COURT OF APPEAL OF ALBERTA

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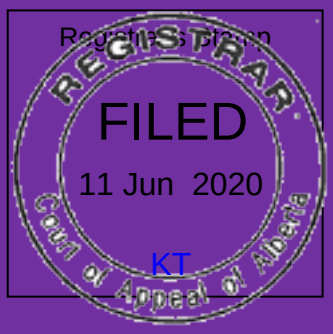

COURT OF APPEAL FILE NUMBER: 1901-0276-AC

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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

DOCUMENT: **FACTUM**

REFERENCE BY THE LIEUTENANT GOVERNOR IN COUNCIL TO THE COURT OF APPEAL OF ALBERTA
Order in Council filed the 9th day of September 2019

FACTUM OF THE INTERVENORS CANADIAN ENVIRONMENTAL LAW ASSOCIATION, ENVIRONMENTAL DEFENCE CANADA INC., and MININGWATCH CANADA INC.

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I. OVERVIEW

1. This Reference essentially asks whether sections 92 and 92A of the *Constitution Act, 1867* preclude Parliament from enacting legislation aimed at gathering information and making decisions about the effects of major projects upon areas of federal interest. The Intervenors Canadian Environmental Law Association, Environmental Defence Canada Inc., and MiningWatch Canada Inc. ("the Intervenors") submit that this question should be answered "No."

2. This question was fully canvassed and clearly answered by the Supreme Court of Canada in the *Oldman River*[1] case. The *ratio decidendi* in the *Oldman River* judgment is dispositive of the constitutional issues that arise in this Reference, and confirms that the *Impact Assessment Act* ("*IAA*") and the *Physical Activities Regulations* ("the *Regulations*") are *intra vires* Parliament.

3. The pith and substance of the *IAA* regime is the establishment of an evidence-based, participatory and precautionary assessment process that anticipates and prevents the adverse effects of certain major projects in one or more areas of federal jurisdiction. Accordingly, the *IAA* regime can be upheld under various functional heads of power or, in the alternative, broader conceptual powers under section 91 of the *Constitution Act, 1867*.

4. Alberta cites the Supreme Court's "Trojan horse" *obiter* in *Oldman River* as support for the province's argument that the *IAA* regime is constitutionally invalid due to alleged overreach into matters of exclusive provincial jurisdiction. However, contrary to Alberta's submissions, the *IAA* and the *Regulations* are constitutionally sound from a division-of-powers perspective.

II. FACTS

5. The Intervenors accept the facts as stated in the factum of the Attorney General of Canada ("AGC").[2]

III. ISSUES

6. Are the *IAA* and the *Regulations* unconstitutional, in whole or in part?

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[1] *Friends of the Oldman River Society v Canada (Minister of Transport),* [1992] 1 SCR 3, 84 Alta LR (2d) 129 ("*Oldman River*") [**Joint Book of Authorities ("JBOA"), Tab 1**].
[2] AGC Factum, paras 6-15.

IV. ARGUMENT

7. The *Constitution Act, 1867* does not assign the "environment" to either the federal or provincial level of government.[3] In order to determine the constitutionality of a federal environmental assessment statute such as the *IAA*, it is necessary to conduct a two-step analysis: (a) characterize the pith and substance of the legislation; and (b) determine whether the legislation falls within one or more "Classes of Subjects" assigned to the federal government.[4]

8. However, it is constitutionally permissible for legislation enacted by one level of government to have "significant practical effects" upon matters otherwise within the jurisdiction of the other level of government, provided that such effects are "incidental" and "collateral or secondary to the mandate of the enacting legislature."[5] As stated in *Oldman River*, if a challenged federal law is, in pith and substance, in relation to classes of subjects within Parliament's exclusive jurisdiction, "that would be the end of the matter" and it is "immaterial" that the law may "also affect provincial subjects such as property and civil rights."[6]

9. The Supreme Court also observed in the *National Energy Board* case that it is "neither unusual nor unworkable" for environmental assessment regimes to co-exist at the federal and provincial levels.[7] Similarly, in *MiningWatch*,[8] the Supreme Court disallowed an attempt by federal authorities to narrow a mining project description in order to confine the assessment to certain components that expressly required federal approvals. Reading *Oldman River*, *National Energy Board* and *MiningWatch* together, the Intervenors submit that there is no constitutional barrier that prevents the federal government from collecting all information needed to review a natural resource project in its entirety if the project may impact areas of federal responsibility.[9]

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[3] *Oldman River*, *supra*, at 16-17, 63 [**JBOA, Tab 1**].
[4] *Oldman River*, *supra*, at 62 [**JBOA, Tab 1**].
[5] *Canadian Western Bank v Alberta*, 2007 SCC 22, [2007] 2 SCR 3, paras. 24, 28-29, 34-37 ["*Canadian Western Bank*"] [**JBOA, Tab 34**]; *Oldman River*, *supra*, at 75 [**JBOA, Tab 1**].
[6] *Oldman River*, *supra*, at 62 [**JBOA, Tab 1**].
[7] *Quebec (Attorney General) v Canada (National Energy Board)*, 1994 CanLII 113, [1994] 1 SCR 159 at para 66 ("*National Energy Board*") [**JBOA, Tab 38**]; *Quebec (Attorney General) v Moses*, 2010 SCC17, [2010] 1 SCR 557 at para 36 [**JBOA, Tab 14**].
[8] *MiningWatch Canada v Canada*, 2010 SCC 2, [2010] 1 SCR 6, at paras 40-42 ("*MiningWatch*") [**JBOA, Tab 26**].
[9] M. Olszynski and M.-A. Bowden, "Old Puzzle, New Pieces: Red Chris and Vanadium and the Future of Federal Environmental Assessment" (2011), 89 Can Bar Rev 445 at 447 ("Olszynski and Bowden") [**Intervenors' Book of Authorities ("IBOA"), Tab 1**].]. See also *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153, [2019] 2 FCR 3, paras 393-404 [**IBOA Tab 2**]; R. Northey, *Guide to Canada's Impact Assessment Act* (Toronto: LexisNexis Canada Inc., 2020), at 18-23 ("Northey") [**IBOA, Tab 3**].

(a) Characterization of the *IAA*

10. The proper characterization of the *IAA* requires an analysis of the dominant purpose and legal effect of the legislation.[10] In *Oldman River*, the Supreme Court described the pith and substance of the *Environmental Assessment and Review Process Guidelines Order* ("*EARPGO*")[11] as "nothing more than an instrument that regulates the manner in which federal institutions must administer their multifarious duties and functions," and is "essentially an information gathering process in furtherance of a decision-making function within federal jurisdiction, and the recommendations made at the conclusion of the information gathering stage are not binding on the decision maker."[12] The Intervenors submit that this description also applies to *EARPGO*'s immediate successor, the *Canadian Environmental Assessment Act, 1992* ("*CEAA 1992*").[13]

11. However, in the two subsequent laws (*Canadian Environmental Assessment Act 2012* ("*CEAA 2012*")[14] and the *IAA*), Parliament has taken a new approach by: (a) utilizing a different assessment trigger (i.e. a presumptive projects list coupled with a screening decision) than was used in *EARPGO*; and (b) embedding decision-making into the assessment regime itself, rather than using the process to inform other statutory decisions, as occurred under *EARPGO* and *CEAA 1992*. Thus, the *IAA* regime is not a mere "adjunct of the federal legislative powers affected."[15] Instead, the pith and substance of the *IAA* is both procedural and substantive in nature: it establishes an iterative process that, *inter alia*, broadly assesses the impacts of designated projects, aims to prevent significant adverse effects within federal jurisdiction, and ensures transparent and timely decision-making by the Minister or Cabinet.

12. Parliament's legislative intent in enacting the *IAA* is set out in the preamble and the purposes section.[16] The *IAA* also imposes an overarching duty upon all federal officials to exercise their powers in a manner that "applies the precautionary principle."[17] The precautionary principle

[10] *Reference re Firearms Act (Can.)*, 2000 SCC 31, [2000] 1 SCR 783, paras 15-18 [**JBOA, Tab 40**].
[11] *EARPGO* [**JBOA, Tab L5]**.
[12] *Oldman River, supra*, at 75 [**JBOA, Tab 1**].
[13] *CEAA 1992* [**JBOA, Tab L8].**
[14] *CEAA 2012* [**JBOA, Tab L9].**
[15] *Oldman River, supra*, at 75 [**JBOA, Tab 1**].
[16] *IAA*, preamble, s 6(1) [**JBOA, Tab L1**].
[17] *IAA*, s 6(2) [**JBOA, Tab L1**].

is not defined in the *IAA*, but is a vital tenet of international law that has been endorsed by the Supreme Court of Canada.[18] In *Castonguay*, the Supreme Court noted:

> This emerging international law principle recognizes that since there are inherent limits in being able to determine and predict environmental impacts with scientific certainty, environmental policies must anticipate and prevent environmental degradation.[19]

13. The *IAA* applies this principle by entrenching a preventative "look before you leap" approach. The precautionary principle is set out in the *IAA* purposes[20] and reflected throughout the *IAA* by applying key assessment considerations[21] to proposed projects as early as possible in the planning stage. Notably, the list of designated projects in the *Regulations* does not capture every activity that could conceivably impact matters of federal jurisdiction. Instead, the *Regulations* more modestly prescribe projects having the greatest potential to impact "one or more" areas of federal interest.[22] The record filed by Alberta presents no cogent evidence to the contrary.

14. The *IAA* generally prohibits proponents from proceeding with designated projects that may cause effects within federal jurisdiction[23] (and prevents federal authorities from issuing permits, performing functions, or providing funds for such projects[24]) until the *IAA*-required information on the project's environmental, socio-economic and health effects is gathered, and until the Minister or Cabinet determines whether any adverse effects within federal jurisdiction (including adverse "direct or incidental effects") are in the public interest.[25] However, after the early "planning phase" of the *IAA* process, the legal requirement to conduct the impact assessment may be waived by the Impact Assessment Agency of Canada.[26] This upfront screening mechanism helps to "secure" the constitutionality of the *IAA* by focusing the impact assessment process only on designated projects that potentially affect matters of federal jurisdiction.[27] However, whether

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[18] *11497 Canada v Hudson (Ville)*, 2001 SCC 40, [2001] 2 SCR 241, paras 30-32 [**JBOA, Tab 33**].
[19] *Castonguay Blasting Ltd. v Ontario*, 2013 SCC 52 (CanLII), [2013] 3 SCR 323, para 20 [**IBOA, Tab 4**].
[20] *IAA*, s 6(1)(d) [**JBOA, Tab L1**].
[21] *IAA*, s 22(1) [**JBOA, Tab L1**].
[22] *Regulatory Impact Analysis Statement* SOR/2019-285 at 5663, 5678 [**JBOA, Tab L2**]. This regulation-making approach under the *IAA* is analogous to the federal process that was endorsed by La Forest J for identifying, consulting upon and assessing toxic substances before they become subject to regulations: see *R v Hydro-Quebec*, 1997 CanLII 318, [1997] 3 SCR 213, paras 142-145 [**JBOA, Tab 12**].
[23] *IAA*, s 7 [**JBOA, Tab L1**].
[24] *IAA*, s 8 [**JBOA, Tab L1**].
[25] *IAA*, s 2 and s 64 [**JBOA, Tab L1**].
[26] *IAA*, s 16 [**JBOA, Tab L1**].
[27] N. Bankes and M.Olszynski, "Setting the Record Straight on Federal and Provincial Jurisdiction of Resource Projects in the Provinces (May 24, 2019) [**JBOA, Tab 25**].

– or to what extent – a particular project affects matters of federal jurisdiction may not be known until the *IAA* process is underway. This underscores the importance of the *IAA*'s precautionary approach to designating projects and assessing their potential effects.

15. In addition, the *IAA* contains several provisions that facilitate coordination and cooperation among federal, provincial and Indigenous levels of government, including: (a) delegation of effects assessment to other jurisdictions; (b) substitution of other jurisdictions' assessment processes for the *IAA* process; and (c) establishment of joint review panels.[28] Alberta's factum largely ignores these important mechanisms for achieving cooperative federalism, which have been present in *CEAA 1992*, *CEAA 2012* and provincial environmental assessment laws[29] for many years in order to avoid duplication in assessment processes that may apply to the same project.

(b) Classification of the *IAA*

16. In *Oldman River*, the Supreme Court held that the *EARPGO* was constitutionally valid on the basis of certain functional heads of power as well as the Peace, Order and Good Government ("POGG") residual power under section 91 of the *Constitution Act, 1867*, and that any intrusion into provincial matters was merely incidental to the pith and substance of the legislation.[30] As noted by Professor Hogg, "the effect of the *Oldman River* decision is to confer upon the federal Parliament the power to provide for environmental assessment of any project that has any effect on any matter within federal jurisdiction" (emphasis added).[31]

(i) Functional Heads of Federal Power

17. The *IAA* defines "effects within federal jurisdiction"[32] in substantially the same focused manner as its predecessor *CEAA 2012*.[33] In several instances, this statutory definition cross-references the relevant federal legislation (e.g. *Fisheries Act*, *Species at Risk Act*, etc.). This approach codifies the legal nexus between the *IAA* process and specific areas of federal jurisdiction, but is considerably narrower than the *EARPGO* approach that was upheld in *Oldman*

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[28] *IAA*, ss 29, 31, 39 [**JBOA, Tab 1**]; *MiningWatch*, *supra*, para 41 [**JBOA, Tab 28**].
[29] *Environmental Protection and Enhancement Act*, RSA 2000, c E-12, s 2(h), s 57 [**JBOA, Tab L6**]. See also s 3.1 of Ontario's *Environmental Assessment Act*, RSO 1990, c E.18 [**IBOA, Tab 5**].
[30] *Oldman River*, *supra*, at 72, 73, 75 [**JBOA, Tab 1**].
[31] P. Hogg, *Constitutional Law of Canada, 5th ed.* (Toronto: Thomson Reuters Canada Limited, 2019), ch. 30.7(b) [**JBOA, Tab 10**].
[32] *IAA*, s 2 **[JBOA, Tab L1]**; Northey, *supra*, at 14, 20-21 [**IBOA, Tab 3**].
[33] *CEAA 2012*, s 5 [**JBOA, Tab L9**]; M. Doelle, "*CEAA 2012*: The End of Federal EA as We Know It?" (2012), 24 J. of Env. L. and Prac. 1, at 4, 11-13 [**IBOA, Tab 6**].

River. This decision confirms that federal assessments can be triggered as a result of Parliament's legislative authority over either the activity in question (e.g. railways), or a potential impact of the activity (e.g. navigable waters).[34] Accordingly, the Intervenors submit that Canada has taken a cautious (if not constrained) approach to defining "effects within federal jurisdiction," leading it to designate merely some – rather than all – projects that may affect areas of federal responsibility.

18. In addition, *Oldman River* affirms that there are no constitutional limits on the types of information to be gathered in the federal assessment process, and that the scope of the assessment may be broader than the trigger that prompted the assessment in the first place.[35] If the outcome of the assessment process identifies potential adverse effects within federal jurisdiction, then this provides a solid basis for federal decision-making under the *IAA*. However, the *IAA* only enables the Minister or Cabinet to impose conditions (e.g. mitigation, monitoring, reporting, etc.) in relation to "adverse effects within federal jurisdiction," or in relation to adverse effects that are directly linked or necessarily incidental to the exercise of a federal duty or function that would permit the project to proceed.[36] This constraint provides a further safeguard against unwarranted federal intrusions into matters of provincial legislative competence once the Minister or Cabinet decides under the *IAA* that a project's effects on matters of federal responsibility are in the public interest after duly considering <u>all</u> of the project's impacts, benefits, risks and uncertainties.

19. The AGC factum[37] identifies a number of functional heads of power in section 91 under which the *IAA* can be upheld (e.g. seacoast/inland fisheries, Indigenous matters, etc.). The Intervenors hereby adopt the AGC's review of these specific section 91 heads, and concur with the AGC's submission that section 92A of the *Constitution Act, 1867* does not trump or override Parliament's exclusive jurisdiction over the classes of subjects enumerated in section 91.[38]

20. Alberta places undue reliance on the observation of La Forest J. in *Oldman River* that the *EARPGO* was only engaged when Parliament had an "affirmatory regulatory duty" in relation to a proposed project.[39] The Intervenors submit that this vague concept was unique to the self-

[34] *Oldman River*, *supra*, at 65-67, 69 [**JBOA, Tab 1**].
[35] *Oldman River*, *supra*, at 66 [**JBOA, Tab 1**].
[36] *IAA*, s 64 [**JBOA, Tab L1**].
[37] AGC Factum, paras 104-125.
[38] *Ibid*, paras 126-130.
[39] Alberta Factum, paras 65-67, 94.

assessment model entrenched in the *EARPGO*, and was later jettisoned by Parliament in favour of specific triggers for "greater legal certainty" when *CEAA 1992* was enacted.[40] The Intervenors further submit that *Oldman River*'s judicial creation of this *EARPGO* concept did not establish a constitutional limit on Parliament's jurisdiction to pass environmental assessment legislation that is triggered by a designated project's potential impacts on areas of federal interest.[41]

(ii) Conceptual Head of Federal Power

21. In the event that this Honourable Court decides that functional heads of federal power cannot support the full extent of the *IAA* as enacted by Parliament, then, in the alternative, the Interveners submit that the *IAA* regime can be upheld, in part, under the federal trade and commerce power.[42] It is well-established that this conceptual power has two distinct branches: (a) interprovincial and international trade and commerce; and (b) general trade and commerce affecting the whole country.[43] Alberta argues that the *IAA* and the *Regulations* are *ultra vires* Parliament because they apply to oil sands resources and intrude on provincial jurisdiction over natural resources, property and civil rights, and local works.[44] However, the *IAA* applies to mines, metal mills, other fossil fuels,[45] and other activities which are broader than just oil sands projects and which may be validly addressed under the first branch of the trade and commerce power.

22. There are four key characteristics of the *IAA* to consider in this regard. First, while the *IAA's* purpose is to assess and prevent significant environmental effects of such projects, "effects" are defined to include changes to economic conditions within federal jurisdiction (extra-provincial or international) and those incidental thereto.[46]

23. Second, greenhouse gases ("GHG") arise from, or are the products of, coal and oil sands operations. The *Canadian Environmental Protection Act, 1999* ("*CEPA*") designates GHG as toxic

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[40] *Regulatory Impact Analysis Statement* SOR/94-636 at 3388 [**IBOA, Tab 7**].
[41] *Moses c Canada*, 2008 QCCA 741 (CanLII), [2008] RJQ 944, paras 93-115 [**IBOA, Tab 8**]; affd. *Quebec (Attorney General) v Moses*, 2010 SCC 17, [2010] 1 SCR 557 [**JBOA, Tab 14**]; Olszynski and Bowden, *supra*, at 472-474 [**IBOA, Tab 1**].
[42] *Constitution Act, 1867*, 30 & 31 Victoria, c 3 (U.K.), s 91(2) [**JBOA, Tab L3**].
[43] P. Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Thomson Reuters Canada Limited, 2019), ch. 20.1 to 20.2(b) [**IBOA, Tab 9**].
[44] Alberta Factum, paras 3, 19-23, 31, 33, 110-112, 115, 117-128, 136, 146, 148, 156.
[45] *Physical Activities Regulations*, SOR/2019-285, ss 18-19, 24-25, 30-34, 37-38 [**JBOA, Tab L2**].
[46] *IAA*, long title (Declaration); s 2 ("effects") [**JBOA, Tab L4**].

substances.[47] GHG emissions have economic as well as environmental effects recognized by the federal *Greenhouse Gas Pollution Pricing Act* ("*GGPPA*") which declares that they constitute an "unprecedented risk" to Canada's "economic prosperity," as well as the environment.[48]

24. Third, the effects of such operations include in-province GHG and other emissions that will also be felt well beyond the borders of the provinces producing them. Furthermore, there is little incentive for company A to clean up in one province if company B in another province can continue to pollute and thereby obtain an economic advantage over company A. By not responding with effective legislation, or by imposing lower environmental standards, it is possible for provinces to subsidize existing, and attract new, businesses to their jurisdictions, thus creating competitive, commercial, and trade imbalances across the country. This suggests the need for a consistent national law to address the economic, trade, and commercial dimensions of pollution through the trade and commerce power. Without the *IAA*, "pollution havens" across the country could well result, with economic, as well as environmental, effects.[49]

25. Fourth, oil sands mining in Alberta (or coal mining taking place in certain provinces) does not supply exclusively local needs, but is intended for export to other provinces and countries.[50] Consequently, export and use of the products of coal or oil sands mining operations will have significant interprovincial and international economic and environmental effects. Federal export laws control toxic substances,[51] and if expanded to cover GHG, could benefit from information derived from, and measures imposed by, the *IAA*, which requires consideration of Canada's climate change commitments.[52] This approach was used in *Murphyores*, cited below.

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[47] *CEPA, 1999*, SC 1999, c 33, Sch. 1 (List of Toxic Substances, items 74-79 (greenhouse gases)) [**IBOA, Tab 10**].
[48] *GGPPA*, being Part 5 of the *Budget Implementation Act, 2018, No. 1*, SC 2018, c 12, Preamble (para 2) [**IBOA, Tab 11**]. See also *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40, [2019] 9 WWR 377, paras 4, 16 [**JBOA, Tab 20**]. *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544, 146 OR (3d) 65, paras 11, 33, 55 [**IBOA, Tab 11**]; *Reference re Greenhouse Gas Pollution Pricing Act*, 2020 ABCA 74, paras 1, 217 [**JBOA, Tab 63**].
[49] P. Emond, "The Case for a Greater Federal Role in the Environmental Protection Field: An Examination of the Pollution Problem and the Constitution" (1972), 10 Osgoode Hall L.J. 647, at 648-649 [**IBOA, Tab 12**]; and J. Hanebury, "Environmental Impact Assessment in the Canadian Federal System" (1991), 36 McGill L.J. 962, at 984-987 [**IBOA, Tab 13**]; *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40, [2019] 9 WWR 377, para 155 (carbon leakage) [**JBOA, Tab 20**].
[50] See, e.g., *Reference re Environmental Management Act (British Columbia)*, 2019 BCCA 181 (CanLII), 434 DLR (4th) 213, paras 32-33, 41; appeal dismissed, 2020 SCC 1 [**IBOA, Tab 14**].
[51] *CEPA*, ss 100-103 & Sch. 3 [**IBOA, Tab 10**].
[52] *IAA*, preamble, s 22(1)(i), s 63(e) [**JBOA, Tab L1**].

26. These characteristics of the *IAA* support classification under the trade and commerce power. In *Klassen*,[53] federal legislation regulating interprovincial and export trade in wheat was held as validly applicable to a purely local work (a feed mill processing locally produced wheat sold as feed to local farmers) because regulation of such intra-provincial transactions was incidental to the main purpose of the law, which was to regulate interprovincial and export trade in that commodity. In *Caloil*,[54] a federal prohibition on the transportation or sale of imported oil west of the Ottawa Valley caught many intra-provincial transactions, but was upheld as incidental in the administration of an extra-provincial marketing scheme designed to control imports. The existence and extent of provincial regulatory authority over specific trades within the province is not the sole criterion in deciding whether a federal regulation affecting trade is invalid.

27. In the course of upholding the constitutionality of the *EARPGO*, the Supreme Court in *Oldman River* referred with approval to *Murphyores*, a decision of the Australian High Court ("AHC"). In that case, the company extracted mineral sands from which it produced certain mineral concentrates, the export of which could be regulated/prohibited by the Minister under federal customs regulations under Australia's trade and commerce power ("ATCP"). The AHC held that the Minister could, under a federal law related to the environmental impact of proposals, consider the impact of the mineral extraction from the area in which the company had its state mining leases, before allowing any further export of concentrates. The AHC unanimously rejected the company's contention that the Minister was restricted to only considering matters relevant to "trading policy" within the scope of the ATCP, rather than environmental concerns arising from mining activity approved by the state government. As noted in *Oldman River*, without drawing any parallels between the constitutional law of Canada and Australia, the environment is not an extraneous consideration in government oversight of economic decisions.[55] Since the *IAA* expressly merges economic and environmental effects (including transboundary effects), it can be upheld, at least in part, as valid federal law under the trade and commerce power.

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[53] *R v Klassen*, 1959 Can LII 418, 20 DLR (2d) 406, at 412-415 (Man CA), leave to appeal denied, [1959] SCR ix [**IBOA, Tab 15**].
[54] *Caloil Inc, v Canada (Attorney General)*, 1970 CanLII 194, [1971] SCR 543, at 550-551 [**IBOA, Tab 16**].
[55] *Oldman River, supra*, at 69-70 [**JBOA, Tab 1**], referring to *Murphyores Inc. Pty. Ltd. v. Commonwealth of Australia*, [1976] HCA 20, (1976), 136 CLR 1, at para 12 per Mason J (Aust. H.C) [**IBOA, Tab 17**].

28. In *Hodel,* the US Supreme Court held a federal surface mining and reclamation law did not violate the commerce clause ("CC") of the US Constitution by regulating the use of private lands. Congressional findings adopted by the Court demonstrated that surface coal mining has substantial effects on interstate commerce ("ISC"). Even activity that is purely intrastate in character may be federally regulated where the activity, combined with like conduct by others similarly situated, affects commerce among the states or foreign nations. The US Congress may regulate the conditions under which goods shipped in ISC are produced where the local activity of producing these goods itself affects ISC. In *Hodel,* coal was found to be a commodity that moves in ISC and the surface mining law ensured that competition in ISC among sellers of coal produced in different states could not be used to undermine the ability of states to improve and maintain adequate standards on coal mining operations within their borders. Prevention of this sort of "destructive" interstate competition is a traditional role justifying Congressional action under the CC. The power conferred by the CC is broad enough to permit congressional regulation of activities causing air or water pollution, or other environmental hazards impacting more than one state.[56]

29. The *IAA* bridges the *ratios* in these cases. Intra-provincial activity capable of causing extra-provincial and international environmental and economic effects, may validly be addressed under Canada's trade and commerce power.[57] Moreover, the above-noted comparative analysis highlights the need to avoid "falling into the conceptual trap of thinking of the environment as an extraneous matter in making legislative choices or administrative decisions."[58]

V. RELIEF SOUGHT

30. For the foregoing reasons, the Interveners respectfully request that this Honourable Court answer "No" to both constitutional questions in this Reference.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 8th day of June, 2020.

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[56] *Hodel v Virginia Surface Mining & Reclamation Assoc.*, 452 US 264 (1981), at 277, 281-283 **[IBOA, Tab 18]**.
[57] Emond, *supra*, at 668-672 **[IBOA, Tab 11]**; Hanebury, *supra*, at 1008 **[IBOA, Tab 12]**.
[58] *Oldman River, supra*, at 70 **[JBOA, Tab 1]**.

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