued ability of Indigenous Nations to exercise their rights and culture.

2. Consistent with Canada's fiduciary responsibilities under section 91(24) of the *Constitution Act, 1867* ("section 91(24)"), the *Impact Assessment Act* ("*IAA*") requires an assessment of impacts upon Indigenous Peoples' abilities to engage in traditional activities and exercise rights under section 35 of the *Constitution Act, 1982*. The *IAA* represents an attempt by Canada to foster reconciliation and bring Canada's laws in line with the *United Nations Declaration on the Rights of Indigenous Peoples* ("UNDRIP").

PART II – ISSUE

3. While the Intervener takes no position regarding the constitutionality of the *IAA* as a whole, Lummi's position is that those sections of the *IAA* that address impacts to Indigenous Peoples and Indigenous Lands are a valid exercise of Canada's jurisdiction over "Indians and Lands Reserved for Indians" under section 91(24).[1]

PART III –ARGUMENT

A. The Purpose of Section 91(24) of the *Constitution Act, 1867*

4. Since the *Proclamation*, the Crown has taken on the responsibility of protecting Indians and their interests in lands. The *Proclamation* was the genesis of the Crown's fiduciary duty, which is embodied in section 91(24).

[1] In particular, ss. 7(1)(c) and (d), 16(2)(c) and (d), & 22(1)(c), (g), (l) and (q) of the *Impact Assessment Act*, SC 2019, c. 28, s. 1 [*IAA*].

5. Section 91(24) has a protective element to it – the need to protect Indigenous Peoples from the wants and desires of the local population. Professor Hogg suggests that:

> The main reason for s.91(24) seems to have been a concern for the protection of the aboriginal peoples against local settlers, whose interest lay in an absence of restrictions on the expansion of European settlement. The idea was that the more distant level of government – the federal government – would be more likely to respect the Indian reserves that existed in 1867, to respect the treaties with Indians that had been entered into by 1867, and generally to protect the Indians against the interests of local majorities.[2][emphasis added]

6. The federal government's role as a protector of Indigenous Peoples has been affirmed by the courts in numerous decisions. Two foundational U.S. Supreme Court decisions that have been frequently cited by this court, *Johnson v. McIntosh* and *Worcester v. Georgia*, confirmed the role of Great Britain, and subsequently the U.S. federal government, as the protector of Indian Nations.[3]

7. Since these early cases, courts in the United States have consistently accepted that the federal government has a unique trust obligation to protect the rights of Indian Tribes from encroachments by the States, particularly in environmental matters that affect the exercise of treaty rights. This special trust or fiduciary relationship is confirmed through both case law and statute:

> In carrying out its fiduciary duty, it is the government's, and subsequently the [US Army] Corps' [of Engineers], responsibility to ensure that Indian treaty rights are given full effect.[4]

8. Thus, there is a positive obligation on the federal government to protect the continued exercise of Indian Tribes' rights. The history is more mixed in Canada. While the federal government has not always upheld its trust responsibility, this protective philosophy is at play in a number of statutes, most notoriously the *Indian Act*. Several sections intend to

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[2] P.W. Hogg, *Constitutional Law of Canada*, 5th ed., Toronto: Thomson Reuters, 2022, at p. 28-2-28-3. See also Bruce McIvor and Kate Gunn, "Stepping Into Canada's Shoes: *Tsilhqot'in, Grassy Narrows* and the Division of Powers," (2016) 67 UNBLJ 146 at 147.
[3] *Johnson & Graham's Lessee v. McIntosh*, 21 U.S. 543, 8 Wheat. 543, 5 L. Ed. 681 (1823) ["*Johnson v. McIntosh*"] at pp. 590 and 595; *Worcester v. Georgia*, 31 U.S. 515, 6 Pet. 515, 8 L. Ed. 483 (1832) at p. 555.
[4] *Northwest Sea Farms, Inc. v. U.S. Army Corps of Engineers*, 931 F.Supp. 1515 at 1520 (1996).

protect the property rights of Indians from encroachment.[5] This court affirmed in the *Peguis* case that the federal Crown alone bears the responsibility to provide for the welfare and protection of Indigenous Peoples in Canada.[6]

9. In *Daniels*, this court considered whether Métis peoples are "Indians" for the purposes of section 91(24).[7] In addition to confirming the "protective purpose" of section 91(24), this court also confirmed that section 91(24) embodies a fiduciary duty on the part of the federal Crown, a matter that the court characterized as settled law.[8]

10. Finally, the *Secession Reference* confirmed the protection of minority rights, particularly Aboriginal and Treaty rights, as an important underlying constitutional value.[9] While those comments were made in the context of section 35, they hold equal weight when considering the scope of section 91(24).

B. The Alberta Court of Appeal Asked the Wrong Question(s)

11. Rather than asking whether the *IAA* or portions thereof are within section 91(24) jurisdiction, the court asked the wrong question – the question of whether provincial laws could apply to "Indians." However, the court was not faced with considering the application of the provincial *Environmental Protection and Enhancement Act* to "Indians"– that question has been settled in the affirmative – but whether the federal government can legislate in relation to "Indians and Lands Reserved for Indians."

12. Lummi's position is that this question was settled by the *Oldman River* case.[10] In that case, this court confirmed that the dam under construction triggered the federal

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[5] *Indian Act,* R.S.C. 1985, c. I-5, in particular, the designation and surrender provisions – sections 37-39 and exemptions from taxation and seizure as well as the application of provincial laws to Indians in sections 87-90.
[6] *Mitchell v. Peguis Indian Band,* [1990] 2 S.C.R. 85 ["*Peguis*"] at p. 130-131.
[7] *Daniels v. Canada (Minister of Indian Affairs & Northern Development),* [2016] 1 S.C.R. 99 ["*Daniels*"]
[8] *Daniels* at paras. 49 & 53.
[9] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 ["*Secession Reference*"] at paras. 80 & 82.
[10] *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 ["*Oldman River*"] at p. 44.

government's responsibilities under section 91(24). In so doing, the court did not limit such jurisdiction to reserves under the *Indian Act* referencing both aspects – Indians and lands reserved for Indians – of the section 91(24) jurisdiction that triggered the assessment under the Environmental Assessment Review Process Guidelines Order.

13. That approach is consistent with the broad fiduciary approach taken by the court in *Guerin*, where Dickson, J. (as he then was) stated that the "Indian interest" in reserve lands – which would trigger section 91(24) jurisdiction – was the same as Aboriginal title lands.[11] Thus, the power to legislate over "lands reserved for Indians" is broader than simply legislating in relation to Indian reserves. To find otherwise would effectively eviscerate the section 91(24) power(s).

14. *Delgamuukw* confirmed that it is the federal government that has jurisdiction to legislate in relation to both Aboriginal rights and Aboriginal title lands.[12]

15. Importantly, while subsequent cases such as *Grassy Narrows* and *Tsilhqot'in* have confirmed that Provinces may justifiably infringe Aboriginal and Treaty rights, this court has not changed the law with regard to Parliament's broad section 91(24) jurisdiction.[13]

16. Section 91(24) plays an important role in fulfilling the promise(s) of section 35(1) and furthering the ongoing project of reconciliation. As this court stated in *Sparrow*, "federal power [section 91(24)] must be reconciled with federal duty [section 35]."[14]

17. While *Sparrow* concerned the test for justification for infringements of Aboriginal rights, the underlying principle(s) from *Sparrow* impose a positive obligation on the Crown to protect such rights from unjustified infringement. One of the ways to do so is through legislation. The *IAA* attempts to do just that by putting the assessment of impacts on Aboriginal and Treaty rights, including the cumulative effects on those rights, as

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[11] *Guerin v. the Queen,* [1984] 2 S.C.R. 335 ["*Guerin*"] at p. 379.
[12] *Delgamuukw v. British Columbia,* [1997] 3 S.C.R. 1010 ["*Delgamuukw*"] at paras. 174 & 178.
[13] *Grassy Narrows First Nation v. Ontario*, 2014 SCC 48 ["*Grassy Narrows*"]; *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 ["*Tsilhqot'in*"]
[14] *R. v. Sparrow*, [1990] 1 SCR 1075 ["*Sparrow*"] at p. 1109.

mandatory factors for assessment. As a result, the *IAA* has potential to reconcile federal power with federal duty.

18. In contrast, the *Environmental Protection and Enhancement Act* is silent on assessing impacts to Aboriginal and Treaty rights, containing only one reference to Indigenous peoples – an Indigenous Wisdom Advisory Panel.[15]

19. Finally, the Alberta Court of Appeal erred in conflating the ownership of natural resources with the power to legislate with regard to the exploitation of those resources. In the *St. Catherine's Milling* case, the Privy Council rejected the federal government's argument that section 91(24) gave it the exclusive power to issue timber licences to third parties over lands that had been surrendered to the federal Crown. The court held that there was nothing inconsistent with the power of the federal government to legislate under section 91(24) and the provincial control over natural resources.[16] Alberta argues that the ownership of a resource equates to the exclusive right to legislate in relation to the exploitation of that resource, which is contrary to the holding in *St. Catherine's Milling* case.

20. Given the weight of authority, Lummi's position is that the sections of the *IAA* dealing with impacts to Indigenous interests clearly are consistent with the federal government's section 91(24) responsibility.[17]

C. Understanding the Purposes of Environmental Assessment

21. Alberta characterizes the purpose of the *IAA* as the "regulation of projects and physical activities themselves, not their effects, irrespective of whether such activities are under provincial or federal jurisdiction."[18] The Alberta Court of Appeal characterized the *IAA*

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[15] *Environmental Protection and Enhancement Act,* R.S.A. 2000, c. E-12, s. 15.3(2)
[16] *St. Catherine's Milling & Lumber Company v. The Queen* (1888), 14 A.C. 46 (P.C.) ["*St. Catherine's Milling*"] at p. 55.
[17] *Impact Assessment Act*, SC 2019, c. 28, s. 1 [*IAA*], ss. 7(1)(c) and (d), 16(2)(c) and (d), & 22(1)(c), (g), (l) and (q).
[18] Factum of Alberta, para. 5.

as a federal veto.[19] Both the Court of Appeal and Alberta's submissions grossly overstate the purpose(s) of the *IAA* and its impacts on provincial decision-making.

22. In *Oldman River*, this court explained that "[e]nvironmental impact assessment is, in its simplest form, a planning tool that is now generally regarded as an integral component of sound decision-making."[20]

23. The Newfoundland and Labrador Court of Appeal succinctly set out the purposes of environmental assessment:

> The regimes created by these statutes represent a public attempt to develop an appropriate response that takes account of the forces which threaten the existence of the environment. If the rights of future generations to the protection of the present integrity of the natural world are to be taken seriously, and not to be regarded as mere empty rhetoric, care must be taken in the interpretation and application of the legislation. Environmental laws must be construed against their commitment to future generations and against a recognition that, in addressing environmental issues, we often have imperfect knowledge as to the potential impact of activities on the environment. One must also be alert to the fact that governments themselves, even strongly pro-environment ones, are subject to many countervailing social and economic forces, sometimes legitimate and sometimes not. Their agendas are often influenced by non-environmental considerations.
>
> The legislation, if it is to do its job, must therefore be applied in a manner that will counteract the ability of immediate collective economic and social forces to set their own environmental agendas. It must be regarded as something more than a mere statement of lofty intent. <u>It must be a blueprint for protective action</u>.[21] [emphasis added]

24. This need for "protective action" takes on greater urgency when projects potentially impact upon constitutional rights. In *Adams*, this court warned about the dangers of Parliament adopting an unstructured discretionary administrative regime:

> In light of the Crown's unique fiduciary obligations towards aboriginal peoples, Parliament may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of

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[19] *Reference Re Impact Assessment Act*, 2022 ABCA 165 at para. 24.
[20] *Oldman River* at p. 71.
[21] *Labrador Inuit Association v. Newfoundland (Minister of Environment and Labour)* 1997 CanLII 14612 (NLCA) at paras. 11 & 12.

> applications in the absence of some explicit guidance. If a statute confers an administrative discretion which may carry significant consequences for the exercise of an aboriginal right, the statute or its delegate regulations must outline specific criteria for the granting or refusal of that discretion which seek to accommodate the existence of aboriginal rights. In the absence of such specific guidance, the statute will fail to provide representatives of the Crown with sufficient directives to fulfil their fiduciary duties, and the statute will be found to represent an infringement of aboriginal rights under the *Sparrow* test.[22]

25. The *IAA* has the potential to ensure that section 35 rights are considered at an early planning stage of the project, in particular the mandatory factors set out in section 22 of the *IAA*:

> (a)(ii) any cumulative effects that are likely to result from the designated project in combination with other physical activities that have been or will be carried out;
>
> (c) the impact that the designated project may have on any Indigenous group and any adverse impact the designated project may have on the rights of Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*;
>
> (g) Indigenous knowledge provided with respect to the designated project;
>
> (l) considerations related to Indigenous cultures raised with respect to the designated project.[23]

26. However, as is evident, the assessment of the *IAA* goes beyond section 35 rights, considering, among other things, matters of Indigenous knowledge, culture and cumulative effects. Such an approach is consistent with the "protective" role of the federal government set out above.

27. As emphasized in recent decisions, provincial policies and processes are often insufficient to assess the cumulative effects of development on the exercise of Aboriginal and Treaty rights.[24] An important aspect of the federal government's protective role is to

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[22] *R. v. Adams,* [1996] 3 S.C.R. 101 ["*Adams*"] at para. 54.
[23] *IAA,* s. 22
[24] *Yahey v. British Columbia,* 2021 BCSC 1287 at paras.1616-1628. See also *Anderson v. Alberta,* 2022 SCC 6 where in the context of the First Nation seeking an advanced costs order, the Crown conceded the First Nation's cumulative effects claim was *prima facie* meritorious: 2019 ABQB 746 at paras. 13 & 18.

provide oversight, as a more distant level of government, to ensure that the cumulative effects of development do not prevent the meaningful exercise of Aboriginal and Treaty rights.

28. Alberta's approach of requiring the issuance of a federal authorization, eg. permit, is difficult to reconcile in the Indigenous context as, with the exception of the on-reserve context, there is no federal authorization. Alberta's approach also does not account for how the courts have characterized the decision-making process under various environmental assessment acts. Courts have used the term polycentric to describe the balancing act performed by decisionmakers who consider economics, cultural considerations, impacts on Indigenous groups, environmental considerations as well as the public interest.[25] Thus, the decision-making process does not take place in a vacuum but is informed by myriad factors that go beyond purely environmental effects. Trying to determine the constitutional parameters for such decision-making, particularly in the context of section 91(24) jurisdiction, is an extremely complex task that will always be a fact-specific exercise. It is not helpful to speak of a veto when there are numerous interests at play, including federal-provincial relations, when determining whether to issue an environmental approval for a project.

D. Canada's Approach is Consistent with UNDRIP and Has the Potential to Further Reconciliation

29. In determining the pith and substance of legislation, this court has frequently referred to the preamble(s) of statutes "in order to illustrate the mischief the legislation is designed to cure and the goals Parliament sought to achieve".[26] The preamble to the *IAA* sets out Parliament's goals, in the context of Indigenous Peoples: 1) to ensure respect for the section 35 rights of Indigenous Peoples; 2) fostering reconciliation and working in partnership with them; and 3) confirming Canada's commitment to implementing UNDRIP.[27]

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[25] *Gitxaala Nation v. Canada,* 2016 FCA 187 at para. 154; *Prophet River First Nation v. British Columbia*, 2017 BCCA 58 at para. 23; *Sarg Oils Ltd. v. Environmental Appeal Board*, 2007 ABCA 215 at para. 13.
[26] *Reference re Greenhouse Gas Pollution Pricing Act,* 2011 SCC 11 at para. 59.
[27] *IAA* Preamble

30. The (recently enacted *Declaration Act* reflects Canada's commitment to implement UNDRIP. The *Declaration Act* contains an obligation on the Government of Canada to "take all measures necessary to ensure that the laws of Canada are consistent with the Declaration."[28]

31. The *IAA* represents a laudable attempt to make Canada's environmental assessment law consistent with Canada's international obligations under UNDRIP and the *Declaration Act*. The rights affirmed in UNDRIP are wide-ranging and include cultural, spiritual, social, economic, and procedural rights. The *IAA* enables the assessment of not just environmental impacts, which are routinely associated with Aboriginal rights, but a broad range of impacts. The *IAA* also introduces procedural requirements, including requirements to consider Indigenous knowledge and assessments conducted by Indigenous governments. If properly applied, the *IAA* will assist Canada to meet its commitments under the *Declaration Act*, in particular, UNDRIP Articles 11, 13, 18, 19, 20, 23, 24, 25, 26, 29, 31, 32, 37 and 38.

32. The *IAA* may also assist Canada to meet its commitment to achieve reconciliation with Indigenous Peoples. As the Truth and Reconciliation Commission writes: "Reconciliation between Aboriginal and non-Aboriginal Canadians, from an Aboriginal perspective, also requires reconciliation with the natural world."[29] Reconciliation requires the Crown to approach environmental assessment differently. Not only must the Crown work with Indigenous Peoples throughout the assessment process on a nation-to-nation basis, but the Crown must also re-evaluate our collective relationship with the earth.

33. "Business as usual," in many instances, will simply continue the injustice of ongoing dispossession and exploitation of Indigenous lands. Regardless of an Indigenous Nation's position on extractive development, the *IAA* provides important procedural safeguards. Especially where provinces resist the transformative change that reconciliation requires,

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[28] *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c. 14 ["*Declaration Act*"], s. 5

[29] 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" (2015).

section 7 of the *IAA* prevents proponents of designated projects from carrying out acts that will impact Indigenous Peoples and lands before the impacts are adequately assessed through consultation with the Indigenous Peoples impacted. Consistent with the objective of reconciliation, this approach makes possible renewed relationships between the Crown and Indigenous Peoples, and between both Indigenous and non-Indigenous peoples with the earth.

PART IV – COSTS

34. Lummi does not seek costs and requests that no costs be ordered against it.

PART V – SUBMISSION ON CASE SENSITIVITY

35. None.

PART VI – REQUEST TO PRESENT ORAL ARGUMENT

36. Lummi requests leave to present oral argument at the hearing of this appeal.

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

John W. Gailus
Counsel for Intervener, Lummi Nation

Courtenay Jacklin

PART VII – TABLE OF AUTHORITIES

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