COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Reference re Environmental Management Act (British Columbia),* 2019 BCCA 181

Date: 20190524
Docket: CA45253

IN THE MATTER OF:

The *Constitutional Question Act*, R.S.B.C. 1996, c. 68

AND IN THE MATTER OF:

A Reference by the Lieutenant Governor in Council, set out in Order in Council No. 211/18 dated April 25, 2018 concerning the Constitutionality of Amendments to Provisions in the *Environmental Management Act*, R.S.B.C. 2003, c. 53 Regarding the Impacts of Releases of certain Hazardous Substances

Before: The Honourable Chief Justice Bauman
The Honourable Madam Justice Newbury
The Honourable Mr. Justice Groberman
The Honourable Mr. Justice Harris
The Honourable Madam Justice Fenlon

On reference from the Lieutenant Governor in Council, April 25, 2018
(Order in Council No. 211/18)

Counsel for the Attorney General of British Columbia:	J.J.M. Arvay, Q.C. C.J. Boies Parker, Q.C. G. Morley D.S. Ball
Counsel for the Attorney General of Canada:	J.E. Brongers B.J. Wray C.M. Rupar J.C. Khan
Counsel for the Interested Person, Attorney General of Alberta:	P.A. Gall, Q.C. A.L. Zwack
Counsel for the Interested Person, Attorney General of Saskatchewan:	T. Irvine K. Roy
Counsel for the Interested Person, City of Vancouver:	S.B. Horne
Counsel for the Interested Person, City of Burnaby:	G.J. McDade, Q.C. M.L. Bradley
Counsel for the Interested Person, EcoJustice Canada:	H.J. Wruck, Q.C. K.J. Pepper-Smith

Counsel for the Interested Persons, The Council of The Haida Nation:	D.R. Paterson T. Williams-Davidson
Counsel for the Interested Persons, The Heiltsuk First Nation:	L.C. Fong K. Webber
Counsel for the Interested Persons, The Assembly of First Nations:	J. McGregor
Counsel for the Interested Persons, The Little Shuswap Lake Indian Band:	A.M. Grant
Counsel for the Interested Person, Trans Mountain Pipeline ULC:	M.E. Killoran, Q.C. O. Dixon
Counsel for the Interested Persons, Beecher Bay First Nations, Songhees First Nation and T'Sou-Ke Nation:	R. Janes, Q.C. A. Laskin
Counsel for the Interested Persons, Lax Kw'alaams Band:	C. Harvey, Q.C. R.V. Wickett, Q.C.
Counsel for the Interested Person, Canadian Association of Petroleum Producers:	B. Armstrong, Q.C. N.R. Hughes W. Shaw L. Manning
Counsel for the Interested Person, Canadian Fuels Association:	D.G. Cowper, Q.C. D.A. Byma
Counsel for the Interested Person, Canadian Energy Pipeline Association:	M. Marion
Counsel for the Interested Person, Enbridge Inc.:	M.E. Killoran, Q.C. S. Sutherland
Counsel for the Interested Persons, Coalition of Interested Parties:	A. Tomkins
Counsel for the Interested Person, Railway Association of Canada:	N.R. Hughes E.M. MacKinnon S. Blanco
Counsel for the Interested Persons, Consortium of Energy Producers (Suncor et al.):	W. Kaplan, Q.C. C. Beagan-Flood
Place and Dates of Hearing:	Vancouver, British Columbia March 18, 19, 20, 21 and 22, 2019
Place and Date of Opinion:	Vancouver, British Columbia May 24, 2019

Written Reasons by:
The Honourable Madam Justice Newbury

Concurred in by:
The Honourable Chief Justice Bauman
The Honourable Mr. Justice Groberman
The Honourable Mr. Justice Harris
The Honourable Madam Justice Fenlon

Summary:

On a constitutional reference by the Province of British Columbia, the Court opined that it is not within the authority of the Legislature to enact a proposed amendment to the Environmental Management Act. The amendment was targeted legislation that in pith and substance relates to the regulation of an interprovincial (or "federal") undertaking — the expanded interprovincial pipeline of Trans Mountain Pipeline ULC and Trans Mountain Pipeline L.P. which is intended to carry "heavy oil" from Alberta to tidewater. The amendment thus lies beyond provincial jurisdiction.

Reasons for Judgment of the Honourable Madam Justice Newbury:

[1] The protection of the environment is one of the driving challenges of our time. No part of the world is now untouched by the need for such protection; no government may ignore it; no industry may claim immunity from its constraints. This reference is not about whether the planned Trans Mountain pipeline expansion ("TMX") should be regulated to minimize the risks it poses to the environment — that is a given. Rather, this reference asks which level or levels of government may do so under our constitution, specifically ss. 91 and 92 of the *Constitution Act, 1867.* [1] British Columbia asserts that it may regulate the pipeline in the interests of the environment — not exclusively, but to the extent that it may impose conditions on, and even prohibit, the presence of "heavy oil" in the Province unless a director under the *Environmental Management Act* issues a "hazardous substance permit" under the proposed addition that is the subject of the reference.

[2] The Province readily acknowledges that the pipeline is an interprovincial (and therefore "federal") undertaking. However, it asserts that the expansion and operation of the pipeline as a carrier of heavy oil will have a disproportionate effect on the interests of British Columbians, as compared with other Canadians. It emphasizes that provincial environmental legislation has long affected aspects of federal undertakings without serious challenge; that the heads of power set out in ss. 91 and 92 are not "watertight compartments"; and that the Supreme Court of Canada has recognized on occasion that certain functions are best carried out by the level of government closest to the citizens affected (the principle of "subsidiarity"). The Province sees the proposed addition to the *Environmental Management Act* as relating to "Property and Civil Rights in the Province" or "Matters of a merely local or private Nature" under s. 92 of the *Constitution Act*.

[3] Canada on the other hand characterizes the addition as relating to the "matter" of "Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province". It submits that its jurisdiction under ss. 91(29) and 92(10)(a) of the *Constitution Act* includes the regulation of the construction and operation of the pipeline, its route and contents, and the management of risks of environmental harm. Although Canada acknowledges that provincial environmental laws of general application may affect interprovincial undertakings

"incidentally", it says the proposed addition is targeted legislation and would effectively lead to a situation of concurrent jurisdiction, contrary to the *exclusive* authority contemplated by the *Constitution Act*. The *National Energy Board Act* and related statutes are said to constitute a comprehensive and integrated scheme for the regulation of interprovincial pipelines, and environmental protection is a key part of that scheme. Canada asks the Court to find the proposed amendment *ultra vires* or inoperative, and thus to eliminate the uncertainty (or some of it) that now hangs over a project of importance to the country as a whole.

Constitutional Framework

[4] I do not propose to attempt to describe here the general workings of the division of powers under the *Constitution Act*; but in order to explain some of the legal jargon that is unavoidable in this opinion, I reproduce below Professor Hogg's thumbnail guide to the steps normally undertaken when the *vires* of legislation are challenged. At §15.4 of *Constitutional Law of Canada*, the learned author writes:

> In Canada the distribution of legislative power between the federal Parliament and the provincial Legislatures is mainly set out in ss. 91 and 92 of the *Constitution Act, 1867*. Section 91 lists the kinds of laws that are competent to the federal Parliament; s. 92 lists the kinds of laws that are competent to the provincial Legislatures. Both sections use a distinctive terminology, giving legislative authority in relation to "matters" coming within "classes of subjects". This terminology emphasizes and helps to describe the two steps involved in the process of judicial review: the first step is to identify the "matter" (or pith and substance) of the challenged law; the second step is to assign the matter to one of the "classes of subjects" (or heads of legislative power). Of course, neither of these two steps has any significance by itself. The challenged statute is characterized (or classified) as in relation to a "matter" (step 1) only to determine whether it is authorized by some head of power in the Constitution. The "classes of subjects" are interpreted (step 2) only to determine which one will accommodate the matter of a particular statute. The process is, in Laskin's words, "an interlocking one, in which the *British North America Act* and the challenged legislation react on one another and fix each other's meaning". Nevertheless, for purposes of analysis it is necessary to recognize that two steps are involved: the characterization of the challenged law (step 1) and the interpretation of the power-distributing provisions of the Constitution (step 2).

[5] The author goes on to note that although the "matter" of a law has been described in many ways, the word basically refers to its dominant characteristic or "true nature and character" — or in legalese, its "pith and substance". Put another way, the question is "What in fact does the law do and why?" (See *Québec (Attorney General) v. Canadian Owners and Pilots Association (2010)* ("*COPA (2010)*") at para. 17.) In some cases, including this one, the dominant purpose will not correspond directly to any of the heads of power set forth in ss. 91 or 92 of the *Constitution Act.* The court must then determine its pith and substance, and to which of the enumerated powers it relates. Occasionally a law may fairly relate to *two* matters, one provincial and one federal. Where this happens, and where both "aspects" are of roughly equivalent importance, the law may be upheld at either level. This is the so-called "double aspect" doctrine.

[6] Since the heads of power are not watertight, the characterization of the pith and substance of legislation is not determined by the fact that it 'incidentally affects' a matter allocated to the other level of government. As stated by the Supreme Court in *Canadian Western Bank v. Alberta (2007)*:

> The "pith and substance" doctrine is founded on the recognition that it is in practice impossible for a legislature to exercise its jurisdiction over a matter effectively without incidentally affecting matters within the jurisdiction of another level of government. For example...it would be impossible for Parliament to make effective laws in relation to copyright without affecting property and civil rights, or for provincial legislatures to make effective laws in relation to civil law matters without incidentally affecting the status of foreign nationals... [At para. 29; emphasis added.]

Given that 'incidental' effects may almost always be expected, and that Canadian courts have in recent decades strongly favoured 'co-operative federalism' over strict compartmentalization of jurisdiction, the 'characterization' process is sometimes difficult. The Supreme Court of Canada has warned that co-operative federalism "cannot override or modify the separation of powers", nor support a finding that an otherwise unconstitutional law is valid. (See *Reference re Securities Act (2011)*, *Rogers Communications Inc. v. Châteauguay (City) (2016)* at para. 39.) As stated in the *Securities Reference (2011)*:

> ... notwithstanding the Court's promotion of co-operative and flexible federalism, the constitutional boundaries that underlie the division of powers must be respected. The "dominant tide" of flexible federalism, however strong its pull may be, cannot sweep designated powers out to sea, nor erode the constitutional balance inherent in the Canadian federal state. [At para. 62.]

[7] The so-called "ancillary powers" doctrine arises from the fact that the *Constitution Act* does not, as the Constitution of the United States does, expressly allocate to either level of government the authority to "make all Laws which shall be necessary and proper for carrying into Execution" the allocated powers. Professor Hogg expresses the view that since the concept of pith and substance enables a law relating to a matter within the competence of the enacting government to have "incidental" or "ancillary" effects on matters outside its usual competence, a doctrine of ancillary powers is unnecessary. (At §15.9 (c).) This view was taken by the majority in *Nykorak v. Attorney General of Canada (1962)* and by Laskin J.A., as he then was, in *Papp v. Papp (1970)*. He suggested that as long as there is a "rational, functional connection" between what is admittedly valid and what is challenged, the head of power relied upon should be interpreted "not in the sense merely of the subject dealt with, but in the sense ... of the purpose or object in view." (At 336.)

[8] Nevertheless, the doctrine was the subject of debate in the Supreme Court of Canada for some years thereafter, leading up to *General Motors of Canada Ltd. v. City National Leasing (1989)*, in which (according to Hogg) the test became a function of the seriousness of the encroachment and the degree of "necessity" therefor. More recently, in *Québec (Attorney General) v. Lacombe (2010)*, Chief Justice McLachlin noted various ways of expressing the 'test' and concluded:

> Regardless of the precise wording of the test, the basic purpose of this inquiry is to determine whether the impugned measure not only supplements, but complements, the legislative scheme; it is not enough that the measure be merely supplemental: *Papp*. [At para. 48.]

[9] Most of the cases in which the ancillary powers doctrine has been applied have involved procedural or remedial provisions necessary to make the enactment work. In *General Motors (1989)*, a provision in the *Combines Investigation Act* that provided a civil remedy for a contravention was upheld since its "intrusion" into the provincial matter of property and civil rights was only "limited" and

there was a rational connection between it and the federal anti-trust scheme; in *Kirkbi AG v. Ritvik Holdings Inc. (2005)*, a provision of the *Trade-marks Act* providing a civil remedy for the infringement of an unregistered mark was upheld as minimally intrusive on provincial jurisdiction and functionally related to the scheme of the *Act;* and in *Reference re Goods and Services Tax (1992)*, certain provisions for the collection of the tax were upheld even though they were seen as 'intruding' on provincial jurisdiction.

[10] As *Re GST (1992)* illustrates, it is difficult to draw the dividing line, if one exists, between the ancillary powers doctrine and the simpler proposition that a valid law of one level of government may "incidentally affect" a matter reserved for the other level. Indeed, Canadian courts have not always clearly distinguished between the concepts of incidental effects, ancillary powers and "double aspect". Professor Hogg suggests that the Supreme Court of Canada should return to the "true path" marked out by cases such as *Papp*. In his analysis, each head of legislative power, whether federal or provincial, "authorizes all provisions that have a rational connection to the exercise of that head of power. There is no theoretical or practical need for a separate ancillary power." (At §15.9(c).)

[11] For purposes of this reference, the relevant heads, or subject-matters, of constitutional authority between Parliament and provincial legislatures are found in the following subsections of ss. 91 and 92 of the *Constitution Act*:

> *Powers of the Parliament*
>
> 91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated that is to say,
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> ...
>
> 10. Navigation and Shipping.
>
> ...
>
> 29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.
>
> And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.
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> ...
>
> *Exclusive Powers of Provincial Legislatures*
>
> 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,
>
> ...
>
> 5. The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon,
>
> ...

> 10. Local Works and Undertakings other than such as are of the following Classes:
>
> (a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province:
>
> (b) Lines of Steam Ships between the Province and any British or Foreign Country:
>
> (c) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.
>
> ...
>
> 13. Property and Civil Rights in the Province.
>
> ...
>
> 16. Generally all Matters of a merely local or private Nature in the Province.

It will be noted that para. (a) of s. 92(10), which is the source of Canada's jurisdiction over interprovincial undertakings, is framed as an *exception* to the provinces' powers over "local works"; but that Parliament's powers under s. 91(29) are stated in the opening lines of s. 91 to be exclusive, just as the provinces' powers are under s. 92.

[12] It will also be noted that "environmental protection" is not a head of power allocated to either level of government. Valid environmental protection legislation is on the books of all provinces *and* of Canada. In British Columbia, the *Environmental Management Act* ("*EMA*") purports to regulate across a number of subject areas including air, water and ground pollution and imposes various conditions, and in many cases requires permits, to which conditions may be attached, for activities that may be harmful to the environment. Mr. Arvay told us he was not aware of any constitutional challenge that has been made to the *EMA,* which is usually regarded as falling under "Property and Civil Rights in the Province." He drew our attention to *Friends of the Oldman River Society v. Canada (Minister of Transport) (1992)*, in which the Court observed that "the environment" was a "constitutionally abstruse matter" that does not "comfortably fit within the existing division of powers without considerable overlap and uncertainty". (At 64.) In the words of La Forest J. for the majority:

> In my view the solution to this case can more readily be found by looking first at the catalogue of powers in the *Constitution Act, 1867* and considering how they may be employed to meet or avoid environmental concerns. When viewed in this manner it will be seen that in exercising their respective legislative powers, both levels of government may affect the environment, either by acting or not acting. This can best be understood by looking at specific powers. A revealing example is the federal Parliament's exclusive legislative power over interprovincial railways under ss. 92(10)(a) and 91(29) of the *Constitution Act, 1867*. ….
>
> This gives some insight into the scope of Parliament's legislative jurisdiction over railways and the manner in which it is charged with the responsibility of weighing both the national and local socio-economic ramifications of its decisions. Moreover, it cannot be seriously questioned that Parliament may deal with biophysical environmental concerns touching upon the operation of railways so long as it is legislation relating to railways. This could involve issues such as emission standards or noise abatement provisions. …
>
> . . .
>
> The provinces may similarly act in relation to the environment under any legislative power in s. 92. Legislation in relation to local works or undertakings, for example, will often take into account environmental concerns. What is not particularly helpful in sorting out the respective

> levels of constitutional authority over a work such as the Oldman River dam, however, is the characterization of it as a "provincial project" or an undertaking "primarily subject to provincial regulation" as the appellant Alberta sought to do. That begs the question and posits an erroneous principle that seems to hold that there exists a general doctrine of interjurisdictional immunity to shield provincial works or undertakings from otherwise valid federal legislation. [At 65–6, 68; emphasis added.]

(See also *R. v. Hydro-Québec (1997)* at 298–9.)

[13] Although there is no single test, the purpose and effects of legislation will obviously be of prime importance in identifying its pith and substance. Both “intrinsic” evidence (the text of the law itself) and “extrinsic” evidence (such as the circumstances in which the law was adopted) may be examined: see generally *R. v. Morgentaler (1993)* at 483–5 and 499–505. On occasion, it will be found that the stated intention or the *apparent* purpose of a statute is a ‘smokescreen’ for a matter lying outside the jurisdiction of the enacting government. *Morgentaler (1993)* is often cited as an example of this principle: see Hogg, §15.5(g). It turned on the validity of a Nova Scotia regulation requiring several medical procedures to be performed in a hospital. One of those procedures was abortions. The Supreme Court of Canada reviewed the history of the enactment and found that its true purpose was to block the establishment of Dr. Morgentaler’s abortion clinic in the province. Although the Court stopped short of characterizing the regulation as “colourable”, it stated that *in any event*, the colourability doctrine “really just restates the basic rule” that constitutional character is not a matter of form, but of the substance of the law in question. (At 496.)

[14] The *effects* of a law are perhaps a more reliable guide to its constitutional validity than its apparent or stated intention. These effects may be legal ones such as effects on the rights or obligations of citizens; or practical ones, especially where there is reason to believe the enacting government may be attempting to do indirectly what it cannot do directly. As an example, Professor Hogg (at §15.5(e)) notes *Central Canada Potash Co. Ltd. v. Government of Saskatchewan (1979)*, in which the validity of a provincial prorationing and price-fixing scheme for potash was challenged. Although the province argued that the scheme was concerned with the conservation of a natural resource, the Supreme Court characterized it as relating to interprovincial and international trade, given that almost all of the province’s production of potash was exported and the province had abundant reserves. In the words of Chief Justice Laskin:

> ... This Court cannot ignore the circumstances under which the Potash Conservation Regulations came into being, nor the market to which they were applied and in which they had their substantial operation. In *Canadian Industrial Gas & Oil Ltd. v. Government of Saskatchewan*, this Court, speaking in its majority judgment through Martland J., said (at p. 568) that “provincial legislative authority does not extend to fixing the price to be charged or received in respect of the sale of goods in the export market”. It may properly be said here of potash as it was said there of oil that “the legislation is directly aimed at the production of potash destined for export, and it has the effect of regulating the export price since the producer is effectively compelled to obtain that price on the sale of his product” (at p. 569). [At 75.]

[15] Where only a *part or parts* of a statute are challenged, the Supreme Court has suggested that the challenged portions should first be considered on their own rather than in the context of the overall statute. In *General Motors (1989)*, Chief Justice Dickson reasoned:

> It is obvious at the outset that a constitutionally invalid provision will not be saved by being put into an otherwise valid statute, even if the statute comprises a regulatory scheme under the general trade and commerce branch of s. 91(2). The correct approach, where there is some doubt that the impugned provision has the same constitutional characterization as the Act in which it is found, is to start with the challenged section rather than with a demonstration of the validity of the statute as a whole. I do not think, however, this means that the section in question must be read in isolation. If the claim to constitutional validity is based on the contention that the impugned provision is part of a regulatory scheme it would seem necessary to read it in its context. If it can in fact be seen as part of such a scheme, attention will then shift to the constitutionality of the scheme as a whole. [At 665; emphasis added.]

(See also *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture) (2002)* at paras. 55–8.)

[16] The "double aspect" principle recognizes that some laws may be regarded as being "in relation to" both the federal and provincial levels of government. In such cases, the provincial and federal 'aspects' are different, but usually roughly equivalent in importance. Thus as the Court stated in *Bell Canada v. Québec (Commission de la Santé et de la Sécurité du Travail) (1988)* ("*Bell Canada (1988)*"), the doctrine does *not* apply where both levels of government have legislated "for the same purpose and in the same aspect." (At 853.) The principle was described by Professor Lederman in *Continuing Canadian Constitutional Dilemmas* (1981) in a passage quoted with approval in *Law Society of British Columbia v. Mangat (2001)*:

> But if the contrast between the relative importance of the two features is not so sharp, what then? Here we come upon the double-aspect theory of interpretation, which constitutes the second way in which the courts have dealt with inevitably overlapping categories. When the court considers that the federal and provincial features of the challenged rule are of roughly equivalent importance so that neither should be ignored respecting the division of legislative powers, the decision is made that the challenged rule could be enacted by either the federal Parliament or provincial legislature. In the language of the Privy Council, "subjects which in one aspect and for one purpose fall within sect. 92, may in another aspect and for another purpose fall within sect. 91". [At para. 48.]

The double aspect principle has been found to apply to traffic laws; securities regulation; the maintenance of spouses and children and custody of children; entertainment in taverns; and gaming. (*Mangat (2001)* at para. 49; see also *Reference re Pan-Canadian Securities Regulation (2018)* at para. 114.)

[17] Finally in this overview of the division of powers in Canada, there are the important doctrines of paramountcy and interjurisdictional immunity. Paramountcy applies where the *validly enacted laws* of two levels of government conflict or the purpose of the federal law is 'frustrated' by the operation of the provincial law. Where this occurs, the provincial law will be rendered inoperative to the extent necessary to eliminate the conflict or frustration of purpose. In recent decades, the Supreme Court of Canada has viewed paramountcy with greater scrutiny than older authorities suggested, and has encouraged "co-operative federalism" and a "flexible" approach to constitutional interpretation where possible consistent with the *Constitution Act*. (See, e.g. *Canadian Western Bank (2007)* at para. 24; *Québec (Attorney General) v. Canada (Attorney General) (2015)* at para. 17; *Alberta (Attorney General) v. Moloney (2015)* at para. 27; *Saskatchewan (Attorney General) v. Lemare Lake Logging*

Ltd. (2015) at paras. 22–3; *Reference re Pan-Canadian Securities Regulation (2018)* at para. 18; *Orphan Well Association v. Grant Thornton Ltd. (2019)* at para. 66.)

[18] The more complex doctrine of interjurisdictional immunity applies when a *valid* law of a province trenches upon, or impairs the "core" of, a *matter* under exclusive federal jurisdiction. (In theory at least, the principle can also operate the other way around: *Canadian Western Bank (2007)* at para. 35.) In early cases involving federal undertakings, it was applied where the provincial law "sterilized" or "paralyzed" the federal undertaking, but the doctrine expanded to include laws that "affected" a "vital part" of the undertaking: *Commission du Salaire Minimum v. Bell Telephone Company of Canada (1966)* ("*Bell (1966)*"). In later cases, the doctrine was modified to require the *impairment* of a vital part of the undertaking. More recently, however, the difficulties inherent in applying the doctrine led the Supreme Court to suggest in *Canadian Western Bank (2007)* that it should be used "with restraint" in future. Justices Binnie and LeBel for the majority of the Court commented:

> ... As we have already noted, interjurisdictional immunity is of limited application and should in general be reserved for situations already covered by precedent. This means, in practice, that it will be largely reserved for those heads of power that deal with federal things, persons or undertakings, or where in the past its application has been considered absolutely indispensable or necessary to enable Parliament or a provincial legislature to achieve the purpose for which exclusive legislative jurisdiction was conferred, as discerned from the constitutional division of powers as a whole, or what is absolutely indispensable or necessary to enable an undertaking to carry out its mandate in what makes it specifically of federal (or provincial) jurisdiction. If a case can be resolved by the application of a pith and substance analysis, and federal paramountcy where necessary, it would be preferable to take that approach, as this Court did in *Mangat*.
>
> In the result, while in theory a consideration of interjurisdictional immunity is apt for consideration after the pith and substance analysis, in practice the absence of prior case law favouring its application to the subject matter at hand will generally justify a court proceeding directly to the consideration of federal paramountcy. [At paras. 77–8; emphasis added.]

(See also *British Columbia (Attorney General) v. Lafarge Canada Inc. (2007)* at paras. 41–2; *COPA (2010)* at paras. 58–61.) When the doctrine is properly applied, it renders the exercise of the power inapplicable to the extent of the impairment of the core of the other government's jurisdiction — a process analogous to 'reading down'.

[19] Finally, on an even more general level, it is trite but true to note that Canadian constitutional law is a 'living tree' that reflects society and its changing concerns over time. The formerly inflexible approach to the division of powers has given way to a ready acceptance of overlapping and often 'mutually modifying' jurisdictions. Nevertheless, the Constitution cannot be separated from the "normal constraints of interpretation." (See Hogg at §15.9(f).) The words of Chief Justice Dickson on this point in *Ontario (Attorney General) v. OPSEU (1987)* have often been quoted:

> ... The history of Canadian constitutional law has been to allow for a fair amount of interplay and indeed overlap between federal and provincial powers. It is true that doctrines like interjurisdictional and Crown immunity and concepts like "watertight compartments" qualify the extent of that interplay. But it must be recognized that these doctrines and concepts have not been the dominant tide of constitutional doctrines; rather they have been an undertow against the strong pull of pith and substance, the aspect doctrine and, in recent years, a very restrained approach to concurrency and paramountcy issues. [At 18.]

Existing Environmental Legislation

The Federal Scheme

[20] Before turning to the proposed legislation that is the subject of this reference, it may be helpful to provide context in the form of a description of existing federal legislation that applies to the proposed TMX pipeline and the transportation of "heavy oil" (a term defined in a schedule to the proposed amendments to the *EMA*.) As stated in the Agreed Statement of Facts ("ASF") submitted by counsel for the Attorney General of British Columbia and the Attorney General of Canada, there are several federal statutes that regulate the interprovincial transportation of petroleum in Canada, namely:

> *Canadian Environmental Assessment Act*, *2012*, S.C. 2012, c. 19, s. 52 and *Regulations Designating Physical Activities*, (SOR/2012-147)
>
> *Canada Transportation Act*, S.C. 1996, c. 10
>
> *National Energy Board Act*, R.S.C., 1985, c. N -7 and *National Energy Board Act Part VI (Oil and Gas) Regulations* (SOR/96-244); *National Energy Board Onshore Pipeline Regulations* (SOR/99-294)
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> *Pipeline Safety Act (An Act to amend the National Energy Board Act and the Canada Oil and Gas Operations Act),* S.C. 2015, c. 21
>
> *Railway Safety Act*, R.S.C. 1985, c. 32 (4th Supp.) and *Railway Operating Certificate Regulations* (SOR/2014-258)
>
> *Transportation of Dangerous Goods Act, 1992*, S.C. 1992, c. 34 and *Transportation of Dangerous Goods Regulations* (SOR/2001-286)

[21] The *National Energy Board Act*, adopted in 1959, established the National Energy Board ("NEB"). In the words of the Minister of Trade and Commerce at that time, the NEB was established to:

> ... assure to the people of Canada the best use of energy resources in this country, regulate in the public interest the construction and operation of oil and gas pipe lines subject to the jurisdiction of the parliament of Canada, the tolls charged for transmission by such pipe lines, the export and import of gas, the export of electric power and the construction of those lines over which such power is exported. The board shall also study and keep under review all matters relating to energy within the jurisdiction of the parliament of Canada, and shall recommend to the Minister of Trade and Commerce such measures as it considers necessary or advisable in the public interest with regard to such matters. [ASF para. 166.]

We are told that the NEB today is an independent federal agency that regulates pipelines that cross interprovincial or international borders, and that there are approximately 73,000 km of such pipelines. This involves the regulation of approximately 100 pipeline companies in Canada. (ASF para. 167.)

[22] The NEB generally has oversight over the approval, construction and operation of interprovincial and international pipelines and administers its own permits as well as those required under other federal statutes or regulations. The ASF describes the NEB's powers and responsibilities that are intended to protect the environment and public safety with respect to pipelines generally:

NEB Orders MO-006-2016 and MO-002-2017 require that companies constructing or operating approved oil or gas pipelines under the NEB's jurisdiction post their current, applicable emergency management plans and program materials on their websites. Under these regulations, all interprovincial transmission pipelines operating in Canada are subject to an emergency management program, which mandate plans for the anticipation, prevention, management, and mitigation of emergencies.

In the Fall of 2015 the Commissioner for Environment and Sustainable Development (CESD) issued a report an Oversight of Federally Regulated Pipelines, presenting the results of the Auditor General's audit of NEB pipeline compliance-tracking and enforcement. A previous report by CESD in December 2011 also addressed this issue.

In June 2016, the federal *Pipeline Safety Act* ("*PSA*"), came into effect, which amended the *NEB Act* and the *Canada Oil and Gas Operations Act*, R.S.C. c. 1985, c. O-7 ("*COGOA*"). Under the *PSA*, pipeline companies are now required to maintain a minimum level of "readily available" financial resources to ensure quick responses. Further, in the event of a spill or after the retirement of infrastructure, the NEB Remediation Process Guide requires details and plans on reporting, remediation assessment, development of a remedial action plan, and closure of the site. The federal government can also create a Pipeline Claims Tribunal to deal with claims for compensation in extraordinary circumstances and the NEB has the authority to take control of incident response and clean-up and order companies to reimburse governments, third parties and or individuals for clean-up costs.

The *COGOA* was introduced in the Senate in 1969 as Bill S-29 (An Act respecting the production and conservation of oil and gas in the Yukon Territory and the Northwest Territories). Generally, *COGOA* governs oil and gas operations on certain onshore lands federal lands and the offshore (waters under Federal jurisdiction).

COGOA outlines the NEB's regulatory responsibilities for oil and gas exploration and activities on frontier lands not otherwise regulated under joint federal/provincial accords. The NEB also has regulatory responsibilities under certain provisions of the *Canada Petroleum Resources Act*, R.S.C., 1985, c. 36 (2nd Supp.).

The NEB may make regulations governing the design, construction, operation and abandonment of a pipeline and providing for the protection of property and the environment and the safety of the public and of the company's employees in the construction, operation and abandonment of a pipeline.

Regulations made under the *NEB Act*, such as the *National Energy Board Onshore Pipeline Regulations*, SOR/99-294 ("*OPR*"), require that companies design safety management, environmental protection, emergency management, third-party crossing, public awareness, and integrity management programs, which are reviewed by the NEB.

Pipelines and equipment regulated by the NEB must also meet Canadian Standards Association specifications. The CSA Z662 sets out the technical standards for the design, construction, operation, maintenance, and decommissioning of Canada's oil and gas pipelines.

The NEB conducts ongoing pipeline monitoring, inspections, and site visits to confirm compliance with regulatory requirements. Where necessary, the NEB can issue mandatory compliance orders or use other appropriate tools to enforce these requirements.

The NEB also regulates the import and export of hydrocarbons, such as gas and crude oil, through short term orders and long term licences.

The *Oil and Gas Regulations* set out the information that applicants seeking such export orders and licences must provide to the NEB, and the terms and conditions that the NEB may impose on export orders and licences.

For the projects it regulates that are prescribed as designated projects under the *Canadian Environmental Act*, *2012* ("*CEAA 2012*"), the NEB is responsible for conducting Environmental Assessments ("EAs") in accordance with *CEAA 2012*.

CEAA 2012 was introduced in Parliament as part of the omnibus Bill C-38 (*An Act to implement certain provisions of the budget tabled in Parliament on March 29, 2012 and other measures*).

Once a pipeline is approved for construction by the GIC [Governor in Council], the NEB takes over with respect to further approvals including:

(a) the plan, profile and book of reference for the pipeline;

(b) determination of the detailed route;

(c) directions concerning diversions and relocations of the pipeline route;

(d) leave to open (i.e. operate);

(e) conditions for operation; and

(f) conditions for abandonment.

> Everything that is done with respect to the approved pipeline must be carried out within the terms and conditions of the CPCN [Certificate of Public Convenience and Necessity] and related approvals. Should circumstances arise in which a variance of a term or condition is required and the NEB is in agreement, that variance can be given by NEB but it only becomes effective after it is approved by the GIC.
>
> The NEB may revoke or suspend a certificate if there is a failure to comply with its terms and conditions, but only with the approval of the GIC. The NEB may vary a certificate, licence or permit but the variation of a certificate or licence is not effective until approved by the Governor in Council. [At paras. 174–189; emphasis added.]

[23] Where other federal departments require permits for aspects of the construction of a major pipeline, the acquisition of such a permit is usually added as a condition of the certificate of public convenience. Such certificates are issued by the Minister of Natural Resources. (At para. 191.)

[24] The ASF also refers to the passage by the House of Commons in June 2018 of the *Canadian Energy Regulator Act*, which is to replace the *National Energy Board Act* and some related statutes. The proposed new law sets out five main objectives, the first of which is to implement "an impact assessment and regulatory system that Canadians trust and that protects the environment and the health and safety of Canadians." (ASF paras. 193–5.)

[25] Mr. Brongers on behalf of Canada drew our attention as well to the *Pipeline Safety Act*, which *inter alia* does the following:

> (a) enshrines in law the "polluter pays" principle, under which companies have unlimited liability when at fault or negligent (*NEB Act*, s. 48.11);
>
> (b) introduces absolute liability for all NEB-regulated companies, meaning that companies will be liable for all costs and damages up to set limits ($1 billion for companies operating major oil pipelines) without proof of fault or negligence (*NEB Act*, s. 48.12(4) and 5));
>
> (c) provides governments with the ability to pursue pipeline operators for the loss of non-use value relating to a public resource (*NEB Act*, 48.12(1)(c));
>
> (d) authorizes the NEB to order reimbursement of costs and expenses incurred by others in taking actions related to an incident (*NEB Act*, s. 48.15);
>
> (e) allows for the NEB to take control of incident response in exceptional circumstances, if a company operating a pipeline is unwilling or unable to shoulder its responsibilities (the costs of which are to be recovered fully from industry) (*NEB Act*, s. 48.16); and,
>
> (f) requires companies to demonstrate that they have financial resources to match at a minimum their level of absolute liability, and that a portion of these resources will be readily accessible to help ensure rapid incident response (*NEB Act*, 48.13(7)). [Emphasis added.]

[26] Finally, I note the *National Energy Board Onshore Pipeline Regulation.* It imposes various obligations on pipeline companies, many of which obligations relate to environmental protection and the minimization of spills. Pipeline companies must, for example, comply with various testing

requirements, prepare and educate employees with respect to operations and maintenance manuals; and implement and maintain emergency management programs that anticipate, prevent, manage and mitigate conditions during an emergency that could adversely affect property, the environment or the safety of workers or the public. (ss. 32(1)–36.) Pipeline companies must also develop and maintain pipeline control systems that include leak detection systems that, for oil pipelines, meet and reflect "the level of complexity of the pipeline, the pipeline operation and the products transported" (s. 37(c).) The requirements of the regulation apply, in counsel's phrase, to the pipeline from "cradle to grave".

[27] In summary, there is in place a complex web of federal statutes and regulations that apply to all aspects of interprovincial pipelines, including environmental assessment, operational oversight, spill and accident responses, and financial liability and compensation for harm done by spills. The 'polluter pays' principle is clearly an important part of these laws: see the *National Energy Board Act*, s. 48.11. The Province did not contend that any of the federal environmental laws may be constitutionally invalid or inapplicable to the Trans Mountain pipeline.

The Provincial Scheme

[28] There are also, of course, various *provincial* statutes aimed at environmental protection, the leading one being the *EMA*. In its factum, the Province described the overall objective of the *EMA* thus:

> ... The overall objective of *EMA* is to protect the quality of the environment by controlling, ameliorating and, where possible, eliminating the deleterious effect of pollution. *EMA* regulates, among other things, waste discharges, hazardous waste storage and transportation, contaminated sites and greenhouse gas emissions, and provides for pollution management through a number of mechanisms, including permitting, pollution abatement orders, and area based management. *EMA* is supported by 38 regulations and codes of practice that outline various regulatory requirements for specific activities.

[29] Pursuant to the *EMA*, the Province has enacted a *Waste Discharge Regulation* which regulates who requires permits for the (non-accidental) discharge or release of waste into the air, water or land. Permits are issued by a director under the *EMA*, who may attach conditions to permits that are "intended to address concerns or risks posed by a proponent's proposed activities, or which ensure that commitments made by proponents are carried out." As far as accidental discharges of waste materials are concerned, the ASF describes existing provincial measures thus:

> …the *Environmental Management Act* …,which has an objective of protecting the quality of the environment by controlling, ameliorating and where possible, eliminating the deleterious effect of pollution on the environment, relies on permits or approvals for the discharge and management of waste to prevent and manage the deleterious effect of pollution on the environment.
>
> The MOE [Ministry of the Environment] follows specific steps in processing applications for waste discharge authorizations. MOE has developed specific guidance materials for applicants to refer to and follow when applying for a permit, approval, registration, or notification. MOE has also developed internal standard operating procedures and guidance documents for staff working through the application process.
>
> Resource project proponents may meet with technical staff of the responsible agencies for pre-application meetings, and may meet during the technical review, to discuss their application.

> There are also various policies and guidelines in place to ensure the requirements for First Nations consultation are met.
>
> A number of the responsible statutory decision-makers have discretionary powers to apply conditions to permits, which are intended to address concerns or risks posed by a proponent's proposed activities, or which ensure commitments made by proponents are carried out.
>
> MOE has a regulatory mandate to prevent, prepare for, respond to, and recover from hazardous material spills. The [*Emergency Program Management Regulation*] requires the Minister of Environment and Climate Change Strategy to provide direction and technical advice with respect to spills, as well as ensure the proper disposal of spilled substances. *EMA* provides the authority for the government to approve regulations that establish requirements for improved spill management in B.C. It also sets out requirements to ensure effective spill management, specifically the responsibilities of a spiller and recovery of government costs for spill response. The government may also introduce amendments to *EMA* to establish new provisions if needed.
>
> Spill management authorities under *EMA* include requiring environmental impact assessments, and measures to ensure spill prevention, response and reporting.
>
> The Minister of Environment and Climate Change Strategy may order a person to undertake investigations, tests, surveys and other actions to determine the magnitude of the risk; prepare and test a contingency plan, or to put the plan into operation; construct, alter, or acquire any works to prevent or abate a spill; and report the spill before (if it is imminent) or after. The Director may use Pollution Prevention Orders and Pollution Abatement Orders to ensure that actions are taken to avoid or stop pollution; and order a recovery plan, including preparing, implementing and reporting on the outcome of the plan.
>
> *EMA* defines and places obligations on responsible persons. This includes spill response; reporting of a spill; providing requested information related to response; deploying skilled staff, resources and equipment to respond; responding to a spill or imminent risk of a spill, cleaning up the spill and recovering the environment; and identifying long-term impacts and mitigating both short and long-term impacts.
>
> The *Spill Contingency Planning Regulation* defines requirements for regulated persons to develop and test spill contingency plans including the required plan content and what types of tests and drills must be completed during each three-year period.
>
> The *Spill Reporting Regulation* requires reporting of a spill or imminent risk of a spill (initial report) and requires the spiller to prepare an "update to Minister report", and "end-of-spill report", and to prepare a lessons-learned report (when ordered by the director).
>
> The *Contaminated Sites Regulation* also applies in the event of a spill by defining requirements for determining whether a contaminated site exists (contamination by a hazardous substance beyond a concentration threshold standard), site remediation (to meet standards), who is responsible for remediation, and recognition of completed remediation.
>
> ...
>
> The BC Oil and Gas Commission has a mandate to manage hazardous materials spills on BC lands here oil and gas activities are occurring under the *Oil and Gas Activities Act (OGAA*). This act and its regulations include requirements regarding the safe operation of oil and gas operations and the prevention of uncontrolled or inappropriate release of substances in the environment. These requirements include First Nations consultation, and are complimented by the activities of other agencies, legislation and national safety standards to ensure adequate protection of people, property and the environment. Under the Act, and specifically the *Emergency Management Regulation* (*EMR*), a permit holder is required to prepare and maintain an emergency response program, and an emergency response plan. The *EMR*, coupled with the included CSA standard, CSA Z246.2 Emergency Preparedness and Response For Petroleum And Natural Gas Industry Systems, provides the foundation for response to emergencies in the oil and gas sector. [ASF paras. 148–159, 161.]

Although there are several provisions in the Province's existing legislation that may be of doubtful application to a federal undertaking, we have not been asked to opine on the constitutionality of any such provisions. This reference is confined only to the *proposed* Part 2.1 of the *EMA*.

[30] The *Environmental Assessment Act* ("*EAA*") is more specific legislation dealing with "reviewable projects" in the Province, which phrase includes new transmission pipelines as defined in the *Reviewable Projects Regulation*. Such a project requires either an environmental assessment certificate or a determination of the executive director that such a certificate is not required because the project will not have significant adverse environmental, economic, social, heritage or health effects. (ASF para. 468.) Where an assessment certificate is required, the provincial Environmental Assessment Office ("EAO") prepares an assessment report concerning its recommendations, which are then forwarded to the Minister of the Environment and the Minister of Natural Gas Development. After they have considered the assessment report and any other matters relevant to the public interest, the ministers may issue a certificate with or without conditions, refuse to issue the certificate, or order further assessment.

[31] In June 2010, the EAO and the NEB entered into an "equivalency agreement" in which they agreed that any assessment by the NEB of a project would constitute an equivalent assessment under the provincial *EAA*. The agreement contemplated that the governments would promote a co-ordinated approach to "achieve environmental assessment process efficiencies with respect to such Projects". (ASF para. 473.) This agreement was the subject of a largely successful judicial review application in *Coastal First Nations v. British Columbia (Environment) (2016)*, to which I will return below.

The Trans Mountain Pipeline Expansion Project

[32] The TMX project involves 'twinning' the existing Trans Mountain pipeline and modifying and expanding pump stations, storage tanks and dock facilities in British Columbia. It will increase the capacity of the existing pipeline, which has been in operation since 1953 and now transports about 300,000 barrels per day of mainly light and medium crude oil, and refined and semi-refined petroleum products from Sherwood Park, Alberta. (ASF paras. 371–3.) In the past, the pipeline has shipped between 26,000 and 120,000 barrels of heavy crude oil per day. (ASF paras. 381, 383.) After the expansion, the pipeline would transport about 890,000 barrels of petroleum products per day, including approximately 540,000 barrels per day of heavy crude and blended bitumen. (ASF paras. 391–2.) Heavy crude and blended bitumen are not consumed in the Province and are exported in all cases. (ASF paras. 241 and 273.)

[33] To support the increased capacity of the pipeline, Trans Mountain intends to construct approximately 987 km of additional pipeline, to increase the capacity of the Burnaby tank farm by almost 300%, and to update and expand existing dock facilities at Westridge Marine Terminal in Burnaby. (ASF paras. 358–9 and 391.) The additional products will be exported to Washington state via pipeline and other Pacific destinations such as California, Hawaii and Asia by tanker. (ASF para. 389.) The project has the potential to result in a seven-fold increase in tanker traffic off the south coast of British Columbia. (ASF para. 359.)

[34] Although it had applied in late 2013 to the NEB for permission to proceed with the TMX, Trans Mountain also co-operated in the EAO's review process of the project over several years. (According

to the ASF, the EAO did not inform the company that it would require an EAO certificate until mid-March 2016.) Near the end of 2016, the EAO issued its report. The ASF recounts:

> On December 8, 2016, the EAO Executive Director issued its Summary Assessment Report for the TMX Project, in which it summarized: (i) the TMX Project; (ii) the EA processes undertaken federally and provincially; (iii) the key conclusions and recommendations from the NEB Report; (iv) supplemental information provided by TM; (v) the EAO's proposed conditions; and, (vi) the EAO's conclusions.
>
> With respect to the potential for terrestrial and marine spills, the Summary Assessment Report reviewed: (i) the NEB's findings and conclusions in the NEB Report, including findings about the fate and behaviour of spilled oil; (ii) the NEB Conditions related to accidents, malfunctions, emergency preparedness and response; (iii) federal legislative requirements for emergency preparedness and response; (iv) EAO proposed conditions related to emergency and spill preparedness; and, (v) the provincial legislative requirements for spill reporting, preparedness, response and recovery.
>
> The EAO Executive Director recommended that an EAC be issued for the TMX Project, subject to 37 conditions (the "EAC Conditions"). [ASF paras. 480–2.]

[35] On January 10, 2017, the two provincial ministers charged with the review of EAO reports issued an environmental certificate authorizing the Trans Mountain pipeline expansion to proceed under the *EAA*, subject to certain terms. On the next day, the two ministers issued a press release stating in part:

> Today we issued an EA Certificate for the project, understanding that all inter- provincial pipelines are under federal jurisdiction. We have looked at areas where we can improve the project by adding conditions that will build upon those already established by the federal government. [ASF para. 486; emphasis added.]

The then premier, Ms. Clark, announced that the Province would support the project provided five conditions were met. The first of these was the "successful completion of the environmental review process"; the second and third were concerned with "world-leading" responses to and practices for spills on sea and land. Another was that Aboriginal and treaty rights would be addressed. (ASF para. 484.) By this time, Trans Mountain had made considerable progress in meeting various provincial requirements under the *EAA* and regulations administered by the EAO, described at para. 499 of the ASF. These were in addition to various requirements and conditions under the *National Energy Board Act* and related regulations detailed at para. 494.

[36] On May 9, 2017, however, a provincial election returned a new government that had a different view of the project. In August 2017, the Minister of Environment and the Attorney General announced that they had retained counsel to represent the Province in intervening in various petitions for judicial review of decisions taken at the federal level concerning the TMX. (ASF para. 525.) Having received advice, the Minister of Environment told the Legislative Assembly on April 9, 2018 that:

> It became clear, through listening to legal advice, that we did not have the authority to stop a project that had been approved by the federal government within its jurisdiction.
>
> We do have authority to apply conditions that are attached to the environmental assessment, a certificate, and to propose regulations to defend B.C.'s coast, but it is not appropriate to "stop the project" or to delay the project through anything other than even-handed consideration of permit applications. That is what we have tried to do at every step of the way.

> …What we're doing is what is within our jurisdiction and lawful for us to do, and that is do everything we can to defend our coast with the tools available to us, including, as I mentioned earlier, intervening in challenges of the decision-making process that was approved through the NEB and, ultimately, made by the federal government — but not disregarding it, as long as it stands as a legal process subject to a decision by the courts. [British Columbia, Legislative Assembly, *Official Report of Debates (Hansard),* 41st Parl., 3rd Sess., No. 108 (9 April 2018) at 3646–7 (Hon. George Heyman).]

The Constitutional Reference

[37] In April 2018, the new government formulated a proposed amendment to the *EMA* consisting of a Part 2.1 dealing with "hazardous substance permits". It is this proposed legislation that is the subject of the reference made by British Columbia to this court on April 25, 2018 pursuant to the *Constitutional Question Act*. We have attached as Schedule I to these reasons a copy of the proposed Part 2.1, which consists of sections 22.1 to 22.9 and a schedule thereto.

[38] Section 22.1 states the purposes of Part 2.1 — the protection of the environment, the health and well-being of British Columbians and their communities from the adverse effects of hazardous substances, and the implementation of the 'polluter pays' principle.

[39] Mr. Gall on behalf of Alberta emphasized the statement in s. 22.2 that the definition of "permit" in s. 1(1) of the *EMA* does not apply to a hazardous substance permit. From this counsel infers that the permitting process and the conditions to be attached to hazardous permits are to be different in kind from those already contemplated by the *EMA*.

[40] Section 22.3 of the proposed legislation provides:

> (1) In the course of operating an industry, trade or business, a person must not, during a calendar year, have possession, charge or control of a substance listed in Column 1 of the Schedule, and defined in Column 2 of the Schedule, in a total amount equal to or greater than the minimum amount set out in Column 3 of the Schedule unless a director has issued a hazardous substance permit to the person to do so.
>
> (2) Subsection (1) does not apply to a person who has possession, charge or control of a substance on a ship.

Column 3 of the Schedule, headed "minimum amount of substance" states:

> The largest annual amount of the annual amounts of the substance that the person had possession, charge or control of during each of 2013 to 2017.

[41] The only "substance" listed in Column 1 of the Schedule is "heavy oil", which is defined according to density in Column 2. The definition includes most forms of heavy crude oil and all bitumen and blended bitumen products. After extraction, bitumen is either upgraded to synthetic crude oil or blended with diluent to facilitate transportation via pipeline, rail or truck. (ASF paras. 4–6 and 8–9.) It is commonly understood that heavy crude, bitumen and blended bitumen may sink or submerge in water. It is perhaps unnecessary to add that oils that sink or submerge are more difficult to clean up than oils that float. Heavy oils are flammable when first spilled, or if oxygen is introduced to a storage container. Storage safety risks include 'boil-overs', flash fires, vapour cloud explosions, and pool fires.

(ASF paras. 29–31.) Heavy oils are toxic, and if spilled can have long-lasting negative effects on human health, fish, wildlife, Indigenous lands and resource use, wetlands, parks and other protected areas, and urban water supplies. These are detailed in the ASF at paras. 32–52. It can take more than a decade for groundwater contaminated by heavy oil to be restored to applicable safety standards for agricultural or drinking use. (ASF para. 50.)

[42] Effectively, the requirement for a hazardous substance permit — which appears to be an annual requirement — applies only to a person who in the course of a business or industry has possession, charge or control of heavy oil that exceeds the largest amount that person had in the Province in any of the years 2013 to 2017. (The Province referred to this as the "Substance Threshold".) If a person had *no* heavy oil in the Province in any of those years, his or her possession or control of *any* heavy oil in the Province in future would be prohibited unless a permit were obtained. Part 2.1 does not apply to a substance on a ship; nor is it likely the Province could purport to legislate on that subject, given the federal jurisdiction over "Navigation and Shipping" under s. 91(10) of the *Constitution Act*.

[43] Section 22.4 provides that a "director" (as defined in s. 1(1) of the *EMA*) "may" on application issue a hazardous substance permit, and before doing so "may" require the applicant to provide information relating to risks to human health or the environment that are posed by a release of the substance and "the types of impacts that may be caused by a release of the substance and an estimate of the monetary value of those impacts". An applicant must also demonstrate to the director's satisfaction that appropriate measures are in place to "prevent a release of the substance" and ensure that any release can be minimized through early detection and response. The applicant must have sufficient capacity, including dedicated equipment and personnel, to be able to respond effectively to a release in the manner and within the time specified by the director. The applicant may be required to post security or demonstrate that it has financial resources to respond to a release of the substance.

[44] The director may also require an applicant to establish a fund or make payments to local governments or First Nations to ensure they have the capacity to respond to a release of the substance; and may require the applicant to agree to compensate any person, local government or First Nations government for damages resulting from a release.

[45] The director may attach conditions to a hazardous substance permit, and may, where such conditions are not complied with, suspend a permit or cancel it by notice served on the holder of the permit. Such conditions must be in respect of the protection of human health or the environment or the "impacts of a release of the substance." The Minister of Environment and Climate Change Strategy may take steps to obtain an order of the Supreme Court of British Columbia restraining the carrying on of an activity or operation in contravention of s. 22.3(1); under s. 22.8, a person in contravention may be prosecuted for an offence and be liable to a fine not exceeding $400,000 or imprisonment for not more than six months, or both.

[46] As will be discussed below, the discretion given to the director under Part 2.1 is very broad indeed — a fact that leads those challenging its constitutionality to suggest that it may be intended to

give cover to a decision motivated by an uncompromising opposition to the TMX project *under any circumstances*. In response to this concern, Mr. Arvay argued, correctly, that the director would have to make his or her decision in good faith for reasons related to the express purposes of Part 2.1. (See *Roncarelli v. Duplessis (1959)* at 140; *C.U.P.E. v. Ontario (Minister of Labour) (2003)* at paras. 91–4; *McLean v. British Columbia (Securities Commission) (2013)* at paras. 65–6.) He suggested that in practical terms, the director would likely communicate with the NEB and "work out" reasonable conditions acceptable to both. As we have seen, the EAO and NEB were already co-operating to a considerable extent on the TMX project in the few years leading up to the change of government.

The Three Questions

[47] The three questions referred by the Province to this court for hearing and consideration were as follows:

> 1 Is it within the legislative authority of the Legislature of British Columbia to enact legislation substantially in the form set out in the attached Appendix?
>
> 2 If the answer to question 1 is yes, would the attached legislation be applicable to hazardous substances brought into British Columbia by means of interprovincial undertakings?
>
> 3 If the answers to questions 1 and 2 are yes, would existing federal legislation render all or part of the attached legislation inoperative?

British Columbia and interested parties supporting its position would answer the questions 'yes, yes and no' respectively; Canada and parties supporting its position would answer them 'no, no and yes'.

Policy Arguments

[48] Mr. Arvay for the Province began his argument in this court by referring to various 'policy' factors that in his submission should inform any consideration of the constitutional validity of the proposed Part 2.1. Many of these factors were discussed by Madam Justice Koenigsberg in *Coastal First Nations (2016)*, which Mr. Arvay commended to us as a "paradigm" for this case. In *Coastal First Nations (2016)*, the petitioners challenged a decision on the part of the EAO to enter into an equivalency agreement with the NEB in connection with the Northern Gateway pipeline project. The agreement had the effect of removing the need for an environmental assessment certificate under the *EAA* once a corresponding approval was obtained from the NEB. The challenge succeeded in large part: the Court declared that the agreement was invalid because it amounted to an abdication by the Province of its responsibility to assess the project under the *EAA* and to issue or withhold a permit; and that the Province had failed to consult the Gitga'at First Nation. No appeal was taken from the judge's order.

[49] As far as the constitutionality of the application of the *EAA* to the Northern Gateway pipeline was concerned, Koenigsberg J. deferred decision, ruling that until it was known what conditions, if any, the Province would impose on the project, it would be premature to "make a finding based on hypothetical conditions". (At para. 47.) In her words:

> ... if it is determined that British Columbia's environmental assessment regime is valid with respect to regulating the Project then that is the end of the constitutional analysis until actual conditions have attached to an EAC [Environmental Assessment Certificate] and are brought forward for constitutional consideration. [At para. 48; emphasis added.]

[50] It was unassailable, she said, that provincial interests would be "substantially affected" by the construction of the Northern Gateway project, and although it was correct to say the pipeline was interprovincial, the majority of it lay within British Columbia. She continued:

> This Project is clearly distinguishable from past division of powers jurisprudence dealing with aviation or telecommunications; the proposed Project, while interprovincial, is not national and it disproportionately impacts the interests of British Columbians. To disallow any provincial environmental regulation over the Project because it engages a federal undertaking would significantly limit the Province's ability to protect social, cultural and economic interests in its lands and waters. It would also go against the current trend in the jurisprudence favouring, where possible, co-operative federalism: *Canadian Western Bank* at paras. 24, 42; *COPA* at para. 44.
>
> …
>
> ... NGP's position goes so far as to assert that the entire *EAA* is of no force and effect in relation to an interprovincial undertaking. It argues that because s. 8 prohibits the operation of any project unless it has received an EAC in accordance with s. 17, and pursuant to s. 17 the Minister can refuse to issue a certificate, the *EAA* is invalid because it is beyond the jurisdiction of the Province to refuse the Project, which would be the effect if it used its discretion and refused to issue an EAC. While I agree that the Province cannot go so far as to refuse to issue an EAC and attempt to block the Project from proceeding, I do not agree with the extreme position of NGP that this invalidates the *EAA* as it applies to the Project.
>
> As the Court held in *Canadian Western Bank*, at para. 29, the doctrine of pith and substance "is founded on the recognition that it is in practice impossible for a legislature to exercise its jurisdiction over a matter effectively without incidentally affecting matters within the jurisdiction of another level of government." It is not enough for NGP to argue that s. 17 of the *EAA* affects matters beyond the Province's jurisdiction. As long as the "dominant purpose" of the legislation is *intra vires*, any secondary effects are not relevant to the question of constitutional validity: *Canadian Western Bank* at para. 28. The Province has a constitutional right to regulate territorial environmental impacts. Since it is established law that regulation of the environment is shared jurisdiction among all levels of government, it flows logically that the *EAA*, whose purpose is to regulate environmental concerns in British Columbia while advancing economic investment in the Province, is valid legislation, even where it applies to an interprovincial undertaking. [At paras. 53, 55–6; emphasis added.]

[51] I should not be taken as necessarily agreeing with the Court's reasoning in *Coastal First Nations (2016)*. In particular, its characterization of the *EMA* as fully applicable to the Northern Gateway project, its emphasis on the portion of the pipeline that lay in the Province, its description of the federal legislation as "merely permissive" and its rationale for failing to decide the issues of paramountcy and interjurisdictional immunity that were before the Court are, with respect, questionable. Nor did the Court grapple with the nature and scope of s. 92(10) of the *Constitution Act.* As seen earlier, the Supreme Court has, notwithstanding the attraction of co-operative federalism, recently reminded us that "the 'dominant tide' of flexible federalism" cannot sweep the allocation of powers in ss. 91 and 92 of the *Constitution Act* "out to sea."

[52] Mr. Arvay expanded on the comments of Koenigsberg J. in his submissions. In particular, he emphasized:

1. The importance of environmental stewardship to both levels of government. In Mr. Arvay's phrase, the environment is "too important" to be allocated exclusively to one level or the other. The importance of environmental protection has been recognized by many Canadian courts: see in particular *Castonguay Blasting Ltd. v. Ontario (Environment) (2013)* at para. 9; *Oldman River (1992)* at 16–17; *Ontario v. Canadian Pacific Ltd. (1995)* at para. 55; *Hydro-Québec (1997)* at paras. 85–6 and 127; *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town) (2001)* ("*Spraytech (2001)*") at para. 1. This recognition, however, does not assist in determining the "true character" of environmental legislation as belonging to any particular head of power in the *Constitution Act*.

2. The fact that British Columbia is "disproportionately" at risk of environmental harm. Counsel notes that approximately two-thirds of the length of the TM pipeline lies in British Columbia; that the proposed pipeline corridor crosses 538 wetlands in the Province; and that at its western end, it passes through urban and environmentally sensitive areas to the Westridge Marine Terminal where the heavy oil would be loaded onto tankers, or piped to Washington state. At that point, of course, the proposed Part 2.1 of the *EMA* would cease to apply, but given the particular qualities of heavy oil, there are obviously concerns about marine spills.

3. The principle of "subsidiarity". This was described by L'Heureux-Dubé J. in *Spraytech (2001)* at para. 3:

> The case arises in an era in which matters of governance are often examined through the lens of the principle of subsidiarity. This is the proposition that law-making and implementation are often best achieved at a level of government that is not only effective, but also closest to the citizens affected and thus most responsive to their needs, to local distinctiveness, and to population diversity.

On the other hand, the Supreme Court has also said that subsidiarity cannot be used to alter the division of powers: see *Reference re Assisted Human Reproduction Act (2010)* at para. 72; and *Canada Post Corporation v. Hamilton (City) (2016)* at para. 84.

4. The "precautionary principle." In *Spraytech (2001),* the Court described this as a principle of international law that, at the time, had been incorporated in the *Oceans Act* and in the *Canadian Environmental Protection Act*, *1999*. The principle was defined in the *Bergen Ministerial Declaration on Sustainable Development* (1990) as follows:

> Environmental measures must anticipate, prevent and attack the causes of environmental degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation. [*Spraytech*, at para. 31; emphasis added.]

See also *Castonguay Blasting (2013)* at para. 20; *Weir v. Environmental Appeal Board (2003)* at paras. 33–8.

> 5. The desirability of collaboration and co-operation between the provincial and federal levels of government. Koenigsberg J. touched on this value in *Coastal First Nations (2016)*. Whilst acknowledging that "if the Province, in the exercise of its jurisdiction under s. 17 [of the *EAA*], were to refuse outright any interprovincial project, the effect of s. 8 would ensure the conditions for a finding of *ultra vires*, or unconstitutionality would be plain", she stated that the relevant sections of the *EAA* were clearly aimed at allowing a "co-operative approach" between overlapping environmental jurisdictions. She saw the equivalency agreement as a "manifestation of carrying out this concept of co-operative federalism."
>
> 6. Prematurity. Two of the Court's findings in *Coastal First Nations (2016)* — that nothing in British Columbia's environmental protection regime amounted to a prohibition or rendered the Northern Gateway project inoperative, and that the federal environmental laws in question were "merely permissive" in that the project was "permitted to proceed as long as it complied with the federal conditions" — led to the conclusion that unless and until specific conditions were imposed on the certificate required under s. 8 of the *EAA*, questions of paramountcy and interjurisdictional immunity could not be determined. While the federal law was saying "Yes, with conditions" to the project, it was possible the Province could say "Yes, with *further* conditions." (Emphasis added; see paras. 74–6.)

[53] The Province advanced arguments similar to those accepted in *Coastal First Nations (2016)*, with respect to Part 2.1 and the TMX project in this reference. In Mr. Arvay's submission, it would be premature for us to rule on the constitutionality of the proposed legislation unless and until the director refused to grant a hazardous substance permit or imposed conditions on the granting of one. It should not be assumed, he contended, that the director would exercise his or her discretion so as prohibit the project outright or so as to "impair" the "core" of the federal power over any specific federal undertaking.

[54] I agree it would be wrong to assume any bad faith or improper motive on the part of the Province or the director in any future exercise of the discretion given by s. 22.4 of Part 2.1. However, this part of the Province's argument, which uses the language of interjurisdictional immunity, assumes that the "pith and substance" of Part 2.1, like that of the *EMA* itself, is the protection of the Province's environment in the general sense and falls under provincial authority; or alternatively, that it 'complements' the *EMA* and can be upheld as 'ancillary' thereto. These assumptions are challenged by Canada and several of the interested parties in this reference.

Characterization

[55] Canada and the supporters of its position argue that Part 2.1 is aimed specifically at the TMX project and crosses the line between "incidentally affecting" and impermissibly regulating the expansion and operation of the pipeline. Unlike the provinces of Alberta and Saskatchewan, Canada did not go so far as to contend that Part 2.1 is "colourable" in the pejorative sense; but Canada relied

on extrinsic evidence as well as the text of Part 2.1 for the proposition that it was "designed primarily to frustrate the construction and operation of the TMX Project, an interprovincial undertaking whose purpose is to transport increased quantities of heavy oil produced in Alberta through BC for export overseas."

[56] In Canada's submission, then, the proposed legislation is both targeted and selective. On its face, it purports to "grandparent" carriers of heavy oil such that Part 2.1 applies only to increases in the quantity such carriers may possess in the Province after 2017. In reality, there *are* no carriers or 'possessors' of heavy oil in the Province other than Trans Mountain and certain rail carriers. British Columbia produces only 1.3% of Canada's annual crude oil (as compared with Alberta, which produces 77% and Saskatchewan, which produces 14%); and the Province produces only 2.6% of all the light and medium crude oil produced in Canada (ASF paras. 221–4.) There are no refineries in British Columbia that have the ability to process heavy oil (ASF para. 241) and the Trans Mountain pipeline system and its two refineries are operating at capacity (ASF para. 248.) Thus Part 2.1 would (leaving aside small amounts transported by rail at present) *actually apply* only to Trans Mountain's heavy oil, in transit from Alberta in Trans Mountain's expanded pipeline. In the words of Canada's factum:

> …The Proposed Legislation… would apply only to businesses that transport a specific product – heavy oil – that originates from outside of BC and transits through the province on its way to being exported internationally. It would apply only to businesses who increase their volumes of heavy oil after 2017. As such, the Proposed Legislation selectively purports to provide environmental protection in respect of just a single type of hazardous substance, and then only for quantities of that substance that are greater than what was transported or stored prior to 2017, and not in cases where that substance is on a ship.

[57] Combined with the fact that Part 2.1 would apply only to additional volumes of heavy oil in the expanded Trans Mountain pipeline above historic amounts, the (admissible) evidence supports Canada's characterization of the proposed legislation as aimed at the TMX project. From this proposition, it is a short step to Canada's argument that the immediate purpose and undeniable effect of Part 2.1 is to provide a means by which the Province may impede additional heavy oil originating in Alberta from being transported through British Columbia generally, and thus "frustrate" the project in particular. In constitutional law terms, Canada says the pith and substance of the proposed legislation is the "regulation of interprovincial undertakings that effect oil transportation between provinces, specifically those like the TMX Project which are designed to ship increased quantities of heavy oil after 2017."

[58] For its part, the Province submits that the purpose of the proposed legislation is not to regulate an interprovincial pipeline but to regulate the release of hazardous substances into the environment — part of what Mr. Arvay described as the Province's "core" or "plenary" jurisdiction with respect to property and civil rights in the Province — and that its effect on the Trans Mountain pipeline is merely incidental. He referred us to instances in which provincial environmental laws have been upheld in their application to federal undertakings. These cases will be discussed below.

[59] Mr. Arvay acknowledged (as did the Court in *Coastal First Nations (2016)*) that the Province could not, without more, simply prohibit an interprovincial undertaking from operating in the Province. However, he asserted that requiring interprovincial undertakings that wish to transport heavy oil in British Columbia, to satisfy reasonable conditions (attached to the required permit) relating to the release of deleterious substances into the environment may be distinguished from a 'blanket' prohibition. Thus he acknowledged that a prohibition (or suspension) *could* occur if Trans Mountain failed to comply with such conditions.

[60] The Province also says that even if the proposed legislation were characterized as being "in relation to" a federal head of power, it should be upheld under the ancillary powers doctrine. In Mr. Arvay's submission, the proposed amendment serves the same broad goals as the rest of the *EMA*, makes use of the same administrative decision-making structure (an assertion challenged by Canada), and regulates the same kind of hazardous substances as other parts of the statute. He described Part 2.1 as 'complementing' the *EMA* and *EAA* by "providing tools for addressing the harmful effects of accidental releases that are similar to those utilized for managing the impacts of intentional releases". In summary, he submits that the amendments are "rationally and functionally related" to the existing provincial legislation. (See *Québec v. Lacombe (2010)* at paras. 47–8; *Reference re Assisted Human Reproduction Act (2010)* at paras. 129–132.)

[61] Alternatively, the Province submits that laws aimed at minimizing the accidental release of harmful substances into the environment should be viewed as having a "double aspect":

> When the release is from a federally regulated undertaking, the federal government has jurisdiction over the *discharger* and can regulate such undertakings *qua* undertakings, and in doing so may impose conditions regarding environmental protection. But the province has jurisdiction over the land, water and air into which the discharge occurs, and can therefore also regulate in relation to accidental releases of dangerous substances as part of its primary jurisdiction over environmental protection. The release of Heavy Oil substances from pipelines, railways and trucks is at least as significant for the province as for the federal government. Protecting persons and property from intentional and accidental releases of hazardous substances is at the core of property and civil rights.

Applicable Law

Background of Sections 91 and 92

[62] Fortunately, there is a large body of case law to assist in resolving debates of this kind. I do not propose here to carry out an historical review of *all* the leading cases dealing with the validity or applicability of provincial environmental laws to federal undertakings such as railways and pipelines. (Given the importance of railways in Canada's birth and evolution, this would be a monumental undertaking. Other forms of interprovincial transport, aeronautics and communications have become just as important in the modern context.) Although I have considered all the authorities provided by counsel, I will refer in these reasons only to the most relevant.

[63] Counsel for the province of Saskatchewan suggested, however, that it would be useful at the outset to recall *why* Parliament had been given exclusive authority over interprovincial and

international undertakings at the beginning of Confederation. Mr. Irvine drew our attention to remarks made by both the premier and deputy premier of the then Province of Canada in the *Confederation Debates* of 1865 concerning the allocation of "all the great questions which affect the general interests of the Confederacy as a whole" to the federal government. John A. Macdonald, then deputy premier, stated:

> ... any honorable member on examining the list of different subjects which are to be assigned to the General and Local Legislatures respectively, will see that all the great questions which affect the general interests of the Confederacy as a whole, are confided to the Federal Parliament, while the local interests and local laws of each section are preserved intact, and entrusted to the care of the local bodies….
>
> It is provided that all "lines of steam or other ships, railways, canals and other works, connecting any two or more of the provinces together or extending beyond the limits of any province," shall belong to the General Government, and be under the control of the General Legislature. In like manner "lines of steamships between the Federated Provinces and other countries, telegraph communication and the incorporation of telegraph companies, and all such works as shall, although lying within any province, be specially declared by the Acts authorizing them to be for the general advantage," shall belong to the General Government. For instance the Welland Canal, though lying wholly within one section, and the St. Lawrence Canals in two only, may be properly considered national works, and for the general benefit of the whole Federation. [*Province of Canada*, *Parliamentary Debates on the Subject of The Confederation of the British North American Provinces*, 8th Parl., 3rd Sess., (6 February 1865), at 40; emphasis added.]

In the same debate, the premier, Sir E.-P. Taché, emphasized that by exercising jurisdiction over these matters, the federal government could ensure year-round access to international markets for the many products that would be exported by Canada in the ensuing decades. (*Parliamentary Debates*, at 6.)

[64] The characterization of a "matter" as relating to an enumerated power in s. 91 or 92 of the *Constitution Act*, then, is not only a question of semantic categorization; it reflects the decisions made by the framers of Confederation as to what laws should be considered by Parliament in the *national* interest, and what should be decided by provincial legislatures on the basis of *local* interests. This was recognized by the Supreme Court nearly 150 years later in *Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters (2009)*, where the majority observed:

> The fact that works and undertakings that physically connected the provinces were subject to exceptional federal jurisdiction is not surprising. For example, it would be difficult to imagine the construction of an interprovincial railway system if the railway companies were subject to provincial legislation respecting the expropriation of land for the railway right of way or the gauge of the line of railway within each province. If the legislature of the province did not grant railway companies the power of expropriation or if they refused to agree to a uniform gauge, the development of a national railway system would have been stymied. [At para. 37; emphasis added.]

At the same time, the majority recognized that the importance of federal works and undertakings such as railways to the new nation did not displace the fact that at the time of Confederation, "jurisdictional diversity" was seen generally as the path to future economic development. (At para. 39.)

The Case-Law

[65] I turn to the case-law dealing specifically with the applicability of provincial laws to interprovincial undertakings. Although a court's first task in such cases is to determine the pith and substance of the provincial law at issue, some of these cases deal also with interjurisdictional immunity, or even seem to combine the two concepts. British Columbia relied heavily in this part of its submission on the oldest case to which we were referred, *Canadian Pacific Railway Company v. Corporation of the Parish of Notre Dame De Bonsecours (Quebec) (1899)*. There, an interprovincial railway was held to be subject to a requirement of the "municipal code" of Québec that it remove rubbish from a ditch forming part of the railway company's "authorized works." Lord Watson for the Judicial Committee of the Privy Council added, however, that it would not be open to the province to regulate the "structure" of such ditch. (At 373.)

[66] Later in the same year, the Committee decided, in *Madden v. Nelson and Fort Sheppard Railway Co. (1899)*, that it was *not* open to British Columbia to pass legislation expressly requiring that *federally-regulated railway companies* erect fencing, failing which they would be "held responsible for cattle injured or killed on their railways by their engines or trains." The Committee distinguished *Bonsecours (1899)* on the basis that in *Madden (1899)* there was an "actual provision that there shall be a liability on the [interprovincial] railway company unless they create such and such works upon their roadway. That is manifestly and clearly beyond the jurisdiction of the Provincial Legislature." (At 629.)

[67] Both *Bonsecours* and *Madden* were referred to by the Supreme Court of Canada in a 1979 case, *Construction Montcalm Inc. v. Minimum Wage Commission*. There the Court ruled that a Québec company working on the construction of an airport under contract with the federal Crown was subject to the minimum wage legislation of Québec. In the course of his reasons for the majority, Beetz J. suggested that in their references to "regulating the construction of a railway", the Judicial Committee had had in mind:

> ... those directions which result in the structural alteration of a federal work, or in the creation of new works, or, presumably and *a fortiori,* in the prohibition of new works. But, as is shown by the *Notre-Dame de Bonsecours* case, at p. 374, provincial law applies even if it affects "the physical condition" of a railway ditch, as long as "the structure of the ditch" remains intact. [At 773; emphasis added.]

The impugned legislation in *Montcalm (1979)* did not purport to regulate the structure of runways, nor prevent them from being properly constructed in accordance with federal specifications; nor was the "physical condition" of the run-ways affected by the wages and conditions of employment of the construction workers. Beetz J. continued:

> The *Notre-Dame de Bonsecours* case is one of a line of cases which have established the general principle that federal works, undertakings, services and businesses remain subject to provincial law as long as provincial law does not reach them *quâ* federal organizations, that is, as long as provincial law does not regulate them under some primary federal aspect. Thus was it held in *Workmen's Compensation Board v. Canadian Pacific Railway Company* that a federal railway is subject to a provincial scheme providing for the compensation of workers accidentally injured in the course of their employment. The general principle was qualified in this sense that the application of provincial law must not interfere with the operation of a federal undertaking ...

> or result in its dismemberment *(Campbell-Bennett Limited v. Comstock Mid-western Limited)*. [At 774; emphasis added.]

[68] In *Attorney-General of Ontario v. Winner (1954)*, the Privy Council was asked whether various provisions of New Brunswick's *Motor Vehicle Act* could apply to the operator of an interprovincial (and international) bus line. The *Act* required the operator to obtain a license to transport passengers through New Brunswick and prohibited it from picking up and dropping off passengers within the province. Their Lordships ruled that the statute exceeded the jurisdiction of the province, reasoning as follows:

> The Province has indeed authority over its own roads but that authority is a limited one and does not entitle it to interfere with connecting undertakings. It must be remembered that it is the undertaking not the roads which come within the jurisdiction of the Dominion, but legislation which denies the use of provincial roads to such an undertaking or sterilizes the undertaking itself is an interference with the prerogative of the Dominion.
>
> Whatever provisions or regulations a Province may prescribe with regard to its roads it must not prevent or restrict interprovincial traffic. As their Lordships have indicated this does not in any way prevent what is in essence traffic regulation but the provisions contained in local statutes and Regulations must be confined to such matters.
>
> In the present case they are not so confined. They do not contain provisions as to the use of the highways—they are not even general Regulations affecting all users of them. They deal with a particular undertaking in a particular way and prohibit Mr. Winner from using the highways except as a means of passage from another country to another state. [At 677; emphasis added.]

(As noted earlier, "sterilization" was the test applied at the time for the application of what is now called interjurisdictional immunity.)

[69] I note that the regulation of highway traffic is now recognized as a subject of the "double aspect" doctrine: see para. 16 above. Mr. Irvine on behalf of Saskatchewan drew our attention to *Coughlin v. The Ontario Highway Transport Board (1968)*, where the Court gave its blessing to an arrangement under which, at the request of Ontario, Parliament conferred on a provincial board the power to regulate interprovincial motor carriage. Ritchie J. in dissent noted at 578 that Canada's *Motor Vehicle Transport Act* had been assented to by Parliament within four months of the *Winner* decision.

[70] *Winner* was distinguished by the Ontario Court of Appeal in *R. v. TNT Canada Inc. (1986)*. In that instance, a regulation made under the *Environmental Protection Act* of Ontario requiring any person managing PCB waste to obtain a certificate before transporting such waste in the province, was held to apply to an interprovincial trucking company. Applying what is now interjurisdictional immunity, the Court found that the legislation did not impair the company's "basic functions in any degree" nor "sterilize" the federal undertaking. In the words of the Court:

> Rather the legislation has been enacted from the interrelated provincial aspects of regulating the use of the provincial highways for the protection of the environment (land, air, water) and for the safety, health and welfare of the province's residents. ...
>
> As stated earlier, the Act and O. Reg. 11/82 are of general application. The legislation does not single out interprovincial undertakings or a particular interprovincial undertaking, as was done in *A.-G. Ont. v. Winner, supra*, but applies to all persons in Ontario handling PCB waste. In the same way that the province can regulate speed limits and the mechanical conditions of vehicles on the roads of the province for the protection and safety of other highway users, it can set

> conditions for the carriage of particular toxic substances within the province, provided that the conditions do not interfere in any substantial way with the carrier's general or particular carriage of goods, and are not in conflict either directly or indirectly with federal legislation in the field. [At 416; emphasis added.]

[71] Provincial environmental legislation was also at issue in a more modern decision applying *Bonsecours (1899) — Ontario v. Canadian Pacific Ltd. (1995)*. For very brief reasons, the Supreme Court of Canada there held that the railway company was subject to a provision of Ontario's *Environmental Protection Act* that prohibited pollution of the natural environment "for any use that can be made of it". The railway had carried out "controlled burns" along its line, allowing dense smoke to escape onto adjacent properties, and thus committed an offence under the statute.

[72] The 1993 decision of the Ontario Court of Appeal in the same case indicates that the CPR had taken the position that the entire *Environmental Protection Act* of the province had "no application" to it because it was a federal undertaking. (At 261.) The Court of Appeal noted that undertakings within the exclusive jurisdiction of Parliament were usually subject to provincial statutes of general application, the only exception to this rule being "when the provincial statute taken as a whole bears essentially upon the management and control of the undertakings to which the provisions of the statute are directed." Accordingly, *Bell Canada (1988*), discussed below, did not apply. (At 265.) The Supreme Court of Canada did not expressly adopt the Court of Appeal's reasoning on appeal in *Ontario v. CPR (1995)*, being content simply to cite *Bonsecours (1899)* as governing.

[73] In 1988 the Supreme Court of Canada decided an important trilogy of cases, *Alltrans Express Ltd. v. British Columbia (Workers' Compensation Board)*, *Canadian National Railway Co. v. Courtois*, and *Bell Canada*. In each of them, the Supreme Court emphasized the "exclusive" nature of the scope of the federal jurisdiction in respect of interprovincial undertakings.

[74] In *Alltrans (1988)*, a company that carried on an interprovincial and international trucking service sought a declaration that it was not subject to a regulation made by the British Columbia Workers' Compensation Board. The regulation required that workers establish and maintain a safety committee and wear adequate footwear when entering the company's vehicle repair premises. The Supreme Court allowed an appeal from *this* court and granted the declaration — even though the *compensation* scheme for workers injured on the job *was* applicable to the company. The Court distinguished between the "preventive scheme" and the "compensation scheme" in the provincial statute, observing:

> ... Unlike the preventive regime, the compensation scheme does not relate to working conditions, labour relations or the management of an undertaking. Instead it represents a statutory regime of collective no-fault liability designed to replace a private law regime of individual liability founded upon fault. This differing characterization allows us to sever the compensation regime from the preventative regime, even when they are in the same statute, in order to properly focus on the rules which do and do not apply to federal undertakings. [At 912.]

[75] In *CNR v. Courtois (1988)*, the Court had to determine the constitutionality of an inquiry commenced by the province of Quebec into the safety practices of the railway following a collision

between two trains in the province. The Court found that the impugned provisions of the Quebec statute, because of their "preventive" nature, regulated "directly and massively, the working conditions, labour relations and management of the undertakings to which [the statute] applies and that for these reasons it is inapplicable to federal undertakings." (At 890.) The Court declined to distinguish between the inquiry itself and remedial orders (such as a subpoena) that might be issued under the provincial legislation, seeing all of these aspects as part of the "preventive means" ordinarily resorted to in provincial inquiries.

[76] The leading case of the trilogy, *Bell Canada (1988),* involved an employee of Bell Canada, a telecommunications undertaking incorporated by special Act of Parliament. The employee was pregnant and sought to invoke certain provisions of a Québec statute regarding occupational health and safety, to obtain a re-assignment of her duties. The employer objected that an arbitrator's decision in her favour under the provincial statute was *ultra vires* and could not be set up against the company. The majority of the Court acknowledged that the "aim" of the provincial statute was the promotion of the health, safety and physical well-being of workers – normally a field within provincial authority. Nevertheless, this "ultimate purpose" was found not to justify "the specific means used to attain that purpose." In the majority's view, by entering the field of accident prevention in the workplace and using means such as "protective re-assignment, detailed regulations, inspection and remedial orders", the province "could not have failed" to:

> ….enter directly and massively into the field of working conditions and labour relations on the one hand and, on the other — though these are two elements of the same reality — into the field of the management and operation of undertakings. In so doing, the legislator precluded itself from aiming at and regulating federal undertakings by the *Act*. [At 798.]

[77] At 837–845, Beetz J. for the Court responded to criticisms that in *Bell (1966)*, the Court had erred in failing to apply the double aspect principle. (See especially Hogg, 2nd ed., at 329–32, 465–6.) The critics, Beetz J. said, had failed to define the content of the *exclusive* authority of the federal government over federal undertakings. In his analysis:

> This is necessary because the effect of s. 91(29) and the exceptions in s. 92(10) is to create exclusive classes of subject, those of federal undertakings, to which a basic, minimum and unassailable content has to be assigned to make up the matters falling within these classes. ... how can the exclusive power to legislate as to management of an undertaking not include the equally exclusive power to make laws regarding its labour relations? To deny this, as the critics have done, is to strip the exclusive federal power of its primary content and transform it simply into a power to make ancillary laws connected to a primary power with no real independent content, apart from the power to regulate rates and the availability and quality of services such as telephone services or railway services. The latter undoubtedly fall within the exclusive classes of subject represented by such federal undertakings, but there is nothing in the constitutional provisions, rules or precedents to indicate that the exclusive legislative authority of Parliament must or may be confined to so narrow a field. Indeed, rates and the availability and quality of services are inseparable from the wage scale that the undertaking must pay, the availability of its manpower, leave, vacation—in short, working conditions. ... [At 839–40; emphasis added.]

[78] The Court disagreed with the idea (which had been adopted by *this* court in *Alltrans (1988)* that certain safety rules promulgated by the Workers' Compensation Board applied to an interprovincial trucking business because the regulations were not severable from the workers' compensation

scheme. The Supreme Court in *Bell Canada (1988)* described the distinction as "impossible" in that the *Workers Compensation Act* "is considered differently depending on whether it is viewed from the standpoint of employer-employee relations (labour relations) or of the employee alone (his health and safety)." In the Court's analysis:

> The provisions of the *Act* represent working conditions for workers as much as for employers, in view of the correlation between their rights and their obligations. The health and safety of workers are no more than a purely nominal "aspect" and a goal that cannot be attained except by means of a labour relations system based on reciprocal rights and obligations of employers and workers. Working conditions remain a global concept which cannot be divided, and the *Act* treats them as such. [At 854; emphasis added.]

Ultimately, the double aspect theory asserted by Québec in *Bell Canada (1988)* was said to have been based on a confusion between a "matter" (labour relations) and a head of power (federal undertakings). That theory disregarded "the fundamental or principal content that must be given to the federal power" and 'stripped' that power of its content. (At 855.)

[79] The Court also rejected an argument that it would always be open to Parliament to protect federal undertakings by exercising its ancillary powers or applying the paramountcy principle. In the Court's analysis, that argument relied on a "spirit of contradiction between systems of regulation, investigation, inspection and remedial notices" that are complex, specialized and highly detailed. In the words of Beetz J.:

> A division of jurisdiction in this area is likely to be a source of uncertainty and endless disputes in which the courts will be called to decide whether a conflict exists between the most trivial federal and provincial regulations, such as those specifying the thickness or colour of safety boots or hard hats.
>
> Furthermore, in the case of occupational health and safety, such a twofold jurisdiction is likely to promote the proliferation of preventive measures and controls in which the contradictions or lack of co-ordination may well threaten the very occupational health and safety which are sought to be protected. [At 843; emphasis added.]

[80] The conclusion that the legislation in question related to an "exclusively federal field" made it unnecessary for the Court to go on to consider the question of impairment of federal undertakings. Beetz J. stated:

> … precisely because it must be held that the *Act* encroaches on a field that falls within the exclusive jurisdiction of Parliament and is, for this reason, not applicable to federal undertakings, it is not relevant whether the *Act* impairs or not the operations and functioning of Bell Canada and Canadian National. It suffices that the application of the *Act* bears upon the undertaking in what makes it specifically of federal jurisdiction for that undertaking to fall outside the ambit of this legislation. The same must be said of the Regulations in *Alltrans*. [At 855–6; emphasis added.]

[81] Nevertheless, Beetz J. went on to deal with the "impairment of federal undertakings" beginning at 855 and in particular, Quebec's argument that the application of the health and safety legislation would not "impair" Bell Canada's telecommunications enterprise. He traced the development of the concept of impairment, from decisions of the Privy Council summarized by Chief Justice Laskin in *Natural Parents v. Superintendent of Child Welfare (1976)* at 761–2. From there the test of

"sterilization" had developed (originally in connection with the powers of federally-incorporated corporations) and in Beetz J.'s analysis had been "transposed to the question of whether federal undertakings were subject to provincial statutes of general application", as illustrated by *Winner (1954)* and *Campbell-Bennett v. Comstock Midwestern Ltd. (1954)*. He noted that "impairment" can cover a wide variety of effects, ranging from "minor inconvenience" to "major impairment":

> ... a range of remedial orders may be imagined that would have the most minimal or the greatest impact on the undertaking. A remedial order directing the repair or replacement of a defective electric wire may only involve an expenditure of a few dollars. But an order directing that the undertaking immediately replace equipment that may be old or new, but that is regarded as dangerous, and is worth hundreds of thousands or even millions of dollars, may depending on the circumstances impair the operations of the undertaking or, at the very least, affect vital aspects of the federal undertaking and even, as in the case at bar as well as in *Canadian National*, affect the federal work which is the infrastructure of the undertaking. [At 865–6; emphasis added.]

[82] Next in time is *Oldman River (1992),* which concerned the construction of a dam by the province of Alberta — a project that affected several federal interests, including navigable waters and fisheries. *Oldman River* did not involve any constitutional challenge to legislation. Instead, the two main issues were whether the relevant federal departments could in their decision-making under the federal enactment — the *Environmental Assessment and Review Process Guidelines Order* made under the *Department of the Environment Act* — take into account matters other than marine navigation; and second, whether the province of Alberta was bound by the *Navigable Waters Protection Act* to obtain authorization for the construction of the dam. The majority answered both questions in the affirmative. With respect to the second, La Forest J. reasoned:

> Certain navigable systems form a critical part of the interprovincial transportation networks which are essential for international trade and commercial activity in Canada. With respect to the contrary view, it makes little sense to suggest that any semblance of Parliament's legislative objective in exercising its jurisdiction for the conservancy of navigable waters would be achieved were the Crown to be excluded from the operation of the Act. The regulation of navigable waters must be viewed functionally as an integrated whole, and when so viewed it would result in an absurdity if the Crown in right of a province was left to obstruct navigation with impunity at one point along a navigational system, while Parliament assiduously worked to preserve its navigability at another point. [At 60–1; emphasis added.]

[83] As we have already seen, in the course of his reasons for the majority, La Forest J. also recognized that "environment" encompassed "the physical, economic and social environment touching several of the heads of power assigned to the respective levels of government". (At 63.) He confirmed that if the *Guidelines Order* were found to be legislation "that is in pith and substance in relation to matters within Parliament's exclusive jurisdiction", that would be the "end of the matter". It would be "immaterial" that the *Guidelines Order* also affected matters of property and civil rights. (At 62.) In considering how both levels of government could affect the environment "either by acting or not acting", the Court suggested that Parliament's exclusive legislative power over interprovincial railways provided some insight:

> ... one might postulate the location and construction of a new line which would require approval under the relevant provisions of the *Railway Act*, R.S.C., 1985, c. R-3. That line may cut through ecologically sensitive habitats such as wetlands and forests. The possibility of derailment may

> pose a serious hazard to the health and safety of nearby communities if dangerous commodities are to be carried on the line. On the other hand, it may bring considerable economic benefit to those communities through job creation and the multiplier effect that [it] will have in the local economy. The regulatory authority might require that the line circumvent residential districts in the interests of noise abatement and safety. In my view, all of these considerations may validly be taken into account in arriving at a final decision on whether or not to grant the necessary approval. ... it defies reason to assert that Parliament is constitutionally barred from weighing the broad environmental repercussions, including socio-economic concerns, when legislating with respect to decisions of this nature. [At 66; emphasis added.]

Ultimately, the Court concluded that the *Guidelines Order* was:

> ... in pith and substance nothing more than an instrument that regulates the manner in which federal institutions must administer their multifarious duties and functions. ... Any intrusion into provincial matters is merely incidental to the pith and substance of the legislation. [At 75.]

[84] Mr. Arvay drew our attention to *Canadian Western Bank (2007)*. It was concerned largely with interjurisdictional immunity (and much of Mr. Arvay's argument was based on that doctrine); but the Court began its analysis with the observation that an analysis of the constitutionality of legislation must begin with its pith and substance. (At para. 25.) Binnie and LeBel JJ. for the majority reasoned:

> When problems resulting from incidental effects arise, it may often be possible to resolve them by a firm application of the pith and substance analysis. The scale of the alleged incidental effects may indeed put a law in a different light so as to place it in another constitutional head of power. The usual interpretation techniques of constitutional interpretation, such as reading down, may then play a useful role in determining on a case-by-case basis what falls exclusively to a given level of government. In this manner, the courts incrementally define the scope of the relevant heads of power. The flexible nature of the pith and substance analysis makes it perfectly suited to the modern views of federalism in our constitutional jurisprudence.
>
> That being said, it must also be acknowledged that, in certain circumstances, the powers of one level of government must be protected against intrusions, even incidental ones, by the other level. [At paras. 31–2; emphasis added.]

[85] The question before the Court in *Canadian Western Bank (2007)* was whether federally chartered banks were subject to regulations under the *Insurance Act* of Alberta regarding the promotion of certain insurance products. The pith and substance of the regulations therefore had to be determined. In the course of its reasons, the Court observed that federal authority had extended in *Bell Canada (1988)* "not only to the management of the undertaking but also to ensuring that the undertaking can fulfil its fundamental mandate 'in what makes them specifically of federal jurisdiction' ... Unimpeded access to conduits and poles was, in other words, absolutely indispensable and necessary to allow Bell to fulfil its federal mandate." (At para. 57; emphasis added.) At para. 80, the pith and substance of the *Insurance Act* regulations was said to be the business of insurance, which fell under the heading of property and civil rights.

[86] Given this ruling, it *was* necessary to go on to determine whether interjurisdictional immunity applied to shield banks from the (valid) provincial statute. Ultimately, the Court found that the promotion of insurance was not "absolutely indispensable or necessary" to enable banks to carry out their "undertakings in what makes them specifically of the federal jurisdiction." (At para. 53.) *Winner (1954)* was distinguished as follows:

> In *Winner*, the Judicial Committee held that a provincial law which required a particular licence to be obtained before a bus company operating an interprovincial and international bus service could "embu[s] or debu[s]" passengers would "destroy the efficacy" of the federal undertaking... For a province to regulate that part of the undertaking would be to usurp the regulatory function of the federal government. Access to passengers and cargo, in other words, was absolutely indispensable and necessary to the carriers' viability: see to the same effect *Registrar of Motor Vehicles v. Canadian American Transfer Ltd.*, [1972] S.C.R. 811, and *R. v. Toronto Magistrates, Ex Parte Tank Truck Transport Ltd.*, [1960] O.R. 497 (H.C.J.). [At para. 54; emphasis added.]

[87] On a more general level the Court, as noted, discouraged recourse to interjurisdictional immunity, observing that it was based "on the attribution to every legislative head of power of a 'core' of indeterminate scope — difficult to define, except over time by means of judicial interpretations triggered serendipitously on a case-by-case basis." The doctrine was said to "run the risk of creating an unintentional centralizing tendency in constitutional interpretation" and thus produced asymmetrical results. It did not allow for "incidental effects" on the "so-called 'core' of jurisdiction." (At para. 44.) The Court disapproved the 'broadening' of interjurisdictional immunity that had occurred in *Bell Canada (1988),* such that the doctrine applied where a provincial law *'affects'* a vital or essential part of a federal undertaking. Rather it was to be restricted to cases in which provincial legislation '*impairs'* a vital part of a federal undertaking. Even given this clarification, the Court emphasized that it did not favour "excessive reliance" on interjurisdictional immunity; nor did the Court wish to see it turned into "a doctrine of first recourse in a division of powers dispute." (At para. 47.)

[88] In *Rogers (2016)*, the Supreme Court of Canada further considered the relationship between "pith and substance" and interjurisdictional immunity. In *Rogers,* the federal telecommunications company had been authorized by the Minister of Industry to install an antenna system on property located in the municipality of Châteauguay to improve the company's cellular telephone network. The municipality, fearing for the health and well-being of people living near such an installation, invoked a by-law authorizing the service on Rogers of a notice of establishment of a "reserve". The notice effectively prohibited all construction on the property for two years, later increased to four years. The Court found that in light of the purpose and effects of the notice of reserve, its pith and substance was the "siting of a radio communication antenna system". Since that represented an "exercise of federal jurisdiction" the notice was *ultra vires* the province. (At para. 5.)

[89] At para. 35, the Court again emphasized that the "pith and substance" of impugned legislation must be analyzed before interjurisdictional immunity or paramountcy need be considered. The purpose and effect of the notice of reserve and the context in which it had been adopted left no doubt that the City had intended to prevent Rogers from installing its antenna system on the Châteauguay property "by limiting the possible choices for the system's location." As the majority stated:

> ... the pith and substance of the notice of a reserve is not the protection of the health and well-being of residents or the development of the territory but, rather, the choice of the location of radio communication infrastructure. Even if the adoption of a measure such as this addressed health concerns raised by certain residents, it would clearly constitute a usurpation of the federal power over radiocommunication.
>
> We agree completely with the flexible and generous approach our colleague advocates at para. 94 of his [partially concurring] reasons. However, flexibility has its limits, and this approach

> cannot be used to distort a measure's pith and substance at the risk of restricting significantly an exclusive power granted to Parliament. ... [At paras. 46–7; emphasis added.]

[90] Although this was sufficient to dispose of the appeal in *Rogers (2016)*, the Court again went on to comment further on interjurisdictional immunity in conjunction with the effects of the municipal regulation. The majority emphasized that the notice of reserve had prevented the company from constructing its antenna system for two successive two-year periods, when no alternative location was available. As a result, Rogers had been unable to meet its obligation to serve the geographical area in question as required by its (federal) spectrum license. The majority continued:

> ... In this sense, the notice of a reserve compromised the orderly development and efficient operation of radiocommunication and impaired the core of the federal power over radiocommunication in Canada.
>
> For these reasons, we consider that the notice of a reserve seriously and significantly impaired the core of the federal power over radiocommunication and that this notice served on Rogers is therefore inapplicable by reason of the doctrine of interjurisdictional immunity. [At paras. 71–2; emphasis added]

[91] Finally, we note a case to which Mr. Brongers on behalf of Canada referred us, *Commission de Transport de la Communauté Urbaine de Québec v. Canada (National Battlefields Commission) (1990)*. It involved a different kind of federal undertaking — the National Battlefields Park in Québec, established by federal statute in 1908. The Court held that certain provisions of Québec's *Transport Act* which required permits for companies engaged in transporting public visitors to the Park free of charge, could not be applied to the National Battlefields Commission. Gonthier J. for the Court observed that the requirement for a permit affected the "fundamental decision to create a service and so impinges on its very existence, making the Commission…responsible for evaluating the need for the service in accordance with its view of the population's requirements." (At 859.) In his analysis:

> The Commission may also order the Régie de l'assurance automobile du Québec to withdraw the registration plate and registration certificate of any vehicle used by the holder of a permit. There seem to be few limits on the discretion of the Commission des transports in authorizing a holder to alter the services provided, and in my opinion the appellant Commission's control over the substance of the service it offers is thereby affected. The holder of a permit is also subject to the same penalties, under s. 40, if he "does not provide service up to the standard the public is entitled to expect, all things considered". Here again, it is to be feared that this expression leaves much too great a scope for the Commission des transports to interfere in the very design of the service.
>
> Accordingly, in my view it is the permit system taken as a whole which cannot be applied to the appellant Commission. The consequence of applying the legislation on permits would be to make the setting up, substance and maintenance of the federal transport service subject to the largely discretionary control of the Commission des transports and the government, when these aspects are within exclusive federal jurisdiction. The *Regulation* is therefore constitutionally inapplicable to the federal service, as are the provisions of the *Act* dealing with the permit system.
>
> I hasten to add that this does not mean that the federal service is necessarily exempt from the application of provincial legislation dealing with safety in the transport industry.... [At 860; emphasis added.]

Analysis

[92] From these and other authorities, we see that although interjurisdictional immunity has on occasion overshadowed the determination of “pith and substance”, the Supreme Court has clarified in recent years that the first task in determining the constitutional validity of legislation is to determine its “true character” or “dominant characteristic”. That determination is not to be conflated with deciding whether the law “impairs” a “vital part” of the federal jurisdiction over interprovincial undertakings. If the law relates in substance to a federal head of power, that is “the end of the matter.” In this case, the pith and substance of the subject legislation is indeed “the end of the matter” and it is unnecessary for us to continue on to paramountcy or interjurisdictional immunity.

[93] It is clear that federal undertakings are not “enclaves” immune from provincial environmental laws. Indeed, *both* levels of government have jurisdiction over *aspects of* the environment, and both levels have adopted complex and far-ranging legislation dealing with the prevention and mitigation of environmental harm and the remediation of and compensation for such harm, usually incorporating the principle of ‘polluter pays.’ Mr. Arvay submitted, however, that provincial jurisdiction in respect of the environment is “plenary and direct” while Parliament’s jurisdiction is “derivative.” He seemed to base this submission on the proposition that environmental legislation is intended to protect “property” and therefore fits directly into “Property and Civil Rights in the Province” in s. 92(13) of the *Constitution Act*. But while the provincial head of power is broad, the authorities do not support a superior or presumptive claim to jurisdiction for the provinces by reason of the role of “property”; nor do they support the notion of absolute and unqualified jurisdiction. Environmental protection is indeed “too important” — and too diffuse — to belong to one level exclusively or absolutely.

[94] I have already suggested that although Part 2.1 is framed as a law of general application, it is intended, and (more importantly) its sole *effect* is, to set conditions for, and if necessary prohibit, the possession and control of increased volumes of heavy oil in the Province. Heavy oil will enter the Province *only* via Trans Mountain’s interprovincial pipeline and railcars destined for export. The Province contended that that fact is irrelevant to the purpose of Part 2.1, and that if there were no interprovincial pipeline, there would be no doubt about the validity of the proposed law. Counsel also cautioned against confusing the “motives” of government, or any of its members, with legislative purpose. (Citing *Canada Post Corporation v. Hamilton (City) (2016)* at para. 40.) I agree with the latter proposition, and have been careful not to rely on extrinsic evidence contained in the ASF that consisted of statements made by governmental officials outside the Legislative Assembly concerning the TMX project or the introduction of Part 2.1. Such statements lack the “institutional” quality that gives some assurance of relevance to the question of legislative purpose. (See *Morgentale*r *(1993)* at 483–5 and *Reference re Upper Churchill Water Rights Reversion Act (1984)* at 315–9.) I do consider that we may take judicial notice of the fact that there is currently much public discussion about the TMX project and that Part 2.1 has been brought forward at the same time as that discussion.

[95] As for the proposition that there would be no doubt about the validity of Part 2.1 in the absence of the Trans Mountain pipeline, it resolves nothing. The fact is that there *is* an interprovincial undertaking the purpose of which is to carry the heavy oil from outside of British Columbia to

tidewater, and that while heavy oil produced and refined in this province (if there were such a thing) would have the same properties as heavy oil from Alberta or elsewhere, the *Constitution Act* distinguishes between the two in terms of regulatory authority.

[96] Relying on *Coastal First Nations (2016)*, Mr. Arvay also submitted that it would be "premature" for us to reach a conclusion on the constitutional validity of Part 2.1 before the director has in fact formulated conditions he or she would impose before granting a hazardous substance permit. With respect, it seems disingenuous to assert this argument when it is the Province that has requested this court's opinion on the matter. I consider that the reference was appropriate given the uncertainty surrounding the TMX project, and that we are bound to express our opinion if at all possible. I note that in *Coastal First Nations (2016)*, the legislation at issue was the *EAA* — truly a law of general application that (according to the Court) did not contain a prohibition. In my view, Part 2.1 is substantially different.

[97] I would not characterize the proposed amendment to the *EMA* as "colourable" in the sense that anything is being concealed; but the practicalities cannot be ignored. The 'default' position of the law is to prohibit the possession of all heavy oil in the Province above the Substance Threshold — an immediate and existential threat to a federal undertaking that is being expanded specifically to increase the amount of oil being transported through British Columbia. This can hardly be described as an "incidental" or "ancillary" effect. Even stopping short of prohibition, the permitting requirement may be used to impose conditions relating to the environment. This seems likely to occur in a qualitatively different manner from the manner in which the existing *EMA* and *EAA* provisions operate — otherwise no new legislation would be necessary.

[98] At what point is the line crossed between valid provincial environmental legislation and the impermissible regulation of a federal undertaking? In the 1988 trilogy, the Supreme Court focused on whether the impugned provincial health and safety legislation had entered the "field of the *management and operation* of [federal] undertakings". (*Bell Canada (1988)* at 798.) Similarly in *CNR v. Courtois (1988)*, the "preventive" nature of the provincial statute regulating working conditions gave rise to concern that the *management* of the railway would be "directly and massively" invaded; while in *Rogers (2016)*, the notice of reserve served on the company was said to have "compromised the orderly development and efficient operation" of radio communication.

[99] The references to "management" or "operation" in this context may not be the most helpful 'test', given that almost any decision required to be made by a corporate entity charged with running an interprovincial trucking line, railway or pipeline may be seen as affecting its management or operation. (That said, it is difficult to imagine on *any* view of the term that Part 2.1 would not significantly affect the "management" or "operation" of the Trans Mountain pipeline.) In part, this criterion may be a reflection of the fact that the provincial legislation interferes "in a substantial way" with the functions of the undertaking, often as a carrier. (See *TNT (1986)* at 416; *Canadian Western Bank (2007)* at para. 54 and cases cited therein.) As the Court observed in the latter case, the *scale* of

allegedly incidental effects may put the law in a "different light" so as to place it in another head of power under the *Constitution Act*. (At para. 31.)

[100] More helpfully, the Court in *Bell Canada (1988)* also suggested that a matter that is "*intrinsic to a field of federal jurisdiction*" is not within provincial jurisdiction, even if it has elements of property and civil rights. (At 842.) *Canadian Western Bank (2007)* similarly referred to what makes federal undertakings "*specifically of federal jurisdiction".* (At paras. 51 and 57.) See also *Consolidated Fastfrate (2009)* at para. 36; *National Battlefields (1990)* at 853; and *Montcalm (1979)*, where it was said that provincial legislation must not reach a federal work *qua federal organization*, or regulate it "under *some primary federal aspect*." (See para. 67 above; my emphasis.)

[101] In my view, Part 2.1 does cross the line between environmental laws of general application and the regulation of federal undertakings. Even if it were not intended to 'single out' the TMX pipeline, it has the potential to affect (and indeed 'stop in its tracks') the entire operation of Trans Mountain as an interprovincial carrier and exporter of oil. It is legislation that in pith and substance relates to, and relates *only* to, what makes the pipeline "specifically of federal jurisdiction." By definition, an interprovincial pipeline is a continuous carrier of liquid across provincial borders. Indeed, in Canada the pipeline owner is subject to conditions of common carriage across those borders: see s. 71(1) of the *National Energy Board Act*. Unless the pipeline is contained entirely within a province, federal jurisdiction is the only way in which it may be regulated. Notwithstanding Mr. Arvay's contention that there is "nothing wrong with a patchwork", it is simply not practical — or appropriate in terms of constitutional law — for different laws and regulations to apply to an interprovincial pipeline (or railway or communications infrastructure) every time it crosses a border. Paraphrasing the majority in *Consolidated Fastfrate (2009)*, the operation of an interprovincial pipeline would be "stymied" by the necessity to comply with different conditions governing its route, construction, cargo, safety measures, spill prevention, and the aftermath of any accidental release of oil. Jurisdiction over interprovincial undertakings was allocated exclusively to Parliament by the *Constitution Act* to deal with just this type of situation, allowing a single regulator to consider interests and concerns beyond those of the individual province(s).

[102] The Province submitted that the federal power over interprovincial undertakings could co-exist with legislation such as Part 2.1 if the latter were read as restricted to remediation and clean-up of environmental damage once it had occurred, rather than as applying to the 'discharger' and the undertaking *per se*. (See para. 61 above.) Of course, the proposed law does not expressly contemplate any such limitation.

[103] It will be recalled that a similar argument failed in *Bell Canada (1988)* with respect to health and safety legislation, with the Court concluding that working conditions were a "global concept which cannot be divided." (At 854.) I view environmental protection as a more diffuse field in which both levels of government play important roles. Part 2.1, however, is unlike the *EMA* and *EAA*. It is not legislation of general application, but is targeted at one substance in one (interprovincial) pipeline. Immediately upon coming into force, it would prohibit the operation of the expanded Trans Mountain

pipeline in the Province until such time as a provincially-appointed official decided otherwise. This alone threatens to usurp the role of the NEB, which has made many rulings and imposed many conditions to be complied with by Trans Mountain for the protection of the environment. The approval process is still continuing. The minimization of environmental harm associated with interprovincial undertakings is a key component of the federal "matter", and there is no authority for the 'hiving off' of damage cleanup and remediation from the prevention of mishaps in the operation and management of an interprovincial work. To the contrary, all of these aspects are part of an integrated whole.

[104] At the end of the day, the NEB is the body entrusted with regulating the flow of energy resources across Canada to export markets. Although the principle of subsidiarity has understandable appeal, the TMX project is not only a 'British Columbia project'. The project affects the country as a whole, and falls to be regulated taking into account the interests of the country as a whole.

[105] Both the law relating to the division of powers and the practicalities surrounding the TMX project lead to the conclusion, then, that the pith and substance of the proposed Part 2.1 is to place conditions on, and if necessary, prohibit, the carriage of heavy oil thorough an interprovincial undertaking. Such legislation does not in its pith and substance relate to "Property … in the Province" or to "Matters of a merely local or private Nature", but to Parliament's jurisdiction in respect of federal undertakings under s. 92(10) of the *Constitution Act*. Contrary to Mr. Arvay's submission, this conclusion does not reflect a 'sea change' in the law, a return to 'watertight' compartments of jurisdiction or a diminution of co-operative federalism. Rather it reflects the more basic principle that ss. 91 and 92 provide for "exclusive" heads of power that have substantive content.

[106] I would therefore answer 'no' to the first question on the reference. In light of this answer to the first question, it is unnecessary to answer the latter two questions.

[107] In accordance with this court's usual practice on references, I would not make any order as to costs.

[108] Finally, I express our thanks to counsel, including counsel for all interested parties, for their helpful submissions and for their co-operation with the Court in making a timely and efficient hearing possible.

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Chief Justice Bauman"

I AGREE:

"The Honourable Mr. Justice Groberman"

I AGREE:

"The Honourable Mr. Justice Harris"

I AGREE:

"The Honourable Madam Justice Fenlon"

SCHEDULE I

APPENDIX

Environmental Management Act

1 The following Part is added to the Environmental Management Act, S.B.C. 2003, c. 53:

PART 2.1 – HAZARDOUS SUBSTANCE PERMITS

Purposes

22.1 The purposes of this Part are

(a) to protect, from the adverse effects of releases of hazardous substances,

(i) British Columbia's environment, including the terrestrial, freshwater, marine and atmospheric environment,

(ii) human health and well-being in British Columbia, and

(iii) the economic, social and cultural vitality of communities in British Columbia, and

(b) to implement the polluter pays principle.

Interpretation

22.2 The definition of "permit" in section 1 (1) does not apply to this Part.

Requirement for hazardous substance permits

22.3 (1) In the course of operating an industry, trade or business, a person must not, during a calendar year, have possession, charge or control of a substance listed in Column 1 of the Schedule, and defined in Column 2 of the Schedule, in a total amount equal to or greater than the minimum amount set out in Column 3 of the Schedule unless a director has issued a hazardous substance permit to the person to do so.

(2) Subsection (1) does not apply to a person who has possession, charge or control of a substance on a ship.

Issuance of hazardous substance permits

22.4 (1) Subject to subsection (2), on application by a person, a director may issue to the applicant a hazardous substance permit referred to in section 22.3 (1).

(2) Before issuing the hazardous substance permit, the director may require the applicant to do one or more of the following:

(a) provide information documenting, to the satisfaction of the director,

(i) the risks to human health or the environment that are posed by a release of the substance, and

(ii) the types of impacts that may be caused by a release of the substance and an estimate of the monetary value of those impacts;

(b) demonstrate to the satisfaction of the director that the applicant

(i) has appropriate measures in place to prevent a release of the substance,

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(ii) has appropriate measures in place to ensure that any release of the substance can be minimized in gravity and magnitude, through early detection and early response, and

(iii) has sufficient capacity, including dedicated equipment and personnel, to be able to respond effectively to a release of the substance in the manner and within the time specified by the director;

(c) post security to the satisfaction of the director, or demonstrate to the satisfaction of the director that the applicant has access to financial resources including insurance, in order to ensure that the applicant has the capacity

(i) to respond to or mitigate any adverse environmental or health effects resulting from a release of the substance, and

(ii) to provide compensation that may be required by a condition attached to the permit under section 22.5 (b) (ii);

(d) establish a fund for, or make payments to, a local government or a first nation government in order to ensure that the local government or the first nation government has the capacity to respond to a release of the substance;

(e) agree to compensate any person, the government, a local government or a first nation government for damages resulting from a release of the substance, including damages for any costs incurred in responding to the release, any costs related to ecological recovery and restoration, any economic loss and any loss of non-use value.

Conditions attached to hazardous substance permits

22.5 A director may, at any time, attach one or more of the following conditions to a hazardous substance permit:

(a) conditions respecting the protection of human health or the environment, including conditions requiring the holder of the permit

(i) to implement and maintain appropriate measures to prevent a release of the substance,

(ii) to implement and maintain appropriate measures to ensure that any release of the substance can be minimized in gravity and magnitude, through early detection and early response, and

(iii) to maintain sufficient capacity, including dedicated equipment and personnel, to be able to respond effectively to a release of the substance in the manner and within the time specified by the director;

(b) conditions respecting the impacts of a release of the substance, including conditions requiring the holder of the permit

(i) to respond to a release of a substance in the manner and within the time specified by the director, and

(ii) to compensate, without proof of fault or negligence, any person, the government, a local government or a first nation government for damages referred to in section 22.4 (2) (e).

Suspension or cancellation of hazardous substance permits

22.6 (1) Subject to this section, a director, by notice served on the holder of a hazardous substance permit, may suspend the permit for any period or cancel the permit.

(2) A notice served under subsection (1) must state the time at which the suspension or cancellation takes effect.

(3) A director may exercise the authority under subsection (1) if a holder of a hazardous substance permit fails to comply with the conditions attached to the permit.

Restraining orders

22.7 (1) If a person, by carrying on an activity or operation, contravenes section 22.3 (1), the activity or operation may be restrained in a proceeding brought by the minister in the Supreme Court.

(2) The making of an order by the court under subsection (1) in relation to a matter does not interfere with the imposition of a penalty in respect of an offence in relation to the same contravention.

Offence and penalty

22.8 A person who contravenes section 22.3 (1) commits an offence and is liable on conviction to a fine not exceeding $400 000 or imprisonment for not more than 6 months, or both.

Power to amend Schedule

22.9 The Lieutenant Governor in Council may, by regulation, add substances, their definitions and their minimum amounts to the Schedule and delete substances, their definitions and their minimum amounts from the Schedule.

2 The following Schedule is added:

SCHEDULE

[section 22.3 (1)]

Column 1 **Substance**	Column 2 **Definition of Substance**	Column 3 **Minimum Amount of Substance**
Heavy oil	(a) a crude petroleum product that has an American Petroleum Institute gravity of 22 or less, or (b) a crude petroleum product blend containing at least one component that constitutes 30% or more of the volume of the blend and that has either or both of the following: (i) an American Petroleum Institute gravity of 10 or less, (ii) a dynamic viscosity at reservoir conditions of at least 10 000 centipoise.	The largest annual amount of the annual amounts of the substance that the person had possession, charge or control of during each of 2013 to 2017.

SCHEDULE II

Cases Cited

Alberta (Attorney General) v. Moloney 2015 SCC 51.

Alltrans Express Ltd. v. British Columbia (Workers' Compensation Board) [1988] 1 S.C.R. 897.

Attorney-General of Ontario v. Winner [1954] 4 D.L.R. 657 (J.C.P.C.).

Bell Canada v. Québec (Commission de la Santé et de la Sécurité du Travail) [1988] 1 S.C.R. 749.

British Columbia (Attorney General) v. Lafarge Canada Inc. 2007 SCC 23.

Campbell-Bennett v. Comstock Midwestern Ltd. [1954] S.C.R. 207.

Canada Post Corporation v. Hamilton (City) 2016 ONCA 767.

Canadian National Railway Co. v. Courtois [1988] 1 S.C.R. 868.

Canadian Pacific Railway Company v. Corporation of the Parish of Notre Dame De Bonsecours (Quebec) [1899] A.C. 367 (J.C.P.C.).

Canadian Western Bank v. Alberta 2007 SCC 22.

Castonguay Blasting Ltd. v. Ontario (Environment) 2013 SCC 52.

Central Canada Potash Co. Ltd. v. Government of Saskatchewan [1979] 1 S.C.R. 42.

Coastal First Nations v. British Columbia (Environment) 2016 BCSC 34.

Commission de Transport de la Communauté Urbaine de Québec v. Canada (National Battlefields Commission) [1990] 2 S.C.R. 838.

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[1] The formal citations of statutes, cases and articles referred to in these Reasons may be found in Schedule II hereto.