

# **In the Court of Appeal of Alberta**

**Citation:** Reference re *Impact Assessment Act*, as amended, 2026 ABCA 320

**Date:** 20261009

**Docket:** 2401-0326AC

**Registry:** Calgary

**In the Matter of the *Impact Assessment Act*, SC 2019, c 28, s 1,  
as amended by the *Budget Implementation Act*, 2024, No 1, SC 2024, c 17,  
and the *Physical Activities Regulations*, SOR/2019-285**

**and**

**In the Matter of a Reference by the Lieutenant Governor in Council  
to the Court of Appeal of Alberta under the *Judicature Act*, RSA 2000, c J-2, s 26**

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**The Court:**

**The Honourable Justice Michelle Crighton  
The Honourable Justice Jo'Anne Strekaf  
The Honourable Justice Kevin Feehan  
The Honourable Justice Bernette Ho  
The Honourable Justice Jane Fagnan**

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**Opinion of the Honourable Justice Crighton  
the Honourable Justice Strekaf  
the Honourable Justice Ho and  
the Honourable Justice Fagnan**

**Dissenting Opinion of the Honourable Justice Feehan**

Reference by the Lieutenant Governor in Council  
Order in Council 316/2024  
Dated the 20th day of November, 2024  
Filed the 28th day of November, 2024

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## Opinion

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Crighton, Strekaf, Ho and Fagnan JJA:

### I. Introduction

[1] The *Impact Assessment Act*, SC 2019, c 28 (*IAA*) and the *Physical Activities Regulations*, SOR/2019-285 (*Regulations*) establish a complex federal assessment process for the review of designated projects.

[2] In *Reference re Impact Assessment Act*, 2023 SCC 23, a majority<sup>1</sup> of the Supreme Court of Canada found the “designated projects” portion of the *IAA* to be unconstitutional.<sup>2</sup> While the majority recognized at the outset that environmental protection is a fundamental value shared by all Canadians, it underscored the judiciary’s vital role in ensuring that legislative efforts to protect the environment comport with Canada’s constitutional framework: para 1.

[3] The majority found the designation mechanism on its own was not problematic: para 146. However, the pith and substance of this part of the federal impact assessment scheme, which included activities primarily regulated by the provinces, were not directed at regulating “effects within federal jurisdiction”. The scheme required the decision maker to consider a broad range of factors without specifying how those factors were to drive the ultimate conclusion, thereby losing its focus on regulating federal impacts: para 178.

[4] The majority considered the three main phases for designated projects: planning (including the screening decision), impact assessment and the public interest decision. It found the screening decision within the planning phase was not rooted in the possibility of adverse federal effects, given the *IAA*’s open-ended list of factors of seemingly equal importance, only some of which were tied to federal jurisdiction: para 151. It held the assessment phase, on its own, did not involve an unconstitutional exercise of federal legislative authority: para 157. However, the public interest decision transformed “what is *prima facie* a determination of whether adverse federal effects are in the public interest into a determination of whether the project as a whole is in the public interest”: para 166. The majority also found the *IAA*’s “effects within federal jurisdiction” went far beyond

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<sup>1</sup> “Majority” will be used herein to refer to the Supreme Court majority in the prior reference, unless otherwise indicated. Further, pinpoint references in this decision to paragraphs, unless otherwise indicated, are to paragraphs in the majority’s decision.

<sup>2</sup> A majority of the Court of Appeal of Alberta had also concluded the scheme was *ultra vires* in *Reference re Impact Assessment Act*, 2022 ABCA 165.

s 91 federal legislative jurisdiction: para 179. Given their conclusions, the majority found it was unnecessary to address whether the doctrine of interjurisdictional immunity would apply: para 213.

[5] The majority determined the portion of the federal impact assessment scheme in ss 81 to 91 of the *IAA* dealing with projects carried out or financed by federal authorities on federal lands or outside Canada was constitutional: para 211.

[6] In response to the concerns raised by the majority regarding the designated projects portion of the *IAA*, Parliament amended the legislation.<sup>3</sup>

[7] Alberta's Lieutenant Governor in Council subsequently referred the question of the *vires* of the amended *IAA* and the *Regulations* to this Court under s 26 of the *Judicature Act*, RSA 2000, c J-2.<sup>4</sup>

[8] The focus of this second reference opinion is not whether Parliament resolved each of the issues noted in the first reference. The majority did not purport to provide an exhaustive list of concerns. This Court's task is to consider the proper characterization and classification of the *IAA* as amended, to determine whether it respects the critically important balance contemplated in the constitutional division of powers under ss 91 and 92 of *The Constitution Act, 1867*, 30 & 31 Vict, c 3 on which our federal state depends for its very existence: ***Reference re Firearms Act (Can)***, [2000] 1 SCR 783, 2000 SCC 31 at para 48. Of course, this Court's analysis is necessarily informed by the concerns identified by the Supreme Court and the changes made to the *IAA* in response.

[9] As will become apparent from the analysis below, we conclude that although Parliament has taken steps to address problems identified by the majority, certain aspects of the “designated projects” portion of the *IAA* scheme continue to undermine the constitutionality of that part of the legislation. Most importantly, the subject areas outlined in the definition of “adverse effects within federal jurisdiction” exceed the scope of federal heads of power, and the decision-making power continues to allow regulation of a project *qua* project based on non-federal concerns. Therefore, the designated projects part of the *IAA* and the *Regulations* are unconstitutional, except insofar as they apply to federal undertakings. Severance of s 7 would not be a viable solution. Given our conclusion, it is not necessary to consider whether the doctrine of interjurisdictional immunity applies in the circumstances.

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<sup>3</sup> Appendix A sets out the key provisions of the original *IAA* and the amended *IAA* side by side.

<sup>4</sup> Order in Council 316/2024, November 20, 2024: Are the *Impact Assessment Act*, SC 2019, c 28, s 1, as amended by the *Budget Implementation Act*, 2024, No 1, SC 2024, c 17, and the *Physical Activities Regulations*, SOR/2019-285, unconstitutional in whole or in part, as being beyond the legislative authority of the Parliament of Canada under the Constitution of Canada, or inapplicable to the extent that their application would impair the core of a provincial legislative power?

## **II. Parties' Basic Positions**

[10] Alberta asserts the amendments have not meaningfully altered the designated projects scheme or the pith and substance of the *IAA*. The *IAA* continues to permit the federal government to stop all work on projects outside its jurisdiction and to decide whether projects are justified in the public interest such that they should be allowed to proceed. As such, the *IAA* is an incursion into exclusive provincial jurisdiction over local works and undertakings (s 92(10) of *The Constitution Act, 1867*), property and civil rights (s 92(13)), matters of a local and private nature (s 92(16)), and the ownership, development and management of provincial natural resources (s 92A).

[11] Canada takes the position that Parliament addressed each of the issues identified by the Supreme Court as being constitutionally problematic, and the amended *IAA* rests firmly within the scope of federal jurisdiction.

[12] Intervenors weighed in on various discrete issues. The Attorney General of Ontario, Attorney General of Saskatchewan, Canadian Association of Petroleum Producers, Enserva, Indian Resource Council, Canadian Constitution Foundation, Canadian Taxpayers Federation, and Business Council of Alberta advanced arguments on issues generally supporting Alberta's position. Cold Lake First Nations, Ecojustice Canada Society and Nature Canada and West Coast Environmental Law provided submissions on issues supporting Canada's position.

## **III. Evolution of Federal Environmental Protection Schemes**

[13] Although the *IAA* is about more than the environment, it is properly understood as the latest installment in a series of federal statutes aimed at protecting the environment. There is no dispute that Parliament and the provincial legislatures may enact laws, including environmental assessment schemes, to address various aspects of environmental protection. Indeed, environmental protection is a fundamental Canadian value. However, the laws underpinning those schemes must fall within each level of government's constitutional sphere of powers under s 91 or s 92 of *The Constitution Act, 1867*. There is no head of power entitled "environment" or "environmental protection". Nor do the environment and environmental problems respect geographic boundaries or fit easily within constitutional powers silos. This makes environmental protection a major challenge in our federal system in the absence of a coordinated approach between governments: see the majority's discussion at paras 1-4.

[14] For decades, federal and provincial governments have engaged in environmental assessment to address environmental impacts of proposed activities. Federal environmental assessment processes have shifted over time from a system of permits, for example under statutes like the *Fisheries Act*, RSC 1985, c F-14, to a more holistic examination focused on various impacts of proposed projects, including social, health and economic effects. The latter type of

examination by the federal government is not challenged here insofar as it relates to federal undertakings. Further, the federal government has decision-making powers that may be relevant in the context of provincial undertakings. Federal environmental assessment legislation applicable to predominantly provincial undertakings must be carefully calibrated to respect the division of powers between Parliament and provincial legislatures.

[15] In *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3, the Supreme Court found the 1984 *Environmental Assessment and Review Process Guidelines Order*, SOR/84-467 (*EARPGO*) to be *intra vires* Parliament. It was interpreted as applying where the federal government has “an affirmative regulatory duty pursuant to an Act of Parliament which relates to the proposed initiative, undertaking or activity”, and was held to merely add to the matters federal decision makers should consider in exercising that federal duty: at 47, 71. In other words, it provided more fulsome information which would then inform the federal government’s decisions regarding the exercise of an affirmative regulatory duty such as whether to grant a permit under the *Fisheries Act*.

[16] The subsequent *Canadian Environmental Assessment Act*, SC 1992, c 37 (*CEAA 1992*) was similarly triggered by the exercise of federal decision-making responsibility, including where the federal government proposed, or provided financial assistance to, a project, where the project involved federal lands, or where the federal government issued a permit or authorization for a project: s 5(1). Under the *CEAA 1992*, “environmental effect” included “any change that the project may cause in the environment” as well as any health and socioeconomic effects of such change: s 2(1). Assessments under the *CEAA 1992* considered factors including public comments, mitigation measures, the project’s purpose and alternative ways of carrying it out: s 16. The assessments could take one of four forms: screening, comprehensive study, panel review and mediation: s 14. Projects that did not require a specific federal decision could be referred to a mediator or review panel if the Minister of the Environment (Minister) found the project might cause significant adverse effects in another province, outside of Canada or on federal lands: ss 46 to 48.

[17] The *CEAA 1992* was replaced by the *Canadian Environmental Assessment Act*, 2012, SC 2012, c 19, s 52 (*CEAA 2012*) which only applied to “designated projects”. This was the first federal assessment scheme to use a project list to engage the federal environmental assessment process, rather than the decision-making triggers found in the *EARPGO* and *CEAA 1992*. The *CEAA 2012* gave the Canadian Environmental Assessment Agency discretion to screen out designated projects which did not require an assessment: s 10. It limited the definition of “environmental effects” to a small number of environmental components: s 5. At the decision-making phase following assessment, if the decision maker decided the project was likely to cause significant adverse environmental effects, the matter was referred to the Governor in Council to decide whether those effects were justified in the circumstances: ss 52(1)-(4). Conditions could be imposed if the project was not likely to cause significant adverse environmental effects or if the

significant adverse environmental effects it was likely to cause were justified in the circumstances: s 53. There was no list of factors to be considered in imposing conditions. The *CEAA 2012* contained a separate informal assessment regime for projects carried out on federal lands or outside Canada.

[18] The constitutionality of the *CEAA 2012* was never tested. Many features of the *CEAA 2012* were carried over, and expanded, in the *IAA*.

[19] The *IAA*'s designated projects scheme applies to projects (physical activities and their incidental activities) designated in the *Regulations* or in a Minister's order, regardless of the existence of an independent federal decision-making function: s 2 definition, "designated project"; ss 109(b) and 9(1). A planning phase contemplates provision of information by the project proponent, consultation by the Agency with various parties, provision of a summary of issues to the proponent, and the proponent's response explaining how it intends to address the issues and providing a detailed project description: ss 10-15. The Impact Assessment Agency then makes a screening decision, determining whether the project requires an impact assessment: s 16. If it does, the Agency provides the proponent with a notice setting out the required information or studies: s 18(1)(a). In the impact assessment phase, the proponent is required to provide the necessary information or studies to the entity conducting the assessment (the Agency or its delegate): ss 25 to 29. An assessment report identifies effects of concern taking into account a broad array of factors listed in s 22. At the decision-making phase, the Minister or the Governor in Council determines if the effects of concern are in the public interest: ss 60(1), 62. If so, the Minister establishes any relevant condition considered appropriate: s 64(1) and (2). There are some possible off ramps available during designation and the planning phase: if another jurisdiction can address the effects through another means, the Minister may decline to designate a project, the Agency may decline to conduct an impact assessment, the Minister may accept another jurisdiction's substituted assessment process or the jurisdiction in question and Canada together may enter into an agreement to coordinate their efforts: ss 9, 16, 31(1), 33(1) and 36(1), 114.

[20] This overall scheme, in terms of the phases and general requirements, has not changed with the amendments to the *IAA*. It is not disputed that Parliament's intent in amending the *IAA* was to remedy those aspects identified by the Supreme Court as rendering it unconstitutional. In other words, it is fair to assume that Parliament did not intend to exceed its jurisdiction in amending the *IAA* but rather intended to bring the *IAA* within its jurisdiction. Therefore, the presumption of constitutionality applies.<sup>5</sup>

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<sup>5</sup> See the majority's discussion of the presumption at paras 69-75.

#### IV. Characterization and Classification

[21] The division of powers analysis to assess whether legislation is constitutional has two steps: characterization and classification.

##### *a. Characterization*

[22] At the characterization step, a court must consider intrinsic and extrinsic evidence and the law's legal and practical effects, determine the purpose and effects of the challenged law and identify, as precisely as possible, its "pith and substance" or the precise "matter" to which the law in question relates - and must do so without reference to the catalogue of potential heads of power in *The Constitution Act, 1867*: paras 61, 65.

##### *i. Intrinsic and Extrinsic Evidence*

[23] A court looks to intrinsic and extrinsic evidence to determine a law's purpose: see para 62 and cases cited therein.

[24] Extrinsic evidence refers to evidence reflecting the context of the law, such as Hansard debates, the minutes of parliamentary committees and relevant government publications. Regarding extrinsic evidence, there is no dispute that the amendments were an attempt by Parliament to respond to the Supreme Court's decision.

[25] Intrinsic evidence includes the titles, the preamble, the purpose clause, and the overall structure.

##### *1. Short and Long Title*

[26] The short title has not been amended. The amended long title contains the following new underlined wording: *An Act respecting a federal process for impact assessments and the prevention or mitigation of significant adverse effects within federal jurisdiction*.

[27] "Adverse effects within federal jurisdiction" are now defined:

*adverse effects within federal jurisdiction* means, with respect to a physical activity or a designated project,

- (a) a non-negligible adverse change to the following components of the environment that are within the legislative authority of Parliament:
  - (i) fish and fish habitat, as defined in subsection 2(1) of the *Fisheries Act*,

- (ii) aquatic species, as defined in subsection 2(1) of the *Species at Risk Act*,
  - (iii) migratory birds, as defined in subsection 2(1) of the *Migratory Birds Convention Act, 1994*, and
  - (iv) any other component of the environment that is set out in Schedule 3;
- (b) a non-negligible adverse change to the environment that would occur on federal lands;
- (c) a non-negligible adverse change to the marine environment that is caused by pollution and that would occur outside Canada;
- (d) a non-negligible adverse change — that is caused by pollution — to boundary waters or international waters, as those terms are defined in subsection 2(1) of the *Canada Water Act*, or to interprovincial waters;
- (e) with respect to the Indigenous peoples of Canada, a non-negligible adverse impact — occurring in Canada and resulting from any change to the environment — on
  - (i) physical and cultural heritage,
  - (ii) the current use of lands and resources for traditional purposes, or
  - (iii) any structure, site or thing that is of historical, archaeological, paleontological or architectural significance;
- (f) a non-negligible adverse change occurring in Canada to the health, social or economic conditions of the Indigenous peoples of Canada; and
- (g) a non-negligible adverse change to a health, social or economic matter that is within the legislative authority of Parliament that is set out in Schedule 3.

In the case of a physical activity or a designated project that is carried out on federal lands or is a federal work or undertaking, as defined in subsection 3(1) of the *Canadian Environmental Protection Act, 1999*, this definition also includes the

non-negligible adverse effects of that activity or project.

[28] The new long title has been broadened in that it refers to “adverse effects”, not “adverse environmental effects”. In this sense, the new long title is consistent with the short title which was found by the Supreme Court to include more than the environment: para 78.

[29] However, the replacement of “adverse environmental effects” with “adverse effects within federal jurisdiction” narrows the scope of the long title in that it clarifies the threshold and is informed by the listed changes or impacts covered in the definition of “adverse effects within federal jurisdiction”. Prior to the amendments, a similar list of subject areas appeared in the definition of “effects within federal jurisdiction”, but without the qualifier “non-negligible”. That definition is now repealed.

## 2. Preamble and Purposes

[30] The majority noted the purposes in former s 6 were considerably broader than the long title might suggest, including not only “environmental effects”, but more general “impacts” taking into account “all effects — both positive and adverse” to protect from “adverse effects caused by a designated project”: para 80.

[31] The amended s 6 purpose is more compact: to prevent or mitigate significant adverse effects within federal jurisdiction, and significant direct or incidental adverse effects, that may be caused by the carrying out of designated projects, as well as significant adverse environmental effects as defined in s 81 (i.e. significant adverse changes to the environment and the impact of these changes on Indigenous peoples in Canada and on health, social or economic conditions), that may be caused by the carrying out of projects, by establishing processes to anticipate, identify and assess the potential effects of those projects in order to inform decision-making under the *IAA* or any other Act of Parliament in respect of those effects.

[32] While the purpose provision has been narrowed, the expansive definition of “sustainability” in s 2 remains unchanged: “the ability to protect the environment, contribute to the social and economic well-being of the people of Canada and preserve their health in a manner that benefits present and future generations”. The majority noted that sustainability “encompasses all environmental, social and economic effects, not only those that the federal government has jurisdiction to regulate”: para 167. “Sustainability” forms part of the mandate (s 6(2)) for the federal decision makers involved in the *IAA*, broadening the purpose of the *IAA* beyond the more narrowly stated purpose.

[33] There is no longer a reference in s 6 to “both positive and adverse effects” resulting from a designated project. However, the amended wording under “Purpose” in s 6(1), “anticipate, identify and assess the potential effects of those projects in order to inform decision making under

this or any other Act of Parliament in respect of those effects”, must be understood in conjunction with the definition of “effects” in s 2:

effects means, unless the context requires otherwise, changes to the environment or to health, social or economic conditions and the positive and negative consequences of these changes.

[34] The newly defined phrase “adverse effects within federal jurisdiction” also informs the focus of the “Purpose”. Former s 6(1)(d) included the language “adverse effects within federal jurisdiction” - although that was not defined pre-amendments. Section 6(1)(d) identified one purpose of the *IAA* was to ensure designated projects requiring exercise of a federal power, duty or function were carried out so as to avoid “adverse effects within federal jurisdiction”. As well, former s 6(1)(l) used the phrase “significant environmental adverse effects” in relation to designated projects carried out on federal lands or supported by federal funding.

[35] While the many purposes in the prior s 6 are still reflected in other aspects of the amended *IAA*, the revised “Purpose” section itself is more compact and focused.

### 3. Conclusion

[36] The amended *IAA* continues, as found by the majority in relation to the former iteration (para 91), to incorporate an information-gathering process in the service of an ultimate decision-making function serving a broad array of purposes, including: protecting the environment and fostering sustainability; satisfying Canada’s environmental obligations; assessing and regulating the broad effects of certain physical activities, such as effects on health, social and economic conditions; facilitating the participation of Indigenous peoples and the public; and establishing an efficient and transparent process.

[37] The evidence does reflect an apparent attempt by Parliament to focus the amended *IAA* more narrowly on “adverse effects within federal jurisdiction” in certain subject areas. However, the definitions of “sustainability” and “effects” continue to indicate assessment, during the process, of both positive and negative consequences of broader effects to inform ultimate decision-making. In this respect, the amended *IAA* is not responsive to all the concerns articulated by the majority.

#### ii. *IAA*’s Legal and Practical Effects

[38] A court considers both the legal and practical effects of a challenged law. Legal effects flow directly from the statutory provisions. Practical effects are the “side” effects flowing from the application of the statute which are not direct effects of the statutory provisions: para 63.

## 1. Legal Effects

### a. Designation Process

[39] As previously noted, the majority found the designation mechanism, on its own, to be unproblematic. However, it did note concerns that informed its ultimate determination.

[40] The designation process requires projects falling within one of the classes of projects included in the *Regulations* to participate, at a minimum, in the planning phase. With the newly defined “adverse effects within federal jurisdiction”, designation by the Minister under s 9 or the Governor in Council under s 109 now must be based on an opinion that a project may cause non-negligible adverse federal effects. The amended *IAA* also provides for increased flexibility for cooperation with other jurisdictions in a designation by the Minister under s 9; the Minister has discretion not to designate a project if another means exists for a jurisdiction to address the non-negligible adverse federal effects: s 9(2)(d).

[41] Nevertheless, the amended *IAA* still gives the federal government very broad powers to designate projects, including those constituting physical activities that are subject to primarily provincial jurisdiction, based on a risk of possible “non-negligible” adverse effects. Once a project is designated, the s 7 prohibition places a temporary hold on certain activities in relation to the project and s 144 makes contravention of s 7 a strict liability offence punishable by fines of up to 8 million dollars. Under s 146, contravention of s 7 constitutes a separate offence for each day the contravention is committed.

[42] Pre-amendment, s 7(1) prohibited a proponent from doing “any act or thing in connection with the carrying out of the designated project . . . if that act or thing may cause” a “change” in enumerated subject areas. Those subject areas are now found in the definition of “adverse effects within federal jurisdiction”.

[43] Amended s 7 imposes a prohibition on acts in connection with a designated project that may cause “any adverse effects within federal jurisdiction”, such effect being a “non-negligible” adverse change. Unlike the prior s 7, the restriction no longer applies to acts causing positive changes, nor to changes of any magnitude given the introduction of the “non-negligible” threshold.

[44] “Non-negligible” (“non négligeable”) is not defined in the amended *IAA*. When pressed on the definition, Canada took the position that it means “non-trivial” and “more than minimal”. This echoes jurisprudence in which penal provisions in relation to environmental protection have been interpreted so as not to cover acts resulting in minimal or trivial effects: *Ontario v Canadian Pacific Ltd*, 1995 CanLII 112 at para 65 (SCC), [1995] 2 SCR 1031; *R v Zuber*, 2004 CanLII 2549 at paras 48, 49 (ON SC).

[45] Alberta points to January 2023 Federal policy guidance suggesting a “negligible” effect is an effect “sufficiently small to likely not result in a noticeable change to the valued component”: Government of Canada, "Summary of Guidance: Describing Effects and Characterizing Extent of Significance" (January 2023).

[46] Canada adopts the Agency’s interpretation of “negligible” as meaning “so small that it is inconsequential” and says this aligns with its plain meaning as “not to be worth considering” or “so small or unimportant or of so little consequence as to warrant little or no attention”.

[47] The dissenting justices in the prior reference took the position that “a change” should be interpreted as incorporating a significance threshold: “significant”, “non-trivial” or “more than *de minimis*”: paras 338, 342. The majority declined to read in such a threshold, noting Parliament had expressly incorporated a significance threshold (“significant adverse environmental effects”) into the secondary scheme (ss 81-91), which was found to be constitutional. It observed that Parliament could have chosen to use that adjective (“significant”) in defining “effects within federal jurisdiction”: para 193.

[48] The majority also noted former s 7(1)(d) barred any acts that may cause a combination of adverse and non-adverse changes to the health, social or economic conditions of Indigenous peoples. The majority held the indefinite prohibition on acts that may cause even trivial or non-adverse impacts was inconsistent with s 91(24)’s focus on protection of and concern for the welfare of Indigenous peoples: para 200.

[49] Adding the qualifier “non-negligible” appears to be an attempt to respond to the majority’s concerns. However, in practical terms, this change may not constitute a meaningful reduction in the activities prohibited by s 7.

[50] The majority held it was difficult to envision a proposed major project in Canada that would not involve any activities that “may” cause at least one of the enumerated effects: para 95. While the effect of s 7 has been narrowed by limiting the targeted project activities to those producing “adverse effects within federal jurisdiction”, it nevertheless remains difficult to imagine a proposed major project involving activities that would not potentially cause non-trivial adverse effects in at least one of the areas listed in the amended s 2 definition.

[51] The majority observed that the prior s 7 paused all projects immediately upon designation and – given the definition of “designated project” in s 2 – this applied to the designated project physical activities and “any physical activity that is incidental to those physical activities”: para 95. That scope has not changed under the amended s 7, although the prohibition now only extends to incidental activities which may cause “adverse effects within federal jurisdiction”.

[52] The majority noted the existence of specific provisions in the *IAA* for projects on federal lands, including reserves under the *Indian Act*, RSC 1985, c I-5 (s 82), and projects that require the exercise of a federal power, duty or function or that involve federal funding (s 8). Accordingly, it reasoned the s 7 prohibitions must be aimed at capturing privately owned or provincially funded projects on provincial lands that do not otherwise require the exercise of a federal power, duty or function: para 197. In other words, the s 7 prohibitions uniquely apply to designated projects, prohibiting conduct with respect to those projects that Parliament has not otherwise elected to regulate, for example through legislation such as the *Fisheries Act*.

[53] Further, s 7 prohibitions for designated projects do not apply to the same *type* of project that is below certain prescribed thresholds such as a new oil refinery with an input capacity below 10,000 m<sup>3</sup>/day or a new petroleum storage facility with a storage capacity below 500,000 m<sup>3</sup>.

[54] The majority cited two examples of concern in relation to s 7: paras 96-97. The first was the prohibition on doing any act that may cause a change to the environment in another province: s 7(1)(b)(ii). That prohibition has been repealed.

[55] The second was the prohibition on doing anything that may cause an effect on Indigenous peoples' traditional land use: s 7(1)(c)(ii). The majority noted Alberta's argument that this would bar any physical activity associated with a designated project proposed to be carried out on provincial lands where traditional use is asserted by Indigenous peoples. That "impact" has been narrowed to "non-negligible adverse impact".

[56] The majority briefly commented on s 8, which prohibits a federal authority from exercising any power, performing any duty and providing financial assistance for the purpose of enabling a designated project to be carried out, unless it is determined under s 16 or it is ultimately determined that no impact assessment is required or, at the decision-making phase, that the effects are in the public interest: para 97. The majority noted this decision-based prohibition bears some resemblance to the *EARPGO* scheme upheld by the Supreme Court in *Oldman River* at 47.

[57] In conclusion, the designation phase now incorporates an adverse effect threshold, thereby addressing an issue noted by the majority. However, s 7 continues to cast a very wide net as the prohibition includes acts that may cause non-trivial adverse effects in at least one of the areas listed in the new s 2 definition. It remains aimed at capturing privately or provincially funded projects that are on provincial lands and that do not otherwise require the exercise of a federal power, duty or function, subjecting those projects to prohibitions that Parliament has not otherwise elected to impose on projects not designated in the *Regulations*.

### b. Planning Phase

[58] The majority found two principal legal effects flowed from the scheme's planning phase. First, the proponent had to provide a detailed project description including information about the project's potential effects which in turn included effects within federal jurisdiction, an estimate of greenhouse gas emissions, and a list of the types of waste and emissions that are likely to be generated: para 98; s 10; ss 19 to 24 of Schedules 1 and 2 of the *Information and Time Management Regulations*. Parliament has now removed the statutory requirement for a proponent to provide the Agency with a detailed project description, allowing the Agency the discretion to require one if it is of the opinion that it cannot make a s 16(1) decision without it: s 15(1.1).

[59] The second principal legal effect was that the ss 7 and 8 prohibitions remained in place until the Agency was satisfied that it had sufficient information to decide whether an impact assessment was required: s 16(1). The majority found the s 16 screening decision to be constitutionally problematic as it was not driven by the likelihood of federal impacts. They found that, given the wide net cast by the designation mechanism, there was a risk that projects with little or no potential for adverse federal effects would be required to undergo an impact assessment based on less relevant, yet mandatory, factors in s 16(2): para 154.

[60] As noted, the designation process now incorporates an adverse effect threshold. The s 16 factors have not appreciably changed, except the Agency must now consider whether some other means would permit another jurisdiction to address the adverse effects within federal jurisdiction: s 16(2)(f.1). However, new s 16(2.1) does provide that the Agency may only decide that an impact assessment is required if it is satisfied that the carrying out of the designated project may cause adverse effects within federal jurisdiction or direct or incidental adverse effects. This directly addresses the concern that s 16 of the *IAA* gave no primacy to the possibility of adverse federal effects relative to the other mandatory considerations. Nevertheless, in practical terms, the threshold remains low: it can be satisfied by a finding that the designated project may cause a non-negligible adverse change, including a change that is otherwise permissible in any of the categories included in the definition of adverse effects within federal jurisdiction.

[61] Alberta submits the broad definition of "adverse effects within federal jurisdiction" means that an impact assessment can be ordered if a designated project may cause a "non-negligible" adverse effect on, for example, Indigenous traditional land use, even where the designated project does not require a federal approval outside of the *IAA*. However, the majority did not go so far as to require an independent federal decision-making trigger for the *IAA* to be constitutional:

132 The scheme treats all "designated projects" in the same way, regardless of whether Parliament is vested with broad jurisdiction over the activity itself or narrower jurisdiction over the activity's impacts on federal heads of power. And many of the physical activities to which the scheme applies are primarily regulated

through the provincial legislatures' powers over local works and undertakings or natural resources. Parliament can enact impact assessment legislation to regulate these projects from a federal perspective, so long as the regulation of federal aspects represents the dominant characteristic of the law.

c. Impact Assessment Phase

[62] As with the designation process, the majority found the assessment phase, on its own, does not involve an unconstitutional exercise of federal legislative authority: para 157. During this phase, the proponent must provide the information or studies required by the Agency within the prescribed time: s 19(1). The project remains subject to the ss 7 and 8 prohibitions.

[63] Prior to the amendments, the impact assessment phase required the proponent to provide the necessary information or studies to the Agency or its delegate: ss 25 to 29. Assessments could be referred to a review panel or substituted for another jurisdiction's assessment process if appropriate: ss 31(1), 33(1) and 36(1).

[64] The assessment phase culminated in an assessment report setting out the effects (i.e. changes both positive and negative) likely to be caused by the carrying out of the designated project and indicating those that were "adverse effects within federal jurisdiction" and those that were adverse direct or incidental effects (linked to federal exercise of a power/duty/function or provision of financial assistance): s 28(3). Again, "effects within federal jurisdiction" were defined in s 2 as "a change" to a list of specific subject areas.

[65] The new definition of "adverse effects within federal jurisdiction" contains a similar list of subject areas. Absent from the list are changes to the environment in another province other than the one where the physical activity or the designated project is being carried out, or outside Canada: (b)(ii) and (iii). Several new areas were added: (c) a non-negligible adverse change to the marine environment that is caused by pollution and that would occur outside Canada; (d) a non-negligible adverse change caused by pollution to boundary waters or international waters, as those terms are defined in subsection 2(1) of the *Canada Water Act*, or to interprovincial waters.

[66] The assessment report must also take into account 20 mandatory factors listed in s 22, including all changes to the environment or health, social or economic conditions; the purpose of, and need for, a designated project; the extent to which the project contributes to sustainability; the intersection of sex and gender with other identity factors; and the extent to which the effects of the designated project hinder or contribute to the federal government's ability to meet its environmental obligations in respect of climate change. An assessment may also consider any other matter relevant to the impact assessment that the Agency requires to be considered.

[67] Notably, s 22 has not been amended. However, ss 9 and 16(2)(f.2), which provide “off-ramps” to avoid an assessment if another means exists for a jurisdiction to address the adverse effects, no longer require that the other means take into account the s 22 factors.

#### d. Decision-making Phase

[68] The assessment process culminates in the Minister’s decision statement.

[69] Under prior s 60, the decision maker was to determine whether the “adverse effects within federal jurisdiction” and “adverse direct or incidental effects” were in the public interest, in light of the factors set out in s 63 and the extent to which the effects are significant. If they were found not to be in the public interest, the proposed project could not go ahead as the ss 7 and 8 prohibitions would remain. If those effects were found to be in the public interest, the Minister could impose binding conditions in relation to those effects and, on compliance, the ss 7 and 8 prohibitions were lifted: ss 64, 7(3)(b), 8(b). Through the conditions, the federal executive’s oversight of the project continued.

[70] Amended s 60 requires the decision maker, after taking into account the implementation of any mitigation measures it considers appropriate, to determine whether the “adverse effects within federal jurisdiction” are likely to be, to some extent, significant and, if so, the extent to which those effects are significant. If any such effects are likely to be, to some extent, significant, the decision maker must determine whether those effects are “justified in the public interest” in light of the extent to which they were determined to be significant and the factors set out in s 63. If they are found to be justified in the public interest, the Minister may impose binding conditions in relation to them. If they are found not to be justified in the public interest, the s 7 prohibition remains.

## 2. Practical Effects

[71] We are of the view that the two general practical effects found by the majority persist with the amendments: 1) delays of indeterminate duration; and 2) the need for the Agency, proponent, federal authorities and other implicated jurisdictions involved to expend resources: paras 106-107.

[72] Parliament did amend the provisions permitting the decision maker to extend time periods: ss 28(6), 28(7), 37(4), 37(5)(c), 65(5), 65(6). The *IAA* no longer contains language allowing the extension of time periods “any number of times”. However, timelines for completing critical steps in the assessment process continue to be subject to discretionary extension by the executive branch.

[73] The durations of both the assessment and the decision statement remain subject to discretionary extension of indefinite duration by any period “that is necessary to take into account circumstances that are specific to the designated project or to allow the Agency to cooperate with a jurisdiction”: s 28(6) s 28(7), 37(3), 37(4), 65(5), 65(6). The new phrase “circumstances that are

specific to the designated project” allows consideration of matters beyond adverse federal effects. Where an impact assessment is referred to a review panel, the *IAA* specifies a time limit of 600 days unless the Agency is of the opinion that more time is required. That limit is also subject to extension by the Minister and/or Cabinet at the Minister’s recommendation: ss 37(1), 37(2), 37(3), 37(4). The decision statement which includes the public interest determination does not limit the Governor in Council to a single extension, nor to a finite time frame: ss 65(5), (6).

[74] Therefore, despite the amendments, the potential for indefinite delay remains. Reasons for extensions are now made publicly available: ss 28(8), 37(5)(c), 65(7). However, it is questionable whether judicial review of a discretionary extension decision by the Governor in Council would be successful or would move the process along any more quickly.

[75] It is not for the Court to assess the effectiveness of the scheme. Both Alberta and Canada point to examples of designated projects subject to the scheme in support of their arguments. It is difficult to assess the *IAA*’s practical effects or to predict its practical consequences based on a very limited number of projects and without sufficient context to understand the nuances of the impact assessments in those cases. However, it is reasonable to infer that the breadth of the s 22 factors at the impact assessment phase may well place onerous obligations on proponents, and result in delay for the review.

[76] The two effects found by the majority continue: delays, potentially leading to permanent prohibition of a project, and significant expenditure of resources by the proponent and the jurisdictions involved.

### 3. Conclusion on Legal and Practical Effects

[77] The scheme continues to be a comprehensive information-gathering and regulatory process, placing broad temporary holds on the designated project, regulating the designated project following a positive public interest determination to mitigate or prevent its effects, and granting the executive branch broad regulatory powers and discretion: para 108.

#### iii. Conclusion on Characterization

[78] Canada submits the pith and substance is narrowed as the scheme is focused on the significant adverse effects said to be within federal jurisdiction. However, the characterization is to be done without reference to the catalogue of potential heads of power.

[79] The majority at paras 6 and 76 concluded that the pith and substance of the former designated projects scheme was:

to assess and regulate designated projects with a view to mitigating or preventing their potential adverse environmental, health, social and economic impacts.

[80] While Parliament has taken steps to address a number of the concerns raised by the majority, we conclude the pith and substance of the *IAA* has not changed appreciably as a result of the amendments.

*b. Classification*

[81] The constitutional division of powers as set out in *The Constitution Act, 1867* is an essential part of Canadian federalism, fostering diversity among its members within one nation. Sections 91 and 92 confer broad legislative powers on provincial legislatures, while conferring the powers “better exercised in relation to the country as a whole” to the federal Parliament: *Canadian Western Bank v Alberta*, 2007 SCC 22 at para 22.

[82] Classification involves determining the classes of subjects into which the matter of the law in question falls, with reference to the heads of power set out in *The Constitution Act, 1867*. This enables the court to determine if the matter of the law is *intra vires* - only the level of government to which a head of power has been assigned can validly legislate regarding matters within that head of power. The focus is on the main thrust or dominant characteristic of a law; its secondary or incidental effects on a head of power belonging to the other level of government do not affect its validity. The party challenging the validity of a law bears the burden of establishing that the law is *ultra vires* the enacting level of government: paras 110-113.

[83] Therefore, the question for this Court at the classification step is whether the main thrust of the *IAA*’s designated projects scheme falls under federal heads of power as set out in *The Constitution Act, 1867*.

[84] The environment does not comfortably fit within the existing division of powers; it cuts across many different areas of constitutional responsibility and neither level of government has exclusive jurisdiction over all environmental assessment: *Oldman River* at 16, 63-65.

[85] It is possible in certain circumstances for both the federal and provincial governments to validly exercise legislative jurisdiction over the same activity or project, consistent with the double aspect doctrine. Environmental assessment of physical activities may or may not have a double aspect in relation to a particular project. Therefore, it is unhelpful to start from the premise that some projects fall within an enclave of exclusivity: *Oldman River* at 68. It is also important that courts not erode the constitutional balance under the guise of “cooperative federalism”: *Reference re Securities Act*, 2011 SCC 66 at para 62. Where one level’s jurisdiction is broader than the other’s, any legislation enacted by the latter must be tailored to the aspects of the project that properly fall within its jurisdiction. However, the majority emphasized that merely incidental

effects touching on another level of government's head of power do not affect the law's validity: paras 128, 113.

i. Majority's analysis

[86] The majority noted the scheme treated all "designated projects" in the same way, regardless of whether Parliament or the province was vested with broad jurisdiction over the activity: para 32. Alberta does not take issue with the constitutionality of the *IAA* designated projects scheme as applied to federal undertakings not covered by ss 81-91, but only as it applies to projects over which Alberta has broad or primary jurisdiction through the province's powers over local works and undertakings or natural resources.

[87] The majority observed that Parliament can enact impact assessment legislation that affects primarily provincial undertakings but regulation of federal aspects must be the dominant characteristic of the law; federal legislation that is insufficiently tailored in that it regulates the activity *qua* activity, rather than only its federal aspects, is *ultra vires*: paras 131-132, citing *Reference re Environmental Management Act*, 2020 SCC 1 at paras 98-101 (BCCA).

[88] The majority determined that federal effects did not drive the scheme's decision-making functions under the *IAA*. Therefore, the scheme was not in pith and substance directed at regulating federal effects. The scheme invited the federal government to make decisions in respect of projects that it has no jurisdiction to regulate from the perspective of the heads of power upon which it relied.

[89] The majority also held that the defined term "effects within federal jurisdiction" exceeded federal legislative jurisdiction under s 91 and this overbreadth "exacerbated the constitutional frailties" of the decision-making functions; it "further diluted the scheme's already tenuous focus on the federal aspects of designated projects" and shifted the decision maker's focus at the key decision-making junctures to encompass aspects within provincial jurisdiction: paras 133, 136, 138, 180-181.

ii. Alberta's Position

[90] Alberta argues the amendments have not cured the fundamental defect, being that the *IAA* regulates the project *qua* project rather than regulating the federal aspects of a project: the designation scheme acts as a gateway for federal decision-making on projects as a whole and imposes a broad prohibition over projects that would not otherwise be subject to federal jurisdiction. Despite the addition of "adverse effects within federal jurisdiction" to the decision-making phase (ss 60-62), the *IAA* is not sufficiently constrained to federal legislative jurisdiction because the public interest determination remains unchanged. Section 63 continues to use "effects" rather than "adverse effects within federal jurisdiction" to drive the public interest

determination, an aspect of the legislation which was previously identified by the majority as problematic.

[91] Alberta further submits the *IAA* continues to allow the federal government to regulate beyond its powers over fisheries, migratory birds, species at risk, and Indigenous peoples and reserved lands.

iii. Canada's Position

[92] Canada responds that decision-making in the amended *IAA* is now driven by significant adverse effects in a limited number of areas falling under heads of federal power: navigation and shipping (s 91(10)), sea coast and inland fisheries (s 91(12)), Imperial treaties (s 132), Indians and lands reserved for Indians (s 91(24)), classes of subjects not enumerated to the provinces (s 91(29)), peace, order, and good government national concern regarding "marine pollution" and "interprovincial waters" or "migratory birds", interprovincial works or undertakings (ss 92(10) and 91(29)), and public debt and property (s 91(1A)). The definition "adverse effect within federal jurisdiction" has been included at every stage of the *IAA* scheme. The definition links the effects caused by designated projects to the potential for harm to the specified areas of federal jurisdiction.

iv. "Adverse Effects within Federal Jurisdiction"

1. Areas covered

[93] The *IAA* previously contained the following definition:

*effects within federal jurisdiction* means, with respect to a physical activity or a designated project,

- (a) a change to the following components of the environment that are within the legislative authority of Parliament:
  - (i) fish and fish habitat, as defined in subsection 2(1) of the *Fisheries Act*,
  - (ii) aquatic species, as defined in subsection 2(1) of the *Species at Risk Act*,
  - (iii) migratory birds, as defined in subsection 2(1) of the *Migratory Birds Convention Act, 1994*, and
  - (iv) any other component of the environment that is set out in Schedule 3;

- (b) a change to the environment that would occur
  - (i) on federal lands,
  - (ii) in a province other than the one where the physical activity or the designated project is being carried out, or
  - (iii) outside Canada;
- (c) with respect to the Indigenous peoples of Canada, an impact — occurring in Canada and resulting from any change to the environment — on
  - (i) physical and cultural heritage,
  - (ii) the current use of lands and resources for traditional purposes, or
  - (iii) any structure, site or thing that is of historical, archaeological, paleontological or architectural significance;
- (d) any change occurring in Canada to the health, social or economic conditions of the Indigenous peoples of Canada; and
- (e) any change to a health, social or economic matter that is within the legislative authority of Parliament that is set out in Schedule 3.

[94] The majority found this definition of “effects within federal jurisdiction” did not comport with federal legislative competence under s 91.

[95] The majority cited, as an example, “interprovincial effects” (b(ii)) noting it would capture an unlimited range of interprovincial environmental changes such as greenhouse gas emissions – an issue which is global in scope: para 184.

[96] The majority added that the Supreme Court’s jurisprudence had recognized that preventing marine pollution and preventing pollution of interprovincial rivers are matters of national concern, but found Canada made no attempt to apply a clarified national concern framework or lead any evidence on which to base the recognition of a new and broader matter of national concern: para 189.

[97] The new definition “adverse effects within federal jurisdiction” generally takes the functional place in the scheme of the prior “effects within federal jurisdiction”. The underlined wording is new:

*adverse effects within federal jurisdiction* means, with respect to a physical activity or a designated project,

- (a) a non-negligible adverse change to the following components of the environment that are within the legislative authority of Parliament:
  - (i) fish and fish habitat, as defined in subsection 2(1) of the *Fisheries Act*,
  - (ii) aquatic species, as defined in subsection 2(1) of the *Species at Risk Act*,
  - (iii) migratory birds, as defined in subsection 2(1) of the *Migratory Birds Convention Act, 1994*, and
  - (iv) any other component of the environment that is set out in Schedule 3;
- (b) a non-negligible adverse change to the environment that would occur on federal lands;
- (c) a non-negligible adverse change to the marine environment that is caused by pollution and that would occur outside Canada;
- (d) a non-negligible adverse change — that is caused by pollution — to boundary waters or international waters, as those terms are defined in subsection 2(1) of the *Canada Water Act*, or to interprovincial waters;
- (e) with respect to the Indigenous peoples of Canada, a non-negligible adverse impact — occurring in Canada and resulting from any change to the environment — on
  - (i) physical and cultural heritage,
  - (ii) the current use of lands and resources for traditional purposes, or
  - (iii) any structure, site or thing that is of historical, archaeological, paleontological or architectural significance;
- (f) a non-negligible adverse change occurring in Canada to the health, social or economic conditions of the Indigenous peoples of Canada; and

- (g) a non-negligible adverse change to a health, social or economic matter that is within the legislative authority of Parliament that is set out in Schedule 3.

In the case of a physical activity or a designated project that is carried out on federal lands or is a federal work or undertaking, as defined in subsection 3(1) of the *Canadian Environmental Protection Act, 1999*, this definition also includes the non-negligible adverse effects of that activity or project.

[98] Conspicuous is the absence of any equivalent to the former b(ii) “interprovincial effects”. Parliament’s amendments are responsive to the majority’s comments in this respect.<sup>6</sup>

## 2. Concerns about s 7 prohibitions and ongoing supervision and regulation

[99] The majority held that due to the overbreadth of “effects within federal jurisdiction” which provided the basis for the s 7 prohibitions, the conduct prohibited by s 7 extended beyond the range of conduct that Parliament could validly regulate. The overbreadth also influenced the ongoing supervision and regulation following the public interest determination.

[100] The former s 7 provided that the proponent of a designated project must not do any act or thing in connection with the carrying out of the designated project, in whole or in part, if that act or thing may cause any of the enumerated effects, which were the same as those in the definition of “effects within federal jurisdiction”. The majority stated that the s 7 effects-based prohibition may be practically necessary during the planning and assessment phases of the scheme, as the potential effects of a proposed project have yet to be identified. However, it had significant concerns about the indefinite application of the prohibitions following a negative public interest decision statement: para 192.

[101] The majority interpreted “change” or “impact” in s 7 as including both positive and negative changes or impacts of any magnitude: para 198. It noted that Parliament had chosen not to incorporate a significance threshold in the designated projects scheme as it had in the secondary ss 81-91 scheme (“significant adverse environmental effects” in ss 82 to 84, 87, 88 and 90).

[102] New s 7(1) prohibits the proponent from doing anything that may cause “any adverse effects within federal jurisdiction”. The new definition of “adverse effects within federal jurisdiction” incorporates a qualifier (adverse) and a threshold (non-negligible) to “change” or

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<sup>6</sup> The majority did not address “direct or incidental effects”, which are defined in part as “effects that are directly linked or necessarily incidental to . . . a federal authority’s provision of financial assistance to a person for the purpose of enabling [a physical] activity or [designated] project to be carried out, in whole or in part” (s. 2). The majority opined the exercise of this federal spending authority would likely have to be considered in the context of the facts of a particular case: para 139.

“impact”. This has narrowed the application of the s 7 prohibition in an attempt to address the above concerns stated by the majority.

### 3. Concerns about areas covered

[103] The majority held that the overbreadth of the “effects within federal jurisdiction”, could result in a s 7 prohibition on doing anything in connection with the carrying out of the designated project, in whole or in part, following a negative public interest determination even where federal legislative authority did not support such wide-ranging regulation of the proposed project.

[104] Paragraphs (a), (e), (f) and (g) of the new definition of “adverse effects within federal jurisdiction” are the same subject matters formerly found in the old s 7(1)(a), (c), (d) and (e). Therefore, to the extent those aspects included effects beyond federal legislative authority, the concerns expressed by the majority remain.

#### a. Fish ((a)(i) and (ii))

[105] Alberta takes the position that the *IAA* is insufficiently connected to protection of fisheries and that its true purpose is regulation of projects.

[106] In *Fowler v The Queen*, [1980] 2 SCR 213, the Supreme Court struck down a provision of the *Fisheries Act*, RSC 1970, c F-14 prohibiting deposit of logging debris into water frequented by fish because it did not link that conduct to actual or potential harm to fisheries. The legislation sought to control certain kinds of operations not strictly on the basis that they have deleterious effects on fish but, rather, on the basis that they might have such effects: at 224.

[107] That case can be contrasted with *Northwest Falling Contractors Ltd v The Queen*, [1980] 2 SCR 292 in which the Supreme Court considered the prohibition on depositing a “deleterious substance” which may enter water frequented by fish. The Court held that, unlike the provision at issue in *Fowler*, the definition of “deleterious substance” ensured the scope of the prohibition was restricted to deposits that *threaten* fish or fish habitat thereby constituting a proper federal concern under s 91(12), “Sea Coast and Inland Fisheries”.

[108] Regarding the s 7 prohibition on doing anything in connection with the project that may cause a change to fish and fish habitat (former s 7(1)(a)(i)), the majority held, citing *Fowler*, that Parliament could not validly amend the *Fisheries Act* to include a prohibition against doing “any act or thing that may cause a change to fish or fish habitat”, noting that s 7 imposes such a prohibition: para 195.

[109] The definition of “adverse effects within federal jurisdiction” now refers to “a non-negligible adverse change to [...] fish and fish habitat”. Cases such as *R v Zuber*, 2004 CanLII

2549 at paras 48, 49 (ON SC) and the decisions cited therein support a finding that this element of the new definition now sufficiently links the conduct to actual or potential harm through inclusion of “non-negligible adverse change” and the requirement, in the balancing exercise under s 60 or s 62, that adverse effects within federal jurisdiction are “likely to be, to some extent, significant”.

b. Migratory birds ((a)(iii))

i. Supreme Court’s analysis

[110] Canada argued before the Supreme Court that prohibitions supported by “a change” to “migratory birds”, as that term is defined in s 2(1) of the *Migratory Birds Convention Act, 1994*, SC 1994, c 22, under the former s 7(1)(a)(iii), came under Parliament’s power to implement “Treaties between the Empire and . . . Foreign Countries” under s 132 of *The Constitution Act, 1867*.

[111] The *Convention Between the United Kingdom and the United States of America for the Protection of Migratory Birds in Canada and the United States, August 16, 1916*, [1917] Gr Brit TS No 7 (Cd 8476) entered into by the British Empire and the United States was amended in 1995 by Canada and the United States through the *Protocol between the Government of Canada and the Government of the United States of America Amending the 1916 Convention between the United Kingdom and the United States of America for the Protection of Migratory Birds in Canada and the United States*, Can TS 1999 No 34. The *Protocol* was implemented domestically through the *Migratory Birds Convention Act, 1994*.

[112] The majority noted neither Canada nor Alberta had devoted much attention to the issue and expressed skepticism that s 132 covered the substantial amendments made by Canada to the imperial treaty. The majority found, regardless, that federal legislative jurisdiction with respect to migratory birds was not alone sufficient to support the constitutional validity of the s 7 prohibition or the *IAA* designated projects scheme in light of the findings that the matter of the scheme could not be classified as falling under Parliament’s legislative powers in relation to sea coast and inland fisheries (s 91(12)), Indians and lands reserved for the Indians (s 91(24)) or interprovincial effects under the POGG power: paras 201-203.

ii. Canada’s position

[113] Canada and several interveners argue that the parties to the *Protocol* did not denounce or replace the original *1916 Convention* but made only limited amendments to it to achieve its initial purpose and respect s 35 rights. Therefore, the *1916 Convention*, as amended by the *Protocol*, remains an imperial treaty and Parliament is empowered to implement it, including through the *IAA* provisions that protect migratory birds through the impact assessment process. It submits the history of federal assessment has included migratory birds since at least *CEAA 1992*. In the

alternative, the *IAA* provisions dealing with migratory birds are reasonably ancillary to the purpose of the original *1916 Convention* and are grounded in s 132 on that basis as the *IAA* scheme furthers the *1916 Convention*'s initial purpose of protecting and preserving migratory birds by limiting the significant and adverse impacts on them caused by designated major projects: citing *Hamilton Wentworth (Regional Municipality of) v Canada (Minister of the Environment)*, 2001 FCT 381 at paras 165, 170, 173–74; *R v JD Irving Ltd*, [2008] NBJ No 371 at paras 13-17 (QL). Finally, Canada submits Parliament has legislative authority over migratory birds under the POGG power given that this is a matter of national concern especially in light of its transboundary aspect.

### iii. Alberta's position

[114] Alberta and Ontario argue the amended *IAA* includes no provisions purporting to address protection and preservation of migratory birds. It provides no criteria to inform its application to migratory birds or factors that permit the weighing of concerns. Neither the Preamble nor the Purpose clause expressly refers to migratory birds, nor are any of the factors listed in s 22, which is the heart of the assessment, expressly about migratory birds. Consequently, the *IAA* cannot be classified as legislation in relation to migratory birds. Further, it is not appropriate on this reference to consider a proposed new national concern, but in any event migratory birds would not meet the test to fall under the POGG power.

### iv. Analysis

[115] Section 132 of *The Constitution Act, 1867* grants the federal government “all Powers necessary or proper for performing the Obligations of Canada or of any Province thereof, as Part of the British Empire, towards Foreign Countries, arising under Treaties between the Empire and such Foreign Countries”. This does not extend to obligations in treaties entered into by Canada which do not arise under a treaty between the British Empire and foreign countries: *Attorney General for Canada v Attorney General for Ontario*, 1937 CanLII 362 (UK JCPC). Canada cannot expand its constitutional jurisdiction by entering into a new treaty or by substantially amending a pre-existing treaty. As the majority noted in the first *IAA* Reference, it is “far from obvious” that s 132 covers the substantial amendments made by Canada to an imperial treaty: para 203.

[116] The preamble to the original *1916 Convention* recognized that migratory birds were “in danger of extermination” and that the signatories were “desirous of saving from indiscriminate slaughter and of insuring the preservation of such migratory birds”. The *Protocol* reaffirmed the commitment of the new signatories (the Governments of Canada and the United States) to achieving the purposes and objectives of the *1916 Convention*.

[117] In our view, it cannot be said that the *IAA* is about saving certain migratory bird species from indiscriminate slaughter or ensuring their preservation. While it is undoubtedly true that the

scientific understanding regarding what is necessary to ensure preservation of migratory birds has developed over time, any federal legislative jurisdiction regarding migratory birds is considerably narrower than what is caught by possible non-negligible adverse changes (s 7) or even “to some extent significant” adverse changes (s 60(1)(a)) to migratory birds. See also *R v Crown Zellerbach Canada Ltd*, 1988 CanLII 63 at para 22, [1988] 1 SCR 401.

[118] In other words, to the extent the federal government may have jurisdiction over migratory birds grounded in its exclusive authority to implement imperial treaties under s 132, that jurisdiction does not extend to any act that could potentially affect a migratory bird in a more than trivial manner.

[119] As for the POGG power, a matter can only be recognized as one of national concern where the scale of its impact on provincial jurisdiction is reconcilable with the fundamental distribution of legislative power under the Constitution: *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at para 160, citing *R v Crown Zellerbach Canada Ltd*, [1988] 1 SCR 401 at 432; *R v Hydro-Québec*, 1997 CanLII 318 at para 66, [1997] 3 SCR 213.

[120] Despite the significant materials and submissions on this issue, it is neither necessary nor desirable on this reference to determine the basis for, and scope of, Parliament’s legislative power in relation to migratory birds in the absence of a live dispute regarding a concrete factual matrix. In the abstract, this Court can do no more than reiterate that any federal jurisdiction in this regard cannot extend to virtually any act that could potentially affect a migratory bird in a more than trivial manner.

c. Other components of the environment set out in Schedule 3 ((a)(iv))

[121] It bears noting that the list of subject areas in the definition of “adverse effects within federal jurisdiction” is not closed; it includes any other component of the environment set out in Schedule 3: (a)(iv). Section 7(2) authorizes the Governor in Council to amend Schedule 3 “to add or remove a component of the environment or a health, social or economic matter”. The definition of “environment” is extremely broad. While nothing has yet been specified in Schedule 3, this part of the definition “adverse effects within federal jurisdiction” gives the federal cabinet the power to unilaterally increase the scope of the *IAA* by regulation without parliamentary oversight.

d. Federal lands (b), the marine environment outside Canada (c) and pollution to boundary waters (e)

[122] These sections, which were added to the amended *IAA*, all relate to matters within federal jurisdiction.

e. Indigenous people ((e) and (f))

i. Majority's analysis

[123] Regarding the prohibitions insofar as they relate to impacts on or changes to the health, social and economic conditions of Indigenous peoples and Indigenous cultural heritage (former ss 7(1)(c) and (d)), the majority found the s 7 prohibitions were aimed at capturing privately or provincially funded projects on provincial lands that do not require the exercise of a federal power, duty or function outside the *IAA*. It reasoned that reserves under the *Indian Act*, RSC 1985, c I-5 would be covered by the secondary scheme (s 82), and projects requiring the exercise of a federal power, duty or function or that involve federal funding would be the subject of s 8 restrictions: para 197.

[124] The former s 7(1)(c) prohibited doing any thing in connection with a designated project that may cause, “with respect to the Indigenous peoples of Canada, an impact — occurring in Canada and resulting from any change to the environment — on (i) physical and cultural heritage, (ii) the current use of lands and resources for traditional purposes, or (iii) any structure, site or thing that is of historical, archaeological, paleontological or architectural significance”.

[125] The majority acknowledged that s 91(24) vests the federal government with primary constitutional responsibility for securing the welfare of Indigenous peoples, citing *Delgamuukw v British Columbia*, 1997 CanLII 302 at para 176, [1997] 3 SCR 1010. However, it found the indefinite prohibition following a negative decision statement on any act or thing in relation to a designated project that may have “an impact” on or cause “any change” - even trivial or non-adverse - to these areas was beyond Parliament’s s 91(24) legislative authority.

[126] Former s 7(1)(d) was also found to be framed as a broad and general prohibition on anything that may cause a combination of adverse and non-adverse changes to the health, social or economic conditions of the Indigenous peoples of Canada, even with the consent of the affected Indigenous group, community or people.

[127] The majority held that s 7(4) (exception for non-adverse changes consented to by an authorized Indigenous representative) did little to narrow the prohibition.

ii. Alberta's position

[128] Parliament ostensibly attempted to address the concerns about trivial or non-adverse changes through the definition “adverse effects within federal jurisdiction”, (e) and (f), outlining several non-negligible adverse changes in relation to Indigenous peoples.

[129] Alberta argues that “adverse effects within federal jurisdiction”, (e) and (f), do not relate to matters covered by s 91(24). Alberta submits that a provincially regulated undertaking does not become federally regulated just because it has a substantial Indigenous component. The activity must be “intimately bound up with the status and rights of Indians”: *NIL/TU, O Child and Family Services Society v BC Government and Service Employees’ Union*, 2010 SCC 45 at para 71. Sections 2(e) and (f) of the definition are not laws about Indigeneity under s 91(24). The current breadth of the definition would allow Canada to effectively subordinate any provincial decision-making process, rendering illusory the provincial jurisdiction over disposition and management of matters under s 92.

[130] Ontario argues that (f) (“health, social or economic conditions of Indigenous peoples”) is not a provision concerned with Indigeneity. It creates a category of federal jurisdiction so broad as to capture almost every aspect of day-to-day life in Canada.

[131] The Indian Resource Council submits the *IAA* ignores the rights of Indigenous peoples to use, extract, and produce minerals on their lands, as protected by s 35 of the *Constitution Act, 1982*, and it fails to recognize or mandate the jurisdiction of Indigenous peoples to assess impacts.

### iii. Canada’s position

[132] Canada argues that federal jurisdiction under s 91(24) is broad and includes the protection of, and concern for, the welfare of Canada’s Indigenous peoples. Through the definition, (e) and (f), Parliament ensured that adverse effects to Indigenous peoples, who may be impacted differently than other residents of a province, are identified and assessed at the earliest stages of a designated project. The amended *IAA* incorporates thresholds at each stage of the scheme to alleviate the concern identified by the majority.

[133] Cold Lake First Nations submits s 91(24) must be interpreted broadly to achieve its purpose, and, at minimum, federal jurisdiction extends to any laws that relate to Indigeneity or Indigenous difference. Indigenous populations may face unique impacts when compared to non-Indigenous peoples. The scope of s 91(24) must also be determined in light of s 35, s 25 of the *Charter*, and it must be interpreted through the lens of the *United Nations Declaration on the Rights of Indigenous Peoples*. Further, the respective obligations of each Crown respecting Indigenous peoples are not mutually exclusive.

### iv. Analysis

[134] Paragraphs (e) and (f) of the new definition of “adverse effects within federal jurisdiction” address the concerns expressed by the majority about trivial or non-adverse changes being the basis for s 7 prohibitions. However, the new definition includes any non-negligible change affecting Indigenous peoples, regardless of whether the matter falls within federal jurisdiction.

[135] In *Reference re An Act respecting First Nations, Inuit and Metis children, youth and families*, 2024 SCC 5, the Supreme Court stated the statute in question was constitutionally valid within Parliament’s s 91(24) jurisdiction over “Indians, and Lands reserved for the Indians”:

2 ...Since it concerns relationships within Indigenous families and the control exercised by Indigenous communities over Indigenous children, the impugned Act relates first and foremost to what is called Indigeneity or “Indianness”, that is, Indigenous peoples as Indigenous peoples, which requires its classification under s 91(24) of *The Constitution Act, 1867*.

[136] First Nations are not enclaves of federal power in a sea of provincial jurisdiction: *Kitkatla Band v British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31 at para 66, citing *Cardinal v Attorney General of Alberta*, 1973 CanLII 980 (SCC), [1974] SCR 695. Section 91(24) does not give the federal Crown a veto over the province’s power to take up treaty lands, nor does it grant the federal Crown supervisory jurisdiction over such matters: *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48; *Chartrand v The District Manager*, 2013 BCSC 1068 at paras 204-206, aff’d in part 2015 BCCA 345. Canada has no obligation or jurisdiction to supervise valid exercises of provincial jurisdiction on the basis that such matters may affect Indigenous peoples, where those activities are not themselves within federal jurisdiction: *Grassy Narrows* at paras 30-37, 50. See also *George Gordon First Nation v Saskatchewan*, 2022 SKCA 41 at para 162; *Chartrand*, at paras 204-206. Further, the federal government’s duty under s 35 does not override the division of powers.

[137] In our view, the concerns expressed in paras 196-200 of the first reference to the effect that ss 7(1)(c) and (d) “overshoot Parliament’s legislative authority under s 91(24)” are not resolved by replacing “an impact” with “a non-negligible adverse impact”. The *IAA* is fundamentally different from the *Act respecting First Nations, Inuit and Metis children, youth and families*, SC 2019, c 24, which was found to be within federal jurisdiction by virtue of s 91(24) because it “relates first and foremost to what is called Indigeneity [...], that is, Indigenous peoples as Indigenous peoples”. The current paragraphs (e) and (f) in the definition of “adverse effects within federal jurisdiction” are open to unspecified and unlimited application, allowing for a radical intrusion on provincial jurisdiction. As drafted, Canada could potentially insert itself into any provincial decision that may result in virtually any impact on Indigenous traditional land use, culture, Aboriginal and treaty rights, or the health, social or economic conditions of Indigenous peoples. Interpreting s 91(24) in such a broad fashion has fundamental implications in relation to provincial jurisdiction, not only with respect to the *IAA* but for future cases.

[138] It also bears noting that the former s 7(4) permitted the carrying out of acts otherwise prohibited where the change was not adverse and the proponent and the Indigenous community agreed. That provision has been repealed. While (e) and (f) speak to “adverse” changes, they cover

any “non-negligible” adverse change. Thus, Indigenous communities are now unable to avoid through agreement the s 7 prohibition on any activities that may cause slightly more than a trivial or negligible adverse change, for example, where an Indigenous community is one of the proponents of a designated project and is satisfied the overall benefits to their community far outweigh any adverse changes identified in (e) and (f).

f. Changes to a health, social or economic matter within the legislative authority of Parliament set out in Schedule 3(g)

[139] As noted earlier, while nothing has yet been specified in Schedule 3, s 7(2) of the *IAA* authorizes the Governor in Council to amend Schedule 3 “to add or remove a component of the environment or a health, social or economic matter”. In the result, the federal cabinet has the power to unilaterally increase the scope of the *IAA* by regulation in an extremely broad fashion without parliamentary oversight.

v. Decision-making

[140] It is with the above analyses in mind that we must consider whether federal effects drive the scheme’s decision-making functions under the amended *IAA*.

1. Designation

[141] The majority held that designation in the *Regulations* of some projects primarily regulated by the provinces was not problematic, since an impact assessment scheme is a prospective planning tool initiated at a point of informational uncertainty as to the full implications of proposed activities and therefore a low threshold for its application is a practical necessity. Further, the precautionary principle dictates that lack of full scientific certainty should not be a basis for postponing measures to prevent environmental degradation if there are threats of serious or irreversible damage: paras 142-145.

[142] The amendments have narrowed the focus at the designation stage through the introduction of a threshold and the definition of “adverse effects within federal jurisdiction”. The designation stage in the amended *IAA* is not, in and of itself, constitutionally problematic.

2. Planning and Screening Decision

[143] As was the case pre-amendment, the Agency must decide whether an impact assessment of a designated project is required by taking into account the mandatory factors set out in s 16(2). The factors have not appreciably changed, except for the addition of (f.1) which requires the Agency to consider whether some other means would permit another jurisdiction to address the adverse effects within federal jurisdiction.

[144] The most significant change at the screening decision stage is that the Agency now may only decide that an impact assessment is required if it is satisfied the carrying out of the project may cause “adverse effects within federal jurisdiction” or “direct or incidental adverse effects”: s 16(2.1).

[145] The majority noted the old s 16(2) was an open-ended list of factors, all of seemingly equal importance, only a couple of which related to adverse effects within federal jurisdiction and adverse direct or incidental effects. It held the decision to require an assessment must be rooted in the possibility of adverse federal effects and found the screening decision under s 16(2) was not driven by possible federal effects and therefore failed to focus the scheme on the federal aspects of designated projects: paras 150, 151, 154.

[146] Section 16(2.1) addresses this concern, but only to the extent that the new definition of “adverse effects within federal jurisdiction” does not go beyond matters of federal jurisdiction. As a result, the screening decision on its face no longer suffers from the constitutional problem identified by the majority. However, to the extent that the breadth of some components in the definition of “adverse effects within federal jurisdiction” goes beyond federal jurisdiction, as discussed above, the screening decision continues to suffer from the constitutional problem identified by the majority.

### 3. Impact Assessment Decision

[147] The impact assessment takes into account the factors listed in s 22(1). Despite Alberta’s position that the s 22 factors went significantly beyond matters with a clear connection to federal jurisdiction, the majority held that the assessment phase, on its own, did not involve an unconstitutional exercise of federal legislative authority, as the permissible scope of environmental assessment is broader than that of environmental decision-making: paras 157-160. It held the federal government is not restricted, when it comes to information gathering and assessment, to only legislating regarding activities over which it has jurisdiction or in respect of environmental effects that impact its areas of jurisdiction; at the assessment stage, the federal government can consider environmental effects that are not only federal in nature for the purposes of any cost-benefit analysis, citing *Oldman River* at 39. What matters most is how the information is used at the decision-making stage.

[148] Alberta submits that the broad scope of the s 22 factors in the amended *IAA* demonstrates that the assessment scheme remains focused on the activity or project as a whole, noting the list does not mention “adverse effects within federal jurisdiction” or “direct or incidental adverse effects” and that the public interest decision under s 63 must “be based” on the report and consider all of the s 22 factors. That brings us to consideration of the thrust of the ultimate public interest decision.

#### 4. Public Interest Decision

##### a. Majority's analysis

[149] The majority held that the wider the *IAA* scheme casts its net, the more critical the funneling function becomes to keeping the overall scheme within the bounds of federal legislative powers: para 150. Canada submits Parliament has addressed this concern through various provisions, most notably through the introduction of “adverse effects within federal jurisdiction” and changes to the public interest decision-making process.

[150] The impact assessment process ultimately informs the public interest decision under ss 60 to 63 which involves determining whether “to some extent” adverse effects within federal jurisdiction are justified in the public interest. If those effects are found to be justified in the public interest, conditions are established, including the implementation of mitigation measures and follow-up programs with which the proponent must comply: s 64. The mandatory conditions must be in relation to the “adverse effects within federal jurisdiction” or “direct or incidental adverse effects” indicated in the report: s 64(1), (2). If the effects are not found to be in the public interest, a negative decision statement issues and the ss 7 and 8 prohibitions continue, practically amounting to a permanent hold on the project.

[151] Pre-amendment, the decision maker was required under ss 60(1)(a), 61(1) or 62, after taking into account the impact assessment report, to:

...determine whether the adverse effects within federal jurisdiction — and the adverse direct or incidental effects — that are indicated in the report are, in light of the factors referred to in section 63 and the extent to which those effects are significant, in the public interest...

[152] Section 63 then set out the following factors:

- (a) the extent to which the designated project contributes to sustainability;
- (b) the extent to which the adverse effects within federal jurisdiction and the adverse direct or incidental effects that are indicated in the impact assessment report in respect of the designated project are significant;
- (c) the implementation of the mitigation measures that the Minister or the Governor in Council, as the case may be, considers appropriate;
- (d) the impact that the designated project may have on any Indigenous group and any adverse impact that the designated project may have on the rights

of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*; and

- (e) the extent to which the effects of the designated project hinder or contribute to the Government of Canada's ability to meet its environmental obligations and its commitments in respect of climate change.

[153] The majority found s 63 to be constitutionally problematic as the decision-making process did not involve a determination as to whether adverse federal effects were in the public interest but rather whether the project as a whole was in the public interest. The majority found the s 63 factors were not all confined to federal legislative competence, pointing as an example to the s 63(a) "sustainability" factor whose definition encompassed all environmental, social and economic effects, not only those that the federal government had jurisdiction to regulate: paras 166-167

[154] Further, some of the factors related to assessment of the project as a whole rather than to the adverse "effects within federal jurisdiction". The majority again cited s 63(a) and its wording "the extent to which the designated project contributes to sustainability", as well as s 63(e) which required consideration of the extent to which the effects of the designated project (not only its federal effects) hindered or contributed to Canada's ability to meet its environmental obligations and climate change commitments.

[155] The majority held the public interest decision must focus on the project's federal effects. The process strayed from federal heads of power because there were few constraints on how the s 63 factors could be used, allowing a mixed assessment of adverse federal effects with other adverse non-federal effects, such as the project's anticipated greenhouse gas emissions under s 63(e). Adverse federal effects, considered in isolation, would likely never be in the public interest. The adverse non-federal effects could amplify the perceived severity of the adverse federal effects and become the underlying basis for a negative public interest decision. As a result, the focus would shift from adverse effects within federal jurisdiction to the overall adverse effects of the project. The *IAA* made no distinction between the assessment of activities that fall under federal jurisdiction and the assessment of impacts from activities that are primarily regulated by the provinces. Section 63 expressly permitted non-federal concerns to stack up on the "adverse" side of the ledger, shifting the dominant thrust of the decision away from the acceptability of adverse federal effects and toward the wisdom of proceeding with the project as a whole: paras 169, 173-174.

[156] The majority posed a hypothetical wherein a decision maker determined under s 63(a) that the overall effects of a designated mining project would hinder sustainability. Given this adverse impact, the decision maker would conclude that the cumulative adverse impact on fish habitat and aquatic species would not be in the public interest. As a result, the fisheries aspect would have

been subsumed into consideration of the project's overall sustainability. In other words, the presence of potential harm to the fisheries would serve as the gateway to a decision about the public interest in the project as a whole - regulation of the project *qua* project on the basis of its overall sustainability: paras 170-172.

[157] Thus, the project's overall adverse effects, such as hindering sustainability broadly or Canada's climate change commitments, could substantiate a negative public interest decision. The majority cited the concern expressed in *Oldman River* at 71-72 that a federal assessment scheme might function as a "constitutional Trojan horse enabling the federal government, on the pretext of some narrow ground of federal jurisdiction, to conduct a far ranging inquiry into matters that are exclusively within provincial jurisdiction": para 176.

[158] The majority noted that an integrated decision considering both adverse federal and non-federal effects would be less concerning in relation to an activity falling under a federal head of power. For example, as in *Oldman River*, a federal decision maker could base its assessment of an interprovincial railway project (falling under ss 92(10)(a) and 91(29) of *The Constitution Act, 1867*) on a variety of environmental and socio-economic concerns, including adverse federal and non-federal effects: para 173.

[159] The majority stated that the *CEAA 2012* approach asking whether the adverse federal effects were "justified in the circumstances" rather than whether they were "in the public interest" made clear that the circumstances could be used to justify the adverse federal effects and render a positive decision, not to magnify the adverse federal effects and thus render a negative decision: para 175.

[160] The majority concluded that the *IAA*'s decision-making mechanism lost its focus on regulating federal impacts, allowing the decision maker a practically untrammelled power to regulate projects *qua* projects, whether or not Parliament had jurisdiction to regulate a given physical activity in its entirety: para 178.

#### b. Analysis

[161] The amended s 60 now provides:

60(1) After taking into account the report with respect to the impact assessment of a designated project that is submitted to the Minister under subsection 28(2) or at the end of the assessment of the effects of a designated project in respect of which the Minister has approved a substitution under section 31, the Minister must

- (a) determine, after taking into account the implementation of any mitigation measures that the decision maker considers appropriate, whether the

adverse effects within federal jurisdiction — and the direct or incidental adverse effects — that are indicated in the report are likely to be, to some extent, significant and, if so, the extent to which those effects are significant; and

- (b) if the decision maker determines that any of the effects referred to in paragraph (a) are likely to be, to some extent, significant, determine whether the effects so determined are, in light of the extent to which the Minister determined them to be significant and the factors referred to in section 63, justified in the public interest...

[162] Canada submits that Parliament adopted the “justified” language used in *CEAA 2012*, which it says the majority expressly preferred at para 175, to make it clear that the circumstances could be used to justify the adverse federal effects and thus render a positive decision, not to magnify the adverse federal effects and thus render a negative decision.

[163] However, s 60(b) employs the phrase “justified in the public interest”, not “justified in the circumstances”, the *CEAA 2012* language preferred by the majority. In the ss 81-91 *IAA* scheme for projects carried out or financed by federal authorities on federal lands or outside Canada, the determination is based on whether the project is “likely to cause significant adverse environmental effects” and whether those effects are “justified in the circumstances”.

[164] The consideration of mitigation measures and degree of significance have been moved from the s 63 list of factors to a preliminary consideration stage in s 60. The amended definition of “mitigation measures” is now restricted to those measures addressing the non-negligible adverse effects on Indigenous peoples, fisheries, migratory birds, federal lands, the marine environment, and boundary, international, or interprovincial waters.

[165] It is only if, after such mitigation measures, the adverse effects within federal jurisdiction indicated in the report are determined likely to be to some extent significant, that the public interest determination proceeds.

[166] Under s 60, the decision maker must “take into account” the impact assessment report. That report addresses the s 22 factors which are wide-ranging, including:

- (a) the changes to the environment or to health, social or economic conditions and the positive and negative consequences of these changes that are likely to be caused by the carrying out of the designated project, including

...(ii) any cumulative effects [defined as “changes”] that are likely to result from the designated project in combination with other physical activities that have been or will be carried out;

...

- (b) mitigation measures that are technically and economically feasible and that would mitigate any adverse effects [not “adverse effects within federal jurisdiction”] of the designated project;

...

- (d) the purpose of and need for the designated project;
- (e) alternative means of carrying out the designated project that are technically and economically feasible, including through the use of best available technologies, and the effects of those means;
- (f) any alternatives to the designated project that are technically and economically feasible and are directly related to the designated project;

...

- (h) the extent to which the project contributes to sustainability;
- (i) the extent to which the effects of the designated project hinder or contribute to the Government of Canada’s ability to meet its environmental obligations and its commitments in respect of climate change;

...

- (q) any assessment of the effects [“changes”] of the designated project that is conducted by or on behalf of an Indigenous governing body and that is provided with respect to the designated project;

...

- (s) the intersection of sex and gender with other identity factors; and
- (t) any other matter relevant to the impact assessment that the Agency requires to be taken into account

[167] The decision maker is to determine whether the likely to some extent significant adverse effects within federal jurisdiction are justified in the public interest. It is not clear how the requirement to “take into account” the impact assessment report addressing all the s 22 factors informs the public interest determination. Canada submits the “justified in the public interest” language in s 62(b) qualifies all of s 63 including the report provided to the decision maker which addresses the factors outlined in s 22. However, that does not explain how, for example, the need for a provincial project, alternative means of carrying out the project and the effects of those means, and alternatives to the project that are directly related to the designated project (s 22(d)(e) and (f)) are relevant to the public interest determination.

[168] Section 63 expressly requires the decision maker to consider the report prepared by the Agency. The decision maker is to make the public interest determination with respect to “likely to some extent significant effects”, in light of the extent of their significance and the s 63 factors. The 63 factors have been somewhat amended, now being:

63...(a) the impact that the effects that are likely to be caused by the carrying out of that project may have on any Indigenous group and any adverse impact that those effects may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*;

(b) the extent to which the effects that are likely to be caused by the carrying out of that project contribute to the Government of Canada’s ability to meet its environmental obligations and its commitments in respect of climate change; and

(c) the extent to which the effects that are likely to be caused by the carrying out of that project contribute to sustainability.

[169] Thus, the Minister is to determine whether “likely to some extent significant” federal effects (after mitigation measures), are “justified in the public interest”, weighing the extent of their significance and these s 63 factors. In effect, s 60(1)(b) prevents the Minister from finding that “to some extent adverse effects within federal jurisdiction” can be “justified in the public interest”, regardless of how beneficial it might be to a province and to matters within that province’s jurisdiction, if the effects of carrying out the project will not have a positive impact in relation to these three factors.

[170] “Effects”, used in ss 63(a), (b) and (c), are defined at s 2 as “changes to the environment or to health, social or economic conditions and the positive and negative consequences of these changes”, unless the context requires otherwise: s 2. It is not clear that the context of s 63 requires a more restrictive interpretation. Therefore, in our view, the term is not restricted to non-negligible adverse changes (nor to areas over which Parliament has legislative authority).

[171] Regarding factor (a), Indigenous impacts, as noted in the majority's decision, the designated project scheme applies to projects on provincial lands, not to Indian reserves (s 82): para 197.

[172] There is no significance threshold in the definition of "effects" or in s 63(a) and therefore trivial positive and negative effects may be considered. On its face, factor (a) requires consideration of both positive and negative effects of any degree, as well as adverse impacts of those effects. Factor (a) may be interpreted as requiring a set-off of positive or adverse effects against adverse impacts of the effects on Indigenous rights, or as requiring separate consideration of all effects, both negative and positive, and in addition any adverse impact of those effects on Indigenous rights. But, according to the majority, an adverse effect cannot be used to justify a public interest determination.

[173] Canada initially took the position that the addition of the word "justified" means that only positive impacts may now be considered in the public interest determination.

[174] There was considerable discussion during oral argument as to whether the "stacking on the adverse side of the ledger" concerns expressed by the majority persist after the amendments. In particular, the question arose as to whether the decision maker may off-set positive effects against negative effects, which may result in positive effects not being considered in relation to whether "to some extent significant" adverse effects within federal jurisdiction are "justified in the public interest". Canada ultimately took the position that although the *IAA* may be read as requiring only positive effects to be considered, the Minister has discretion in this regard.

[175] Therefore, factor (a) leaves open the possibility that, in the absence of an adverse impact on s 35 rights, general adverse effects in relation to one or more Indigenous groups may nevertheless be deemed to overcome general positive effects on one or more Indigenous groups or they must be considered separately. In other words, factor (a) appears to be open to an interpretation that would allow weighing of trivial adverse non-federal effects in the public interest determination.

[176] The same concern arises in relation to factors (b) and (c), despite the inclusion of the phrase "contribute to" and the absence of the word "adverse". Again, "effects" are defined as changes and positive and negative consequences of those changes. As the Minister may choose to first determine the net "effects" (in provincial and federal domains) under (b) or (c), it is possible that positive changes which "contribute to" climate change initiatives or sustainability (which remains broadly defined) will in reality be ignored in considering justification in the public interest.

[177] It is also not clear whether there may be a "netting" as between factors (a), (b) and (c). If so, a net negative effect finding regarding sustainability, for example, might overcome positive effect findings in relation to climate change or Indigenous groups.

[178] Therefore, Canada's position that only positive considerations under factors (a), (b) and (c) can be used to justify "adverse effects within federal jurisdiction" in the public interest does not hold up to scrutiny. The language of s 63 does not expressly prohibit the consideration of negative effects within each of ss 63 (a)(b) and (c) or as between them. The project's overall net impact on any Indigenous group, sustainability, or climate change - which includes matters not within federal jurisdiction - will determine whether any of these factors are available to potentially offset any identified adverse effects within federal jurisdiction.

[179] If the project is not indefinitely prohibited, s 64 mandates that the Minister impose any conditions the Minister considers appropriate in relation to any non-negligible adverse effects indicated in the assessment report in the areas set out in the definition of "adverse effects within federal jurisdiction". Thus, although ss 60 and 63 ostensibly perform a "funneling" function in terms of significance of adverse effects, from a practical point of view this really only serves to narrow the determination as to whether any "to some extent significant" adverse effects within federal jurisdiction are justified in the public interest. Mandatory conditions may still be imposed with respect to non-negligible, potentially insignificant, adverse "federal" effects.

[180] Therefore, although the public interest decision weighs various factors in light of likely to some extent significant adverse effects, conditions deemed appropriate are imposed in relation to all non-negligible adverse changes in any of the areas referred to in the definition of "adverse effects within federal jurisdiction". Canada submits that significant cumulative effects can result from individually minor effects. However, this disconnect between identification of significant adverse effects in the public interest decision-making and the broad jurisdiction in s 64 opens up the possibility that the Minister will regulate separate, non-negligible, non-cumulative adverse changes.

[181] All of this raises the question as to whether the majority's concern about a broad power to regulate projects *qua* projects has really been addressed by the amendments, particularly given Canada's acknowledgement that the Minister retains discretion to consider negative effects so stacking on the adverse side of the ledger may still occur.

[182] Take, for example, the majority's hypothetical designated mining project. The majority expressed concern that a finding that the mining project would hinder sustainability could subsume the adverse effects in the areas of fisheries, leading to consideration of the project's overall sustainability. Potential harm to the fisheries could serve as the gateway to a decision about the public interest in the project as a whole based on its overall sustainability.

[183] Assume the designated mining project is determined to be likely to cause to some extent significant non-negligible adverse impacts in the areas of fisheries. Under the amended decision-making provisions, the decision maker may weigh net non-federal effects to determine whether the adverse federal effects are "justified in the public interest". If those non-federal effects

are found to be insufficient to justify the adverse federal effects, any activity in relation to a designated primarily provincial project may remain indefinitely prohibited under s 7 on the basis that it may cause adverse effects “within federal jurisdiction”. Alternatively, the decision maker may determine the designated project is justified in the public interest but nevertheless impose expansive conditions addressing effects identified in the Agency’s report prepared in relation to the s 22 factors including, for example, alternative means of undertaking the project, that could apply for the life of the project.

[184] The public interest decision must focus on the acceptability of the adverse federal effects. Despite the amendments, the potential remains that the consideration of effects which are not tied to any federal head of power will drive the determination as to whether the adverse federal effects are justified in the public interest.

[185] The same public interest decision-making framework applies to all projects, whether Parliament is vested with broad jurisdiction over the activity itself or narrower jurisdiction over the activity's impacts on federal heads of power and whether or not the activities in question require federal approvals in relation to distinct effects caused by the activity.

[186] Further, there is no direct connection to existing external federal decision-making responsibilities. The *IAA* does not establish any standards or parameters related to the “adverse effects within federal jurisdiction” subject areas themselves or set parameters on what a project or its underlying activities can and cannot do in relation to areas of federal jurisdiction. While Parliament may have the power to create an impact assessment scheme that complements existing regulation in environmental matters, the *IAA* creates great uncertainty due to the potential for previously unpronounced standards to apply to designated projects. This merely exacerbates the concern that a federal assessment scheme might enable the federal government, on the pretext of some narrow ground of federal jurisdiction, to conduct a far-ranging inquiry into matters that are exclusively within provincial jurisdiction.

[187] Absent this legislation, a provincially regulated project could potentially have negative effects on matters within federal jurisdiction. It is open to Parliament to regulate matters within federal jurisdiction. However, under the amended *IAA*, a project primarily subject to provincial jurisdiction could be prevented from proceeding due to a potential adverse, but not otherwise prohibited or regulated, effect within federal jurisdiction, as a result of a public interest balancing of the project as a whole performed by a federal decision-maker from the perspective of federal priorities. So long as there is a federal “hook”, the proponent and the provincial stakeholder in a project otherwise primarily within provincial jurisdiction may still be subject to federal regulation of the project *qua* project - evaluating the wisdom of proceeding with the project as a whole - and not just federal regulation of the adverse federal effects. In other words, the decision maker may regulate the project causing the impacts through imposition of conditions and follow-up programs

or indefinite prohibitions on entire projects and matters within provincial jurisdiction rather than confining oversight to federal effects caused by the project.

[188] Therefore, we conclude the decision-making under ss 60 to 64 remains problematic: 1) the assessment report, including non-federal factors, must be taken into account; 2) s 60 prevents the Minister from finding that “to some extent adverse effects within federal jurisdiction” can be “justified in the public interest”, regardless of how beneficial it might be to a province and to matters within that province’s jurisdiction, if the effects of carrying out the project will not have a positive impact in relation to the three s 63 factors; 3) the term “effects” in s 63(a), (b) and (c) is not restricted to non-negligible adverse changes; 4) the Minister may choose to set off positive and negative s 63 effects such that not only positive effects may be determinative; and 5) the Minister may impose any conditions the Minister considers appropriate in relation to any non-negligible adverse effects indicated in the assessment report in the areas set out in the definition of “adverse effects within federal jurisdiction”.

[189] Of course, the overbreadth under the definition of “adverse effects within federal jurisdictions” exacerbates these problems.

#### vi. Conclusion on Classification

[190] The majority in the first reference concluded that the designated projects scheme in the initial *IAA* could not be classified under federal heads of power and was, therefore, *ultra vires*. The pith and substance was to “to assess and regulate designated projects with a view to mitigating or preventing their potential adverse environmental, health, social and economic impacts”. That exceeded federal jurisdiction because: (1) the defined “effects within federal jurisdiction” did not drive the scheme’s decision-making functions so it was not in pith and substance directed at regulating those effects; and (2) the “effects within federal jurisdiction” did not fall within federal legislative competence under s 91 of *The Constitution Act, 1867*. The scheme intruded “more than incidentally into the provinces’ constitutional sphere...[which] encompasses exclusive legislative jurisdiction to regulate in areas including property and civil rights in the province (s 92(13)), matters of a local nature (s 92(16)), local works and undertakings (s 92(10)), and non-renewable natural resources, forestry resources, and electrical energy (s 92A)”: paras 204-205. In our view, the constitutional problems identified by the majority remain despite the amendments.

[191] The pith and substance of the amended “designated projects” scheme is “to assess and regulate designated projects with a view to mitigating or preventing their potential adverse environmental, health, social and economic impacts”. While the amendments address some of the specific concerns identified by the majority, they fail to address the fundamental problem: the *IAA* continues to provide the federal executive branch with ultimate decision-making power in respect of broad effects of a primarily provincial project.

[192] We conclude the *IAA* and *Regulations* designated projects scheme continues to be *ultra vires*, except insofar as it applies to federal undertakings.

## **V. Severance of s 7**

[193] Canada argues in the alternative that if this Court finds the designated project scheme to be *ultra vires*, s 7 or any part of it (and the offence provision, s 144, as it pertains to the s 7 prohibition) might be severed so as to render the designated projects scheme constitutional.

[194] Alberta has not challenged s 8 which relates to the exercise of federal authorities' powers. Section 8 essentially prevents the exercise of authority under separate federal legislation until the completion of an assessment, similar to *EARPGO* and the *CEAA 1992*. To the extent the structure of the *IAA* simply feeds into the decision-making around those exercises of legislative authority, this was endorsed in *Oldman River* at 71–72.

[195] In our view, the alternative remedy requested by Canada would not make the designated projects scheme constitutional. Severance of s 7 would leave s 8 prohibitions in place and would not address the overbreadth in the definition of “adverse effects within federal jurisdiction” which, as noted above, characterizes matters beyond federal jurisdiction as “adverse effects within federal jurisdiction” (s-s 2(a)(iii), (e), (f), and (g)). Further, severance of s 7 would not be a solution to the fundamental constitutional problem identified since ss 60, 63 and 64 would continue to raise the prospect of regulation of the project *qua* project.

## **VI. Interjurisdictional Immunity**

[196] The majority, having concluded that the designated projects scheme was *ultra vires*, found it was unnecessary to address this alternative argument: para 213. We adopt the same approach.

## **VII. Application to Strike**

[197] Alberta applied to strike evidence filed in this matter, relying broadly on Rule 3.68(4)(a) of the *Alberta Rules of Court*, Alta Reg 124/2010 which allows the Court strike out all or part of an affidavit containing frivolous, irrelevant or improper information. It submits the offending portions constitute hearsay or improper legal opinion.

[198] We have considered the application to strike evidence against the backdrop of the fulsome submissions on this reference. Some of the “evidence” in question is essentially disguised argument. Other evidence is not particularly helpful. In any event, none of the evidence in question would affect the result. In other words, it is not material. Therefore, we need not expound upon its legitimacy or relevance, nor whether it is properly before the Court.

## VIII. Conclusion

[199] The reference questions should be answered in the affirmative. The designated projects part of the *IAA* and the *Regulations* are unconstitutional, except insofar as they apply to primarily federal undertakings. Severance of s 7 would not be a viable solution.

Special Hearing heard February 24 - 26, 2026

Opinion filed at Calgary, Alberta  
this 9th day of October, 2026

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Authorized to sign for: Crighton J.A.

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Strekaf J.A.

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Ho J.A.

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Fagnan J.A.

**Feehan J.A. (Dissenting):**

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**Feehan J.A. (Dissenting):**

**I. Overview**

[200] I have had the opportunity of reading the majority opinion of my colleagues, Justices Crighton, Strekaf, Ho, and Fagnan, and I commend them for their thoughtful and detailed reasons. I, however, respectfully dissent for the reasons below.

[201] This current reference is unlike others. It is a second request by the Alberta government for opinions, after this Court and the Supreme Court of Canada addressed a preliminary reference on the *Impact Assessment Act*, SC 2019, c 28, s 1 and the *Physical Activities Regulations*, SOR/2019-285, *Reference re Impact Assessment Act*, 2022 ABCA 165, 470 DLR (4th) 1, *Reference re Impact Assessment Act*, 2023 SCC 23, 486 DLR (4th) 379. Extensive amendments were made by Parliament specifically to address the Supreme Court's expressed concerns. This second reference has now been directed on those amendments.

[202] This reference turns largely on whether Parliament's amendments in the *Impact Assessment Act*, SC 2019, c 28, s 1, made by the *Budget Amendment Act*, 2024, No 1, SC 2024, c 17, and the *Physical Activities Regulations*, SOR/2019-285, have adequately and sufficiently addressed the concerns of the Court. I conclude they have, and that the new iteration of the *Act* is constitutionally within the jurisdiction of the Parliament of Canada.

**II. Brief Background**

[203] On June 21, 2019, the federal Parliament passed *An act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other acts*, SC 2019, c 28. Part one enacted the *Impact Assessment Act* and repealed the *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52.

[204] On September 9, 2019, the Alberta government issued Order-in-Council 160/2019 under s 26 of the *Judicature Act*, RSA 2000, c J-2, asking for this Court's opinion on two questions:

- a) Is Part 1 of *An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts*, S.C. 2019, c. 28 unconstitutional, in whole or in part, as being beyond the legislative authority of the Parliament of Canada under the Constitution of Canada?
- b) Is the *Physical Activities Regulations*, SOR/2019-285, unconstitutional in whole or in part by virtue of purporting to apply to certain activities listed in Schedule 2 thereof that relate to matters entirely within the legislative authority of the Provinces under the Constitution of Canada?

[205] The majority of this Court opined that the 2019 original iteration of the *Act* and regulations were unconstitutional. The minority in this Court held that they were within the jurisdiction of the Parliament of Canada.

[206] The decision of this Court was appealed to the Supreme Court. The Supreme Court issued its opinions on the original *Act* on October 13, 2023. The majority, in extensive reasons, found that certain provisions of the *Act* were within the jurisdiction of Canada, and therefore constitutional, other provisions were outside the jurisdiction of Canada, and therefore unconstitutional, and made specific recommendations as to how those provisions found to be unconstitutional could be amended so as to become constitutionally valid. The minority found the *Act* and regulations to be wholly *intra vires* the jurisdiction of Canada.

[207] In response to the decision of the Supreme Court on the original *Act*, on June 20, 2024, the Parliament of Canada passed the *Budget Implementation Act*, No 1, SC 2024, c 17, Part 3, Division 28, which made extensive amendments to the *Impact Assessment Act* said to address the constitutional concerns of the majority of the Supreme Court.

[208] Following the amendments to the *Act*, Alberta issued a new Order-in-Council on November 20, 2024, OC 316/2024, pursuant to s 26 of the *Judicature Act*, addressing the constitutionality of the *Act* and *Regulations* as amended:

Are the *Impact Assessment Act*, S.C. 2019, c. 28, s. 1, as amended by the *Budget Implementation Act*, 2024, No. 1, S.C. 2024, c. 17, and the *Physical Activities Regulations*, SOR/2019-285, unconstitutional in whole or in part, as being beyond the legislative authority of the Parliament of Canada under the Constitution of Canada, or inapplicable to the extent that their application would impair the core of a provincial legislative power?

[209] This Court heard oral submissions on this reference from February 24 to 26, 2026.

### **III. The 2023 Supreme Court Decision and Parliament’s Responsive Amendments**

#### **(a) Provisions of the Act said to be Constitutionally Compliant**

[210] The majority of the Supreme Court identified provisions of the original *Act* which were constitutional and did not need to be changed.

[211] First, the majority said, para 48, that the “secondary scheme”, sections 81 to 91, were materially different from the remainder of the *Act*, the “primary scheme”, focusing on a narrow set of “projects” defined as:

- a) physical activity that is carried out on federal lands or outside Canada in relation to a physical work and that is not a designated project or a physical activity designated by regulations made under para 112(1)(a.2); and
- b) a physical activity that is designated under s 87 or that is part of a class of physical activities that is designated under that section.

[212] The majority had “little trouble in concluding this secondary scheme is *intra vires* Parliament”, paras 207-211, 215. The minority concurred, para 220. These provisions have not been challenged in the current reference.

[213] The majority explicitly also found a number of other sections not constitutionally problematic on their own, although they were unconstitutional because they were part of the “designated projects” scheme which was beyond Parliament’s jurisdiction: s 7, prohibitions on doing anything in relation to a project, to the extent that it applies during the planning and impact assessment phases; s 8, prohibitions relating to the federal exercise of authority; ss 109(b) and s 9(1), the power to designate physical activities as ‘designated projects’; ss 10 to 15, the proponent’s obligations during the planning phase; and ss 21 to 59, the impact assessment stage of the process, including specifically s 22, as it relates to information gathering.

[214] The majority structured its analysis around the four decision-making junctures in the scheme: designation, screening, impact assessment, and public interest decision making. The majority indicated that the provisions governing the designation of activities as designated projects and the delineation of the scope of the impact assessment were, on their own, constitutionally unproblematic. The majority said, para 160, that it was not problematic for a federal agency to consider a broad range of factors when delineating the scope of the impact assessment:

In light of the interrelated nature of environmental matters, it would be both artificial and uncertain to limit the factors that can be studied or considered to those that are federal. What matters most is how the information is used at the decision-making stage.

[215] The majority recognized that “a low threshold for the application of an impact assessment scheme is a practical necessity”, para 143. Assessment is prospective and launches from a “point of informational uncertainty”; “the full implications of proposed activities cannot be properly understood, if at all, until an assessment is well underway if not completed”, paras 143, 144; ***Friends of the Oldman River Society v Canada (Minister of Transport)***, [1992] 1 SCR 3, para 71, 88 DLR (4th) 1. It concluded, para 146:

Requiring definitive proof that a project will have effects on areas of federal jurisdiction prior to an impact assessment would put the cart before the horse and undermine the precautionary principle ... . Therefore, ... the designation

mechanism's imperfect focus on federal effects is both practically necessary and constitutionally sound.

[216] Parliament may regulate federal effects or impacts of intraprovincial projects, provided the legislation is truly focused on impacts within the federal sphere of authority; para 142: “[e]ven a ‘provincial’ project, may cause effects in respect of which the federal government can properly legislate”. The majority recognized the *IAA* employs an “effects- or project-based trigger”, unlike the scheme upheld in *Oldman River*, which used a “decision-based trigger”, paras 13, 18 23, 34. But the scheme’s project-based trigger was not, on its own, constitutionally problematic, nor was there any constitutional requirement to exclude activities primarily regulated by the provinces from a federal impact assessment scheme altogether, “so long as the regulation of *federal aspects* represents the dominant characteristic of the law”, para 132, emphasis in original.

[217] As to the impact assessment stage, the majority reviewed the factors to be taken into account, listed in s 22, when delineating the scope of an assessment, and said, para 161: “the breadth of the factors listed in s. 22 of the *IAA* does not pose a constitutional issue.” In “undertaking an impact assessment [Parliament] has wide latitude to evaluate the project's anticipated effects. It is not restricted to studying or gathering information about those effects that fall within its legislative jurisdiction.”

[218] Additionally, the majority acknowledged, para 192, that s 7, with its “effects-based prohibitions may well be necessary for practical reasons during the planning and assessment phases of the impact assessment process, when the potential effects of a proposed project have yet to be identified”. The temporary pause created by the s 7 prohibitions was permissible as written through the planning and impact assessment phases, though it created constitutional problems at the public interest decision-making phase.

[219] The majority also appeared to accept as constitutional the Minister’s power to impose conditions under s 64 following a positive public interest decision. First, the majority recognized that through this power, “the federal executive’s oversight of the project continues, even where it determines that the adverse effects are in the public interest”, para 101. Later, in a hypothetical scenario involving a proposed mining project that posed a potential risk to fish habitat and aquatic species, the majority recognized “the fisheries aspect is federal”, para 170. If the Minister imposed conditions to mitigate the adverse impact on fisheries following a positive public interest decision, then “[t]he thrust of the decision and the force of federal regulation would clearly be aimed at protecting the fisheries through mitigation measures, follow-up programs, and any other conditions that the Minister considers appropriate under s. 64(1) and (4)”, para 171. The majority appeared unconcerned by this scenario, consistent with its view that Parliament may use impact assessment to pursue environmental protection, so long as the scheme’s “main thrust” is “directed at federal matters” and “the effects regulated by the scheme ... align with federal legislative competence”, para 206.

[220] In addition, the majority made general comments about how the federal government could create constitutional compliance.

[221] First, it provided guidance on the two decision-making junctures that were constitutionally problematic: the screening decision and the final public interest decision.

[222] With respect to screening, it said, para 150, that the factors governing a screening decision must be more closely tied to possible adverse federal effects than is necessary for a designation decision. That is because the screening decision determines whether the rest of the impact assessment regime applies to a project, including its continuing prohibitions, the requirement to gather information and, ultimately, the decision whether to approve the project in the public interest. Accordingly, at the screening stage, it is necessary to funnel (or filter) designated projects into those that are “rooted in the possibility of adverse federal effects”.

[223] Amendments to ensure the s 16 screening decision is “driven by the likelihood of federal impacts”, para 154, would make this step constitutionally compliant. A screening decision focused on non-trivial, not insignificant effects in areas of federal jurisdiction would conform to constitutional requirements.

[224] As to the final public interest decision-making, the majority said, para 177, while it was “inevitable and permissible” for the scheme to be broad at the assessment stage (when the Agency determines the scope of the information required in the impact assessment), at the ultimate decision-making juncture the focus on federal aspects was critical: “Parliament can validly regulate only the impacts that fall within its jurisdiction or that arise from activities within its jurisdiction”, but “at the assessment stage, the federal government is not restricted to considering environmental effects that are federal in nature”: paras 157, 177; see *Oldman River*, 39; *Québec (Attorney General) v Canada (National Energy Board)*, [1994], 1 SCR 159, 191, 193, 112 DLR (4th) 129; *R v Hydro-Québec*, [1997] 3 SCR 213, para 134, 151 DLR (4th) 32; *R v Crown Zellerbach Canada Ltd*, [1988] 1 SCR 401, 420, 49 DLR (4th) 161; *Ontario v Canadian Pacific Ltd*, [1995] 2 SCR 1031, para 43, 125 DLR (4th) 385. The majority said, para 204, that “effects within federal jurisdiction” had to “comport with federal legislative competence under s. 91 of the *Constitution Act, 1867*” and drive the scheme’s decision-making functions.

[225] Amendments to anchor final decision-making on significant adverse federal effects would make this final step in the scheme unproblematic.

[226] Paragraph 206 in particular set out a roadmap for constitutional compliance. Here, the majority acknowledged that Parliament can enact legislation to protect the environment under the heads of power assigned to it in the *Constitution Act, 1867* and can enact an impact assessment scheme as part of that responsibility. However, it said the scheme must be consistently focused on federal matters. Projects ought to be designated based on their potential effects on areas of federal

jurisdiction, the main thrust must be directed at federal matters. The screening decision must be rooted in the possibility of adverse federal effects. The public interest decision must focus on the acceptability of the adverse federal effects, must not veer towards regulating projects *qua* projects, and the effects must align with federal legislative competence. These comments set the benchmark for evaluating Canada's amendments and the ultimate constitutionality of the current *Act*.

(b) *Provisions of the Act said to be Constitutionally Non-Compliant and Parliament's Amendments*

[227] The majority specifically identified provisions which it said were constitutionally problematic, such that the designated projects scheme as a whole fell outside federal jurisdiction. Alberta argues that Parliament's amendments were not truly responsive to the majority's guidance, leaving the designated projects scheme fundamentally unchanged and unconstitutional. Canada says it read the decision carefully, identified the criticisms, and addressed them directly to comply with the majority's guidance and ensure the constitutionality of the *Act*. As discussed below, Parliament's amendments address all the constitutional concerns identified by the majority.

[228] Below, I identify those particular areas of concern expressed by the majority, and the targeted responses in the amendments to the *Act*.

[229] First, while the designation decision itself was seen as constitutionally unproblematic by the majority, Parliament amended it in a manner that addresses a concern identified by the majority with respect to substitution. The majority reasoned the requirement to consider s 22 factors in any substituted process ensured even a substituted process "will be federal, at least in substance", para 107. Parliament amended the designation provision to expressly permit the Minister to consider "whether a means other than an impact assessment exists that would permit a jurisdiction to address the adverse effects within federal jurisdiction" when rendering a designation decision. Canada points out that this new provision, s 9(2)(d), does not require that the other means consider the factors listed in s 22 to the *Act*. This increases the scope of possible processes that can be considered by the Minister in deciding not to designate a project and supports cooperation among jurisdictions.

[230] Similarly, at the screening decision, Parliament added s 16(2)(f.1), which permits the Agency to decide not to conduct an impact assessment where another jurisdiction can address the adverse effects within federal jurisdiction through another means, without an obligation to consider the s 22 factors.

[231] To respond to the majority's concerns that the mandatory factors in s 16(2) governing the screening decision were not limited to the possible effects of designated projects on areas of federal concern, Parliament added s 16(2.1), which clarifies that the Agency may only require an impact assessment if satisfied that the designated project may cause adverse effects within federal

jurisdiction, and a precise definition in s 2 of “adverse effects within federal jurisdiction”. The latter definition includes non-negligible adverse changes to: specified components of the environment (fish and fish habitat, aquatic species, and migratory birds); the environment, where the change would occur on federal lands; the marine environment, where the change is caused by pollution and would occur outside Canada; and boundary waters, international waters and interprovincial waters, where the change is caused by pollution.

[232] The definition includes non-negligible adverse changes and impacts on the physical and cultural heritage, use of lands and resources for traditional purposes, historical, archaeological, paleontological or architectural significance of structures, and the health, social or economic conditions of the Indigenous peoples of Canada. The definition also includes non-negligible adverse changes to “any other component of the environment” or “a health, social or economic matter that is within the legislative authority of Parliament” set out in Schedule 3, and the *Act* empowers the Governor in Council to add or remove items from Schedule 3, s 7(2). This element of the definition is consistent with the old *Act*, which empowered the Governor in Council to modify Schedule 3, which in turn was included in the former definition of s 2 “effects within federal jurisdiction”. The majority did not express concern about this regulatory power, which has never been exercised.

[233] Parliament repealed the former definition of s 2 “effects within federal jurisdiction”, including (b)(ii), which the majority called the “interprovincial effects” clause, para 183. The majority observed this provision included “an unlimited range of interprovincial environmental changes” within the ambit of the scheme, para 184. Parliament’s removal of the interprovincial effects clause responds to the majority’s concern and significantly narrows the application of the *Act*.

[234] Under the amended *Act*, a mere change to a listed item is not an adverse effect within federal jurisdiction; only non-negligible adverse changes or impacts fall within the definition. That amendment fundamentally narrowed the effects that the Agency must consider under s 16(1)(b), (f.1), and potentially (c), and s 16.2(2.1), when making a screening decision.

[235] Parliament also amended the definition of “direct or incidental effects”, now “direct or incidental adverse effects”, s 2, to limit those effects to “non-negligible adverse effects” that are directly linked or necessarily incidental to a federal exercise of a power or performance, or duty or function under s 8. That change in definition also affected the definition of “mitigation measures”, s 2, which are now limited to “adverse effects within federal jurisdiction, direct or incidental adverse effects, or adverse environmental effects as defined in section 81”.

[236] Those definitional amendments, and their inclusion in s 16, directly address the majority’s concerns as to the constitutionality of the screening decision. Whereas the former s 16(2) permitted designation “for reasons other than, or not sufficiently tied to, the project’s possible impacts on

areas of federal jurisdiction”, para 151, the new limitation in s 16(2.1) expressly requires that “[t]he Agency may decide that an impact assessment is required only if it is satisfied that the carrying out of the designated project may cause adverse effects within federal jurisdiction or direct or incidental adverse effects”, as defined above.

[237] Likewise, the Minister’s power to impose conditions under s 64(1), not viewed as problematic by the majority, has nonetheless been narrowed, as those conditions must be “in relation to the adverse effects within federal jurisdiction”.

[238] The majority focused its constitutional concerns on the public interest decision, and in particular ss 60 to 63 of the *Act*. These are also the sections that have undergone the most significant amendments.

[239] To ensure that the public interest determination focusses on the project’s federal effects, ss 60(1) and 61(1) imposes a significance threshold beyond the ‘non-negligible adverse effects’ threshold that is included in the definition of “adverse effects within federal jurisdiction’. The federal decision maker must determine whether the adverse effects within federal jurisdiction (as indicated in the Agency’s report) are likely to be, “to some extent” significant and how significant those effects will be.

[240] With respect to the final federal decision itself, the majority observed that the mandatory public interest factors set out in s 63 of the old *Act* were extensive: the extent to which the designated project contributes to sustainability, the extent to which the adverse effects within federal jurisdiction and adverse direct and incidental effects are significant, mitigation measures considered appropriate, the impact upon Indigenous groups and adverse impact on the rights of Indigenous peoples, and the extent to which the effects of the project hinder or contribute to Canada's ability to meet its environmental obligations and commitments in respect of climate change. These factors were not all confined to areas of federal legislative jurisdiction – in particular, effects on sustainability and Canada’s ability to meet its climate change commitments.

[241] The majority found, para 66, that these criteria represent “an unconstitutional arrogation of power by Parliament” and were “constitutionally vulnerable”.

[242] The s 63 factors remain largely the same but their function in the public interest decision under ss 60-63 has changed considerably. They are, specifically: impact of the effects likely to be caused by carrying out the project on Indigenous groups and any adverse impacts of those effects on s 35 rights; the extent to which those effects contribute to Canada’s ability to meet its environmental obligations and commitments in respect of climate change; and the extent to which those effects contribute to sustainability.

[243] The majority was concerned with how the s 63 factors in the previous *Act* functioned in the public interest decision. In particular, it was concerned that adverse non-federal effects listed in s 63 could amplify the perceived severity. It said, para 169, “the mandatory cumulation of adverse non-federal effects shifts the focus of the decision from the adverse effects within federal jurisdiction to the overall adverse effects of the project”, permitting non-federal concerns to “stack up” on the “adverse” side of the ledger.

[244] It recommended, para 175, adoption of the language from the *Canadian Environmental Assessment Act 2012*, ss 52(2) & (4) to make it clear that the mandatory circumstances considered by the Minister or Governor in Council could only be used to justify the adverse federal effects and thus render a positive decision, but not be used to magnify adverse federal effects and render a negative decision. As will be noted below, this is exactly what Parliament has done through its amendments to both the assessment process that informs the final federal decision-making, ss 28(3), 33(2), 51(1)(d)(ii), 59(2), and ultimately the amended public interest decision-making provisions themselves, ss 60(1)(b), 61(1)(b), 62(b).

[245] Those amendments begin with the Impact Assessment Report submitted to the Minister. Section 28(3) now requires from among the adverse effects determined to be within federal jurisdiction, and the direct or incidental adverse effects, the report must specifically identify “the ones that are likely to be, to some extent, significant, and the extent to which they are significant”.

[246] Likewise, in the amendment to s 33(2) the Minister must be satisfied that a report in substitution for a federal assessment report will indicate the adverse effects within federal jurisdiction and those that are direct or incidental adverse effects, and “specify, from among those adverse effects within federal jurisdiction and direct or incidental adverse effects, the ones that are likely to be to some extent, significant, and the extent to which they are significant”. That same requirement is added in the amendment to s 51(1)(d)(ii) in setting out the review panel’s duties, and the adverse effects set out in the report upon completion of the impact assessment, s 59(2).

[247] However, while ensuring a substituted report provides the necessary information as to the significance of adverse federal effects to inform the ultimate federal public interest decision-making, the scheme continues to contemplate cooperation among jurisdictions. Sections 31(1)(a) & (b) provide for the substitution of another jurisdiction’s assessment process, and conditions for the Minister’s approval of a substitution for the impact assessment are now set out in ss 33(1)(a), (d) & (g.1), 34, and 35. Amendments to ss 31, 33, and 35 now contemplate that an impact assessment can be conducted with other jurisdictions not only through substitution, but also through activities undertaken through an arrangement with another jurisdiction under s 114(1)(f). Section 33(2.1) now provides that the report submitted to the Minister “will set out how any Indigenous knowledge provided with respect to the designated project was taken into account”. Likewise, the amendments also provide for agreements or arrangements with the Canadian Nuclear Safety Commission and Canadian Energy Regulator, s 43.1(1) & (2).

[248] The amended *Act* creates a bifurcated public interest decision making process. At the first stage, the Minister must determine whether the adverse effects within federal jurisdiction, and direct or incidental adverse effects, as indicated in the Agency's Impact Assessment Report, are likely to be, "to some extent" significant and how significant those effects will be: s 60(1)(a). At that stage, the Minister also takes into account the implementation of any mitigation measures considered appropriate.

[249] If the Minister determines that the adverse effects within federal jurisdiction are significant the Minister must determine whether those factors are "justified in the public interest", ss 60(1)(b) and 62(a) and (b). Those same criteria are added in s 61(1), on referral to the Governor in Council.

[250] Section 63 is now entitled "Factors - justification in the public interest".

[251] Canada says the justification provisions in these sections, 60(1)(a) & (b), 61(1)(a) & (b), 62(a) & (b), and 63, clearly mean that non-federal concerns cannot "stack up" on the "adverse side of the ledger", as feared by the majority, para 174. It is the significant adverse effects within federal jurisdiction, and the direct or incidental adverse effects, which must be justified in the public interest. The s 63 factors' sole function is to justify – that is, support – a determination that the designated project is in the public interest, despite the likelihood that it will have significant adverse effects, to some extent, on matters within federal jurisdiction.

[252] Under the old *Act*, the federal decision-maker determined whether the adverse effects within federal jurisdiction were in the public interest "in light of the factors referred to in section 63". The minority correctly said, paras 269, 290, 294, 320, 327, those factors require the Minister's or Governor in Council's decision to be "reasonable and proportionate". However, the majority appeared to be concerned this general language permitted the federal decision maker to consider effects on the non-federal matters in s 63 in an unstructured way, including to magnify the severity of adverse federal effects and render a negative decision on the project as a whole. Now, the federal decision-maker is limited to considering s 63 factors if they "justify" the significant adverse federal effects. This limitation resolves the constitutional concern identified by the majority.

[253] The hypothetical scenario considered by the majority, para 172, modified to reflect the amended *Act*, demonstrates the change. Where a provincial mining project is likely to have significant adverse effects on fish, the federal decision-maker must determine if those effects are justified in the public interest. If the overall effects likely to be caused by the project contribute to sustainability, that positive contribution to sustainability could justify the significant adverse effects on fish, leading to a positive determination. But if the overall effects likely to be caused by the project do not contribute to sustainability, those effects would lack any justificatory force and therefore would be irrelevant to the public interest determination. Harm to sustainability would not be considered by the federal decision-maker. Given the amended scheme's orientation around justification, there is no longer any scope for the federal decision-maker to conclude the adverse

effects on fish are magnified “in light of” an adverse effect on a non-federal factor such as sustainability.

[254] Alberta argues that ss 60-63 require the federal decision-maker to consider both the negative and positive effects of a designated project on non-federal concerns such as sustainability and Canada’s ability to meet its climate change commitments. After all, s 63 refers to “the effects” on those things and “effects” includes both good and bad changes. Alberta argues that because the federal decision-maker must consider likely negative effects of a project on sustainability, any negative effect therefore “stacks up” alongside likely significant adverse effects within federal jurisdiction on the negative side of the ledger as a reason not to approve the project. In short, negative effects on sustainability amplify the significant adverse effects of a project on federal matters, which is what the majority found impermissible.

[255] Contrary to Alberta’s argument, there is no constitutional concern arising from the federal decision-maker “netting” s 63 factors, by e.g., considering both positive and negative effects on sustainability to determine whether the effects likely to be caused by the project make an overall positive contribution to sustainability, that could justify the project’s significant adverse effects within federal jurisdiction. It is only reasonable that the federal decision-maker might consider both positive and negative effects on s 63 matters to determine if there is an overall beneficial impact relevant to the question of justification. The bottom line remains that if the effects of the project have an overall adverse impact on a non-federal s 63 factor such as sustainability, this non-federal concern will then be irrelevant to the federal decision-making. Non-federal factors will only be relevant to the public interest determination if the effects of the project will benefit them in a manner that justifies the significant adverse federal effects.

[256] The amendments permit the federal decision maker to take into account only the (possibly net) beneficial effects of a designated project on non-federal concerns in s 63, when determining whether adverse effects within federal jurisdiction are justified. Were it unconstitutional to allow that, the consequences would be counterintuitive and wasteful. In many cases a determination that a project is likely to have significant adverse effects within federal jurisdiction would lead to the conclusion that those effects are not justified and that the project cannot proceed. Often there would be no beneficial effects on federal concerns capable of doing the justifying work. That would be so even though the project is likely to have significant beneficial effects on non-federal matters that considerably outweigh its likely adverse effects within federal jurisdiction.

[257] There are two ways of avoiding this result. The first is to conclude that the Minister is constitutionally permitted to consider beneficial effects on non-federal matters when determining whether a project is justified. The other is to conclude that federal authorities cannot constitutionally regulate the federal aspects of projects using a project-based approach, at least when the project is provincially regulated. The latter is inconsistent with the law set out by the majority.

[258] Having identified how effects within federal jurisdiction did not sufficiently drive the screening decision and the public interest decision, the majority then turned its attention to the application of the phrase “effects within federal jurisdiction” at the final decision-making step. It said, para 180, that this phrase's overbreadth diluted the decision-maker's focus away from federal aspects to include aspects within provincial jurisdiction, and that its role in the s 7 prohibitions extends the conduct prohibited “beyond the range of conduct that Parliament can validly regulate”.

[259] Because the definition of effects within federal jurisdiction was not at the time limited to non-negligible adverse effects, as amended, the majority found the definition to be overbroad. This broad definition was said, para 186, to “lack specificity as to the type or scale of the ‘change to the environment’ that is said to be a federal effect”.

[260] For example, the majority pointed out that under the old definition, the s 7 prohibitions “forbid the proponent from doing any act or thing that may cause any ‘change’ or ‘impact’ specified in the provision”. It said, para 193, this includes “impacts of any magnitude”. The minority, paras 272-274, 276, 280, 338, 345, read into the definition a requirement that the change be “non-trivial”, more than “*de minimis*”, or more than “insignificant”. The majority declined to do so as a matter of statutory interpretation, because the words of the old *Act* did not include any significance threshold in the designated project scheme. That is the exact rationale for the new definition of “adverse effects within federal jurisdiction”, expressly limiting such effects to those which are non-negligible, and at the decision-making stage, those which are “to some extent, significant”.

#### (c) Conclusion on Parliament's Amendments

[261] It is clear that Parliament responded to every concern raised in the majority decision, ensuring the provisions of the *Act* that did not conform to the constitutional division of powers were addressed, corrected, and made compliant. No concerns of the majority have gone unanswered. Canada says the amended *Act* therefore has a meaningfully different pith and substance than the old *Act* and now falls within federal jurisdiction. Below, I test this argument through the traditional division of powers analysis for determining the validity of legislation.

### IV. Characterization

[262] Both the majority and minority affirmed, paras 60, 252, that a division of powers validity analysis has two steps: characterization and classification.

[263] At the characterization step, “a court must consider the purpose and effects of the challenged law in order to identify its, ‘pith and substance’”, paras 61, 253; *Union Colliery Co of British Columbia v Bryden*, [1899] AC 580 (PC), 587; *Québec (Attorney General) v Canada (Attorney General)*, 2015 SCC 14, paras 28, 29, [2015] 1 SCR 693; *Reference re Pan-Canadian*

*Securities Regulation*, 2018 SCC 48, para 86, [2018] 3 SCR 189; *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11, para 51, [2021] 1 SCR 175; *Murray-Hall v Québec (Attorney General)*, 2023 SCC 10, paras 22, 23, [2023] 1 SCR 367; *Reference re Genetic Non-Discrimination Act*, paras 28, 30, [2020] 2 SCR 283.

[264] The majority said, para 61, the “objective of the characterization inquiry is to identify the precise ‘matter’ to which the law in question relates”; *Canadian Western Bank v Alberta*, 2007 SCC 22, para 26, [2007] SCR 3. To do so, a court looks to both “intrinsic and extrinsic evidence”, para 62; *Reference re Firearms Act (Can)*, 2000 SCC 31, para 17, [2000] 1 SCR 783; *Canadian Western Bank*, para 27; *Reference re Genetic Non-Discrimination Act*, para 34; *References re GGPPA*, para 51. As the majority indicated, para 62:

Intrinsic evidence refers to material contained within the four corners of the law in question, including the text of the law, its preamble, its purpose clause, if it has one, its title, and its overall structure. Extrinsic evidence refers to evidence that speaks to the context of the law in question, such as Hansard debates, the minutes of parliamentary committees, and relevant government publications.

[265] Additionally, a court is required to consider both legal and practical effects of the law; *Kitkatla Band v British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31, para 54, [2002] 2 SCR 146; *References re GGPPA*, para 51. Further, para 63:

Legal effects are those effects that, “flo[w] directly from the provisions of the statute itself”, while practical effects are those, ‘side’ effects [that] flow from the application of the statute which are not direct effects of the provisions of the statute itself.

[266] Finally, paras 64, 255, the court is required to characterize the “pith and substance” of the challenged law “as precisely as possible”. The characterization and classification analyses must be kept distinct; “only after precisely stating the matter to which the law relates should a court proceed to the classification phase of the analysis and consider specific heads of power”, paras 65, 255; *References re GGPPA*, paras 52, 56; *Reference re Genetic Non-Discrimination Act*, paras 31, 32. Based on these principles, the majority criticized Canada’s inclusion of the phrase “in relation to matters within federal jurisdiction” within its proposed statement of the pith and substance, noting that this “amounts to a statement that the main thrust of the scheme is to do what it does in a constitutionally valid manner”, para 67.

[267] In written submissions, Alberta characterizes this guidance as an “admonition that reference to the heads of power contained within section 91 of the *Constitution Act, 1867* should be avoided (as they lead to a self-fulfilling classification analysis)”. Alberta argues Canada’s proposed pith and substance uses “self-justifying classification language that the SCC expressly

cautioned against”. As Canada’s proposed pith and substance on this reference no longer includes the phrase “in relation to matters within federal jurisdiction”, this argument appears to attack the use of terms that appear in s 91, such as “fisheries”, in Canada’s articulation of the pith and substance of the amended *Act*.

[268] With respect, Alberta’s concern misinterprets the majority’s guidance. The majority cautions discipline in the two-step validity analysis to avoid results-based reasoning at the characterization step. This warning responds to the longstanding concern that “because the identification of the ‘matter’ of a statute will often effectively settle the question of its validity, there is ‘a danger that the whole exercise will become blurred and overly oriented towards results’”, Peter W Hogg and Wade Wright, *Constitutional Law of Canada*, 5th Ed (Toronto: Carswell, 2019), § 15:5, quoting *Chatterjee v Ontario*, 2009 SCC 19, para 16, [2009] 1 SCR 624. To avoid results-based reasoning, the pith and substance must be defined as precisely as possible, based on a faithful analysis of “the law itself and what it is really about” without regard for the ultimate outcome at the classification step: *Reference re Genetic Non-Discrimination Act*, para 31; *Re IAA*, para 65.

[269] If this analytical process is followed, the resulting pith and substance will be sound, even if it includes language in ss 91 or 92. There is no categorical prohibition on identifying the matter of the legislation using terms from ss 91 or 92. Sometimes it is a natural way of expressing what the law is about. As observed by Professors Hogg and Wright, § 15:5, “sometimes the ‘matter’ of a law will be described in the very language of a class of subject”. To take a recent example from the Supreme Court’s jurisprudence, the pith and substance of the *Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c 24, includes the phrase “Indigenous peoples”: *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5, para 41, 488 DLR (4th) 189. The same words appear in the modern statement of the subject matter of s 91(24), which may be referred to as “Indigeneity” or “Indigenous peoples as Indigenous peoples”: *ibid*, para 94. Rejecting a characterization solely because it aligns with language found in ss 91 or 92 is an overly formal interpretation of the majority’s guidance, which could lead to absurd results.

(a) Presumption of Constitutionality

[270] The majority addressed the presumption of constitutionality as “a cardinal principle of our division of powers jurisprudence”, para 69; *Murray-Hall*, para 79; *Reference re The Farm Products Marketing Act*, [1957] SCR 198, 255, 7 DLR (2d) 257; *Nova Scotia Board of Censors v McNeil*, [1978] 2 SCR 662, 687-88, 84 DLR (3d) 1; *Reference re Firearms Act*, para 25; *Rogers Communications Inc v Châteauguay (City)*, 2016 SCC 23, para 81, [2016] 1 SCR 467.

[271] It said, para 70, that “every legislative provision is presumed to be *intra vires* the level of government that enacted it ... unless the party challenging the validity of the legislation

demonstrates otherwise”. It assumes that “a legislative body does not intend to exceed its powers under the Constitution and a court faced with, “competing, plausible characterizations ... should normally choose that one which would support the validity of the law”, paras 71, 72: *Osborne v Canada (Treasury Board)*, [1991] 2 SCR 69, 103, 82 DLR (4th) 321; *McKay v the Queen*, [1965] SCR 798, 803-4, 53 DLR (2d) 532; *Siemens v Manitoba (Attorney General)*, 2003 SCC 3, para 33, [2003] 1 SCR 6; *Desgagnés Transport Inc v Wärtsilä Canada Inc*, 2019 SCC 58, para 28, [2019] 4 SCR 228. However, courts cannot rely on the presumption of constitutionality to disregard a statute that speaks clearly and is *ultra vires* its enacting body, para 73; *Law Society of British Columbia v Mangat*, 2001 SCC 67, para 66, [2001] 3 SCR 113.

[272] This presumption of constitutionality is a cornerstone of the minority decision, paras 218, 222, 229-231, 269, 280, 283, 314.

(b) Purpose of the Act; Intrinsic and Extrinsic Evidence

[273] The majority analyzed the purpose of the original *Act* by reviewing intrinsic and extrinsic evidence, paras 62, 79-80, 82-83, 91, including the short and long titles to the *Act*, the preamble, and expressed purposes. The minority did the same, paras 256-267.

[274] Although the short title of the *Act* remains unchanged, the long title of the *Act* has been modified to directly address concerns raised by the majority at paras 79, 80. It now is entitled “*An Act respecting a federal process for impact assessments and the prevention or mitigation of significant adverse effects within federal jurisdiction*” (amendments emphasized).

[275] Likewise, the preamble has been rewritten to address the concerns of the majority in paras 80 and 81. It specifically begins with the defining paragraph: “Whereas *Parliament is committed to having an impact assessment process that prevents or mitigates significant adverse effects within federal jurisdiction*” (amendment emphasized).

[276] The remaining provisions of the preamble are substantially amended to specifically include respect for the rights of Indigenous peoples of Canada, fostering reconciliation and working partnerships with Indigenous peoples, the importance of coordinated actions among jurisdictions, integrating scientific information and Indigenous knowledge, fostering meaningful public participation, striving to be transparent, efficient and timely, encouraging the use of innovative approaches and technologies, fostering sustainability and Canada's ability to meet its commitments in respect of climate change.

[277] This amended preamble foreshadows s 6, the purpose clause; s 16, screening decision criteria; and s 22, impact assessment factors to be considered.

[278] The majority, in examining extrinsic evidence, referenced the 2017 discussion paper: Natural Resources Canada, *Environmental and Regulatory Reviews, discussion paper (2017)*, the speeches made during second reading of Bill C-69 in February, 2018, *House of Commons Debates*, February 14, 2018, 17202-11, and speeches in the *Standing Committee on Environment and Sustainable Development, House of Commons, Standing Committee on Environment and Sustainable Development, Evidence*, No 99, 1st Sess, 42nd Parl, March 22, 2018, 2.

[279] The majority also referenced the Minister's comments on the regulations, indicating that the designated projects list included only those projects “that have the most potential for adverse effects in areas of federal jurisdiction related to the environment”, para 88, citing *Standing Committee on Environment and Sustainable Development*, 18; *Regulatory Impact Analysis Statement*. On the whole, the majority concluded the scheme had an array of purposes related to the environment, but “also to health, social or economic conditions”, to be achieved through a scheme with both an information gathering and regulatory component; paras 90, 91.

[280] Canada points to extrinsic evidence in respect of the amendments which it says show the amended *Act* is intended to focus on significant adverse effects on specific areas, which it says fall within federal jurisdiction. Generally, that evidence supports that Canada accepted the majority’s opinion and sought to understand and respond to it through Parliament’s amendments. All that extrinsic evidence points to an express intent to assess only activities with serious potential effects anchored in areas within federal responsibility.

(c) Legal and Practical Effects

[281] The majority identified four stages in the operation of the scheme – the designation of physical activities and the three phases of the impact assessment process (planning, impact assessment and public interest decision making) – and identified the legal effects of each stage. The legal effects of designation included bringing certain major projects within the assessment scheme, requiring those projects to proceed through the planning phase, and placing two immediate, but temporary, holds on those projects, paras 93, 94. The first is set out in s 7 which prohibits the proponent of a designated project from doing any act or thing in connection with the carrying out of the designated project if determined to cause any of the concerning enumerated effects. Those legal effects at the designation stage were, as indicated above, determined to be non-constitutionally problematic. And a second hold arises in s 8, which prohibits a federal authority from exercising powers, duties or functions that would permit a designated project to be carried out at this stage. Again, that provision was found to be non-problematic constitutionally.

[282] At the planning phase, the majority again indicated, paras 98, 99, two principal effects: the project proponent is required to provide a detailed project description, including information about the project’s potential effects, and the continuation of the prohibitions in ss 7 and 8 until the screening decision and beyond, if the Agency decides that an impact assessment is required.

[283] At the screening decision under the old *Act*, the majority said the broad and unstructured s 16 decision failed to provide “the funneling function necessary to maintain the scheme’s focus on federal impacts”, para 151. As discussed above, this issue was addressed by amendments to s 16, such that under the amended scheme, the Agency may only require an impact assessment if carrying out the project may cause “adverse effects within federal jurisdiction”, as that term is now more narrowly defined. Under the amended *Act*, the Agency must screen out activities that have no adverse effects on the specified areas, or only negligible adverse effects on the specified areas.

[284] The legal effect of the impact assessment phase, under both the old and amended *Act*, simply continues the consequences created in the planning phase for those projects that pass through the narrower funnel of the amended s 16. The breadth of the assessment itself was identified as constitutionally permissible by the majority. These effects are unchanged in the amended *Act*.

[285] During the final decision-making phase, the legal effects stem from the federal decision statement. Under the old *Act*, the federal decision-maker could impose binding conditions, s 7(3)(b), in which case the ss 7 and 8 pauses were removed, if the federal decision-maker determined those effects were in the public interest, s 64. If the decision-maker determined that the effects were not in the public interest, that “marks the end of the road for the proposed project”, para 102.

[286] As indicated above, this is the area in which most of the significant amendments to the *Act* have been made. The federal public interest decision-making is now driven by justification of significant adverse effects on specified topics: Indigenous peoples, fisheries, migratory birds, federal lands, certain marine environments, and boundary, international and interprovincial waters. The legal effect of the public interest decision depends on the decision rendered: a positive public interest decision will be accompanied by binding conditions addressing the significant adverse effects on the enumerated areas, and compliance with those conditions lifts the ss 7 and 8 pauses; a negative public interest statement means the project will not proceed. In either case, the extensive amendments to the public interest decision-making process constrain the federal decision-maker by anchoring the decision to the justification of significant adverse effects on the listed areas.

[287] Turning to the practical effects of the legislation, the majority said it was not its role to “assess the effectiveness of the scheme or attempt to predict its practical consequences in the absence of relevant evidence”, para 104; *References re GGPPA*, para 78. However, it did comment that the scheme resulted in indeterminate delays by extension of time-limited steps, ss 65(3)-(6). Additionally, the impact assessment process requires cooperation with federal authorities and other implicated jurisdictions, requiring, sometimes, additional information from those other sources, ss 31(1), 33(1), and 35.

[288] The minority noted the limited relevance of practical effects, as they sometimes add little to the task of characterization: *R v Morgentaler*, [1993] 3 SCR 463, paras 485-488, 107 DLR (4th) 537; *References re GGPPA*, para 78.

[289] Once again, as indicated, significant amendments have been made to the *Act* to address the majority's concern about delays and necessary cooperation.

(d) Pith and Substance

[290] The majority and minority agreed that in characterizing the pith and substance of the challenged law, it must be phrased "as precisely as possible". "The court should "capture the law's essential character", in terms that are as precise as the law will allow"; paras 64, 252-254; *Murray-Hall*, paras 22, 23; *References re GGPPA*, para 52; *Reference re Genetic Non-Discrimination Act*, paras 26, 32.

[291] The majority of the Supreme Court described two separate pith and substance statements for the two separate schemes contained within the *Act*. For ss 81 to 91, the secondary scheme, non-designated projects on federal lands or outside Canada, have the pith and substance described at paras 5, 76, 109, 130, 204:

A scheme that directs the manner in which federal authorities that carry out or finance a project on federal lands or outside Canada assess the significant adverse environmental effects that the project may have.

[292] As to the primary scheme, addressing designated projects, the majority described the pith and substance at paras 6, 76, 109, 130, 204:

A scheme to assess and regulate designated projects with a view to mitigating or preventing their potential adverse environmental, health, social, and economic impacts.

[293] In contrast, the minority decision characterized the pith and substance of the designated projects scheme at paras 223, 257, 298:

To establish an environmental assessment process to (1) assess the effects of physical activities or major projects on federal lands, Indigenous peoples, fisheries, migratory birds, and lands, air, or waters outside Canada or in provinces other than where a project is located, and (2) determine whether to impose restrictions on the project to safeguard against significant adverse federal effects, unless allowing those effects is in the public interest.

[294] The minority contended this was a more precise characterization of the matter, highlighting the critical role of the public interest decision-making process, para 257.

[295] Having regard to Parliament's amendments, I conclude the pith and substance of the *Act* now falls somewhere between those descriptions:

To establish a process to assess the effects of designated projects and impose restrictions or conditions to prevent or mitigate significant adverse effects on Indigenous peoples, fisheries, migratory birds, federal lands, certain marine environments, and boundary, international and interprovincial waters, unless justified in the public interest.

[296] Parliament's amendments have changed the *Act* and "what it is really about", ***Reference re Genetic Non-Discrimination Act***, paras 31, 165. At two key decision-making junctures, the Agency screening decision and the ultimate public interest decision, the scheme is now firmly anchored in addressing significant adverse impacts to certain enumerated areas, being Indigenous peoples, fisheries, migratory birds, federal lands, certain marine environments, and boundary, international and interprovincial waters. Preventing and mitigating significant adverse effects to those areas is the consistent focus throughout the amended *Act*, such that this now represents the dominant characteristic of the amended scheme.

(e) Conclusion on Characterization

[297] The *Act* is presumed to be constitutional. In examining the purpose and effect of the *Act*, through intrinsic and extrinsic evidence, and viewing its legal and practical effects, the appropriate pith and substance is as described above.

## V. Classification

[298] After determination of characterization, the constitutional analysis turns to classification, determining whether the law is "properly classified as falling under a head of power assigned to the adopting level of government", paras 110, 300: ***Desgagnés Transport***, para 38; ***Québec (Attorney General) 2015***, para 29; ***Reference re Pan-Canadian Securities Regulation***, 2018 SCC 48, para 86, [2018] 3 SCR 189; ***References re GGPPA***, paras 47, 114; ***Reference re Securities Act***, 2011 SCC 66, para 65, [2011] 3 SCR 837; ***Murray-Hall***, para 23; ***Reference re Firearms Act***, para 25; ***Oldman River***, para 62.

[299] As the majority recognized, para 112, each head of power has been assigned to one level of government (or occasionally both levels, ss 92A(3), 94A, and 95) and only the level of government to which a head of power has been assigned can validly legislate in respect of matters falling within that head of power. A law is classified based on "its main thrust or dominant

characteristic, and incidental effects do not disturb the constitutionality of an otherwise *intra vires* law”: *Canadian Western Bank*, para 28; *Global Securities Corp v British Columbia (Securities Commission)*, 2000 SCC 21, para 23, [2000] 1 SCR 494; *British Columbia v Imperial Tobacco Canada, Ltd*, 2005 SCC 49, para 28, [2005] 2 SCR 473; *Rogers Communications*, para 37; *Québec (Attorney General) 2015*, para 32.

[300] The environment is not a head of power under ss 91, 92, or any other section of the *Constitution Act, 1867*. It does not comfortably fit within the existing division of powers “without considerable overlap and uncertainty”: *Oldman River*, paras 16, 63, 64; *Hydro-Québec*, para 86. As a result, both levels of government can legislate in respect of certain aspects of environmental protection, paras 116, 301, consistent with the double aspect doctrine where the “same fact situation can be regulated from different perspectives, one falling within s 91 and the other falling within s 92”: para 118; *Oldman River*, 63-65; *Hydro-Québec*, para 112; *References re GGPPA*, paras 129, 130; *Desgagnés Transport*, para 82; *Rio Hotel Ltd v New Brunswick (Liquor Licensing Board)*, [1987] 2 SCR 59, p 65, 44 DLR (4th) 663; *Canadian Western Bank*, para 30.

[301] This, however, does not mean it is an area of concurrent jurisdiction; each level of government can only enact laws which, in pith and substance, fall within its respective jurisdiction. Both levels of government have exclusive power within their respective jurisdictions, but not concurrent jurisdiction: para 121; *Reference re Securities Act*, para 66; *Desgagnés Transport*, paras 82, 83; *Reference re Assisted Human Reproduction Act*, 2010 SCC 61, paras 268-271, [2010] 3 SCR 457; *Oldman River*, paras 71, 72; *Bell Canada v Québec (Commission de la Santé et de la Sécurité du Travail)*, [1988] 1 SCR 749, 766, 51 DLR (4th) 161.

[302] This is consistent with the “dominant tide” of cooperative federalism, para 228, accommodating overlapping jurisdictions and encouraging intergovernmental cooperation, provided that such cooperative jurisdiction cannot override or modify the separation of powers, para 122; *Reference re Securities Act*, paras 57, 61, 62; *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48, paras 17, 18; *Rogers Communications*, paras 39, 85.

[303] In this area, projects do not “fall within an enclave of exclusivity”; paras 128, 142.

(a) Canada’s Position

[304] Canada says the impact assessment scheme deals with effects that fall under s 91 of the *Constitution Act, 1867*; in particular, under the national concern doctrine of Parliament’s ability to make laws for the peace, order, and good government of the country; s 91(10), navigation and shipping; s 91(12), seacoast and inland fisheries; s 91(24), “Indians, and lands reserved for the Indians”; and s 132, imperial treaty obligations.

(b) Indigenous Peoples, Charter s 25, Constitution Act, 1982 s 35

[305] Section 2(e) & (f) of the *Act* includes within “adverse effects within federal jurisdiction”, non-negligible adverse impacts on Indigenous peoples, including on their physical and cultural heritage, the current use of lands and resources for traditional purposes, structures, sites, or things of historical, archaeological, paleontological or architectural significance, and their health, social or economic conditions. Through these provisions, the *Act* establishes a process to assess the effects of major industrial activities and impose restrictions or conditions to prevent or mitigate significant adverse effects on Indigenous peoples, unless justified in the public interest. The issue is whether this aligns with federal legislative authority under s 91(24).

[306] Section 35 of the *Constitution Act, 1982* recognizes and affirms existing Aboriginal and treaty rights for First Nations, Inuit, and Métis peoples of Canada, guaranteed equally to male and female persons. Section 25 of the *Canadian Charter of Rights and Freedoms*, Part 1, *Constitution Act, 1982*, Schedule B, *Canada Act, 1982* (UK), 1982, c 11, provides that other provisions of the *Charter* shall not be “construed as to abrogate or derogate from any aboriginal, treaty, or other rights or freedoms” that Indigenous peoples have as recognized by the *Royal Proclamation* of October 7, 1763, and any rights or freedoms existing by way of land claims agreements.

[307] Those provisions are particularly impactful on the federal government by virtue of its exclusive legislative authority under s 91(24) of the *Constitution Act, 1867*: “Indians, and lands reserved for the Indians”.

[308] The federal jurisdiction under this provision is “broad in scope” and includes the protection and concern for the welfare of Canada's Indigenous peoples, paras 196, 347, 348; ***Reference re an Act respecting First Nations, Inuit and Métis, children, youth and families***, paras 93-95, 98; ***Daniels v Canada (Indian Affairs and Northern Development)***, [2016] 1 SCR 99, paras 1, 4, 5, 13-15, 49, 50, 395 DLR (4th) 381; ***Canadian Western Bank***, paras 60, 61; ***Delgamuukw v British Columbia***, [1997] 3 SCR 1010, para 176, 153 DLR (4th) 193.

[309] Amendments in the *Act* now restrict the responsibility of the federal government to non-negligible adverse changes affecting Indigenous peoples during the planning and assessment phases of the scheme, and significant adverse effects during the decision-making phase, and whether such significant adverse effects are justified in the public interest.

[310] Additionally, the amendments specifically require the involvement and participation of Indigenous peoples in determining issues of significance, adverse effects, and public interest, ss 12, 14(1), 18(1)(b), 22(1)(c), (g), (l), (q) & (r), 33(1)(d) & (2.1), 41, 42(d), 51(1)(d)(ii.1), 114(1), 119(1), 155(b)(i) & (2)(e).

[311] The prior *Act* empowered federal decision-makers to indefinitely prohibit “acts that may cause even trivial or non-adverse impacts”, which the majority found was “inconsistent with s. 91(24)’s focus on protection of and concern for the welfare of Indigenous peoples”, para 200. In particular, under the previous *Act*, proponents were prohibited, following a negative decision statement, from bringing about non-adverse (including beneficial) changes to various aspects of the life and culture of Indigenous people. In the majority’s view, that was inconsistent with the purpose of s 91(24), which is to enhance and protect the welfare of Indigenous peoples.

[312] In the amended *Act*, Parliament has revised the s 7 prohibitions to track the new definition of “adverse effects within federal jurisdiction”. The result is that, following a negative decision statement, s 7 now prohibits proponents from doing any act in connection with a designated project that may cause non-negligible *and* adverse effects on various aspects of Indigenous peoples’ life and culture. Those changes are responsive to the majority’s concerns and the focus of s 91(24). The s 7 prohibitions, and the designated projects scheme as a whole, insofar as they relate to Indigenous peoples clearly fall within Parliament’s authority under s 91(24) to legislate for the welfare and protection of Indigenous peoples.

[313] Parliament narrowed the *Act* to align with its s 91(24) responsibility, by focusing the *Act* on non-negligible adverse impacts, and ultimately, the prevention of significant adverse impacts. This is responsive to the majority’s concern and aligns with federal jurisdiction. The responsibility for matters impacting the welfare of Indigenous peoples in the *Act* clearly falls within s 91(24).

(c) *Migratory Birds, Imperial Treaties, and the National Concern Doctrine of POGG*

[314] Section 132 of the *Constitution Act, 1867*, provides federal jurisdiction to implement treaty obligations “arising under Treaties between the Empire and ... Foreign Countries”. It is trite that “there is no freestanding federal treaty implementation power and Parliament’s authority to implement treaties signed by the federal government depends on the ordinary division of powers”: *References re GGPPA*, para 149, citing *Canada (Attorney General) v Ontario (Attorney General)*, [1937] AC 326 (PC). However, pursuant to s 132, Parliament has authority to implement treaty obligations arising from imperial treaties.

[315] The majority and minority, paras 202, 342-345, recognize that one such treaty is the *Convention between the United Kingdom and the United States of America for the protection of migratory birds in Canada and the United States*, August 16, 1916, [1917] Gr Brit TS, No 7 (Cd 8476). They also recognize that Canada and the United States later modernized that convention on December 14, 1995, through the *Protocol Between the Government of Canada and the Government of the United States of America, Amending the 1916 Convention Between the United Kingdom and the United States of America for the Protection of Migratory Birds in Canada and the United States*, CTS 1999, No 34.

[316] With little discussion, the majority said, para 203, it was “far from obvious” that s 132 covered the amendments made to the imperial treaty. It concluded that the designated project scheme did not in pith and substance relate exclusively to the implementation of a British Empire treaty for the protection of migratory birds, para 203.

[317] The *1916 Convention* is an imperial treaty aimed at preserving and protecting migratory birds, and implementing it through domestic law falls under federal jurisdiction pursuant to s 132. The modernization of the *1916 Convention* in 1995 did not change this. It did not repeal, rescind, or replace the *1916 Convention* and only made amendments to update it, given the extensive advance of conservation science between 1916 and 1995. Additionally, changes were made, as indicated in the preamble to the protocol, “to ensure conformity with the Aboriginal and treaty rights of the Aboriginal peoples of Canada”; but that also did not alter the purpose of the *1916 Convention*. It merely enabled the original purpose of the *1916 Convention*, the protection and preservation of certain migratory bird species, to be implemented in a manner that comported with Canada’s constitutional obligations.

[318] The *1916 Convention* remains an imperial treaty and Parliament is tasked with enforcing it. In the *Act*, Parliament carries out the protection of migratory birds through the impact assessment process.

[319] *Regina v Sikyea* (1964), 43 DLR (2d) 150, 160, 161, [1964] 2 CCC 325 (NWTCA), aff’d [1964] SCR 642, 50 DLR (2d) 80, confirmed that statutes implementing imperial treaties remain valid following the *Statute of Westminster 1931*, 22 & 23 Geo 5, c 4 “so long ... as those treaties have not been denounced”:

... statutes made to implement treaties properly made under s 132 of the *B.N.A. Act* can still be amended if that be necessary to properly carry out the terms of the treaty.

[320] In *Hamilton Wentworth (Regional Municipality Of) v Canada (Minister of The Environment)*, 2001 FCT 381, paras 165, 170, 173-74, the Federal Court confirmed that s 132 authorizes “legislation going beyond the narrow terms of the treaty, so long as that legislation is ancillary to the treaty”, para 165, citing *The King v Stuart*, [1925] 1 DLR 12 (MBCA), 511, 514, [1924] 3 WWR 648.

[321] In *R v J D Irving Ltd*, [2008] NBJ, No 371, the Court rejected the argument that the 1995 amendments took the *1916 Convention* outside the scope of s 132, paras 13-17. It found the 1995 amendments reinforced and strengthened the original commitments and in no way constituted a rejection or denunciation of the *1916 Convention*. It said, para 16: “The treaty remains a living document with enabling legislation that may be amended from time to time to address new threats to migratory bird populations. Its aim remains conservation and protection of these populations”.

[322] In *R v Blackbird* (2005), 248 DLR (4th) 201, para 22, 192 CCC (3d) 453 the Ontario Court of Appeal recognized that the *Migratory Birds Convention Act*, “derived from a Convention and a Protocol, ... designed to redress a serious environmental concern in North America”.

[323] No decisions have been brought to the attention of this Court to the contrary.

[324] The modernization in 1995, restating the original intent of the parties, and in conformity with Indigenous rights, cannot bring the *1916 Convention* outside the scope of s 132.

[325] Even if the changes to the *1916 Convention* made by way of the protocol are not themselves an imperial treaty, federal jurisdiction persists to the extent that legislative measures further the *1916 Convention*’s initial purpose; *Western Canada Wilderness Committee v Canada (Environment and Climate Change)*, 2024 FC 167, paras 81-84.

[326] Additionally, migratory birds are not a class of subjects assigned exclusively to the provinces under s 92 of the *Constitution Act, 1867*. Canada submits, as an alternative argument, that “assessing and attaching conditions to major projects to mitigate or prevent significant adverse effects on migratory birds” is a matter of national concern under the peace, order, and good government preamble to s 91, on the criteria set out in *References re GGPPA*, paras 141, 144, 166.

[327] It was unnecessary for the Supreme Court to consider this issue in the first reference. The majority reasoned that even if s 132 empowers Parliament to implement the *1916 Convention* as amended by the Protocol, the scheme as a whole would still be invalid because federal jurisdiction in respect of migratory birds could not support the constitutional validity of the *IAA* more broadly, para 203. The minority was satisfied that Parliament had authority to enact the impact assessment scheme in respect of migratory birds under s 132, paras 342-345. In this case, too, it is unnecessary to decide this issue given the strength of Canada’s argument with respect to s 132 and my conclusion above.

[328] However, Canada has tendered a significant record, including expert evidence, addressing the three steps in the national concern branch of the peace, order, and good governance power: whether the matter is of sufficient concern to Canada as a whole, whether it has a singleness, distinctiveness, and indivisibility that clearly distinguishes it from a matter of provincial concern, and has a scale of impact reconcilable with the division of powers.

[329] Canada says the protection of migratory birds is of concern across Canada. Migratory birds are vulnerable across their flyways and assessing significant adverse impacts of designated major projects aims at the preservation and protection of those birds. Migratory birds are not unique to any single province, territory, or region in Canada.

[330] In the singleness, distinctiveness, and indivisibility analysis, the protection of migratory birds, Canada argues, is a specific, identifiable, and qualitatively different matter from areas of provincial concern. No one province or territory can by itself, or in combination with some other provinces or territories effectively address this issue; *References re GGPPA*, para 164. The federal role engages the *1916 Convention*, a responsibility of Canada, and is distinct from and not duplicative of that of the provinces; *References re GGPPA*, para 151. The prevention of significant adverse effects on migratory birds is a specific and identifiable matter, limited to migratory birds and regulatory tools for their protection as an extra-provincial and international transboundary species.

[331] Canada also says a province, by itself or in combination with others, is constitutionally incapable of enacting comprehensive protection for migratory birds, and the failure to include one or more provinces in a legislative scheme would jeopardize the successful operation of the scheme in other parts of the country; *References re GGPPA*, para 152.

[332] Canada says one province's failure to deal with this matter may have grave extraprovincial consequences involving serious harm to these bird populations; *References re GGPPA*, paras 153, 155. The need to monitor and regulate migratory birds at the international level requires federal and international involvement, Canada submits. It is uncontroverted that migratory birds play important roles in Canadian ecosystems through pest control, regulation of insect abundance, seed dispersal and pollination, and scavenger and nutrient cycling. Loss of migratory birds would cause serious harm to the environment, a “grave extra provincial consequence”; *References re GGPPA*, para 155.

[333] As to scale of impact on provincial jurisdiction, Canada submits federal jurisdiction over migratory birds is reconcilable with the fundamental distribution of legislative power under the Constitution; *References re GGPPA*, para 160. There is limited impact on provincial regulation of designated projects in relation to migratory birds. Protecting migratory birds justifies the limited impact on provincial jurisdiction imposed through the *Act*.

[334] Alberta argues it is unnecessary to determine the question of federal jurisdiction in respect of migratory birds because the amended *Act* is not in relation to migratory birds, it is about assessing and regulating projects to mitigate or prevent their potential adverse environmental, health, social and economic impacts. In the alternative, Alberta relies on Ontario’s submissions on the national concern doctrine, which argues that Canada has not met the third step of the national concern criteria. This Court has not heard full argument on all three steps of the test. Given my determination on the federal responsibility to enforce imperial treaties, above, it is not necessary to finally determine whether this area of concern falls under the national concern doctrine of peace, order, and good government in the preamble to s 91, but it is likely this jurisdiction can be found on this record.

(d) Fish, Fish Habitat, and Aquatic Species

[335] Fish, fish habitat, aquatic species, and boundary waters are within the legislative authority of Parliament pursuant to s 91(12), seacoast and inland fisheries, paras 224, 339.

[336] In *Fowler v The Queen*, [1980] 2 SCR 213, 226, 113 DLR (3d) 513, and *Northwest Falling Contractors Ltd v The Queen*, [1980] 2 SCR 292, 300-302, 113 DLR (3d), the Supreme Court held that legislation must be aimed at preventing harm to fisheries, rather than at preventing any change to fish or fish habitat. The focus of the amended *Act* on non-negligible adverse impacts to fisheries, and ultimately, the prevention of significant adverse impacts to fisheries, aligns with federal competence under s 91(12).

(e) Environment on Federal Lands, Federal Works or Undertakings

[337] The amended *Act* provides for the regulation, in various ways, of designated projects that may have or are likely to have non-negligible (or at the decision-making stage, significant) adverse effects on the environment that would occur on federal lands. Federal lands are defined in s 2 to include lands owned by Canada, offshore lands and areas, and lands subject to the *Indian Act*, RSC 1985, c I-5, all of which fall within Parliament's exclusive jurisdiction; *British Columbia (Attorney General) v Lafarge Canada Inc*, 2007 SCC 23, para 51, [2007] 2 SCR 86; *Reference Re: Offshore Mineral Rights*, [1967] SCR 792, paras 83, 84, 98-108, 65 DLR (2d) 353; *Reference re Newfoundland Continental Shelf*, [1984] 1 SCR 86, 128-129, 5 DLR (4th) 385; *Crown Zellerbach*, paras 58,59; *St Catherine's Milling and Lumber Company v The Queen*, (1889), 14 App Cas 46, para 14; *Delgamuukw*, para 174.

[338] The definition of federal work or undertaking is taken from the *Canadian Environmental Protection Act*, 1999, s 3(1), is repeated in s 262 of the *Greenhouse Gas Pollution Pricing Act*, and has been found to be within federal constitutional jurisdiction.

[339] There is no contest to Parliament's exclusive jurisdiction and responsibility in this area.

(f) Pollution to Certain Marine Environments, Interprovincial Rivers, Boundary Waters, International Waters, and Interprovincial Waters

[340] Canada supports its jurisdiction in respect of adverse effects caused by pollution to certain marine environments and interprovincial rivers, and boundary, international and interprovincial waters through the recognized matter of national concern of preventing marine pollution and the pollution of interprovincial rivers (*Crown Zellerbach*), and s 132, implementing imperial treaty obligations pursuant to the *Treaty Between the United States and Great Britain Relating to Boundary Waters, and Questions Arising Between the United States and Canada*, 11 January 1909,

36 US Stat 2448, Article IV. Again, there is no contest to Parliament's exclusive jurisdiction and responsibility in these areas.

(g) Conclusion on Classification

[341] In the classification stage of a division of powers analysis, the court determines the classes of subjects into which the matter falls by reference to the heads of power set out in the *Constitution Act, 1867*. If a matter is properly classified as falling under a head of power assigned to that level of government, the legislation is *intra vires* and valid.

[342] In this analysis, the *Act* is consistently focused first on the non-negligible, and later, significant adverse environmental, social, health, and economic impacts on Indigenous peoples, migratory birds, fisheries, marine environments and aquatic areas, federal lands, and federal works or undertakings, all properly classified within s 91, POGG, (10), (12), (24), and s 132 of the *Constitution Act, 1867*.

**VI. Severance of s 7 prohibition**

[343] Canada has indicated that in the alternative, should the Court find the designated project scheme to be *ultra vires* in respect of all or portions of s 7, it could be severable from the remainder of the *Act*. Canada would continue to rely on s 8, such that there would be no pause in a proponent carrying out the designated project while the impact assessment was ongoing.

[344] Alberta does not contest that s 8 is a constitutionally valid basis for a federal impact assessment. Section 8 only prevents the exercise of legislative authority until the completion of the assessment and is in that way broadly similar to both the *Environmental Assessment and Review Process Guidelines Order*, SOR/84-467; see *Oldman River*, paras 71, 72.

[345] Since this dissent has found the provisions of the *Act*, including s 7, to be *intra vires* the legislative responsibility of Canada, it is not necessary to address this alternative position on severance.

**VII. Interjurisdictional Immunity**

[346] Alberta, and some intervenors, argue that the designated projects scheme, or parts of it, are inapplicable under the doctrine of interjurisdictional immunity. At the outset, I have difficulty identifying the precise scope of that argument. Alberta does not clearly identify either which provisions are said to be inapplicable or what concrete things or activities are immune from the application of the *Act*.

[347] On the first point, it is unclear whether the argument is directed at the s 7 prohibitions, the provisions governing one or more of the decision-making junctures, or the designated-projects

scheme as a whole. On the second point, Alberta submits that the relevant parts of the scheme cannot apply to "designated projects, activities and undertakings that fall under exclusive provincial jurisdiction." The difficulty is that this formulation identifies a legislative power rather than a concrete thing or activity. It is unclear what concrete things or activities are said to be immune from the application of the Act. Is it designated projects on provincial lands, energy resource projects, the resources themselves, or something else?

[348] The majority concluded, para 213, that as portions of the impact assessment scheme were *ultra vires*, it did not need to address interjurisdictional immunity.

[349] Where a statute has been found *intra vires* one level of government, in this case the federal government, its provisions may still be inapplicable to, in this case, provincial undertakings under the doctrine of interjurisdictional immunity, para 355. When the doctrine applies, "the impugned provisions remain valid but are declared inapplicable to matters that would fall under the core of the exclusive head of power of the other order of government"; *Opsis Airport Services Inc v Québec (Attorney General)*, 2025 SCC 17, para 35; *Desgagnés Transport*, para 90. This involves reading down the impugned provisions; *Opsis*, para 35; *Sharp v Autorité des marchés financiers*, 2023 SCC 29, para 113, 47 DLR (4th) 467.

[350] A proponent of interjurisdictional immunity must first identify the "scope" of the provincial power said to be affected; *Opsis*, para 38; *Desgagnés Transport*, para 95. Once the scope of the power affected has been determined, the proponent of the directive must identify the "core" within that scope of power. This core is necessarily narrower than the scope of the power: *Opsis*, para 38.

[351] Then, the application of the doctrine depends on two conditions being met: "(1) intrusion on the core of the exclusive head of power and (2) impairment to the core of the exclusive head of power", para 356; *Opsis*, para 36; *Rogers Communications*, para 59.

[352] The first condition requires that the impugned statute intrude on the core of an exclusive head of power of the other level of government; the core of a head of power being, "its basic, minimum and unassailable content"; *Opsis*, para 37, citing *Bell Canada v Québec (Commission de la Santé et de la Sécurité du Travail)*, [1988] 1 SCR 749, 839, 51 DLR (4th) 161; *Canadian Western Bank*, para 50; *Québec (Attorney General) v Canadian Owners and Pilots Association*, 2010 SCC 39, para 35, [2010] 2 SCR 536; *Desgagnés Transport*, para 93.

[353] The identification of the core of a head of power depends to a large extent on precedent. If a binding decision has established that certain powers are indispensable for the relevant legislature to achieve the purpose underlying the head of power, that determines the core: *Western Bank* at para 77; *Opsis* at paras 38-39. Presumably, the core may also be identified by analogy to a core recognized in an existing precedent. Where no precedent exists, it remains possible, in theory, to

identify a new core of a head of power. In practice, however, there is a paucity of principle about how to do so absent a precedent. The only option is to engage in abstract reasoning about what is vital and essential to a head of power. The core is the “‘authority that is absolutely necessary’ to enable [a level of government] to effectively achieve the purpose for which the power was conferred”: *Opsis*, para 37; *Canadian Western Bank*, para 57; *Pilots Association*, para 35; *Desgagnés Transport*, para 93.

[354] The second condition requires the intrusion to be of sufficient degree so as to impair the core of the exclusive head of power: *Opsis*, para 40. To be impaired, there must be something more than mere affect on the core, but not necessarily something amounting to “paralysis or sterilization” of the core: *Opsis*, para 40. The adverse consequences to the core must be “seriously or significantly, tramm[e]d”, *Opsis*, para 40.

[355] The narrow scope of the doctrine limits its application to the specific provisions that impair the core of the other level of government’s exclusive head of power: *Opsis*, para 63. The Supreme Court has urged restraint in applying the doctrine of interjurisdictional immunity where possible to allow for the ordinary operation of statutes in furtherance of cooperative federalism, para 359: *Opsis*, paras 33, 34; *Canadian Western Bank*, paras 77, 78; *Rogers Communications*, para 63; *References re GGPPA*, para 124; *Reference re Genetic Non-Discrimination Act*, para 22; *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44, paras 61-65, [2011] 3 SCR 134

[356] Alberta and Saskatchewan formulated the core of provincial authority under s 92A in broadly similar ways. For Alberta, the core includes ultimate decision-making over whether and when natural resources will be developed, as well as the balancing of the interests central to such decisions. For Saskatchewan, the core includes the determination of whether a natural resource is to be developed and the manner in which it is to be developed, managed and conserved. Ontario describes the core as “the location, construction and operation of undertakings or installations required to utilize [natural] resources, and the management of the resources themselves”.

[357] Canada replies that these descriptions of a provincial “core” are too broad and vague for there to be any determination of either intrusion or impairment. Limiting the effect of the *Act*, as amended, to impose restrictions to prevent or mitigate significant adverse environmental, social, health, and economic impacts on narrowly designated areas within federal responsibility, does not intrude on an exclusive head of provincial power. Likewise, Canada says there is no impairment of the provincial government exercising its own exclusive jurisdiction within the specified heads of power in ss 92(10) and 92A of the *Constitution Act, 1867*. Neither Alberta nor Saskatchewan point to any instances where the operation of the *Act*, to date, has prevented them from exercising their constitutional jurisdiction.

[358] Additionally, Canada says Alberta's failure to set out specific elements of the *Act* which are intruding or impairing should be fatal to its request, as the doctrine of interjurisdictional immunity “must be limited to the specific provisions of the impugned statute that impair the core of the exclusive power”; *Opsis*, para 63.

[359] The descriptions of a core proposed by Alberta, Saskatchewan, Ontario describe the scope of the claimed provincial powers, rather than their core: *PHS*, para 68. I agree with Canada that the formulations are too broad and abstract to permit a meaningful analysis of either intrusion or impairment.

[360] They also give rise to practical problems. If the core of s 92A includes ultimate decision making over whether, when and how a natural resource is to be developed, it would immunize natural resource projects from federal legislation such as the *Fisheries Act*, whose practical effect can also be to prevent a project from proceeding unless authorization is obtained: *Reference re Impact Assessment Act*, 2022 ABCA 165 at para 757 (per Greckol JA in dissent). That strongly indicates that Alberta and Saskatchewan have formulated the core of s 92A too broadly: *PHS*, paras 66-70.

[361] More fundamentally, neither Alberta nor Saskatchewan identifies a precedent recognizing such a core: *PHS*, para 67. Nor do they develop an abstract argument explaining why decision-making over resource development constitutes an indispensable part of the s 92A power.

[362] In my view, describing the core in terms of decision-making over whether, when, and how natural resources are developed comes very close to describing the entirety of the power rather than a narrow and indispensable part of it.

[363] The minority in the Supreme Court said, para 359: “[i]n keeping with the movement of constitutional law towards a more flexible view of federalism that reflects the political and cultural realities of Canadian society, the fixed ‘watertight compartments’ approach has long since been overtaken, and the doctrine of interjurisdictional immunity has been limited: *Reference re Genetic Non-Discrimination Act*, para 22.

[364] The minority pointed out, para 360, that Alberta had offered no precedent to support the application of the doctrine to the heads of provincial power invoked and saw no basis to apply the doctrine in the current circumstances.

[365] The *Act* is a valid exercise of federal jurisdiction, limited to specifically defined effects within federal responsibility, in a shared, but not concurrent, area of legislative competence. “The fact that a project involves activities primarily regulated by the provincial legislatures does not create an enclave of exclusivity”, para 142. Provincial jurisdiction in the areas of natural resource development, including exploration, conservation and production, “may cause effects in respect of

which the federal government can properly legislate”, as the majority said, para 142, and the inclusion of provincial projects to be considered under the *Act* “is not itself problematic”. As such, the majority has already determined that there is not necessarily an intrusion into a core aspect of federal jurisdiction, let alone an impairment.

## **VIII. Conclusion**

[366] For the reasons above, I would have found the provisions of the *Act* to be *intra vires* the legislative jurisdiction and responsibility of Canada, and would have upheld the *Act* in its entirety.

[367] I would have answered the question posed by Alberta in this reference in the negative.

Special Hearing heard February 24 - 26, 2026

Dissenting Opinion filed at Calgary, Alberta  
this 9th day of October, 2026

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Feehan J.A.

## Appendix A

### Key Provisions of the 2019 IAA and the amended IAA

The following table compares the 2019 IAA which was before the Court in the 2023 Reference with the current IAA. Underlined text has been added in the amended IAA. The double-underlined text comes from another part of the same section or elsewhere in the original IAA.

| 2019 IAA                                                                                                                                                                                                                                                                                                                                  | IAA (blacklined)                                                                                                                                                                                                                                                                                                                                   |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Long Title</b>                                                                                                                                                                                                                                                                                                                         |                                                                                                                                                                                                                                                                                                                                                    |
| An Act respecting a federal process for impact assessments and the prevention of significant adverse environmental effects                                                                                                                                                                                                                | An Act respecting a federal process for impact assessments and the prevention <u>or mitigation</u> of significant adverse <del>environmental</del> effects <u>within federal jurisdiction</u>                                                                                                                                                      |
| <b>Preamble</b>                                                                                                                                                                                                                                                                                                                           |                                                                                                                                                                                                                                                                                                                                                    |
| Whereas the Government of Canada is committed to fostering sustainability;                                                                                                                                                                                                                                                                | Whereas <del>the Government of Canada</del> <u>Parliament</u> is committed to <del>fostering sustainability</del> <u>having an impact assessment process that prevents or mitigates significant adverse effects within federal jurisdiction;</u>                                                                                                   |
| Whereas the Government of Canada recognizes that impact assessments provide an effective means of integrating scientific information and Indigenous knowledge into decision-making processes related to designated projects;                                                                                                              | <u>Whereas the Government of Canada is committed to implementing the United Nations Declaration on the Rights of Indigenous Peoples;</u>                                                                                                                                                                                                           |
| Whereas the Government of Canada recognizes the importance of public participation in the impact assessment process, including the planning phase, and is committed to providing Canadians with the opportunity to participate in that process and with the information they need in order to be able to participate in a meaningful way; | <u>Whereas the Government of Canada is committed, in the course of exercising its powers and performing its duties and functions in relation to impact, regional and strategic assessments, to ensuring respect for the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the Constitution Act, 1982; and to</u> |

|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
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| <p>Whereas the Government of Canada recognizes that the public should have access to the reasons on which decisions related to impact assessments are based;</p> <p>Whereas the Government of Canada is committed, in the course of exercising its powers and performing its duties and functions in relation to impact, regional and strategic assessments, to ensuring respect for the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the <i>Constitution Act, 1982</i>, and to fostering reconciliation and working in partnership with them;</p> <p>Whereas the Government of Canada is committed to implementing the United Nations Declaration on the Rights of Indigenous Peoples;</p> <p>Whereas the Government of Canada recognizes the importance of cooperating with jurisdictions that have powers, duties and functions in relation to the assessment of the effects of designated projects in order that impact assessments may be conducted more efficiently;</p> <p>Whereas the Government of Canada recognizes that a transparent, efficient and timely decision-making process contributes to a positive investment climate in Canada;</p> <p>Whereas the Government of Canada recognizes that impact assessment contributes to Canada's ability to meet its environmental</p> | <p><del>fostering reconciliation and working in partnership with them;</del></p> <p>Whereas Parliament recognizes the importance of implementing the impact assessment process in a manner that supports coordinated action among <u>jurisdictions that have powers, duties and functions in relation to the assessment of the effects of designated projects,</u></p> <p><u>fosters reconciliation and working in partnership with the Indigenous peoples of Canada,</u></p> <p><u>integrates scientific information and Indigenous knowledge,</u></p> <p><u>fosters meaningful public participation,</u></p> <p><u>is transparent, efficient and timely and contributes to a positive investment climate in Canada,</u></p> <p><u>encourages the use of innovative approaches and technologies to prevent or mitigate adverse effects within federal jurisdiction, and</u></p> <p><u>contributes to fostering sustainability and to the Government of Canada's ability to meet its environmental obligations and its commitments in respect of climate change;</u></p> <p><u>Whereas Parliament is committed, in order to prevent or mitigate significant adverse <i>environmental effects</i>, as defined in section 81, to having a process for the assessment of <i>projects</i>, as defined in that section, that are to be carried out on federal lands, or those that are outside Canada and</u></p> |
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| <p>obligations and its commitments in respect of climate change;</p> <p>Whereas the Government of Canada recognizes the importance of encouraging innovative approaches and technologies to reduce adverse changes to the environment and to health, social or economic conditions;</p> <p>And whereas the Government of Canada recognizes the importance of regional assessments in understanding the effects of existing or future physical activities and the importance of strategic assessments in assessing federal policies, plans or programs that are relevant to conducting impact assessments;</p> | <p><u>that are to be carried out or financially supported by a federal authority;</u></p> <p>And whereas <del>the Government of Canada</del> <u>Parliament</u> recognizes the importance of regional assessments in understanding the effects of existing or future physical activities and the importance of strategic assessments in assessing federal policies, plans or programs that are relevant to conducting impact assessments;</p>                                                                                                                                                                                       |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Definitions                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
| <p><b><i>effects within federal jurisdiction</i></b> means, with respect to a physical activity or a designated project,</p> <p>(a) a change to the following components of the environment that are within the legislative authority of Parliament:</p> <p>(i) <i>fish and fish habitat</i>, as defined in subsection 2(1) of the <i>Fisheries Act</i>,</p> <p>(ii) <i>aquatic species</i>, as defined in subsection 2(1) of the <i>Species at Risk Act</i>,</p> <p>(iii) <i>migratory birds</i>, as defined in subsection 2(1) of the <i>Migratory Birds Convention Act, 1994</i>, and</p>                  | <p><b><i>adverse effects within federal jurisdiction</i></b> means, with respect to a physical activity or a designated project,</p> <p>(a) a <u>non-negligible adverse</u> change to the following components of the environment that are within the legislative authority of Parliament:</p> <p>(i) <i>fish and fish habitat</i>, as defined in subsection 2(1) of the <i>Fisheries Act</i>,</p> <p>(ii) <i>aquatic species</i>, as defined in subsection 2(1) of the <i>Species at Risk Act</i>,</p> <p>(iii) <i>migratory birds</i>, as defined in subsection 2(1) of the <i>Migratory Birds Convention Act, 1994</i>, and</p> |

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| <p>(iv) any other component of the environment that is set out in Schedule 3;</p> <p>(b) a change to the environment that would occur</p> <p>(i) on federal lands,</p> <p>(ii) in a province other than the one where the physical activity or the designated project is being carried out, or</p> <p>(iii) outside Canada;</p> <p>(c) with respect to the Indigenous peoples of Canada, an impact — occurring in Canada and resulting from any change to the environment — on</p> <p>(i) physical and cultural heritage,</p> <p>(ii) the current use of lands and resources for traditional purposes, or</p> <p>(iii) any structure, site or thing that is of historical, archaeological, paleontological or architectural significance;</p> <p>(d) any change occurring in Canada to the health, social or economic conditions of the Indigenous peoples of Canada; and</p> <p>(e) any change to a health, social or economic matter that is within the legislative authority of Parliament that is set out in Schedule 3. (<i>effet relevant d'un domaine de compétence fédérale</i>)</p> | <p>(iv) any other component of the environment that is set out in Schedule 3;</p> <p>(b) a <u>non-negligible adverse</u> change to the environment that would occur <del>(i)</del> on federal lands, <del>(ii) in a province other than the one where the physical activity or the designated project is being carried out, or</del> <del>(iii)</del></p> <p>(c) a <u>non-negligible adverse change to the marine environment that is caused by pollution and that would occur</u> outside Canada;</p> <p>(d) a <u>non-negligible adverse change — that is caused by pollution — to boundary waters or international waters, as those terms are defined in subsection 2(1) of the Canada Water Act, or to interprovincial waters;</u></p> <p>(e) with respect to the Indigenous peoples of Canada, a <u>non-negligible adverse</u> impact — occurring in Canada and resulting from any change to the environment — on</p> <p>(i) physical and cultural heritage,</p> <p>(ii) the current use of lands and resources for traditional purposes, or</p> <p>(iii) any structure, site or thing that is of historical, archaeological, paleontological or architectural significance;</p> <p>(f) a <u>non-negligible adverse</u> change occurring in Canada to the health, social or economic conditions of the Indigenous peoples of Canada; and</p> |
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|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    | <p><b>(g) a non-negligible adverse</b> change to a health, social or economic matter that is within the legislative authority of Parliament that is set out in Schedule 3.</p> <p><u>In the case of a physical activity or a designated project that is carried out on federal lands or is a federal work or undertaking, as defined in subsection 3(1) of the <i>Canadian Environmental Protection Act, 1999</i>, this definition also includes the non-negligible adverse effects of that activity or project. (<i>effets négatifs relevant d'un domaine de compétence fédérale</i>)</u></p> |
| <p><b>direct or incidental effects</b> means effects that are directly linked or necessarily incidental to a federal authority's exercise of a power or performance of a duty or function that would permit the carrying out, in whole or in part, of a physical activity or designated project, or to a federal authority's provision of financial assistance to a person for the purpose of enabling that activity or project to be carried out, in whole or in part. (<i>effets directs ou accessoires</i>)</p> | <p><b>direct or incidental adverse effects</b> means <u>non-negligible adverse effects</u> that are directly linked or necessarily incidental to a federal authority's exercise of a power or performance of a duty or function that would permit the carrying out, in whole or in part, of a physical activity or designated project, or to a federal authority's provision of financial assistance to a person for the purpose of enabling that activity or project to be carried out, in whole or in part. (<i>effets directs ou accessoires négatifs</i>)</p>                              |
| <p><b>effects</b> means, unless the context requires otherwise, changes to the environment or to health, social or economic conditions and the positive and negative consequences of these changes. (<i>effets</i>)</p>                                                                                                                                                                                                                                                                                            | <p><b>effects</b> means, unless the context requires otherwise, changes to the environment or to health, social or economic conditions and the positive and negative consequences of these changes. (<i>effets</i>)</p>                                                                                                                                                                                                                                                                                                                                                                        |
| <p><b>environment</b> means the components of the Earth, and includes</p>                                                                                                                                                                                                                                                                                                                                                                                                                                          | <p><b>environment</b> means the components of the Earth, and includes</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |

| <p>(a) land, water and air, including all layers of the atmosphere;</p> <p>(b) all organic and inorganic matter and living organisms; and</p> <p>(c) the interacting natural systems that include components referred to in paragraphs (a) and (b). (<i>environnement</i>)</p>                                                                                                                                                                                                                                                                                                                                                                                                                             | <p>(a) land, water and air, including all layers of the atmosphere;</p> <p>(b) all organic and inorganic matter and living organisms; and</p> <p>(c) the interacting natural systems that include components referred to in paragraphs (a) and (b). (<i>environnement</i>)</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |
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| <p><b>sustainability</b> means the ability to protect the environment, contribute to the social and economic well-being of the people of Canada and preserve their health in a manner that benefits present and future generations. (<i>durabilité</i>)</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                | <p><b>sustainability</b> means the ability to protect the environment, contribute to the social and economic well-being of the people of Canada and preserve their health in a manner that benefits present and future generations. (<i>durabilité</i>)</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| Purpose                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |
| <p><b>Purposes</b></p> <p><b>6 (1)</b> The purposes of this Act are</p> <p>(a) to foster sustainability;</p> <p>(b) to protect the components of the environment, and the health, social and economic conditions that are within the legislative authority of Parliament from adverse effects caused by a designated project;</p> <p>(b.1) to establish a fair, predictable and efficient process for conducting impact assessments that enhances Canada's competitiveness, encourages innovation in the carrying out of designated projects and creates opportunities for sustainable economic development;</p> <p>(c) to ensure that impact assessments of designated projects take into account all</p> | <p><b>Purposes</b></p> <p><b>6 (1)</b> The purposes of this Act <u>is to prevent or mitigate significant adverse effects within federal jurisdiction — and significant direct or incidental adverse effects — that may be caused by the carrying out of designated projects, as well as significant adverse environmental effects, as defined in section 81, that may be caused by the carrying out of projects, as defined in that section, by establishing processes to anticipate, identify and assess the potential effects of those projects in order to inform decision-making under this or any other Act of Parliament in respect of those effects.</u></p> <p>[The below paragraphs are those that have been repealed from s 6(1) and are <u>not</u> found in</p> |

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| <p>effects — both positive and adverse — that may be caused by the carrying out of designated projects;</p> <p><b>(d)</b> to ensure that designated projects that require the exercise of a power or performance of a duty or function by a federal authority under any Act of Parliament other than this Act to be carried out, are considered in a careful and precautionary manner to avoid adverse effects within federal jurisdiction and adverse direct or incidental effects;</p> <p><b>(e)</b> to promote cooperation and coordinated action between federal and provincial governments — while respecting the legislative competence of each — and the federal government and Indigenous governing bodies that are jurisdictions, with respect to impact assessments;</p> <p><b>(f)</b> to promote communication and cooperation with Indigenous peoples of Canada with respect to impact assessments;</p> <p><b>(g)</b> to ensure respect for the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the <i>Constitution Act, 1982</i>, in the course of impact assessments and decision-making under this Act;</p> <p><b>(h)</b> to ensure that opportunities are provided for meaningful public participation during an impact assessment, a regional assessment or a strategic assessment;</p> <p><b>(i)</b> to ensure that an impact assessment is completed in a timely manner;</p> | <p>the new <i>IAA</i>. The other paragraphs have migrated to or were already in subsections 6(2)–(3) in some shape or form.]</p> <p><del><b>(b)</b> to protect the components of the environment, and the health, social and economic conditions that are within the legislative authority of Parliament from adverse effects caused by a designated project;</del></p> <p><del><b>(c)</b> to ensure that impact assessments of designated projects take into account all effects — both positive and adverse — that may be caused by the carrying out of designated projects;</del></p> <p><del><b>(k)</b> to ensure that an impact assessment takes into account alternative means of carrying out a designated project, including through the use of best available technologies;</del></p> <p><del><b>(n)</b> to encourage improvements to impact assessments through the use of follow-up programs.</del></p> |
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- (j) to ensure that an impact assessment takes into account scientific information, Indigenous knowledge and community knowledge;
- (k) to ensure that an impact assessment takes into account alternative means of carrying out a designated project, including through the use of best available technologies;
- (l) to ensure that *projects*, as defined in section 81, that are to be carried out on federal lands, or those that are outside Canada and that are to be carried out or financially supported by a federal authority, are considered in a careful and precautionary manner to avoid significant adverse environmental effects;
- (m) to encourage the assessment of the cumulative effects of physical activities in a region and the assessment of federal policies, plans or programs and the consideration of those assessments in impact assessments; and
- (n) to encourage improvements to impact assessments through the use of follow-up programs.

### **Mandate**

(2) The Government of Canada, the Minister, the Agency and federal authorities, in the administration of this Act, must exercise their powers in a manner that fosters sustainability, respects the Government's commitments with respect to the rights of the Indigenous peoples of Canada and applies the precautionary principle.

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| <p><b>Application of principles to powers</b></p> <p>(3) The Government of Canada, the Minister, the Agency and federal authorities must, in the administration of this Act, exercise their powers in a manner that adheres to the principles of scientific integrity, honesty, objectivity, thoroughness and accuracy.</p> | <p><b>Mandate</b></p> <p>(2) The Government of Canada, the Minister, the Agency and federal authorities, in the administration of this Act, must exercise their powers in a manner that fosters sustainability, respects the <del>Government's commitments with respect to</del> rights of the Indigenous peoples of Canada <u>recognized and affirmed by section 35 of the <i>Constitution Act, 1982</i>, takes into account Indigenous knowledge, considers the cumulative effects of physical activities, applies the precautionary principle and promotes cooperation among jurisdictions and with the Indigenous peoples of Canada.</u></p> <p><b>Application of principles to powers</b></p> <p>(3) The Government of Canada, the Minister, the Agency and federal authorities must, in the administration of this Act, exercise their powers in a manner that</p> <p><u>(a) ensures that processes referred to in subsection (1) are fair, predictable and efficient; and</u></p> <p><u>(b) adheres to the principles of scientific integrity, honesty, objectivity, thoroughness and accuracy.</u></p> |
| <b>Prohibitions</b>                                                                                                                                                                                                                                                                                                         |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| <b>Proponent</b>                                                                                                                                                                                                                                                                                                            | <b>Proponent</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |

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| <p><b>7 (1)</b> Subject to subsection (3), the proponent of a designated project must not do any act or thing in connection with the carrying out of the designated project, in whole or in part, if that act or thing may cause any of the following effects:</p> <p><b>X(a)</b> a change to the following components of the environment that are within the legislative authority of Parliament:</p> <ul style="list-style-type: none"> <li><b>(i)</b> <i>fish and fish habitat</i>, as defined in subsection 2(1) of the <i>Fisheries Act</i>,</li> <li><b>(ii)</b> <i>aquatic species</i>, as defined in subsection 2(1) of the <i>Species at Risk Act</i>,</li> <li><b>(iii)</b> <i>migratory birds</i>, as defined in subsection 2(1) of the <i>Migratory Birds Convention Act, 1994</i>, and</li> <li><b>(iv)</b> any other component of the environment that is set out in Schedule 3;</li> </ul> <p><b>(b)</b> a change to the environment that would occur</p> <ul style="list-style-type: none"> <li><b>(i)</b> on federal lands,</li> <li><b>(ii)</b> in a province other than the one in which the act or thing is done, or</li> <li><b>(iii)</b> outside Canada;</li> </ul> <p><b>(c)</b> with respect to the Indigenous peoples of Canada, an impact — occurring in Canada and resulting from any change to the environment — on</p> <ul style="list-style-type: none"> <li><b>(i)</b> physical and cultural heritage,</li> <li><b>(ii)</b> the current use of lands and resources for traditional purposes, or</li> </ul> | <p><b>7 (1)</b> Subject to subsection (3), the proponent of a designated project must not do any act or thing in connection with the carrying out of the designated project, in whole or in part, if that act or thing may cause any of the following adverse effects <u>within federal jurisdiction</u>.</p> <p><del><b>(a)</b> a change to the following components of the environment that are within the legislative authority of Parliament:</del></p> <ul style="list-style-type: none"> <li><del><b>(i)</b> <i>fish and fish habitat</i>, as defined in subsection 2(1) of the <i>Fisheries Act</i>,</del></li> <li><del><b>(ii)</b> <i>aquatic species</i>, as defined in subsection 2(1) of the <i>Species at Risk Act</i>,</del></li> <li><del><b>(iii)</b> <i>migratory birds</i>, as defined in subsection 2(1) of the <i>Migratory Birds Convention Act, 1994</i>, and</del></li> <li><del><b>(iv)</b> any other component of the environment that is set out in Schedule 3;</del></li> </ul> <p><del><b>(b)</b> a change to the environment that would occur</del></p> <ul style="list-style-type: none"> <li><del><b>(i)</b> on federal lands,</del></li> <li><del><b>(ii)</b> in a province other than the one in which the act or thing is done, or</del></li> <li><del><b>(iii)</b> outside Canada;</del></li> </ul> <p><del><b>(c)</b> with respect to the Indigenous peoples of Canada, an impact — occurring in Canada and resulting from any change to the environment — on</del></p> <ul style="list-style-type: none"> <li><del><b>(i)</b> physical and cultural heritage,</del></li> <li><del><b>(ii)</b> the current use of lands and resources for traditional purposes, or</del></li> </ul> |
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| <p>(iii) any structure, site or thing that is of historical, archaeological, paleontological or architectural significance;</p> <p>(d) any change occurring in Canada to the health, social or economic conditions of the Indigenous peoples of Canada; or</p> <p>(e) any change to a health, social or economic matter within the legislative authority of Parliament that is set out in Schedule 3.</p> <p>[...]</p> <p><b>Federal authority</b></p> <p><b>8</b> A federal authority must not exercise any power or perform any duty or function conferred on it under any Act of Parliament other than this Act that could permit a designated project to be carried out in whole or in part and must not provide financial assistance to any person for the purpose of enabling that designated project to be carried out, in whole or in part, unless</p> <p>(a) the Agency makes a decision under subsection 16(1) that no impact assessment of the designated project is required and posts that decision on the Internet site; or</p> <p>(b) the decision statement with respect to the designated project that is issued to the proponent of the designated project under section 65 sets out that the</p> | <p><del>(iii) any structure, site or thing that is of historical, archaeological, paleontological or architectural significance;</del></p> <p><del>(d) any change occurring in Canada to the health, social or economic conditions of the Indigenous peoples of Canada; or</del></p> <p><del>(e) any change to a health, social or economic matter within the legislative authority of Parliament that is set out in Schedule 3.</del></p> <p>[...]</p> <p><b>Federal authority</b></p> <p><b>8</b> A federal authority must not exercise any power or perform any duty or function conferred on it under any Act of Parliament other than this Act that could permit a designated project to be carried out in whole or in part and must not provide financial assistance to any person for the purpose of enabling that designated project to be carried out, in whole or in part, unless</p> <p>(a) the Agency makes a decision under subsection 16(1) that no impact assessment of the designated project is required and posts that decision on the Internet site; <del>or</del></p> <p>(b) the decision statement with respect to the designated project that is issued to the proponent of the designated project under section 65 sets out that <del>the effects that are indicated in the report with respect to the impact assessment of that project are in the public interest.</del></p> |
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| <p>effects that are indicated in the report with respect to the impact assessment of that project are in the public interest.</p>                                                                                                                                                                                                                                                                                                                                                        | <p><u>(i) the adverse effects within federal jurisdiction — and the direct or incidental adverse effects — that are indicated in the report with respect to the impact assessment of that project are not likely to be, to some extent, significant, or</u></p> <p><u>(ii) the Minister has determined under paragraph 60(1)(b), or the Governor in Council has determined under paragraph 62(b), that the adverse effects within federal jurisdiction — and the direct or incidental adverse effects — that are the subject of the determination are justified in the public interest; or</u></p> <p><u>(c) the exercise of the power, the performance of the duty or function or the provision of financial assistance is for the purpose of authorizing the proponent to do an act or thing referred to in paragraph 7(3)(c).</u></p> |
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| Designation of Physical Activity                                                                                                                                                                                                                                                                                                                                                                                                                                                         |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
| <p><b>Minister's power to designate</b></p> <p><b>9 (1)</b> The Minister may, on request or on his or her own initiative, by order, designate a physical activity that is not prescribed by regulations made under paragraph 109(b) if, in his or her opinion, either the carrying out of that physical activity may cause adverse effects within federal jurisdiction or adverse direct or incidental effects, or public concerns related to those effects warrant the designation.</p> | <p><b>Minister's power to designate</b></p> <p><b>9 (1)</b> The Minister may, on request or on <del>his or her</del> <u>the Minister's</u> own initiative, by order, designate a physical activity that is not prescribed by regulations made under paragraph 109(b) if, in <del>on his or her</del> <u>the Minister's</u> opinion, <del>either</del> the carrying out of that physical activity may cause adverse effects within federal jurisdiction or <del>adverse</del> direct or incidental <u>adverse</u> effects, <del>or public concerns related to those effects warrant the designation.</del></p>                                                                                                                                                                                                                            |

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| <p><b>Factors to be taken into account</b></p> <p>(2) Before making the order, the Minister may consider adverse impacts that a physical activity may have on the rights of the Indigenous peoples of Canada — including Indigenous women — recognized and affirmed by section 35 of the <i>Constitution Act, 1982</i> as well as any relevant assessment referred to in section 92, 93 or 95.</p> | <p><b><del>Factors to be taken into account</del></b></p> <p><del>(2) Before making the order,</del> <u>If the Minister is of the opinion that the carrying out of the physical activity may cause adverse effects within federal jurisdiction or direct or incidental adverse effects, the Minister may, in deciding whether to make an order, consider</u></p> <p><u>(a) public concerns related to the adverse effects within federal jurisdiction — or the direct or incidental adverse effects — that may be caused by the carrying out of the physical activity;</u></p> <p><u>(b) the adverse impacts that the physical activity may have on the rights of the Indigenous peoples of Canada — including Indigenous women — recognized and affirmed by section 35 of the <i>Constitution Act, 1982</i>;</u></p> <p><u>(c) any relevant assessment referred to in section 92, 93 or 95;</u></p> <p><u>(d) whether a means other than an impact assessment exists that would permit a jurisdiction to address the adverse effects within federal jurisdiction — and the direct or incidental adverse effects — that may be caused by the carrying out of the physical activity; and</u></p> <p><u>(e) any other factor that the Minister considers relevant.</u></p> |
| <p align="center"><b>Decisions Regarding Impact Assessments</b></p> <p align="center"><b>Agency's Decision</b></p>                                                                                                                                                                                                                                                                                 |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
| <p><b>Decision</b></p>                                                                                                                                                                                                                                                                                                                                                                             | <p><b>Decision</b></p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |

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| <p><b>16 (1)</b> After posting a copy of the notice on the Internet site under subsection 15(3), the Agency must decide whether an impact assessment of the designated project is required.</p> <p><b>Factors</b></p> <p><b>(2)</b> In making its decision, the Agency must take into account the following factors:</p> <ul style="list-style-type: none"> <li><b>(a)</b> the description referred to in section 10 and any notice referred to in section 15;</li> <li><b>(b)</b> the possibility that the carrying out of the designated project may cause adverse effects within federal jurisdiction or adverse direct or incidental effects;</li> <li><b>(c)</b> any adverse impact that the designated project may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the <i>Constitution Act, 1982</i>;</li> <li><b>(d)</b> any comments received within the time period specified by the Agency from the public and from any jurisdiction or Indigenous group that is consulted under section 12;</li> <li><b>(e)</b> any relevant assessment referred to in section 92, 93 or 95;</li> <li><b>(f)</b> any study that is conducted or plan that is prepared by a jurisdiction — in respect of a region that is related to the designated project — and that has been provided to the Agency; and</li> </ul> | <p><b>16 (1)</b> After posting a copy of the notice on the Internet site under subsection 15(3), the Agency must decide whether an impact assessment of the designated project is required.</p> <p><b>Factors</b></p> <p><b>(2)</b> In making its decision, the Agency must take into account the following factors:</p> <ul style="list-style-type: none"> <li><b>(a)</b> the description referred to in section 10 and any notice referred to in section 15;</li> <li><b>(b)</b> <del>the possibility that the carrying out of the designated project may cause adverse effects within federal jurisdiction — or the adverse direct or incidental adverse effects — that may be caused by the carrying out of the designated project;</del></li> <li><b>(c)</b> any adverse impact that the designated project may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the <i>Constitution Act, 1982</i>;</li> <li><b>(d)</b> any comments received within the time period specified by the Agency from the public and from any jurisdiction or Indigenous group that is consulted under section 12;</li> <li><b>(e)</b> any relevant assessment referred to in section 92, 93 or 95;</li> <li><b>(f)</b> any study that is conducted or plan that is prepared by a jurisdiction — in respect of a region that is related to the designated project — and that has been provided to the Agency;</li> </ul> |
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| <p>(g) any other factor that the Agency considers relevant.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             | <p><u>(f.1) whether a means other than an impact assessment exists that would permit a jurisdiction to address the adverse effects within federal jurisdiction — and the direct or incidental adverse effects — that may be caused by the carrying out of the designated project; and</u></p> <p>(g) any other factor that the Agency considers relevant.</p> <p><b><u>Limitation</u></b></p> <p><u>(2.1) The Agency may decide that an impact assessment is required only if it is satisfied that the carrying out of the designated project may cause adverse effects within federal jurisdiction or direct or incidental adverse effects.</u></p>        |
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| Factors to be Considered                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |
| <p><b>Factors — impact assessment</b></p> <p><b>22 (1)</b> The impact assessment of a designated project, whether it is conducted by the Agency or a review panel, must take into account the following factors:</p> <p>(a) the changes to the environment or to health, social or economic conditions and the positive and negative consequences of these changes that are likely to be caused by the carrying out of the designated project, including</p> <p>(i) the effects of malfunctions or accidents that may occur in connection with the designated project,</p> <p>(ii) any cumulative effects that are likely to result from the designated</p> | <p><b>Factors — impact assessment</b></p> <p><b>22 (1)</b> The impact assessment of a designated project, whether it is conducted by the Agency or a review panel, must take into account the following factors:</p> <p>(a) the changes to the environment or to health, social or economic conditions and the positive and negative consequences of these changes that are likely to be caused by the carrying out of the designated project, including</p> <p>(i) the effects of malfunctions or accidents that may occur in connection with the designated project,</p> <p>(ii) any cumulative effects that are likely to result from the designated</p> |

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| <p>project in combination with other physical activities that have been or will be carried out, and</p> <p><b>(iii)</b> the result of any interaction between those effects;</p> <p><b>(b)</b> mitigation measures that are technically and economically feasible and that would mitigate any adverse effects of the designated project;</p> <p><b>(c)</b> the impact that the designated project may have on any Indigenous group and any adverse impact that the designated project may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the <i>Constitution Act, 1982</i>;</p> <p><b>(d)</b> the purpose of and need for the designated project;</p> <p><b>(e)</b> alternative means of carrying out the designated project that are technically and economically feasible, including through the use of best available technologies, and the effects of those means;</p> <p><b>(f)</b> any alternatives to the designated project that are technically and economically feasible and are directly related to the designated project;</p> <p><b>(g)</b> Indigenous knowledge provided with respect to the designated project;</p> <p><b>(h)</b> the extent to which the designated project contributes to sustainability;</p> <p><b>(i)</b> the extent to which the effects of the designated project hinder or contribute to the Government of Canada's ability to meet its environmental obligations and its</p> | <p>project in combination with other physical activities that have been or will be carried out, and</p> <p><b>(iii)</b> the result of any interaction between those effects;</p> <p><b>(b)</b> mitigation measures that are technically and economically feasible and that would mitigate any adverse effects of the designated project;</p> <p><b>(c)</b> the impact that the designated project may have on any Indigenous group and any adverse impact that the designated project may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the <i>Constitution Act, 1982</i>;</p> <p><b>(d)</b> the purpose of and need for the designated project;</p> <p><b>(e)</b> alternative means of carrying out the designated project that are technically and economically feasible, including through the use of best available technologies, and the effects of those means;</p> <p><b>(f)</b> any alternatives to the designated project that are technically and economically feasible and are directly related to the designated project;</p> <p><b>(g)</b> Indigenous knowledge provided with respect to the designated project;</p> <p><b>(h)</b> the extent to which the designated project contributes to sustainability;</p> <p><b>(i)</b> the extent to which the effects of the designated project hinder or contribute to the Government of Canada's ability to meet its environmental obligations and its</p> |
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| <p>commitments in respect of climate change;</p> <p><b>(j)</b> any change to the designated project that may be caused by the environment;</p> <p><b>(k)</b> the requirements of the follow-up program in respect of the designated project;</p> <p><b>(l)</b> considerations related to Indigenous cultures raised with respect to the designated project;</p> <p><b>(m)</b> community knowledge provided with respect to the designated project;</p> <p><b>(n)</b> comments received from the public;</p> <p><b>(o)</b> comments from a jurisdiction that are received in the course of consultations conducted under section 21;</p> <p><b>(p)</b> any relevant assessment referred to in section 92, 93 or 95;</p> <p><b>(q)</b> any assessment of the effects of the designated project that is conducted by or on behalf of an Indigenous governing body and that is provided with respect to the designated project;</p> <p><b>(r)</b> any study or plan that is conducted or prepared by a jurisdiction — or an Indigenous governing body not referred to in paragraph (f) or (g) of the definition <i>jurisdiction</i> in section 2 — that is in respect of a region related to the designated project and that has been provided with respect to the project;</p> <p><b>(s)</b> the intersection of sex and gender with other identity factors; and</p> | <p>commitments in respect of climate change;</p> <p><b>(j)</b> any change to the designated project that may be caused by the environment;</p> <p><b>(k)</b> the requirements of the follow-up program in respect of the designated project;</p> <p><b>(l)</b> considerations related to Indigenous cultures raised with respect to the designated project;</p> <p><b>(m)</b> community knowledge provided with respect to the designated project;</p> <p><b>(n)</b> comments received from the public;</p> <p><b>(o)</b> comments from a jurisdiction that are received in the course of consultations conducted under section 21;</p> <p><b>(p)</b> any relevant assessment referred to in section 92, 93 or 95;</p> <p><b>(q)</b> any assessment of the effects of the designated project that is conducted by or on behalf of an Indigenous governing body and that is provided with respect to the designated project;</p> <p><b>(r)</b> any study or plan that is conducted or prepared by a jurisdiction — or an Indigenous governing body not referred to in paragraph (f) or (g) of the definition <i>jurisdiction</i> in section 2 — that is in respect of a region related to the designated project and that has been provided with respect to the project;</p> <p><b>(s)</b> the intersection of sex and gender with other identity factors; and</p> |
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| <p>(t) any other matter relevant to the impact assessment that the Agency requires to be taken into account.</p> <p><b>Scope of factors</b></p> <p>(2) The Agency's determination of the scope of the factors made under subsection 18(1.2) applies when those factors are taken into account under subsection (1).</p>                                                                                                                                                                                                                                                                                                                                                                                 | <p>(t) any other matter relevant to the impact assessment that the Agency requires to be taken into account.</p> <p><b>Scope of factors</b></p> <p>(2) The Agency's determination of the scope of the factors made under subsection 18(1.2) applies when those factors are taken into account under subsection (1).</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |
| <b>Substitution Provisions</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |
| <p><b>Minister's power</b></p> <p><b>31 (1)</b> Subject to sections 32 and 33, if the Minister is of the opinion that a process for assessing the effects of designated projects that is followed by a jurisdiction referred to in any of paragraphs (c) to (g) of the definition <i>jurisdiction</i> in section 2, that has powers, duties or functions in relation to an assessment of the effects of a designated project would be an appropriate substitute, the Minister may, on request of the jurisdiction and before the expiry of the time limit referred to in subsection 18(1), or any extension of that time limit, approve the substitution of that process for the impact assessment.</p> | <p><b>Minister's power</b></p> <p><b>31 (1)</b> Subject to sections 32 and 33, <u>the Minister may, on request of a jurisdiction referred to in any of paragraphs (c) to (g) of the definition <i>jurisdiction</i> in section 2 that has powers, duties or functions in relation to an assessment of the effects of a designated project and before the expiry of the time limit referred to in subsection 18(1), or any extension of that time limit, do one of the following:</u></p> <p style="padding-left: 40px;">(a) <u>if the Minister is of the opinion that a process for assessing the effects of designated projects that is followed by the jurisdiction would be an appropriate substitute, approve the substitution of that process for the impact assessment;</u></p> <p style="padding-left: 40px;">(b) <u>if the Minister is of the opinion that a process for assessing the effects of designated projects that is followed by the jurisdiction would, together with the activities undertaken under an agreement or arrangement referred to in paragraph 114(1)(f) in relation to the assessment of the effects of the designated project, be an</u></p> |

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| <p><b>Notice inviting public comments</b></p> <p>(2) When the Minister receives a request for substitution, the Agency must post the request on the Internet site as well as a notice that invites the public to provide comments respecting the substitution within 30 days after the day on which the notice is posted.</p> <p><b>Minister must consider public comments</b></p> <p>(3) The Minister must consider any comments received from the public in deciding whether to approve the substitution.</p> <p><b>Posting of Minister's decision on Internet site</b></p> <p>(4) The Agency must post a notice of the Minister's decision with respect to the request for substitution and the reasons for it on the Internet site.</p> <p><b>Exceptions</b></p> <p><b>32</b> The Minister must not approve the substitution of a process in relation to a designated project</p> | <p><u>appropriate substitute, approve the substitution of that process and those activities for the impact assessment.</u></p> <p><b>Notice inviting public comments</b></p> <p>(2) When the Minister receives a request for substitution, the Agency must post the request on the Internet site as well as a notice that invites the public to provide comments respecting the substitution within 30 days after the day on which the notice is posted.</p> <p><b>Minister must consider public comments</b></p> <p>(3) The Minister must consider any comments received from the public in deciding whether to approve the substitution.</p> <p><b>Posting of Minister's decision on Internet site</b></p> <p>(4) The Agency must post a notice of the Minister's decision with respect to the request for substitution and the reasons for it on the Internet site.</p> <p><b>Exceptions</b></p> <p><b>32</b> The Minister must not approve the substitution of a process in relation to a designated project</p> <p>(a) the impact assessment of which has been referred by the Minister to a review panel; or</p> <p>(b) that includes activities that are regulated under the <i>Canada Oil and Gas Operations Act</i>, the <i>Canada–Nova Scotia</i></p> |
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| <p>(a) the impact assessment of which has been referred by the Minister to a review panel; or</p> <p>(b) that includes activities that are regulated under the <i>Canada Oil and Gas Operations Act</i>, the <i>Canada-Nova Scotia Offshore Petroleum Resources Accord Implementation Act</i>, the <i>Canada-Newfoundland and Labrador Atlantic Accord Implementation Act</i> or the <i>Canada Transportation Act</i>.</p> <p><b>Conditions</b></p> <p><b>33 (1)</b> The Minister may only approve a substitution if he or she is satisfied that</p> <p>(a) the process to be substituted will include a consideration of the factors set out in subsection 22(1);</p> <p>(b) federal authorities that are in possession of relevant specialist or expert information or knowledge will be given an opportunity to participate in the assessment;</p> <p>(c) the jurisdiction that is following the process to be substituted has the ability to enter into an arrangement with any jurisdiction referred to in paragraphs (e) to (g) of the definition <i>jurisdiction</i> in section 2 respecting cooperation between those jurisdictions in the conduct of the assessment;</p> | <p><i>Offshore Petroleum Resources Accord Implementation and Offshore Renewable Energy Management Act</i>, the <i>Canada-Newfoundland and Labrador Atlantic Accord Implementation and Offshore Renewable Energy Management Act</i> or the <i>Canada Transportation Act</i>.</p> <p><b>Conditions</b></p> <p><b>33 (1)</b> The Minister may only approve a substitution if he or she is satisfied that</p> <p>(a) <del>the process to be substituted will include a consideration of the</del> factors set out in subsection 22(1) <u>will be considered under the process to be substituted or under an agreement or arrangement referred to in paragraph 114(1)(f);</u></p> <p>(b) federal authorities that are in possession of relevant specialist or expert information or knowledge will be given an opportunity to participate in the assessment;</p> <p>(c) the jurisdiction that is following the process to be substituted has the ability to enter into an arrangement with any jurisdiction referred to in paragraphs (e) to (g) of the definition <i>jurisdiction</i> in section 2 respecting cooperation between those jurisdictions in the conduct of the assessment;</p> <p>(d) the process to be substituted will include consultations with any Indigenous group that may be affected by the carrying out of the designated project <u>or the consultations will be undertaken under an agreement or arrangement referred to in paragraph 114(1)(f);</u></p> |
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| <p>(d) the process to be substituted will include consultations with any Indigenous group that may be affected by the carrying out of the designated project;</p> <p>(e) the public will be given an opportunity to participate meaningfully in the assessment and to provide comments on a draft report;</p> <p>(f) the public will have access to records in relation to the assessment to enable its meaningful participation;</p> <p>(g) at the end of the assessment, a report will be submitted to the Minister;</p> <p>(h) the report will be made available to the public; and</p> <p>(i) any other conditions that the Minister establishes are or will be met.</p> <p><b>Effects set out in report</b></p> <p>(2) The Minister must be satisfied that the report that will be submitted to him or her will set out the effects that, in the opinion of the jurisdiction that is following the process to be substituted, are likely to be caused by the carrying out of the designated</p> | <p>(e) the public will be given an opportunity to participate meaningfully in the assessment and to provide comments on a draft report;</p> <p>(f) the public will have access to records in relation to the assessment to enable its meaningful participation;</p> <p>(g) at the end of the assessment, a report will be submitted to the Minister;</p> <p><u>(g.1) in the case of a substitution approved under paragraph 31(1)(b), the report will be based on the process and the activities referred to in that paragraph;</u></p> <p>(h) the report will be made available to the public; and</p> <p>(i) any other conditions that the Minister establishes are or will be met.</p> <p><b>Effects set out in report</b></p> <p>(2) The Minister must be satisfied that the report that will be submitted to <del>him or her</del> <u>the Minister</u> will set out the effects that, <del>in the opinion of the jurisdiction that is following the process to be substituted,</del> are likely to be caused by the carrying out of the designated project. The Minister must also be satisfied that the report will</p> <p><u>(a) indicate, from among the effects set out in it, those that are adverse effects within federal jurisdiction and those that are <del>adverse</del> direct or incidental adverse effects; and</u></p> <p><u>(b) specify, from among those adverse effects within federal jurisdiction and direct or incidental adverse effects, the</u></p> |
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project. The Minister must also be satisfied that the report will indicate, from among the effects set out in it, those that are adverse effects within federal jurisdiction and those that are adverse direct or incidental effects, and specify the extent to which those effects are significant.

#### **Report — Indigenous knowledge**

(2.1) The Minister must be satisfied that the report that will be submitted to him or her will set out how the jurisdiction that is following the process to be substituted, in determining the effects that are likely to be caused by the carrying out of the designated project, took into account and used any Indigenous knowledge provided with respect to the designated project.

#### **Approval**

(3) The Minister may also approve the substitution of a process that has already been completed for an impact assessment if he or she is satisfied that the conditions referred to in subsections (1) and (2) have been met.

#### **Availability**

ones that are likely to be, to some extent, significant and the extent to which they are significant.

#### **Report — Indigenous knowledge**

(2.1) The Minister must be satisfied that the report that will be submitted to ~~him or her~~ the Minister will set out ~~how the jurisdiction that is following the process to be substituted~~ any Indigenous knowledge provided with respect to the designated project was taken into account and used in determining the effects that are likely to be caused by the carrying out of ~~the designated~~ that project.

#### **Approval**

(3) The Minister may also approve the substitution of a process that has already been completed for an impact assessment if he or she is satisfied that the conditions referred to in subsections (1) and (2) have been met.

#### **Availability**

(4) The conditions referred to in paragraph (1)(i) must be made available to the public.

#### **Assessment considered in conformity**

**34** ~~If~~ The assessment of the effects of a designated project in respect of which the Minister approves the ~~has approved a substitution of a process under section 31, the assessment that results from the substituted process~~ is considered to be an impact assessment under this Act and to satisfy any

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| <p><b>(4)</b> The conditions referred to in paragraph (1)(i) must be made available to the public.</p> <p><b>Assessment considered in conformity</b></p> <p><b>34</b> If the Minister approves the substitution of a process under section 31, the assessment that results from the substituted process is considered to be an impact assessment under this Act and to satisfy any requirements of this Act and the regulations in respect of an impact assessment.</p> <p><b>Additional information</b></p> <p><b>35</b> If, after taking into account the report with respect to the impact assessment of a designated project that is submitted to the Minister at the end of the assessment under the substituted process approved under section 31, the Agency is of the opinion that additional information is required for the purposes of subsection 60(1), it may require the proponent of the designated project to provide the additional information to the Minister or may make a request to the jurisdiction that followed the process to provide that information to the Minister.</p> | <p>requirements of this Act and the regulations in respect of an impact assessment.</p> <p><b>Additional Information</b></p> <p><b>35</b> If, <del>after taking into account the report with respect to the impact assessment of the effects of a designated project that is submitted to the in respect of which</del> the Minister <del>at the end of the assessment under the substituted process</del> has approved under section 31 a substitution, the Agency is of the opinion that <del>additional</del> information is required for <u>the purpose of ensuring that the factors set out in subsection 22(1) will be considered or for the purposes of subsection 60(1) or (1.1),</u> it may require the proponent of <del>the designated</del> <u>that project</u> to provide the <del>additional</del> information to the Minister or may make a request to the jurisdiction that <u>is following or followed the process — or to any jurisdiction that is undertaking or undertook activities under an agreement or arrangement referred to in paragraph 114(1)(f) in relation to the assessment of effects of that project —</u> to provide that information to the Minister.</p> |
| <b>Decision-making Provisions</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |
| <p><b>Minister's decision</b></p> <p><b>60 (1)</b> After taking into account the report with respect to the impact assessment of a designated project that is submitted to the</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    | <p><b>Minister's decision</b></p> <p><b>60 (1)</b> After taking into account the report with respect to the impact assessment of a designated project that is submitted to the</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |

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| <p>Minister under subsection 28(2) or at the end of the assessment under the process approved under section 31, the Minister must</p> <p>(a) determine whether the adverse effects within federal jurisdiction — and the adverse direct or incidental effects — that are indicated in the report are, in light of the factors referred to in section 63 and the extent to which those effects are significant, in the public interest; or</p> <p>(b) refer to the Governor in Council the matter of whether the effects referred to in paragraph (a) are, in light of the factors referred to in section 63 and the extent to which those effects are significant, in the public interest.</p> | <p>Minister under subsection 28(2) or at the end of the assessment <del>under the process of the</del> <u>effects of a designated project in respect of which the Minister has approved a</u> substitution under section 31, the Minister must</p> <p>(a) determine, <u>after taking into account the implementation of any mitigation measures that the Minister considers appropriate</u>, whether the adverse effects within federal jurisdiction — and the <del>adverse</del> direct or incidental <u>adverse</u> effects — that are indicated in the report are <u>likely to be, to some extent, significant and, if so, the extent to which those effects are significant; and</u></p> <p>(b) <u>if the Minister determines that any of the effects referred to in paragraph (a) are likely to be, to some extent, significant, determine whether the effects so determined are, in light of the extent to which the Minister determined them to be significant and the factors referred to in section 63, justified in the public interest.</u></p> <p><b><u>Referral to Governor in Council</u></b></p> <p><b><u>(1.1) After taking into account the report referred to in subsection (1) or at the end of the assessment of the effects of a designated project in respect of which the Minister has approved a substitution under section 31, the Minister may, instead of making the determinations under that subsection, refer to the Governor in Council the matter of making those determinations.</u></b></p> |
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| <p><b>Notice posted on Internet site</b></p> <p>(2) If the Minister refers the matter to the Governor in Council, he or she must ensure that a notice of the referral and the reasons for it are posted on the Internet site.</p> <p><b>Referral to Governor in Council</b></p> <p><b>61 (1)</b> After taking into account the report with respect to the impact assessment of a designated project that the Minister receives under section 55 or that is submitted to the Minister under section 59, the Minister, in consultation with the responsible Minister, if any, must refer to the Governor in Council the matter of determining whether the adverse effects within federal jurisdiction — and the adverse direct or incidental effects — that are indicated in the report are, in light of the factors referred to in section 63 and the extent to which those effects are significant, in the public interest.</p> <p>[...]</p> | <p><b>Notice posted on Internet site</b></p> <p>(2) If the Minister refers the matter to the Governor in Council, he or she must ensure that a notice of the referral and the reasons for it are posted on the Internet site.</p> <p><b>Referral to Governor in Council</b></p> <p><b>61 (1)</b> After taking into account the report with respect to the impact assessment of a designated project that the Minister receives under section 55 or that is submitted to the Minister under section 59, the Minister, in consultation with the responsible Minister, if any, must refer to the Governor in Council</p> <p>(a) <u>the matter of determining, after taking into account the implementation of any mitigation measures that the Governor in Council considers appropriate, whether the adverse effects within federal jurisdiction — and the <del>adverse</del> direct or incidental <u>adverse</u> effects — that are indicated in the report <u>are likely to be, to some extent, significant and, if so, the extent to which those effects are significant; and</u></u></p> <p>(b) <u>the matter of determining whether the effects, if any, that are likely to be, to some extent, significant are, in light of the extent to which they are significant and the factors referred to in section 63, <u>justified</u> in the public interest.</u></p> <p>[...]</p> <p><b>Governor in Council's determination</b></p> |
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| <p><b>Governor in Council's determination</b></p> <p><b>62</b> If the matter is referred to the Governor in Council under paragraph 60(1)(b) or section 61, the Governor in Council must, after taking into account the report with respect to the impact assessment of the designated project that is the subject of the referral, determine whether the adverse effects within federal jurisdiction — and the adverse direct or incidental effects — that are indicated in the report are, in light of the factors referred to in section 63 and the extent to which those effects are significant, in the public interest.</p> | <p><b>62</b> If a matter is referred to the Governor in Council under subsection 60(1)(b) <del>or section 64(1.1) or 61(1)</del>, the Governor in Council must, after taking into account the report with respect to the impact assessment of the designated project <del>that is the subject of the referral</del>,</p> <p>(a) determine, <u>after taking into account the implementation of any mitigation measures that the Governor in Council considers appropriate</u>, whether the adverse effects within federal jurisdiction — and the <del>adverse</del> direct or incidental adverse effects — that are indicated in the report are <u>likely to be, to some extent, significant and, if so, the extent to which those effects are significant; and</u></p> <p>(b) <u>if the Governor in Council determines that any of the effects referred to in paragraph (a) are likely to be, to some extent, significant, determine whether the effects so determined are, in light of the extent to which the Governor in Council determined them to be significant and the factors referred to in section 63, justified in the public interest.</u></p> <p><b>Factors — <u>justification in public interest</u></b></p> <p><b>63</b> The Minister's determination under paragraph 60(1)(b) <del>(a) in respect of a designated project referred to in that subsection</del>, and the Governor in Council's determination under paragraph 62(b) <del>in respect of a designated project referred to in that subsection</del>, must be based on the report with respect to the impact assessment <u>of the designated project</u> and a consideration of the following factors:</p> |
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### Factors — public interest

**63** The Minister's determination under paragraph 60(1)(a) in respect of a designated project referred to in that subsection, and the Governor in Council's determination under section 62 in respect of a designated project referred to in that subsection, must be based on the report with respect to the impact assessment and a consideration of the following factors:

- (a) the extent to which the designated project contributes to sustainability;
- (b) the extent to which the adverse effects within federal jurisdiction and the adverse direct or incidental effects that are indicated in the impact assessment report in respect of the designated project are significant;
- (c) the implementation of the mitigation measures that the Minister or the Governor in Council, as the case may be, considers appropriate;
- (d) the impact that the designated project may have on any Indigenous group and any adverse impact that the designated project may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*; and
- (e) the extent to which the effects of the designated project hinder or contribute to the Government of Canada's ability to meet its environmental obligations and its

(a) the impact that the designated project effects that are likely to be caused by the carrying out of that project may have on any Indigenous group and any adverse impact that the designated project those effects may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*;

(b) the extent to which the effects of the designated project that are likely to be caused by the carrying out of that project hinder or contribute to the Government of Canada's ability to meet its environmental obligations and its commitments in respect of climate change; and

(c) the extent to which the designated project effects that are likely to be caused by the carrying out of that project contributes to sustainability.

[The following paragraphs are found reworded in the above subsections 60(1), 60(2) and section 62 and have not been entirely repealed.]

(b) the extent to which the adverse effects within federal jurisdiction and the adverse direct or incidental effects that are indicated in the impact assessment report in respect of the designated project are significant;

(c) the implementation of the mitigation measures that the Minister or the

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| commitments in respect of climate change. | Governor in Council, as the case may be, considers appropriate; |
|-------------------------------------------|-----------------------------------------------------------------|

**Appearances:**

E.B. Mellett, KC  
S. L. Major, KC  
R. Martin  
S.R. Assie  
A. Williams  
for the Applicant, Attorney General of Alberta

K. Boyd  
J.R. Elford  
C. A. A. Francon (no appearance)  
K. Creelman  
for the Respondent, Attorney General of Canada

J. M. Hunter  
H. F. Evans  
for the Intervenor Attorney General of Ontario

K.L. Lambert  
A. Clark  
for the Intervenor Cold Lake First Nations

A. Johnston  
for the Intervenor Nature Canada and West Coast Environmental Law

P.G. Chiswell (no appearance)  
R.L. Martz  
for the Intervenor Canadian Association of Petroleum Producers

M.E. Killoran, KC  
S. Sutherland  
A.E. Light (no appearance)  
M. Cardinal  
for the Intervenor Business Council of Alberta

C. E. Hatt  
A. McIntosh  
for the Intervenor Ecojustice Canada Society

T. Irvine, KC  
N. S. Wernikowski  
for the Intervenor Attorney General of Saskatchewan

L.D. Rae  
S. Loudon (no appearance)  
A. Pantazopoulos  
for the Intervenor Indian Resource Council

B.S. Gilmour  
M. Matwichuk  
for the Intervenor Enserva

H.L. Treacy, KC  
J.A. Jantzi  
M. Riley  
A. Aboudheir  
for the Intervenor Canadian Constitution Foundation

R.B.E. Hallsor, KC  
D. Drover  
for the Intervenor Canadian Taxpayers Federation