Distributed to Panel

Canadian Environmental Law Association
EQUITY. JUSTICE. HEALTH.


August 20, 2021

Registrar
Court of Appeal of Alberta
2600, 450 - 1st St. S.W.
Calgary, AB T2P 5H1

Attention: Laurie Baptiste, Case Management Officer

**RE: HMQ in right of Alberta (A) v. HMQ in right of Canada (R); Attorney General of Ontario (I) - Court of Appeal File Number 1901-0276 AC**

Pursuant to the Court's direction dated July 23, 2021, these are the supplementary submissions of the intervenors Canadian Environmental Law Association, Environmental Defence Canada, and MiningWatch Canada in relation to the Supreme Court of Canada's judgment in *References re Greenhouse Gas Pollution Pricing Act* ("*GGPPA*").

## 1. The *Oldman River* Judgment Remains Binding and Persuasive

The majority decision in the *GGPPA* reference appeals refers to, and cites with approval,[1] the Supreme Court's 1992 judgment in *Friends of the Oldman River Society v Canada*,[2] which upheld the constitutional validity of the federal environmental assessment process in place at that time.

Accordingly, the constitutional principles articulated and applied in *Oldman River* remain good law for the purposes of the within reference on the *Impact Assessment Act* ("*IAA"*). In particular, the intervenors submit that the division-of-powers methodology, findings and conclusions of La Forest J in *Oldman River* should be followed by this Honourable Court in determining that the *IAA* and the project list regulations are *intra vires* Parliament.

## 2. The Correct Approach to Characterization/Classification of the *IAA*

In the *GGPPA* judgment, the majority decision affirms the "well-established two-stage analytical approach to the review of legislation on federalism grounds,"[3] and explains the factors to be considered (e.g. intrinsic and extrinsic evidence, legal and practical effects, etc.) during the characterization exercise.[4] Moreover, the majority decision specifically directs that the pith and substance of an impugned statute must be defined with legal precision.[5]

In accordance with these considerations, the intervenors submit that the pith and substance of the *IAA* is "the establishment of an evidence-based, participatory and precautionary assessment

[1] 2021 SCC 11, para 148.
[2] [1992] 1 SCR 3 ("*Oldman River*").
[3] *References re GGPPA*, para 47.
[4] *Ibid*, para 51.
[5] *Ibid*, paras 52 and 69.

process that anticipates and prevents the adverse effects of certain major projects in one or more areas of federal jurisdiction."[6] This characterization is substantially similar to the straightforward definitions of the *IAA*'s pith and substance offered by Canada[7] and by intervenors[8] in support of Canada in this reference. In contrast, Alberta has attempted to vaguely describe the pith and substance of the *IAA* in the broadest possible terms so as to make it appear unduly expansive, inherently duplicative, and generally all-inclusive of federal and provincial matters.[9]

On the basis of the Supreme Court's above-noted directions in the *GGPPA* references, and having regard for the preamble, purposes, provisions and effect of the *IAA*, the intervenors respectfully submit that this Honourable Court should prefer, and give considerable weight to, the carefully crafted (and more legally accurate) definitions of the *IAA*'s pith and substance advanced by Canada and its supportive intervenors.

## 3. Nature of Federal Jurisdiction over Greenhouse Gas Emissions

After characterizing the subject matter of the *GGPPA* as setting "minimum national standards of greenhouse gas price stringency to reduce greenhouse gas emissions," the majority decision upheld the constitutionality of the legislation under the national concern branch of the federal Peace, Order and Good Government ("POGG") power under section 91 of the *Constitution Act, 1867*.[10] Nevertheless, despite its focus on POGG, the majority decision includes important guidance on the "double aspect" doctrine that is instructive and relevant in the *IAA* reference.

For example, the majority decision repeatedly rejects the proposition that provincial jurisdiction over natural resource management fully ousts or excludes federal jurisdiction over any interprovincial or international effects arising from the use or development of such resources.

Writing for the majority, Wagner CJC notes that the national concern doctrine can apply to certain aspects of the provincial management of natural resources (e.g., under section 92(13) of the *Constitution Act, 1867* and, after 1982, section 92A of the *Constitution Act, 1982*). Prior to World War II, the dominant characteristic of uranium mining would likely have been the management of natural resources within the province. However, this did not prevent atomic energy, including the production of its raw materials, from subsequently being found by the Supreme Court to be a matter of national concern because of its safety and security risks, particularly the risk of catastrophic interprovincial and international harm.[11] By analogy, the same can also be said with respect to natural resources that produce greenhouse gas emissions ("GHGE") and the need for minimum national standards of price stringency under the *GGPPA* to reduce such emissions.

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[6] Factum of Canadian Environmental Law Association, Environmental Defence Canada and MiningWatch Canada, para 3.
[7] Factum of the Attorney General of Canada, para 1.
[8] See, for example, Factum of Nature Canada, para 7; Factum of Ecojustice Canada Society, para 8.
[9] Factum of the Attorney General of Alberta, para 44; Supplemental Submissions of the Attorney General of Alberta, para 6.
[10] *References re GGPPA*, para 4.
[11] *Ibid*, paras 107, 121-122, 125, 128, 138, 148, 193 (referring to *Ontario Hydro v. Ontario (Labour Relations Board)*, [1993] 3 S.C.R. 327).

For the purposes of the *IAA* reference, the intervenors respectfully submit that this reasoning is equally applicable to GHGE arising from the types of major projects designated by SOR/2019-285. As noted in the majority decision, GHGE "represent a pollution problem that is not merely interprovincial, but global, in scope."[12]

The intervenors further submit that the "double aspect" doctrine is properly reflected in the general prohibition set out in subsections 7(1)(b)(ii) and (iii) of the *IAA* regarding designated projects that may cause environmental changes in other provinces or outside Canada. Accordingly, the intervenors submit that provincial heads of power in sections 92 and 92A cannot serve as a "shield" against federal legislation aimed at the interprovincial and international effects of GHGE. This position is supported by the majority decision in the *GGPPA* references[13] which affirmed the Supreme Court's previous judgment in *Interprovincial Cooperatives Ltd v R* regarding provincial inability to effectively address interprovincial environmental harm.[14]

Moreover, like the *GGPPA*, the *IAA* does not "regulate" GHGE per se, nor does it confer a federal "veto" over natural resource projects within the provinces. Instead, the *IAA* empowers federal decision-makers to determine whether or not a project's potential adverse effects on areas of federal jurisdiction are in the public interest.[15] On this point, the intervenors submit that the *Oldman River* judgment[16] clearly confirms that this determination may take into account a broad range of environmental and socio-economic information, including GHGE.

Alberta's supplemental submissions further claim that there is no general federal jurisdiction over GHGE.[17] In reply, the intervenors note that aside from the POGG-based result in the *GGPPA* references, greenhouse gases are, as these intervenors pointed out during oral argument, in fact, regulated as toxic substances under the *Canadian Environmental Protection Act, 1999*, which has been upheld by the courts as a constitutionally valid exercise of Parliament's criminal law power.[18]

For the foregoing reasons, the intervenors respectfully submit that there is nothing in the *GGPPA* judgment that prevents this Honourable Court from concluding on the record that the *IAA* and the project list regulations are *intra vires* Parliament.

Yours truly,
**CANADIAN ENVIRONMENTAL LAW ASSOCIATION**

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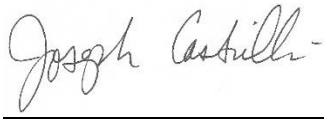

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cc. Counsel for all parties and intervenors

[12] *References re GGPPA*, para 173.
[13] *References re GGPPA*, paras 99, 173, 195.
[14] [1976] 1 SCR 477 per Pigeon J.
[15] *IAA*, section 63.
[16] *Oldman River*, at 66.
[17] Supplemental Submissions of the Attorney General of Alberta, paras 7-10.
[18] *R v Hydro-Quebec* [1997] 3 SCR 213; *Syncrude Canada Ltd. v Canada*, 2016 FCA 160.