In the Court of Appeal of Alberta

Citation: Reference re *Impact Assessment Act*, 2022 ABCA 165

Date: 20220510
Docket: 1901-0276AC
Registry: Calgary

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

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

The Court:

The Honourable Chief Justice Catherine Fraser
The Honourable Justice Jack Watson
The Honourable Justice J.D. Bruce McDonald
The Honourable Justice Sheila Greckol
The Honourable Justice Jo'Anne Strekaf

Opinion of the Honourable Chief Justice Fraser,
the Honourable Justice Watson and
the Honourable Justice McDonald

Concurred in by the Honourable Justice Strekaf

Dissenting Opinion of the Honourable Justice Greckol

Reference by the Lieutenant Governor in Council
Order in Council 160/2019
Dated the 9th day of September, 2019
Filed the 10th day of September, 2019

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Opinion

I. Introduction

[1] Sustainable economic development cannot be achieved without a sustainable healthy environment and society. Since we all want a healthy biosphere in which to live, we expect our governments to make informed decisions about proposed larger scale projects in this country in a careful and precautionary manner. The utility therefore of environmental impact assessments of such projects to determine their environmental, social, economic and health impacts is undisputed. That has been unanimously recognized by the four governments and all intervenors who participated in this Reference. Indeed, without exception, every government in this country has, in aid of responsible stewardship of the environment, enacted comprehensive environmental assessment processes to evaluate the benefits and burdens of significant proposed infrastructure and resource activities.

[2] Times of great change often lead to pressures to centralize power. Popular thinking may consider a central government best suited to manage whatever change dominates public discourse. Today, that discourse most certainly includes climate change. The increasing frequency of weather events related to climate change and their detrimental effects are evident; the need to act with urgency on this front undeniable. But this should not be confused with the issue at stake here.

[3] This Reference is not about the legitimate concerns all governments and citizens have today about climate change nor how best to address them. Nor is it about the anxiety many rightly feel about this subject. Rather, the issue before this Court is whether Parliament has overstepped the limits of its constitutional mandate under Canada's Constitution.

[4] The Lieutenant Governor in Council has asked for this Court's opinion on two questions:[1]

> 1. 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?
>
> 2. 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?

[1] The Order in Council was issued under s 26 of the *Judicature Act*, RSA 2000, c J-2.

Part 1 of this legislation consists only of the *Impact Assessment Act*, SC 2019, c 28, s 1 [*Act*]. We sometimes refer to the *Act* and the *Physical Activities Regulations*, SOR/2019-285 [*Regulations*] collectively as the "*IAA*" or the "legislative scheme".

[5] For reasons explained in this Opinion, the *Act* and *Regulations* are unconstitutional.

[6] Climate change constitutes an existential threat to Canada.[2] But climate change is not the only existential threat facing this country. The *IAA* involves another existential threat – one also pressing and consequential – and that is the clear and present danger this legislative scheme presents to the division of powers guaranteed by our Constitution and thus, to Canada itself. This Reference shines a spotlight on the crucial feature of federalism built into our constitutional framework. History teaches that government by central command rarely works in a geographically large country with a diverse population and divergent regional priorities. In most major democratic countries in the world, federalism and its associated principle, subsidiarity, have been insisted upon by the governed. That includes Canada which, by deliberate choice, is a federation not a unitary state.

[7] Federalism is fundamental to Canada's existence: ***Reference re Secession of Quebec***, [1998] 2 SCR 217 at paras 37, 55-60 [***Secession Reference***].[3] And what is fundamental to Canada's model of federalism is preservation of the carefully calibrated division of powers between the federal and provincial governments[4] set out in Part VI of the *Constitution Act, 1867*, as amended.[5]

[8] Legislative power is divided and balanced between Parliament and provincial Legislatures mainly through an allocation of mutually exclusive heads of legislative power. Most federal powers are those vested exclusively in Parliament under s 91 and s 92(10)(a), (b) and (c) of the *Constitution Act, 1867*. Provincial powers include those legislative powers vested exclusively in provincial Legislatures under s 92 of the *Constitution Act*, *1867* as well as the proprietary powers flowing from the provinces' ownership of their natural resources under s 109. They also include those allocated to the provinces under s 92A(1) with respect to non-renewable natural resources, forestry resources and sites and facilities for generation and production of electrical energy (sometimes referred to as "92A natural resources") in their province. Reserving meaningful powers

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[2] ***References re Greenhouse Gas Pollution Pricing Act***, 2021 SCC 11 at paras 167, 171 [***References re Greenhouse Gas Pollution Pricing Act SCC***].

[3] See also ***Liquidators of the Maritime Bank of Canada v Receiver-General of New Brunswick***, [1892] AC 437 at 441-43 (PC); ***In Re the Initiative and Referendum Act***, [1919] AC 935 at 942 (PC); ***Re: Resolution to Amend the Constitution***, [1981] 1 SCR 753 at 905-9.

[4] In this Opinion, we include territorial governments within the phrase provincial governments unless the context otherwise requires.

[5] 30 & 31 Vict, c 3 (UK), reprinted in RSC 1985, Appendix II, No 5. This includes s 92A, which was added as an amendment to the *Constitution Act, 1867* as part of the *Constitution Act, 1982*, s 50, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

to provincial governments remains a key objective of federalism: ***Canadian Western Bank v Alberta***, 2007 SCC 22 at para 22, [2007] 2 SCR 3 [***Canadian Western Bank***].

[9] Under the Constitution, the "environment" is not a head of power assigned to either Parliament or provincial Legislatures: ***Friends of the Oldman River Society v Canada (Minister of Transport)***, [1992] 1 SCR 3 at 63 [***Oldman River***].[6] That being so, when either government level legislates for purposes relating to the environment, that legislation *must* be linked to a specific head of power within its jurisdiction. A meritorious motive – protection of the environment – does not by itself found constitutional jurisdiction for either level of government. Accordingly, Parliament is not entitled, on the basis that Canadians nationally share legitimate concerns about the environment and climate change, to legislate and regulate on the environment generally. Nor is Parliament entitled to require federal oversight and approval of intra-provincial activities otherwise within provincial jurisdiction on the basis of the environmental effects of those projects, and factors, not linked, or not sufficiently linked, to a federal head of power. And yet this legislative scheme authorizes just that.

[10] There is a long history here. The *IAA* is a classic example of legislative creep. The federal government appears to have taken the Supreme Court decision in ***Oldman River*** upholding the federal government's *Environmental Assessment and Review Process Guidelines Order*, SOR/84-467 [*Guidelines Order*] as a license to systematically expand federal powers under the environmental umbrella. The *IAA*, with its intrusions into provincial jurisdiction, is far removed from the federal environmental assessment legislation that the Supreme Court found constitutional in ***Oldman River***. The assessment process under the *Guidelines Order* did not include the usurpations of provincial jurisdiction embedded in the *IAA*. It was also procedural only, a planning tool and integral component of sound decision-making.[7] Its purpose was to provide the federal decision maker with an objective basis for granting or denying permits or approvals required for a proposed development under federal legislation. But the *IAA* extends well beyond this.

[11] The full scope of this legislative scheme is revealing. It is both an impact assessment and regulatory regime. It provides for a comprehensive impact assessment process to assess the "effects" of certain physical activities carried out in Canada. That includes any physical activity designated as a "designated project" by the Governor in Council under the *Regulations* or by the Minister of the Environment under the *Act* (sometimes referred to as "designated projects" or "designated project" and the Governor in Council and Minister of Environment sometimes referred to collectively as the "federal executive").[8]

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[6] The concepts of the "environment" and "health" are "vague" and "general": ***References re Greenhouse Gas Pollution Pricing Act*** at para 53.

[7] The basic concepts are "early identification and evaluation of all potential environmental consequences of a proposed undertaking" and "decision making that both guarantees the adequacy of this process and reconciles, to the greatest extent possible, the proponent's development desires with environmental protection and preservation": ***Oldman River*** at 71, citing Roger Cotton & D. Paul Emond, "Environmental Impact Assessment" in John Swaigen, ed, *Environmental Rights in Canada* (Toronto: Butterworths, 1981) 245 at 247.

[8] Section 2 defines designated project as follows: "designated project means one or more physical activities that (a)

[12] A number of physical activities subject to the *Act* are within exclusive federal jurisdiction.[9] Some have been prescribed as designated projects ("federal designated projects"). No one challenges this scheme as it relates to activities within exclusive federal jurisdiction, including federal designated projects.

[13] A number of physical activities prescribed as designated projects though involve intra-provincial activities which otherwise fall within exclusive provincial jurisdiction under several heads of provincial power: s 92A(1) (development and management of natural resources); s 109 (proprietary rights as owners of public lands); s 92(5) (management of public lands); s 92(10) (local works and undertakings); s 92(13) (property and civil rights); and s 92(16) (local or private matters). The focus of this Reference has been on the constitutional validity of the *IAA* when applied to those intra-provincial activities designated as "designated projects" (sometimes referred to as "intra-provincial designated projects" or "intra-provincial designated project"). Inclusion of an intra-provincial activity within this scheme is triggered merely by its designation as a designated project by the federal executive.

[14] Through this legislative scheme, Parliament has also imposed a regulatory regime on all intra-provincial designated projects on provincially-owned as well as provincially-controlled lands. That has been accomplished through a number of means including a public interest determination by the federal executive and related decision statement. In the result, the *IAA* regulates matters within provincial competence as well as federal competence.

[15] Some intra-provincial designated projects may require a permit, license or authorization (sometimes referred to as a "federal permit") under other valid federal legislation allowing the project to be carried out. But others may not. Intra-provincial designated projects include both. The scheme is not restricted to intra-provincial activities requiring a federal permit, in other words activities in respect of which a federal authority has some decision-making authority under valid and applicable federal legislation independent of this scheme. Instead, the *IAA* regulates all intra-provincial designated projects even where there is no such federal decision-making. And therein lies one instance of federal jurisdictional overreach under the *IAA*.

[16] The impact assessment required for intra-provincial designated projects includes not only their environmental impacts but a wide range of economic, social, cultural and heritage impacts. The definitions under the *Act* sweep within its purview all aspects of the environment no matter how untethered they may be, when applied to intra-provincial designated projects, to federal heads of power. The *Act* touches land, water, air, flora, fauna and energy which pretty well covers the

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are carried out in Canada or on federal lands; and (b) are designated by regulations made under paragraph 109(b) or designated in an order made by the Minister under subsection 9(1). It includes any physical activity that is incidental to those physical activities, but it does not include a physical activity designated by regulations made under paragraph 112(1)(a.2)."

[9] Parliament has exclusive jurisdiction to enact laws in relation to federally-owned and federally-controlled property and territory and works and undertakings under ss 91 and 92(10)(a), (b) and (c) in addition to its "Peace, Order, and good Government" (POGG) power.

entire biosphere known to mankind. It is also aimed at social, economic, cultural, humanist and historical topics which pretty well covers all aspects of human life within the biosphere. The *Act* also has within it unilaterally expandable schedules as to the types of construction, development, business, commerce and other intra-provincial activities that the federal government may choose to bring under its scrutiny as designated projects. Thus, it covers all those things too.

[17] Under the *Act*, Parliament has regulated what it has defined as "effects within federal jurisdiction" from a designated project and what it characterizes as "adverse effects within federal jurisdiction" from that project. It has self-defined "effects within federal jurisdiction" as various changes or impacts to the environment, health, social or economic matters from or by a designated project. That is the hook Canada claims anchors its jurisdiction over intra-provincial designated projects that do not otherwise require a federal permit. However, while those changes or impacts may be "effects within federal jurisdiction" for purposes of the *Act*, that does not make all of them effects within federal jurisdiction for purposes of the division of powers.

[18] Parliament's self-definition of "effects within federal jurisdiction" (sometimes referred to as "purported federal effects" or "federal effects" and "adverse effects within federal jurisdiction" sometimes referred to as "purported adverse federal effects" or "adverse federal effects") includes effects not within its constitutional jurisdiction when applied to intra-provincial designated projects – namely, the incidental effects of provincial laws (authorizing intra-provincial designated projects) on a federal head of power, effects not linked, or not sufficiently linked, to a federal head of power and effects that do not even qualify as significant. And therein lies another instance of federal jurisdictional overreach under this legislative scheme.

[19] Further, Parliament has layered onto its self-definition of "effects within federal jurisdiction" mandatory factors which must be considered in the impact assessment. Again, some are not within Canada's jurisdiction when applied to intra-provincial designated projects. The federal executive is then empowered to make a substantive decision, a "public interest determination", with respect to each intra-provincial designated project taking into account both the impact assessment, which itself includes all effects of the project, not simply federal effects, and prescribed mandatory factors, again not all of which are within Canada's jurisdiction as they relate to those projects.

[20] In particular, the federal executive is permitted to use those mandatory factors and all effects of an intra-provincial designated project in declining to make the key substantive decision required for the project to proceed – a positive public interest determination. A positive public interest determination means that the federal executive has determined that the intra-provincial designated project is in the public interest.[10] Without a positive public interest determination, all the prohibitions under the *Act* continue, meaning that the proponent of an intra-provincial designated project is effectively prohibited from proceeding with that project. And without a positive public interest determination, the federal executive is under no obligation to identify

[10] We explain in detail later why the public interest determination involves assessing whether the intra-provincial designated project overall is in the public interest having regard to federal priorities and policies.

conditions for the project to proceed. And without a positive public interest determination, other federal authorities are forbidden from issuing any federal permit required for the intra-provincial designated project to proceed. And therein lies an even more fatal instance of federal overreach under this legislative scheme.

[21] For Parliament to empower the federal executive to stop any intra-provincial designated project over the objections of the provincial government involved unless the federal executive finds the project to be in the public interest constitutes a breathtaking pre-emption of provincial legislative authority. The economic life of this country lies largely in the provinces. While some may believe the *IAA*'s primary target is fossil fuel projects, no province should assume that intra-provincial highways or light rail transit systems or flood control or wind farms or solar farms or any of the innumerable intra-provincial activities a province may decide are needed for its citizens would be exempt from the *IAA*. They would not be.

[22] Neither government level has the right to define the parameters of its constitutional jurisdiction: ***Desgagnés Transport Inc v Wärtsilä Canada Inc***, 2019 SCC 58 at para 140, per Wagner CJ and Brown J concurring [***Desgagnés Transport***]. Instead, the ultimate responsibility for defending the dividing line between provincial and federal governments in this country rests with the courts: ***Northern Telecom Canada Ltd v Communication Workers of Canada***, [1983] 1 SCR 733 at 741. Courts do not determine the constitutionality of legislation under the division of powers based on the preference of a majority of Canadians or a majority of provinces. Majoritarianism is not superior to the Constitution. Indeed, Canada's Constitution and the Rule of Law are protections against majoritarianism.

[23] In discharging its duty, the courts have no mandate to erase the dividing line and draw another: ***Caron v Alberta***, 2015 SCC 56 at para 36, [2015] 3 SCR 511. Rather, the courts must respect the structure of government that the Constitution has implemented: ***Trial Lawyers Association of British Columbia v British Columbia (Attorney General)***, 2014 SCC 59 at para 26, [2014] 3 SCR 31. The golden thread running through Canada's Constitution is federalism. Hence the need for the courts to maintain an appropriate balance between federal and provincial heads of power: ***Reference re Firearms Act (Can.)***, 2000 SCC 31 at para 48, [2000] 1 SCR 783 [***Firearms Reference***].

[24] Were the courts to uphold the validity of the *IAA*, all provincial industries, almost every aspect of a province's economy that the federal government chooses to sweep within the *IAA*, along with a province's development of its natural resources, would be subject to federal regulation, including an effective federal veto. This would undermine the division of powers, substantially overriding s 92(5) (management of public lands), s 92(10) (local works and undertakings), s 92(13) (property and civil rights) and s 92(16) (local or private matters) of the Constitution.

[25] In addition, it would effectively write s 109 and s 92A(1) out of the Constitution, thereby ending the provinces' constitutional rights to ownership and development of their natural resources. To these fundamental rights of Canada's constitutional makeup, the *IAA* expresses no

deference. Instead, this legislative scheme allows the federal government to essentially render worthless the natural resources of individual provinces by stopping their development. If upheld, the *IAA* would permanently alter the division of powers and forever place provincial governments in an economic chokehold controlled by the federal government.

[26] Perhaps most troubling, this legislative scheme allows the federal government to pick winners and losers, not just in terms of individual intra-provincial designated projects, and individual categories thereof, but also in terms of individual provinces. Thus, this legislative scheme not only has a corrosive effect on the division of powers, it has an equally corrosive effect on the economic health and well-being of citizens of individual provinces. For those Canadians living in parts of the country with lesser populations, and, thus, lesser political influence on the federal government, the economic and social consequences are especially devastating. True respect for federalism is the only defence against this kind of unrestrained federal power.

[27] This is not an academic matter for western Canada. The early history of Canada prior to 1930 singled out the prairie provinces for economic inequality compared to other provinces. It was only when ecological and economic disaster befell the prairie provinces that they were provided with the same ownership and control of public lands and natural resources as the founding provinces had retained on Confederation. This was finally achieved by constitutional amendment in 1930. But federal government initiatives started to claw back on that constitutional amendment. This led to the provinces seeking, and securing, through the addition of s 92A further reinforcement and expansion of provincial jurisdiction over 92A natural resources.

[28] The *IAA* raises an issue of fundamental fairness. Through this legislative scheme, Parliament has taken a wrecking ball to the constitutional right of the citizens of Alberta and Saskatchewan and other provinces to have their 92A natural resources developed for their benefit. And in doing so, it has also taken a wrecking ball to something else – and that is the likelihood of capital investment in projects vital to the economy of individual provinces. Capital investment does not just happen, especially where the capital investment is measured in the billions, not millions of dollars. And it particularly does not happen where, as under this legislative scheme, the investing rules are uncertain, unpredictable, unquantifiable and unreliable.

[29] To deprive Alberta and Saskatchewan, which together have the vast majority of oil and gas reserves in this country, of their constitutional right to exploit these natural resources – especially while the federal government continues to permit the import of hundreds of millions of barrels of oil into Canada from other countries – is to reintroduce the very discrimination both provinces understood had ended, if not in 1930, then certainly by 1982. To put the extent of those imports in perspective, in 2020, a year in which consumption was reduced because of the pandemic, Canada imported more than 200,000,000 barrels of oil that year alone, representing 24.3% of total consumption of oil in this country.[11]

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[11] Canada Energy Regulator, "Market Snapshot: Crude oil imports decreased in 2020, and so did the cost", online: <https://www.cer-rec.gc.ca/en/data-analysis/energy-markets/market-snapshots/2021/market-snapshot-crude-oil-imports-decreased-in-2020-and-so-did-the-cost.html> (accessed 7 July 2021). Since daily consumption was estimated at 2,282,479 barrels a day overall for 2020, the imports that year of 554,700 barrels of oil each day amounted to about

[30] The *IAA* also brings to the fore legitimate concerns about stranding oil and gas resources in this country as the world transitions away from fossil fuels to a greener economy. This transition will take time. That is why it is called a transition. That time may be measured in double digits, if not three or possibly four decades, particularly if carbon capture, utilization and storage, the use of hydrogen and small modular nuclear reactors allow those resources to be developed in, or near, a net-zero manner.[12] While many may be delighted by the prospect of stranding these resources, including Canada's oil and gas competitors who would thereby enhance their own position for markets outside Canada and potentially within Canada too, that enthusiasm may not be shared by the provinces that own these resources nor by the citizens of those provinces.[13]

[31] Parliament has the authority to legislate to protect the environment. However, it must do so in accordance with the Constitution. For reasons explained in detail in this Opinion, we have concluded that the subject matter of the *IAA* is properly characterized as "the establishment of a federal impact assessment and regulatory regime that subjects all activities designated by the federal executive to an assessment of all their effects and federal oversight and approval". When applied to intra-provincial designated projects, this subject matter does not fall under any heads of power assigned to Parliament but rather intrudes impermissibly into heads of power assigned to provincial Legislatures by the *Constitution Act, 1867.*

[32] Accordingly, the *IAA* is *ultra vires* Parliament. Intra-provincial activities requiring a federal permit under other valid and applicable federal laws remain subject to those laws but in accordance with the terms of such laws, not this legislative scheme.

[33] In summary, the federal government's invocation of concerns about the environment and climate change that all provincial governments and Canadians share is not a basis on which to tear apart the constitutional division of powers.

II. Positions of the Parties

A. Alberta and Intervenors in Support of Alberta

[34] Alberta argues that the *IAA* intrudes impermissibly into provincial jurisdiction. It contends the *IAA* is a "Trojan horse", enabling the federal government, on the pretext of claimed narrow grounds of federal jurisdiction, to conduct far-ranging inquiries into matters assigned exclusively to the provinces. The result is federal intrusion into areas of core provincial jurisdiction, including

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24.3% of total consumption. The prior year, 2019, Canada imported more than 250,000,000 barrels of oil that year; imports that year were about 27.3% of total consumption.

[12] On April 14, 2021, Alberta signed onto a Memorandum of Understanding originally made between Ontario, New Brunswick and Saskatchewan dated December 1, 2019 for the development and deployment of small modular nuclear reactors.

[13] Nor by other democratic nations requiring market access to fossil fuels for crucial purposes during the transition.

development of 92A natural resources and local works and undertakings, and an effective federal veto over intra-provincial activities and resource development.

[35] Alberta characterizes the subject matter of the *IAA*, its pith and substance, as "the establishment of a comprehensive impact assessment regime that requires proposed resource developments and infrastructure projects to undergo a broad ranging assessment of their impacts, environmental and other, and to subject those projects to federal oversight and approval".[14]

[36] Alberta contends that the *IAA* departs significantly from the predecessor environmental assessment legislation and establishes a broad review process that has no jurisdictional connection to a federal head of power. Alberta points out that the *Regulations* designate projects and undertakings within exclusive provincial authority, further revealing the extent of the jurisdictional overreach. Alberta argues that, in the event this Court concludes the *IAA* is *intra vires*, it should apply the doctrine of inter-jurisdictional immunity and declare that the *IAA* does not apply to activities and undertakings under exclusive provincial jurisdiction.

[37] Ontario and Saskatchewan, as well as the Woodland Cree First Nation, the Indian Resource Council, the Canadian Taxpayers Federation, the Canadian Association of Petroleum Producers, the Canadian Energy Pipeline Association, the Explorers and Producers Association of Canada, the Independent Contractors and Businesses Association and the Alberta Enterprise Group all intervened in support of Alberta's position.[15] Broadly speaking, these intervenors submit that the *IAA* allows comprehensive federal regulation of intra-provincial activities that do not fall within Parliament's jurisdiction. A number also assert that the *IAA* represents an attempt by the federal government to regulate the management and development of 92A natural resources and undo the negotiated compromise agreement reflected in s 92A.

[38] The Woodland Cree and the Indian Resource Council further contend that the *IAA* encroaches on the independence of First Nations groups, unduly restricting their ability to exploit their natural resources and represent their peoples. In particular, they argue that the *IAA* infringes on their Aboriginal and treaty rights as protected by s 35 of the Constitution.

B. Canada and Intervenors in Support of Canada

[39] Canada defends the *IAA* on the basis it deals only with matters within federal jurisdiction. It characterizes the *IAA* as being focussed merely on the "adverse effects within federal jurisdiction" from designated projects, arguing that the *Regulations* focus on large projects with the greatest potential for adverse effects within federal jurisdiction. Canada asserts the federal

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[14] Factum of the Attorney General of Alberta at para 44.

[15] Most intervenors endorse the characterization of the pith and substance of the *IAA* proposed by the level of government whose position they support. Some, however, suggested alternative characterizations. For example, the Canadian Association of Petroleum Producers: "To establish a comprehensive impact assessment regime to determine whether designated infrastructure or resource development projects are consistent with federal objectives and policies".

government is entitled to take into account the public interest in deciding whether, and if, it will impose conditions on the proponents of projects that will have "adverse effects within federal jurisdiction". And it contends that the decision provisions of the *Act* restrain the outcome of an assessment to "adverse effects within federal jurisdiction".

[40] Canada characterizes the subject matter of the *IAA* as follows:[16]

> To establish a federal environmental assessment process to protect against adverse environmental effects:
>
> a. on matters within federal jurisdiction (as listed in s 7);
>
> b. in the exercise of federal regulatory power in other existing federal schemes (s 8); and
>
> c. in relation to projects carried out on federal Crown lands, or by federal authorities outside Canada, or which engage the provision of financial assistance (ss 81-91).

[41] Canada submits that the *IAA* relates to multiple heads of federal jurisdiction and, depending on the factual context of a particular project, one or more federal heads of power may be engaged. It asserts that the *IAA* does not regulate intra-provincial designated projects but merely provides for an impact assessment to determine if there are any adverse federal effects caused by such projects and, if so, then to prohibit or regulate the same. Canada denies that the *IAA* creates a federal veto. In its view, any federal trespass into works, undertakings or activities within the legislative jurisdiction of the province is merely incidental to protection of those aspects of the environment within federal legislative jurisdiction.

[42] Nature Canada, Ecojustice Canada Society, MiningWatch Canada Inc., the Canadian Environmental Law Association, Environmental Defence Inc., Athabasca Chipewyan First Nation and Mikisew Cree First Nation intervened in support of Canada. They argue the *IAA* is a precautionary tool aimed at safeguarding federal components of the environment. They contend the *IAA* is well within federal constitutional limits and has ample support under s 91 of the *Constitution Act, 1867*.

[43] The Athabasca Chipewyan First Nation submit that striking down the *IAA* would restrict Indigenous participation in environmental assessments and preclude consideration of Indigenous knowledge. The Mikisew Cree First Nation say that, to the extent the *IAA* permits the federal government to assess and make decisions with respect to the impacts of a designated project on Aboriginal and treaty rights, it is a valid exercise of federal jurisdiction.

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[16] Factum of the Attorney General of Canada at para 24.

[44] Several intervenors allude to the importance of evaluating the *IAA* in a manner respecting cooperative federalism. Ecojustice Canada Society argues that the *IAA* should be upheld under the federal criminal law power.[17] The Canadian Environmental Law Association, Environmental Defence Inc. and MiningWatch Canada Inc. contend the *IAA* should also be upheld under the federal trade and commerce power.

III. Relevant Provisions of the Constitution

A. *Constitution Act, 1867*

[45] The key provisions of the *Constitution Act, 1867* follow:

1. Federal Legislative Powers

> 91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters *not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces*; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) *the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,*
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> ...
>
> 1A. The Public Debt and Property.
>
> 2. The Regulation of Trade and Commerce.
> ...
>
> 12. Sea Coast and Inland Fisheries.
> ...
>
> 24. Indians, and Lands reserved for the Indians.
> ...
>
> 27. The Criminal Law ...
> ...

[17] Ecojustice Canada Society proposed an alternative characterization of the "matter" of the *IAA*: "To establish a federal environmental assessment process to safeguard against adverse environmental effects on certain matters within federal jurisdiction."

> 29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces. [Emphasis added]

132. The Parliament and Government of Canada shall have 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.

2. Provincial Legislative Powers

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

...

5. The Management and Sale of the Public Lands belonging to the Province ...
...

10. Local Works and Undertakings other than such as are of the following Classes:

(a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province:

(b) Lines of Steam Ships between the Province and any British or Foreign Country:

(c) Such Works as, although wholly situate within the Province, are before or after their Execution declared

by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.

...

13. Property and Civil Rights in the Province.

...

16. Generally all Matters of a merely local or private Nature in the Province.

B. Key Provisions Added by the *Constitution Act, 1982*

1. Additional Provincial Powers under Amendment to the *Constitution Act, 1867*

92A. (1) In each province, the legislature may exclusively make laws in relation to

(a) exploration for non-renewable natural resources in the province;

(b) development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom; and

(c) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy.

...

(6) Nothing in subsections (1) to (5) derogates from any powers or rights that a legislature or government of a province had immediately before the coming into force of this section.

2. Procedure for Amending the Constitution

38. (1) An amendment to the Constitution of Canada may be made by ...

(b) resolutions of the legislative assemblies of at least two-thirds of the provinces that have, in the

> aggregate, ... at least fifty per cent of the population of all the provinces.
>
> ...
>
> (3) An amendment [that derogates from the legislative powers, proprietary rights or any other rights or privileges of the legislature or government of a province] shall not have effect in a province the legislative assembly of which has expressed its dissent thereto by resolution supported by a majority of its members ...

IV. The Environment and the Division of Powers

A. The Environment is a Constitutionally Abstruse Matter

[46] The environment has not been assigned to either Parliament or provincial Legislatures under the *Constitution Act, 1867*. Nor has the environment been allocated to the federal government under the national concern doctrine.[18] If it were, provincial governments would not be constitutional equals. They could do what they were permitted by the federal government. And nothing more.

[47] Instead, the courts have recognized that the environment is "a constitutionally abstruse matter which does not comfortably fit within the existing division of powers without considerable overlap and uncertainty": ***Oldman River*** at 64. Understood generically as encompassing "the physical, economic and social", the "environment" necessarily touches on "several of the heads of power assigned to the respective levels of government": *ibid.* at 63. Thus, regulation of the environment, including regulation of pollution, has some provincial aspects and some federal aspects: *ibid.* at 69; ***Quebec (Attorney General) v Moses***, 2010 SCC 17 at para 36, [2010] 1 SCR 557 [***Moses SCC***].

[48] Both levels of government may affect the environment (either by acting or not acting) but only within the legislative powers specifically assigned to each: ***Oldman River*** at 65. In other words, to be valid, a legislative provision must be "linked to the appropriate head of power", as in "sufficiently linked" to that head of power: *ibid.* at 67-68. Identifying a specific head of power is also important because the extent to which environmental concerns may be taken into account by the relevant government will vary based on the scope of the power: *ibid.* at 67; ***R v Hydro-Québec***, [1997] 3 SCR 213 at paras 114, 117 [***Hydro-Québec***].

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[18] As noted in Dale Gibson, "Constitutional Jurisdiction over Environmental Management in Canada" (1973) 23:1 UTLJ 54 at 85 [Gibson]: "it is no less obvious that 'environmental management' could never be treated as a constitutional unit under one order of government in any constitution that claimed to be federal, because no system in which one government was so powerful would be federal."

B. Environmental Impact Assessments Are Not Within Parliament's Exclusive Jurisdiction

[49] Neither level of government has exclusive jurisdiction over environmental impact assessments. Like the environment more generally, impact assessments are not explicitly enumerated as a head of power under ss 91 or 92 of the *Constitution Act, 1867*. Indeed, both Canada and Alberta have long exercised their jurisdiction in this area. Alberta has provided for environmental impact assessments in legislation since 1973: see *The Land Surface Conservation and Reclamation Act*, SA 1973, c 34, s 8; P.S. Elder, "Environmental Impact Assessment in Alberta" (1985) 23:2 Alta L Rev 286 at 296-298. Canada, meanwhile, first set out formal regulations dealing with environmental impact assessments in the 1984 *Guidelines Order*.

C. Joint Federal-Provincial Environmental Accords

[50] As a consequence of ***Oldman River***, it became apparent that some form of joint approach by federal and provincial governments to environmental impact assessments involving intra-provincial activities was desirable. To reduce overlap and duplication of environmental assessments, the federal government and individual provincial governments have entered into various accords.[19] For example, since 1993, Canada and Alberta have had a bilateral agreement, the Canada-Alberta Agreement for Environmental Assessment Cooperation, which contemplates joint panel reviews.[20] The most recent version of this non-binding bilateral agreement, the 2005 Canada-Alberta Agreement on Environmental Assessment Cooperation [Bilateral Agreement] sets out the mechanisms for conducting a joint panel review, including a framework for determining the lead jurisdiction.[21]

[51] A cooperative approach between the federal government and a provincial government does not mean that the provincial government has relinquished its jurisdiction to the federal government. Or *vice versa*. Neither has a right to cede its constitutional jurisdiction to the other whether because of concerns about the environment or climate change or otherwise. If the division of powers is to be changed, this must be done by constitutional amendment, not constitutional surrender.

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[19] The Canada-Wide Accord on Environmental Harmonization was signed January 29, 1998 by the Canadian Council of Members of the Environment with the exception of Québec. While not legally binding, it signalled an intention at both the federal and provincial levels to eliminate overlap and duplication in environmental management matters. Three sub-agreements were also approved, including one on Environmental Assessment.

[20] While the first version of this bilateral agreement dates to 1993, Canada and Alberta had a different earlier bilateral agreement in place, that is the Canada-Alberta Accord for the Protection and Enhancement of Environmental Quality (8 October 1975).

[21] It also contemplates that the information generated will be used in the provincial and federal government's respective decision-making: s 6.20. This is subject however to legislation to the contrary at either level.

V. History of Prairie Provinces - Ownership of Natural Resources and Section 92A

[52] To appreciate the intended scope of provincial power over natural resources, a brief review of the constitutional history of how the prairie provinces came to acquire ownership and control of these resources is warranted.

A. Prairie Provinces Secure Ownership of Their Natural Resources

[53] Unlike other provinces, for decades following their entering into Confederation, the prairie provinces were denied ownership of the natural resources in their provinces. When Alberta became a province in 1905, the *Alberta Act*, 4 & 5 Edw. VII, c 3, s 21 continued to vest all Crown lands, including mines and minerals, in the federal Crown. Saskatchewan was not granted ownership of its resources either when it became a province that same year. Nor was Manitoba when it entered Confederation decades earlier in 1870.

[54] This finally changed with the *Natural Resources Acts* passed in 1930 by Parliament and the Legislatures in each of Alberta, Saskatchewan and Manitoba.[22] These *Natural Resources Acts* incorporated Memorandums of Agreement made between the Dominion of Canada and each province dated December 14, 1929. The Agreements explicitly recognized both as a recital and in their operative provisions that the prairie provinces had been in a position of inequality vis à vis other provinces because they did not own their natural resources. In particular, as set out in the preamble to each, the intent was to put each signing province "in a position of equality with the other provinces of Confederation with respect to the administration and control of its natural resources". The Agreements thus provided that the Dominion of Canada would transfer all Crown lands, mines and minerals in each province to that province so that they might be in the same position as the original provinces of Confederation.

[55] The British Parliament then passed the *British North America Act*, *1930*, 20-21 Geo. V, c 26, (now called the *Constitution Act, 1930*) and made all their provisions law. As a consequence, that Imperial constitutional law entrenched the prairie provinces' ownership of their natural resources in the Constitution, thereby overriding any contrary federal or provincial legislation.[23] This put the prairie provinces in the same position as the provinces (Ontario, Quebec, Nova Scotia and New Brunswick) that retained ownership of their natural resources at Confederation under s 109 of the *Constitution Act, 1867*: Gerald V. La Forest, *Natural Resources and Public Property under the Canadian Constitution* (Toronto: University of Toronto Press, 1969) at 34-36 [La Forest]; ***Re Exported Natural Gas Tax***, [1982] 1 SCR 1004 at 1055-1056 [***Natural Gas Tax***].

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[22] See *Alberta Natural Resources Act*, SC 1930, c 3; *Manitoba Natural Resources Act*, SC 1930, c 29 and *Saskatchewan Natural Resources Act*, SC 1930, c 41.

[23] The *Newfoundland Act*, 1949 12 & 13 Geo. V1, c 22 (UK) placed Newfoundland in the same position. But the Terms of Union did not provide for it to retain ownership of offshore oil and gas resources which, absent Union, would have arguably belonged to Newfoundland. Under the Atlantic Accord, February 11, 1985, Canada and Newfoundland and Labrador finally reached an agreement on the joint management of the province's offshore oil and gas resources and the sharing of revenues from their exploitation.

[56] Ownership brought the prairie provinces the right to exploit their natural resources and, in turn, greater financial security: ***Natural Gas Tax*** at 1080. They also gained a number of significant new powers, including the power to limit production for conservation purposes: ***Spooner Oils Ltd v Turner Valley Gas Conservation***, [1933] SCR 629. They could regulate their newly Crown-owned natural resources under s 109 by virtue of s 92(5) of the *Constitution Act, 1867*. This section confers exclusive jurisdiction on the provinces over the management of public lands, including mines and minerals. Provincial ownership also provided revenue in the form of royalties from Crown leases. As for freehold leases, provinces possess legislative authority to regulate non-Crown owned resources by virtue of s 92(13) (property and civil rights) and s 92(16) (local or private matters).

B. Federal Government Interventions and Pressures for Constitutional Reform

[57] Resource ownership provided Alberta with a measure of security over the development of its natural resources for over four decades between 1930 and 1973. However, provincial ownership rights were still subject to laws enacted by Parliament under its heads of power. This could negatively affect property owned by a province without for that reason alone being rendered unconstitutional: La Forest at 147-148; ***Reference re Waters and Water-Powers***, [1929] SCR 200 at 212, 219; ***Attorney-General for Quebec v Nipissing Central Railway Company***, [1926] AC 715 at 723-724 (PC) [***Nipissing Central Railway***]. Accordingly, at that stage, ownership rights alone were often considered insufficient to determine jurisdiction over a matter.[24] After large oil reserves were discovered at Leduc in 1947, leading to a rapid expansion of oil production in Alberta, Canada implemented several energy policies with wide-ranging effect. That included the National Oil Policy of 1961 that divided the country's oil source between east (foreign) and west (domestic).[25]

[58] It was not until the 1973 OPEC embargo sharply increased world oil prices that federal government actions raised provincial concerns, resulting in escalating actions on both sides. Beginning in 1973, the federal government enacted a series of measures which directly affected oil and gas resources owned by the provinces. These included an oil export tax, a national market for oil and the *Petroleum Administration Act*, SC 1974-75-76, c 47 [*Petroleum Act*]. The *Petroleum Act* gave the federal government authority to set oil and gas prices unilaterally. Collectively, these actions directly and adversely affected the western provinces: See J. Peter Meekison & Roy J. Romanow, "Western Advocacy and Section 92A of the Constitution" in J. Peter Meekison, Roy J. Romanow & William D. Moull, eds, *Origins and Meaning of Section 92A: The 1982 Constitutional Amendment on Resources* (Montreal: The Institute for Research on Public Policy, 1985) 3 [Meekison & Romanow].

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[24] See for example Gibson at 60.

[25] Brendan Downey et al., "Federalism in the Patch: Canada's Energy Industry and the Constitutional Division of Powers" (2020) 58:2 Alta L Rev 273 at 276.

[59] As early as 1975, provincial premiers concluded that discussions on the Constitution should include a general review of the division of powers and, in particular, the control of natural resources, which was put on the agenda at the 1976 First Ministers' conference: Meekison & Romanow at 10. Provincial concerns about the scope of their existing jurisdiction over natural resources were further heightened by litigation in Saskatchewan that culminated in two Supreme Court decisions, ***Canadian Industrial Gas & Oil Ltd v Government of Saskatchewan et al***, [1978] 2 SCR 545 [***CIGOL***] and ***Central Canada Potash Co Ltd et al v Government of Saskatchewan***, [1979] 1 SCR 42 [***Potash***]: Meekison & Romanow at 3, 7-10. In Saskatchewan's view, those decisions undermined the jurisdiction the provinces thought they had over natural resources.

[60] ***CIGOL*** involved Saskatchewan's attempt to capture the increased value of oil after the OPEC embargo.[26] Saskatchewan imposed a "mineral income tax" on oil production subject to freehold leases and a "royalty surcharge" on Crown leases. The Supreme Court held that because most of the oil was for export, the charges were "export taxes". That meant the province had no power to impose either since export taxes involve interprovincial or international trade, a subject of federal jurisdiction under s 91(2). The Supreme Court also characterized both the income tax and royalty surcharge as "indirect taxes" which provinces are not competent to impose under s 92(2).

[61] In ***Potash***, the Supreme Court struck down Saskatchewan's rationing scheme aimed at controlling the amount of potash produced in the province. It held that notwithstanding a province's general ability to control the production of its natural resources, since most of the potash was marketed outside the province, the scheme was an impermissible intrusion on federal jurisdiction over interprovincial and international trade under s 91(2).

[62] Given this history, by 1978, Alberta and Saskatchewan led the negotiations on behalf of the provinces for a constitutional amendment that would expressly confirm and strengthen the provinces' ability to develop, manage and control their natural resources. This was partly in response to the federal government's having that same year tabled a constitutional amendment bill omitting any reference to s 109 of the *Constitution Act, 1867*. Provincial concerns also related to resource taxation, the federal declaratory power, the federal emergency power and indirect taxation: Meekison & Romanow at 10-14.

[63] In 1980, further tensions arose when the federal government introduced the National Energy Program (NEP) and invoked those parts of the *Petroleum Act* enabling it to unilaterally establish prices for oil and natural gas. It was the federal government's view that the rest of Canada, and not just the oil producing provinces, should benefit financially from the rapid rise in oil prices. Alberta disagreed. So too did other western provinces. As explained in Meekison & Romanow at 24: "The NEP was seen by the three western provinces as a major assault on provincial ownership and jurisdiction over resources".

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[26] The litigation was a battle between a province and the private sector: Robert D. Cairns et al., "Constitutional Change and the Private Sector: The Case of the Resource Amendment" (1986) 24:2 Osgoode Hall L J 299 at 301, 308.

C. Constitutional Compromise

1. Section 92A – Resource Amendment

[64] Developments in September 1981 set the stage for a negotiated agreement to resolve the constitutional impasse over resource control and management. First, the Supreme Court found the federal government's unilateral attempt to patriate the Constitution contrary to constitutional convention: ***Re: Resolution to amend the Constitution***, [1981] 1 SCR 753. Second, Alberta and the federal government signed an oil and gas pricing and revenue sharing agreement that brought the immediate dispute over the NEP to an end: Howard Leeson, *The Patriation Minutes* (Edmonton: Centre for Constitutional Studies, Faculty of Law, University of Alberta, 2011) at 13, 23.

[65] It was against this background that the federal and provincial governments finally reached a compromise regarding provincial powers over natural resources which allowed the Constitution to be patriated.[27] For Alberta and Saskatchewan, two key components of that compromise, which were part of the patriation package signed April 17, 1982, were the inclusion of s 92A (sometimes called the "*Resource Amendment*") in Part VI of the *Constitution Act, 1982* which amended the *Constitution Act, 1867*, and s 38, the opt-out right, under the amending formula in Part V of the *Constitution Act, 1982*.

[66] Section 92A provides for exclusive provincial jurisdiction in three areas: (i) exploration for non-renewable natural resources; (ii) the development, conservation and management of non-renewable natural resources and forestry resources; and (iii) the development, conservation and management of sites and facilities for the generation and production of electrical energy (s 92A(1)). It also provides for concurrent or non-exclusive jurisdiction in two areas: (i) the export of natural resources from the province (s 92A(2)); and (ii) taxing powers over natural resources (s 92A(4)).

2. Section 38 – Opt-Out Right

[67] Section 38, the opt-out right, which was part of the constitutional compromise, informs the purpose and intended scope of s 92A. Alberta and Saskatchewan had insisted that provinces' *proprietary rights* to their natural resources, *including their development rights under s 92A*, be protected in any constitutional amending formula. Thus, the general amending formula under s 38(1) of the *Constitution Act, 1982* (requiring an agreement by at least 2/3 of the provinces with at least 50% of the Canadian population and the federal government) is subject to a further limitation, an opt-out right which protects the provinces' control over their natural resources.

[68] That opt-out right, set out in s 38(3) of the *Constitution Act*, *1982*, allows an individual province to opt out of any future constitutional amendment that derogates from the *legislative*

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[27] Québec did not agree to the terms of patriation.

powers, *proprietary rights* or any other rights or privileges of a province.[28] This was designed to ensure that no constitutional amendment in the future could strip any province of its proprietary rights and its exclusive right, confirmed in s 92A, to *develop* its natural resources for the benefit of its citizens. In other words, when Premiers Allan Blakeney and Peter Lougheed insisted on the inclusion of s 92A and the opt-out right as conditions of agreeing to patriation of the Constitution, they took the steps necessary to protect their citizens against future legislative intrusion by other governments, including the federal government.

3. Section 36 – Economic Development and Equalization

[69] The *Constitution Act, 1982* also included s 36 which provides:

> 36. (1) Without altering the legislative authority of Parliament or of the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority, *Parliament and the legislatures, together with the government of Canada and the provincial governments*, *are committed to*
>
> (a) *promoting equal opportunities* for the well-being of Canadians;
>
> (b) *furthering economic development* to reduce disparity in opportunities; and
>
> (c) providing essential public services of reasonable quality to all Canadians.
>
> (2) Parliament and the government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation. [Emphasis added]

[70] This part of the constitutional bargain on patriation commits both the federal and provincial governments and Parliament and the Legislatures to "*promoting equal opportunities* for the well-being of Canadians" and "*furthering economic development* to reduce disparity in opportunities": ss 36(1)(a) and (b), emphasis added. It also commits Parliament and the government of Canada to make "equalization payments to ensure that provincial governments have sufficient resources to provide reasonably comparable levels of public services at reasonably comparable levels of taxation": s 36(2). Sections 36(1)(a) and (b) established a means whereby the federal government's commitment to equalization payments would be assisted by the provinces having equal

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[28] Under s 38(3), if an amendment under the prescribed amending formula in s 38(2) derogates from the *legislative powers*, *proprietary rights* or any other rights or privileges of a province, then under s 38(3), that amendment *shall have no effect in a province that opts out of the amendment*.

opportunities and being able to further their economic development. These sections were important, not just as aspirational statements, but to underscore equality of opportunity for development of a province's natural resources.

[71] Since patriation, Alberta has contributed to the federal government hundreds of billions of dollars more than it has received.[29] These funds have in turn assisted the federal government in its financial capacity to make equalization payments to other provinces. Alberta's agreement to s 36, including the concept of equalization payments, was based not only on the inclusion of the *Resource Amendment* and the s 38 opt-out right but also on the federal government's commitment to further economic development.

4. Conclusion

[72] In summary, s 92A represents a clear, deliberate negotiated amendment to the Constitution intended to assure exclusive provincial jurisdiction over the *exploration*, *development*, *management and conservation* of a province's 92A natural resources.[30] Nor can s 92A be interpreted in a constitutional vacuum. It is directly linked to other provisions critical to the provinces' agreement to patriation, namely the amending formula, the provincial opt-out right under s 38(3) and the provisions under s 36 of the *Constitution Act*, *1982*. This was the constitutional bargain made. And it is one the provinces are entitled to have honoured. To borrow a phrase from Beetz J in ***Bell Canada v Quebec (Commission de la santé et de la sécurité du travail)***, [1988] 1 SCR 749 at 840, the constitutional amendments agreed to on patriation could have been different, but they are not.[31]

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[29] Alberta has not received equalization payments for decades: Trevor Tombe, "'Final and Unalterable' — But Up for Negotiation: Federal-Provincial Transfers in Canada" (2018) 66:4 Canadian Tax Journal 871. Net federal fiscal transfers by Alberta, which include money for equalization payments, money for the Canada Health Transfer and money for the Canada Social Transfer totalled $240 billion for the 12 years alone from 2007 to and including 2018: Statistics Canada, "Revenue, expenditure and budgetary balance - General governments, provincial and territorial economic accounts (x 1,000,000)", online: (2021) <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3610045001>. In 2020, because of the pandemic, Alberta, like every other provincial government in this country, received more than it contributed to the federal government. That, of course, is because the federal government has incurred substantial debt to support Canadians through the pandemic.

[30] Section 92A(6) makes it clear that nothing in s 92A reduces the provinces' powers under other provisions in the Constitution. It does not limit in any way the province's ownership rights under s 92(5) and s 109 of the *Constitution Act, 1867*.

[31] Beetz J stated, in reference to Parliament's power over federal undertakings including in respect of employer-employee relations: "If this power is exclusive, it is because the Constitution, which could have been different but is not, expressly specifies this to be the case; and it is because this power is exclusive that it pre-empts that of the legislatures both as to their legislation of general and specific application, in so far as such laws affect a vital part of a federal undertaking. The exclusivity rule is absolute and does not allow for any distinction between these two types of statute."

D. Role of the Courts

[73] Under the *Constitution Act*, *1982*, the power to amend the Constitution was given exclusively to the legislative branch. Accordingly, the courts should not permit judicial decisions to be used to sidestep the amending formula and render the opt-out right nugatory. As Lord Sankey cautioned in ***In Re The Regulation and Control Of Aeronautics In Canada***, [1932] AC 54 at 70, judicial interpretation should not be allowed "to dim or to whittle down the provisions of the original contract upon which the federation was founded".[32] Or, we would add, the constitutional amendments agreed to on patriation. Incremental changes in favour of the federal government, once sanctioned, may well encourage the federal government to expand its jurisdictional reach further yet. And if that expansion should then be approved by the courts, it becomes difficult to deny that the Constitution has been amended by judicial fiat.[33] Thus, the courts must ensure that the constitutional bargain agreed to on patriation is respected and the division of powers dividing line maintained.

VI. The Purpose and Scope of the *Resource Amendment*

A. Introduction

[74] Some seem to think, or prefer to think, that s 92A is a constitutional nothing. And that it merely affirmed the powers provinces already had as owners of their natural resources. But the historical record with respect to the negotiations leading up to its inclusion in the Constitution and the actual wording of the constitutional text indicate otherwise. The addition of s 92A to Canada's Constitution was not a gift from the federal government to the provinces; it was a negotiated compromise. There is no doubt that the provinces understood that s 92A *added* to their jurisdiction. To secure the federal government's agreement to the addition of s 92A took more than two years of hard-fought negotiations. In exchange for the agreement of Alberta and Saskatchewan, and other provinces as well, to patriate the Constitution, the federal government agreed to include s 92A in the Constitution.

[75] Neither Parliament nor Legislatures enact for no reason: ***Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)***, 2012 SCC 37 at para 47, [2012] 2 SCR 345, per

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[32] In warning about judicial interpretations moving away from the original meaning of the text "from what has been enacted to what has been judicially said about the enactment", Lord Sankey added this at 70: "To borrow an analogy; there may be a range of sixty colours, each of which is so little different from its neighbour that it is difficult to make any distinction between the two, and yet at the one end of the range the colour may be white, and at the other end of the range black. Great care must therefore be taken to consider each decision in the light of the circumstances of the case in view of which it was pronounced, especially in the interpretation of an Act such as the British North America Act, which was a great constitutional charter, and not to allow general phrases to obscure the underlying object of the Act, which was to establish a system of government upon essentially federal principles. Useful as decided cases are, it is always advisable to get back to the words of the Act itself and to remember the object with which it was passed."

[33] Hogg has made this point in the context of amending the Constitution through judicial law-making and the "discovery (meaning invention) by the courts of 'unwritten constitutional principles' ....": Peter Hogg & Wade Wright, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2007) (loose-leaf updated 2021) at §15:28 [Hogg].

Rothstein J (in dissent but not on this point). Nor do either intend words used in legislation to be redundant: ***Medovarski v Canada (Minister of Citizenship and Immigration)***; ***Esteban v Canada (Minister of Citizenship and Immigration)***, 2005 SCC 51 at para 31, [2005] 2 SCR 539. Therefore, no legislative provision should be interpreted so as to render it mere surplusage: ***R v Proulx***, 2000 SCC 5 at para 28, [2000] 1 SCR 61. That interpretive approach applies with even more force to constitutional amendments. Changes are not made to a constitution for no purpose.

B. Purpose of the *Resource Amendment*

[76] Prior to the *Resource Amendment*, the provincial governments were well aware how their *proprietary rights* as owners of their natural resources had been curtailed. To eliminate ambiguity and ensure that a full array of both legislative and proprietary powers were available to the provinces as owners of their 92A natural resources, the provinces sought, and secured, a constitutional amendment that defined with precision exactly what provincial governments had the *exclusive* jurisdiction to do *as owners* of those resources.

C. Scope of the *Resource Amendment*

[77] The significance of the *Resource Amendment* was noted by William D. Moull in "Natural Resources and Canadian Federalism: Reflections on a Turbulent Decade" (1987) 25:2 Osgoode Hall LJ 411 at 413 [Moull]:

> [The Resource Amendment] was the only component of the 1982 constitutional patriation package that purported to alter the division of federal-provincial legislative powers, and it represents the first amendment to the Constitution since Confederation that has had the effect of enhancing the legislative authority of the provinces.

[78] What then is the scope of provincial jurisdiction under s 92A? Rather than merely add to the catalogue of heads of power under s 92, s 92A(1) sets out in detail the provinces' exclusive powers vis à vis their 92A natural resources. In particular, s 92A(1) expressly provides that "[i]n each province, the *legislature may exclusively make laws* in relation to (a) exploration for non-renewable natural resources in the province; (b) *development, conservation and management* of non-renewable natural resources and forestry resources in the province ...; and (c) *development, conservation and management* of sites and facilities in the province for the generation and production of electrical energy" (emphasis added).

[79] Provincial powers under s 92A are very broad, extending from one end of the exploitation of 92A natural resources, exploration, to the other end, export – and everything in between, covering as they do exploration, development, management and conservation. The wording under s 92A was not simply prudent drafting about the scope of provincial jurisdiction. It was designed to assure provincial governments that the powers listed therein, all of which are also consistent with proprietary rights, were within their exclusive control. Section 92A(6) reinforces the exclusivity of provincial powers under s 92A(1). It provides that nothing in subsections (1) to (5)

derogates from any rights or powers that a legislature or government of a province had immediately before the coming into force of s 92A.[34]

[80] Hence, the extent to which the *IAA* interferes with provincial jurisdiction must be assessed in light of the provinces' powers under s 92A(1). This section is not constitutionally inferior to ss 91 or 92. To the extent ambiguity existed with respect to a province's exclusive right to *exploit* the 92A natural resources it owned, s 92A put this beyond doubt. No principled reason exists to diminish the full import of the exclusive jurisdiction conferred on the provinces under s 92A(1).

D. Significance of the *Resource Amendment*

[81] Section 92A does not override Parliament's "Peace, Order, and good Government" (POGG) power nor its powers under both s 92(10)(a) vis à vis interprovincial undertakings and s 92(10)(c) to declare a work or undertaking for the benefit of Canada or two or more provinces: ***Ontario Hydro v Ontario (Labour Relations Board)***, [1993] 3 SCR 327 [***Ontario Hydro***]; ***Westcoast Energy Inc. v Canada (National Energy Board)***, [1998] 1 SCR 322 at paras 80-84.[35] But short of the proper invocation of these powers, the purpose of s 92A, when passed, was to ensure that the approval of projects for the exploration, development, conservation and management of 92A natural resources was vested exclusively in the province that owned them.

[82] Provincial jurisdiction over natural resources is "one of the mainstays of provincial power": ***Ontario Hydro*** at 376. Deciding the terms and conditions under which a project to exploit these natural resources will be constructed and operated goes directly to a province's power to decide how best to manage, and the conditions under which it will permit the development of, its 92A natural resources. That is inextricably linked in turn to a crucial concern of any provincial government, namely its economy.

[83] Provincial governments should not be faulted for focussing their attention on matters important to their citizens. That includes not only the environment but also the economy. It is a false dichotomy to suggest that the two are mutually exclusive. Without a strong economy, a province's ability to respond to the needs of its citizens, including meeting the challenges of climate change, is diminished. Moreover, if a provincial government is not responsible and accountable for managing its economy and natural resources for the benefit of its citizens, then who is?

VII. Overview of Environmental Impact Assessment Legislation Federally

A. Brief Historical Review of Federal Legislation

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[34] Section 92A does not contain a reciprocal provision in favour of Parliament or the federal government. While Parliament's jurisdiction is addressed in s 92A(3), that is only with respect to Parliament's authority to enact laws in relation to the matters referred to in s 92A(2), that is relating to the export of natural resources from a province.

[35] Or Parliament's powers under s 92(10)(b).

1. Environmental Assessment and *Guidelines Order*

[84] The first mandatory federal environmental assessment process was the *Guidelines Order* issued in 1984 under the *Department of the Environment Act*, RSC 1985, c E-10, s 6.[36] The *Guidelines Order* required all federal departments and agencies with "decision making responsibility" for any "proposal" involving an "initiative, undertaking or activity" that might have an environmental effect on an area of federal responsibility to initially screen the proposal to determine whether it may cause any adverse environmental effects.

[85] The Supreme Court upheld the *Guidelines Order* as constitutional in ***Oldman River***, and affirmed its mandatory nature. However, La Forest J linked federal environmental review of projects otherwise within exclusive provincial jurisdiction to the existence of a specific "affirmative regulatory duty" on the part of the federal government, in that case under the *Navigable Waters Protection Act*, RSC 1985, c N-22 [*Navigable Waters Protection Act*].[37] He also determined that the federal assessment could only "affect matters that are 'truly in relation to an institution or activity that is otherwise within [federal] legislative jurisdiction'": ***Oldman River*** at 72, citing ***Devine v Quebec (Attorney General)***, [1988] 2 SCR 790 at 808.[38]

2. *Canadian Environmental Assessment Act, 1992*

[86] In 1992, Parliament enacted the *Canadian Environmental Assessment Act*, SC 1992, c 37 [*CEAA 1992*]. It was not proclaimed in force until 1995 when the *Law List Regulations*, SOR/94-636 [*Law List Regulations*] issued under s 59(f) of *CEAA 1992* came into force.[39]

[87] *CEAA 1992* was also "decision-based", setting out four main categories of federal decisions under which a project would be subjected to an environmental assessment.[40] Three related to the federal government's exclusive jurisdiction.[41] The fourth category was where a federal authority under a provision prescribed by the *Law List Regulations* issued a permit or licence, granted an approval or took any other action for the purpose of enabling the project to be carried out in whole or in part: s 5(1)(d).[42] Only those intra-provincial projects in this category, in other words those

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[36] Originally the *Government Organization Act*, *1979*, SC 1978-79, c 13, s 14.

[37] The term "responsibility" meant the federal government "must have an affirmative regulatory duty pursuant to an Act of Parliament which relates to the proposed initiative, undertaking or activity": ***Oldman River*** at 47.

[38] The *Guidelines Order* was said to be "supported by the particular head of federal power invoked in each instance" because it included "the necessary element of proximity that must exist between the impact assessment process and the subject matter of federal jurisdiction involved": ***Oldman River*** at 72.

[39] It was given royal assent June 1992 and proclaimed in force January 1995.

[40] Section 5(1), subject to certain exclusions in s 7.

[41] Where a "federal authority" (1) proposed the project; (2) provided financial assistance to a project; or (3) sold, leased or disposed of federal land: s 5(1)(a)-(c).

[42] The *Law List Regulations* listed various federal statutory provisions whose application to a project, including intra-

requiring a federal permit, were compelled to undergo an environmental assessment under *CEAA 1992*.

[88] The extent of the assessment varied by project.[43] *CEAA 1992* contemplated four levels of assessment, each with increasing requirements: screenings, comprehensive studies, mediations and panel reviews. Screenings were the default unless the project was listed in the *Comprehensive Study List Regulations*, SOR/94-638 [*Comprehensive Study List Regulations*] or excluded.[44]

[89] Until the Supreme Court's decision in ***MiningWatch Canada v Canada (Fisheries and Oceans)***, 2010 SCC 2, [2010] 1 SCR 6 [***Red Chris***], a federal Minister or "responsible authority" under *CEAA 1992* was considered to have the discretion to limit the "scope" of the assessment of a proposed project to the component thought to fall within federal jurisdiction as opposed to assessing the entire project as proposed by the proponent (e.g., assessing a dam close to a mine rather than the entire mine).[45] This was called "scoping to trigger".[46] Scoping to trigger had implications for which "track" a project would fall under. While a proposed project might be listed in the *Comprehensive Study List Regulations* and thereby require a "comprehensive study", scoping the project to include only the portion purportedly falling within federal jurisdiction could take it out of that category such that only a "screening" would be required.

[90] This "scoping to trigger" approach had been approved in Federal Court of Canada decisions: ***Manitoba's Future Forest Alliance v Canada (Minister of Environment)***, [1999] FCJ No 903 (QL) (TD); ***Friends of the West Country Assn. v Canada (Minister of Fisheries and Oceans)***, [2000] 2 FC 263 (CA).[47] These decisions preceded amendments made to *CEAA 1992* in 2003 which changed the requirements for projects in the "comprehensive study list" by explicitly providing for "public consultation" with respect to the proposed scope of the project.

[91] Later, in ***Red Chris***, despite Canada's submission that nothing in the 2003 amendments to *CEAA 1992* was intended to change the practice of scoping to trigger, the Supreme Court determined otherwise. It found that the public consultation must take place prior to the actual scoping decision and that the environmental assessment track was determined by the proposed

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provincial projects, "triggered" the federal assessment.

[43] *CEAA 1992*, ss 14, 18, 21, 40.

[44] Screenings and comprehensive studies are examples of "self-assessment" under which the relevant authority that proposed to exercise a duty or function assessed the project themselves. Panel reviews were undertaken by independent expert bodies, often jointly with another jurisdiction.

[45] As explained by Marie-Ann Bowden & Martin Z. P. Olszynski in "Old Puzzle, New Pieces: Red Chris and Vanadium and the Future of Federal Environmental Assessment" (2010) Can Bar Rev 445 at 452 [Bowden & Olszynski]: "This practice involved separating a development proposal into a list of components and then only 'scoping-in' those which required federal regulatory approval ...."

[46] Bowden & Olszynski trace this history from *CEAA 1992* to the Supreme Court's decisions in ***Red Chris*** and ***Moses SCC***.

[47] It was also approved in ***Prairie Acid Rain Coalition v Canada (Minister of Fisheries and Oceans)***, 2006 FCA 31, [2006] 3 FCR 610.

project, not by the scoping decision of the federal authority: ***Red Chris*** at para 34.[48] In other words, "scoping to trigger" could not be used to assess only part of a project.[49]

[92] In 2010, following ***Red Chris***, the federal government amended *CEAA 1992* as part of an omnibus budget bill called the *Jobs and Economic Growth Act*, SC 2010, c 12 (Bill C-9) [*Jobs and Economic Growth Act*]. These amendments effectively overruled ***Red Chris***.[50] Bill C-9 restored "scoping to trigger" by giving the Minister of the Environment the power to scope projects down to their components. It also reduced public participation in the comprehensive study process.[51]

3. *Canadian Environmental Assessment Act, 2012*

[93] In 2012, Parliament replaced *CEAA 1992* with the *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52 [*CEAA 2012*] which addressed a number of provincial concerns.[52] *CEAA 2012* was never the subject of a constitutional challenge by any of the provinces.

[94] First, Parliament attempted to minimize the identified problems arising from duplicate environmental impact assessments where an intra-provincial activity was involved, namely jurisdictional uncertainty, intergovernmental conflicts and duplication of resources. To address these concerns, Parliament provided in *CEAA 2012* for a process of substitution and equivalency. Substitution allowed the federal government to delegate the environmental assessment to a province and base its decision on the findings of that provincial review. And equivalency allowed the federal government to treat the provincial assessment as "equivalent" to the federal process for purposes of determining whether the proposed intra-provincial activity would likely cause a significant adverse impact on matters within federal jurisdiction.

[95] Second, as with the 2010 amendments to *CEAA 1992*, *CEAA 2012* was designed to step past the need for environmental assessment of every proposed project in Canada over which the federal government had decision-making jurisdiction. *CEAA 2012* substantially reduced the number of federal environmental assessments from those under *CEAA 1992* by providing that only those projects designated by regulation or by the Minister of Environment were subject to federal

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[48] The Supreme Court reasoned that while s 15 of *CEAA 1992* granted the Minister discretion in terms of scope of the project, the presumed scope was as proposed and the Minister's discretion was limited to *increasing* its scope.

[49] The constitutionality of *CEAA 1992* was not challenged on this point.

[50] These 2010 amendments in Bill C-9 involving *CEAA 1992* (see ss 2152-2161) included adding s 15.1 to *CEAA 1992* (see s 2155 of *Jobs and Economic Growth Act*), which stated as follows: "Despite section 15, the Minister may, if the conditions that the Minister establishes are met, *determine that the scope of the project in relation to which an environmental assessment is to be conducted is limited to one or more components of that project*" (emphasis added).

[51] Specifically, s 2156 of Bill C-9 amended s 21 of *CEAA 1992* to remove the "requirement for public consultation on the proposed scoping of comprehensive studies": see Robert B Gibson, "Three analyses of the amendments to the *Canadian Environmental Assessment Act* made through the *Budget Implementation Act 2010*" (2010) 51 CELR 184.

[52] For an excellent summary of the differences between *CEAA 1992* and *CEAA 2012*, see Brenda Heelan Powell, "Environmental Assessment & the Canadian Constitution: Substitution and Equivalency" (28 November 2014), online (pdf): Environmental Law Centre <https://elc.ab.ca/media/94543/EAConstitutionBriefFinal.pdf>.

environmental assessment: *CEAA 2012*, ss 2, 14, 84(a). It accordingly moved to a "project-based" regime from the prior "decision-based" regime under which assessments had been triggered by various kinds of federal decision-making.[53] This explains why the numbers of projects assessed federally dropped dramatically from the number "reviewed" under *CEAA 1992*. Most projects under *CEAA 1992* had proceeded by way of screening without a full comprehensive review. The *CEAA 2012* reforms eliminated screenings. Further, projects designated by regulation under *CEAA 2012* did not lead to a federal environmental assessment where the federal government agreed that a project could be assessed provincially under the substitution and equivalency process.

[96] Third, *CEAA 2012* reduced the levels of assessment from four under *CEAA 1992* (screenings, comprehensive studies, mediation and panel reviews) to two (assessment by the "responsible authority" or a panel review). *CEAA 2012* did not retain the "scoping to trigger" provisions from Bill C-9. Scoping had been a significant issue under *CEAA 1992* because it affected whether a project would fall under the "comprehensive study" track or the "screening" track. But *CEAA 2012* eliminated this distinction. Under *CEAA 2012*, "designated projects" listed in the *Regulations Designating Physical Activities*, SOR/2012-147 [*Regulations Designating Physical Activities*] largely mirrored those projects which had previously fallen under the *CEAA 1992 Comprehensive Study List Regulations*. Since those projects were subject to a comprehensive review under *CEAA 2012* regardless, that ended the advantage of "scoping to trigger".

[97] Fourth, the scope and content of the environmental assessment of a designated project under *CEAA 2012* was narrower than under *CEAA 1992*. The definition of "environmental effects" in *CEAA 2012* was limited to effects on fish and fish habitat, aquatic species at risk, migratory birds, federal lands, extra-provincial effects and Aboriginal peoples.

[98] Fifth, to minimize delay, *CEAA 2012* prescribed legislated time limits for completion of federal environmental assessments.

[99] Sixth, *CEAA 2012* restricted public participation to "interested parties" only.[54] *CEAA 1992* had required that a review panel hold hearings in a manner that offered "the public an opportunity to participate in the assessment": s 34(b). *CEAA 2012* required that a review panel hold hearings in a manner that offered "any interested party an opportunity to participate in the environmental assessment": s 43(1)(c). The term "interested party" was defined in turn as a person who is "directly affected by the carrying out of the designated project" or "has relevant information or expertise". This thereby reduced the extent of involvement by the general public in the assessment process: s 2(2).

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[53] Rod Northey, *Guide to the Canadian Environmental Assessment Act, 2018 Edition* (Toronto: LexisNexis Canada, 2017) at 12 [Northey].

[54] The 2010 amendments to *CEAA 1992* under Bill C-9 had also limited public participation in the comprehensive study process.

B. Overview of the *Act* and *Regulations*

[100] The environmental impact assessment process federally has morphed from the procedural planning tool under the *Guidelines Order* upheld in ***Oldman River*** into a substantive regulatory regime under the *IAA*.

1. Scope and Purposes of the *Act*

[101] The *Act* applies to and compels (subject to a screening decision that no assessment is required) a comprehensive assessment and review of *any activity anywhere in Canada* designated in the *Regulations* (sometimes referred to as the "project list") or by Ministerial order: *Act*, s 2.[55] The Governor in Council has broad discretion to decide which activities fall under the *Regulations*: *Act*, s 109(b). The Minister may also designate a physical activity not already prescribed by the *Regulations* if the Minister believes that the physical activity may cause adverse federal effects or if public concerns related to the effects warrant the designation: *Act*, s 9.

[102] The *Act* is designed to assess proposed designated projects in their entirety rather than allowing for "scoping to trigger". Unlike *CEAA 2012*, it has been expanded to assess the socioeconomic effects of proposed projects in addition to their biophysical effects.[56]

[103] The breadth of the impact assessment mandated is illustrated not only by the scope of purported federal effects but also by at least *20 different factors* that must be considered. These range from changes to environmental, health, social, or economic conditions, to "the extent to which the designated project contributes to sustainability", to "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", to "the intersection of sex and gender with other identity factors" to "any other matter relevant to the impact assessment" that the Impact Assessment Agency of Canada (Agency) "requires to be taken into account": *Act*, s 22(1).

[104] The stated purposes of the *Act* include fostering sustainability, protecting components of the environment within federal jurisdiction, assessing the positive and adverse effects of a designated project, encouraging innovation, promoting cooperation with other jurisdictions, respecting the rights of Indigenous peoples and providing opportunity for public participation: *Act*, s 6(1).

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[55] The Governor in Council is authorized to make regulations "for the purpose of the definition designated project in section 2, designating a physical activity or class of physical activities and specifying which physical activity or class of physical activities may be designated by the Minister under paragraph 112(1)(a.2)": *Act*, s 109(b).

[56] Rod Northey, Liane Langstaff & Anna Côté, *A Guide to Canada's Impact Assessment Act, 2020 Edition* (Toronto: LexisNexis Canada, 2020) at 8 [Northey 2020].

2. Relevant Definitions Under the *Act* Relating to Effects

[105] These include the following:

> *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.
>
> *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.[57]
>
> *direct or incidental effects* 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.

3. Exclusivity Principle – Primary and Limited Jurisdiction

[106] The types of activities in the project list relate to a variety of sectors. They include ones within the exclusive jurisdiction of either the federal or provincial governments. We recognize the limitations inherent in identifying an activity as being within the exclusive jurisdiction of one government level.[58] As noted in ***Oldman River***, the other government level may also have jurisdiction over some aspects of that activity. In particular, intra-provincial designated projects otherwise subject to exclusive provincial jurisdiction may have aspects subject to federal jurisdiction. For example, a project may require a permit under the *Fisheries Act*, RSC 1985, c F-14 [*Fisheries Act*].

[107] Nevertheless, identifying which government level has the exclusive jurisdiction for the subject activity is not a trap but rather a necessary part of a division of powers analysis. The reference to "exclusive" jurisdiction is, after all, the written text of the Constitution itself. That text is the foundational basis for constitutional interpretation.[59] The exclusivity principle means

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[57] Schedule 3 of the *Act* lists "Components of the Environment" and "Health, Social, or Economic Matters." Under s 7(2), the Governor in Council may, by order, add or remove a component or matter from Schedule 3. No components under s 7(1)(a)(iv) or matters under s 7(1)(e) are presently listed.

[58] As La Forest J explained in ***Oldman River*** at 68: "What is not particularly helpful in sorting out the respective levels of constitutional authority over a work such as the Oldman River dam, however, is the characterization of it as a 'provincial project' or an undertaking 'primarily subject to provincial regulation' as the appellant Alberta sought to do."

[59] "[C]onstitutional interpretation ... must first and foremost have reference to, and be constrained by, that text": ***Quebec (Attorney General) v 9147-0732 Québec inc.***, 2020 SCC 32 at para 9. "The primacy of our written Constitution remains one of the fundamental tenets of our constitutional framework": ***Quebec (Attorney General) v Canada (Attorney General)***, 2015 SCC 14 at para 18, [2015] 1 SCR 693.

something in constitutional law.[60] It helps the court identify, and focus on, which government level has the "primary" jurisdiction for the subject activity as a whole and which has a "limited" jurisdiction vis à vis some aspects only of that activity or none at all.[61] That necessarily includes zeroing in on the limitations inherent in the scope of the head of power of each government level.[62]

[108] Put in the context of this case, provincial Legislatures have the exclusive jurisdiction over intra-provincial designated projects under several provincial heads of power. In other words, they have the primary jurisdiction over intra-provincial designated projects. Parliament's jurisdiction is limited to the consequences of those projects on federal heads of power. And so too is Parliament's regulatory authority over those projects.[63]

4. Activities Included in the *IAA*

[109] The following activities designated in the *Regulations* Schedule[64] are matters primarily within exclusive federal jurisdiction:

- certain types of projects or activities located within a National Park or federally protected wildlife area, bird sanctuary or protected marine area (ss 1-11);
- specified matters involving the military or defence (ss 12-17);
- uranium mines or mills (ss 20-23);
- nuclear facilities (ss 26-29);
- offshore oil or gas facilities (ss 34-36);

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[60] For an excellent history of the various pre-Confederation resolutions leading up to the final draft of the *British North America Act, 1867* (renamed the *Constitution Act*, *1867* on patriation in 1982) and the evolution and significance of the exclusivity principle, see Asher Honickman, "Watertight Compartments: Getting Back to the Constitutional Division of Powers" (2017) 55:1 Alta L Rev 225 at 227-231 [Honickman].

[61] One author has characterized the two as "comprehensive" jurisdiction as opposed to "restricted" jurisdiction: Steven A. Kennett, "Federal Environmental Jurisdiction After *Oldman*" (1993) 38 McGill LJ 180 at 187-191 [Kennett].

[62] As La Forest J explained in ***Oldman River*** at 67, "the exercise of legislative power, as it affects concerns relating to the environment, must, as with other concerns, be linked to the appropriate head of power, and since the nature of the various heads of power under the *Constitution Act*, *1867* differ, the extent to which environmental concerns may be taken into account in the exercise of a power may vary from one power to another."

[63] The Supreme Court recognized this distinction in ***Moses SCC*** at para 36: "There is no doubt that a vanadium mining project, considered in isolation, falls within provincial jurisdiction under s. 92A of the *Constitution Act*, *1867* over natural resources. There is also no doubt that ordinarily a mining project anywhere in Canada that puts at risk fish habitat could not proceed without a permit from the federal Fisheries Minister, which he or she could not issue except after compliance with the *CEAA*. *The mining of non-renewable mineral resources aspect falls within provincial jurisdiction, but the fisheries aspect is federal*" (emphasis added).

[64] The *Regulations* include one Schedule.

- new international electrical transmission lines or inter-provincial power lines designated under the *Canadian Energy Regulator Act* (s 39);
- offshore oil and gas pipelines (s 40);
- interprovincial oil and gas pipelines (s 41);
- offshore wind power generating facilities (ss 44-45);
- aerodromes or runways (ss 46-47);
- international or interprovincial bridges or tunnels (s 48);
- canals or causeways in navigable waters (ss 49-50); and
- marine terminals (ss 52-53).

[110] Importantly, however, designated projects also include intra-provincial activities otherwise within provincial jurisdiction such as mining, renewable energy, transportation and oil and gas. The following activities designated in the *Regulations* Schedule are matters primarily within exclusive provincial jurisdiction:

- certain activities with respect to new or existing coal, diamond, metal (other than uranium), rare earth element mines or stone quarry sand or gravel pits exceeding a specified daily production capacity (ss 18-19);
- certain activities with respect to existing or new oil sands mines with a bitumen production capacity of 10,000 m^3/day or more (ss 24-25);
- the construction, operation, decommissioning, abandonment or expansion of a fossil fuel-fired power generating facility with a production capacity of 200 MW or more (ss 30-31);
- the construction, operation, decommissioning, abandonment or expansion of an *in situ* oil sand extraction facility with a bitumen production capacity of 2,000 m^3/day or more in a province that does not have provincial legislation limiting the amount of greenhouse gas emissions produced by oil sands sites in the province or where such limits have been reached (ss 32-33);
- the construction, operation, decommissioning and abandonment of new, or expansion of existing, oil refineries, facilities to liquify petroleum products from coal or natural gas, sour gas processing facilities, petroleum storage facilities, natural gas liquids storage facilities above specified production or storage capacities (ss 37-38);

- the construction, operation, decommissioning and abandonment of a new, and expansion of an existing, hydroelectric generating facility over a certain production capacity (ss 42-43);

- the construction, operation, decommissioning and abandonment of a new all-season public highway that requires a total of 75 km or more of new right of way (s 51);

- the construction, operation, decommissioning and abandonment of a new facility, or the expansion of an existing facility, for the treatment of hazardous waste that is within 500 m from a natural water body (ss 56-57); and

- the construction, operation, decommissioning and abandonment of a new, or expansion of an existing, dam or dyke or water diversion structure that exceed certain limits (ss 58-61).

5. Section 7 and Prohibitions

[111] Section 7 of the *Act* prohibits the proponent of a designated project, and that would include all intra-provincial designated projects, from doing "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 listed effects. The listed effects track almost word for word the definition of "effects within federal jurisdiction", that is the purported federal effects. Under s 7(3), a proponent of a designated project *cannot do anything* that *may cause* any of the effects listed in s 7(1) unless and until: (a) the Agency decides under s 16(1) that the project does *not* require an impact assessment; (b) the proponent *complies with the conditions in the decision statement* issued for the project following an impact assessment; or (c) the Agency permits the proponent to do something *in aid of the impact assessment*.

[112] In particular, s 7 provides as follows:

> 7 (1) 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:
>
> (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 in which the act or thing is done, 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; or

(e) any change to a health, social or economic matter within the legislative authority of Parliament that is set out in Schedule 3.

(2) The Governor in Council may, by order, amend Schedule 3 to add or remove a component of the environment or a health, social or economic matter.

(3) The proponent of a designated project may do an act or thing in connection with the carrying out of the designated project, in whole or in part, that may cause any of the effects described in subsection (1) if

(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;

> (b) the proponent complies with the conditions included in the decision statement that is issued to the proponent under section 65 with respect to that designated project and is not expired or revoked; or
>
> (c) the Agency permits the proponent to do that act or thing, subject to any conditions that it establishes, for the purpose of providing to the Agency the information or details that it requires in order to prepare for a possible impact assessment of that designated project or for the purpose of providing to the Agency or a review panel the information or studies that it considers necessary for it to conduct the impact assessment of that designated project.
>
> (4) Despite paragraph (1)(d), the proponent of a designated project may do an act or thing in connection with the carrying out of the designated project, in whole or in part, that may cause a change described in that paragraph in relation to an Indigenous group, community or people that holds rights recognized and affirmed by section 35 of the Constitution Act, 1982 if the change is not adverse and the council, government or other entity that is authorized to act on behalf of the Indigenous group, community or people and the proponent have agreed that the act or thing may be done.

[113] Contravening s 7 is an offence under the *Act*, punishable by substantial fines under s 144.

6. Section 8 and Prohibitions

[114] Under the *Act*, Parliament has also regulated what it has defined as "direct or incidental effects" and what it characterizes as "adverse direct or incidental effects". Direct or incidental effects include effects that are directly linked or necessarily incidental to a federal authority's grant of a federal permit or approval that a designated project requires under other valid federal legislation to proceed: *Act*, s 2. Simply, this definition captures those designated projects requiring a federal permit to proceed. Various sections of the *Act* refer to "adverse direct or incidental effects" and "adverse effects within federal jurisdiction" together.[65]

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[65] Examples: "the effects within federal jurisdiction or the direct or incidental effects" or "the adverse effects within federal jurisdiction and the adverse direct or incidental effects" or "the adverse effects within federal jurisdiction or the adverse direct or incidental effects" or "those that are adverse effects within federal jurisdiction and those that are direct or incidental effects" or "which ... are adverse effects within federal jurisdiction and which are direct or incidental effects": *Act*, ss 6(d), 9(1), 16(2)(b), 28(3), 33(2), 36(2)(a), 51(1)(d)(ii), 59(2), 60(1)(a), 61(1), 62, 63(b) and 106(2)(c)).

[115] Section 8 of the *Act* prohibits a federal authority from issuing a federal permit for a designated project *unless a positive public interest determination has been made by the federal executive* or unless no impact assessment is required:

> 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
>
> > (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
> >
> > (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 effects that are indicated in the report with respect to the impact assessment of that project are in the public interest.

7. Phases of Impact Assessment Process

[116] There are three main phases to the impact assessment process.

[117] First, there is the planning phase: *Act*, ss 10-18. A proponent of a designated project provides the Agency with a description of the project that must include information prescribed by regulation. An initial project description is provided based on Schedule 1 of the *Information and Management of Time Limits Regulations*, SOR/2019-283 [*Information Regulations*]: *Act*, s 10(1). The Agency then consults with a number of parties, on the basis of which it provides the proponent with a summary of issues: *Act*, s 14(1). The proponent must then provide the Agency with a notice setting out a response to this summary of issues and a detailed project description based on Schedule 2 of the *Information Regulations*: *Act*, s 15(1). If the Agency decides a designated project requires an impact assessment, it issues a notice of commencement outlining the information and studies needed to conduct the assessment and documents set out in s 5 of the *Information Regulations*: *Act*, s 16; s 18(1).

[118] Second, there is the impact assessment phase. This begins with the proponent collecting the requested information and completing the required studies which it provides to the Agency in a document called an "impact statement": *Act*, s 19(1).[66] An assessment of the designated project

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[66] Government of Canada, Impact Assessment Agency of Canada, "Phase 2: Impact Statement", online:

is then carried out, either by the Agency or, in cases where the Minister is of the view it is in the public interest, a review panel. The potential effects of a designated project are assessed, after which a report (Report) is prepared by the Agency or review panel detailing the effects of the project: *Act*, ss 25, 51(1)(d)(i)-(ii). The Report must set out the likely effects of the designated project, indicate the adverse federal effects and specify the extent to which those effects are significant.[67]

[119] Notably, the Report *must* take into account the factors set out in s 22(1) (sometimes referred to as the "s 22 mandatory factors"), namely:

> (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
>
> > (i) the effects of malfunctions or accidents that may occur in connection with the designated project,
> >
> > (ii) any cumulative effects that are likely to result from the designated project in combination with other physical activities that have been or will be carried out, and
> >
> > (iii) the result of any interaction between those effects;
>
> (b) mitigation measures that are technically and economically feasible and that would mitigate any adverse effects of the designated project;
>
> (c) *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*;
>
> (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;

<https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/impact-assessment-process-overview/phase2.html>.

[67] The Report must also explain how any provided Indigenous knowledge was considered, summarize any public comments and recommend mitigation measures and follow-up programs: *Act*, ss 28(3)-(3.2), 51(1)(d)(ii.1)-(iv).

(f) any alternatives to the designated project that are technically and economically feasible and are directly related to the designated project;

(g) Indigenous knowledge provided with respect to the designated project;

(h) *the extent to which the designated 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*;

(j) any change to the designated project that may be caused by the environment;

(k) the requirements of the follow-up program in respect of the designated project;

(l) considerations related to Indigenous cultures raised with respect to the designated project;

(m) community knowledge provided with respect to the designated project;

(n) comments received from the public;

(o) comments from a jurisdiction that are received in the course of consultations conducted under section 21;

(p) any relevant assessment referred to in section 92, 93 or 95;

(q) 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;

(r) 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 *jurisdiction* 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;

> (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. [Emphasis added]

[120] Third, there is the decision phase: *Act*, ss 60-66. The Minister or Governor in Council is required to make a public interest determination with respect to the designated project which must be based on both the Report (which must take into account the s 22 mandatory factors) and the factors set out in s 63 (sometimes referred to as the "s 63 mandatory factors"; the "s 22 mandatory factors" and "s 63 mandatory factors" being sometimes collectively referred to as the "mandatory factors"). If the public interest determination is positive, the Minister or Governor in Council must also determine what conditions will be imposed: *Act*, ss 64(1)-(2). The Minister must then issue a "decision statement" to the proponent informing the proponent of the public interest determination made by either the Minister or Governor in Council and the reasons for it and, if applicable, any conditions that must be complied with by the proponent: *Act*, s 65(1).

[121] If the public interest determination is not positive, that is negative, the proponent continues to be prohibited from proceeding with the designated project if it *may cause any of the purported federal effects*: *Act*, s 7(3). This effectively prohibits the proponent from proceeding since the negative public interest determination constitutes a finding by the federal executive that the designated project may cause such purported federal effects. Further, without a positive public interest determination, the federal executive has no obligation to set out any conditions to allow the proponent to proceed regardless: *Act*, s 64(1), s 64(2). In addition, as noted, if the proponent requires a federal permit to proceed, no federal authority is permitted to issue that federal permit without a positive public interest determination: *Act*, s 8(b). Other enforcement measures are also available to prevent the proponent from proceeding: *Act*, ss 120-140.

[122] In the real world, these provisions reduce to this: *unless and until the federal executive determines that an intra-provincial designated project is in the public interest*, the proponent of that project cannot proceed with it, full stop.

VIII. Overview of Environmental Assessment Legislation Provincially

A. Alberta

1. Overview of Environmental Impact Assessment Legislation in Alberta

[123] For decades, Alberta has played an international leadership role in developing oil and gas resources in an environmentally responsible manner. Alberta was one of the first jurisdictions in Canada to implement an environmental impact assessment process. It first enacted legislation for this purpose in 1973, more than a decade before federal environmental assessment legislation.

[124] The *Environmental Protection and Enhancement Act*, RSA 2000, c E-12 [*EPEA*] currently governs provincial environmental assessments in Alberta. The process is administered by Alberta

Environment and Parks or, in cases of upstream oil and gas or coal development, the Alberta Energy Regulator.[68]

[125] The *Environmental Assessment (Mandatory and Exempted Activities) Regulation,* Alta Reg 111/1993 [*Mandatory and Exempted Activities Regulation*] passed under the *EPEA* classifies projects as mandatory or exempted for purposes of conducting a provincial environmental assessment. Schedule 1 of the *Mandatory and Exempted Activities Regulation* lists mandatory projects.[69] The full list, which is extensive and runs from (a) to (aa), includes projects such as the construction, operation, or reclamation of:

- a pulp, paper, newsprint or recycled fibre mill with a capacity of more than 100 tonnes per day;
- a quarry producing more than 45,000 tonnes per year;
- a dam greater than 15 metres in height;
- a surface coal mine producing more than 45,000 tonnes per year;
- an oil sands mine;
- a commercial oil sands, heavy oil extraction, upgrading or processing plant producing more than 2000 cubic metres of crude bitumen or its derivatives per day;
- a thermal electrical power generating plant that uses non-gaseous fuel and has a capacity of 100 megawatts or greater;
- a hydroelectric power generating plant with a capacity of 100 megawatts or greater;
- an oil refinery;
- a sour gas processing plant that emits more than 2.8 tonnes of sulphur per day;
- a pesticide manufacturing plant.

[126] In addition, the Director may also require an environmental assessment for any project the Director decides warrants further consideration: *EPEA*, s 43.[70] In deciding whether to subject a project to an environmental assessment, the Director must consider factors such as the size, location, nature and complexity of the project as well as public concerns: *EPEA*, s 44(3).[71]

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[68] The Alberta Energy Regulator was created by s 3 of the *Responsible Energy Development Act*, SA 2012, c R-17.3, which also dissolved the predecessor Energy Resources Conservation Board (s 81).

[69] Schedule 2 sets out exempted projects.

[70] The term "Director" is defined in s 43 of the *EPEA*, as well as ss 44-56, as being "the Director who is designated for the purposes of those sections".

[71] Alberta provided examples of two projects that have been reviewed in accordance with the Director's exercise of discretion: Alberta Sulphur Terminals Ltd.'s sulphur forming and shipping facility near Bruderheim, Alberta and the expansion of the Castle Mountain Resort near Pincher Creek, Alberta (Affidavit of Corinne Kristensen at paras 25-26: Alberta Record at A6-7).

2. Operational Aspects of Alberta's Environmental Impact Assessment Regime

[127] The purposes of the *EPEA* focus on environmental protection and sustainable development, integrating environmental and economic decision-making in the earliest planning stages, predicting the environmental, social, economic and cultural consequences of a proposed activity and engaging key stakeholders and the general public: *EPEA*, s 40.

[128] The environmental assessment process results in the production of an environmental impact assessment report (EIA Report). Under s 49 of the *EPEA*, the EIA Report must include information such as:

- a description of the activity;
- an analysis of the need for the activity;
- a site selection analysis;
- a description of potential positive and negative environmental, social, economic and cultural impacts of the proposed activity, including cumulative, regional, temporal and spatial considerations and the significance of these effects;
- plans to mitigate any negative impacts;
- alternatives to the proposed activity;
- plans to monitor environmental impacts;
- a program of public consultation; and
- any other necessary information.

[129] Federal stakeholders can also contribute to provincial impact assessments under the *EPEA*. Federal agencies, including the Agency, Environment and Climate Change Canada and Fisheries and Oceans Canada, can be invited to participate in the review of an EIA Report.[72]

[130] Once an EIA Report is complete, it is referred to the appropriate regulatory decision-maker to determine if the activity is in the public interest and whether regulatory approvals should be granted.

3. *In Situ* Oil Sands Projects

[131] Alberta has a highly developed and comprehensive legislative regime to address all aspects of development of its oil and gas resources, including environmental consequences. *In situ* recovery is used where the oil sands from which bitumen is to be extracted are buried too deep to mine, that is more than 75 metres below the ground. Wells are drilled to extract the bitumen.[73]

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[72] Affidavit of Corinne Kristensen at para 38: Alberta Record, A11.

[73] This process is explained in some detail in Alberta Energy Regulator, "In Situ Recovery", online: <www.aer.ca/providing-information/by-topic/oil-sands/in-situ-recovery>. Where the bitumen is too viscous to flow to the well on its own, heat must be added or fluids injected to reduce its viscosity. Most *in situ* bitumen recovery uses steam to heat the bitumen in the reservoir. This is known as thermal *in situ* recovery. There are two main thermal *in situ* oil sands technologies: steam-assisted gravity drainage and cyclic steam stimulation. While they are the most

[132] *In situ* operations are subject to a number of specific Directives from the Alberta Energy Regulator.[74] It currently regulates 85 active thermal/enhanced *in situ* projects and over 215 active primary recovery *in situ* projects.[75] A proponent must secure the necessary environmental approvals before proceeding. Assessments are "mandatory" under the *Mandatory and Exempted Activities Regulation* if the *in situ* project "will produce more than 12,600 barrels (2000 m³) of bitumen per day".[76] A proponent seeking to develop an *in situ* project in the oil sands must also obtain a "scheme approval" under the *Oil Sands Conservation Act*, RSA 2000, c O-7. Other approvals might include approvals under the *Oil and Gas Conservation Act*, RSA 2000, c O-6 (for well licences), *Pipeline Act*, RSA 2000, c P-15 (for pipeline licences), *Water Act*, RSA 2000, c W-3 (to divert water and/or cause impacts to water bodies) and the *Public Lands Act*, RSA 2000, c P-40 (for access to and use of public lands).[77]

[133] *In situ* oil recovery is akin to extracting oil through individual oil wells drilled into the ground.[78] Thus, under prior federal environmental legislation, *in situ* oil sands projects typically did not require a federal environmental impact assessment.[79] The exception was if the project proponent required a federal permit under federal legislation such as the *Fisheries Act*.[80]

[134] To place the addition of *in situ* projects to the project list in context, mining versus *in situ* methods of recovery today in Alberta are currently roughly equal. Mining accounts for 47% of current production and *in situ*, 53%. However, *in situ* is expected to outpace mining in the future to the point where mining will make up 19% of production and *in situ* 81%.[81]

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widely used, other options exist: Toe-to-Heel Air Injection, Vapour Extraction Process and an Electro-Thermal Dynamic Stripping Process: see Energy Education, online: <https://energyeducation.ca/encyclopedia/In_situ_oil_sands_mining>.

[74] *In situ* operations are required to recycle as much water as possible. Typically 90% of the water is recycled: Alberta Energy Regulator, "In Situ Recovery", online: <www.aer.ca/providing-information/by-topic/oil-sands/in-situ-recovery>.

[75] Affidavit of Camille Almeida at para 12: Alberta Record, B4.

[76] Affidavit of Camille Almeida at paras 27, 31: Alberta Record, B7-8. Exhibit "D" (Alberta Record, A39-47) of the Affidavit of Corinne Kristensen (Alberta Record, A1-23) lists completed environmental assessments in Alberta. Of the 67 *in situ* projects on the list, 66 were subject to a "mandatory" assessment and one to a "discretionary" assessment which took place.

[77] Affidavit of Camille Almeida at paras 18-26: Alberta Record, B5-7.

[78] As explained in the Affidavit of Paul Tsounis at para 11: "In-situ oil sands production requires infrastructure and surface footprints that are similar to conventional oil and gas production and does not involve or require surface mining" (Alberta Record, C4).

[79] Affidavit of Corinne Kristensen at para 88: Alberta Record, A22.

[80] Affidavit of Camille Almeida at para 29: Alberta Record, B7.

[81] Affidavit of Paul Tsounis at para 11, which notes that it is "estimated that approximately 81% of Alberta's oil sands resource will be developed using in situ methods rather than mining methods" (Alberta Record at C4). This figure is derived from Natural Resources Canada data attached as Exhibit "B" to his Affidavit (Alberta Record, C14-15).

4. Canada-Alberta Bilateral Agreement on Environmental Assessment

[135] The optional process outlined in the Bilateral Agreement has previously been used for projects subject to an assessment under the *EPEA* and in respect of which federal jurisdiction has been triggered.[82]

B. Ontario

1. Overview of Environmental Assessment Impact Legislation in Ontario

[136] The *Environmental Assessment Act*, RSO 1990, c E.18 [*ONEAA*] sets out the processes to evaluate the environmental impact of intra-provincial enterprises, activities, plans, programs or proposals. The purpose of the *ONEAA* is "the betterment of the people of the whole or any part of Ontario by providing for the protection, conservation and wise management in Ontario of the environment": *ONEAA*, s 2. "Environment" is defined broadly to include the natural, social, economic, cultural and built environments: *ONEAA*, s 1(1).

[137] The *ONEAA* applies to: (a) enterprises, activities, plans, programs, or proposals of the public sector, such as provincial ministries, municipalities, or public bodies; and (b) enterprises, activities, plans, programs, or proposals of the private sector designated by regulations or voluntary agreement: *ONEAA*, ss 3, 3.0.1.

[138] With the approval of the Lieutenant Governor in Council, the Minister may exempt an undertaking from the *ONEAA* or amend, impose or revoke conditions imposed on an undertaking under the *ONEAA* if the Minister considers it in the public interest to do so: *ONEAA*, s 3.2(1). The Minister may also vary or dispense with requirements under the *ONEAA* if another jurisdiction already imposes restrictions on the undertaking, and the Minister considers those requirements to be equivalent to what is required in Ontario under a harmonization agreement: *ONEAA*, s 3.1. For example, Ontario and Canada may coordinate their respective environmental assessments under a harmonization agreement.

2. Operational Aspects of Ontario's Environmental Impact Assessment Regime

[139] An undertaking subject to the *ONEAA* will undergo either the streamlined environmental assessment process or the individual environmental assessment process. The streamlined process usually applies to undertakings carried out routinely with predictable environmental effects that can be readily managed. These are set out in Class Environmental Assessment approvals, exempting regulations and Minister's declaration orders: *ONEAA*, s 16, 39(f), 3.2. Some undertakings within a routine class may warrant additional study and consideration in which case the *ONEAA* authorizes the Minister to impose additional conditions or require the undertaking to go through the individual process instead: *ONEAA*, s 16(3).

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[82] Affidavit of Corinne Kristensen at para 89: Alberta Record, A22.

[140] The individual assessment process usually applies to large-scale complex undertakings where there is the potential for significant environmental impacts. This process is intended to assess reasonable alternatives or means of implementing the undertaking, taking into account the environmental advantages and disadvantages. The individual process involves:

- Preparation of Terms of Reference: Terms of reference setting out the framework for the planning and decision-making process must be prepared and reviewed. At this stage, the proponent also gives public notice of the proposed terms of reference: *ONEAA*, ss 6(1)-(3.6).

- Approval of Terms of Reference: The Minister decides whether to approve the terms of reference or ask for amendments: *ONEAA*, ss 6(4)-(6).

- Environmental Assessment: If approved, the environmental assessment will be prepared and submitted in accordance with the approved terms of reference. The assessment will contain a description of the purpose and rationale for the undertaking, a description of the environmental impacts, a description of the actions that may be reasonably necessary to mitigate or prevent environmental impacts, an evaluation of any alternative methods of carrying out the undertaking and a description of any consultation that has taken place: *ONEAA*, ss 6.1-6.2.

- Review of Environmental Assessment: The environmental assessment will be reviewed by the Director appointed under the *ONEAA*. There will be an opportunity for public comment on the undertaking, the environmental assessment and the Director's review: *ONEAA*, ss 7, 7.2. The Director will give the proponent an opportunity to remedy any deficiencies and may reject the environmental assessment if not satisfied that the deficiencies have been remedied: *ONEAA*, s 7(6). The Minister may also decide whether to refer all or part of the decision to the Environmental Review Tribunal: *ONEAA*, ss 9.1-9.3. The Minister (or Tribunal) then decides whether to approve the undertaking (subject to the approval of the Lieutenant Governor in Council), and must take into account a list of factors set out in the *ONEAA* including the purpose of the *ONEAA* and any public comments: *ONEAA*, ss 9(1)-(2), 9.1(2)-(3).

C. Saskatchewan

1. Overview of Environmental Assessment Legislation in Saskatchewan

[141] *The Environmental Assessment Act*, SS 1979-80, c E-10.1 [*SKEAA*] sets out the assessment processes for intra-provincial developments that impact the environment to obtain approval from the Saskatchewan Ministry of Environment. "Environment" is defined broadly to include the natural, social, economic and cultural environments: *SKEAA*, s 2(e).

2. Operational Aspects of Saskatchewan's Environmental Impact Assessment Regime

[142] The assessment process first involves a screening step to determine whether the project meets the definition of a "development". The proponent must apply for a determination whether its project is a "development" and provide the Minister with all information reasonably required to make that determination: *SKEAA*, s 7.2. Under s 2(d), "development" is defined as:

> any project, operation or activity or any alteration or expansion of any project, operation or activity which is likely to:
>
> (i) have an effect on any unique, rare or endangered feature of the environment;
>
> (ii) substantially utilize any provincial resource and in so doing pre-empt the use, or potential use, of that resource for any other purpose;
>
> (iii) cause the emission of any pollutants or create by-products, residual or waste products which require handling and disposal in a manner that is not regulated by any other Act or regulation;
>
> (iv) cause widespread public concern because of potential environmental changes;
>
> (v) involve a new technology that is concerned with resource utilization and that may induce significant environmental change; or
>
> (vi) have a significant impact on the environment or necessitate a further development which is likely to have a significant impact on the environment.

[143] If the project does not fall within the definition of "development", the proponent will receive a Ministerial determination that an environmental impact assessment is not necessary: *SKEAA*, s 7.6. If the project does meet the definition of "development", the proponent must then obtain Ministerial approval in order to proceed with the development: *SKEAA*, s 8(1).

[144] To obtain Ministerial approval, the proponent must submit an environmental impact assessment of the development and an impact statement relating to the development: *SKEAA*, s 9(1). The Minister will review the statement and impose any conditions considered appropriate and the statement will be made available for public inspection: *SKEAA*, ss 11(1)-(2). The Minister may appoint persons to conduct additional inquiries at any point prior to making their decision: *SKEAA*, s 14. The Minister will then either give approval to proceed with or without terms and conditions or refuse to approve the development: *SKEAA*, s 15(1).

IX. Foundational Constitutional Principles

A. Federalism

[145] Federalism is a foundational principle of Canada's constitutional architecture and defining characteristic of Canada as a nation.[83] It finds its "primary textual expression" in the division of powers set out mainly in ss 91 and 92 of the *Constitution Act, 1867*: ***Secession Reference*** at para 47; ***Reference re Genetic Non-Discrimination Act***, 2020 SCC 17 at para 20 [***Genetic Non-Discrimination***]. Under this division, "broad powers were conferred on the provinces to ensure diversity, while at the same time reserving to the federal government powers better exercised in relation to the country as a whole to provide for Canada's unity": ***References re Greenhouse Gas Pollution Pricing Act***, 2021 SCC 11 at para 49 [***References re Greenhouse Gas Pollution Pricing Act SCC***].

[146] This reflects the balance the Fathers of Confederation chose between diversity and unity; reconciling the two was achieved by granting significant powers to provincial governments: ***Secession Reference*** at para 43. Thus, federalism recognizes the "autonomy of provincial governments to develop their societies within their respective spheres of jurisdiction": ***Secession Reference*** at para 58, cited in ***R v Comeau***, 2018 SCC 15 at para 78, [2018] 1 SCR 342.

[147] Federalism has distinct advantages. It enhances efficiency by decentralizing power. And in doing so, it enhances accountability to the people that governments serve. Moreover, since neither level of government has unlimited power, each serves as a check on the other. In addition, federalism encourages opportunities for innovation and new ways of dealing with old problems especially where provinces or regions face unique challenges. This permits new solutions to be tested locally or regionally first, thereby avoiding the problems invariably inherent in a one size fits all solution for challenges faced by all provinces.[84] Additionally, by its nature, our federal structure creates competitive incentives in the marketplace.[85]

[148] The *Constitution Act, 1867* grants Parliament the authority to enact laws for the "Peace, Order, and good Government of Canada" and in relation to roughly 30 classes of laws described in ss 91, 92(10), 92A(3), 93(4), 94, 94A, 95, 101, 132 and other parts of the *Constitution Act*, *1867*. It grants the provincial Legislatures the authority to enact laws as described in ss 92, 92A, 93, 94A and 95. A law enacted by Parliament or a provincial Legislature is valid only if the maker had the power to pass it. Neither has unlimited legislative authority.

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[83] ***Secession Reference*** at para 32; ***References re Greenhouse Gas Pollution Pricing Act*** at para 48. The objectives of federalism are to "reconcile unity with diversity, promote democratic participation by reserving meaningful powers to the local or regional level and to foster co-operation among governments and legislatures for the common good": ***Canadian Western Bank*** at para 22.

[84] Hogg at §5:8.

[85] The Constitution specifically contemplates people seeking opportunities: see s 6 of the *Charter*.

B. Subsidiarity

[149] Subsidiarity has been recognized as an underlying principle of federalism: see Dwight Newman, "Changing Division of Powers Doctrine and the Emergent Principle of Subsidiarity" (2011) 74:1 Sask L Rev 21 at 26-28. Subsidiarity is the principle that "law-making and implementation are often best achieved at a level of government that is not only effective, but also closest to the citizens affected and thus most responsive to their needs, to local distinctiveness, and to population diversity": ***114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)***, 2001 SCC 40 at para 3, [2001] 2 SCR 241. The division of powers generally adheres to this principle: Peter Hogg & Wade Wright, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2007) (loose-leaf updated 2021) at §5:7 [Hogg].[86] It accomplishes this by "distributing power to the government thought to be most suited to achieving the particular societal objective": ***Secession Reference*** at para 58.[87]

[150] The principle of subsidiarity also reflects the political realities of our geographically large country whose population is concentrated in certain provinces. Subsidiarity is a counterbalance to centralism and majoritarianism.[88] Those provinces with the largest populations and most Members of Parliament will often have the most substantial influence on the policies of the federal government when, as typically happens, they are responsible for the election of that government. As a result, policies chosen by the federal government are often dictated by the wishes of the majority, especially the majority in those areas responsible for their election. Therefore, what is important to an individual province and its citizens may not be as important to the federal government.

[151] The protection for individual provinces, all of whom may find themselves on the outside looking in at one time or another, lies in the division of powers. This helps ensure that a province, no matter how small or large, is able to defend itself against those asserting that the national good trumps that province's interests.[89] In recognizing the benefit of the proximity of government to the people that government serves, subsidiarity invigorates confidence in the electors that their

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[86] In ***Reference re Assisted Human Reproduction Act***, 2010 SCC 61 at para 273, [2010] 3 SCR 457 [***AHRA Reference***], LeBel and Deschamps JJ suggested the principle of subsidiarity could act as an "interpretive principle that derives, as this Court has held, from the structure of Canadian federalism and that serves as a basis for connecting provisions with an exclusive legislative power".

[87] See also Hugo Cyr, "Autonomy, Subsidiarity, Solidarity: Foundations of Cooperative Federalism" (2014) 23:4 Const F 20 at 26.

[88] As stated at para 66 of the ***Secession Reference***, "[n]o one majority is more or less 'legitimate' than the others as an expression of democratic opinion, although, of course, the consequences will vary with the subject matter. A federal system of government enables different provinces to pursue policies responsive to the particular concerns and interests of people in that province."

[89] Former Alberta Premier Peter Lougheed captured these concerns well: "The only way that there can be a fair deal for the citizens of the outlying parts of Canada is for the elected provincial governments of these parts to be sufficiently strong to offset the political power in the House of Commons of the populated centres. That strength can only flow from the provinces' jurisdiction over the management of their own economic destinies and the development of the natural resources owned by the provinces": Meekison & Romanow at 11.

voice is heard and valued. As an interpretive principle, therefore, subsidiarity militates strongly against erosion of provincial powers.

C. Conclusion

[152] Thus, in determining whether the *IAA* is unconstitutional, federalism, including subsidiarity, weighs heavily in the analysis. Where a doubt arises about classification of a challenged law, the subsidiarity principle, an essential aspect of federalism, favours provincial jurisdiction.[90]

X. Indigenous Peoples and the Division of Federal/Provincial Powers

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

[153] Canada has exclusive jurisdiction to legislate in relation to "Indians, and Lands reserved for the Indians" under s 91(24) of the *Constitution Act*, *1867*. The main statutory form in which Parliament has exercised its s 91(24) jurisdiction is the *Indian Act*, RSC 1985, c I-5 [*Indian Act*].[91]

[154] Canadian courts have long rejected the idea that Indigenous peoples and "Lands reserved for the Indians" are federal "enclaves" from which provincial laws are excluded. "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, [2002] 2 SCR 146 [***Kitkatla***]; see also ***Paul v British Columbia (Forest Appeals Commission)***, 2003 SCC 55 at para 36, [2003] 2 SCR 585 [***Paul***]; ***Cardinal v Attorney General of Alberta***, [1974] SCR 695 at 702-703 [***Cardinal***]. Therefore, while only Parliament can validly enact legislation in relation to "Indians, and Lands reserved for the Indians", provincial legislation can affect and thus apply to these subjects "so long as the law is in relation to a matter coming within a provincial head of power": Hogg at §28:7.

[155] Accordingly, provincial laws of general application usually apply to the Indigenous peoples of Canada of their own force, that is *proprio vigore*: ***Cardinal*** at 702-703; ***NIL/TU,O Child and Family Services Society v B.C. Government and Service Employees' Union***, 2010 SCC 45 at para 71, [2010] 2 SCR 696 [***NIL/TU,O***]. Those laws are constitutionally valid even if they have incidental effects on "Indians, and Lands reserved for the Indians": ***Rempel Bros. Concrete Ltd. v Chilliwack (District of)***, 1994 CanLII 1728 at para 24, 5 WWR 122 (BCCA).[92]

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[90] That was the view of LeBel and Deschamps JJ in ***AHRA Reference*** in concluding at para 273 that subsidiarity "would favour connecting the rules in question with the provinces' jurisdiction over local matters, not with the criminal law power".

[91] "Indians" include the Inuit, Métis, and non-status Indians (***Daniels v Canada (Indian Affairs and Northern Development)***, 2016 SCC 12, [2016] 1 SCR 99 [***Daniels***]), though Parliament has not included these groups in the *Indian Act*.

[92] A municipal bylaw regulating and imposing a fee for the removal of gravel was found within provincial jurisdiction since it did not regulate the use of land on a reserve even though gravel was being removed from reserve lands.

[156] The one exception involves the doctrine of interjurisdictional immunity. Under this doctrine, a valid provincial law of general application which impairs the "core" of s 91(24) cannot apply of its own force.[93] The "core" of s 91(24) refers to matters going to "Indianness": Hogg at §28:9.[94] Such matters have been found to include, for example, Indian status (***Natural Parents v Superintendent of Child Welfare***, [1976] 2 SCR 751); "possession of lands on an Indian reserve" (***Derrickson v Derrickson***, [1986] 1 SCR 285 at 296); and occupancy of a family residence on a reserve (***Paul v Paul***, [1986] 1 SCR 306). These involve "relationships within Indian families and reserve communities, matters that could be considered absolutely indispensable and essential to their cultural survival": ***Canadian Western Bank*** at para 61. It has similarly been suggested that "Indianness" would include "rights so closely connected with Indian status that they should be regarded as necessary incidents of status such for instance as registrability, membership in a band, the right to participate in the election of Chiefs and Band Councils, reserve privileges, etc.": ***Four B Manufacturing v United Garmet Workers***, [1980] 1 SCR 1031 at 1048.

[157] In the result, provincial laws of general application will apply to "Indians, and Lands reserved for the Indians" providing they do not impair the core of Parliament's power under s 91(24). While legislation that singles out Indigenous people for special treatment is *ultra vires* the province, legislation that merely regulates Indigenous peoples and their property as members of the broader community is not, even if the provincial legislation has a disproportionate effect on them: ***Kitkatla*** at paras 66-69. Indigenous peoples are citizens of the provinces in which they live and are therefore, in their day-to-day activities, subject to provincial laws of general application. That would include, for example, provincial laws under which a provincial authority has approved an intra-provincial project for the development of natural resources or a roadway or electrical power plant.

B. Section 35 of the *Constitution Act, 1982*

[158] Section 35 of the *Constitution Act*, *1982* is not a source of jurisdiction. It does not amend or displace the distribution of legislative powers between federal and provincial governments under the *Constitution Act*, *1867*. Therefore, the Crown's duties to Indigenous peoples do not inform a *vires* analysis under the division of powers.

[159] Section 35 recognizes and affirms "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada". Its purpose is to "facilitate the ultimate reconciliation of prior Aboriginal occupation with *de facto* Crown sovereignty": ***Taku River Tlingit First Nation v British Columbia (Project Assessment Director)***, 2004 SCC 74 at para 42, [2004] 3 SCR 550. The assertion of Crown sovereignty gives rise to the concept of "the honour of the Crown", and it too

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[93] Section 88 of the *Indian Act* extends the effects of valid provincial laws of general application in certain circumstances notwithstanding that they would otherwise be inapplicable to "Indians" under the interjurisdictional immunity doctrine.

[94] The core has also been described as going to the "status and rights of Indians": ***NIL/TU,O*** at paras 66, 70: Guy Régimbald & Dwight Newman, *The Law of the Canadian Constitution*, 2nd ed (Toronto: LexisNexis, 2017) at 828.

has reconciliation as its purpose: ***Mikisew Cree First Nation v Canada (Governor General in Council)***, 2018 SCC 40 at paras 21-22, [2018] 2 SCR 765 [***Mikisew 2018***]; ***Manitoba Metis Federation Inc. v Canada (Attorney General)***, 2013 SCC 14 at para 66, [2013] 1 SCR 623 [***Manitoba Metis Federation***]. The honour of the Crown is engaged by s 35 and considered a "constitutional principle": ***Manitoba Metis Federation*** at para 69.[95]

[160] The honour of the Crown imposes a number of obligations, one of which is the "duty to consult and accommodate": ***Haida Nation v British Columbia (Minister of Forests)***, 2004 SCC 73 at paras 16-38, [2004] 3 SCR 511 [***Haida Nation***]. This duty is not restricted to the federal Crown; it is owed by both levels of government: ***Grassy Narrows First Nation v Ontario (Natural Resources***), 2014 SCC 48 at para 33, [2014] 2 SCR 447 [***Grassy Narrows***]; ***Haida Nation*** at paras 57-59. Where a province has the power to "take up" lands under a treaty, its right to do so is subject to the province's duty to consult and, if appropriate, accommodate Aboriginal interests: ***Grassy Narrows*** at para 51.[96] Taking up lands under a treaty may include, for example, settlement, mining, lumbering, extraction of natural resources or other purposes.

[161] The constitutional guarantee of Aboriginal rights in s 35 operates as a limitation on both federal and provincial legislative powers: ***Tsilhqot'in Nation v British Columbia***, 2014 SCC 44 at para 142, [2014] 2 SCR 256 [***Tsilhqot'in Nation***]. The scope of their respective obligations is defined by the jurisdictional limits of each level of government under the division of powers.

[162] It has long been accepted that Canada has the jurisdiction under s 91(24) to regulate and infringe s 35 Aboriginal and treaty rights: ***R v Sparrow***, [1990] 1 SCR 1075 at 1109 [***Sparrow***]. In ***Tsilhqot'in Nation***, the Supreme Court confirmed that the doctrine of interjurisdictional immunity should be applied with restraint and should not be used to preclude a province from regulating and infringing s 35 Aboriginal rights: paras 131-152. It specifically concluded that Aboriginal rights under s 35 are not part of the "core" of s 91(24): paras 133-135, 140.[97] Thus, "provincial regulation of general application will apply to exercises of Aboriginal rights, including Aboriginal title land, subject to the s. 35 infringement and justification framework" set out in ***Sparrow***: para 150.

[163] The same is true with respect to treaty rights. Interjurisdictional immunity does not preclude a province which "takes up" land from justifying any infringement of a treaty right: ***Grassy Narrows*** at para 53. While ***Tsilhqot'in Nation*** and ***Grassy Narrows*** did not abolish the idea that s 91(24) has a "core" which protects against provincial intrusion, they did remove

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[95] See also ***Mikisew 2018*** at para 24; ***Southwind v Canada***, 2021 SCC 28 at para 55, citing Brian Slattery, "The Aboriginal Constitution" (2014) 67 SCLR (2d) 319 at 320.

[96] "When a *government* — be it the federal or a provincial government — exercises Crown power, the exercise of that power is burdened by the Crown obligations toward the Aboriginal people in question": ***Grassy Narrows*** at para 50, emphasis in original.

[97] As the Supreme Court explained, while s 35 operates as a limit on both federal and provincial powers, it has "nothing to do with whether something lies at the core of the federal government's powers": para 142.

Aboriginal and treaty rights from that "core".[98] The result is that interjurisdictional immunity no longer applies to s 35 rights. As a consequence, provincial authority has been enlarged with respect to Aboriginal and treaty rights.[99]

XI. Division of Powers Framework

A. The Two Stages in a Division of Powers Analysis

[164] Reviewing legislation for validity on federalism grounds involves a two-stage analytical approach: (1) characterization; and (2) classification. First, the subject matter (or "pith and substance") of the challenged legislation must be characterized. Second, that subject matter must be classified by reference to federal and provincial heads of power: ***References re Greenhouse Gas Pollution Pricing Act SCC*** at para 47; ***Genetic Non-Discrimination*** at para 26; ***Desgagnés Transport*** at para 30; ***Reference re Pan-Canadian Securities Regulation***, 2018 SCC 48 at para 86, [2018] 3 SCR 189 [***Second Securities Reference***].

[165] A statute and related regulations will be considered together for purposes of constitutional characterization where the regulations give "concrete meaning and content to the statute and [are] indispensable to its classification": ***R v Morgentaler***, [1993] 3 SCR 463 at 481 [***Morgentaler***], discussing ***Texada Mines Ltd. v Attorney-General of British Columbia***, [1960] SCR 713. As explained in ***Red Chris*** at para 31, citing Ruth Sullivan, *Sullivan on the Construction of Statutes,* 5th ed (Markham, Ont.: LexisNexis, 2008) at 370, "'[w]hen regulations are made to complete the statutory scheme, they are clearly intended to operate together and to be mutually informing'".[100]

[166] The *Regulations* constitute an integral part of this legislative scheme. The *Act* provides a statutory framework; the *Regulations* make that framework operative. It is the *Regulations* which list the designated projects subject to the federal environmental impact assessment.[101] Accordingly, the *Act* and *Regulations* should be considered together to properly characterize and classify the legislative scheme as a whole.

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[98] ***Daniels*** at para 51. See also HW Roger Townshend, "What Changes Did *Grassy Narrows First Nation* Make to Federalism and Other Doctrines?" (2017) 95:2 Can Bar Rev 459 at 478-479.

[99] According to Bruce McIvor & Kate Gunn, "Stepping into Canada's Shoes: *Tsilhqot'in*, *Grassy Narrows* and the Division of Powers" (2016) 67 UNBLJ 146, the result has been a "significant expansion of provincial authority to legislate in ways that could infringe the rights of Indigenous Peoples" (160) while "narrowing federal exclusivity in relation to Aboriginal and treaty rights" (165).

[100] See also ***R v Campbell***, [1999] 1 SCR 565 at para 26; ***Monsanto Canada Inc. v Ontario (Superintendent of Financial Services)***, 2004 SCC 54 at para 35, [2004] 3 SCR 152.

[101] The definition of "effects within federal jurisdiction" and the scope of the 7 prohibitions can also be expanded by order of the Governor in Council: *Act*, s 7(1)(a)(iv), s 7(1)(e), s 7(2).

1. Characterization of the "Matter" of the Challenged Law

[167] The first stage requires characterizing the "matter" of the challenged law by identifying its "dominant purpose" or "dominant or most important characteristic": ***Genetic Non-Discrimination*** at para 29; ***Desgagnés Transport*** at para 31. It is this "pith and substance" or "true subject matter" or "caractère véritable" that must be identified because ss 91 and 92 of the *Constitution Act, 1867* provide that both levels of government are authorized to "make Laws in relation" to certain "Matters": ***Genetic Non-Discrimination*** at para 28; ***References re Greenhouse Gas Pollution Pricing Act SCC*** at para 51; ***Second Securities Reference*** at para 86. The first stage has also been colloquially described by asking the question "What's it all about?"[102] or "What in fact does the law do and why?"[103]

[168] Characterization requires looking at both the purpose of the law and its effects. In determining the purpose, a court is entitled to consider intrinsic evidence such as the legislation's preamble or purposes clause and extrinsic evidence such as Hansard or minutes of parliamentary committees: ***Kitkatla*** at para 53; ***Canadian Western Bank*** at para 27. Although Parliament's choice of means is not determinative of the legislation's true subject matter, it may be relevant to consider the legislative choice of means in defining a statute's purpose: ***References re Greenhouse Gas Pollution Pricing Act SCC*** at paras 53-54. Looking beyond the overarching purpose to the means selected to achieve that purpose may give a more accurate definition of the true matter of the legislation.

[169] The effects of the law refer to both legal effects and practical effects: ***Reference re Securities Act***, 2011 SCC 66 at para 64, [2011] 3 SCR 837 [***First Securities Reference***]; ***Kitkatla*** at para 54. Legal effects are those which flow directly from the provisions of the statute itself, whereas practical effects are "side" effects that flow from the application of the statute: ***References re Greenhouse Gas Pollution Pricing Act SCC*** at para 51; ***Kitkatla*** at para 54. In particular, the legal effects refer to "how the legislation as a whole affects the rights and liabilities of those subject to its terms, and is determined from the terms of the legislation itself": ***Morgentaler*** at 482. Practical effects are "the actual or predicted results of the legislation's operation and administration": ***Morgentaler*** at 486. The legal effects flow directly from the provisions of the statute and the practical effects flow from its application. Effects must therefore include the law's "practical operation in the every-day world."[104]

[170] The pith and substance should be described as definitively as possible, capturing the law's essential character in terms that are "as precise as the law will allow": ***References re Greenhouse***

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[102] ***Desgagnés Transport*** at para 35, citing A. S. Abel, "The Neglected Logic of 91 and 92" (1969) 19:4 UTLJ 487 at 490.

[103] D.W. Mundell, "Tests for Validity of Legislation under the British North America Act: A Reply to Professor Laskin" (1955) 33:8 Can Bar Rev 915 at 928 [Mundell], cited in Hogg at §15:5.

[104] Mundell at 928.

Gas Pollution Pricing Act SCC at para 52; ***Genetic Non-Discrimination*** at para 32.[105] A precise statement "more accurately reflects the true nature of what Parliament did and what it intended to do": ***References re Greenhouse Gas Pollution Pricing Act SCC*** at para 69. Precision also means that characterization is less likely to be influenced by classification: ***Genetic Non-Discrimination*** at para 31.

[171] The corollary of characterizing legislation according to its "pith and substance" is that "incidental effects" outside the jurisdiction of the legislature that enacted it are irrelevant to the law's validity: ***Canadian Western Bank*** at para 28. As stated in ***Rogers Communications Inc. v Châteauguay (City)***, 2016 SCC 23 at para 37, [2016] 1 SCR 467 [***Rogers Communications***], "[t]he fact that a measure has what are merely incidental effects on an exclusive head of power of the other level of government does not suffice to justify declaring that measure to be *ultra vires*". Effects are merely "incidental" when they are "collateral and secondary to the mandate of the enacting legislature" even if of "significant practical importance": ***Canadian Western Bank*** at para 28.

2. Classification Under Head of Power

[172] The second stage requires the court to assign the "matter" to one of the heads of legislative power: Hogg at §15:4. This is also sometimes referred to as determining the "class(es) of subjects" into which the matter falls: ***Desgagnés Transport*** at para 38; ***Quebec (Attorney General) v Canada (Attorney General)***, 2015 SCC 14 at para 29, [2015] 1 SCR 693 [***Quebec (Attorney General)***]. But since not all powers are limited to a class of subjects, the court's task is more accurately described as determining "whether the subject matter of the challenged legislation falls within the head of power being relied on to support the legislation's validity": ***Second Securities Reference*** at para 86. In the present case, the impugned legislation will be valid if, as Canada argues, its subject matter falls within federal heads of power under s 91 and s 132 of the *Constitution Act*, *1867*. Conversely, it will be *ultra vires* Parliament and thus invalid if, as Alberta argues, the subject matter improperly intrudes into provincial heads of power set out in s 92 and s 92A(1) of the *Constitution Act, 1867*.

B. Importance of Keeping the Two Stages Separate

[173] Characterization of the law and its classification are distinct steps, meaning that "the pith and substance of a statute or a provision must be identified without regard to the heads of legislative competence": ***References re Greenhouse Gas Pollution Pricing Act SCC*** at para 56. Otherwise there is "a danger that the whole exercise will become blurred and overly oriented towards results": ***Chatterjee v Ontario (Attorney General)***, 2009 SCC 19 at para 16, [2009] 1 SCR

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[105] A vague or general description can result in the law being superficially assigned to both federal and provincial heads of powers or exaggerate the extent to which the law extends into the other level of government's sphere of jurisdiction: ***References re Greenhouse Gas Pollution Pricing Act SCC*** at para 52; ***Genetic Non-Discrimination*** at para 32; ***Desgagnés Transport*** at para 35.

624.[106] Classification sometimes requires interpreting the scope of the claimed head of power as, for example, in the case of "Trade and Commerce" under s 91(2) or "Criminal Law" under s 91(27): ***Desgagnés Transport*** at paras 39-41; ***First Securities Reference*** at para 65; ***Quebec (Attorney General)*** at para 32.

C. The Pith and Substance Doctrine and the Environment

[174] The pith and substance doctrine remains the primary analytical tool for resolving division of powers disputes: ***Canadian Western Bank*** at paras 25-26; ***Firearms Reference*** at para 16; ***Kitkatla*** at para 52; ***Desgagnés Transport*** at para 121, per Wagner CJ and Brown J concurring. That is so even where the environment is involved.

[175] The environment covers everything in life, from what we do, to how we live, to the values we hold dear, to ensuring the safety of the planet, to mitigating the effects of climate change for which humans are responsible, to concerns about future generations, to how we organize our economies, to sustainable development, to the ethical treatment of animals and more. But as vital as the environment is to all forms of life on this planet, it is not, for constitutional purposes, a superordinate subject matter that transcends or trumps the division of powers.

[176] As explained, some "aspects" of the environmental effects of an intra-provincial designated project may be within provincial jurisdiction, others federal. In this context, "aspect" means legal aspect, as in the legal aspect of facts, the facts being the environmental effects of the intra-provincial designated project. However, simply because both government levels have legislative authority over different legal aspects of those effects does not mean that regulation of the intra-provincial designated project overall is a true matter of double aspect and thus subject to the double aspect doctrine.

[177] The double aspect doctrine recognizes that "the same fact situations can be regulated from different perspectives, one of which may relate to a provincial power and the other to a federal power": ***Desgagnés Transport*** at para 84. Under this doctrine, both levels of government are able to legislate with respect to the same fact situation using different heads of power. Hogg notes at §15:7 that the double aspect doctrine may more properly be described as the "double matter" doctrine.

[178] But Parliament has no head of power entitling it to regulate intra-provincial designated projects, or their environmental effects, generally. And since the environment is not a head of power, such regulation cannot be based on the environment alone. Neither the environment, nor environmental regulation, is an independent subject matter of jurisdiction for either government level.[107] As a diffuse subject, the environment cuts across several different areas of constitutional

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[106] A "matter" may be described using "the very language of a class of subject". Where that occurs, the identification of the "matter" will effectively settle the issue of the law's validity, classification being a formality: Hogg at §15:5.

[107] "Environmental regulation is not an 'independent' matter of jurisdiction but rather is a function of the exercise of particular heads of power": Kennett at 186.

responsibility, some provincial, some federal. For both government levels, legislation relating to the environment or environmental protection *must be tied to a specific head of power under the Constitution*. In other words, the legislation must actually fall within the specific characteristics of the head of power under which it is claimed to be justified: ***Hydro-Québec*** at paras 112, 114.

[179] Therefore, where an activity, such as an intra-provincial designated project, is otherwise within exclusive provincial jurisdiction, Parliament's jurisdiction is *limited to the environmental effects of that activity on a federal head of power*.[108] Accordingly, the fact one aspect of the environmental effects of an intra-provincial designated project, the fisheries aspect for example, falls within federal jurisdiction does not give Parliament the jurisdiction to regulate the intra-provincial designated project itself from beginning to end.[109] If it did, that would be a back door route to the federal government's securing what amounts to exclusive jurisdiction over the environment and all intra-provincial activities. That is because where a conflict arises between federal laws and provincial laws, under the doctrine of paramountcy, the federal law would prevail.

[180] Were that to happen, the only way for the courts to preserve any vestige of provincial jurisdiction would be through the doctrine of interjurisdictional immunity. That would invariably turn division of powers disputes between the federal and provincial governments from an analysis of the pith and substance of challenged laws into a dispute about interjurisdictional immunity and its boundaries for every head of provincial power.[110] The preferable approach is for the courts to reaffirm the validity and utility of the pith and substance doctrine which has been the constitutional foundation for resolution of division of powers disputes for more than 120 years: ***Union Colliery Co. of British Columbia v Bryden***, [1899] AC 580 (PC).[111] That includes recognizing when the double aspect doctrine properly applies – and to what – and when it does not.

D. The POGG Power

[181] Section 91 of the *Constitution Act, 1867* confers on the federal Parliament the power "to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces...." Parliament's POGG power is residuary as it is expressly confined to matters not

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[108] Within a head of power means that the government has the power to enact laws coming within that head of power.

[109] As noted in ***Moses SCC*** at para 36: "The mining of non-renewable mineral resources aspect falls within provincial jurisdiction but the fisheries aspect is federal".

[110] We recognize that the doctrine of interjurisdictional immunity, which protects the exclusivity principle under the division of powers, may be viewed as subsumed in the pith and substance doctrine itself rather than independent of it. As noted in ***Desgagnés Transport*** at para 161, per Wagner CJ and Brown J (concurring), "the idea underlying the doctrine of interjurisdictional immunity is better understood not as an independent doctrine, but as a function of the pith and substance test, properly understood and applied".

[111] As the Supreme Court explained in ***Canada (Attorney General) v PHS Community Services Society***, 2011 SCC 44 at para 65, [2011] 3 SCR 134 [***Insite***] in seeking to narrow the reach of interjurisdictional immunity: "... in areas of overlapping jurisdiction, the modern trend is to strike a balance between the federal and provincial governments, through the application of pith and substance analysis and a restrained application of federal paramountcy."

coming within the classes of subjects assigned exclusively to the provinces. The POGG power includes different branches. One is the "national concern" branch.

[182] That branch was recently restated by the majority of the Supreme Court in ***References re Greenhouse Gas Pollution Pricing Act SCC*** in assessing the constitutionality of the *Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12, s 186 [*GGPPA*]. The federal statute established both a fuel charge on various types of carbon-based fuel and a pricing mechanism for greenhouse gas (GHG) emissions of certain industrial facilities in provinces determined to lack sufficiently stringent standards. A number of provinces challenged Parliament's authority to pass the legislation which Canada sought to justify solely on the basis of the "national concern" doctrine.

[183] The majority of the Supreme Court characterized the "pith and substance" of the *GGPPA* as "establishing minimum national standards of GHG price stringency to reduce GHG emissions": ***References re Greenhouse Gas Pollution Pricing Act SCC*** at paras 57, 80. It then applied this same characterization of the matter of the statute to its analysis of the proposed "matter" of "national concern" (paras 114, 119). The majority ultimately held that the *GGPPA* was *intra vires* Parliament on the basis of the "national concern" doctrine, concluding that establishing minimum national standards of GHG price stringency to reduce GHG emissions was a matter of national concern (para 207).

[184] Prior to that decision, the leading articulation of the national concern doctrine was a four-part test set out by Le Dain J in ***R v Crown Zellerbach Canada Ltd.***, [1988] 1 SCR 401 at 431-32 [***Crown Zellerbach***].[112] The majority in ***References re Greenhouse Gas Pollution Pricing Act SCC*** emphasized that "the test for finding that a matter is of national concern is an exacting one" (para 208) and that courts "must approach a finding that the federal government has jurisdiction on the basis of the national concern doctrine with great caution" (para 142). The majority restated the four-part test from ***Crown Zellerbach*** as a three-part test at paras 163-166:

> First, Canada must establish that the matter is of sufficient concern to the country as a whole to warrant consideration as a possible matter of national concern. This question arises in every case, regardless of whether the matter can be characterized as historically new. If Canada discharges its burden at the step of this threshold inquiry, the analysis will proceed.

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[112] "1. The national concern doctrine is separate and distinct from the national emergency doctrine of the peace, order and good government power, which is chiefly distinguishable by the fact that it provides a constitutional basis for what is necessarily legislation of a temporary nature; 2. The national concern doctrine applies to both new matters which did not exist at Confederation and to matters which, although originally matters of a local or private nature in a province, have since, in the absence of national emergency, become matters of national concern; 3. For a matter to qualify as a matter of national concern in either sense it must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution; 4. In determining whether a matter has attained the required degree of singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern it is relevant to consider what would be the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the intra-provincial aspects of the matter."

> Second, the court must undertake the analysis explained in *Crown Zellerbach* through the language of "singleness, distinctiveness and indivisibility". More important than this terminology, however, are the principles underpinning the inquiry. The first of these principles is that, to prevent federal overreach, jurisdiction based on the national concern doctrine should be found to exist only over a specific and identifiable matter that is qualitatively different from matters of provincial concern. The second principle to be considered at this stage of the inquiry is that federal jurisdiction should be found to exist only where the evidence establishes provincial inability to deal with the matter.
>
> If these two principles are satisfied, the court will proceed to the third and final step and determine whether the scale of impact of the proposed matter of national concern is reconcilable with the division of powers.
>
> The onus is on Canada throughout this analysis, and evidence is required. Where a proposed federal matter satisfies the requirements of all three steps of the framework, there is a principled basis to conclude that the matter is one that, by its nature, transcends the provinces and should be recognized as a matter of national concern.

[185] Importantly, the majority in ***References re Greenhouse Gas Pollution Pricing Act SCC*** did not expand the breadth of "national concern" any further than carbon pricing. In particular, it did not broaden Parliament's authority to include the regulation of GHG emissions generally. Accordingly, Parliament's jurisdiction under the "national concern" doctrine in relation to GHG emissions extends only to establishing minimum national standards of GHG price stringency to reduce GHG emissions, a point to which we return later.

E. Cooperative Federalism and Caution

[186] The courts adopted cooperative federalism as a means of accommodating overlapping jurisdiction and encouraging intergovernmental cooperation: ***References re Greenhouse Gas Pollution Pricing Act SCC*** at para 50; ***Genetic Non-Discrimination*** at para 22; ***First Securities Reference*** at para 57. It has been described as the "dominant tide" of modern federalism, which "finds its principled underpinning in the concern that a court should favour, where possible, the ordinary operation of statutes enacted by *both* levels of government": ***Canadian Western Bank*** at para 37, emphasis in original; see also ***Rogers Communications*** at para 38; ***Second Securities Reference*** at para 17.[113]

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[113] Courts will not generally interfere with cooperative regulatory schemes so long as they are compatible with the bounds of the Constitution: ***Second Securities Reference*** at para 18.

[187] However, cooperative federalism has its limits. It supports, but does not supplant, or modify, the division of powers: ***Second Securities Reference*** at para 18; ***References re Greenhouse Gas Pollution Pricing Act SCC*** at para 50. "The 'dominant tide' of flexible federalism, however strong its pull may be, cannot sweep designated powers out to sea, nor erode the constitutional balance inherent in the Canadian federal state": ***First Securities Reference*** at para 62. Cooperative federalism cannot be used to make an otherwise unconstitutional law a valid one: ***Rogers Communications*** at para 39; ***Second Securities Reference*** at para 18. Nor to impose limits on the otherwise valid exercise of legislative competence: ***Quebec (Attorney General)*** at para 19; ***Rogers Communications*** at para 39; ***Second Securities Reference*** at para 18. Nor to mandate cooperation where the division of powers authorizes one level of government to act unilaterally: ***Quebec (Attorney General)*** at para 20; ***Genetic Non-Discrimination*** at para 25.

[188] Further, where the two orders of government are at odds, reliance on cooperative federalism risks eroding the boundaries of provincial jurisdiction by favouring the federal government and centralization of authority: Eugenie Brouillet, "The Supreme Court of Canada: The Concept of Cooperative Federalism and Its Effect on the Balance of Power" in Nicholas Aroney & John Kincaid eds, *Courts in Federal Countries: Federalists or Unitarists?* (Toronto: University of Toronto Press, 2017) 135 at 156-159, 163; see also Asher Honickman, "Watertight Compartments: Getting Back to the Constitutional Division of Powers" (2017) 55:1 Alta L Rev 225 at 250-251 [Honickman].[114]

[189] To be effective, cooperative federalism must be grounded in mutual respect for the constitutional dividing lines and the recognition, and acceptance, by each government level of its own jurisdictional limitations. The concept is cooperative, not coercive, federalism.

XII. The First Stage: Characterization – What is the "Matter" of the *IAA*?

A. Introduction

1. The *IAA* – Two Acts in One

[190] The *IAA* is essentially two acts in one. One act, as reflected in ss 81 to 91 of the *Act*, covers activities within exclusive federal jurisdiction on federal lands or outside Canada that have not been designated as "designated projects" by the federal executive.[115] These activities are subject

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[114] To put it the way that Honickman has at 246, 250-251: "The concept of flexible federalism is more than simply extra-textual; it is *contra*-textual. It does not sit uncomfortably or even awkwardly with the text; it sits entirely apart.... [I]t is at least arguable that unfettered discretion serves as a *disincentive* for cooperation and is much more likely to produce federal domination by way of the paramountcy doctrine" (emphasis in original).

[115] Federal lands is defined in s 2 as "(a) lands that belong to Her Majesty in right of Canada, or that Her Majesty in right of Canada has the power to dispose of, and all waters on and airspace above those lands, other than lands under the administration and control of the Commissioner of Yukon, the Northwest Territories or Nunavut; (b) the following lands and areas: (i) the internal waters of Canada, in any area of the sea not within a province, (ii) the territorial sea of Canada, in any area of the sea not within a province, (iii) the exclusive economic zone of Canada, and (iv) the

to an entirely different impact assessment and regulatory regime than that which applies to "designated projects". No one has challenged ss 81 to 91. The second act, as reflected in the balance of this legislative scheme, covers all activities designated as "designated projects" by the federal executive.

[191] Including in this legislative scheme two distinct regimes, one of which is constitutionally *intra vires*, does not enhance the constitutionality of the other. Further, with respect to the second act, the environmental assessment of federal designated projects versus intra-provincial designated projects is manifestly distinct in ordinary legal and factual terms, let alone constitutional terms.

B. Purpose of the Legislative Scheme

1. Intrinsic Evidence of Purpose

a. Title

[192] A law's title, especially its long title, is an important form of intrinsic evidence since both titles are an integral part of the law: Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham, Ont.: LexisNexis Canada, 2014) at §14.13-§14.15. However, while a statute's title can be a useful tool for the purposes of characterizing its true subject matter, it is not determinative: ***References re Greenhouse Gas Pollution Pricing Act SCC*** at para 58.

[193] The full name of the *Act* is "*An Act respecting a federal process for impact assessment and the prevention of significant adverse environmental effects*". This reflects one of the focusses of the *Act*, namely the establishment of a federal impact assessment process.[116] The other key one, as evidenced by the substantive decision-making elements under the *Act*, is the establishment of a federal regulatory regime for all designated projects. Further, although the title refers to the "prevention of significant adverse environmental effects", as we explain later, the *Act* is not limited to preventing *significant* adverse environmental effects. Nor is it limited, when applied to intra-provincial designated projects, to preventing adverse effects within Parliament's jurisdiction.

b. Preamble

[194] Legislative bodies cannot through statutory recitals settle the classification of their own statutes for purposes of the division of powers: W. R. Lederman, *Continuing Canadian*

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continental shelf of Canada; and (c) reserves, surrendered lands and any other lands that are set apart for the use and benefit of a band and that are subject to the Indian Act, and all waters on and airspace above those reserves or lands. (territoire domanial)"

[116] Canada describes the review process as a "federal environmental assessment process to protect against adverse environmental effects". Alberta describes it as a "comprehensive impact assessment regime" requiring "a broad ranging assessment of ... impacts, environmental and other". Given the breadth of the assessment of the "effects" and "factors" contemplated under this legislative scheme, it is more accurate to describe the review as an "impact assessment" rather than the more restrictive "environmental assessment". That is also how it is described in the *Act* itself.

Constitutional Dilemma: Essays on the Constitutional History, Public Law and Federal System of Canada (Toronto: Butterworths, 1981) at 282. However, while the preamble of a statute is not conclusive, it can nevertheless be useful "to illustrate the 'mischief' the legislation is designed to cure and the goals Parliament sought to achieve": ***References re Greenhouse Gas Pollution Pricing Act SCC*** at para 59. Similarly, the preamble of the Bill enacting the challenged statute can also be helpful.

[195] The *Act* was enacted as part of Bill C-69. The preamble to Bill C-69 states:

> Whereas the Government of Canada is committed to implementing an impact assessment and regulatory system that Canadians trust and that provides safeguards to protect the environment and the health and safety of Canadians;
>
> Whereas the Government of Canada is committed to enhancing Canada's global competitiveness by building a system that enables decisions to be made in a predictable and timely manner, providing certainty to investors and stakeholders, driving innovation and enabling the carrying out of sound projects that create jobs for Canadians;
>
> Whereas the Government of Canada is committed to achieving reconciliation with First Nations, the Métis and the Inuit through renewed nation-to-nation, government-to-government and Inuit-Crown relationships based on recognition of rights, respect, co-operation and partnership;
>
> Whereas the Government of Canada is committed to using transparent processes that are built on early engagement and inclusive participation and under which the best available scientific information and data and the Indigenous knowledge of the Indigenous peoples of Canada are taken into account in decision-making;
>
> And whereas the Government of Canada is committed to assessing how groups of women, men and gender-diverse people may experience policies, programs and projects and to taking actions that contribute to an inclusive and democratic society and allow all Canadians to participate fully in all spheres of their lives;

[196] The first item in the preamble to Bill C-69 refers to implementing "an impact assessment and regulatory system" and protecting "the environment and health and safety of Canadians". The remaining items recite Canada's commitment to a wide range of other federal priorities, such as "enhancing global competitiveness", "driving innovation", creating "jobs", "achieving

reconciliation" and contributing to an "inclusive" society for women, men and gender-diverse people.

[197] The preamble of the *Act* itself also confirms that designated projects are to be assessed based on a similarly wide range of federal priorities.[117] It affirms Canada's commitment to "fostering sustainability", "ensuring respect for the rights of Indigenous peoples", "fostering reconciliation", and "implementing the United Nations Declaration on the Rights of Indigenous Peoples". It also affirms that "impact assessment contributes to Canada's ability to meet its environmental obligations and its commitments in respect of climate change" and it speaks of encouraging innovation to reduce adverse changes "to the environment and to health, social or economic conditions".

[198] Not only do such broad-ranging objectives in the preambles to both Bill-69 and the *Act* extend well beyond preventing significant adverse environmental effects, but, when applied to intra-provincial designated projects, many are not even linked to a federal head of power. Further, the preamble to the *Act* also recognizes that the *Act* extends beyond impact assessment and includes "decision-making processes related to designated projects".

c. Statutory Purposes of the *Act*

[199] While a statement of legislative intent is often a useful tool, courts "must nevertheless seek to ascertain the *true* purpose of the legislation, as opposed to its mere stated or apparent purpose": ***Canadian Western Bank*** at para 27, emphasis in original.

[200] The stated purposes of the *Act* set out in s 6(1) include "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": *Act*, s 6(1)(c). This expressly contemplates that the impact assessment will consider *all effects*, which includes "changes to the environment or to health, social or economic conditions and the positive and negative consequences of these changes", that *may be caused* by a designated project: *Act*, s 2. The rest of the purpose clause in s 6(1) focuses on other expansive federal considerations. The drift away from preventing *significant* adverse environmental effects when applied to intra-provincial designed projects is both manifest and extensive: enhancing "Canada's competitiveness", encouraging "innovation in

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[117] The *Act's* preamble includes the following: "Whereas the Government of Canada is committed to fostering sustainability; 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; ... 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 fostering reconciliation and working in partnership with them; Whereas the Government of Canada is committed to implementing the United Nations Declaration on the Rights of Indigenous Peoples; ... Whereas the Government of Canada recognizes that impact assessment contributes to Canada's ability to meet its environmental obligations and its commitments in respect of climate change; 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."

the carrying out of designated projects", creating "opportunities for sustainable economic development", and encouraging "the assessment of the cumulative effects of physical activities in a region".

[201] The stated purpose to consider *all effects* that may be caused by a designated project is echoed in the s 22 mandatory factors. These include "the changes to the environment or to health, social or economic conditions and the positive and negative consequences of these changes...": *Act*, s 22(1)(a). The balance of the s 22 mandatory factors focus on federal objectives and priorities, a number of which extend well beyond significant adverse environmental effects, and again, which are not, when applied to intra-provincial designated projects, all linked to federal heads of power.

2. Extrinsic Evidence of Purpose

[202] While statements made during parliamentary debate are to be viewed with caution, a statute's legislative history, including legislative debates, can nonetheless be helpful in discerning Parliament's purpose: ***References re Greenhouse Gas Pollution Pricing Act SCC*** at paras 62-68.

[203] The legislative debates on Bill C-69 confirm the intended breadth of the *IAA*. Before the Standing Committee on Environment and Sustainable Development, the Minister of Environment stated that "assessments will consider not just environmental impacts of projects, but also the social, health and economic impacts they may cause".[118] This theme was repeated throughout the debate on Bill C-69 including the Minister's introductory remarks on third reading where she said the Bill provided for "project reviews that consider a wide range of positive and negative impacts on the economy, health, indigenous rights, and communities, in addition to the environment ...."[119]

[204] The legislative debates also reveal that one of the objectives of the legislative scheme is to give the federal executive regulatory control over GHG emissions from whatever intra-provincial projects it chooses to include in the project list. Speaking before the Standing Committee on Environment and Sustainable Development, the Minister of the Environment confirmed that the criteria for creating the project list should include "an environmental threshold, including greenhouse gas emissions".[120] At second reading in the House of Commons, the Minister confirmed the importance of this federal government priority: "Under Bill C-69, it is clear that we will consider the impact projects will have on the climate. We also said that we wanted to conduct a strategic environmental assessment to ensure that the projects fit with the climate change action

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[118] House of Commons, Standing Committee on Environment and Sustainable Development, *Evidence*, 42-1, No 099 (22 March 2018) at 2 (Hon Catherine McKenna).

[119] "Bill C-69 An Act to enact the Impact Assessment Act and the Canadian Energy Regulatory Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts", 3rd reading, *House of Commons Debates*, 42-1, No 313 (12 June 2018) at 20775 (Hon Catherine McKenna).

[120] House of Commons, Standing Committee on Environment and Sustainable Development, *Evidence*, 42-1, No 099 (22 March 2018) at 16 (Hon Catherine McKenna).

plan."[121] Later, when the Minister was asked about the addition of *in situ* projects to the project list, she acknowledged that the federal government's proposed approach to *in situ* oil sand projects was based on "a cap on emissions".[122]

3. Conclusions Relating to Purpose of the *IAA*

[205] Together, the intrinsic and extrinsic evidence demonstrate that the purpose of the *IAA* is to establish a federal impact assessment and regulatory regime to review and regulate *all effects* of both federal designated projects and intra-provincial designated projects even though intra-provincial designated projects otherwise fall within exclusive provincial jurisdiction and even though all effects of intra-provincial designated projects, including GHG emissions therefrom, are not within federal heads of power.

C. Effects of the *IAA*

1. Introduction

[206] Attentively considered, the effects of the *IAA*, and here we are speaking of a legal term of art, reinforce its dominant purpose.[123] "The *effects* of a law are perhaps a more reliable guide to its constitutional validity than its apparent or stated intention. These effects may be legal ones such as effects on the rights or obligations of citizens; or practical ones, especially where there is reason to believe the enacting government may be attempting to do indirectly what it cannot do directly": ***Reference re Environmental Management Act (British Columbia)***, 2019 BCCA 181 at para 14, emphasis in original [***Environmental Management Act BCCA***], aff'd 2020 SCC 1.

[207] For an intra-provincial activity or class of activities to be designated as a "designated project" has serious negative consequences that flow immediately upon designation. The *IAA* triggers federal review of the "effects" of intra-provincial designated projects even where the federal government has no decision-making authority with respect to an intra-provincial designated project under other valid federal legislation. Further, Parliament has not limited the regulation of intra-provincial designated projects to effects actually within federal jurisdiction. And even where there are such effects, the regulation is not limited, as required under the division of powers, to the consequences, that is effects, of the subject project on a federal head of power.

[208] Instead, this regulatory regime mandates federal review of all effects of intra-provincial designated projects with no requirement that there be any established nexus with a federal head of

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[121] "Bill C-69 An Act to enact the Impact Assessment Act and the Canadian Energy Regulatory Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts", 2nd reading, *House of Commons Debates*, 42-1, No 264 (14 February 2018) at 17204 (Hon Catherine McKenna).

[122] The Senate, Standing Senate Committee on Energy, the Environment and Natural Resources, *Evidence*, 42-1, No 68 (2 May 2019) (Hon Catherine McKenna).

[123] Legal and practical "effects" of the *IAA* at law are different than the defined "effects" of a designated project under the *IAA*.

power. Put simply, Parliament has authorized the federal executive to regulate all intra-provincial designated projects from inception to completion.

[209] That this is so may be seen from an analysis of the legal and practical effects of the *IAA*.[124]

2. Legal Effects of the *IAA*

a. Designation and Public Interest Determination vis à vis Intra-Provincial Designated Projects Are Not Linked to Federal Decision-Making Authority

(i) Scope of the *IAA* and Designation of Designated Projects

[210] The intra-provincial activities swept into this assessment and regulatory regime are not limited to those likely to have adverse environmental effects on a matter within federal competence.

[211] The designated projects approach is a fundamental change from the *Guidelines Order* upheld as constitutional in ***Oldman River***. There the federal environmental review process was triggered by the *existence of a federal regulatory duty* with respect to a project.[125] *CEAA 1992* retained a similar trigger, though one broader in scope. An intra-provincial project was required to undergo an environmental assessment only where the federal government *issued a listed permit or authorization for that project*: *CEAA 1992*, s 5(1).[126] In other words, overall, the trigger under *CEAA 1992* can be understood as projects *requiring a federal decision*: Meinhard Doelle & Chris Tollefson, *Environmental Law: Cases and Materials*, 3rd ed (Toronto: Thomson Reuters, 2019) at 598-99.

[212] *CEAA 2012* changed the trigger for an environmental assessment by introducing the concept of a "project list".[127] But not all listed projects required an assessment under *CEAA 2012*.[128] If a provincial assessment was considered equivalent, that process was followed. The *Act*

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[124] While characterization and classification are distinct stages of a division of powers analysis, in assessing the *IAA*'s legal effects, it may be necessary, given the self-defined "effects within federal jurisdiction", to refer to the scope of certain federal heads of power in placing those legal effects in their proper context.

[125] The *Guidelines Order* required "all federal departments and agencies that have a decision-making authority for any proposal, i.e., any initiative, undertaking or activity that may have an environmental effect on an area of federal responsibility, to initially screen such proposal to determine whether it may give rise to any potentially adverse environmental effects": ***Oldman River*** at 17. A review by an environmental assessment panel was required if the proposal could have *significant adverse effects*.

[126] An environmental assessment was also required when the project was within exclusive federal jurisdiction, that is where the federal government proposed a project, provided financial assistance to a project, or where the project involved federal lands.

[127] Only projects listed by regulation or Ministerial order required an environmental assessment: see *CEAA 2012*, ss 2, 14(2), 84(a); *Regulations Designating Physical Activities*.

[128] The Agency made a separate "screening decision" to decide if an environmental assessment of the project was

is similarly "project-based" in that it uses a project list approach, rather than the existence of a federal decision-making responsibility, to trigger federal assessments.[129] However, as explained, from a division of powers perspective, the *IAA* is fundamentally different in scope than *CEAA 2012*. Nor was the constitutionality of that legislation ever challenged by a province.[130]

[213] The project list under the *Regulations* includes activities based on size, whether physical size or production output size. For example, a new all-season public highway that requires more than 75 km of new right of way (s 51) is included even though wholly within one province and within provincial jurisdiction as a local work or undertaking: *Constitution Act*, *1867*, s 92(10). While the highway would, if it crossed a provincial boundary, be within federal jurisdiction as an interprovincial undertaking under s 92(10)(a), the *Regulations* make no distinction between highways in these two constitutionally distinct categories.

[214] In addition, the federal government has added to the project list new project types otherwise within exclusive provincial jurisdiction and not previously subject to, or claimed to be subject to, a federal environmental assessment. That includes *in situ* oil sands extraction facilities with a bitumen production over a certain capacity which do not otherwise require a federal permit.

[215] The *Act* even gives the federal government the right to designate a project *after the physical activity has commenced*, unless the project "has substantially begun": *Act*, s 9(7)(a).[131] As a result, an intra-provincial designated project can be required to undergo the assessment and review process under the *IAA* after the project has completed a full environmental review, and been approved, by applicable provincial authorities, and after work on it has commenced, so long as the project has not *substantially begun*.

[216] Canada contends that the purposes of the *Act* constrain the Governor in Council's "regulation-making power to list designated projects to those likely to have adverse federal effects": Factum of the Attorney General of Canada at para 80.[132] However, the only limitations

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required: *CEAA 2012*, s 10.

[129] See Northey 2020 at 19. Like *CEAA 2012*, the *Act* also includes a "screening decision" in s 16 to "decide whether an impact assessment of the designated project is required". But this screening is lengthier since designated projects must also now undergo a newly added "planning phase" before the screening decision is undertaken: *ibid* at 20.

[130] One author noted the constitutional issues this raised. According to Northey at 245, "[S]ubsection 5(1) [of *CEAA 2012*] raises constitutional issues because it triggers some federal review of environmental effects, even where there is no federal regulatory decision-making. This approach appears to be inconsistent with *Oldman*. *Oldman* made it a principle of federal EA that its triggers needed to be tied to federal regulatory decision-making" (underline in original).

[131] *CEAA 2012* precluded the Minister from making the designation after the "activity has begun and, as a result, the environment has been altered": s 14(5)(a).

[132] Canada also points to the RIAS which states that the objective of the project list is to "capture those major projects with the greatest potential for adverse effects in areas of federal jurisdiction related to the environment, so that they can enter into the impact assessment process": *Regulatory Impact Analysis Statement*, (2019) C Gaz II, Vol 153, No 17, (*Physical Activities Regulations*, SOR/2019-285), online: <http://www.gazette.gc.ca/rp-pr/p2/2019/2019-08-21/html/sor-dors285-eng.html>[RIAS].

in the *Act* governing the exercise of the federal executive's regulation-making power to designate projects are contained in ss 6(2) and 6(3):

> 6(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.
>
> 6(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.

[217] These sections provide no direction and prescribe no criteria as to the nature of the intra-provincial activities that the federal executive can include as designated projects. Notably, the *IAA* contains no enforceable restriction limiting designation to those "likely to have *significant* adverse federal effects" or even "likely to have adverse federal effects". Regulations made under a statute must be consistent with the enabling statute and its overriding purpose and within the scope of, and subject to, the conditions prescribed by that statute: ***References re Greenhouse Gas Pollution Pricing Act SCC*** at para 87. However, that limitation does not meaningfully limit the federal executive's actions under this legislative scheme since its power to designate intra-provincial activities is essentially unconstrained given the *Act*'s stated purposes.

[218] In any event, the current project list speaks for itself. It confirms that the federal executive has been empowered to designate – and has – whatever intra-provincial activities it unilaterally decides to include in the project list. However, the federal government does not have a free-standing right to require an environmental assessment of every intra-provincial activity in this country that it wishes. It must have some valid decision-making authority over the activity itself apart from the environmental assessment.[133]

(ii) Need for Federal Decision-Making Authority Linked to Federal Head of Power

[219] In ***Oldman River*** at 47, La Forest J recognized the significance of, and rationale for, the existence of an affirmative regulatory duty to trigger the federal environmental review process:[134]

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[133] Even then, the environmental effects to be studied may be limited to those which may have an impact on the areas of federal responsibility affected, a point to which we return later.

[134] The project in ***Oldman River***, a dam, was said to trigger the *Guidelines Order* because the *Navigable Waters Protection Act* placed an affirmative regulatory duty on the Minister of Transport whose approval was required for any work *substantially interfering* with navigation. The Minister of Transport had granted the approval, subject to conditions, without subjecting the application to an assessment under the *Guidelines Order*.

> That is not to say that the *Guidelines Order* is engaged every time a project may have an environmental effect on an area of federal jurisdiction. *There must first be a "proposal" which requires an "initiative, undertaking or activity for which the Government of Canada has a decision making responsibility"....* In my view the proper construction to be placed on the term "responsibility" is that the federal government, *having entered the field in a subject matter assigned to it under s 91 of the Constitution Act, 1867, must have an affirmative regulatory duty pursuant to an Act of Parliament which relates to the proposed initiative, undertaking or activity. It cannot have been intended that the Guidelines Order would be invoked every time there is some potential environmental effect on a matter of federal jurisdiction*.[135] [Underline in original; italics added]

[220] Thus, ***Oldman River*** has been described as making it "a principle of federal [environmental assessment] that its triggers needed to be tied to federal regulatory decision-making" and that while federal assessment is "constitutionally justified in a stand-alone way as an information gathering process", it otherwise needed to relate to "specific headings of federal constitutional authority that had existing legislative and regulatory controls".[136]

[221] In ***Moses c Canada (Procureur général)***, 2008 QCCA 741 [***Moses CA***] (varied on other grounds in ***Moses SCC***), the Quebec Court of Appeal addressed what could appropriately trigger a federal environmental assessment, in that case under *CEAA 1992*. Quebec had argued that no environmental review was required for a fish permit under *CEAA 1992*; Canada contended that *CEAA 1992* had modified the environmental review process. The Quebec Court of Appeal concluded that *CEAA 1992* was broader in scope than the *Guidelines Order* in that it provided for an environmental review whenever a federal permit, license or approval was required for the purpose of enabling the project to be carried out. It stressed though at para 63:

> Even more fundamentally, it should be recalled that environmental statutes (shared jurisdiction) are constitutionally valid as long as they remain accessory to the exercise of a (federal or [provincial]) legislative jurisdiction and that, generally speaking, such statutes must be closely related to the jurisdiction to be exercised. In contrast, such statutes may not in themselves serve as a pretext to invade the jurisdictional field of another level of government.

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[135] La Forest J added at 48: "In my view the *Navigable Waters Protection Act* does place *an affirmative regulatory duty* on the Minister of Transport. Under that Act there is a *legislatively entrenched regulatory scheme* in place in which the approval of the Minister is required before any work that substantially interferes with navigation may be placed in, upon, over or under, through or across any navigable water" (emphasis added).

[136] Northey at 245-246.

[222] We do not agree that ***Moses CA*** eliminated the need for a federal decision-making authority as the trigger for a federal environmental assessment. What ***Moses CA*** said was that given the broader wording of *CEAA 1992*, which required an environmental assessment whenever there was a need for a federal permit, license or approval, that was sufficient to trigger the federal review process whereas under the *Guidelines Order*, that review was only required where there was a "positive obligation under federal legislation to regulate in relation to a proposed undertaking or activity": ***Moses CA*** at para 102.[137] This distinction flows from the different wording of the enabling legislation. What the Quebec Court of Appeal did not do is approve the validity of a federal environmental review of an intra-provincial activity absent a federal decision-making authority with respect to that activity under a federal head of power.

[223] Recently, in ***Attorney General of Quebec v IMTT-Québec inc.***, 2019 QCCA 1598, leave to appeal to SCC refused, 38929 (16 April 2020), the Quebec Court of Appeal again underscored the need for the existence of a decision-making authority under otherwise valid legislation as a trigger for environmental review by either level of government. It specifically endorsed at para 225 La Forest J's remarks in ***Oldman River*** about the need for an affirmative regulatory duty as being "just as applicable to provincial environmental impact assessment and review schemes, which will validly be applied only if the province has an affirmative constitutional regulatory duty with respect to the undertaking or activity in question". It then added at paras 226-227:

> *[A]n environmental assessment is not an end in and of itself. It is a decision-making tool. If a level of government has no decision-making jurisdiction with respect to a project or an activity, an environmental assessment carried out by that level of government would be futile. It would also be unconstitutional.* Thus, it is not the responsibility of the Government of Quebec to assess a project or activity under exclusive federal jurisdiction unless it must exercise decision-making authority over the project or activity under a constitutionally valid, applicable and operative provincial statute. The same principle applies to the federal government with respect to a project or activity under exclusive provincial jurisdiction. The equilibrium of Canada's constitutional order depends on it.
>
> *Consequently, one level of government cannot engage in an environmental assessment of a project unless the project requires the authorization of that government based on a constitutional power or unless the other level of government consents*. [Emphasis added]

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[137] It was this change in the scope of when an environmental review would be required that led to a different result from ***Oldman River*** vis à vis the *Fisheries Act*. La Forest J found at 49 that: "Whereas the Minister of Transport is responsible under the terms of the *Navigable Waters Protection Act* in his capacity as regulator, the Minister of Fisheries and Oceans under s. 37 of the *Fisheries Act* has been given a limited *ad hoc* legislative power which does not constitute an affirmative regulatory duty."

[224] Thus, a federal environmental assessment of an intra-provincial activity otherwise within exclusive provincial jurisdiction must be tied to a constitutional decision-making authority over that activity independent of the environmental assessment itself. Under the *Guidelines Order*, that authority was the existence of an affirmative regulatory duty. Under *CEAA 1992*, that authority was the requirement for a federal permit. These semantical distinctions are irrelevant. What is relevant is whether some federal decision-making authority exists with respect to the intra-provincial designated project, regardless of what it is labelled. The requirement for a decision-making authority under a valid and applicable federal statute independent of the environmental assessment evinces and establishes federal jurisdiction. The absence of such a decision-making authority demonstrates the opposite.

[225] Under this legislative scheme, the designation of an intra-provincial activity is not contingent on the existence of a federal decision-making authority over that activity.[138] Nor is the public interest determination. However, since there is no public interest determination head of power, that public interest determination, along with the imposition of conditions and decision statement relating thereto, must be linked to the exercise of a decision-making authority under a constitutionally valid and applicable federal statute. It is not.

[226] Parliament's failure to limit the *IAA* to intra-provincial designated projects that require a federal permit or some other decision-making authority under a federal head of power constitutes federal jurisdictional overreach.

b. Regulation of Any and All Effects of Intra-Provincial Designated Projects

[227] Instead of grounding review of impact assessments of intra-provincial designated projects in federal decision-making under federal heads of power, Parliament has imposed a review and regulatory regime based on *all the effects* of such projects. As a result, the *IAA* is not limited to the environmental effects of an intra-provincial designated project on a matter actually within federal competence.

[228] There are three aspects to this facet of federal overreach vis à vis intra-provincial designated projects. First, Parliament's self-defined "effects within federal jurisdiction" under the *Act*, as with the related "adverse effects within federal jurisdiction", are not all within federal jurisdiction. Second, the effects are not all validly linked to a federal head of power. In this regard, the legislative scheme regulates *all effects* of an intra-provincial designated project even though all are not sufficiently linked to any federal decision-making authority or are merely incidental to the exercise of a provincial head of power or are not even significant. Third, on top of this, the

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[138] We recognize that, in the absence of a pre-existing decision-making authority, legislation authorizing an environmental impact assessment of an intra-provincial activity could itself prescribe the scope of a decision-making authority under specific federal heads of power. Such legislation would need to specify the parameters of federal regulation of aspects of that intra-provincial activity on terms that would survive constitutional challenge. But the *IAA* contains no legislative regulations relating to fisheries, species at risk, migratory birds or "Indians, and Lands reserved for the Indians" with respect to intra-provincial designated projects. Parliament already has legislation on these subject matters.

public interest determination by the federal executive is not even limited to the "effects" of designated projects but also includes mandatory factors that themselves are not all validly linked to a federal head of power.

(i) Self-Defined "Effects Within Federal Jurisdiction" Are Not All Within Federal Jurisdiction

[229] When applied to intra-provincial designated projects, not all the self-defined "effects within federal jurisdiction" are within federal competence. It must be borne in mind that the starting point is that provincial Legislatures have primary jurisdiction over intra-provincial designated projects. Parliament's jurisdiction is limited to the effects of those projects on federal heads of power. Thus, Parliament has no constitutional right to regulate those projects from beginning to end. Federal regulation is restricted to the effects of those projects on actual federal heads of power.

[230] Take for example "a change to the environment that would occur in a province other than the one" where the intra-provincial designated project is being carried out: *Act*, s 7(1)(b)(ii). Given the broad sweep of this legislative scheme, that includes a change to the environment from GHG emissions from intra-provincial designated projects. Indeed, Canada asserts its right to control GHG emissions from those projects based on the national concern doctrine. But as we explain later, GHG emissions generally, and from intra-provincial designated projects in particular, do not fall within Parliament's jurisdiction.

[231] Another example – "any change occurring in Canada to the health, social or economic conditions of the Indigenous peoples of Canada": *Act*, s 7(1)(d). Again, as explained later, Parliament's jurisdiction under s 91(24), when applied to intra-provincial designated projects, does not include all changes caused by such projects to, for example, the economic conditions of an Indigenous group. Nor does it entitle Parliament to exercise wholesale regulatory control over intra-provincial designated projects on the basis of an impact resulting from "any change to the environment" from such projects on "the current use of lands and resources for traditional purposes": *Act*, s 7(1)(c)(ii).

(ii) Federal Jurisdiction Does Not Extend to Any and All Effects of Intra-Provincial Designated Projects

[232] Parliament has empowered the federal executive to use *any and all* effects, environmental and otherwise, from an intra-provincial designated project in deciding whether to make a positive public interest determination, that is whether the project is in the public interest. However, Parliament's attempt to use *all effects* of an intra-provincial designated project in regulating and prohibiting that project from proceeding cannot succeed. It runs counter to long-standing precedent and has far-reaching negative implications for federalism and the division of powers. Simply put, Parliament does not have the constitutional jurisdiction to regulate intra-provincial designated projects from inception to completion merely because they may, or will, have some effects on a matter otherwise within federal jurisdiction.

[233] First, the pith and substance of the federal legislation must be sufficiently connected to a federal head of power. Using the fisheries as an example, if the pith and substance of federal legislation is not sufficiently connected to protection of fisheries, it will not be valid: ***Fowler v The Queen***, [1980] 2 SCR 213 at 226 [***Fowler***].[139] In ***Fowler***, the Supreme Court characterized the impugned section of the *Fisheries Act*, RSC 1970, c F-14 as seeking to control certain kinds of operations not strictly on the basis they have deleterious effects on fish but, rather, on the basis that they might have such effects. It concluded at 226 that the broad prohibition, which was not linked to actual or potential harm to fisheries, was not necessarily incidental to the federal power to legislate in respect of sea coast and inland fisheries and was *ultra vires*.

[234] Under the *IAA* however, there is no requirement that the effects of an intra-provincial designated project must be linked to actual or likely harm to the fisheries (or another matter within a federal head of power) such that a federal permit would be required for the project to proceed. As noted, there is no requirement that an intra-provincial designated project even need a federal permit as an entry point into this assessment and regulatory regime. Thus, the "effects" from intra-provincial designated projects are not limited to "direct or incidental effects" that would, in turn, give rise to the need for a federal permit for the project. That is obvious from the *Act* which explicitly distinguishes between "direct or incidental effects" linked to a federal permit, which are within Parliament's jurisdiction and are addressed under s 8, and self-defined "effects within federal jurisdiction", which are not all within Parliament's jurisdiction and are addressed under s 7.

[235] In the result, this legislative scheme is not limited to protecting against adverse effects on matters within federal competence that would meet the constitutional test for federal regulation of aspects of intra-provincial designated projects.

[236] Second, even if the effects of an intra-provincial designated project are linked to a federal head of power, there is no requirement under this legislative scheme that the effects even be significant before the federal executive can deny a positive public interest determination and effectively end the project. Neither the impact assessment nor public interest determination and related decision-making elements are limited to protecting against *significant* adverse environmental effects as claimed in the long title of the *Act*.

[237] Prior to the *Act*, every version of federal environmental assessment legislation required that adverse effects on matters within federal jurisdiction be *significant* to warrant federal regulation of some aspect of the project. For example, the stated purposes of *CEAA 1992* included preventing

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[139] In ***Fowler***, the Supreme Court found a provision enjoining the deposit of slash, stumps or other debris into water frequented by fish *ultra vires* Parliament since it was not validly linked to any actual or potential harm to fisheries. But in ***Northwest Falling Contractors Ltd. v The Queen***, [1980] 2 SCR 292, the Supreme Court found a provision prohibiting the deposit of deleterious substances in any place where they might enter waters frequented by fish *intra vires* under s 91(12) of the *Constitution Act*, *1867*. La Forest J pointed out the distinction between these two cases in ***Oldman River*** at 68.

significant adverse environmental effects: *CEAA 1992*, s 4(1)(a).[140] And the first stated purpose in *CEAA 2012* was "to protect the components of the environment that are within the legislative authority of Parliament from *significant adverse environmental effects caused by* a designated project": *CEAA 2012*, s 4(1)(a), emphasis added.

[238] That purpose in *CEAA 2012* was reflected in its relevant substantive provisions. Under *CEAA 2012*, the federal government's decision whether to issue a positive decision statement and set out any conditions a proponent must meet was directly related to whether the proposed project was *likely* to cause *significant* adverse environmental effects and even if it did, whether those could nevertheless be "justified in the circumstances": *CEAA 2012*, ss 52-54. In other words, *CEAA 2012* essentially contemplated that a positive decision statement would be forthcoming if the project was *not likely* to cause *significant* adverse effects on a matter actually related to a federal head of power and even if it was likely to cause *significant* adverse effects, if it could nevertheless be justified in the circumstances. Accordingly, *CEAA 2012* had a materiality threshold (significant) for adverse federal effects built into it.[141]

[239] However, the *Act* includes no materiality threshold in the federal executive's public interest determination or decision statement relating thereto. Instead, under the *Act*, the requirement for a materiality threshold, significant adverse effects, is gone. It is now a stated purpose "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": *Act*, s 6(1)(b), emphasis added.[142]

[240] It is true that under s 28(3) of the *Act*, the Agency must set out in its Report the effects that are "likely to be caused by the carrying out of the designated project" and "the extent to which those effects are significant". And a review panel must do likewise under s 51(1)(d)(i)-(ii) of the *Act*. But the parameters for the public interest determination by the Minister or Governor in Council do not include a materiality threshold. While ss 60(1)(a) and 62 both require the Minister or Governor in Council to take into account the Report and the adverse federal effects indicated therein and to consider *the extent to which any adverse federal effects are significant* in making a public interest determination, there is *no requirement* that any purported adverse federal effects actually *be significant*. To the contrary. The explicit reference to considering the "extent" to which

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[140] The *Guidelines Order* did not contain a purpose provision. The stated purposes of *CEAA 1992* included considering projects in a precautionary manner and promoting sustainable development: *CEAA 1992*, s 4(1)(a)-(b).

[141] So too did *CEAA 1992*. It provided that the Minister "shall" issue an environmental assessment decision statement setting out the Minister's opinion whether the "project is or is not likely to cause significant adverse environmental effects": *CEAA 1992*, s 23(1)(a). It too contemplated that the responsible authority would permit the project to be carried out where it was not likely to cause significant adverse environmental effects or, even if it was likely to cause significant adverse environmental effects, where those effects could be justified in the circumstances: s 37(1)(a).

[142] Nor is there any requirement that there even be likely adverse effects before the Agency directs that an impact assessment proceed. The "possibility that the carrying out of the designated project *may cause adverse effects within federal jurisdiction or adverse direct or incidental effects*" is but one of the seven factors to be considered, and even this low standard is not a prerequisite: *Act*, s 16(2)(b), emphasis added.

adverse federal effects are "significant" makes it clear that they need not be significant. In other words, if the adverse federal effects are not significant, there is *no requirement* that the Minister or Governor in Council must make a positive public interest determination.[143]

[241] In the result, the *Act* allows the federal executive to stop any intra-provincial designated project whenever there are *any* adverse federal effects of that project on the components of the environment even where no federal permit is required and even where such effects are not even significant. This would include any adverse federal effects not prohibited under any existing federal law.

[242] Third, if the federal executive could prohibit an intra-provincial designated project from proceeding simply because its effects may have some impact on a matter within a federal head of power, this would negate a key element of the pith and substance doctrine. Under the pith and substance doctrine, one level of government may validly legislate on matters within its jurisdiction in a manner that causes incidental effects on matters within the jurisdiction of the other level of government: ***Canadian Western Bank*** at paras 28-29; Hogg at §15:5. Therefore, if the pith and substance of a law is within a head of power assigned exclusively to the provinces, the fact the law may have incidental effects – which could involve a "substantial impact" – on a head of power within exclusive federal jurisdiction is irrelevant for constitutional purposes: *ibid.*; ***General Motors of Canada Ltd. v City National Leasing***, [1989] 1 SCR 641 at 670 [***General Motors***]; ***Quebec (Attorney General)*** at para 32; ***Rogers Communications*** at para 37; ***Paul*** at para 14.

[243] It is equally irrelevant where a provincial law, authorizing, for example, a local work and undertaking on terms and conditions set by the provincial government, has incidental effects on something over which the federal government *does not have exclusive jurisdiction*, *namely the environment*. Almost every activity in life affects the environment in some way. "[E]nvironmental pollution alone is itself all-pervasive. It is a by-product of everything we do. In man's relationship with his environment, waste is unavoidable."[144] It would be ironic indeed if the federal government could use the "environment" to shove aside the power of provincial governments to authorize and regulate intra-provincial activities where the federal government could not use *incidental effects* of a provincial law on an *actual head of exclusive federal power* to do so. Thus, the fact a provincial law under which intra-provincial activities are authorized may have some incidental effects on the environment, which is not a federal head of power, but merely *related to a federal head of power*, is also constitutionally irrelevant.

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[143] The *IAA* appears to assume there will inevitably be effects which qualify as adverse federal effects. It fails to address what would occur if the Agency, review panel, Minister or Governor in Council after an assessment concluded there were no adverse federal effects from a designated project. The Agency (s 28(3)) and review panel (s 51(1)(d)) are directed to indicate the adverse federal effects in their respective Reports and appear to be required to submit those Reports even if no such effects are identified. The decision statement (s 65) does not contemplate a decision that there are no adverse federal effects. While it might be suggested it is "implied" that a decision statement would be issued with no conditions, it is telling that this prospect is not even contemplated.

[144] ***Crown Zellerbach*** at 455, per La Forest J.

[244] Were Parliament permitted to prohibit "all effects" on its heads of power flowing from an activity authorized by a provincial Legislature under valid provincial laws, that would effectively prohibit that authorized activity.[145] For example, if a federal law prohibiting "any effects" on banks were constitutionally valid, banking being within exclusive federal jurisdiction under s 91(15) of the Constitution, that could insulate banks from provincial taxation (upheld in ***Bank of Toronto v Lambe*** (1887), 12 App Cas 575 (PC)) and provincial rules for selling insurance (upheld in ***Canadian Western Bank***). This would defeat the principle that valid provincial legislation can authorize an activity which has incidental effects on matters within federal jurisdiction.

[245] To be clear, in regulating "all effects" of an intra-provincial designated project, Parliament is regulating the project itself. The effects of an intra-provincial designated project do not arise, nor exist, in a vacuum. They are tied to one thing and one thing only – the project itself. Substantively, this legislative scheme regulates not only effects, but the physical activity giving rise to the effects, that is the intra-provincial designated project. Of course, under the *IAA*, Parliament has not regulated every aspect of the project. But federal regulatory authority necessarily extends to the project itself since Parliament has given the federal executive the ultimate regulatory club – an effective veto over every intra-provincial designated project. That veto is the apex of regulation. It is evidenced by the necessity for a positive public interest determination by the federal executive before a proponent can effectively proceed with an intra-provincial designated project. No positive public interest determination equals no project.

[246] What Parliament has done under the *IAA* is to use what may well be no more than incidental effects of provincial legislation (under which such intra-provincial designated projects are authorized) on federal heads of power, or more problematic yet, incidental effects of provincial legislation on the environment, which is not a federal head of power, to justify legislation that directly invades provincial jurisdiction. This turns the incidental effects doctrine upside down.[146]

[247] Canada's submission that "any" potential effects on a matter within its jurisdiction justifies a full impact assessment and regulation of matters otherwise within provincial jurisdiction is also inconsistent with its position in ***Environmental Management Act BCCA***.[147] In that case, Canada challenged amendments to British Columbia's *Environmental Management Act*, SBC 2003, c 53. The purpose of that legislation was described at para 38 as "the protection of the environment, the health and well-being of British Columbians and their communities from the adverse effects of hazardous substances, and the implementation of the 'polluter pays' principle".

[248] Canada successfully argued the legislation was *ultra vires* to the extent it "would effectively lead to a situation of concurrent jurisdiction, contrary to the *exclusive* authority contemplated by the *Constitution Act*", with respect to an interprovincial undertaking subject to

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[145] And *vice versa*.

[146] We recognize that an authorized intra-provincial activity may well have effects on a federal head of power such that it requires a federal permit. But not all intra-provincial designated projects are in this category.

[147] This was unanimously upheld by the Supreme Court: 2020 SCC 1.

federal jurisdiction: para 3, emphasis in original. Canada contended the *National Energy Board Act*, RSC 1985, c N-7 and related statutes "constitute a comprehensive and integrated scheme for the regulation of interprovincial pipelines, and environmental protection is a key part of that scheme": *ibid*. While Canada sought to distinguish ***Environmental Management Act BCCA*** as legislation targeting the TMX pipeline, that was not the basis of the judgment of the British Columbia Court of Appeal. Indeed, that Court specifically indicated at para 97 that the impugned legislation was not colourable.

[249] Alberta, Saskatchewan and Ontario have each passed a "comprehensive and integrated scheme" for the regulation of local works and undertakings and the development of their natural resources. Environmental protection is a key part of each of their schemes. The *IAA* leads to concurrent jurisdiction with respect to intra-provincial designated projects otherwise subject to provincial jurisdiction under provincial heads of power.

[250] We would add this. If Parliament could validly exercise jurisdiction over matters otherwise within provincial jurisdiction because of "any effects" on federal matters, a provincial Legislature could presumably validly exercise jurisdiction over matters within federal jurisdiction because of "any effects" on provincial matters. The converse of the *IAA* would be provincial legislation authorizing the province to designate projects (including those which fall within federal jurisdiction such as an airport or inter-provincial pipeline) and subjecting them to a multi-year environmental review process to determine if there *might be any adverse effects on matters within provincial jurisdiction* and, in the meantime, prohibiting *any effects* unless the project is found to be in the public interest based on provincial priorities and policies. On this theory, a provincial government would be able to hold up construction of, for example, a new airport or inter-provincial pipeline for years pending completion of the review process to determine if the construction might have "any effects" on matters within provincial jurisdiction (such as wildlife or property and civil rights) and then, if it decided that the project was not in the public interest based on provincial policies and priorities, ultimately stop it from proceeding.

(iii) Public Interest Determination Is Not Limited to Purported Adverse Federal Effects

[251] In addition, in any event, the jurisdiction Canada claims is not even limited only to the purported adverse federal effects of intra-provincial designated projects. The *Act* requires that the mandatory factors must be taken into account in both the impact assessment and public interest determination phases of this legislative scheme. Section 63 of the *Act* provides that both the Report (which must consider the s 22 mandatory factors) and the s 63 mandatory factors must be taken into account in making a public interest determination.[148]

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[148] The Report must also take into account "any other matter relevant to the impact assessment that the Agency requires to be taken into account": *Act*, s 22(1)(t). This potentially expands the scope of a Report to an unlimited extent.

[252] However, several of the mandatory factors, when applied to intra-provincial designated projects, are not linked to a federal head of power. Take for example, the "need for the designated project": *Act*, s 22(1)(d). Whether an intra-provincial designated project is needed is for the provincial government to decide, not the federal government. Parliament has no head of power authorizing it to determine whether an intra-provincial designated project is "needed".

[253] Or take for example one of the s 63 mandatory factors, "the extent to which the designated project contributes to sustainability": *Act*, s 63(a). Sustainability is defined as "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": *Act*, s 2. While this is within Parliament's jurisdiction for federal designated projects, that is not so for intra-provincial designated projects. Parliament has no head of power giving it the right to authorize the federal executive to decide whether an intra-provincial designated project is in the public interest based on whether that project contributes to the social and economic well-being of the people of Canada.[149] And to effectively put an end to it if the federal executive decides it is not. Indeed, the very fact the federal executive is entitled to put on the public interest determination scale whether the intra-provincial designated project contributes to the well-being of the people of Canada refutes the assertion that the public interest determination for intra-provincial designated projects is not based on federal priorities and policies. It most assuredly is.

[254] Another example is s 63(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". Again, this does not fall within Parliament's jurisdiction when applied to intra-provincial designated projects.

[255] As a result, the scope of both the impact assessment and the public interest determination permit the federal executive to use not only "any effects" of an intra-provincial designated project but also the defined mandatory factors to regulate and ultimately stop an intra-provincial designated project from proceeding. This too constitutes federal jurisdictional overreach and is, by itself, fatal to this legislative scheme.

(iv) Conclusions

[256] Parliament's attempt to use "any effects" and an equally wide range of mandatory factors in its oversight and regulation of intra-provincial designated projects raises the very concern recognized by La Forest J in ***Oldman River*** at 71-72:

> I am not unmindful of what was said by counsel for the Attorney General for Saskatchewan who sought to characterize the *Guidelines Order* as a constitutional Trojan horse enabling the federal government, on the pretext of some narrow ground of federal

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[149] It is for the relevant provincial government or provincial authority to determine whether an intra-provincial designated project is in the best interests of the people of the province involved.

> jurisdiction, to conduct a far ranging inquiry into matters that are exclusively within provincial jurisdiction....
>
> Because of its auxiliary nature, environmental impact assessment can only affect matters that are "*truly in relation to an institution or activity that is otherwise within [federal] legislative jurisdiction*"....
> Moreover, where the *Guidelines Order* has application to a proposal because it affects an area of federal jurisdiction ... *the environmental effects to be studied can only be those which may have an impact on the areas of federal responsibility affected*. [Emphasis added]

[257] It is noteworthy that the Supreme Court's response to, and dismissal of, the Trojan horse concern was based on its conclusions that the environmental impact assessment *could only affect matters truly in relation to an activity otherwise within federal legislative jurisdiction* and that the environmental effects to be studied *can only be those which may have an impact on the areas of federal responsibility affected*. ***Oldman River*** was not therefore an endorsement of comprehensive federal environmental impact assessments of intra-provincial activities otherwise within provincial jurisdiction. To the contrary.

[258] Nor has the Supreme Court in any subsequent decision modified those conclusions from a constitutional perspective. We recognize that in ***Red Chris***, the Supreme Court determined that a federal authority was required to undertake a comprehensive study of a proposed project, rather than simply screening the project. But Rothstein J made it clear at para 27 that the issue before the Court was one of statutory interpretation: "The duty of this Court is to interpret the *Act* based on its text and context." The constitutionality of the legislation in question was not before the Supreme Court. ***Red Chris*** neither purported to, nor did it, overrule ***Oldman River*** regarding the scope of federal environmental impact assessments for intra-provincial activities.

[259] Duplication of comprehensive environmental impact assessments arguably creates a jurisdictional nightmare for proponents of intra-provincial designated projects. While their perspective is not relevant to the division of powers, what is relevant are the consequences potentially flowing therefrom for the provincial governments that would otherwise have exclusive jurisdiction over those projects, namely constitutional gridlock and improper intrusion into provincial jurisdiction. We appreciate the arguments in favour of comprehensive environmental impact assessments. However, while every activity in this country is subject to federal or provincial jurisdiction or sometimes both, there being no gap in constitutional powers, one government level typically has primary jurisdiction over an activity. For intra-provincial designated projects, that would be the provincial government. And since all provincial governments have comprehensive environmental impact assessment legislation in place, as a practical matter, the relevant provincial government can be counted on to conduct a comprehensive environmental impact assessment. Thus, as a further practical matter, that comprehensive assessment would be available to both government levels to use for its respective purposes.

[260] That said, given our view of the degree of federal jurisdictional overreach under this legislative scheme, we see no need to explore the issues relating to duplication of comprehensive environmental impact assessments. In particular, we do not find it necessary to consider whether the federal government has the jurisdiction to compel, as does this legislative scheme, a comprehensive impact assessment of every intra-provincial designated project even where the effects studied extend beyond the areas of federal responsibility affected by that project.

[261] One point is clear regardless. Parliament does not have the jurisdiction to take over the wholesale regulation of intra-provincial designated projects, especially in the absence of any actual decision-making authority with respect to those projects. Accordingly, it does not have the jurisdiction to authorize the federal executive to use all effects of an intra-provincial designated project, whether by themselves or in combination with the mandatory factors, to stop the project from proceeding if the federal executive decides the project is not in the public interest.

[262] It follows that we reject the contention that under this legislative scheme, Parliament has only regulated what it calls "adverse effects within federal jurisdiction". We have already explained why self-defined "effects within federal jurisdiction" do not all fall within federal jurisdiction regardless. Nor does adding the adjective "adverse" to the mix, as in "adverse effects within federal jurisdiction", change this conclusion. Since "adverse" is not even defined in the *Act*, this adjective includes any "adverse" environmental change no matter how insignificant it may be.[150] But "adverse" effects cannot be equated with the provable "harm" that would be required for those effects to actually fall within a federal head of power, for example fisheries. Moreover, the prohibitions under the *IAA* are not even tied to "adverse" effects. Those prohibitions apply irrespective of whether the effects of an intra-provincial designated project are positive, neutral, or adverse. Thus, the argument that under this legislative scheme, Parliament has regulated only "adverse" effects of intra-provincial designated projects "within federal jurisdiction", irrespective of what "adverse" actually means, is simply erroneous.

[263] We also reject the argument that this legislative scheme merely has an incidental effect on provincial powers. The problem here is not with the incidental effects of this legislative scheme; the problem is with its main thrust: ***First Securities Reference*** at para 129. This legislative scheme regulates intra-provincial designated projects from beginning to end. Further, even where the effects of an intra-provincial project truly affected a matter within one of Parliament's heads of power, its jurisdiction is limited to the *consequences of those effects on that head of power*. Parliament does not have jurisdiction over all effects, environmental and otherwise, of intra-provincial designated projects not linked at all, or not sufficiently linked, to federal heads of power, much less the right to authorize the federal executive to effectively veto all intra-provincial designated projects based on its unilateral determination that the project is not in the public interest.

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[150] Given the breadth of the definitions of "effects" and "effects within federal jurisdiction", every intra-provincial designated project will invariably have some "adverse effects within federal jurisdiction". In fact, this legislative scheme does not even contemplate what would occur if the Agency, review panel, Minister or Governor in Council concluded there were no such adverse effects.

[264] If Parliament had that kind of unbridled power, it would eviscerate provincial legislative competence. No federal head of power should be given a scope that would lead to this result: ***First Securities Reference*** at para 71; ***References re Greenhouse Gas Pollution Pricing Act SCC*** at para 49.

c. Prohibitions Under Section 7 and Federal Jurisdictional Overreach

[265] Section 7 imposes substantial prohibitions on the proponents of designated projects only. The proponent of a designated project, like the proponent of any other project in this country, is subject to all federal laws of general application, including all environmental prohibitions and regulations. Under those laws, necessary federal approvals or permits must be obtained to enable the project to proceed.

[266] The *IAA*, however, imposes *additional prohibitions* and *related sanctions* specifically and *exclusively* on the proponents of designated projects. Proponents of intra-provincial designated projects are prohibited from doing any act or thing that *may* cause *any* of the "effects" listed in s 7(1).[151] The result is that proponents of intra-provincial designated projects are prohibited from engaging in conduct that is permissible for others and which is not otherwise prohibited by laws of general application – and for which they alone are exposed to substantial penalties – unless and until a positive public interest determination is made.

[267] There were no prohibitions under the *Guidelines Order* which was procedural rather than substantive in nature.[152] Thus, project proponents were not subject to additional prohibitions not applicable to anyone else in Canada merely because they were the proponent of a project. Under *CEAA 1992*, a Minister could, by order, prohibit a proponent from doing any act or thing that would alter the environment: *CEAA 1992*, s 11.1(1). However, any prohibition under *CEAA 1992* was not automatic but rather required a positive action to make an order. Further, the prohibition applied only to acts or things that *would*, *not might*, alter the environment.

[268] *CEAA 2012* first introduced the concept of an automatic prohibition into federal environmental assessment legislation. It provided that a proponent of a project must not cause certain listed effects unless the project did not require an assessment or the proponent complied with conditions in a decision statement: *CEAA 2012*, s 6. As noted though, that scheme was fundamentally different in a number of crucial constitutional respects from this one and its constitutionality was never challenged by a province.

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[151] The prohibitions apply regardless of whether the effects are positive, neutral or adverse, material, actually linked to a federal head of power or have even been the subject of regulation under a federal head of power.

[152] As stated in ***Oldman River*** at 42: "The *Guidelines Order* establishes an environmental assessment process for use by all federal departments in the exercise of their powers and the performance of their duties and functions, whereas the *Fisheries Act* embraces the substantive matter of protecting fish and fish habitat. There is, of course, a connection between the two, but *the crucial difference is that one is fundamentally procedural while the other is substantive in nature*" (emphasis added).

[269] Contravening s 7 of the *Act* is a summary conviction offence, but subject to substantial penalties.[153] The maximum fine for contravening the prohibition under *CEAA 2012* ranged from $200,000 to $400,000: *CEAA 2012*, s 99(1). Under s 144 of the *Act*, the magnitude of fine has increased substantially and can now be up to $8 million per offence per day.[154] In addition, the *Act* makes any senior officer of a corporation, as defined in s 2 of the *Criminal Code*, who directed, authorized, assented to or acquiesced in the commission of the offence a "party to and guilty of the offence": s 147. It also imposes on every senior officer the obligation to "take all reasonable care to ensure that the corporation" complies with the *Act*: s 148.

[270] The result is that both the prohibited effects and offences under the *Act* are broader in scope, the personal jeopardy greater for senior officers of corporations and the fines prohibitive. It is understandable therefore why no senior officer of a corporation would ever proceed with an intra-provincial designated project without federal approval through a positive public interest determination and decision statement setting out the conditions for proceeding with that project.

[271] A review of the specific prohibitions under s 7(1) demonstrates the breadth of their legal effects and the extent to which they improperly trench on provincial powers.

(i) Prohibitions on Changes to Particular Components of the Environment

Changes to Fish and Fish Habitat and Aquatic Species

[272] Existing legislation under s 91(12) of the *Constitution Act*, *1867* regarding the fisheries addresses specific issues or concerns in relation to fish, fish habitat and aquatic species at risk. Both the *Fisheries Act* and *Species at Risk Act*, SC 2002, c 29 [*Species at Risk Act*] provide criteria, identify objectives and impose sanctions. The *IAA* contains no such provisions in relation to fish, fish habitat or species at risk. Instead, the proponent of a designated project is prohibited from causing any *change* to fish and fish habitat and aquatic species: *Act*, s 7(1)(a)(i) (fish and fish habitat), s 7(1)(a)(ii) (aquatic species). The legal effect of these sections is that the proponent of an intra-provincial designated project is prohibited from conduct that may cause any effects to fish, fish habitat and aquatic species even where Parliament has not seen fit to regulate or require a federal permit for the subject conduct.

[273] Where the true purpose is protection of fisheries, federal legislation will be valid despite having an incidental effect on property interests or development of natural resources in a province: ***Moses SCC*** at para 36. However, this legislative scheme is far removed from ***Moses SCC*** where the Supreme Court confirmed that while a vanadium mining project fell within provincial jurisdiction under s 92A, "a mining project anywhere in Canada that puts at risk fish habitat could

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[153] The minimum fine for a first offence and range for subsequent offences, respectively, is $5,000 and $10,000 to $600,000 for an individual; $25,000 and $50,000 to $4 million for a small revenue corporation; and $100,000 and $200,000 to $8 million for any other corporation: *Act*, s 144.

[154] Where offences are committed or continue on more than one day, that constitutes a separate offence for each day, meaning the fine can be imposed per day: *Act*, s 146(1).

not proceed without a permit from the federal Fisheries Minister, which he or she could not issue except after compliance with the *CEAA*." To repeat, the need for a federal permit is not a prerequisite to an intra-provincial activity being designated as an intra-provincial designated project under the *IAA*.

[274] Under the *IAA*, the proponent of an intra-provincial designated project is prohibited from doing any act that could have *any effect* on fish and fish habitat.[155] If Parliament added an offence to the *Fisheries Act* prohibiting any person from engaging in any conduct that could have *any effect* on fish or fish habitat, or passed a new law to this effect, both would, given ***Fowler***, be *ultra vires*. But the proponents of intra-provincial designated projects are subject to this very prohibition throughout the *IAA* process and indefinitely unless the federal executive makes a positive public interest determination. The fact the prohibition is subsumed in the *IAA* as part of an even more expansive prohibition does not make it any less unconstitutional. Proponents of designated projects alone are prohibited from engaging in conduct which is permissible for everyone else based on a prohibition that would be *ultra vires* Parliament had it directly regulated such conduct by a law of general application.[156]

[275] For example, s 92A(1)(c) of the *Constitution Act*, *1867* provides that provinces have exclusive jurisdiction to make laws in relation to the "development, conservation and management of sites and facilities in the province for the generation and production of electrical energy". A new intra-provincial hydroelectric generating facility is a designated project and subject to the *IAA* unless it has a production capacity of less than 200 MW: *Regulations* Schedule, s 42(a). The proponent of a new hydroelectric generating facility below the 200 MW threshold (and not therefore included as a designated project) could cause adverse effects on fish or fish habitat to the extent they were not otherwise prohibited or regulated under the *Fisheries Act*. But a proponent of a new hydroelectric generating facility with a capacity of 200 MW or more which would cause *less significant adverse effects* on fish or fish habitat (for example, because it employed more sophisticated technology) could be indefinitely prohibited from proceeding based on a determination by the federal executive that the project was not, despite those lesser effects, in the "public interest". The result – proponents of intra-provincial designated projects can be indefinitely prohibited from causing the same or lesser adverse effects on the environment than are permitted to be caused by similar non-designated projects.

[276] The differing consequences underscore the federal overreach and demonstrable lack of connection of the *IAA* to a federal head of power. They reveal that the true purpose of the *IAA* is not to prevent adverse environmental effects on matters actually within federal jurisdiction but

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[155] Currently, the *Fisheries Act* prohibits any person from carrying on any work, undertaking or activity "other than fishing, that results in the death of fish" (s 34.4(1)) or "that results in the harmful alteration, disruption or destruction of fish habitat" (s 35(1)), subject to specified exceptions including the issuance of a permit by the Minister.

[156] This is an example of "effects" that fall within the scope of the self-defined "effects within federal jurisdiction" for purposes of the *Act* but are not sufficiently linked to a federal head of power and thus are not effects within federal jurisdiction for purposes of the Constitution.

rather to regulate intra-provincial designated projects and veto those which the federal executive does not consider to be in the public interest – based on federal priorities and policies.

[277] Parliament does not have exclusive jurisdiction over every effect on every fish caused by an intra-provincial designated project in Canada; its head of power is over the fisheries. That means *regulation of the fisheries* through preservation of fish and their environment: Hogg at §30:26. Hence, the mere fact there may be an "effect" of an intra-provincial designated project on some fish somewhere does not, by itself, entitle the federal executive to "prohibit" that project from proceeding where the project does not otherwise require a federal permit under valid federal legislation.

Changes to Migratory Birds

[278] Canada relies on its jurisdiction under s 132 of the *Constitution Act, 1867* to anchor the prohibition in s 7(1)(a)(iii) relating to designated projects that cause, or may cause, any effects on migratory birds and the ability of the federal executive to decide whether intra-provincial designated projects which have *any* adverse effects on migratory birds should be allowed to proceed. Section 132 provides that:

> The Parliament and Government of Canada shall have 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*. [Emphasis added]

[279] The treaty Canada relies on is the 1916 *Convention for the Protection of Migratory Birds in Canada and the United States* made between the British Empire and the United States which was implemented in *The Migratory Birds Convention Act*, SC 1917, c 18. A later amendment to the Convention was implemented in the *Migratory Birds Convention Act*, *1994*, SC 1994, c 22 [*Birds Act*], which is referenced in s 7(1)(a)(iii) of the *Act*.[157] The *Birds Act* contains broad prohibitions against being in possession of a migratory bird or nest, or making them subject to a commercial transaction without lawful excuse: s 5. Similarly, no person or vessel (broadly defined as a boat, ship, etc.) can deposit (broadly defined as discharging, spraying, releasing, etc.) a substance that is *harmful to migratory birds* in "waters or an area frequented by migratory birds or in a place from which the substance may enter such waters or such an area": s 5.1(1).[158]

[280] The *Birds Act* also confers broad authority on the Governor in Council to "make any regulations" considered "necessary to carry out the purposes and provisions" of the *Birds Act* and

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[157] The Convention was amended by 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" signed on December 14, 1995. See Factum of the Attorney General of Canada at paras 113-116.

[158] Other prohibitions include destroying information or documents required under the Act: s 5.2.

Convention, including providing time periods and areas in which migratory birds can be captured, killed or taken, their nests can be damaged, destroyed, etc., or become subject to a commercial transaction: s 12(1)(a)-(d).[159]

[281] The prohibition in s 7(1)(a)(iii) suffers from the same defects as a law that prohibits "any effects" on fish. The constitutionally impermissible over-breadth of this prohibition is demonstrated by its application to intra-provincial designated projects that may cause *any effects* on migratory birds regardless of whether those effects are material or the subject of prohibitions under the *Birds Act* or whether the project even requires a permit under the *Birds Act*.

(ii) Prohibitions on Changes on Federal Lands, Outside the Province or Outside Canada

[282] The proponent of a designated project is prohibited from doing any act or thing that *may* cause any changes to the environment that would occur on federal lands (*Act*, s 7(1)(b)(i)) or in a province other than the one in which the act or thing is done (*Act*, s 7(1)(b)(ii)) or outside Canada (*Act*, s 7(1)(b)(iii)).

[283] Canada suggests that this type of regulation is not new and that *CEAA 1992* permitted the Minister to refer a matter for environmental assessment if of the opinion that the project could cause significant adverse environmental effects in another province. However, the *Act* is not limited to significant adverse environmental effects that occur in another province since s 7(1)(b)(ii) prohibits any change to the environment that would occur outside a province regardless of its materiality.[160]

[284] What Parliament is attempting to do is use any possible change to the environment – that would be anything in the entire biosphere given the definition of environment – on federal lands or outside the province or outside Canada from an intra-provincial designated project wholly within a province to justify regulation of that project.[161] Again, this is no more constitutionally valid than a law that prohibits any effects on banks or fish.

Why the National Concern Doctrine Does Not Include Regulation of GHG Emissions

[285] Canada defends the prohibitions in s 7(1)(b)(ii)-(iii) on the basis of the national concern doctrine. Parliament's regulation of effects from intra-provincial designated projects that occur outside the province in which the project is located or outside Canada does not satisfy the three-part

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[159] Regulations may be made "for granting permits to remove or eliminate migratory birds or nests where it is necessary to do so to avoid injury to agricultural interests or in any other circumstances set out in the regulations" and "respecting the issuance, renewal, revocation and suspension of permits": s 12(1)(e)-(f).

[160] *CEAA 1992* and *CEAA 2012* were significantly different in key constitutional respects from the *IAA*.

[161] "Environment" is defined under s 2 of the *Act* as meaning "the components of the Earth, and includes (a) land, water and air, including all layers of the atmosphere; (b) all organic and inorganic matter and living organisms; and (c) the interacting natural systems that include components referred to in paragraph (a) and (b)".

test under the national concern doctrine.[162] In particular, in neither of these cases does the matter have a "scale of impact on provincial jurisdiction that is reconcilable" with the division of powers: ***References re Greenhouse Gas Pollution Pricing Act SCC*** at para 160. This legislative scheme fails this third part of the test.[163]

[286] Parliament's primary target and claimed entry point into regulation of intra-provincial designated projects is patent – GHG emissions. The federal government has made no attempt to conceal its intention on this front. As noted, Parliamentary debates expressly acknowledged GHG emissions as a consideration in developing the project list. This goal – regulation of GHG emissions – is also reflected in the mandatory factors that *must* be taken into account in the impact assessment of a designated project. Under s 22(1)(i), the factors include "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". It is also an explicit mandatory consideration in the federal government's public interest determination: *Act*, s 63(e). And it is reflected as well in ss 32-33 of the *Regulations* Schedule which exempts *in situ* oil sands facilities in a province from the project list *if*, *but only if*, that province has legislated GHG emission limits on oil sands sites.

[287] What this reduces to is this. Where a proposed intra-provincial project in a province would emit any GHG emissions – *and that would necessarily include every proposed intra-provincial project in every province* – Parliament claims the unilateral right to decide whether it will, or will not, designate that project and, more important, if designated, whether that project will, or will not, proceed. That is the legal effect of s 7(1)(b)(ii)-(iii). Again, this constitutes federal jurisdictional overreach.

[288] This is just another way of Parliament's seeking to do indirectly what it does not have the constitutional right to do directly under the division of powers. That is to regulate GHG emissions generally in a province or in individual intra-provincial designated projects, or category thereof, in that province. We do not suggest this legislative scheme is colourable. Colourable legislation rests on the premise that the true motive of the legislation is something other than its stated purpose.

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[162] The matter must be (1) "of sufficient concern to the country as a whole to warrant consideration as a possible matter of national concern"; (2) "a specific and identifiable matter that is qualitatively different from matters of provincial concern" and where there is "provincial inability to deal with the matter"; and (3) the scale of impact must be "reconcilable with the division of powers": ***References re Greenhouse Gas Pollution Pricing Act SCC*** at paras 163-165.

[163] As noted in ***References re Greenhouse Gas Pollution Pricing Act SCC*** at para 133: "[A]n onus rests on Canada throughout the national concern analysis to adduce evidence in support of its assertion of jurisdiction." The *GGPPA* satisfied the third part of the test because the federal backstop feature only applied where specific provincial deficiencies existed. Conversely, the *IAA* allows the federal executive to effectively veto an intra-provincial designated project despite a province's full impact assessment, approval and regulation of that project. Canada led no evidence to meet the second part of the test either. Regulating the effects of intra-provincial designated projects, including their GHG emissions, is not qualitatively different from matters of provincial concern, nor is there provincial inability to deal with the same.

But there is no hidden motive in this legislative scheme. Everything is there in plain sight – if one is prepared to look.

[289] All three appellate courts that heard the Greenhouse Gas References concluded that the federal government did not have the constitutional jurisdiction to regulate GHG emissions in a province.[164] The appellate courts split on whether carbon pricing involved that degree of control. This Court found it did; the other two appeal courts, Ontario and Saskatchewan, found it did not. Although the Supreme Court held it was constitutional under the national concern doctrine for Parliament to establish minimum national standards for GHG pricing stringency, it did not extend Parliament's power under the national concern doctrine to regulation of GHG emissions generally: ***References re Greenhouse Gas Pollution Pricing Act SCC*** at paras 168, 199. Therefore, while Parliament has the right to regulate GHG emissions for any industry or enterprise in a province over which it has exclusive jurisdiction, it does not have the right under the national concern doctrine to regulate GHG emissions generally within a province including from intra-provincial designated projects approved by that province, much less stop such projects from proceeding.

[290] Lest there be any doubt about Parliament's intentions to regulate GHG emissions from intra-provincial designated projects, numerous aspects of the *Act* are directed to exactly that: *Act*, s 22(1)(i); s 63(e). Equally patent is that Parliament has given the federal executive the authority to use the GHG emissions from an intra-provincial designated project to deny the project a positive interest determination, thereby effectively vetoing it. For example, the federal executive may make a negative public interest determination if it concludes that the effects of the intra-provincial designated project hinder Canada's ability to meet its climate change commitments: *Act*, s 63(e).[165] Or if its effects involve a change to the environment that would occur in a province outside the one in which the project is located: *Act*, s 7(1)(b)(ii). That would necessarily mean all intra-provincial designated projects since GHG emissions, unless fully captured, escape into the atmosphere.

[291] That the regulation of GHG emissions from intra-provincial designated projects falls squarely under specific provincial heads of power is undeniable. The very fact this legislative scheme exempts *in situ* projects from the project list where a province has a plan in place to limit GHG emissions within its province is proof of that. That exemption is premised on the provinces' jurisdiction to regulate GHG emissions in their own provinces on those subject to their jurisdiction.[166] Nor does this legislative scheme become constitutionally permissible because it authorizes the federal executive to control GHG emissions project by project rather than overall in a province.

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[164] ***Reference re Greenhouse Gas Pollution Pricing Act***, 2019 SKCA 40 at paras 127-138; ***Reference re Greenhouse Gas Pollution Pricing Act***, 2019 ONCA 544 at paras 73-74; ***Reference re Greenhouse Gas Pollution Pricing Act***, 2020 ABCA 74 at para 198.

[165] This is also to be considered in the Report: *Act*, s 22(1)(i).

[166] GHG emissions can be readily identified and thus regulated at source by the applicable provincial government.

[292] It is evident from the *Act* that if the GHG emissions from a given intra-provincial designated project or province in which it is located exceed whatever the federal government deems acceptable in the moment, the federal executive can use this as a reason for making a negative public interest determination. Satisfy the federal executive on these matters and the proponent may succeed. But if, for example, the intra-provincial designated project exceeds the GHG emissions that the federal executive is prepared to accept and a negative public interest determination is made, the result is an effective end to the project. Could it be any clearer that Parliament claims the right under this legislative scheme to regulate GHG emissions both in individual intra-provincial designated projects and thus in individual provinces? We think not.

[293] If Parliament had this power under the national concern doctrine, the consequences for the division of powers and provincial autonomy would be fatal to both. Why? That degree of federal power is so pervasive that it would effectively absorb the entire catalogue of provincial powers and unwind federalism. Virtually everything we do on this planet produces GHG emissions. If Parliament had regulatory control over GHG emissions generally, there would be almost no aspect of a province's economy and the daily lives of the citizens of a province into which it could not intrude. Indeed, it is hard to imagine what aspects of the economy and daily life would be left for provincial Legislatures.[167]

[294] To bring this down to reality, there are several ways GHG emissions could be reduced. A few examples, which admittedly are at one end of the extreme, for illustrative purposes only. Limit the number of children per family.[168] Stop eating beef and become vegetarian. Stop drinking dairy milk. Stop living in single family homes. Limit the square footage a person, couple or family can occupy. Stop heating homes above a prescribed temperature and stop cooling homes below a prescribed temperature. Stop using gas appliances. Stop driving vehicles that cannot achieve a stringent mileage level per litre. Stop driving vehicles of any kind. Stop taking holidays that involve leaving home by plane, car or bus. Stop eating as much. Stop spending as much on consumer goods. Shut down all cruise vessels and all plane travel for pleasure. Shut down the dairy and cattle industry. Shut down all cement plants. Shut down the auto industry and aerospace industry. Shut down all electrical power generation plants. Shut down the production and export of coal. And shut down the entire Canadian oil and gas industry.

[295] We recognize that some favour this last option and oppose any further development of oil and gas resources in this country. Even though Canada continues to import hundreds of millions of barrels of oil annually. And even though countries such as Norway, with its strong environmental record, rush to exploit oil and gas resources in recognition of the obvious: if this is

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[167] As explained in W. R. Lederman, "Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation" (1975) 53:3 Can Bar Rev 597 at 610-611: "If 'labour relations' were to be enfranchised as a new subject of federal power by virtue of the federal general power, then provincial power and autonomy would be on the way out over the whole range of local business, industry and commerce as established to date under the existing heads of provincial power. The same point can be made about environmental pollution or economic growth ... as unitary legislative subjects."

[168] Some believe there is no greater threat to climate change than continued expansion of the world's population.

not done with urgency, these resources will become stranded assets. While some may prefer not to hear this, the inconvenient fact is that Canada will continue to require oil and gas to meet the daily needs of Canadians for years, measured in double digits, if not three or possibly four decades, into the future. And so too will other democratic nations. Moreover, in our fractured world today, energy security is vital to this country's national security and that of other democratic nations.

[296] Decisions as to how, where and when to reduce GHG emissions are inherently, and undeniably, political. This is about making political choices. While Parliament has the right to make those choices for matters within its exclusive jurisdiction, it does not have the right under the national concern doctrine to do so for matters falling within exclusive provincial jurisdiction. Under Canada's Constitution, those choices are for provincial Legislatures.

[297] Nor does Parliament possess a general treaty-making power. As noted in ***Attorney-General for Canada v Attorney-General for Ontario***, [1937] AC 326 at 351 [***Labour Conventions***] in the context of the division of powers in ss 91 and 92: "there is no such thing as treaty legislation as such". As explained by Hogg at §11:12: "The result of the Labour Conventions case is that the federal Parliament has the power to implement 'Empire treaties' under s. 132, but no power to implement Canadian treaties under s. 132". Not only is there no freestanding treaty implementation power under s 91 of the *Constitution Act, 1867*, there is no "international accord" or "international undertaking" implementation power either. Accordingly, Parliament cannot impose on the provinces international accords or undertakings which do not even have the status of treaties through legislation relating to matters allocated to provincial Legislatures – including the regulation of intra-provincial activities and emissions therefrom and the development of a province's natural resources.[169]

[298] Canada also relies on ***Interprovincial Co-operatives Ltd. et al v R***, [1976] 1 SCR 477 [***Interprovincial Co-operatives***] and ***Crown Zellerbach*** in support of its claim that it has the power under the national concern doctrine to regulate any change to the environment that occurs in one province from an intra-provincial designated project in another province (*Act*, s 7(1)(b)(ii)). It similarly claims authority to regulate changes to the environment that occur outside Canada from an activity in a province (*Act*, s 7(1)(b)(iii)), that is the extra-territorial effects of an intra-provincial designated project, in reliance on ***Reference re Newfoundland Continental Shelf***, [1984] 1 SCR 86 [***Newfoundland Continental Shelf***].

[299] None of these cases support such a broad extension of the national concern doctrine. ***Interprovincial Co-operatives*** held that Manitoba legislation that purported to regulate the dumping of mercury in rivers in Saskatchewan and Ontario which flowed into Manitoba was beyond provincial jurisdiction.[170] ***Crown Zellerbach*** upheld a federal law which prohibited

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[169] We recognize that the existence of international agreements can be relevant to the national concern analysis since they "may in some cases indicate that a matter is qualitatively different from matters of provincial concern": ***References re Greenhouse Gas Pollution Pricing Act SCC*** at para 149.

[170] One takeaway from this case was the majority's recognition that one province could not, by its laws, require the shutting down of plants approved and operated in another province in compliance with the laws of that other province.

dumping of toxic substances in marine waters, including provincial marine waters, under the national concern doctrine. ***Newfoundland Continental Shelf*** concluded that Newfoundland did not have jurisdiction over the continental shelf.

[300] Those cases are readily distinguishable from this case. When it comes to intra-provincial designated projects, the relevant province is regulating an intra-provincial activity located within its province; it is not purporting to regulate extra-provincial conduct. Further, the fact provincial legislation may have an incidental effect beyond its boundaries does not violate territorial limitations on provincial legislative competence: ***Global Securities Corp. v British Columbia (Securities Commission)***, 2000 SCC 21 at paras 23-24, 38, [2000] 1 SCR 494; ***British Columbia v Imperial Tobacco Canada Ltd***, 2005 SCC 49 at para 28, [2005] 2 SCR 473.[171]

(iii) Prohibitions on Matters Affecting Indigenous Peoples of Canada

[301] Section 7(1)(c) prohibits the proponent of a designated project from doing any act or thing that may cause, with respect to the Indigenous peoples of Canada, an impact resulting from *any change in 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". Section 7(1)(d) prohibits *any act or thing* that may cause "any change ... to the health, social or economic conditions of the Indigenous peoples of Canada". When applied to intra-provincial designated projects, these provisions too constitute federal jurisdictional overreach.

[302] First, there is no materiality threshold in either prohibition; both apply to *any* change, even positive change. Further, unlike ss 7(1)(a), (b) and (c), the prohibitions in s 7(1)(d) need not even result from a "change to the environment" but apply to "any change occurring in Canada to the health, social or economic conditions of the Indigenous peoples of Canada". This expands the scope of this prohibition to an almost unlimited extent. Moreover, since these prohibitions apply to any changes, that is "any effects", they suffer from the same overreach identified earlier vis à vis Parliament's claimed jurisdiction over all effects from intra-provincial designated projects.[172]

[303] Second, Canada's claimed jurisdiction over *any effects* of any intra-provincial designated project as it relates to Indigenous peoples resulting, for example, from any change to the "environment" that has an impact on "the current use of lands and resources for traditional purposes" or any change "to the health, social or economic conditions of the Indigenous peoples of Canada" contradicts the fundamental principle that provincial laws of general application apply

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[171] Similarly, as explained in ***Reference re Upper Churchill Water Rights Reversion Act***, [1984] 1 SCR 297 at 332: "Where the pith and substance of the provincial enactment is in relation to matters which fall within the field of provincial legislative competence, incidental or consequential effects on extra-provincial rights will not render the enactment *ultra vires*."

[172] This goes beyond what was authorized in ***Oldman River***. "The dam on the Oldman River had an effect on navigable waters, fisheries and lands reserved for the Indians (there was an Indian reserve downstream from the dam site). These effects justified a wide-ranging environmental assessment encompassing the impact of the dam on those three subject matters": Hogg §30:32.

to "Indians, and Lands reserved for the Indians".[173] The *IAA* improperly extends Parliament's reach to "effects" of intra-provincial designated projects on Indigenous peoples from *outside* reserve lands where those effects have to do with them *as people and residents of the subject province* and are not related to their "Indianness". Parliament does not have the power under s 91(24) to exempt "Indians" and the lands on which they live from provincial laws of general application: compare ***Siksika Health Services v Health Sciences Association of Alberta***, 2019 ABCA 494 at para 39, 99 Alta LR (6th) 73.

[304] If Canada were correct that Parliament's jurisdiction over "Indians, and Lands reserved for the Indians" extended to any "effects" (as Parliament has self-defined them) from any intra-provincial designated project on "the health, social or economic conditions" of the Indigenous peoples of Canada or on any change to the "environment" that has an impact on "the current use of lands and resources for traditional purposes" by the Indigenous peoples of Canada, there would be virtually no intra-provincial activity in this country that would be free of federal oversight, regulation and veto since the Indigenous peoples of Canada populate the landscape across this country and are involved in all dimensions of Canadian society. Under this theory, provincial jurisdiction over intra-provincial activities would be rendered meaningless.

[305] Third, through this legislative scheme, Parliament has done something else it has no jurisdiction to do under the division of powers. That is to convert Aboriginal and treaty rights under s 35 into a veto by the federal executive. Parliament has done so by giving the federal executive the right to effectively veto an intra-provincial designated project. But where Aboriginal and treaty rights are engaged with respect to an intra-provincial designated project, Parliament does not have the constitutional right to second guess a provincial government's compliance with its duty under s 35.

[306] Assume that a province, in compliance with the province's constitutional obligations, enters into an agreement either directly with an Indigenous entity respecting an intra-provincial designated project that the Indigenous group regards as beneficial and in its interests or with the Indigenous entity and the proponent of the project. Under the *IAA*, that project can be sidelined indefinitely and ultimately terminated through a negative public interest determination by the federal executive. For those detailed provincial obligations, Canada would substitute its assurance to the Indigenous entity that what Parliament is doing under the *IAA* is in its interests in light of their legislative power relating to "Indians, and Lands reserved for the Indians". In such circumstances, the rug would have been pulled out from under the exercise of provincial legislative and constitutional authority to (a) authorize the intra-provincial designated project and (b) enter into an agreement with the Indigenous entity and, if applicable, proponent in question. The provincial Crown would have honoured its relationship with the Indigenous entity, but it would be worth nothing to them.

[307] Parliament's jurisdiction under s 91(24) does not include subjecting any agreement involving the provincial government and an Indigenous entity with respect to an intra-provincial

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[173] See *Act*, s 7(1)(c)(ii) and s 7(1)(d).

designated project to federal government oversight and approval. The province's duty to consult and accommodate to the extent necessary and appropriate is with the Indigenous entity involved, not with the federal government. And it is the courts, not the federal government, that determine whether a provincial government has met its constitutional duty under s 35 to Indigenous peoples.

[308] Fourth, regardless of whether Aboriginal or treaty rights are involved, Parliament's jurisdiction under s 91(24) does not include substituting federal authority for the rights of Indigenous peoples to make their own agreements with provincial governments or with proponents of intra-provincial designated projects. And yet, through the *IAA*, Parliament invokes *its own* obligations towards Indigenous people under s 91(24) of the *Constitution Act*, *1867* to override not only provincial legislative powers and duties but also an agreement entered into by an Indigenous entity with the proponent and province or with the proponent and approved by the province or provincial authority.

[309] Since there are hundreds of First Nations, it is likely that some intra-provincial designated projects will be viewed as positive by some Indigenous peoples, and negative by others. This was the case with the Indigenous intervenors on this Reference, some of whom supported Alberta's position and others, Canada's.

[310] This legislative scheme allows a proponent of an intra-provincial designed project to cause a change that "is not adverse" to the health, social or economic conditions of an "Indigenous group, community or people" with the agreement of the council, government or other entity authorized to act on their behalf: *Act*, s 7(4). In other words, the proponent and affected Indigenous entity are precluded from entering into an agreement that would authorize any "adverse" change to the matters identified in s 7(1)(d) *even if insignificant* and *even if offset by some other consideration*. The result – the proponent of an intra-provincial designated project supported by an Indigenous entity, which may even have an ownership interest in the project, cannot cause any "adverse" change to matters in s 7(1)(d) even where the project would provide *overall benefits* to the affected Indigenous entity, and with their agreement.

[311] Further, with respect to s 7(1)(c), there is no provision to allow for a proponent to cause a change thereunder even with the agreement of the affected Indigenous entity. The result – the proponent of an intra-provincial designated project cannot cause any change whatever to matters in s 7(1)(c) even if the changes are positive and agreed to by the affected Indigenous entity.

[312] Moreover, the *IAA* gives the final say to the federal executive, not the Indigenous entity. In particular, the federal executive is authorized to stop any intra-provincial designated project based on its view of the effects of that project on the interests of an Indigenous group or on its view of the public interest generally notwithstanding the view of that group. That is so whether Aboriginal or treaty rights are, or are not, directly involved.

[313] A number of First Nations oppose the prohibitions in ss 7(1)(c) and (d) and raise arguments related to the legal effects of those provisions. The intervenor Woodland Cree noted that the Truth and Reconciliation Commission found that reconciliation includes the economic development of

Indigenous peoples. This Court has previously stressed that economic development on reserve lands is in the public interest: ***AltaLink Management Ltd v Alberta (Utilities Commission)***, 2021 ABCA 342 at para 59. The Woodland Cree contend the *IAA* reduces their voice in decisions regarding their own natural resources, provides excessively broad public participation rights on their projects and potentially negates their ability to develop their natural resources.

[314] The intervenor Indian Resource Council, which represents oil and gas producing First Nations, submits that the right to produce minerals, including hydrocarbons, on their lands, is as much an Aboriginal right as hunting, fishing and gathering rights and is protected by s 35 of the *Constitution Act*, *1982*. In its view, the production of hydrocarbons is not inherently an adverse change to the health, social and economic conditions of Indigenous peoples and can provide positive changes to their lives. The Indian Resource Council also asserts that Indigenous peoples have an Aboriginal right "to improve their economic and social conditions through the creation of economic activity and the realization of economic rents from the production of hydrocarbons": Factum at para 17. In its view, the *IAA* "grants both *de jure* and *de facto* veto power over any particular project to the Governor in Council": Factum at para 13. We agree. It does.

[315] That this legislative scheme permits the federal executive to stop intra-provincial designated projects authorized by a province or provincial authority even where agreements have been made by an Indigenous entity with either or both the provincial government and project proponent and with provincial approval again constitutes federal overreach. It also underscores that the true purpose of this legislative scheme is to empower the federal executive to veto intra-provincial designated projects based on its view of the public interest, not what is in the interests of the Indigenous entity involved, never mind the interests of the province in question and its citizens.

[316] The preamble in the *Act* states that Canada is committed to "ensuring respect for the rights of the Indigenous peoples of Canada … and to fostering reconciliation and working in partnership with them". Restricting what Indigenous peoples are permitted – and not permitted – to do of their own accord through the prohibitions in ss 7(1)(c) and (d) smacks of paternalism. Indigenous peoples have suffered the sting of paternalism since the 19th Century: see for example the history set out in ***McDiarmid Lumber Ltd. v God's Lake First Nation***, 2006 SCC 58 at paras 46-68, [2006] 2 SCR 846. The autonomy of Indigenous peoples includes their ability, via their leadership, to make lawful arrangements with provincial authorities and proponents of intra-provincial designated projects for what they consider to be in their best interests. Section 91(24) provides no constitutional basis for Parliament's imprisoning Indigenous peoples in their own Aboriginal and treaty rights.

(iv) Additional Prohibitions

[317] Finally, the proponent of a designated project is prohibited from causing "any change to a health, social or economic matter within the legislative authority of Parliament that is set out in Schedule 3": *Act*, s 7(1)(e). While nothing has yet been specified in Schedule 3, the *Act* authorizes the addition of any health, social or economic matter *without limitation* by order of the Governor

in Council: *Act*, s 7(2). The potential scope of this legislative delegation is immense and no link to an adverse effect on the environment is required.

(v) Term and Effect of the Prohibitions

[318] The prohibitions imposed by s 7 continue to apply: (1) throughout the review process, except where the Agency decides no impact assessment is required or permits certain acts to be done for information gathering purposes: *Act*, s 7(3)(a), s 7(3)(c); and (2) indefinitely, unless the proponent complies with any conditions imposed in a decision statement issued under s 65: *Act*, s 7(3)(b).[174]

[319] Canada argues that the s 7 prohibition is merely a "temporary hold". That argument is without merit. The net effect of these provisions is that a proponent of an intra-provincial designated project cannot ever realistically proceed with that project, conditionally or otherwise, *without a positive public interest determination*. In the absence of that positive determination, the federal executive has no obligation to set out any conditions that the proponent would need to meet to proceed with the intra-provincial designated project. That is so whether the project requires a federal permit or not. The result is that without a positive public interest determination, the prohibitions remain in effect and the "temporary hold" becomes a "permanent hold".

d. Exercise of Federal Regulatory Power

[320] As noted, s 8(b) of the *Act* prohibits a federal authority from exercising any power or performing any duty that could permit a designated project to be carried out in whole or in part until the *IAA* review has been completed and until a positive public interest determination has been made. The legal effect of this provision is that, where an intra-provincial designated project requires a federal permit, a federal authority is forbidden from setting conditions under which that permit will be issued *unless and until the federal executive makes a positive public interest determination*: ss 8(b), 60(1), 62. Then, and only then, is the federal executive under any obligation to identify the conditions that a proponent must meet: s 64(2). And then, and only then, is the proponent of the intra-provincial designated project able to seek and secure any required federal permit under other federal legislation.

e. Requirement for Public Interest Determination by the Federal Executive and Consequences if Determination Is Not Positive

(i) Key Decision Under the *IAA*

[321] At the heart of the regulatory process under the *IAA* lies the public interest determination.[175]

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[174] This presupposes that a decision has not been made at the outset that no review process is required.

[175] Other decision-making points from which legal effects flow include (a) the Minister's notice prior to commencement of the assessment process advising either that the federal authority will not be exercising a power required for that designated project to be carried out or that the Minister is of the opinion that the designated project

(ii) Public Interest Determination by the Federal Executive

Public Interest Determination Is Based on the Intra-Provincial Designated Project as a Whole

[322] Alberta, Saskatchewan and Ontario contend that the federal executive's public interest determination when applied to intra-provincial designated projects – and therefore whether an intra-provincial designated project is able to proceed – is based on its assessment of the designated project as a whole having regard to federal priorities and policies. Canada disagrees. It argues that the Minister and Governor in Council do not consider whether the designated project as a whole is in the public interest but rather whether the adverse federal effects are in the public interest. According to Canada, this is done by considering *all* the positive and negative effects arising out of a proposed project and comparing them to the adverse federal effects to determine if the adverse federal effects are in the public interest.

[323] The Minister is required to consider a Report prepared by the Agency and make the public interest determination set out in s 60(1) or refer that determination to the Governor in Council for its consideration under s 62. Section 60(1) provides:

> After taking into account the report with respect to the impact assessment of a designated project ..., the Minister *must*
>
> > (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
> >
> > (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.* [Emphasis added]

[324] Where a Report is prepared by a review panel, the Minister is required to refer that determination to the Governor in Council: *Act*, s 61(1). Section 62 sets out terms for the public interest determination by the Governor in Council that are identical to those prescribed for the Minister under s 60(1)(a):

> 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

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would cause unacceptable environmental effects within federal jurisdiction and the basis for this opinion (*Act*, s 17(1)); (b) a determination by the Agency whether an impact assessment is required (*Act*, s 16); and (c) conduct of the impact assessment by the Agency or review panel and preparation of the Report (*Act*, ss 18-57).

> 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*. [Emphasis added]

[325] The legal effect of all relevant provisions is that, in making a public interest determination with respect to an intra-provincial designated project, both the Minister and Governor in Council will necessarily determine whether the project overall is in the public interest *having regard to federal priorities and policies*.

[326] First, the definitions of "effects" and "environment" are so broad and all encompassing that the public interest determination must, of necessity, include a consideration of the effects of the intra-provincial designated project as a whole. Indeed, one of the rationales for this legislative scheme is to assess the designated project as a whole. A determination whether the adverse federal effects are in the public interest cannot be made without considering whether the intra-provincial designated project itself is in the public interest. The two are inextricably linked. It is only if the public interest determination, taking into account all of the effects of the project, is positive that it would be possible to conclude that "adverse effects within federal jurisdiction" could be in the public interest. After all, how could adverse federal effects ever be in the public interest unless the public interest in the project overall outweighed those adverse federal effects?[176] To put it another way, in assessing whether "adverse effects" are in the public interest, the obvious question is "compared to what"? The comparison here, even under Canada's own formulation, is to the designated project overall, that is all its positive and negative effects.

[327] Second, what is implicit in ss 60 and 62 – namely that the federal executive has the right in making its public interest determination to do so based on whether the effects of the designated project overall are in the public interest – is made explicit in s 64. Section 64(1), which is linked back to the determinations made by the Minister or Governor in Council under ss 60(1)(a) or 62, provides as follows:

> *If the Minister determines* under paragraph 60(1)(a), or the *Governor in Council determines* under section 62, that the *effects that are indicated in the report* that the Minister or the Governor in Council, as the case may be, takes into account *are in the public interest*, *the Minister must establish any condition* that he or she considers appropriate *in relation to the adverse effects within federal jurisdiction* with which the proponent of the designated project must comply. [Emphasis added]

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[176] La Forest J made essentially the same point in ***Oldman River***.

[328] This section distinguishes between the "effects" in the Report which relate to the whole project, both positive and negative, since that is what must be included in the Report and the "adverse effects within federal jurisdiction". In doing so, it makes it clear that it is only *if the Minister or Governor in Council have determined that the "effects" are in the public interest* that the Minister must then establish any condition in relation to the "adverse effects within federal jurisdiction". In other words, s 64 explicitly contemplates that the Minister's and Governor in Council's determination under s 60 and s 62 respectively regarding the public interest will be based on the "effects" of the designated project as a whole: see s 64(1).[177]

[329] Third, s 8 makes it clear that the public interest determination is based on the effects of the whole project, and not merely adverse federal effects. Section 8 precludes a federal authority from issuing a permit or authorization that could permit a project to be carried out unless the decision statement issued by the Minister sets out that "the effects that are indicated in the report with respect to the impact assessment of that project are in the public interest". As noted, the Report must include *all the effects of the designated project*, not merely the adverse federal effects.

Public Interest Determination Must Include Mandatory Factors

[330] In any event, the public interest determination extends beyond the adverse federal effects of an intra-provincial designated project regardless. The reason – the *Act* explicitly requires that the public interest determination by the Minister and Governor in Council must be based not only on the Report but also the s 63 mandatory factors. The breadth of these mandatory factors too belies Canada's narrow characterization of what the federal executive's public interest determination involves. Section 63 provides:

> 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;

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[177] Similarly, s 64(2) distinguishes between the effects indicated in the Report and the direct or incidental effects and *it is only if the effects are found to be in the public interest*, which here too must necessarily mean the effects of the project overall, that the Minister is then obligated to establish the conditions directly linked or necessarily incidental to the issuance of a federal permit by a federal authority.

> (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.* [Emphasis added]

[331] When applied to intra-provincial designated projects, these s 63 mandatory factors demonstrably go beyond matters actually within federal jurisdiction under the division of powers.[178]

Conclusions Regarding Scope and Content of Public Interest Determination

[332] For these reasons, however one expresses the process leading to the federal executive's public interest determination – whether the public interest in proceeding with the intra-provincial designated project overall is sufficient to overcome the adverse federal effects, or whether it is in the public interest to proceed with the project despite the adverse federal effects, or whether the adverse federal effects are in the public interest – the end result is the same. The federal executive is empowered to determine, in the exercise of its unilateral discretion, whether the project overall is in the public interest.

[333] In doing so, it assesses the intra-provincial designated project overall and determines whether its effects (which will of necessity include all its positive and negative effects) outweigh the adverse effects claimed to be within federal jurisdiction sufficiently to warrant a favourable public interest determination having regard as well to the mandatory factors. The fact the public interest determination includes a consideration of adverse federal effects does not change this fundamental aspect of this legislative scheme. In other words, the effects of the intra-provincial designated project overall are an inescapable part of the federal executive's public interest determination. What is equally inescapable is that the federal executive's determination of whether the project is in the public interest will be made *having regard to federal priorities and policies*.

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[178] Three of the s 22 mandatory factors are identical to the s 63 mandatory factors: ss 22(1)(c), (h) and (i). Both the s 22 and s 63 mandatory factors include ones that go directly to the project overall: the extent to which the designated project contributes to sustainability (s 22(1)(h), s 63(a)); and 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 (s 22(1)(i), s 63(e)).

That is evident from both the mandatory factors to be considered and the scope of the adverse federal effects.

[334] However, Parliament has no constitutional right to empower the federal executive to use a negative public interest determination, based on mandatory factors and effects, a number of which are not linked, or not sufficiently linked, to federal heads of power, to prohibit an intra-provincial designated project from proceeding. And yet, that is exactly the effect of this legislative scheme. This constitutes fatal federal jurisdictional overreach.

[335] For example, an intra-provincial designated project aimed at developing Saskatchewan's natural resources might cause a minor adverse impact on fish or fish habitat to a degree otherwise permissible under federal law such that no federal permit was required.[179] If that minor adverse federal effect were the only consideration, one would expect there would be no basis to make a negative public interest determination. Under the *Act*, however, if the Minister were of the view that the intra-provincial designated project would hinder Canada's ability to meet its climate change commitments, the Minister could conclude that the adverse federal effects on fish or fish habitat were not offset by any net benefit of the project as a whole when viewed from the perspective of Canada's treaty obligations and therefore, such effects were not in the public interest. The end result would be that the intra-provincial designated project that did not even require a federal permit would be prevented from proceeding with the minor effect on fish or fish habitat otherwise permissible under federal law essentially acting as a "hook" to anchor the negative public interest determination and stop the project.

[336] Further, unlike the *Guidelines Order* under which any conditions that could have been imposed were contained in valid federal legislation relating to permits or authorizations, the *IAA* permits the imposition of *any conditions* the Minister "considers appropriate in relation to the adverse effects within federal jurisdiction": *Act*, s 64(1). Since adverse federal effects are not all within Parliament's jurisdiction, this too constitutes impermissible federal overreach when applied to intra-provincial designated projects.

Public Interest Determination and Oldman River

[337] Canada argues that ***Oldman River*** is authority for the validity, and use, of the public interest determination under this legislative scheme vis à vis intra-provincial designated projects. This argument cannot withstand scrutiny.

[338] To unpack why, we start with this. In deciding whether to grant a proponent of an intra-provincial designated project a federal permit, the federal government is entitled to consider the public interest in the project overall. As La Forest J pointed out in ***Oldman River*** at 39, it would

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[179] A permit is required under the *Fisheries Act* for any work, undertaking or activity, other than fishing, that "results in the death of fish" or the "harmful alteration, disruption or destruction of fish habitat". This *Act* prohibits an effect on fish habitat by an intra-provincial designated project even where the effects are so minor that they do not even result in the death of fish or the harmful alteration, disruption or destruction of fish habitat. Otherwise, the project would require a federal permit under the *Fisheries Act*.

be difficult to understand how the federal government could decide that a federal permit under the *Navigable Waters Protection Act* could be issued notwithstanding "harm" to navigable waterways unless the public interest in proceeding with the project warranted issuance of a federal permit.[180] Thus, he made it clear that whether the project overall was in the public interest could be used to grant a federal permit.

[339] But notably, La Forest J did not state that if the federal government decided that a project was not in the public interest, that could be used to deny a federal permit. The theory that the results of a public interest assessment should work both ways holds to the view that if the federal government can use a positive public interest determination to grant or relax a federal permit, it should be able to use a negative public interest determination to deny the federal permit.

[340] However, this presupposes an equivalency between the two positions. Arguably, there is not. In the first case, the federal government is using a positive public interest determination as a reason to "stand down" from a veto it could otherwise use under one of its heads of power and instead support an intra-provincial designated project approved by the province. In doing so, the federal government remains within its constitutional lane. Nor is it harming any core competence of the provincial government. But the reverse is not necessarily so on either count.

[341] The federal government's power to deny a federal permit must be exercised for the right reasons. A denial must be based on the effects of the intra-provincial designated project on the federal head of power engaged, not on a negative public interest determination grounded in factors and considerations untethered to the head of power. Were the denial based on factors and considerations other than the actual effects of the project alone on, for example, the fisheries, the federal government would be operating outside its constitutional lane.[181] In such circumstances, it would be using the federal executive's assessment of the public interest overall to deny the federal permit even if the actual effects of the project on a federal head of power did not warrant the denial. After all, if the effects on the fisheries themselves were sufficient to justify the denial, the federal government would have no reason to rely on a public interest assessment rooted in policies and priorities extraneous to the effects on the fisheries.

[342] Take for example "the extent to which the designated project contributes to sustainability", one of the s 63 mandatory factors. Or the "need for the designated project", one of the s 22

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[180] "If the significance of the impact on marine navigation were the sole criterion, it is difficult to conceive of a dam of this sort ever being approved. It is clear, then, that the Minister must factor several elements into any cost-benefit analysis to determine if a substantial interference with navigation is warranted in the circumstances": ***Oldman River*** at 39.

[181] As explained in Kennett at 200-201 with respect to an intra-provincial dam and Parliament's limited jurisdiction to address the consequences of the dam for areas of federal responsibility: "While Parliament can, of course, veto the dam, respect for the limits of restricted jurisdiction requires that it only do so for reasons related to its areas of authority.... [O]nce the [environmental assessment] considers the full range of environmental effects, it risks transforming restricted jurisdiction (based on the dam's consequences for fisheries) into *de facto* comprehensive jurisdiction, enabling the federal government to base its refusal to issue a *Fisheries Act* licence on its view of the dam's costs in areas of provincial jurisdiction."

mandatory factors that must be considered in the Report. Both go into the federal executive's public interest determination. There is an issue whether these mandatory factors would be relevant to the valid exercise of the federal government's discretion vis à vis a permit under the *Fisheries Act*. And a related issue is whether the federal government would be doing indirectly what it could not do directly, that is veto an intra-provincial designated project based not on the effects of the project on the fisheries but on federal priorities and policies unrelated to the valid exercise of discretion.

[343] Whatever the answer to whether the federal executive's public interest determination can be validly used to deny a federal permit for an intra-provincial designated project, this legislative scheme runs afoul of the division of powers regardless. The *IAA* catapults well past intra-provincial designated projects that require a federal permit. Parliament could easily have restricted the *IAA* to intra-provincial designated projects in respect of which it actually has some decision-making authority. It did not. And deliberately so. It has expressly included in the project list intra-provincial designated projects that do not require a federal permit, that is those in respect of which it has no decision-making authority.

[344] More important, the public interest determination under the *IAA* is far removed from what was approved in ***Oldman River***. Under this legislative scheme, there is no required link between the public interest determination by the federal executive and a federal permit. Nor is there even any required link between the public interest determination and the exercise of a federal head of power. In all instances, the public interest determination by the federal executive is not being made as part of deciding whether a federal permit should be granted or denied. It stands separate and apart from that entirely. It is being made by the federal executive in deciding whether to permit the intra-provincial designated project to proceed or to stop it. Simply, Parliament has authorized the federal executive to make its public interest determination based on certain mandatory factors and effects that are not all linked to a federal head of power, or even if linked, not sufficiently linked, to a federal head of power.

[345] ***Oldman River*** was not an invitation to Parliament to do indirectly through a public interest assessment by the federal executive what it cannot do directly under the division of powers, namely veto an intra-provincial designated project where the veto is not linked to the proper exercise of federal decision-making authority with respect to that project. That decision-making authority under valid and applicable federal legislation establishes that an aspect of the intra-provincial designated project actually falls within a federal head of power under the Constitution.

The Federal Executive – Effective Veto Over Intra-Provincial Designated Projects

[346] What then does all this mean? Just this. Through this legislative scheme, Parliament has granted the federal executive what amounts to an effective veto over all intra-provincial designated projects in this country. While the *IAA* does not use the word "veto", the combination of the requirement for a positive public interest determination and the continued prohibitions, fines and injunctions speak for themselves. No intra-provincial designated project can proceed without the express approval of the federal executive. That the federal executive never utters the word "veto"

is irrelevant. Because by not making a positive public interest determination, it is effectively vetoing the intra-provincial designated project. Thus, the theory that the federal executive is not vetoing an intra-provincial designated project when it makes a negative public interest determination cannot be sustained.

[347] Put succinctly, even where the federal government has no decision-making authority with respect to an intra-provincial designated project, the federal executive can stop – that is veto – that project unless it decides that the intra-provincial designated project is in the public interest based on federal priorities and policies. That is beyond Parliament's jurisdiction under Canada's Constitution.

f. Time Limits for Assessments and Decision Statements

[348] *CEAA 2012* first introduced legislated time limits for environmental assessments. Neither the *Guidelines Order* nor *CEAA 1992* had prescribed time limits.[182] *CEAA 2012* specified that certain stages of an environmental assessment were to be completed within a certain number of days, subject to extension: *CEAA 2012*, ss 10, 27(2), 54(2).

[349] The *Act* also provides for legislated time limits. But two critical points should be noted. First, the length of the review process has been extended considerably.[183] Under *CEAA 2012*, if a federal impact assessment proceeded without any extensions of time, the maximum length of time it could take for the assessment to be completed was *13.5 months* by the Agency and *2 years and 4 months* by a review panel. By contrast, the corresponding times under the *Act* for an assessment by the Agency is now *4 years and 5 months* (where the decision is by the Minister) and *4 years and 7 months* (where the decision is by the Governor in Council). And where the assessment is by a review panel, the time is *4 years and 7 months* (where the decision is by the Minister) and *5 years and 5 months* (where the decision is by the Governor in Council).

[350] Second, under the *Act*, the Governor in Council may extend a number of key time limits repeatedly and indefinitely.[184] The Agency is given almost a year after it receives all required information to submit its Report to the Minister.[185] But the *Act* gives the Minister and then the Governor in Council the authority to extend the prescribed time limit by which the Agency must do so, and in the case of the Governor in Council, that extension may be "any numbers of times".[186]

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[182] Generally, under both, an environmental assessment was to start as early as possible and conclude before any regulatory decision-making: see *Guidelines Order*, s 3; *CEAA 1992*, s 11.

[183] The proponent now has three years to provide the information the Agency sets out in its notice of commencement of the impact assessment: *Act*, s 19(1). That is necessarily linked to the extent of the information demanded.

[184] See the *Act*, ss 28(5)-(7), 37(2)-(4), 65(6).

[185] The Agency must provide the Report no later than 300 days after the day on which it posts the notice under s 19(4) on the Internet site: s 28(2).

[186] Under s 28(6) of the *Act*, the Minister may extend the time for provision of this Report by any period up to a maximum of 90 days for certain purposes. But under s 28(7) of the *Act*, if the Minister so recommends, the Governor

The result: there is no effective deadline by which the Agency must provide its Report to the Minister. That is also so if a review panel conducts the impact assessment. Here too, there is no effective deadline by which the review panel must provide its Report.[187]

[351] On receipt of a Report, the Minister must (a) make a determination with respect to the public interest; or (b) refer this determination to the Governor in Council.[188] That leads in turn to a "decision statement" which must be issued by the Minister within a certain number of days after the Report, or summary of it, is posted on the Internet site informing the proponent of the public interest determination. The time limit is no later than 30 days for the Minister's decision and 90 days for the Governor in Council decision. But again, these time limits too may be extended initially up to a maximum of 90 days for any reason the Minister considers necessary: *Act*, s 65(5). And again, under s 65(6), the concept of a definitive time limit is erased since it provides that the Governor in Council may, on the recommendation of the Minister, "extend the time limit extended under subsection (5) any number of times".

[352] All this being so, there are no finite time limits within which the Minister and Governor in Council must make a public interest determination with respect to an intra-provincial designated project and the Minister issue a decision statement relating thereto.

g. Consultation with Other Jurisdictions

[353] The *Act* contemplates the possibility of consulting with other jurisdictions at various stages of review of a designated project.[189] The Minister can also approve the substitution of another jurisdiction's review process provided certain conditions are met: *Act*, s 31. And the Minister can enter into an agreement with another jurisdiction (including a province) for the establishment of a joint review panel: *Act*, s 39.

[354] However, many of these provisions are subject to a number of constraints. For example, under s 31, the Minister may approve the substitution of another jurisdiction's assessment process for the federal process, *but only* if the Minister is satisfied, amongst other things, that the

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in Council may extend the extended 90 day time limit under s 28(6), "any number of times".

[187] A review panel must submit its Report to the Minister within 600 days unless the Agency is of the opinion that more time is required for certain purposes: s 37(2). The Minister may extend this time limit up to a maximum of 90 days: s 37(3). This extended time limit may, if the Minister recommends, be extended by the Governor in Council "any number of times": s 37(4). That is also so where the Minister refers a designated project to a review panel under s 43: *Act*, s 37.1.

[188] Under s 61(1), where the Minister receives a Report from a review panel (under s 55) or from the Agency (under s 59, where the review panel has been terminated), the Minister, in consultation with the responsible Minister, must refer the determination of the "public interest" directly to the Governor in Council.

[189] The Agency is required, when preparing for a possible impact assessment of a designated project, to offer to consult with any jurisdiction that has powers in relation to an environmental assessment of the project and with any Indigenous group that may be affected by the project: *Act*, s 12. The Agency, or the Minister if the impact assessment of a designated project has been referred to a review panel, is required to offer to consult with any jurisdiction that has powers in relation to an environmental assessment of the project: *Act*, s 21.

substituted process will consider the s 22 mandatory factors. Of course, that compels the provinces themselves to place on the scale factors which lie at the root of the constitutional challenge to the *IAA*. In other words, unless the province is prepared to consider all the mandatory factors the federal government demands, there can be no substituted process. Further, the Minister cannot even approve a substitution if the impact assessment has been referred to a review panel.[190]

[355] In any event, the potential for consultation and substitution does not affect the validity of the challenged legislative scheme under the division of powers. Cooperative federalism does not override or modify the division of powers: ***Rogers Communications*** at para 39.

3. Practical Effects of the *IAA*

[356] Efficacy of legislation is not relevant to a division of powers analysis; it does not advance the pith and substance inquiry: ***Ward v Canada (Attorney General)***, 2002 SCC 17 at para 26, [2002] 1 SCR 569. That said, there is a difference between efficacy of a statute and its practical effects. Efficacy goes to the effectiveness of the means chosen to achieve the identified legislative purpose; practical effects to the actual impact of the legislation on those subject to it. Therefore, while courts do not have either the institutional capacity or legitimacy to decide whether a statute is a "good idea", the practical effects of the legislation remain relevant in a division of powers analysis.

[357] The practical effects of this legislative scheme are also fatal to the putative federal jurisdiction vis à vis intra-provincial designated projects.

a. Delay

[358] It is indisputable that one of the practical effects of the *Act* is delay. Given the structure of this legislative scheme, this is not surprising.

[359] At every point that counts, when a step is to be taken or a decision is to be made by the Minister or Governor in Council, there is no enforceable deadline by which that step or decision must be made.[191] In particular, there is no requirement that the decisive decision-making step, the issuance of a "decision statement", which includes the public interest determination, will be made by the Minister or Governor in Council within any finite time frame, reasonable or not. Instead, the *Act* permits an endless loop of delay.

[360] Intra-provincial designated projects can be killed under this *Act* in different ways. A negative public interest determination by the federal executive is one way. But it is not the only one. Death by delay will do so as well.

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[190] Or if the project includes activities regulated under certain other federal legislation.

[191] As noted, that is so for the Agency and review panel as well.

[361] In the commercial world, no responsible investor is willing to wait for years, much less indefinitely, for an answer on whether required approvals are forthcoming. Why would they? By that point, they will have invested substantial funds, likely measured in the millions, along with the attendant manpower, complying with prescribed environmental impact assessments, whether by one or both levels of government. And where natural resources are concerned, they will also likely have spent substantial funds acquiring leasehold interests in those resources. Understandably, they would anticipate an answer, and within a reasonable time. And while they have no legal entitlement to demand either, one would expect the federal government would be interested in providing one.

b. Uncertainty

[362] Another practical effect of this statutory regime is uncertainty. If there were one consideration above all that militates strongly against investment in any country, it is uncertainty. Investors crave certainty. Those investing in intra-provincial designated projects need to know, and be able to rely on, the ground rules that apply to a proposed project. This is especially so where those investments would potentially be measured in billions of dollars. Further, while Canada remains an importer of foreign capital, capital flow works both ways. Investors, both foreign and domestic, can vote with their feet if a country is not competitive on the investment front. Predictability and reliability of investing rules are essential to Canada's economic success in an integrated world.

[363] Of course, it is a given that all regulatory processes will involve some elements of uncertainty about the *outcome*. But under this legislative scheme, the problem is the *process* itself. Uncertainty infects every step of the process. Moreover, the proponent may find itself locked inside disputes between the federal and provincial governments. Investors understandably have no interest in being involved in inter-jurisdictional disputes.

[364] Add to this that the proponent has no idea what conditions may be imposed under what claimed federal heads of power for the intra-provincial designated project to proceed. Typically, when a proponent intends to proceed with a project, that involves identifying what must be done to comply with conditions likely to be imposed to proceed with the project and obtain any required federal permits. But under this legislative scheme, the federal executive has no obligation to identify any potential conditions unless it makes a positive public interest determination – even where the intra-provincial designated project has already been approved, and permits issued, by the provincial government.

[365] All of this substantially increases regulatory risk and cannot help but negatively impact investor confidence and capital investment in Canada. Potential investors might well view the *IAA* as the poster child for "invest in this country at your peril".

c. No Practical Remedy to Review Federal Action/Inaction

[366] A third practical effect of this statutory scheme relates to judicial review. Canada and its supporters submit that should the federal government overshoot the proper boundaries of its powers under the *IAA*, there would be a remedy available in judicial review. But constitutionality does not turn on the availability or efficacy of judicial review. An unconstitutional law is not made constitutional because the exercises of discretion thereunder are subject to judicial review.

[367] In any event, there is no air of reality to the suggestion that the decision by the Governor in Council or Minister to designate certain kinds of intra-provincial activities as designated projects would be subject to a successful judicial review.[192] Parliament's grant of such a generalized exercise of discretion in favour of the federal executive means there is no "line" delimiting what falls on the unreasonableness side. The *IAA* specifies no facts and law that substantively constrain the federal executive: ***Canada (Minister of Citizenship and Immigration) v Vavilov***, 2019 SCC 65 at para 105.

[368] As for challenges at the decision-making stage, while competent counsel may be able to craft arguments in support of judicial review, those arguments would not likely succeed given certain fundamental principles of law. Legally, the first hurdle is an obvious one – it is not apparent on what basis a non-decision would be reviewable absent express language in the enabling legislation permitting judicial review of a non-decision: ***Duitama Gomez v Canada (Public Safety and Emergency Preparedness)***, 2010 FC 593 at paras 8, 30. Where a "decision" under the *Act* has never been made because time limits have been repeatedly extended, there is arguably nothing to judicially review. Moreover, there is no obligation under the *Act* to provide reasons for any time extensions.

[369] Nor does it appear likely that a form of mandatory order could be granted by a court to compel the Minister or Governor in Council to make a wholly discretionary "decision" under the *IAA* where the time for doing so, as prescribed or as extended, *has not finally expired*. Nor would arguments about an abuse of public office or breach of duty of care likely provide a foundation for successful judicial review. These arguments may well be futile where the Minister or Governor in Council has simply postponed making a decision. In these circumstances, government inaction would not likely ground an action based on abuse of public office or breach of a duty of care.

[370] Finally, even if a decision has been made by the Minister or Governor in Council, it would be legally difficult, if not impossible, to successfully review the exercise of discretion since the criteria to be used by the Minister or Governor in Council in making a public interest determination are highly subjective. Given the margin of appreciation courts typically extend to government, any such decision would not likely be practically amenable to judicial review regardless.[193] It must

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[192] We recognize that a challenge to the actions of the federal government could be advanced based on an alleged breach by the federal government of constitutional obligations it otherwise has.

[193] Nor is judicial review of the entry into the impact assessment regime a realistic option either. Given the Agency's

also be said that even if judicial review could be sought in theory, the judicial review process would, practically speaking, involve no useful interim remedy as the case wound its way through the courts.

[371] In the result, under this legislative regime, the suggestion of judicial review as a remedy for federal overreach is neither a practical reality let alone a legal one. In the end, under the *IAA*, "no answer" is a "no" answer, but not a plainly reviewable one.

D. Conclusion Regarding the "Matter" of the *IAA*

[372] Our analysis of the purpose and effects of the *IAA* has led us to conclude that its "matter" – its "most important feature", its "main thrust", "dominant characteristic", "essential character", "pith and substance" – is: "the establishment of a federal impact assessment and regulatory regime that subjects all activities designated by the federal executive to an assessment of all their effects and federal oversight and approval". This subject matter, and any variation on it, including the "establishment of a federal impact assessment and regulatory regime that subjects all intra-provincial activities designated by the federal executive to an assessment of all their effects and federal oversight and approval", intrudes fatally into provincial jurisdiction and the provinces' proprietary rights as owners of their public lands and natural resources.

[373] In analyzing the purpose and the effects of the *IAA*, we have explained the impermissible degree of federal jurisdictional overreach thereunder. Canada's Constitution does not permit this hollowing out of provincial powers. We summarize those reasons and the federal overreach as follows:

> 1. The *IAA* compels an intra-provincial designated project to undergo a wide-ranging impact assessment and subjects the project to regulation from inception to completion merely because the federal executive has designated it as a designated project.
>
> 2. The *IAA* gives the federal executive the unilateral right to make that designation even where the federal government has no decision-making authority vis à vis that project under other valid and applicable federal legislation.[194]
>
> 3. The *Act*'s self-defined "effects within federal jurisdiction" includes effects not within Parliament's jurisdiction when applied to intra-provincial designated projects, namely, the incidental effects of provincial laws (authorizing such projects) on a federal head of power, effects not linked, or not sufficiently linked, to a federal head

degree of latitude under s 16(2), including that nothing more is required to trigger the impact assessment than the *mere possibility* that carrying out the designated project *may cause* certain defined effects, any ability to judicially review the entry into this impact assessment regime will also be practically unavailable.

[194] In other words, where the intra-provincial designated project does not require a federal permit to proceed.

of power and effects that do not even qualify as significant.

4. The *Act* prohibits a proponent of an intra-provincial designated project from any conduct that is otherwise lawful for proponents of non-designated projects unless the federal executive determines that the intra-provincial designated project is in the public interest.

5. The *Act* mandates the federal executive to consider *all effects* of an intra-provincial designated project in determining whether the project is in the public interest even where those effects are not all linked, or sufficiently linked, to a federal head of power.

6. The *Act* mandates the federal executive to consider *all effects* of an intra-provincial designated project in determining whether the project is in the public interest even where those effects include incidental effects of provincial laws on a federal head of power.

7. The *Act* permits the federal executive to determine that an intra-provincial designated project is not in the public interest even where the adverse federal effects caused by that project are not material.

8. The *Act* mandates the federal executive to take into account mandatory factors in determining whether an intra-provincial designated project is in the public interest, not all of which are linked to a federal head of power.

9. The public interest determination necessarily includes assessing whether the intra-provincial designated project overall is in the public interest – having regard to federal priorities and policies.

10. A negative public interest determination by the federal executive constitutes an effective veto of the intra-provincial designated project: the proponent is prohibited from proceeding even if the project satisfies, can satisfy, or does not otherwise require, any federal permit under other valid and applicable federal legislation.

11. The *Act* authorizes the federal executive to impose on an intra-provincial designated project whatever conditions it chooses in relation to self-defined adverse "effects within federal jurisdiction" as part of the decision statement authorizing the project to proceed even though the adverse federal effects are not all within federal jurisdiction.

12. The *Act* permits the federal executive to second guess and veto

> the results of a province's duty to consult under s 35 of the *Constitution Act*, *1982* with respect to an intra-provincial designated project where that duty arises.
>
> 13. The *Act* authorizes the federal executive to stop an intra-provincial designated project even where agreements have been made by an Indigenous entity with either or both the provincial government and project proponent and with provincial approval.

XIII. *De Facto* Expropriation

[374] The Indian Resource Council raised the issue of expropriation. It argues that the right to the use and benefit of minerals on Indian reserve lands is an Aboriginal right protected by s 35 of the Constitution.[195] While it recognizes that the federal government has the jurisdiction to impact on-reserve resources, it contends it can only do so in compliance with the ***Sparrow*** test.[196] In its view, if the federal government wishes to sterilize the development of on-reserve natural resources (including oil and gas production), it must expropriate them through a proper process and compensate the affected First Nation for the taking of those resources. Given our conclusion that the *IAA* is unconstitutional, we need not address whether s 35 protects against a *de facto* expropriation of natural resources on reserve lands and whether First Nations must be compensated by the federal government if that is so.

[375] Were this legislative scheme upheld, it would arguably raise other issues relating to *de facto* expropriation as well. That would include whether this scheme effectively strips the provinces of their proprietary and development rights in their own property, including their natural resources. That would raise in turn whether, and at what point, this constitutes a *de facto* expropriation of such property: see ***Manitoba Fisheries Ltd. v The Queen***, [1979] 1 SCR 101; ***R v Tener***, [1985] 1 SCR 533.[197] And whether the federal government would be attempting to do something else indirectly through this legislative scheme that it cannot do directly – and that is block or stop the development of a province's natural resources without compensating the province for the loss of those resources or its proprietary interests therein. While these issues too await another day, we do however note the following.

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[195] This argument was made in oral submissions before this Court.

[196] ***Sparrow*** at 1119 sets out considerations to determine when a s 35 violation can be justified by the Crown, including "whether, in a situation of expropriation, fair compensation is available".

[197] Where a statute is regulatory and does not involve a "taking" of property, the general rule is that no compensation is payable: Hogg at §29:8; ***Alberta (Minister of Infrastructure) v Nilsson***, 2002 ABCA 283 at para 61. The boundary between regulating and taking is an imprecise one. Also, whether what constitutes a constructive taking of provincial Crown lands is the same as what constitutes a constructive taking of private property is an open issue. The scope of *de facto* expropriation of private property is on reserve at the Supreme Court: ***Halifax Regional Municipality v Annapolis Group Inc***., 2021 NSCA 3, leave to appeal to SCC granted, 39594 (24 June 2021), judgment reserved 16 February 2022.

[376] The concept of expropriation is that governments have a right to expropriate property owned by others for the general, common good. However, since there is no federal power authorizing expropriation at large, expropriation by the federal government must be justified under some federal head of power: Hogg at §29:5. While the federal government may expropriate property owned by the provinces, that expropriation extends only to "the property absolutely essential to the Dominion undertaking": ***Natural Gas Tax*** at 1053; see also ***Nipissing Central Railway***.

[377] It is true there is no property right guaranteed under the Canadian Constitution. Therefore, the Canadian Constitution does not compel either level of government to compensate parties for property they expropriate.[198] That has led one judge to state that the admonition "Thou shalt not steal" does not apply to governments.[199] However, the federal government's *de facto* expropriation of property owned by the provinces is in a different category altogether. Why? Because under s 109 of the Constitution, the proprietary rights of the provinces in public lands including their natural resources are expressly guaranteed. These rights were further reinforced by the addition of s 92A to the Constitution. Consequently, the federal government would be required to compensate a province for the *de facto* expropriation of any of its natural resources.

XIV. Classification of the Subject Matter of the *IAA*

A. Introduction

[378] We now turn to whether the subject matter of the challenged legislation when applied to intra-provincial designated projects falls within the heads of power Canada is relying on to support the legislation's validity: ***Second Securities Reference*** at para 86.

[379] Alberta argues that the *IAA* has no jurisdictional connection to any federal head of constitutional power when applied to intra-provincial designated projects. Canada relies on multiple heads of power to support different aspects of this legislative scheme.

B. Federal Heads of Power

1. Federal Triggers Do Not Determine Classification

[380] Canada submits there are three federal "triggers" that bring a project within the *IAA*, each of which it contends is linked to federal heads of power:

1. A trigger tied to federal projects, prohibiting a federal authority

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[198] Hogg at §29:8. That said, there is a rule of statutory interpretation that a statute that expropriates private property is to be read as requiring compensation to the private owner absent a clear provision to the contrary in the statute: ***Attorney General v De Keyser's Royal Hotel***, [1920] AC 508 (UKHL) at 542.

[199] ***Florence Mining Co. v Cobalt Lake Mining Co.*** (1909), 18 OLR 275 at 279 (HC), cited in ***Authorson v Canada (Attorney General)***, 2003 SCC 39 at para 53, [2003] 2 SCR 40.

> carrying out a project or providing financial assistance to enable a project to be carried out on federal lands or outside Canada without complying with ss 81-91 of the *Act* (ss 82-83);
>
> 2. A federal decision-based trigger, arising out of the prohibition on a federal authority exercising a power or performing a duty or function that could permit a designated project to be carried out (s 8); and
>
> 3. An effects-based trigger, arising out of the prohibitions imposed on the proponent of a designated project from causing any changes to identified matters (s 7).

[381] Canada's attempt to equate the "triggers" bringing activities within the *IAA* to federal heads of power is misplaced. The issue is not what "triggers" the *IAA* but rather whether the subject matter of the *IAA* is properly classified under one or more federal heads of power. In any case, both from a legal and practical perspective, the "trigger" which brings an intra-provincial activity within the regulatory scheme under the *IAA* is designation as a designated project.

[382] As noted, no one challenges the provisions relating to the first category, federal projects.[200] Regardless, these do not support the constitutionality of the remainder of the challenged legislation. As for the second category, we have already explained why the federal jurisdictional overreach – including the requirement for a positive public interest determination – applies with equal force to designated projects subject to s 8, that is those requiring a federal permit. Intra-provincial designated projects in this second category are subject to the same regulatory scheme and federal jurisdictional overreach as those intra-provincial designated projects subject to the s 7 prohibitions alone. The third category, the effects-based trigger arising out of the prohibitions in s 7, covers intra-provincial designated projects that do not require a federal permit.

[383] Canada submits Parliament has jurisdiction to regulate the federal effects of intra-provincial designated projects under four heads of federal power: (1) s 91(12) – Sea Coast and Inland Fisheries; (2) s 132 – Imperial Treaties; (3) s 91(24) – Indians and Lands Reserved for the Indians; and (4) s 91 POGG – national concern doctrine.[201]

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[200] The provisions relating to the first category of prohibitions are contained in a limited and discrete part of the *Act* with a different and less stringent review process from that which applies to "designated projects".

[201] Canada also pointed out that "federal lands" are within federal jurisdiction under s 91(1A) of the *Constitution Act, 1867*. No one disputed this. Parliament's jurisdiction over "federal lands" though does not include legislative authority over "all effects" on such lands. As noted earlier, a blanket prohibition against "all effects" is no more constitutionally valid than a law that prohibits "any effects" on fish.

2. The Subject Matter of the *IAA* Is Not Within Federal Heads of Power

[384] The subject matter of the *IAA* cannot be classified as falling within federal jurisdiction on the basis of the claimed heads of powers, individually or collectively.

a. Section 91(12) – Sea Coast and Inland Fisheries

[385] Canada relies on its jurisdiction over the "Sea Coast and Inland Fisheries" under s 91(12) of the *Constitution Act*, *1867* to "anchor" the prohibitions relating to intra-provincial designated projects that cause, or may cause, any effects on fish, fish habitat and aquatic species and the ability of the federal executive to decide whether intra-provincial designated projects which have *any* adverse effects thereon should be allowed to proceed.

[386] Parliament's power under s 91(12) is not a general power to regulate water pollution. We have already explained why Parliament's claimed jurisdiction to regulate an intra-provincial designated project based on *any effects* of that project on fish, fish habitat and aquatic species – even though all such effects are not the subject of prohibitions under the *Fisheries Act* or *Species at Risk Act* and could not validly be under the division of powers and even though the project does not even require a permit under the *Fisheries Act* or *Species at Risk Act* – constitutes federal jurisdictional overreach.

[387] That overreach also includes Parliament's authorizing the federal executive to effectively veto an intra-provincial designated project based not only on *any effects* on fish, fish habitat and aquatic species but also on *mandatory factors* not within federal heads of power.[202]

[388] In the result, the *IAA*, when applied to intra-provincial designated projects, is not sufficiently linked to any likely harm to the fisheries and, in any event, improperly intrudes into provincial heads of power. The subject matter of the *IAA* does not fall within Parliament's jurisdiction under s 91(12).

b. Section 132 – Imperial Treaties

[389] Canada relies on its jurisdiction under s 132 of the *Constitution Act, 1867* to "anchor" the prohibitions relating to intra-provincial designated projects that cause, or may cause, *any effects* on migratory birds and the ability of the Minister and Governor in Council to decide whether intra-provincial designated projects which have any adverse effects on migratory birds should be allowed to proceed.

[390] Parliament's power under s 132 is not a general power to regulate air pollution. Again, as with the fisheries, Parliament's claimed jurisdiction to regulate an intra-provincial designated

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[202] Those factors include the "need" for the intra-provincial designated project and "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": *Act*, s 22(1)(d), s 22(1)(i), s 63(e).

project based on *any effects* of that project on migratory birds – even though all such effects are not the subject of prohibitions under the *Birds Act* and could not validly be under the division of powers and even though the project may not even require a permit under the *Birds Act* – constitutes federal jurisdictional overreach.

[391] That overreach also includes Parliament's authorizing the federal executive to effectively veto an intra-provincial designated project based not only on *any effects* on migratory birds but also on *mandatory factors* not within federal heads of power.

[392] In the result, the *IAA*, when applied to intra-provincial designated projects, is not sufficiently linked to any likely harm to migratory birds and, in any event, improperly intrudes into provincial heads of power. The subject matter of the *IAA* does not fall within Parliament's jurisdiction under s 132.

c. Section 91(24) – Indians and Lands Reserved for the Indians

[393] Canada relies on its jurisdiction over "Indians, and Lands reserved for the Indians" under s 91(24) of the *Constitution Act*, *1867* to "anchor" the prohibitions in s 7(1)(c) and (d) and the inclusion of the effects referred to in those sections as "effects within federal jurisdiction".

[394] Canada's position is premised on the proposition it has jurisdiction over an intra-provincial designated project otherwise within exclusive provincial jurisdiction as long as the project may have *any effect* on the environment, health, social or economic conditions of Indigenous peoples. This too constitutes federal overreach; Parliament's powers under s 91(24) do not extend this far.

[395] If Parliament could, as claimed, *use any effects on any aspect of the environment, social, health or economic conditions of Indigenous peoples* to veto, that is stop, any intra-provincial designated project, that would negate not only the incidental effects doctrine, but more important, provincial powers. Intra-provincial designated projects fall primarily within provincial jurisdiction and the fact an intra-provincial designated project may have incidental effects on Indigenous peoples does not affect the validity of the provincial legislation nor its application to Indigenous peoples.

[396] The subject matter of the *IAA* does not fall within Parliament's jurisdiction under s 91(24).

d. Section 91 – National Concern Doctrine Under POGG

[397] As explained, Parliament's regulation of "any change" to the environment generally, including GHG emissions in particular, that would occur outside the province in which an intra-provincial designated project would be carried out or outside Canada from individual intra-provincial designated projects or category thereof within a province, does not fall within the national concern doctrine.

[398] The subject matter of the *IAA* does not fall within Parliament's jurisdiction under POGG.

e. Section 91(2) – Trade and Commerce

[399] Three intervenors invoke the trade and commerce power under s 91(2) of the *Constitution Act, 1867* in support of the constitutionality of this legislative scheme. The intervenors argue that the *Act* assesses and regulates the "effects" of a project related to interprovincial and international trade and commerce. Canada did not adhere to this argument in its submissions.

[400] The test for the trade and commerce power is strict and is not reached by the *IAA*. For a law to engage the federal trade and commerce power, it must be "qualitatively different from anything that could practically or constitutionally be enacted by the individual provinces either separately or in combination": ***Second Securities Reference*** at para 101, citing ***A.G. (Can.) v Can. Nat. Transportation, Ltd.***, [1983] 2 SCR 206 at 267; see also ***General Motors***. The *Act* regulates intra-provincial designated projects that the provinces have the ability and jurisdiction to regulate under several provincial heads of power. There is no interprovincial commercial activity served by this legislative scheme when applied to intra-provincial designated projects.

[401] The subject matter of the *IAA* does not fall within Parliament's trade and commerce power under s 91(2).

f. Section 91(27) – Criminal Law

[402] One intervener, Ecojustice Canada Society, argues that s 7 of the *Act* can also be upheld on the basis of Parliament's criminal law power under s 91(27) of the *Constitution Act*, *1867*. It contends s 7 contains all three requirements for classification as criminal law, namely (1) a prohibition, (2) accompanied by a penalty, and (3) backed by a criminal law purpose: ***Genetic Non-Discrimination*** at para 67; ***Firearms Reference*** at para 27; ***Reference re Assisted Human Reproduction Act***, 2010 SCC 61 at para 35, [2010] 3 SCR 457 [***AHRA Reference***]. Alberta argues the provision is regulatory in nature and, as such, lacks a criminal law purpose. Canada does not defend this legislative scheme on the basis of its criminal law power.

[403] Section 7(1) of the *Act* constitutes a prohibition in that it prohibits a proponent of a designated project from causing certain enumerated effects, subject to meeting one of the conditions set out in s 7(3). That the prohibition allows for exceptions rather than being absolute in nature is not inconsistent with criminal law: ***AHRA Reference*** at para 36; ***Firearms Reference*** at para 39. Moreover, breach of s 7 constitutes an offence under s 144(1)(a) and is backed up by a penalty in s 144(2)-(4). The first two requirements are therefore met.

[404] The point of contention is whether s 7 contains a criminal law purpose. A law will have such a purpose "if it addresses an evil, injurious or undesirable effect on a public interest traditionally protected by the criminal law, or another similar public interest": ***Genetic Non-Discrimination*** at para 74 (per Karakatsanis J), para 137 (per Moldaver J). These public interests have traditionally included peace, order, security, health and morality: ***Genetic Non-Discrimination*** at para 68. The list also includes the protection of the environment: ***Hydro-Québec***

at para 43 (per Lamer CJ and Iacobucci J), paras 123, 127 (per La Forest J). However, there must be some degree of threat of *harm* to the public interest in question for the prohibition to be criminal in nature: ***Genetic Non-Discrimination*** at paras 68, 75, 78-79.

[405] Under this legislative scheme, the prohibition in s 7 is not limited to protecting against objectively "harmful effects" to the environment. Rather, s 7 prohibits *any change* to various components of the environment. The prohibited conduct is also defined in too excessively broad a manner and with too remote a potential of harm to avoid the constitutional infirmities of vagueness or overbreadth were it found to be criminal law: ***R v Nova Scotia Pharmaceutical Society***, [1992] 2 SCR 606.

[406] Moreover, conduct lawful for others is prohibited merely because the proponent's proposed project has been "designated". The criminal law is necessarily a law of national effect. Centuries of tradition make plain that the criminal law does not contemplate a checkerboard of criminal liability depending on whether a proponent's project has been "designated". Limiting the prohibitions to designated projects based on size or specific industries within Canada is a central feature of s 7. That is a patent indication of a purely regulatory law.

[407] In any event, the *IAA* does not declare crimes, prosecute and punish accordingly. Instead, the federal executive is authorized to let the proponent of the designated project proceed. Or not. And if it permits it to proceed, it might require the proponent to comply with imposed conditions. Or not. Where a prohibition is confined to ensuring compliance with a legislative scheme rather than independently serving the public interest, it will be regulatory rather than criminal in nature: ***Firearms Reference*** at para 38.[203] The s 7 prohibition and accompanying penalties are merely ancillary to the regulatory regime created by the *IAA* itself.

[408] In summary, the *IAA* is regulatory in nature. Its subject matter does not fall within Parliament's criminal law power under s 91(27) of the *Constitution Act*, *1867*.

C. Provincial Heads of Power

1. Introduction

[409] The subject matter of the *IAA*, when applied to intra-provincial designated projects, falls squarely within several heads of provincial power.

2. Intra-Provincial Designated Projects Fall Within Provincial Heads of Power

[410] That the real "matter" of the *Act* overshoots the bounds of federal jurisdiction when applied to intra-provincial designated projects is clear. As noted, provincial governments can turn to

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[203] A statute can be regulatory even in the face of a prohibition coupled with a penalty. As explained by Lamer CJ and Iacobucci J (dissenting but not on this point) in ***Hydro-Québec*** at para 46: "Any regulatory statute that lacked ... prohibitions and penalties would be meaningless. However, ... the penalties that are provided in a regulatory context serve a 'pragmatic' or 'instrumental' purpose and do not transform the legislation into criminal law".

several provincial heads of power to regulate all aspects of intra-provincial designated projects: s 92A(1), development and management of natural resources; s 109, proprietary rights as owners of public lands; s 92(10), local works and undertakings; s 92(5), management of public lands; s 92(13), property and civil rights; and s 92(16), local or private matters.

a. Section 92A – Development and Management of Natural Resources

[411] Under the *Resource Amendment*, s 92A, each provincial Legislature has the exclusive jurisdiction to manage and develop its 92A natural resources for the benefit of its present and future residents. This is one of the powers provincial Legislatures can rely on, along with s 92(10), s 92(13) and s 92(16) when acting as legislator, as opposed to owner, of privately-owned natural resources.

[412] Provincial powers under s 92A(1) include determining terms and conditions under which industry will – or will not – be permitted to develop its s 92A natural resources in the province. That necessarily includes the conditions a province may choose to impose regarding those operations, including regulating their GHG emissions.

[413] Section 92A extends not only to the provinces' legislative authority over non-Crown-owned natural resources. It also explicitly authorizes the exercise of the provinces' proprietary rights.[204] No exploration for 92A natural resources can be undertaken without provincial permits. No intra-provincial designated project to develop those resources can be constructed or operated on provincial lands or provincially-controlled lands without provincial permits.

b. Section 109 – Proprietary Rights as Owners of Public Lands

[414] Section 92A is not the only power the provinces have with respect to the development of their natural resources. To this must be added the provinces' proprietary rights as owners of their natural resources under s 109 of the Constitution. These rights clearly extend to regulation of resources before, during and after recovery from the ground.

[415] A province's proprietary rights along with its exclusive powers under s 92A(1) include the right to exploit its natural resources. As the Supreme Court stated in ***Natural Gas Tax*** at 1080: "The allocation in 1930, by agreement and constitutional amendment, of property to the Crown in the right of the Province of Alberta necessarily carries with it the right of the province to the proceeds of disposition – in the words of Duff J to 'enjoy the fruits of that property'. The resources were intended to be an important source of revenue, indeed the basis of the provincial financial integrity, and *therefore must be capable of realization*" (emphasis added). Section 92A(1) put this beyond doubt when it comes to the 92A natural resources since it expressly guarantees the provinces the exclusive right to "development" of those resources.

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[204] As explained in Moull at 419: "It is noteworthy that, at least partially in recognition of the potency ascribed to provincial Crown proprietary rights, subsection 92A(6) expressly preserves not only all pre-existing provincial legislative powers but also all pre-existing provincial government 'rights' as well."

c. Section 92(5) – Management of Public Lands

[416] Under s 92(5) of the *Constitution Act*, *1867*, provincial Legislatures have the jurisdiction to determine the conditions under which a party is entitled to use public lands, whether as a lessee or otherwise. Provincial legislative powers under this section extend to making laws in relation to management of public lands, including laws relating to environmental impact assessments and the regulation of natural resources, including GHG emissions therefrom.[205]

d. Section 92(10) – Local Works and Undertakings

[417] Under s 92(10) of the *Constitution Act*, *1867*, provincial Legislatures have exclusive jurisdiction over local works and undertakings. Local works and undertakings, which include projects for the development and management of natural resources, are subject to provincial jurisdiction unless the work or undertaking falls within one of the exceptions under s 92(10)(a), (b) or (c). "Local regulation is the rule; federal regulation, the exception": ***Consolidated Fastfrate Inc. v Western Canada Council of Teamsters***, 2009 SCC 53 at para 31, [2009] 3 SCR 407 [***Fastfrate***]. [206] The generation and distribution of hydroelectricity falls within provincial jurisdiction since dams, generating stations and distribution systems constitute local works and undertakings: ***Fulton et al v Energy Resources Conservation Board***, [1981] 1 SCR 153.

e. Section 92(13) – Property and Civil Rights

[418] Under s 92(13), property and civil rights, one of the broadest areas of provincial jurisdiction under the *Constitution Act*, *1867*, provincial Legislatures also have the power to regulate industry in the province, except for those industries within federal jurisdiction. This power includes regulating land use and emissions that could pollute the environment: Hogg at §30:33. The provinces' powers over nuisance and trespass, and that would include the regulation of GHG emissions, as a subset of their exclusive jurisdiction over property and civil rights, have long been recognized. The provinces' power under s 92(13) also includes the control and regulation of local trade and commerce generally: ***Re: Anti-Inflation Act***, [1976] 2 SCR 373 at 452-453, per Beetz J (in dissent but not on this point).

[419] While transportation is not mentioned in the *Constitution Act, 1867*, provincial Legislatures have jurisdiction over intra-provincial modes of transportation, including roadways funded by the province or by municipalities under provincially-delegated power, under s 92(13), as well as s 92(10) and s 92(16). That is so even if the roadway is physically connected to other roadways that extend beyond the limits of the province.

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[205] For private lands, s 92(13), property and civil rights, gives the provinces power to make comparable laws.

[206] The rationale for this, cited in ***Fastfrate*** at para 33, was explained in 1865 by then Attorney General John A. Macdonald: "... the local legislatures have the control of all local works; and it is a matter of great importance ... that each province will have the power and means of developing its own resources and aiding its own progress after its own fashion and in its own way."

f. Section 92(16) – Local or Private Matters

[420] This head of power covers matters of a merely local or private nature in the province. There is nothing "mere" though about s 92(16) legislative jurisdiction. It completes the constitutional design of an exhaustive distribution of legislative jurisdiction and constitutes an express deduction from federal legislative jurisdiction.

D. Conclusions on Classification

[421] The subject matter of the *IAA*, when applied to intra-provincial designated projects, falls within several heads of provincial power. The federal jurisdictional overreach is manifest. Despite the blending of federal points of interest with the parts of the *IAA* challenged here, the *IAA* constitutes a profound invasion into provincial legislative jurisdiction and provincial proprietary rights. Parliament's claimed power to regulate all environmental and other effects of intra-provincial designated projects improperly intrudes into industrial activity, resource development, local works and undertakings and other matters within provincial jurisdiction.

[422] The division of powers exists for a reason: ***Attorney General of Nova Scotia v Attorney General of Canada***, [1951] SCR 31. Under this *Act*, the federal government is aggrandizing onto itself decisions vis à vis intra-provincial designated projects which the citizens of individual provinces rightly expect – and the Constitution requires – will be made by those directly accountable to those citizens, and that is the provincial government of the province in which they live.

[423] If upheld, the *IAA* would reduce the plainly applicable provisions of s 92A, s 92(5), s 92(10), s 92(13), s 92(16) and s 109 to a subordinate status to federal authority. The unavoidable effect of the *IAA* would be the centralization of the governance of Canada to the point this country would no longer be recognized as a real federation. This is not what the framers of our Constitution intended. And it is certainly not what provincial governments agreed to either on patriation of the Constitution.

[424] Where natural resources are involved, it is each province that is concerned with the sustainable development of its natural resources, not the federal government. It is the province that owns those natural resources, not the federal government. And it is the province and its people who lose if those natural resources cannot be developed, not the federal government. The federal government does not have the constitutional right to veto an intra-provincial designated project based on its view of the public interest. Nor does the federal government have the constitutional right to appropriate the birthright and economic future of the citizens of a province.

XV. Conclusion on Validity of the *IAA* and Severance

[425] For these reasons, we have concluded that the *IAA* is *ultra vires* Parliament.

[426] Canada maintains the *IAA* is not severable and ought to stand or fall as a whole. We agree. In our view, it would not be possible to practically sever offending provisions from the *Act*. Nor does severing the part implementing the *Act*, that is the *Regulations*, make sense. The two are inextricably linked. This Court cannot fairly conclude that Parliament would have enacted this scheme without including therein intra-provincial designated projects: ***Ontario (Attorney General) v G***, 2020 SCC 38 at paras 112-114. Thus, this Court cannot simply strike from the *Regulations* all intra-provincial designated projects.

[427] Further, severing the *Regulations* would not address the overreach in the *Act* itself nor preclude, in any event, the adoption of new, equally problematic, regulations. Therefore, severance is not a remedy in these circumstances.

XVI. Interjurisdictional Immunity

[428] Alberta and Saskatchewan invoke, as an alternative argument, the doctrine of interjurisdictional immunity.[207] Under this doctrine, an otherwise valid law will be inapplicable to the extent it impairs the "core", that is "basic, minimum and unassailable content", of a head of power falling under the jurisdiction of the other level of government: ***Desgagnés Transport*** at paras 90-93. That is so especially where the effect is on "circumscribed areas of activity": Guy Régimbald & Dwight Newman, *The Law of the Canadian Constitution*, 2nd ed (Toronto: LexisNexis, 2017) at 210, citing ***Canada (Attorney General) v PHS Community Services Society***, 2011 SCC 44 at para 60, [2011] 3 SCR 134 [***Insite***]. The impairment test is "a midpoint between sterilization and mere effects": ***Quebec (Attorney General) v Canadian Owners and Pilots Association***, 2010 SCC 39 at para 44, [2010] 2 SCR 536.

[429] To date, this doctrine has been used to protect the core of federal powers: ***Insite*** at para 60; ***Canadian Western Bank*** at para 45. But as the Supreme Court confirmed in ***Insite*** at para 65, this doctrine should work both ways, that is in favour of the provinces as well as the federal government.[208] It would be unfair indeed if the federal government, with all its constitutional advantages, were permitted to rely on this doctrine but the provinces could not: Hogg at §15:21. The result would be a ratchet that turns one way only, in favour of the federal government and against the provinces. Not only are the provincial powers under s 92 just as "exclusive" as the

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[207] As the Supreme Court indicated in ***Insite*** at para 65, "before applying the doctrine of interjurisdictional immunity in a new area, courts should ask whether the constitutional issue can be resolved on some other basis." We accordingly began by resolving the constitutionality of the *IAA* on the basis of the pith and substance and validity analysis.

[208] The Supreme Court had earlier signalled the doctrine should also apply in favour of the provinces: ***Canadian Western Bank*** at para 35. Some argue that rather than extend the doctrine in favour of the provinces, the courts should instead read down federal legislation to keep it within federal jurisdiction: Jonathan Penner, "The Curious History of Interjurisdictional Immunity and Its (Lack of) Application to Federal Legislation" (2011) 90:1 Can Bar Rev 1 at 20-21, 26; Honickman at 236-239.

federal ones under s 91, so too are the provincial powers under s 92A(1). Thus, "each provincial head of power, no less than each federal head of power, has a 'basic, minimum and unassailable content' that is immune from incursion by the other level of government": Hogg at §15:21.

[430] While we have concluded that the *IAA* is *ultra vires*, alternatively, if this legislative scheme were ultimately found to be constitutionally valid, the doctrine of interjurisdictional immunity should apply to protect what constitutes the "core" of relevant provincial heads of power. The *Act* and *Regulations* seriously and significantly impair provincial powers under s 92A(1), s 92(5), s 92(10), s 92(13), s 92(16) and s 109. However, what constitutes the "core" of each of these provincial heads of power was not sufficiently addressed to permit this Court to definitively resolve all aspects of the application of this doctrine and we decline to do so.

XVII. Conclusion

[431] The *IAA* is *ultra vires* Parliament.

[432] As noted, intra-provincial activities are not immune from federal government regulation providing that regulation remains within the constitutional dividing lines. Therefore, intra-provincial designated projects that require a federal permit under other valid and applicable federal laws remain subject to those laws but in accordance with the terms of such laws, not this legislative scheme.

[433] We would add this. Legitimate concerns about the environment and climate change shared by all Canadians and provincial governments as well as the federal government do not justify overriding our existing form of federalism and the division of powers. If the federal government believes otherwise, it should make the case for an increase in its jurisdiction to the Canadian public. Constitutional change should be effected as the Constitution requires – by agreement amongst the federal and provincial governments.

[434] We ought never lose sight of the great genius of our constitutional structure which has produced a free and secure democracy, one that has served Canadians well for 155 years. Our ancestors chose a federal, not unitary, structure for a purpose – to unify separate colonies and create a country. The negotiated division of powers lies at the heart of what makes this country what it is, and why, despite significant tensions from time to time, Canada has been able to survive

and prosper since Confederation. It remains one of this country's greatest strengths. It will continue to benefit present and future generations as we face the environmental, economic and security challenges ahead providing that we respect the principles on which Canada has been founded: federalism, responsible government and the Rule of Law.

Special Hearing heard February 22-25, 2021

Opinion filed at Calgary, Alberta
this 10th day of May, 2022

Fraser C.J.A.

Watson J.A.

McDonald J.A.

Strekaf, JA:

[435] I have reviewed the Opinion of Fraser C.J.A., Watson J.A. and McDonald J.A. and agree with the analysis and conclusions expressed therein with the exception of paragraphs 374 to 377 about which I make no comment.

Special Hearing heard February 22-25, 2021

Opinion filed at Calgary, Alberta
this 10th day of May, 2022

Strekaf J.A.

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Paragraph

Greckol J.A. (Dissenting):

I. Introduction

[436] The Government of Alberta seeks this Court's opinion on the constitutionality of the *Impact Assessment Act*, SC 2019, c 28, s 1 [*IAA*] and one of its associated regulations, the *Physical Activities Regulations*, SOR/2019-285 [the *Regulation*].

[437] Briefly stated, the *IAA* establishes a federal environmental assessment regime that facilitates planning and information-gathering mostly in relation to "designated projects", these being certain physical activities largely as outlined in the *Regulation*. Projects listed in the *Regulation* cover a wide range of areas, including not only those clearly within federal jurisdiction (e.g., certain activities in national parks) but also those like *in situ* oil sands extraction facilities, which, though they may have environmental impacts that fall within federal jurisdiction, are themselves regulated provincially. The legislative scheme is ultimately concerned with whether such projects may cause certain "adverse effects" said to be within the legislative authority of Parliament, and if so, whether those effects are in "the public interest". With that end in mind, the *IAA* sets out a process whereby designated projects are prohibited from causing a number of changes to the environment unless and until it is determined that i) an assessment is not necessary or ii) an assessment of the proposed project is undertaken and, on that basis, the Minister or Governor in Council is able to conclude that any so-called "effects within federal jurisdiction" that may be caused by the proposed project are in the public interest.

[438] The questions posed by Alberta in this Reference are set out in the Order in Council:

1. 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?

2. 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? (160/2019)

[439] Bill C-69, entitled *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, consists of four parts. The *IAA* is Part 1 of Bill C-69 and is the enabling legislation of the *Regulation*. No other part of Bill C-69 is at issue in this Reference.

[440] Several points should be borne in mind as a prelude to considering this Reference.

[441] First, the majority, Alberta, and the intervenors, do not disagree that a significant portion of the legislative scheme involves matters within federal jurisdiction. The Project List in the Schedule of the *Regulation* includes the following uncontentious areas: national parks and protected areas (ss 1-11); defence (ss 12-17); uranium mines or mills (ss 20-23); nuclear facilities (ss 26-28); offshore oil and gas facilities (ss 34-36); international or interprovincial power lines (ss 39); offshore oil and gas pipelines and renewable energy (ss 40, 44-45); aerodromes or runways (ss 46-47); international or interprovincial bridges or tunnels (s 48); canals or causeways in navigable waters (ss 49-50); and marine terminals (ss 52-53). And even with respect to these activities, the central provision of the *IAA* (s 7) is limited to changes with *effects* in the following areas said to be within federal jurisdiction: fish and fish habitat, aquatic species, migratory birds, federal lands, trans-provincial effects, and certain effects upon Indigenous peoples. Nor is any issue taken with ss 81-91 of the *IAA*, which provides for the assessment of projects (even where not designated) on federal lands and outside Canada.

[442] What is left to consider – and what this Reference is about – is whether it is constitutionally permissible for a federal project-based environmental assessment regime to regulate "effects" (defined in s 2 to include "changes to the environment or to health, social or economic conditions and the positive and negative consequences of these changes") *on purported areas of federal jurisdiction* caused by certain designated projects where the projects themselves otherwise fall within provincial jurisdiction, as follows:

- s 92(10) of the *Constitution Act, 1867* as involving:

    i) "Local Works and Undertakings" (new public highways that require 75 km or more of new right of way in s 51 of the *Regulation* Schedule; certain railways and railway yards in ss 54-55 of the *Regulation* Schedule).

- s 92A(1) of the *Constitution Act, 1867* as involving:

    i) The "exploration ... development, conservation and management of non-renewable natural resources ... in the province" (mines and metal mills in ss 18-19, 24-25 of the *Regulation* Schedule; oil, gas, and other fossil fuel facilities in ss 30-33, ss 37-38 of the *Regulation* Schedule); and

    ii) The "development, conservation and management of sites and facilities in the province for the generation and production of electrical energy" (renewable energy in ss 42-43 of the *Regulation* Schedule).

[443] In my opinion, the *IAA* and its *Regulation* are a valid exercise of Parliament's authority to legislate on the matter of the environment. Section 7 of the *IAA* prohibits proponents of physical activities or designated projects on the *Regulation* Project List from doing anything to advance the project if it may cause defined *effects* in federal jurisdiction. Most of the designated projects involve activities within areas of federal jurisdiction and *prima facie* within s 91 of the *Constitution Act, 1867* – such as national parks, interprovincial railways, and offshore oil and gas facilities –

that may have *effects* upon areas *also* within federal jurisdiction, such as fish habitat, federal lands, or Indigenous peoples. The remainder of the designated projects are intra-provincial and *prima facie* within s 92 of the *Constitution Act, 1867* – such as mines and metals, and oil and gas facilities – that may have *effects* upon areas of federal jurisdiction, such as fish habitat, federal lands, or Indigenous peoples. In either case, the project-based federal environmental assessment regime in the *IAA* and *Regulation* target *effects in federal jurisdiction*.

[444] Second, at least five important legal points already established by the Supreme Court of Canada provide a useful backdrop to this Reference:

1. The environment "is a diffuse subject that cuts across many different areas of constitutional responsibility, some federal, some provincial": *R v Hydro-Québec*, [1997] 3 SCR 213 at para 112, 151 DLR (4th) 32 [*Hydro-Québec*]; see also *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3 at 63-64, 88 DLR (4th) 1 [*Oldman River* cited to SCR];

2. Some local projects will have both a provincial aspect and a federal aspect: *Oldman River* at 69; *Quebec (Attorney General) v Moses*, 2010 SCC 17 at para 36, [2010] 1 SCR 557 [*Moses*]. As noted by La Forest J in *Oldman River* at 69, "[a]lthough local projects will generally fall within provincial responsibility, federal participation will be required if the project impinges on an area of federal jurisdiction". Accordingly, "[t]he effect of the *Oldman River* decision is to confer on the federal Parliament the power to provide for environmental assessment of *any project* that has *any effect* on *any matter within federal jurisdiction*": Peter W. Hogg & Wade K. Wright, *Constitutional Law of Canada*, 5th ed supplemented (Toronto: Thomson Reuters, 2021) (loose-leaf updated 2021) at § 30.32 [Hogg] [emphasis added];

3. Due to this overlap, both federal and provincial environmental assessment regimes can apply to a given project, which has been held to be "neither unusual nor unworkable": *Quebec (Attorney General) v Canada (National Energy Board)*, [1994] 1 SCR 159 at 193, 112 DLR (4th) 129 [*National Energy Board* cited to SCR]. Environmental assessments have accordingly come to contemplate a cooperative approach to protecting the environment through shared impact assessment responsibilities between jurisdictions, including by means of bilateral agreements between individual provinces and the federal government;

4. A federal environmental assessment regime applicable to local projects is permitted to review and assess the *entire project* as proposed by a proponent rather than simply the scope of the project thought to fall within federal jurisdiction: *MiningWatch Canada v Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 SCR 6 [*MiningWatch*]; and

5. There is no constitutional imperative that environmental assessment legislation use a particular trigger to initiate a federal assessment, such as the "affirmative regulatory duty" described in *Oldman River*: *Moses* at para 13, aff'g 2008 QCCA 741 at paras 93-115.

[445] Third, following up on this last point, with respect, neither the majority nor Alberta nor any other interested party has provided a clear explanation as to why it is constitutionally impermissible for Canada to move from an environmental assessment process triggered by an external statute rooted in a named federal head of constitutional authority (such as that considered in *Oldman River*) to a project-based environmental assessment approach where the environmental assessment legislation is itself rooted in heads of constitutional power, limiting its reach to environmental *effects* in federal jurisdiction, if indeed it does so. A democratically elected Parliament is free to design an environmental protection approach of its choice, so long as it acts within constitutional constraints. Indeed, it would be surprising if it did not change that approach to meet the challenges of the ever-increasing threat posed by environmental degradation and the climate crisis. Some might call this progress. In any event, Canada's choice of approach to environmental issues is an expression of the will of the people; Canadians are often in the vanguard of progress on the fundamental social issues of our times.

[446] Fourth, natural resource projects are not an enclave of exclusive provincial jurisdiction for all purposes, including environmental protection, immune from federal consideration. A province and the industries contained therein cannot exist in splendid isolation. While the division of powers contemplates that the provinces are constitutionally entitled to be master of their commercial ship and captain of their resource fate, Canada is a federation comprised of a complex matrix of jurisdictions: federal, provincial, Indigenous groups, territorial, regional, and local governments, each with their own environmental interests. With respect to the federal and provincial governments, this is what was meant when La Forest J described the environment as "a constitutionally abstruse matter which does not comfortably fit within the existing division of powers without considerable overlap and uncertainty": *Oldman River* at 64.

[447] Oversight of environmental impacts cannot be the monopoly of one level of government, as environmental impacts are ubiquitous, touching upon a multiplicity of diverse interests, from an individual project's sometimes minor effects upon limited numbers of people at a community level to cumulative effects that attain the magnitude of existential threat to all peoples at a global level. Canadians might be surprised, or even alarmed, by the notion that natural resources projects such as *in situ* oil sands extraction facilities are immunized from federal environmental regulation.

[448] Within this country, Canada geese will fly over tailings ponds north of Fort McMurray without heed of jurisdiction. Fisheries will be disrupted by damming waterways or constructing pipelines that transcends provincial boundaries. Effluent from a potash mine in Saskatchewan may affect the health of Québécois or Indigenous peoples living downstream along a river system that has no regard for provincial borders. A proposed coal strip mining operation on the borders of Banff or Jasper National Park may affect the roaming elk herds whose breeding grounds are deep within the Parks or may contaminate the headwaters of rivers meant to provide clean drinking water to Alberta ranchers and Indigenous communities. An oil spill in Clayoquot Sound may contaminate beaches in the wilderness beloved by Canadians, jeopardize the livelihood of local Indigenous peoples, disrupt the tourism economy of Tofino residents, and pollute coastlines abroad. Environmental concerns engage the interests of a complex matrix of jurisdictions and all

Canadians, affecting the air we breathe, the water we drink, the food we eat, and are best addressed as the shared responsibility of all levels of government, with Indigenous peoples the first among equals, given their historical stewardship of and continued reliance upon the land.

[449] Constitutional decisions to date lead to the conclusion that both Parliament and the provinces have authority to pass laws with respect to the environment, including with respect to the impact upon the environment of physical activities and designated projects in the resource sector, each with respect to the aspect of the environment within their own constitutional authority. My point here is a simple one: the trust of citizens in their various levels of government to protect their environmental interests rests with all levels of government given the complexity and pervasiveness of environmental concerns, appropriately named the existential threat of our times.

[450] The challenge posed by protecting the environment is no longer the purview only of the young and idealistic; it has engaged governments and civil society, the science community, and increasingly, leaders of industry and commerce across the globe. It falls to governments, as guardians of the environment, to put in place legislative processes and administrative infrastructure to protect against environmental effects. It falls to the courts, in turn, to determine whether governments have the constitutional authority to enact the environmental protection regimes they have chosen for this purpose. Courts must do so neutrally and dispassionately. But such a stance need not be in service of the kind of rigidity that hobbles the ability of governments to respond to the complexities of modern Canadian society. To that end, courts in this country have developed various interpretive tools and metaphors designed to ensure some degree of flexibility in our federal system of governance. Now is not the time to abandon these tools or, worse yet, to give credence to the kind of "Trojan horse" metaphor advanced by Alberta and Saskatchewan that, in likening Canada to a foreign invading army deceptively breaching our protective walls, only fuels suspicion and pits one level of government against another.

[451] Canadian constitutional law is already replete with metaphors, including many involving something central to the environment itself: water. The division of powers as "water-tight compartments" (*Canada (AG) v Ontario (AG)*, [1937] 1 DLR 673 at 684, [1937] AC 326); the Constitution as a "living tree" capable of growth, *nourished* by progressive interpretation (*Edwards v Canada (Attorney General)*, [1930] 1 DLR 98 at 106-107, [1930] AC 124); flexible federalism as a "dominant tide" that cannot sweep designated powers "out to sea" (*Reference re Securities Act*, 2011 SCC 66 at para 62 [*Securities Reference*]). To these metaphors I add only this. We in this country are all in the same boat. The division of powers provides multiple oars and in many instances no assurance that we will all row in the same direction. But constitutional interpretation can and should at least allow for such cooperation, where feasible. The environment is one such case. Our planet is on fire, and we need water – not heat. The majority offers heat. This is water. It offers at least the *opportunity* for governments in this country to work collaboratively on issues of overlapping jurisdiction in order that they may better serve the multifaceted concerns of their citizens. Without such water, we risk more than merely rowing in different directions: we risk running aground.

II. History of Canadian Environmental Assessment Legislation

[452] The Parliament of Canada has been legislating to protect the environment for almost four decades, including with federal environmental assessment legislation in relation to subjects within federal jurisdiction. When the predecessors to the *IAA* are compared to subsequent iterations, it is apparent that the approach to environmental assessment has incrementally evolved, but the fundamental purpose remains the same: generally, it is to protect against adverse effects. Each of the modalities employed since 1984 has included these essential elements: an environmental assessment process; regulation of environmental "effects" *described* as within federal jurisdiction; "environmental effects" broadly defined as inclusive of changes to the physical environment, to health and socio-economic conditions, to physical and cultural heritage, as well as to the use of land and resources for traditional purposes by Indigenous people, and cooperation amongst jurisdictions. The project-based approach – a listing of projects to which the legislation would apply – is common to the last two iterations of environmental legislation, and as discussed herein, has already passed constitutional muster.

A. *EARPGO* or the *Guidelines Order*

[453] In 1984, pursuant to the *Department of the Environment Act*, being Part I of the *Government Organization Act, 1970*, RSC 1970, c 14 (2nd Supp), as amended by Part III of the *Government Organization Act, 1979*, SC 1978-1979, c 13 as it appeared on June 22, 1984, the Governor in Council promulgated the *Environmental Assessment and Review Process Guidelines Order,* SOR/84-467: [*EARPGO* or *Guidelines Order*]. *EARPGO* required all federal departments and agencies with decision-making authority for any proposal to undertake environmental screening and initial assessment to determine "whether, and the extent to which, there may be any potentially adverse environmental effects from the proposal": s 10(1). A proposal meant "any initiative, undertaking or activity for which the Government of Canada has a decision making responsibility": s 2. The *Guidelines Order* applied to any proposal that (s 6):

> (a) was undertaken by a federal department,
> (b) may have had an environmental effect on an area of federal jurisdiction,
> (c) required federal funding, or
> (d) was located on federal lands.

[454] In considering a proposal, the initiating department was required to consider potential environmental effects, social effects, public concerns, and could also consider general socioeconomic effects: s 4. Federal decision-makers could reject proposals within their governing legislation: s 12(f).

[455] The responsible federal department decided a project proposal could proceed if it had no adverse effects, insignificant adverse effects, or mitigable adverse effects. A proposal was to be modified, rescreened, or abandoned if it had unacceptable effects. If the proposal had significant adverse effects or unknown adverse effects, it was to undergo further review: s 12.

[456] *EARPGO* contemplated cooperation with provincial assessments: ss 5, 8, 35(c).

[457] The *EARPGO* environmental assessment regime was in place when the Supreme Court of Canada decided the *Oldman River* case.

B. *Canadian Environmental Assessment Act, 1992*

[458] In 1992, Parliament passed the *Canadian Environmental Assessment Act,* SC 1992, c 37 [*CEAA*, *1992*]. *CEAA*, *1992* had a broader scoping mechanism than *EARPGO*. It *required* an environmental assessment of a project before a federal authority exercised certain powers or performed certain duties or functions, including if it (s 5):

> (a) was the proponent of a project,
> (b) provided financial assistance to a project,
> (c) administered federal lands connected to the project, or
> (d) issued a permit or authorization for a project from a list as prescribed by regulation.

[459] However, the legislation also *allowed* the Minister of the Environment to refer a project for an environmental assessment in various instances *notwithstanding that no power, duty or function referred to in s 5 was to be exercised or performed by a federal authority*. One involved where the Minister was "of the opinion that the project may cause significant adverse environmental effects *in another province*": s 46(1) [emphasis added]. Another was where the Minister was "of the opinion that the project may cause significant adverse environmental effects occurring ... *outside Canada* and outside ... federal lands": s 47(1) [emphasis added]. A third involved where the Minister was of the opinion that the project may cause significant adverse environmental effects on certain enumerated federal lands: s 48(1).

[460] *CEAA*, *1992* provided for a review of projects unless specifically excluded: ss 7(1)(a), 59(c)-(c.1). It required environmental assessment to be conducted as early as practicable in the planning stages: s 11. An "environmental effect" included any change the project *may* cause to the environment of listed wildlife species and habitats, any effect of such change on health and socio-economic conditions, physical and cultural heritage, use of lands and resources by Indigenous persons, and on structures and sites of historical, archeological, paleontological, or architectural significance: s 2(1).

[461] The environmental assessment process (s 14) required consideration of a wide variety of factors including environmental effects, their significance, public comments, mitigation measures, and alternative means of carrying out the project; and could consider community knowledge and Aboriginal traditional knowledge: ss 16, 16.1.

[462] The responsible authority could approve a project if it was not likely to cause significant adverse environmental effects, or if the significant adverse environmental effects could be justified in the circumstances: ss 20, 23(1), 37(1).

[463] *CEAA*, *1992* contemplated cooperation with other jurisdictions (ss 12(4)), a joint review panel (s 40), delegation (s 17), or coordination (ss 12.1-12.5), including with provincial agencies, bodies established under land claim agreements, and foreign states.

[464] The *CEAA*, *1992* environmental assessment regime was in place when the Supreme Court of Canada decided the *Moses* and *MiningWatch* cases.

C. *Canadian Environmental Assessment Act, 2012*

[465] In 2012, Parliament passed the *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52 [*CEAA, 2012*], the forerunner to the *IAA*. *CEAA, 2012* applied to designated projects, much like the *IAA*. "Designated projects" were defined to include physical activities (a) carried out in Canada or on federal lands; (b) designated by regulations or ministerial order and (c) linked to the same federal authority as specified in those regulations or that order: ss 2(1), 10, 14(2), 84(a). The *Regulations Designating Physical Activities*, SOR/2012-147 [the *2012 Regulation*] set out the "Project List."

[466] *CEAA, 2012* added an effects-based trigger: it prohibited proponents from carrying out the designated project if that act *may* cause an "environmental effect" within the legislative authority of Parliament unless the Agency decided no environmental assessment was required or the proponent complied with the conditions set out in a decision statement: ss 5(1), 6.

[467] Section 5 of *CEAA, 2012* identified "environmental" effects essentially identically to the "effects" now set out in ss 7(1)(a) to (d) of the *IAA*: a change to various components of the environment within federal jurisdiction: fish and fish habitat, aquatic species, migratory birds; and other components set out in Schedule 2. In turn, these components were defined in federal legislation. Environmental effects also included changes that may be caused to the environment on federal lands, in another province, or outside Canada. Finally, environment effects included any change to the environment that may affect the health and socio-economic conditions of Aboriginal peoples, their heritage, the use of lands and resources for traditional purposes and any structure or site of historical, archaeological, paleontological, or architectural significance. Certain other effects were to be taken into account if the designated project required a federal authority to exercise a power or duty under federal legislation apart from the *CEAA, 2012*: ss 5(2), 7.

[468] The environmental assessment process was required to consider a wide variety of factors, including environmental effects, their significance, public comments, mitigation measures, and alternative means of carrying out the project; and could consider community knowledge and Indigenous traditional knowledge: s 19.

[469] The decision-maker (typically the Minister, the National Energy Board or Canadian Nuclear Safety Commission) decided whether the project was likely to cause *significant* adverse environmental effects: s 52(1). If so, the decision was referred to the Governor in Council who decided whether the effects were justified in the circumstances: s 52(4).

[470] *CEAA, 2012* provided for jurisdictional cooperation and a joint review panel: ss 18, 40.

D. *IAA* and *Regulation*

[471] In 2019, Parliament replaced *CEAA, 2012* with the *IAA.* The Governor in Council, on the recommendation of the Minister, promulgated the accompanying *Regulation*.

[472] Of particular relevance to this Reference is a comparison between the Project Lists created under *CEAA, 2012* and under the *IAA.* Later, at paras 517-523, I explain the main differences.

[473] While this legislative history does not answer the constitutional question before us, it is useful context and helps dispel the notion that the incremental progression of environmental measures to include *effects* from an emerging form of resource recovery, *in situ* oil sands projects, is a colourable effort to control or veto development and management of provincial natural resources. The additions to the Project List can be seen as incremental responses to changes in the energy industry, particularly the addition of wind turbines and *in situ* oil extraction facilities, the latter being expected to dominate future oil recovery processes.[209]

III. The Legislative Scheme of the *IAA* and *Regulation*

A. The *IAA*: Title, Preamble, Purpose, and Impact Assessment Regime

1. The Title, Preamble and Stated Purpose

[474] The title of the *IAA* is "An Act respecting a federal process for impact assessments and the prevention of significant adverse environmental effects".

[475] The *Preamble* proclaims Canada's commitment to "fostering sustainability". The means chosen to achieve that goal is the "impact assessment" process, described as an "effective means of integrating scientific information and Indigenous knowledge into decision-making processes" in respect of "designated projects". Other expressed values in the *Preamble* include public participation; respect for the Indigenous peoples of Canada; cooperation among jurisdictions; transparent, timely decisions contributing to a positive investment climate; impact assessment contributing to Canada's ability to meet environmental and climate change commitments; innovation and technologies to reduce adverse changes to the environment and to health, social or economic conditions; and the importance of regional assessments in assessing the effects of activities and federal policies, plans and programs.

[476] The *Purposes* of the *IAA,* itemized in s 6, contain the stated legislative intentions, including to: foster sustainability; protect the environment and the health, social and economic conditions *within Parliament's legislative authority* from adverse effects caused by a designated project; and establish an impact assessment regime that takes into account both positive and adverse effects

[209] See Exhibit "B" to the Affidavit of Paul Tsounis, sworn December 12, 2019, Alberta Record at C14-15.

that may be caused by designated projects. The purposes are fully considered as a matter of intrinsic evidence showing the legislative purpose at paras 570-571 of this Opinion.

2. The Impact Assessment Regime

[477] The Impact Assessment Agency (the Agency) is created by s 153(1). Among the Agency's many objects is the conduct of impact assessments: ss 155-156.

[478] The impact assessment process involves four stages: planning, preparation of the impact statement, conduct of the impact assessment, and decision-making, followed by implementation.

[479] The *environment* means "the components of the Earth, and includes (a) land, water and air, including all layers of the atmosphere; (b) all organic and inorganic matter and living organisms; and (c) the interacting natural systems that include components … in paragraphs (a) and (b)": s 2.

[480] In the *IAA*, "*jurisdiction*" includes a variety of entities: a federal authority, agency, or body; a provincial government, agency or body; an Indigenous governing body; a foreign government; or an international organization of states: s 2. This term is important because of the scope in the *IAA* for cooperation between various "jurisdictions" with authority over environmental effects.

a. Section 7 and the *Regulation's* Project List

[481] Section 7 of the *IAA* and the *Regulation* operate together as the trigger of the federal environmental impact assessment regime.

[482] Section 7 applies to "designated projects". Under s 109(b), the Governor in Council is empowered to pass regulations "designating a physical activity or class of physical activities". Section 2 of the *IAA* defines "designated projects" as physical activities that are (a) carried out in Canada or on federal lands; and (b) are designated by regulations under s 109(b) or by Ministerial order under s 9(1). Accordingly, it passed the *Regulation* that sets out the Project List.

[483] In the result, s 7 is triggered or engaged if the proposed "physical activity" or "designated project" is on the Project List or designated by Ministerial order.

[484] A thumbnail sketch of s 7 of the *IAA* illustrates its intended jurisdictional reach. By the terms of s 7(1), a proponent of a *designated activity* is prohibited from doing anything that may cause certain *effects*: (a) a change to certain components of the environment within the legislative authority of Parliament, including fish and fish habitat, aquatic species, migratory birds; (b) any change to the environment on federal lands, in another province, or outside Canada; (c) any change to the environment of Indigenous peoples with impact on physical and cultural heritage, use of lands for traditional purposes, or structures of significance; (d) any change to health, social or economic conditions of Indigenous peoples; or (e) any change to a health, social or economic matter within the legislative authority of Parliament set out in Schedule 3 (as yet undefined).

[485] In the *IAA*, for s 7, and in this Opinion, "*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": s 2.

[486] The *IAA* environmental assessment regime regulates environmental *effects* that may be caused by designated projects on the Project List in these categories listed in the Schedule of the *Regulation*:

- National Parks and Protected Areas (ss 1-11);
- Defence (ss 12-17);
- Mines and Metal Mills (ss 18-25);
- Nuclear Facilities (ss 26-29);
- Oil, Gas and Other Fossil Fuels (ss 30-38);
- Electrical Transmission Lines and Pipelines (ss 39-41);
- Renewable Energy (ss 42-45);
- Transport (ss 46-55);
- Hazardous Waste (ss 56-57); and
- Water Projects (ss 58-61).

[487] The Project List contains many matters that are incontrovertibly within federal constitutional authority and some that are constitutionally contested: certain mines and metal mills; certain oil, gas and other fossil fuel projects; certain renewable energy projects; new public highways longer than 75 kilometers; and railways and railway yards of a certain size.

[488] In addition to these designations on the Project List, the Minister has the power to designate a physical activity that may cause *adverse effects within federal jurisdiction*, or *adverse direct or incidental effects*, or if public concerns *related to those effects* warrant the designation; before doing so, the Minister may consider adverse impacts on the rights of Indigenous peoples under s 35 of the *Constitution Act, 1982* as well as other relevant assessments: ss 9(1)-(2).

[489] In the *IAA*, and in this Opinion, "*direct or incidental effects"* 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…of a physical activity or designated project, or to a federal authority's provision of financial assistance…for the purpose of enabling that activity or project to be carried out…": s 2.

[490] Therefore, s 7, working in conjunction with the Project List, is ground zero of the environmental impact assessment process: the s 7 process is triggered once a physical activity becomes a "designated project". The proponent of such a project must follow the impact assessment process to lawfully undertake the designated activity or project: ss 10-20.

[491] The proponent of a designated project *may* undertake activity that may cause the *effects* set out in s 7(1) in any of the following circumstances: the Agency decides no impact assessment is required (s 7(3)(a)); the proponent complies with conditions in a decision statement (s 7(3)(b)); or

it is permitted by the Agency for assessment purposes (s 7(3)(c)). Moreover, effects in s 7(1)(d) may be undertaken if the change is not adverse and an agreement is reached with an Indigenous governing body (s 7(4)).

[492] Similar considerations apply with respect to federal authorities being prohibited from exercising any power or performing any duty or function that allows a designated project to be carried out under s 8. Such a prohibition ceased with respect to a designated project in either of the following circumstances: the Agency decides that (a) no impact assessment is necessary, or (b) an assessment takes place, and the relevant effects are found to be in *the public interest*.

b. Phase I. The Planning Phase

i. Proponent and Agency steps to determine if an impact assessment is necessary: ss 10-15

[493] The proponent of a designated activity must participate in the Planning Phase. The proponent provides a project description: s 10. The Agency must provide for public participation regarding a possible impact assessment (s 11) and offer to consult with any jurisdiction or Indigenous group that may be affected: s 12. Federal authorities must co-operate with provision of information: s 13. The Agency must provide a summary of issues to the proponent (s 14), and the proponent must provide the Agency with a notice setting out how it intends to address the issues and a detailed description of the designated project: s 15.

ii. The Agency's decision as to whether an impact assessment is necessary: s 16

[494] In deciding whether an impact assessment is necessary, the Agency considers the filed information, including these factors: the possibility that the designated project "may cause *adverse effects within federal jurisdiction* or adverse or incidental effects" [emphasis added]; any adverse impact on Indigenous peoples; and comments from the public, a jurisdiction or Indigenous group: s 16(2).

[495] If the Agency decides an impact assessment is necessary (and the Minister does not approve the substitution of a process under s 31, i.e. of another jurisdiction) the Agency must provide the proponent with notice of the commencement of the impact assessment, setting out the information required, including guidelines for studies, plans for cooperation with other jurisdictions, engagement with Indigenous peoples, public participation, and issuance of permits, after considering factors set out in s 22: s 18.

[496] The list of s 22 factors is extensive, and includes changes to the "environment or to health, social or economic conditions" likely to be caused by carrying out the designated project, including the effects of accidents or malfunctions, cumulative effects caused by the designated project in combination with other physical activities, mitigation measures, impact on an Indigenous peoples

or their rights, and many more, including "any other matter relevant to the impact assessment that the Agency requires to be taken into account".

c. Phase II. The Impact Statement

[497] The proponent must provide the Agency with an impact statement, including the information required in the notice: s 19. If the proponent fails to do so, the impact assessment is terminated: s 20.

[498] The Agency (or the Minister if the impact assessment is referred to a review panel) must offer to consult and cooperate with any jurisdiction with authority to assess environmental impacts of a designated project, including those set out in s 2 of the *IAA*: s 21.

d. Phase III. The Impact Assessment

[499] Whether the Agency or a Review Panel or a substituted process conducts the impact assessment, it must consider the factors listed in s 22: ss 33, 42.

[500] The Agency must conduct the impact assessment of the designated project and prepare a report: ss 25-29. It may use any information available or require further information or study: s 26. It must ensure the opportunity for meaningful public participation: ss 27-28. The final impact assessment report must be submitted to the Minister within the 300-day time limit: s 28(2).

i. The impact assessment report considers *adverse effects* and *adverse or incidental effects* of a designated project

[501] The Agency's report must describe the *effects* that are likely to be caused by carrying out the designated project, and moreover, identify those which are *adverse effects within federal jurisdiction* and *adverse direct or incidental effects*, specifying the extent to which those effects are *significant*: s 28(3).

[502] The Agency's report must also explain how it used Indigenous knowledge (s 28(3.1)); summarize the public comments; recommend mitigation measures and follow-up programs; and provide its rationale and conclusions: s 28(3.2).

ii. Substitution and delegation of impact assessment

[503] The Agency may *delegate* the impact assessment or part of it, or preparation of the report, to a "jurisdiction" as defined in s 2: s 29.

[504] Upon the request of a "jurisdiction" described in ss 2(c) to (g), (e.g., provincial government or an Indigenous body), the Minister may approve the *substitution* of its impact assessment process if satisfied the process will include consideration of the s 22(1) factors: s 31(1).

[505] The Minister must be satisfied that the report will set out *adverse effects within federal jurisdiction, adverse and incidental effects*, and the *significance* of those *effects*, and that it considered Indigenous knowledge: ss 33(2)-(2.1).

[506] If the Minister approves a substituted process, the resulting assessment is an impact assessment in conformity with the *IAA*, but the Agency may require more information for the purposes of decision-making under s 60(1): s 34.

iii. Impact assessment by a review panel

[507] If it is in the public interest, the Minister may refer an impact assessment to a review panel: s 36. To decide whether it is in the public interest, the Minister must consider: the extent to which the *effects* are adverse; public concerns; opportunities for cooperation with any "jurisdiction" that has powers, duties, or functions in relation to assessment of the project; and any adverse impact on the rights of Indigenous peoples under the *Constitution Act, 1982*: s 36(2). The review panel will conduct an impact assessment, facilitate public participation, and prepare a report: s 51.

[508] The Minister may also establish a joint review panel with another "jurisdiction" (such as a province or Indigenous body) with powers to conduct an environmental assessment: s 39.

e. Phase IV. The Decision

i. Minister's decision

[509] After the impact assessment report is complete – under the Agency process (s 28(2)) or the substituted process (s 31) – the Minister decides the following question under s 60(1)(a):

> 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 in section 63 and *the extent to which those effects are significant, in the public interest*. [emphasis added]

The phrase "effects within federal jurisdiction" is defined in s 2 of the *IAA* and mirrors the effects listed in s 7(1). Accordingly, the public interest determination is focused on the adverse s 7 effects caused by the designated project.

ii. Referral to Governor in Council

[510] Alternatively, the Minister may refer that decision to the Governor in Council: s 60(1)(b). Moreover, the Minister, in consultation with any responsible Minister, *must* refer the decision to Governor in Council where the report is from a review panel (s 55) or where the assessment by the review panel is terminated (s 59): s 61.

iii. The Governor in Council's Decision

[511] The Governor in Council, too, must decide "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*": s 62 [emphasis added]. Again, the focus is on whether adverse s 7 effects caused by the designated project are in the public interest.

iv. The Decision must consider the s 63 Factors

[512] Both the Minister and the Governor in Council must make their public interest determination in light of the impact assessment report and the following factors outlined in s 63:

> (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 in the impact assessment report are significant;
>
> (c) the implementation of mitigation measures that the Minister or the Governor in Council considers appropriate;
>
> (d) the impact of the designated project on Indigenous groups and on Indigenous peoples as recognized and affirmed by s 35 of the *Constitution Act, 1982*; and
>
> (e) the extent to which the effects of the designated project hinder or contribute to Canada's ability to meet its environmental obligations and commitments in respect of climate change.

The s 22 factors are considered in preparation of the impact assessment report, and the report is considered in the ultimate decision that must consider the s 63 factors.

[513] If the Minister or Governor in Council determines that the effects are in the public interest, the Minister must establish any appropriate conditions, also definitionally linked to federal jurisdiction: s 64. The proponent must comply. Conditions must include mitigation measures and a follow-up program and may include an adaptive management plan: ss 64(1)-(4).

[514] The Minister must issue and make public a "decision statement" with detailed reasons for the determination made under s 60 or 62, conditions, and a timeline: ss 65, 66. Decision statements are part of the licensing processes under the *Nuclear Safety and Control Act*, *Canadian Energy Regulator*, and *Canada Oil and Gas Operations Act*: s 67.

v. Projects by federal authorities

[515] There is an assessment process under the *IAA* for non-designated projects on federal lands and international projects proposed by Canada or receiving federal financial assistance: ss 81-91.

There are exemptions for projects that will cause *insignificant* environmental effects (s 88(1)); or projects related to national security under the *Emergencies Act*; or that must be carried out urgently to protect the environment: s 91.

[516] The *IAA* provides for regional assessments where the region is entirely on federal lands; or in part on or outside federal lands, by agreement: ss 92, 93.

B. What Has Changed: Comparing *CEAA, 2012* vs *IAA* Project Lists

[517] A comparison between the *2012 Regulation* Project List and the *IAA Regulation* Project List shows changes in four categories: (1) projects where the *threshold* for application of the federal environmental assessment regime is *raised* – that is, there must be more activity or production for the *IAA* to apply than was the case under the *CEAA, 2012*; (2) projects where the threshold for application of the federal regime *remains the same*; (3) projects where the federal regime applies for the first time; and (4) projects that are no longer on the Project List.

[518] First, for some projects, the threshold for application of the federal impact assessment regime *is raised* moving from the *CEAA, 2012 Regulation* Project List to the *IAA* Project List. For example, for a pipeline project, the threshold length of pipeline is raised from 40 km or more (*2012 Regulation* Schedule, ss 46, 47) to 75 km or more (*Regulation* Schedule, s 41). For a metal mine project, other than rare earth element mine project, the threshold ore production capacity is raised from 3000 t/day or more (*2012 Regulation* Schedule, ss 16(a), 17 (a)) to 5000 t/day (*Regulation* Schedule, ss 18(c), 19(c)). For a coal mine project, the threshold coal production capacity is raised from 3000 t/day or more (*2012 Regulation* Schedule, ss 16(d), 17(d)) to 5000 t/day or more (*Regulation* Schedule, ss 18(a), 19(a)). For a new all-season public highway that requires a new right of way, the threshold is extended from 50 km (*2012 Regulation* Schedule, s 25(c)) to 75 km (*Regulation* Schedule, s 51).

[519] Second, for some projects, the threshold for application of the federal impact assessment regime remains the same in the *CEAA*, *2012* Project List and the *IAA* Project List. Examples are oil sands mine projects, oil refinery projects, facilities to produce liquid petroleum projects, and petroleum storage facilities.

[520] Third, the federal environmental assessment regime applies to some projects designated for the first time in the *IAA* Project List, as described in the Regulatory Impact Analysis Statement (*RIAS*)[210] accompanying the *Regulation*. In this category are four types of designated projects. New under this regime, and apparently the *provocateur* for this Reference, are *in situ* oil sands extraction facilities with a threshold for application of the federal assessment regime being a bitumen production capacity of 2000 m3/day or more: *Regulation* Schedule, ss 32, 33. Also added are other project types that are presumably not controversial: offshore wind turbines (ss 44, 45); new permanent causeways over 400 m long through navigable waters (s 50); and new entries for

[210] *Regulatory Impact Analysis Statement*, (2019) C Gaz II, Vol 153, No 17, 5661 at 5664-5665 (published following *Physical Activities Regulations*, SOR/2019-285).

federal protected areas including certain activities in national parks, wildlife areas and migratory bird sanctuaries (s 1).

[521] Fourth, several project types were removed from the Project List, because "it was determined that they did not meet the threshold of projects with the greatest potential for effects in federal jurisdiction related to the environment": *RIAS* at 5668. The removed projects include, for example, decommissioning and abandonment of existing pipelines (regulated by the Canadian Energy Regulator), certain mines that generally have lower effects than others, and certain projects regulated by the Canadian Nuclear Safety Commission.

[522] This profile is consistent with Parliament's objective for the Project List, as set out in the *RIAS* at 5661: "to identify those major projects with *the greatest potential for adverse effects on areas of federal jurisdiction* related to the environment, so that they can enter into the impact assessment process" [emphasis added]. The *RIAS* further notes that the Project List uses a "criteria-based approach", with the list under *CEAA, 2012* as a starting point, and that the changes to the Project List "are not expected to significantly change the total number of projects that are subject to federal impact assessment annually compared to the number under the *CEAA, 2012*" and that "[t]he Agency's analysis suggests there would likely be a small decrease in the number of projects that may be required to undergo federal impact assessment on an annual basis": *RIAS* at 5661.

[523] In my opinion, this review shows that not much has changed between *CEAA, 2012* and the *IAA* Project List. A federal project-based environmental assessment regime has existed for ten years, with designated projects on a Project List, that may cause adverse *effects* said to be in federal jurisdiction. No proponents of projects affected by this legislation have challenged its constitutionality or other aspects of its application. Alberta now does so, because *effects* said to be in federal jurisdiction that *may* be caused by *in situ* oil sands projects are added to the Project List, an inevitable progression from an environmental protection point of view since *in situ* projects are the way of the future in the oil sands. As noted, according to evidence filed by Alberta from Paul Tsounis, an employee with the Alberta Department of Energy, in terms of *future* development based on oil *reserves*, mining is projected to make up 19% and *in situ* production 81%.[211]

IV. Distribution of Legislative Powers Under the *Constitution Act, 1867*

[524] For ease of reference, I include the relevant portions of ss 91, 92, 92A and 132 of the *Constitution Act, 1867.*

> **POWERS OF THE PARLIAMENT**
>
> **Legislative Authority of Parliament of Canada**
>
> 91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good

[211] Natural Resources Canada, "Crude oil facts", December 10, 2019 (Exhibit "B" to the Affidavit of Paul Tsounis, sworn December 12, 2019, Record at C14-15).

Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends *to all Matters* coming within the *Classes of Subjects* next hereinafter enumerated; that is to say, [emphasis added].

…

12. Sea Coast and Inland Fisheries.

24. Indians, and Lands reserved for the Indians.

…

29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

…

Treaty Obligations

132. The Parliament and Government of Canada shall have 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.

EXCLUSIVE POWERS OF PROVINCIAL LEGISLATURES

Subjects of exclusive Provincial Legislation

92. In each Province the Legislature may exclusively make Laws in relation to *Matters* coming within the *Classes of Subjects* next hereinafter enumerated; that is to say, [emphasis added]

…

10. Local Works and Undertakings other than such as are of the following Classes:

(a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province:

(b) Lines of Steam Ships between the Province and any British or Foreign Country:

(c) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.

…

13. Property and Civil Rights in the Province.

…

16. Generally all Matters of a merely local or private Nature in the Province.

…

NON-RENEWABLE NATURAL RESOURCES, FORESTRY RESOURCES AND ELECTRICAL ENERGY

Laws respecting non-renewable natural resources, forestry resources and electrical energy

92A. (1) In each province, the legislature may exclusively make laws in relation to

(a) exploration for non-renewable natural resources in the province;

(b) development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom; and

(c) development, conservation and management of sites and facilities in the province for the generation and production of electrical energy.

Export from provinces of resources

(2) In each province, the legislature may make laws in relation to the export from the province to another part of Canada of the primary production from non-renewable natural resources and forestry resources in the province and the production from facilities in the province for the generation of electrical energy, but such laws may not authorize or provide for discrimination in prices or in supplies exported to another part of Canada.

Authority of Parliament

(3) Nothing in subsection (2) derogates from the authority of Parliament to enact laws in relation to the matters referred to in that subsection and, where such a law of Parliament and a law of a province conflict, the law of Parliament prevails to the extent of the conflict.

…

"Primary Production"

(5) The expression "primary production" has the meaning assigned by the Sixth Schedule.

V. Analysis

A. General Principles

1. The Architectural Design of the *Constitution Act, 1867*: Federalism

[525] The *Constitution Act, 1867* establishes a governance system of federalism, "regional diversity within a single nation": *R v Comeau*, 2018 SCC 15 at para 85. Canadian federalism envisages a delicately balanced power sharing arrangement as the bedrock of democracy, recognizing the diversity of the component parts of the Confederation and the autonomy of provincial governments to develop their societies within their respective spheres of jurisdiction. The federal structure of our country also facilities democratic participation by distributing power to the government "thought to be most suited to achieving the particular societal objective having regard to this diversity": *Reference Re Secession of Quebec*, [1998] 2 SCR 217 at para 58, 161 DLR (4th) 385.

[526] In *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 [*GGPPA SCC*], Wagner CJC said this on federalism at paras 49-50:

> Sections 91 and 92 of the *Constitution* give expression to the principle of federalism and divide legislative powers between Parliament and the provincial legislatures: *Reference re Securities Act*, 2011 SCC 66, [2011] 3 S.C.R. 837 ("*2011 Securities Reference*"), at para. 54. Under the division of powers, broad powers were conferred on the provinces to ensure diversity, while at the same time reserving to the federal government powers better exercised in relation to the country as a whole to provide for Canada's unity: *Canadian Western Bank*, at para. 22. Importantly, the principle of federalism is based on a recognition that within their spheres of jurisdiction, provinces have autonomy to develop their societies, such as through the exercise of the significant provincial power in relation to "Property and Civil Rights" under s. 92(13). …

> Although early Canadian constitutional decisions by the Judicial Committee of the Privy Council applied a rigid division of federal-provincial powers as watertight compartments, this Court has favoured a flexible view of federalism – what is best described as a modern form of cooperative federalism – that accommodates and encourages intergovernmental cooperation: *2011 Securities Reference*, paras. 56-58. That being said, the Court has always maintained that flexibility and cooperation, while important to federalism, cannot override or modify the constitutional division of powers. As the Court remarked in *2011 Securities Reference*, "[t]he 'dominant tide' of flexible federalism, however strong its pull may be, cannot sweep designated powers out to sea, nor erode the constitutional balance inherent in the Canadian federal state": para. 62. It is in light of this conception of federalism that I approach this case.

2. The Subject of the Environment: A "Matter" that Falls within both Federal and Provincial Heads of Constitutional Authority

[527] Section 91 of the *Constitution Act, 1867* states that it shall be lawful for Parliament to make laws for the "Peace, Order, and good Government" (POGG) of Canada in relation to all Matters not coming within the exclusive jurisdiction of the provinces, and that the "exclusive Legislative Authority of the Parliament of Canada extends to all Matters" enumerated, including matters such as "Sea Coast and Inland Fisheries", and "Indians, and Lands reserved for the Indians".

[528] Section 92 of the *Constitution Act, 1867* states that "in each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated", including "Local Works and Undertakings" and "Property and Civil Rights in the Province". Section 92A(1) assigns exclusive jurisdiction to the provinces over **"**non-renewable natural resources": **"**the legislature may exclusively make laws in relation to (a) exploration for non-renewable natural resources in the province" and "(b) development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom".

[529] Canada and the provinces have enacted environmental assessment legislation to assess the environmental impact of activities and projects. As early as 1992, in the *Oldman River* decision, the Supreme Court of Canada endorsed the authority of both Parliament and the provincial legislatures to enact environmental protection legislation directed at adverse impacts on the environment.

[530] *Oldman River* concerned the construction of a dam in southern Alberta. After study, planning, and environmental assessment under provincial legislation, Alberta authorized the construction of the dam. Though a provincial assessment had been done, because the project affected navigable waters, fisheries, and "Indians and Indian lands", federal interests were engaged, and the dam proposal was reviewed by the Regional Screening and Co-Ordinating Committee of the federal Department of the Environment. The building of the dam was well underway when the Friends of the Oldman River Society brought an application for judicial review to compel a public environmental assessment pursuant to the *Guidelines Order*. The Society

argued that the Minister of Transport must approve the project under the *Navigable Waters Protection Act*, RSC 1985, c N-22, and in so doing was required to provide an assessment under the *Guidelines Order*; and that the Minister of the Environment had a similar duty under the *Fisheries Act,* RSC, 1985, c F-14: *Oldman River* at 22. The constitutional question was whether the *Guidelines Order* was so broad as to offend ss 92 and 92A of the *Constitution Act*, *1867*: *Ibid* at 31, 62. The Supreme Court of Canada held that the *Guidelines Order* was constitutionally valid.

[531] On the question of where the matter of the environment falls under the *Constitution Act, 1867*, La Forest J, writing for the majority, wrote that the environment is not an enumerated head of power but touches several heads of power assigned to the federal government and the provinces: *Ibid* at 63-67. He noted that the environment is a complex, "abstruse" matter, with aspects that may come within both provincial jurisdiction and federal jurisdiction: *Ibid* at 64.

[532] The Court in *Oldman River* also endorsed a broad view of the "environment", at 37:

> I cannot accept that the concept of environmental quality is confined to the biophysical environment alone; such an interpretation is unduly myopic and contrary to the generally held view that the "environment" is a diffuse subject matter; ...
>
> Surely the potential consequences for a community's livelihood, health and other social matters from environmental change are integral to decision-making on matters affecting environmental quality, subject, of course, to the constitutional imperatives…

[533] Professor Hogg similarly describes the matter of the "environment" broadly, at § 30:31:

> The environment, comprising as it does "all that is around us", is too diffuse a topic to be assigned by the Constitution exclusively to one level of government. Like inflation, it is an aggregate of matters, which come within various classes of subjects, some within federal jurisdiction and others within provincial jurisdiction.

[534] La Forest J returned to the topic of the breadth of environmental concerns, touching on globalism, Canadian values, and pollution as a "sweeping subject", in *Hydro-Quebec* at para 154:

> In *Crown Zellerbach*, I expressed concern with the possibility of allocating legislative power respecting environmental pollution exclusively to Parliament. I would be equally concerned with an interpretation of the Constitution that effectively allocated to the provinces, under general powers such as property and civil rights, control over the environment in a manner that prevented Parliament from exercising the leadership role expected of it by the international community and its role in protecting the basic values of Canadians regarding the environment through the instrumentality of the criminal law power. Great sensitivity is required in this area since, as Professor Lederman has rightly observed, environmental pollution "is no limited subject or theme, [it] is a sweeping subject or theme

> virtually all-pervasive in its legislative implications"; see W. R. Lederman, "Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation" (1975), 53 Can. Bar Rev. 597, at p. 610.

[535] Applicable to this Reference is the Court's recognition in *Oldman River* at 69 that projects may have implications for both federal and provincial heads of power:

> What is important is to determine whether either level of government may legislate. One may legislate in regard to provincial aspects, the other federal aspects. *Although local projects will generally fall within provincial responsibility, federal participation will be required if the project impinges on an area of federal jurisdiction as is the case here* [emphasis added].

[536] The Court characterized the *Guidelines Order* as having two fundamental aspects: a substantive aspect dealing with environmental impact assessment "to facilitate decision-making under the federal head of power through which a proposal is regulated" (and sustainable under the relevant s 91 head of power), and a "procedural or organizational element that coordinates the process of assessment, which can in any given case touch upon several areas of federal responsibility, under the auspices of a designated decision maker, or in the vernacular of the *Guidelines Order*, the 'initiating department'": *Oldman River* at 73. The latter facet of the legislation was described as having "as its object the regulation of the institutions and agencies of the Government of Canada as to the manner in which they perform their administrative functions and duties" and "unquestionably *intra vires* Parliament … either as an adjunct of the particular legislative powers involved, or, in any event, … justifiable under the residuary power in s. 91": *Ibid* at 74.

[537] As noted by Professor Hogg, "the effect of the *Oldman River* decision is to confer on the federal Parliament the power to provide for environmental assessment of any project that has any effect on any matter within federal jurisdiction": Hogg at § 30.32.

[538] In 2010, federal environmental assessment legislation was again challenged in *Moses,* when a proponent sought to develop a vanadium mine in Quebec. One of the issues was the applicability of *CEAA, 1992.* Canada said that a federal assessment was required because the mine was going to impact fish, requiring authorization from the Minister of Fisheries under s 35(2) of the *Fisheries Act*. While the details of *Moses* are set out below when considering whether an external legislative trigger tied to a federal head of power is constitutionally required (for example, the *Fisheries Act*), of relevance here is the double aspect doctrine. In *Moses*, the Court recognized that some activities or projects may have both a provincial and federal aspect over which each level of government can validly exercise law-making authority.

[539] The majority in *Moses* observed that a vanadium mining project, considered in isolation, would be seen to fall within provincial jurisdiction. However, where the project has an adverse impact on fish habitat, the federal environmental regulatory system is engaged. Though resource projects may fall within provincial jurisdiction under s 92A, "a mining project anywhere in Canada that puts at risk fish habitat could not proceed without a permit from the federal Fisheries Minister,

which he or she could not issue except after compliance with the *CEAA*": *Moses* at para 36. The non-renewable resources aspect falls within provincial jurisdiction, while the "fisheries aspect" falls within federal jurisdiction: *ibid*. The dissent too agreed on this general point. Stating that "[t]he inquiry into whether federal jurisdiction can be validly invoked turns on whether the activity ... can be viewed as having a federal aspect" (para 121), it found that "the Project's impact on fish habitat engages federal jurisdiction" (para 124).

3. Federal and Provincial Regulation of Environmental *Effects*: Cooperative Federalism

[540] After *Oldman River* was decided in January of 1992, Hogg noted that "[t]he case for environmental impact assessment by a single, jointly-established, federal-provincial agency, with comprehensive powers delegated by both levels of government could not be clearer": §30:32. Soon thereafter, on June 23, 1992, Canada passed *CEAA, 1992,* which, as noted, contemplated joint review panels between Canada and the provinces. Three days later Alberta did the same: *Environmental Protection and Enhancement Act*, SA 1992, c E-13.3, s 55.

[541] In 1993, Alberta and Canada signed the *Canada-Alberta Agreement for Environmental Assessment Cooperation*, a bilateral agreement which detailed the operation of joint review panels to assess projects in cases involving overlapping jurisdiction. And in 1994, the Supreme Court of Canada concluded in *National Energy Board* at 193 that two levels of government legislating at once in relation to environmental assessment is neither "unusual nor unworkable".

[542] This history illustrates both the reality of overlapping federal-provincial jurisdiction when it comes to the environmental assessment of certain local projects and concomitant recognition by Canada and provinces like Alberta that such overlap militates in favour of cooperation.

[543] In *Reference Re Pan-Canadian Securities Regulation*, 2018 SCC 48 at paras 17-18 [*Pan-Canadian Securities Reference*], the Supreme Court of Canada recognized that the principle of cooperative federalism favors a harmonious reading of cooperative regulating schemes enacted by the provincial and federal governments, enabling each to operate comfortably within its own sphere:

> Cooperative federalism is an interpretative aid that is used when "interpreting constitutional texts to consider how different interpretations impact the balance between federal and provincial interests" (*R. v. Comeau*, 2018 SCC 15, [2018] 1 S.C.R. 342, para. 78). Where possible, courts should favour a harmonious reading of statutes enacted by the federal and provincial governments which allows for them to operate concurrently (*Rogers Communications Inc. v. Chateauguay (City)*, 2016 SCC 23, [2016] 1 S.C.R. 467, at para. 38). …
>
> Cooperative federalism is often applied "to facilitate interlocking federal and provincial legislative schemes and to avoid unnecessary constraints on provincial legislative action" (*Quebec (Attorney General) v. Canada (Attorney General)*, 2015 SCC 14, [2015] 1 S.C.R. 693, at paras. 17-19). Broadly speaking, it "accommodates

> overlapping jurisdiction and encourages intergovernmental cooperation", and therefore discourages courts from interfering with cooperative regulatory schemes so long as they are not incompatible with the boundaries dictated by the *Constitution Act, 1867* [authorities omitted]. …

See also *Reference re Genetic Non-Discrimination Act*, 2020 SCC 17 at paras 22-24.

[544] A cautionary gloss was drawn over the principle of co-operative federalism in *Rogers Communications Inc v Châteauquay (City),* 2016 SCC 23 at para 39:

> [A]lthough co-operative federalism has become a principle that the courts have invoked to provide flexibility for the interpretation and application of the constitutional doctrines relating to the division of powers, such as federal paramountcy and inter jurisdictional immunity, it can neither override nor modify the division of powers itself. It cannot be seen as imposing limits on the valid exercise of legislative authority: *Quebec (Attorney General) v. Canada (Attorney General)*, at paras. 17-19. …

[545] The principle of cooperative federalism supports concurrent operation of environmental protection statutes enacted by federal and provincial governments so that a single project may variously engage environmental regulations passed by both levels of government, each regulating a distinct and separate aspect of the project. Though there will be overlap, it is dealt with through cooperation and federal–provincial agreements.

[546] In my view, environmental assessment regimes may be seen as paradigmatic examples of co-operative federalism. The question is whether Parliament has overstepped its bounds as circumscribed by s 91 of the *Constitution Act, 1867*, in the *IAA* and *Regulation*, or provisions within it. The majority of the Court in *Oldman River* addressed this point, (at 72):

> Because of its auxiliary nature, *environmental impact assessment can only affect matters that are "truly in relation to an institution or activity that is otherwise within [federal] legislative jurisdiction*"; see *Devine v. Quebec (Attorney General)*, [1988] 2 S.C.R. 790, at p. 808. Given the necessary element of proximity that must exist between the impact assessment process and the subject matter of federal jurisdiction involved, this legislation can, in my view, be supported by the particular head of federal power invoked in each instance. In particular, the *Guidelines Order* prescribes a close nexus between the social effects that may be examined and the environmental effects generally. Section 4 requires that the social effects examined at the initial assessment stage be "directly related" to the potential environmental effects of a proposal, as does s. 25 in respect of the terms of reference under which an environmental assessment panel may operate. Moreover, where the *Guidelines Order* has application to a proposal because it affects an area of federal jurisdiction, as opposed to the other three bases for application enumerated in s. 6, the environmental effects to be studied can only be those which may have an impact on the areas of federal responsibility affected [emphasis added].

[547] In *Oldman River*, the activity subject to environmental assessment – a dam across the river – was a project wholly within the province of Alberta but with environmental *effects* upon both federal and provincial interests. Both federal and provincial environmental legislation was implicated. This Reference, too, concerns both federal environmental assessment legislation, the *IAA*, and provincial environmental legislation, in Alberta, the *Environmental Protection and Enhancement Act*, RSA 2000, c E-12 [*EPEA*], as well similar legislation in other provinces.

4. The Presumption of Constitutionality

[548] The presumption of constitutionality favors a constitutional interpretation of the *IAA*. The presumption of constitutionality can be relevant to how the matter of an impugned law is characterized: Hogg at § 15:13. As noted in *Siemens v Manitoba (Attorney General)*, 2003 SCC 3 at para 33, "[w]hen faced with two plausible characterizations of a law", courts should normally favour the one "which supports the law's constitutional validity". Similarly, where a legislative text is capable of bearing a meaning that makes it constitutionally valid, that meaning should be adopted: *Desgagnés Transport Inc v Wärtsilä Canada Inc*, 2019 SCC 58 at para 28 [*Desgagnés Transport*].

[549] An interpretation of the *IAA* as an environmental assessment regime intended to regulate environmental *effects* in federal jurisdiction and to work in concert with interlocking provincial environmental processes that are intended to regulate *effects* in provincial jurisdiction is consonant with the double aspect doctrine, cooperative federalism, and the presumption of constitutionality.

B. Validity of the *IAA* and *Regulation*

[550] The constitutional questions posed in this Reference treat the enabling legislation, the *IAA,* and its subsidiary *Regulation* separately, and Alberta's approach is to analyse them separately. However, as a review of the legislation makes crystal clear, the *IAA* and the *Regulation* are legislatively a piece of whole cloth, woven together by their terms, informing each others' content, and intended to operate in an integrated fashion. The trigger of the assessment process is s 7 animated by the Project List of physical activities or designated projects in the *Regulation;* "trigger" means the assessment process springs into action once a proponent advances a proposal for a designated project. The enabling legislation, the *IAA*, and its subsidiary legislation, the *Regulation*, must be read and interpreted together to discern Parliament's true legislative intent.

[551] Alberta submits that, even if the *IAA* is found constitutionally valid, the *Regulation* itself "fail[s] to establish any boundaries restricting the application of the *IAA* to projects clearly within federal jurisdiction and as such should be found *ultra vires* the Parliament of Canada": Factum at para 120. This approach, which would require the separate consideration of the constitutionality of the *IAA* and the *Regulation*, has been rejected in cases where a statute and the regulation promulgated under it "were intertwined from the start", and where "[t]he regulations gave concrete meaning and content to the statute and were indispensable to its classification for constitutional purposes": *R v Morgentaler*, [1993] 3 SCR 463 at 480-81, 107 DLR (4th) 537 [*Morgentaler* cited

to SCR], referring to *Texada Mines Ltd v Attorney-General of British Columbia*, [1960] SCR 713, 24 DLR (2d) 81.

[552] Regulations "complete and implement" the statutory scheme and therefore must be read within the context of the scheme, having regard to the language and purpose of their enabling Act: Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham, LexisNexis Canada Inc, 2014) at 413. An impugned provision is not to be considered in isolation. Rather, it must be situated in context – within the statutory scheme as a whole and the legislative history: *Ward v Canada (Attorney General)*, 2002 SCC 17 at paras 19-23, [2002] 1 SCR 569 [*Ward*].

[553] Similarly, in *Syncrude Canada Ltd v Canada (Attorney General)*, 2016 FCA 160 at para 33, the Federal Court of Appeal rejected the argument that an impugned provision must be read first in isolation, and only if the pith and substance cannot be resolved in that manner is it appropriate to examine the provision in the context of the entire scheme – a proposed methodology described by the Court as "problematic as a matter of doctrine". A regulation that on its face, and when read alone, might appear to be regulating a matter within the jurisdiction of the other level of government must be considered in its proper context, in light of the entire scheme, to understand its true purpose and effect: *Ibid* at para 34.

[554] Alberta's approach to the *Regulation* poses the wrong question. The *IAA* and the *Regulation* work together and are informed by each other; they must be read and interpreted together. There is one legislative scheme to characterize here, and one "pith and substance".

[555] As to the constitutional analysis of the legislative regime, Hogg provides the approach required by this Reference: Hogg at §15:4. Sections 91 and 92 of the *Constitution Act, 1867*, respectively, set out the distribution of powers between the federal Parliament and the provincial legislatures. Each section lists the kinds of law competent to each level of government, giving legislative authority to "matters" coming within "classes of subjects". There are two steps involved in judicial review: "the first step is to identify the 'matter' (or pith and substance) of the challenged law; the second step is to assign the matter to one of the 'classes of subjects' (or heads of legislative power)": *Ibid*. As explained by Professor Hogg:

> The challenged statute is characterized … as in relation to a "matter" (step 1) only to determine whether it is authorized by some head of power in the Constitution. The "classes of subjects" are interpreted (step 2) only to determine which one will accommodate the matter of a particular statute. The process is, in Laskin's words, "an interlocking one, in which the British North America Act and the challenged legislation react on one another and fix each other's meaning". Nevertheless, for purposes of analysis it is necessary to recognize that two steps are involved: the characterization of the challenged law (step 1) and the interpretation of the power-distributing provisions of the Constitution (step 2).

[556] Each of the two steps – characterization of the legislation and classification of the matter under federal and provincial heads of power – will be considered in turn.

1. Characterization

[557] Both Parliament and the provincial legislatures have constitutional authority to pass legislation concerned with adverse impacts on the environment caused by physical activities or projects. To determine whether the *IAA* and *Regulation* are within Parliament's constitutional authority, first it is necessary to determine the "pith and substance" of the impugned law.

[558] The "pith and substance" of a legislative provision is "the dominant or most important characteristic of the challenged law": *Oldman River* at 62; Hogg at §15:5.

[559] In *Securities Reference*, the Supreme Court of Canada described the "pith and substance" analysis as follows at paras 63–64:

> The "pith and substance" analysis is used by Canadian courts to determine the constitutional validity of legislation from a division of powers perspective. The analysis looks at the *purpose* and *effects* of the law to identify its "main thrust" as a first step in determining whether a law falls within a particular head of power…. Incidental effects may be discounted; the search is for the main thrust of the law (*Canadian Western Bank*, at para. 28).
>
> Intrinsic evidence, such as purpose clauses and the general structure of the statute, may reveal the *purpose* of a law. Extrinsic evidence, such as Hansard or other accounts of the legislative process, may also assist in determining a law's purpose. The *effects* of a law include the legal effect of the text as well as practical consequences of the application of the statute (*Lacombe*, at para. 20; *Kitkatla*, at para. 54).

[560] In *GGPPA SCC*, the Court reiterates that the "pith and substance" should be described *as precisely as possible*, capturing the law's essential character in terms that are "as precise as the law will allow": para 52. The call for precision is further refined at para 69: "[w]hen characterizing a matter, a court must strive to be as precise as possible, because a precise statement more accurately reflects the true nature of what Parliament did and what it intended to do". The Supreme Court was critical of this Court's characterization of the legislation at issue as being about "GHG emissions" generally, finding it was instead about "establishing minimum national standards of GHG price stringency to reduce GHG emissions": para 80. Moreover, "[c]ourts should generally hesitate to attribute to Parliament *an intention to occupy an entire field*": para 65 [emphasis added]. I take this to mean that courts should be reluctant to find the purpose of federal legislation is to legislate over an entire subject matter, in that case, the regulation of GHG emissions.

[561] Alberta describes the pith and substance or dominant character of the *IAA* as:

> Establishment of a comprehensive impact assessment regime that requires proposed resource developments and infrastructure projects to undergo a broad ranging assessment of their impacts, environmental and other, and to subject those projects to federal oversight and approval.

[562] Alberta makes a similar argument to the one it made in the *GGPPA* Reference. There, Alberta essentially argued that Canada was trying to occupy the entire field of GHG regulation because if the "pith and substance" of the *Greenhouse Gas Pollution Pricing Act*, SC 2018, c 12, s 186 is "regulating GHGs", and that is a matter of national concern under the POGG power, then provinces retain no ability to regulate GHGs (since the POGG power is exclusive and plenary). Similarly, by claiming the *IAA* is "comprehensive", Alberta is essentially arguing that Canada is trying to take over the entire field of environmental assessment. That is, a federal decision-maker will make a determination about *all aspects* of a project such that there is nothing left for a provincial decision-maker to consider. The question is whether that is so. Certainly, the *IAA* can be interpreted so that the two assessment regimes operate cooperatively.

[563] Further, Alberta's formulation of the pith and substance of the *IAA* and the *Regulation* assumes or suggests that their dominant purpose is to assert federal control over resource development and infrastructure projects. Alberta's version of the pith and substance of the *IAA* and *Regulation* is not "as precise as the law will allow", but is broad and general, missing the essential purpose of this project-based environmental assessment regime: to determine whether *certain* adverse environmental effects of designated projects are in the public interest - worth the environmental cost - to warrant government authorization to proceed.

[564] On the other hand, Canada describes the "pith and substance", or dominant character, of the *IAA* as to establish a federal environmental assessment process to protect against adverse environmental effects:

a. on matters within federal jurisdiction (as listed in s 7).

b. in the exercise of federal regulatory power in other existing federal schemes (s 8); and

c. in relation to projects carried out on federal Crown lands, or by federal authorities outside Canada, or which engage the provision of financial assistance (ss 81-91).

[565] While Canada's view of the *IAA* and *Regulation* is more precise, it adverts to the effects of the environmental assessment regime and pre-judges the question of whether the essential character of the legislation is constitutionally permissible, an analysis that should occur at the classification stage.

[566] In ascertaining the pith and substance of the *IAA* and *Regulation*, I consider first the *purpose* of the law, as revealed by intrinsic and extrinsic evidence, and then the *effects* of the law, both legal and practical.

a. Purpose of the *IAA* and *Regulation*

i. Intrinsic evidence

The purpose of the *IAA* and *Regulation* shown through the Title, Preamble and Purpose provision

[567] Parliament's express purpose in passing the *IAA* is in its title, its preamble, and the statement of purpose in s 6.

[568] The full name of the *IAA* is helpful in identifying Parliament's purpose: *GGPPA SCC* at para 58. It is "An Act respecting a federal process for impact assessment and the prevention of significant adverse environmental effects". The title tells us that the essential goal of the *IAA* is an environmental assessment regime for the "prevention of significant adverse environmental effects". The "significance" of the adverse environmental effects plays forward through the *IAA* decision-making process as a factor in determining whether a project will be authorized: s 63(b).

[569] The preamble to a statute is "useful in constitutional litigation to illustrate the 'mischief' the legislation is designed to cure and the goals Parliament sought to achieve": *GGPPA SCC* at para 59. The content of the *IAA* Preamble is summarized at para 476 above. It can best be described as an expression of Canada's commitment to, or recognition of, a set of high-level values and principles that underlie its project-based environmental assessment regime.

[570] The *IAA* Purpose section carries these values forward by stating Parliament's general and specific goals – what the *Act* intends to accomplish:

- to foster sustainability: s 6(a);
- to protect components of the environment and the health, social and economic conditions within federal authority from adverse effects caused by a designated project: s 6(b);
- to establish a fair, predictable and efficient process for impact assessments in the interests of competitiveness, innovation, and sustainable economic development: s 6(b.1);
- to ensure that impact assessments consider all positive and adverse effects: s 6(c);
- to ensure federal authorities avoid adverse effects in federal jurisdiction or adverse or incidental effects: s 6(d);
- to promote cooperation between federal, provincial and Indigenous governments with respect to impact assessment: s 6(e);
- to promote communication and cooperation with Indigenous peoples and respect their s 35 rights during impact assessment: ss 6(f), (g);
- to ensure public participation during impact assessment; to ensure impact assessment is completed in a timely manner: s 6(h);
- to ensure consideration of scientific, Indigenous and community knowledge: s 6(j);
- to ensure consideration of alternative means of carrying out the designated project: s 6(k);
- to ensure federal projects (s 81) avoid significant adverse environmental effects; to ensure assessment of *cumulative effects* of designated projects and consideration of federal policies and programs in impact assessments: ss 6(l), (m);
- to encourage improvement of impact assessment through follow-up programs: s 6(n).

[571] Parliament's purpose or goal in passing the *IAA* and the *Regulation* is also demonstrated by operation of the project-based environmental assessment regime: its trigger in s 7 in concert with the *Regulation* Project List; its effectuation through the environmental assessment process; its interjurisdictional mechanisms; and its multifactorial approach at the decision-making stage.

ii. Extrinsic evidence

[572] In determining legislative purpose, a court may consider the legislative history of a statute, including government policy papers and legislative debates: *GGPPA SCC* at para 62.

[573] A review of the extrinsic evidence relevant to the enactment of Bill C-69 confirms that Parliament's purpose was to establish a federal environmental assessment regime with several related aims: to *foster sustainability* and *facilitate planning and information gathering* for projects that may have *effects on areas within federal jurisdiction*, where the public interest involves considering both positive and negative effects.

[574] Comments by the Minister of the Environment during legislative debates on Bill 69 explain the nature of the impact assessment process and its focus on the *effects* of projects under review. For example, in her Introductory Remarks to the Standing Committee on Environment and Sustainable Development on May 3, 2018, the Minister described Bill C-69 as follows:

> The Government of Canada is committed to ensuring that Canada's major projects are developed in a way that is informed by rigorous science, evidence, and [I]ndigenous knowledge. They must also be consistent with Canada's climate plan, protect our rich natural environment, respect the rights of [I]ndigenous peoples, and support our economy.
>
> Our priority remains to effectively advance both Canada's economic progress and our environmental responsibilities. These values are at the core of Bill C-69. …
>
> Bill C-69 restores robust oversight and thorough impact assessments that take into consideration not only the negative environmental effects of a project, but also the environmental, economic, health and social impacts.
>
> Impact assessments will also consider how projects are consistent with our environmental obligations and climate change commitments, including with the Paris Agreement.[212]

[575] In an earlier standing committee meeting, the Minister had explained that the review of a project's impacts is relevant to a sustainability determination, stating that "the sustainability test does require looking at the positive and negative impacts, including economic, environmental,

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[212] House of Commons, Standing Committee on Environment and Sustainable Development, *Evidence*, 42-1, No 110 (3 May 2018) at 1-2 (Hon Catherine McKenna).

social and health impacts".[213] She further noted that "[d]ecisions will be based on whether a project with adverse effects is in the public interest" and include consideration of "the project's contribution to sustainability, impacts on [I]ndigenous peoples and their rights, and mitigation measures that are proposed to reduce the project's impacts on Canada's ability to meet its environmental obligations and climate change commitments".[214]

[576] At Third Reading in the House of Commons, the Minister noted that the Bill improves decision making through "project reviews that consider a wide range of positive and negative impacts on the economy, health, [I]ndigenous rights, and communities, in addition to the environment"[215], all factors said to play into the assessment of whether a project is in the public interest.[216] This theme re-emerged at a Senate Standing Committee, where the Minister noted that impact assessments will consider effects on the environment, and the "long-term social, health and economic impacts", including "positive economic contributions", all of which inform a decision on sustainability.[217]

[577] The legislative debates also emphasize the focus on information gathering and planning built into the impact assessment process as well as inter-jurisdictional collaborations. For example, before the House of Commons Standing Committee, the Minister noted:

> … project reviews need to be predictable, provide regulatory certainty, and work across multiple jurisdictions. The new legislation proposes to have one agency, the impact assessment agency of Canada, lead all major project reviews and coordinate with [I]ndigenous peoples. One project, one assessment, is a guiding principle to drive co-operative reviews and avoid duplication[...]
>
> A new early planning phase will engage jurisdictions, potentially affected [I]ndigenous peoples and communities, to ensure that key issues are raised early so that project proponents know at the outset what is expected from them.[218]

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[213] House of Commons, Standing Committee on Environment and Sustainable Development, *Evidence*, 42-1, No 099 (22 March 2018) at 17 (Hon Catherine McKenna).

[214] *Ibid* at 2.

[215] "Bill C-69 An Act to enact the Impact Assessment Act and the Canadian Energy Regulatory Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts", 3rd reading, *House of Commons Debates*, 42-1, No 313 (12 June 2018) at 20775.

[216] *Ibid* at 20778.

[217] The Senate, Standing Senate Committee on Energy, the Environment and Natural Resources, *Evidence*, 42-1, No 68 (2 May 2019) (Hon Catherine McKenna).

[218] House of Commons, Standing Committee on Environment and Sustainable Development, *Evidence*, 42-1, No 099 (22 March 2018) at 2 (Hon Catherine McKenna).

[578] The centrality of early planning and engagement was reiterated by the Minister in her introductory remarks at Third Reading.[219]

[579] Early planning, information gathering, and collaboration arose again at the Standing Senate Committee on Energy, the Environment and Natural Resources, where the Minister's introductory remarks included the following:

> … there is broad support for the early planning phase, an essential component of the new impact assessment system that reflects what we know to be best practice for industry. Early planning provides for a structured process, led by the impact assessment agency, to engage with stakeholders, potentially affected Indigenous peoples and communities, regulators and cooperating jurisdictions. It ensures key issues are raised early in the process, leading to better project design and ensuring project proponents know what's expected of them at the outset. Additionally, upfront investment in early planning allows for faster reviews and more timely decisions. This is a key element of our "one project, one review" approach, ensuring the needs of all partners, whether provinces or federal life cycle regulators are met through a single process ... .[220]

[580] The focus on *effects within federal jurisdiction* was also a subject of discussion in the legislative debates on Bill C-69. Before the Senate Standing Committee on May 2, 2019, the Minister noted that the environment is a joint field of jurisdiction between the provinces and the federal government and confirmed that the legislative regime would examine "impacts in fields of federal jurisdiction". In discussing the Project List in March 2018, the Minister noted that consultation on the List was ongoing, but that the focus would be, not on federal funding, but on "projects that have the most potential for adverse effects in areas of federal jurisdiction related to the environment".[221] Before the May 3, 2018, House of Commons Standing Committee, the Minister reiterated that consultation on the Project List focused on the review of "major projects with the potential for adverse environmental impacts that are clearly within federal jurisdiction".[222]

[581] The *RIAS* bears out this approach, identifying the rationale for the Project List as "to identify those major projects with *the greatest potential for adverse effects on areas of federal jurisdiction* related to the environment, so that they can enter into the impact assessment process": *RIAS* at 5661 [emphasis added]. The *RIAS* further notes that the Project List uses a "criteria-based

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[219] "Bill C-69 An Act to enact the Impact Assessment Act and the Canadian Energy Regulatory Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts", 3rd reading, *House of Commons Debates*, 42-1, No 313 (12 June 2018) at 20774-8 (Hon Catherine McKenna).

[220] The Senate, Standing Senate Committee on Energy, the Environment and Natural Resources, *Evidence*, 42-1, No 68 (2 May 2019) (Hon Catherine McKenna).

[221] House of Commons Standing Committee (22 March 2018) at 18.

[222] House of Commons Standing Committee (3 May 2018) at 7.

approach", using the List under *CEAA 2012* as a starting point, and that the changes to the Project List "are not expected to significantly change the total number of projects that are subject to federal impact assessment annually compared to the number under the *CEAA, 2012*": *RIAS* at 5661.

iii. Conclusion as to purpose of the *IAA* and *Regulation*

[582] The extrinsic and intrinsic evidence shows that Parliament's purpose in passing the *IAA* and its companion *Regulation* is to foster sustainability by establishing a federal project-based impact assessment regime that seeks to limit adverse effects on identified areas of claimed federal jurisdiction by subjecting certain projects to review to determine whether said effects are in the public interest.

b. Effects of the *IAA* and *Regulation*

[583] Concisely described, a "law's legal effects are discerned from its provisions by asking "how the legislation as a whole affects the rights and liabilities of those subject to its terms": *GGPPA SCC* at para 70, citing *Morgentaler* at 482. Conversely, its practical effects are "'side' effects flow[ing] from the application of the statute which are not direct effects of the provisions of the statute itself": *GGPPA SCC* at para 77, citing *Kitkatla Band v British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31 at para 54.

i. The effects of the *IAA* and *Regulation* shown through s 7 and the Project List

[584] Section 7 is engaged when a proponent's proposal for development is a "designated project", usually because it is on the Project List under the *Regulation*. The proposed project is then within the purview of the *IAA* and the impact assessment process is triggered. A proponent must follow the legislative regime, a prescription for authorization, before it can proceed lawfully (s 10) and may only proceed with the project when authorized, most notably if the Agency decides no impact assessment is required (s 7(3)(a)) or the proponent complies with conditions in a decision statement (s 7(3)(b)).

[585] The legal effect of the *IAA* and *Regulation* is that proponents of "physical activities" or "designated projects" that may cause *effects* on the environment in purported areas of federal jurisdiction *must* participate in the federal environmental assessment regime or face penalties.

ii. The effects of the *IAA* and *Regulation* shown through the environmental assessment process

[586] One effect of the *IAA* and *Regulation* is that the proponent of a "designated project" may be required to proceed through the four phases of the impact assessment regime under the auspices of the Agency: planning, preparation of the impact statement, conduct of the impact assessment, issuance of the decision, followed by implementation of the decision. The proponent must work with the Agency through the steps necessary for a determination as to whether an impact assessment is necessary: ss 10-15, 16(1)-(2).

[587] A second effect is that if the Agency decides an impact assessment is necessary (and the Minister does not approve the substitution of a process under s 31), the Agency must provide the proponent with a notice of the commencement of the impact assessment, setting out the information required and plans for cooperation with other jurisdictions, Indigenous peoples, public participation, and issuance of permits: s 18. The Agency will determine the scope of the s 22 factors that the proponent must address in its impact statement, including the mandatory factors, Indigenous and community knowledge, comments from the public and other jurisdictions, as well as regional, strategic, and Indigenous assessments: s 18(1.2).

[588] The proponent must then address and provide information and any plans for cooperation with other jurisdictions as required by the Agency. These too are legal effects.

iii. The effects of the *IAA* shown through decision-making: authorization of projects in the public interest

[589] Though the information-gathering and factors considered in the impact assessment process are broad ranging, s 28 (3) of the *IAA* requires the impact assessment report to focus on *significant effects within federal jurisdiction*. Both the Minister and Governor in Council must base their public interest decisions on the impact assessment report and the s 63 factors. The proponent will need to marshal its case to address the s 63 factors that will form the basis of decision-making.

iv. Conclusion as to effects of the *IAA* and *Regulation*

[590] In conclusion, the effects of the *IAA* and *Regulation* are found in its procedural and substantive content. There are legal effects: once the *IAA* regime is triggered by s 7 and the Project List, proponents of projects identified on the Project List are prohibited from proceeding unless and until they have complied with the environmental assessment regime in the *IAA*. Failure to comply with the legal requirements of the *IAA* may result in penalties or failure to obtain the necessary approval for the project to proceed. There are practical effects: the *IAA* process to decision-making requires the time and resources of the Agency, the proponent, and other implicated jurisdictions, such as provincial environmental authorities or First Nations, as well as affected communities. The process may result in delay.

c. Conclusion as to Pith and Substance of the *IAA* and *Regulation*

[591] While finding that challenged provisions of the *Guidelines Order* were validly enacted in *Oldman River*, La Forest J described the impact assessment approach at 71:

> Environmental impact assessment is, in its simplest form, a planning tool that is now generally regarded as an integral component of sound decision-making. Its fundamental purpose is summarized by R. Cotton and D. P. Emond in "Environmental Impact Assessment", in J. Swaigen, ed., *Environmental Rights in Canada* (1981), 245, at p. 247:

> The basic concepts behind environmental assessment are simply stated: (1) early identification and evaluation of all potential environmental consequences of a proposed undertaking; (2) decision making that both guarantees the adequacy of this process and reconciles, to the greatest extent possible, the proponent's development desires with environmental protection and preservation.
>
> As a planning tool it has both an information-gathering and a decision-making component which provide the decision maker with an objective basis for granting or denying approval for a proposed development ….

[592] Both the *IAA* with its *Regulation* and the *Guidelines Order* at issue in *Oldman River* involved a process for environmental assessment: use of a planning tool intended to be an integral component of sound decision-making with respect to proposed activities and projects that may have environmental effects. The *IAA* is different from the *Guidelines Order* in that it is project-based and certain decisions pursuant to which projects are assessed are contained internally. The *Regulation* identifies projects with potential environmental *effects* within the federal sphere that are subject to a regulatory process triggered by s 7 and culminate in a decision as to whether an assessment is necessary and if so, whether the project is authorized to proceed because certain enumerated environmental effects are in the public interest. However, the *IAA* and *Regulation* remain essentially a planning tool, effectuated by the Agency-led administrative infrastructure to facilitate information-gathering, decision-making, and enforcement.

[593] In my view, the pith and substance of the *IAA* and *Regulation* is to establish a federal environmental assessment regime that facilitates planning and information gathering with respect to specific projects to inform decision-making, cooperatively with other jurisdictions, as to whether the project should be authorized to proceed on the basis that identified adverse environmental effects purported to be within federal jurisdiction are in the public interest.

2. Classification

[594] In considering the constitutional validity of legislation relating to the environment, it is necessary to look at the catalogue of powers assigned to Parliament and the provincial legislatures to see if the exercise of authority in the impugned legislation falls within one or more of the powers assigned to the government that enacted it: *Oldman River* at 65; *Hydro-Quebec* at para 112; *GGPPA SCC* at para 533. As noted by La Forest J in *Oldman River* at 73, "[t]here is no constitutional obstacle preventing Parliament from enacting legislation under *several heads of power* at the same time" [emphasis added].

[595] Having identified the matter of the *IAA* and *Regulation*, I turn next to the interpretation of the "classes of subjects" in the *Constitution Act, 1867*, to determine which ones, if any, will accommodate the "matter" of the impugned legislation: Hogg at § 15.4. The question is whether the subject matter of the challenged legislation genuinely falls within the head of constitutional power relied upon to support its validity; where it does, the legislation will be upheld on the basis that it is *intra vires*, and therefore valid: *Pan-Canadian Securities Reference* at para 86.

[596] Accepting that "environmental regulation" is too broad to be "the matter" of the *IAA* and the *Regulation*, nor is it a single matter, nor is it a discrete head of power, legislative authority over environmental regulation is distributed and parceled out between various federal and provincial heads of power. As the Court in *Oldman River* stated at 67-68:

> It must be noted that the exercise of legislative power, as it affects concerns relating to the environment, must, as with other concerns, be linked to the appropriate head of power, and since the nature of the various heads of power under the *Constitution Act, 1867* differ, the extent to which environmental concerns may be taken into account in the exercise of a power may vary from one power to another. For example, a somewhat different environmental role can be played by Parliament in the exercise of its jurisdiction over fisheries than under its powers concerning railways or navigation since the former involves the management of a resource, the others, activities…

[597] Following the decision in *Oldman River*, author Steven Kennett suggested a distinction between activities over which Parliament has "comprehensive" environmental jurisdiction (such as interprovincial railways, the example used in *Oldman River*) and activities which, because they merely touch on or have consequences for an area of federal competence, are subject only to "restricted" or limited federal jurisdiction. Comprehensive jurisdiction would permit Parliament to regulate all the environmental consequences of an activity, where the activity is referred to directly or implicitly under a federal head of power. Limited federal jurisdiction would apply to activities that are not directly referred to in a federal head of power but have consequences for an area of federal competence; the extent of jurisdiction would be limited to "addressing these consequences".[223] Noting the distinct forms of federal authority over activities and the necessity for a holistic approach to environmental assessment, the author makes the case "that federal-provincial cooperation is required if [environmental assessment] is to achieve its full potential when both levels of government have jurisdictional interests regarding an activity."[224]

[598] Regardless of nomenclature, there is a distinction between environmental assessment of activities that are explicitly or implicitly within federal heads of power, and environmental assessment of activities that may have *effects on or consequences for* areas of federal competence. A useful exercise for analyzing whether the *IAA* and *Regulation* regime genuinely operates within federal jurisdiction is to distinguish between those activities or projects in the *Regulation* Project List that are indisputably tied, explicitly or implicitly, to a federal head of power, and those activities or projects in the Project List that are *prima facie* tied to a provincial head of power but may have *effects* within areas of federal jurisdiction, thus narrowing the focus of the inquiry.

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[223] See Steven A Kennett, "Federal Environmental Jurisdiction After *Oldman*" (1993) 38:1 McGill L J 180 at 186-189.

[224] *Ibid* at 203.

a. Matters in the *IAA Regulation* Project List *prima facie* Within s 91 of the *Constitution Act, 1867*

[599] In *Desgagnés Transport* at para 39, the Supreme Court recognized that "classification may sometimes be self-evident – and thus constitute a mere formality – once the law is properly characterized". Otherwise, classification "requires considering the scope of the relevant head of power (see *Reference re Securities Act* at paras 65, 69; *Reference re Assisted Human Reproduction Act*, per LeBel and Deschamps JJ., at para. 159; *Ward v. Canada (Attorney General)*, 2002 SCC 17, [2002] 1 S.C.R. 569, at para. 29; Hogg, at pp. 15-6 and 15-7)": *Ibid*.

[600] As touched on previously, many of the designated physical activities or projects on the Project List in the *Regulation* Schedule involve subject matters whose classification within s 91 of the *Constitution Act, 1867* is self-evident and beyond dispute. These include:

- physical activities or projects located within a National Park, federal protected wildlife area, bird sanctuary or protected marine area (ss 1-11);
- specified matters involving the military or defence (ss 12-17);
- uranium mines or mills (ss 20-23);
- nuclear facilities (ss 26-29) (though s 29 appears to be contentious);
- offshore oil or gas facilities (ss 34-36);
- new international electrical transmission lines or inter-provincial power lines designated under the *Canadian Energy Regulator Act* (s 39);
- offshore oil and gas pipelines (s 40 - 41) (pipelines: depending on whether interprovincial);
- offshore wind power generating facilities (ss 44-45);
- aerodromes or runways (ss 46-47);
- international or interprovincial bridges or tunnels (ss 48-49);
- canals or causeways in navigable waters (ss 49-50); and
- marine terminals (ss 52-53).

b. Matters in the *IAA Regulation* Project List *prima facie* Within s 92 of the *Constitution Act, 1867*

[601] This Reference is about the remaining matters – designated physical activities or projects on the Project List in the *Regulation* Schedule that *prima facie* fall within s 92(10) of the *Constitution Act, 1867* as being "Local Works and Undertakings" or 92A(1) of the *Constitution Act, 1867* as relating to "exploration, ... development, conservation, and management of non-renewable natural resources ... in the province" or "development, conservation and management of sites and facilities in the province for the generation and production of electrical energy":

- mines and metal mills (ss 18-19, 24-25);
- oil, gas and other fossil fuel facilities (ss 30-33, 37-38);
- renewable energy (ss 42-43);
- new public highways that require 75 km or more of new right of way (s 51);

- railways and railway yards (ss 54-55);
- hazardous waste (ss 56-57); and
- water projects (ss 58-61).

Is it constitutionally permissible for the federal environmental assessment regime to regulate environmental "effects", said to be in federal jurisdiction, caused by such projects?

c. Section 7 and the *Regulation*: Environmental Effects upon Areas of Federal Jurisdiction

[602] Section 7 is the key to the operation of the *IAA* and *Regulation*. It uses language that, literally interpreted, contemplates assessment of "designated projects" that may have environmental *effects* causing changes to certain components of the environment said to be *within the legislative authority of Parliament*. Section 7 incorporates by reference types of "designated projects" in the *Regulation* Project List. And as noted, the effects listed in s 7 mirror the definition of "effects within federal jurisdiction" at the centre of the decision made by the Minister and Governor in Council in ss 60 and 62.

[603] In analysing s 7, it is helpful to recall that the "environment" is broadly defined as the components of the Earth including "(a) land, water and air, all layers of the atmosphere; (b) all organic and inorganic matter and living organisms; and (c) the interacting natural systems..."; and "effects" defined as "changes to the environment or to health, social or economic conditions and the positive and negative consequences of these changes": s 2.

[604] Section 7 puts these concepts to work in this fashion: the proponent of a "designated project" is prohibited from doing anything to carry out that project if it *may* cause "*effects",* including change to the "environment" in areas, variously described as in federal jurisdiction:

> 7(1) 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*:
>
> (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 in which the act or thing is done, 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; or

(e) any change to a health, social or economic matter *within the legislative authority of Parliament* that is set out in Schedule 3.

(2) The Governor in Council may, by order, amend Schedule 3 to add or remove a component of the environment or a health, social or economic matter.

[emphasis added]

[605] In my view, the language used in s 7 is jurisdiction-limiting. It clearly contemplates that the prohibited effects are restricted to those falling within federal jurisdiction, particularly as the effects listed in s 7 are self-defined as being "effects within federal jurisdiction". It is true that simply defining effects as being within federal jurisdiction does not make it so. However, as catalogued below, I find that each of these s 7 effects fall within a head of federal power under s 91 of the *Constitution Act, 1867*. In other words, the *IAA* regime applies specifically to *effects* that are changes to the environment within federal jurisdiction.

[606] This also holds true for the projects that are really at issue in this case – those located entirely within a province, and *prima facie* falling within s 92 or 92A of the *Constitution Act, 1867*. Those local or "intra-provincial" projects on the Project List are projects which are being assessed for the purpose of determining whether the effects within federal jurisdiction (e.g., on fish and fish habitat, aquatic species, migratory birds, etc.) caused by the project are in the public interest. An excellent example is an *in situ* oil sands extraction facility, designated in the *Regulation* Schedule under Oil, Gas and Other Fossil Fuels, at s 32:

> The construction, operation, decommissioning and abandonment of a new *in situ* oil sands extraction facility that has a bitumen production capacity of 2000 m^3/day or more …

[607] The construction of *in situ* projects *may* cause *effects* that change "components of the environment that are within the legislative authority of Parliament", such as to fish and fish habitat, aquatic species, and migratory birds. Various parties referred to a May 2019 "Discussion Paper on the Proposed Project List" published by the Government of Canada. It says this of onshore oil and gas:

> Projects that process or consume large quantities of oil and gas have impacts in areas of federal jurisdiction due to their greenhouse gas emissions. They may also have adverse effects to fish and fish habitat and migratory birds through land disturbance, air and water pollution and water usage, accidental spills, flaring, as well as through the incidental activities that may be needed to transfer the oil and gas products to or from the facility or to provide power for the facility.[225]

[608] The Discussion Paper goes on to note that certain project types, including certain *in situ* projects, were "determined as having the greatest potential for adverse environmental effects in areas of federal jurisdiction, primarily due to their potential for greenhouse gas emissions, as well as, potential effects on fish and fish habitats": [10]

[609] Alberta's evidence, as noted, includes the affidavit of Paul Tsounis, an employee with the Alberta Department of Energy. At para 11 of his affidavit, Mr. Tsounis notes it is "estimated that approximately 81% of Alberta's oil sands resource *will* be developed using *in situ* methods rather than mining methods" [emphasis added], a figure said to derive from Natural Resources Canada data attached as Exhibit "B": Record at C4. That data provides that *mining accounts for 47% of current production and in situ 53%*. However, in terms of *future* development based on oil *reserves*, mining is projected to make up 19% and *in situ* production 81%: *Ibid* at C14-15. In other words, while mining vs the *in situ* method is currently roughly equal, *in situ* is expected to overtake mining substantially going forward. It is in this latter sense (i.e., future projection) that the 80% figure is accurate.

[610] It is correct that s 7 of the *IAA* and the *Regulation* apply to *effects* of purely "intra-provincial" projects that *prima facie* fall within ss 92(10) and 92A(1) of the *Constitution Act, 1867*, such as *in situ* oil sands extraction facilities. However, the federal assessment regime is intended, designed, and operationally limited to apply only to the *effects that are within federal jurisdiction*.

[611] Moreover, s 7 cannot be read in isolation from the rest of the *IAA*. While s 7 itself speaks of effects generally (which could include "positive" or "neutral" effects), it is clear the *IAA* is ultimately concerned with *adverse* effects within federal jurisdiction: ss 60-64. As the long title of the legislation itself notes, the *IAA* is designed to protect against "adverse environmental effects". The prohibitions in s 7 are broader, presumably for administrative purposes: Parliament seeks to place a temporary hold on a project to determine their effects *before they proceed*, whereas a prohibition limited to adverse effects could jeopardize that approach by allowing proponents to claim that effects on federal jurisdiction are neutral and forge ahead, but at the end, they turn out

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[225] Canada, *Discussion Paper on the Proposed Project List: A Proposed Impact Assessment System* (May 2019) at 10 (Record at A331 – A358) [Discussion Paper].

not to be so. However, these broad prohibitions are nevertheless in service of Parliament's narrower goal of determining whether certain *adverse* affects within federal jurisdiction are in the public interest, which is why the screening decision by the Agency in s 16 of the *IAA* seeks to eliminate from the assessment process designated projects not thought to have *adverse* effects within federal jurisdiction.

[612] With this in mind, I turn now to the specific triggers in s 7 of the *IAA* and explain why, in my view, each is within federal jurisdiction.

i. Section 7(1)(a)(i) – change to fish and fish habitat, as defined in s 2(1) of the *Fisheries Act*, within the legislative authority of Parliament: the Fisheries Power under s 91(12) of the *Constitution Act, 1867*

[613] Section 7(1)(a)(i) of the *IAA* prohibits a proponent from doing anything to carry out a designated project that may cause a change to "fish and fish habitat", defined in s 2(1) of the *Fisheries Act*, RSC, 1985, c F-14, within the legislative authority of Parliament.

[614] Section 91(12) of the *Constitution Act, 1867*, provides that Parliament has exclusive legislative authority over the "Sea Coast and Inland Fisheries".

[615] As explained in Hogg, the power over fisheries under s 91(12) includes the authority to "legislate for the *preservation of fish*", for example, to regulate fishing operations by establishing closed seasons, and to prohibit the use of destructive fishing methods, regardless of who owns the fishing rights: Hogg at § 30:26 [emphasis added]. Parliament also has the power "to protect *the environment of fish*", for example, to ensure fish habitats are not polluted, though it is not a general power to regulate water pollution: *ibid* [emphasis added].

[616] Legislation to protect fisheries by "preventing substances deleterious to fish [from] entering into waters frequented by fish" is a proper concern of legislation under s 91(12): *Northwest Falling Contractors v The Queen*, [1980] 2 SCR 292 at 301, 113 DLR (3d) 1 [*Northwest Falling Contractors* cited to SCR]. The fisheries resource "includes the animals that inhabit the seas. But it also embraces commercial and economic interests, aboriginal rights and interests, and the public interest in sport and recreation": *Ward* at para 41.

[617] It is true that s 91(12) does not afford Parliament jurisdiction over *all aspects* of fish. For instance, Parliament has no ability to legislate in relation to the processing and marketing of fish: *Reference re Certain Sections of the Fisheries Act, 1914*, [1930] AC 111 at 122 (PC). However, the kinds of changes contemplated in s 7(1)(a)(i) are clearly directed to the preservation of fish and the protection of fish habitat – matters which indisputably fall within s 91(12) – given that they are restricted to changes caused by proponents of designated projects. The reach of the *IAA* is obviously informed by the *Regulation*, and *vice versa*. Neither should be read in isolation.

[618] Nor do I read the *IAA* as even purporting to claim jurisdiction over all aspects of fish. Rather, s 7(1)(a)(i) is limited to changes to fish and fish habitat "within the legislative authority of Parliament", a phrase confined to subsection (a) of s 7(1) rather than applying to the whole catalogue of effects listed in s 7. This suggests Parliament understood that components of the environment listed in s 7(1)(a) would not necessarily fall within federal jurisdiction in all aspects and sought to limit its reach accordingly.

[619] Finally, I reject the contention that s 7(1)(a)(i) of the *IAA* is inconsistent with *Fowler v The Queen*, [1980] 2 SCR 213 [*Fowler*]. In *Fowler*, the Supreme Court of Canada struck down s 33(3) of the *Fisheries Act*, RSC 1970, c F-14 – which prohibited activities like logging which put "any slash, stumps or other debris into any water frequented by fish" – because the provision made "no attempt to link the proscribed conduct to *actual or potential* harm to fisheries": 226 [emphasis added]. Under the *IAA*, conversely, Parliament is clearly focused on activities thought to cause harm (i.e., have an adverse effect) to fish and fish habitat. Section 7(1)(a)(i) is in service of protecting against such harm, even if the harm is only potential and will not materialize in every case. Moreover, because the public interest determination under ss 60 or 62 of effects listed in s 7(1)(a)(i) must be tied to *actual adverse effects* on fish and/or fish habitat, designated projects not linked to the harm of fisheries will not ultimately be prohibited from proceeding under s 7.

[620] Accordingly, s 7(1)(a)(i) of the *IAA* is properly anchored in Parliament's authority to legislate for the protection of fish and regulation of their environment under s 91(12) of the *Constitution Act, 1867*.

ii. Section 7(1)(a)(ii) – change to aquatic species, as defined in ss 2(1) of the *Species at Risk Act*, within the legislative authority of Parliament: the Fisheries Power under s 91(12) of the *Constitution Act, 1867*

[621] For similar reasons, I also agree with Canada's contention that aquatic species fall under Parliament's constitutional authority over fish under s 91(12) of the *Constitution Act, 1867*.

[622] Subsection 2(1) of the *Species at Risk Act*, SC 2002, c 29, defines "aquatic species" as "a wildlife species that is a fish, as defined in s 2 of the *Fisheries Act*, or a marine plant, as defined in s 47 of that *Act*." Section 47 of the *Fisheries Act* defines marine plants to include "all benthic and detached algae, marine flowering plants, brown algae, red algae, green algae, and phytoplankton."

[623] In *Northwest Falling Contractors*, at 300, in discussing a protective provision in the same version of the *Fisheries Act* considered in *Fowler*, Martland J wrote that shellfish, crustaceans and marine animals, which are included in the definition of "fish" by s 2 of that *Act*, are all part of the system which constitutes the fisheries resource; the power to control and regulate that resource "must include the authority to protect all those creatures which form a part of that system".

[624] Accordingly, s 7(1)(a)(ii) of the *IAA* is properly anchored in Parliament's authority to legislate for the protection of fish under s 91(12) of the *Constitution Act, 1867*.

iii. Section 7(1)(a)(iii) – change to migratory birds, as defined in ss 2(1) of the *Migratory Birds Convention Act, 1994,* within the legislative authority of Parliament: Imperial Treaty Power under s 132 of the *Constitution Act, 1867*

[625] Section 7(1)(a)(iii) of the *IAA* prohibits proponents from doing anything to carry out a designated project if doing so may cause a change to migratory birds, as defined in ss 2(1) of the *Migratory Birds Convention Act*, *1994*, within the legislative authority of Parliament.

[626] Section 132 of the *Constitution Act, 1867* provides:

> The Parliament and Government of Canada shall have 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.

[627] As stated in Hogg at § 11.12: "the federal Parliament has the power to implement "Empire treaties" under s. 132, but no power to implement Canadian treaties under s. 132". Section 132 authorized the performance of treaty obligations which arose "under Treaties between the Empire and ... Foreign Countries", but not those which arose under treaties between Canada and foreign countries.

[628] Canada submits that s 132 of the *Constitution Act, 1867* authorizes legislation implementing Imperial treaties and includes jurisdiction to enact legislation going beyond the narrow terms of the treaty so long as it is ancillary to the treaty. One such treaty between the British Empire and the United States that remains in force today is the 1916 *Migratory Birds Convention*: *Convention Between the United States and Great Britain for the Protection of Migratory Birds*, 16 August 1916, 39 US Stat 1702, TIAS No 628 (entered into force 7 December 1916) [*Convention*]). Canada implemented an amended *Convention*, the *Convention for the Protection of Migratory Birds in the United States and Canada*, 14 December 1995, (entered into force 8 October 1999) Can TS 1999 No 34 [*Amended Convention*], through the *Migratory Birds Convention Act, 1994*, SC 1994, c 22 *(MBCA).*

[629] Subsection 2(1) of the *MBCA* defines a "migratory bird" as a bird referred to in the *Amended Convention* as set out in the Schedule of the *MBCA*, and includes sperm, eggs, embryos, tissue cultures, and parts of the bird. The *MBCA* was enacted to implement the *Amended Convention* by protecting migratory birds and nests.

[630] Section 7(1)(a)(iii) of the *IAA* is properly anchored in Parliament's authority to legislate for the protection of migratory birds as ancillary to the implementation of an Imperial treaty under s 132 of the *Constitution Act, 1867*.

iv. Section 7(1)(a)(iv) – change to components of the environment within the legislative authority of

Parliament: any other component of the environment set out in Schedule 3

[631] Section 7(2) provides that the "Governor in Council may, by order, amend Schedule 3 or add or remove a component of the environment or a health, social or economic matter". Schedule 3 has not been amended, but in any event, s 7(1)(e) limits these components of the environment to "any change to a health, social or economic matter *within the legislative authority of Parliament* that is set out in Schedule 3" [emphasis added].

v. Section 7(1)(b)(i) – change to the environment on federal lands

[632] "[F]ederal lands" are defined in s 2 of the *IAA*. They include lands that belong to Canada, and other identified lands and areas, as well as "reserves, surrendered lands and any other lands that are set apart for the use and benefit of a band and that are subject to the *Indian Act*", and all waters on and airspace above those reserves or lands. Parliament's jurisdiction to legislate with respect to environmental effects or changes to the environment on federal lands does not appear to be in dispute.

vi. Section 7(1)(b)(ii) – change to the environment in another province: POGG and s 91 of the *Constitution Act, 1867*

[633] Section 7(1)(b)(ii) prohibits proponents of designated projects from doing anything to carry out those projects if doing so may cause changes to the environment in another province. This provision regulates a project's extra-provincial environmental effects, something Canada has been assessing since *CEAA, 1992*: s 46(1). And again, while s 7 itself covers any change to the environment, the *IAA* is ultimately concerned with *adverse* effects to the environment in another province.

[634] These effects are the exclusive domain of Canada by virtue of the national concern doctrine under the POGG power. The Supreme Court of Canada has already confirmed that the problem of inter-provincial pollution is a matter of national concern for which Canada has jurisdiction to legislate: *Interprovincial Co-operatives Ltd et al v R*, [1976] 1 SCR 477 [*Interprovincial Co-operatives*]; *R v Crown Zellerbach Canada Ltd*, [1988] 1 SCR 401 at 445-446, per La Forest J (in dissent but not on this point) [*Crown Zellerbach*]; *GGPPA SCC* at para 99. As a majority of the Supreme Court recently noted in *GGPPA SCC* at para 195, "interprovincial pollution is constitutionally different from local pollution and … may fall within federal jurisdiction on the basis of the national concern doctrine".

[635] That Canada must have jurisdiction to consider extra-provincial environmental effects is confirmed by *Interprovincial Co-operatives*. In that case, the province of Manitoba brought an action against two companies for damage caused in Manitoba from the release of mercury into rivers in Ontario and Saskatchewan. At issue was whether Manitoba had the authority to pass a statute creating liability for harm sustained from water pollution originating from other provinces, even where the pollution was given regulatory approval by those other provinces.

[636] A majority of the Supreme Court held that Manitoba had no such authority, Pigeon J concluding that "in respect of injury caused by acts performed outside its territory, I cannot accede to the view that this can be treated as a matter within its legislative authority when those acts are done in another province" (516). Rather, the pollution of interprovincial waters must fall within federal jurisdiction (513-514) because the jurisdiction from which the interprovincial pollution originated (in this case, Ontario, and Saskatchewan) likewise lacks the regulatory authority to authorize such extra-provincial effects. As Pigeon J noted at 511, "it does not appear to me that a province can validly license on its territory operations having an injurious effect outside its borders". It is this reality of provincial incapacity that explains the following remark by Laskin CJ at 499 (in dissent but not on this point): "if any regulatory authority to have *interprovincial effect* is to exist in respect of pollution of interprovincial waters it would have to be established under *federal legislation*" [emphasis added].

[637] In short, jurisdiction to consider the extra-provincial environmental effects of a local project must fall to Canada because the province in which the effects are created lacks the jurisdiction to authorize them and the province in which the effects are felt lacks the jurisdiction to protect against them. POGG is a residual power that can only be engaged where the matter does not fall under any provincial head of power: *GGPPA SCC* at paras 89, 110, 141. That is certainly the case with respect to the extra-provincial environmental effects of local projects, as no province has the jurisdiction to consider them. This also explains why such effects are a matter of "national concern" specifically. The doctrine relies to a considerable extent on the concept of "provincial inability", the idea that "federal jurisdiction should be found to exist only where the evidence establishes provincial inability to deal with the matter": *GGPPA SCC* at paras 152, 164. Here provincial inability is patent and not reliant upon evidentiary considerations: provinces are simply constitutionally incapable of acting on the problem. Nor does anything in the reformulation of "national concern" in *GGPPA SCC* detract from the conclusion that inter-provincial pollution is a matter of national concern.

[638] Moreover, the power to address inter-provincial pollution must include the ability for Canada to limit and potentially prohibit the *source* of the pollution – even though that source is an activity located within a province. This was specifically addressed in *Crown Zellerbach* at 445, where La Forest J (in dissent but not on this point) said this about the POGG power:

> In legislating under its general power for the control of pollution in areas of the ocean falling outside provincial jurisdiction, the federal Parliament is not confined to regulating activities taking place within those areas. *It may take steps to prevent activities in a province, such as dumping substances in provincial waters that pollute or have the potential to pollute the sea outside the province*. [Emphasis added]

Accordingly, there is nothing inappropriate about the *IAA* seeking to prohibit, first temporarily and potentially permanently, extra-provincial effects emanating from a designated activity located in a particular province. Canada has the constitutional authority, if not the moral duty, to protect provinces and their residents from extra-provincial environmental harm that the province itself is

constitutionally incapable of addressing. It should come as no surprise that Canada would seek to do so by focusing on the source of that harm.

[639] Accordingly, s 7(1)(b)(ii) of the *IAA* is properly anchored in Parliament's authority to legislate for the "Peace, Order, and good Government of Canada" under s 91 of the *Constitution Act, 1867*, inter-provincial harm to the environment being a matter of national concern.

vii. Section 7(1)(b)(iii) – change to the environment outside Canada: POGG and s 91 of the *Constitution Act, 1867*

[640] Parliament likewise has legislative authority over environmental effects that occur outside Canada under s 7(1)(b)(iii) of the *IAA*. The reason is much the same as with extra-provincial effects: authority must fall to Canada as a residual power under POGG because provinces have no legislative jurisdiction beyond their own borders.

[641] This is evidenced in *Reference re Newfoundland Continental Shelf*, [1984] 1 SCR 86, 5 DLR (4th) 385 [*Newfoundland Continental Shelf* cited to SCR], where the Supreme Court of Canada considered whether Canada or Newfoundland had legislative jurisdiction over natural resources on the continental shelf offshore Newfoundland. The Court had little difficulty deciding that legislative jurisdiction falls to Canada under the POGG power and that Newfoundland's legislative competence, like that of all the other provinces, is confined to legislation operating within the provinces, a restriction found expressly in s 92(13) and s 92A(1) of the *Constitution Act*, *1867* (127-128).

[642] The significance of *Newfoundland Continental Shelf* in terms of Canada's jurisdiction under POGG is not confined to the exploitation of natural resources offshore. La Forest J (in dissent but not on this point) relied on the case when he said the following about the POGG power in *Crown Zellerbach* at 445: "I have no doubt that [Canada] may also, as an aspect of its international sovereignty, exercise legislative jurisdiction for *the control of pollution beyond its borders*" [emphasis added].

viii. Section 7(1)(c)(i)-(iii) – change to the environment of Indigenous Peoples, with impact on

a) physical and cultural heritage.

b) the current use of lands and resources for traditional purposes.

c) any structure, site or thing that is of historical, archeological, paleontological, or architectural significance.

and

Section 7(1)(d) – any change occurring in Canada to the health, social or economic conditions of the Indigenous peoples of Canada.

[643] Section 7(1)(c) prohibits proponents of designated projects from doing anything to carry out the project that will cause a change to the environment of Indigenous peoples, where that change will have an impact on physical and cultural heritage, use of lands and resources for traditional purposes, or structures or sites of historical, archaeological, paleontological, or architectural significance. Section 7(1)(d) prohibits activity that will cause a change in Canada to the "health, social or economic conditions" of Indigenous peoples.

[644] Pursuant to s 91(24), Canada has exclusive authority to make laws in relation to "Indians, and Lands reserved for the Indians". Much has been written about the reason for reserving legislation in relation to these subjects exclusively to the federal government. One explanation is that it was considered that "Indians and their lands required the protection of a centralized authority from the adverse interests of local settlers".[226] The Supreme Court of Canada in *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 at para 25, [2016] 1 SCR 99 described the purpose of s 91(24) as supporting the expansionist goals of Confederation, including the building of a national railway, which required a relationship between the federal government and Aboriginal groups.

[645] Like other federal effects defined in the *IAA*, the provisions in ss 7(1)(c) and (d) are not new additions to federal environmental legislation. They largely track the language of s 5(1)(c) of *CEAA, 2012*.

[646] The validity of s 5(1)(c) of *CEAA, 2012* was challenged in *Taseko Mines Limited v Canada (Environment),* 2017 FC 1100 [*Taseko Mines*], where it was argued that the effect of the provision was to render provincial approval of a project inoperative if there was an effect on Aboriginal peoples. The Federal Court dismissed the judicial review application on other grounds and did not find it necessary to address the constitutionality of the provision. However, in *obiter*, Phelan J stated that he would have found it to be *intra vires* the federal government, noting that the purpose clause of *CEAA, 2012* speaks to the "promotion of communication and cooperation with [A]boriginal people", that the legislature recognized the environmental assessment process is designed to satisfy the Crown's duty to consult, and that the language of s 5(1)(c) is intended to draw out the impacts to be considered: paras 150-151. He found that the pith and substance of the provision comes within "Parliament's power to legislate for 'Indians, and Lands Reserved for the Indians' in s 91(24)": para 152. These same considerations are true of the current ss 7(1)(c) and (d) of the *IAA.*

[647] Relevant to the effects on Indigenous peoples described by ss 7(1)(c) and (d) is the Crown's duty to consult, an obligation imposed as part of the constitutional principle of the honour of the

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[226] Kerry Wilkins, "Life Among the Ruins: Section 91(24) after *Tsilhqot'in* and *Grassy Narrows*" (2017) 55:1 Alta L Rev 91 at 97; see also Hogg at § 28:1.

Crown: *Mikisew Cree First Nation v Canada (Governor General in Council),* 2018 SCC 40 at paras 24-27, [2018] 2 SCR 765 [*Mikisew Cree*]. The duty to consult arises where "the Crown contemplates executive action that may adversely affect s 35 rights" and has also been applied in the "context of statutory decision makers that ... act on behalf of the Crown": *Mikisew Cree* at para 25. The decision of whether to approve a project that has the potential to adversely affect Aboriginal rights gives rise to a duty to consult: *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74 at paras 27-28, [2004] 3 SCR 550 [*Taku River*]. The obligation is owed by both levels of government (*Grassy Narrows First Nation v Ontario (Natural Resources*), 2014 SCC 48 at para 50, [2014] 2 SCR 447 [*Grassy Narrows*]) and, depending on the circumstances, may be owed by both levels of government at once.

[648] The duty may be met where the affected Indigenous group participates in an environmental assessment process related to the project, as was the case in *Taku River*. In that case, the relevant assessment process, under British Columbia's *Environmental Assessment Act*, included participation by the affected Aboriginal groups, the provincial government, and the federal government, and was adequate to satisfy the Crown's duty to consult: paras 39-41. The role of environmental assessment and regulatory processes in satisfying the Crown's constitutional obligations to Indigenous peoples was also discussed in *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40 at paras 30-34, [2017] 1 SCR 1069, where the Supreme Court of Canada found the procedures of the National Energy Board could be relied upon by the Crown "to completely or partially fulfill its duty to consult": para 34.

[649] Like environmental assessment generally, this is an area where cooperative federalism can and should be encouraged. The purposes of the *IAA* include promoting communication and cooperation with Indigenous peoples in the impact assessment process (s 6(1)(f)) and ensuring respect for the s 35 rights of Indigenous peoples in the course of the assessment process (s 6(1)(g)). The provisions of the *IAA* that contemplate involvement of Indigenous groups and facilitate information gathering to identify effects on Indigenous peoples and their lands are in keeping with the stated purposes of the legislation and facilitate the federal government's duty to consult. In *Taseko Mines*, the Federal Court was of the view that a purpose of s 5(1)(c) of *CEAA, 2012* was to garner information for the environmental assessment process, in furtherance of the Crown's duty to consult. I agree, and the same can be said of the equivalent provisions of the *IAA*.

[650] In addition, the consultation and cooperation provisions of the *IAA* can apply to ensure the sharing of information among jurisdictions where a project is subject to both the federal regime and another jurisdiction's environmental assessment regime, and where constitutional obligations are owed by both levels of government.

[651] The duty to consult aside, no one has offered a serious articulation as to why the interests protected in ss 7(1)(c) and (d) of the *IAA* somehow fall outside the scope of "Indians, and Lands reserved for the Indians". It may be true that these interests fall outside the "core" of s 91(24) such that interjurisdictional immunity does not prevent provincial legislation of general application from authorizing projects which impact upon them and ultimately infringe Aboriginal and treaty rights under s 35 of the *Constitution Act*, *1982*: see *Grassy Narrows*; *Tsilhqot'in Nation v British*

Columbia, 2014 SCC 44, [2014] 2 SCR 256. However, the applicability of provincial legislation to Indigenous peoples says nothing about the validity of federal legislation like the *IAA*. A local project authorized by a provincial legislative regime can nonetheless have adverse effects on Indigenous interests, where those effects are understood as effects within federal jurisdiction.

[652] A case in point is the circumstances in *Oldman River*, which Hogg describes this way: "The dam on the Oldman River had an effect on navigable waters, fisheries and lands reserved for the Indians (there was an Indian reserve downstream from the dam site). These effects justified a wide-ranging environmental assessment encompassing the impact of the dam on those three subject matters as well as any other federal matters that turned out to be implicated" (§30:32). It was in this context that Hogg ultimately characterized the decision in these terms: "The effect of the *Oldman River* decision is to confer on the federal Parliament the power to provide for environmental impact assessment of any project that has any effect on any matter within federal jurisdiction" (*ibid*). In other words, adverse effects on Indigenous peoples from a local project are said to constitute effects within federal jurisdiction.

[653] A particularly compelling image is painted in an Alberta case, *Fort McKay First Nation v Prosper Petroleum Ltd,* 2020 ABCA 163*,* of what may be at stake for First Nations peoples when resource development encroaches on their traditional lands. In 2013, Prosper Petroleum sought authorization from the Alberta Energy Regulator to construct a bitumen recovery project that would produce 10,000 barrels a day. This oil extraction plant would be 5 kilometers from the First Nations border, adjacent to an area used as traditional fishing and hunting lands. In the land use planning process under municipal authority, in 2003 Alberta had promised to preserve a buffer zone to protect these traditional lands. Nonetheless, under the predecessor to the current *EPEA*, the Alberta Energy Regulator granted approval to Prosper Petroleum to build its oil extraction facility next to the traditional lands. Due to the extensive industrial and resource development surrounding Fort McKay First Nation, the Nation was concerned about the ability of its members to pursue their traditional way of life in their community which had been "the *most* severely affected of all First Nations by oil sands development in the region": para 6.

[654] This is the kind of situation where ss 7(1)(c) and (d) might apply: the "designated project… may cause *effects*…with respect to Indigenous peoples" … "resulting from any change to the environment" on "cultural heritage" … "use of lands and resources for traditional purposes" …or "any change … to the health, social or economic conditions of the Indigenous peoples of Canada".

[655] For such circumstances, the *IAA* contemplates a multilateral process that would involve the Agency, Indigenous groups, provincial, and even regional jurisdictions, in a process to determine what is in the public interest. There can be little doubt that environmental *effects* from such a project – and there are environmental *effects* from bitumen recovery projects – would impact the neighbouring First Nation's environment, broadly construed, and that these *effects* are directly linked to a matter within federal jurisdiction: "Indians, and Land reserved for the Indians" under s 91(24) of the *Constitution Act, 1867*. Paragraphs 7(1)(c) and (d) provide Indigenous peoples with a way to assert their constitutional and other rights and interests, whether to protect traditional homelands for pursuit of cultural interests or for advancement of economic interests.

ix. Section 7(4) – the proponent may cause a change referred to in s 7(1)(d) in relation to Indigenous peoples that hold rights affirmed by s 35 of the *Constitution Act, 1982* if the change is not adverse and the Indigenous peoples and proponent agree the act or thing may be done.

[656] Section 7(4) allows for a proponent of a designated project to carry out an activity that may cause a change in relation to an Indigenous group that holds rights affirmed by s 35 of the *Constitution Act, 1982* "if the change is not adverse and the council … authorized to act on behalf of the Indigenous group, community or people and the proponent have agreed that the act or thing may be done". Canada cites s 7(4) as an example of cooperation and consultation with Indigenous peoples.

[657] Where this provision is engaged, a question may arise as to whether an anticipated change is "adverse", and whether Indigenous groups have the autonomy to consent to "effects" that are "adverse". Decisions made under the *IAA* environmental assessment regime ultimately balance positive and negative effects to determine whether a project is in the public interest. The same approach might apply to a decision on a project where s 7(4) is engaged; an agreement by an Indigenous group to develop resources might weigh in the balance whether the effects are adverse. But when and whether a project that engages s 7(4) will be approved cannot be decided in the abstract; and in any event, the s 7(4) language reflects a federal policy choice rather than a constitutional conundrum.

d. Section 8: Federal Decisions

[658] Section 8 of the *IAA* prohibits a *federal authority* from exercising any power or performing any duty or function that *permits* a designated project to be carried out, and from providing financial assistance, unless the Agency decides that no impact assessment is necessary, or the project is approved following an impact assessment. This provision applies to federal decisions external to the operation of the *IAA*, as the Court found to be within the constitutional power of the federal authority in *Oldman River*.

e. Sections 81-83: Federal Projects on Federal Lands and Projects Outside Canada

[659] Similarly, federal projects carried out on federal lands and outside Canada (*IAA*, ss 81-83) are indisputably within federal constitutional authority. These provisions mirror s 6 of *Guidelines Order*, found to be within federal constitutional authority in *Oldman River*.

f. Sections 32-33 of the *Regulation* Schedule: GHG Emissions may be "Effects" in Federal Jurisdiction; and Identify Threshold Levels for Project Inclusion on the Project List

[660] Alberta suggests that if "the production of GHG emissions or the potential for accidental spills are sufficient from a constitutional perspective to support impact assessment … then the potential application of the *IAA* becomes virtually limitless" (Alberta's Factum at para 81). This is the extent to which Alberta challenges the reference to GHG emissions in ss 32-33 of the *Regulation* Schedule.

[661] GHG emissions is *not* itself a federal trigger under s 7 of the *IAA* (or anywhere else). Indeed, Canada explicitly declined to adopt a proposal from certain Indigenous groups which "[r]ecommended a greenhouse gas emissions trigger that designates a project where project-related GHG emissions may affect Canada's ability to meet its international commitments to reduce GHG emissions": *RIAS* at 5671. Accordingly, neither the *IAA nor the Regulation assert* GHG emissions are a matter of federal jurisdiction in the way that *effects* on fish or Indigenous peoples are said to be matters of federal jurisdiction. There is no language in the *IAA* claiming federal jurisdiction to assess a "provincial" project anytime that project emits GHGs. If that were true, essentially every project would be subjected to a federal assessment (which is not the case) and there would be no need for a "screening" decision in s 16 of the *IAA*.

[662] Section 32 of the *Regulation* Schedule applies to the:

> construction, operation, decommissioning and abandonment of a new *in situ* oilsands extraction facility that has a bitumen production capacity of 2 000 m^3/day or more and that is
>
> (a) not within a province in which provincial legislation is in force to limit the amount of greenhouse gas emissions produced by oil sands sites in the province; or
>
> (b) within a province in which provincial legislation is in force to limit the amount of greenhouse gas emissions produced by oil sands sites in the province and that limit has been reached.

Section 33 of the *Regulation* Schedule says the same with respect to the "expansion of an existing in *situ oil* sands extraction facility, if the expansion would result in an increase in bitumen production capacity of 50% or more and a total bitumen production capacity of 2 000 m3/day or more".

[663] Section 7(1)(b) of the *IAA* operates in conjunction with ss 32 and 33 of the *Regulation* Schedule and the screening decision in s 16 of the *IAA* to trigger a federal assessment of certain *in situ* oil sands extraction facility projects if carrying out such a project *may* cause adverse effects to the environment on, for example, federal or First Nations lands, in another province, or outside of Canada. In my view, the reference to GHG emissions in these sections demarcates a *threshold* for particular *in situ* projects to be placed on the Project List to trigger s 7 of the *IAA*, just as certain capacity thresholds identify other projects in the Project List; and just as certain thresholds of activity identified projects for the Project List under *CEAA, 2012,* as discussed in Part II above.

[664] It was important in *GGPPA SCC* that the matter of GHG emissions generally was not a "matter of national concern" because of the mechanics of the POGG power: once something is a matter of national concern, the provinces are precluded from legislating on that matter. Clearly, provinces have the jurisdiction to legislate on GHG emissions. Indeed, something can only be a matter of national concern if provinces lack the jurisdiction to deal with it. Accordingly, a narrow aspect of GHG emissions was carved out for purposes of POGG, namely "establishing minimum national standards of GHG price stringency to reduce GHG emissions": *GGPPA SCC* at para 207.

[665] First, the emission of GHGs from certain very large projects could in principle have adverse effects outside Canada or outside the province in question, thus triggering a federal assessment under s 7(1)(b)(ii)-(iii). However, if that were the case (a question of fact and evidence beyond the scope of this Reference), the jurisdiction would not be based on GHGs *generally* – it would be based on whatever the extra-provincial *effects* happened to be, something that Canada must have jurisdiction over under POGG because, as noted, individual provinces lack the jurisdiction to regulate them. The nature of the substance causing the extra-provincial effect is irrelevant. Moreover, the extra-provincial *effect* triggers are longstanding and are best illustrated by concern not with GHGs or climate change but with rivers running between provinces or between Canada and the United States. Indeed, federal assessments over inter-provincial rivers date back to *EARPGO*: see for example *Can. Wildlife Fed. Inc. v Can. (Min. of the Environment)*, [1989] 4 WWR 526 (FC) at 540, [1989] 3 FC 309:

> I agree that unwarranted duplication should be avoided but it seems to me that a number of federal concerns were not dealt with by the provincial environment impact statement, including a review of the impact of the project in North Dakota and Manitoba. As such, I do not think that applying the EARP Guidelines Order would result in unwarranted duplication but would fill in necessary information gaps.

[666] Second, GHG emissions and climate change are constitutionally permissible factors in decision-making to the extent they are relevant or rationally connected to valid federal triggers. As noted by author Martin Z Olszynski, "[s]o long as the "pith and substance" of the legislation falls within the scope of a federal head of power, and the factors considered by the decision-maker are relevant, or rationally connected, to his or her decision, then decision-making pursuant to that legislation will be constitutional".[227] This raises the distinction between legislating on a matter and making decisions under that legislation, discussed in more detail under heading V.B.2.i.i. herein. Clearly, the factors that a decision-maker can take into account are broader than the subject matter which triggered the jurisdiction to make the decision. A federal Minister who has jurisdiction to consider whether a project's harm to fish is in the public interest is not limited to "fish-related" considerations, otherwise approvals would rarely, if ever, be granted because adverse effects will rarely, if ever, be beneficial to fisheries. The decision-maker must be able to consider outside

[227] Martin Z Olszynski, "Reconsidering *Red Chris*: Federal Environmental Decision-Making after *Miningwatch Canada v Canada (Fisheries and Oceans)*" in The Honourable Mr. Justice William A Tilleman and Alastair R Lucas, Q.C., eds, *Litigating Canada's Environment: Leading Canadian Environmental Cases By the Lawyers Involved* (Toronto: Thomson Reuters, 2017) 267 [Reconsidering Red Chris] at 271.

benefits to counterbalance the harm, including, for example, economic benefits in the form of jobs and revenue to the local economy. However, once this is accepted, the question becomes how far a decision-maker can go to develop a complete economic picture.

[667] Take "sustainability", for example, a factor in s 63 of the *IAA* to be considered when determining whether "adverse federal effects" are in the "public interest" under s 60. Sustainability is defined in the *IAA* as "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": s 2. Carbon pollution is relevant to sustainability for all sorts of reasons, including economic reasons. For example, it has recently been suggested that federal assessments under the *IAA* consider the "social cost of carbon", the "dollar figure representing the estimated cost of damages that result from an additional ton of carbon dioxide (CO2) emitted into the atmosphere".[228] The idea is that carbon pollution is not only an obstacle to our continued survival as a species (no small matter) – it is also really expensive. It creates financial costs that ultimately must be borne by all of us, regardless of where the emissions originate.

[668] Accordingly, when one is determining the economic benefit of a project, some consideration of GHG emissions as part of the metric creates a richer picture by internalizing what would otherwise be an economic externality. As noted by authors Martin Z Olszynski & Marie-Ann Bowden:

> [T]here seems to be little room for doubt that the federal government weighs what can be considered conventional economic benefits of resource projects in its decision-making – even seemingly local ones. If this is the case, the only change brought about by the *CEAA* is to *broaden the federal government's previously narrow metric for measuring benefits – by reference to jobs and revenue, for example – with the concept of sustainable development, which necessitates the incorporation of environmental costs and benefits into the equation*.[229] [emphasis added]

[669] Indeed, it would be ironic if a federal decision-maker were allowed to consider a primarily local concern like "jobs created" as part of the "public interest" determination but not economic considerations like the cost of carbon which transcend local concerns into the realm of the national.

[670] In summary, if a designated project, even in the natural resources sector, may produce GHGs with effects in federal jurisdiction, then it is properly subject to the *IAA* just as is any other designated project on the Project List that may have effects extra-provincially or beyond the borders of Canada. However, there is no evidence in this Reference to consider to what extent an *in situ* oil sands extraction facility produces GHGs, and whether GHGs emitted from any particular

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[228] David V Wright & Meinhard Doelle, "Social Cost of Carbon in Environmental Impact Assessment" (2019) 52:3 UBC L Rev 1007 at 1020.

[229] Marie-Ann Bowden & Martin Z P Olszynski, "Old Puzzle, New Pieces: Red Chris and Vanadium and the Future of Federal Environmental Assessment" (2011) 89 Can Bar Rev 445 [Bowden & Olszynski] at 484.

in situ project may cause effects that change the environment on federal lands, in another province, or outside Canada. This issue remains for another day. In any event, ss 32-33 of the *Regulation* Schedule simply identify a *threshold* required to put particular *in situ* projects on the Project List so as to trigger s 7 of the *IAA*. The references to GHG emissions on the Project List would seem to be a red herring or irrelevant to whether federal regulation of such designated projects' effects on areas of federal jurisdiction is constitutional.

g. Project-Based Assessment: An External Legislative Trigger (Affirmative Regulatory Duty) tied to a Specific Head of Power is not a Constitutional Prerequisite

[671] Alberta argues that *EARPGO* and *CEAA*, *1992* expressly relied on a federal ground of jurisdiction with an "affirmative regulatory duty" to trigger the federal regime, as in *Oldman River*, for example, the need for an authorization under the *Navigable Waters Protection Act* for a project that was otherwise regulated entirely by a province. The federal assessment power was tethered to an affirmative regulatory duty under a federal head of power. On the other hand, goes the argument, the *IAA* does not contain a federal trigger and instead relies on a list of designated projects in the Project List that become *prima facie* subject to federal assessment, such as the potential for accidental oil spills, so that the reach of the *IAA* "becomes virtually limitless": Alberta's Factum at para 81. The majority agrees.

[672] However, the federal government is not confined in its approach to environmental assessment, so long as it stays within its constitutional lane. The project-based approach in the *IAA* (and which likewise existed in *CEAA, 2012*) contains multiple safeguards to ensure that federal assessments remain focused on effects within federal jurisdiction. First, the trigger in s 7 limits its application to effects within federal jurisdiction, as previously outlined. Second, designated projects on the Project List are chosen based on their likelihood of causing effects within federal jurisdiction. And third, that a project is on the Project List does not necessarily mean an assessment will even occur. The screening decision in s 16 is designed to weed out individual designated projects not thought to have effects on federal jurisdiction, thereby addressing the concern that if triggers are not tied to an independent federal permit or authorization, then projects may be subjected to a federal assessment even if they do not ultimately have any adverse effects on federal jurisdiction.

[673] In addition, while s 7 has the effect of tying up projects before a screening decision is made, the focus is still that of determining whether a project has *federal effects*. The benefit of this kind of "anticipatory" approach is that it clarifies early in the life of a project whether a federal authorization is required or not. Under the prior "decision-based" framework, a proponent might get years into a project before realizing that it required a federal license or permit. Often it is not known in advance whether a project will have adverse federal effects or the magnitude of those effects – indeed, the fact of imperfect knowledge is the whole reason why assessment regimes exist in the first place. Given the centrality of the "precautionary principle" in modern environmental law, it is understandable that Parliament would want to focus on potential harm in areas of federal jurisdiction. Certain groups may not like this approach as a matter of *policy*, but

that does not mean it is a problem constitutionally. Parliament is under no obligation to structure its environmental laws in ways that developers find optimal. Intervenors siding with Alberta expressed concerns and highlighted aspects of the law they found problematic. However, the efficacy of a law is not the concern of the courts in a division of powers analysis: *Reference re Firearms Act (Can), 2000 SCC 31* at para 18, [2000] 1 SCR 783 [*Firearms Reference*].

[674] Moreover, and in any event, jurisprudence subsequent to *Oldman River* "has confirmed that the 'affirmative regulatory duty' concept applied only to the *EARPGO* and did not establish any kind of constitutional limit on the triggering of federal environmental assessment".[230] Cited for this proposition is *Moses (sometimes called Vanadium)*.[231]

[675] In *Moses*, as previously discussed, a proponent wanted to develop a mine in Quebec. One of the issues was the applicability of *CEAA, 1992.* Canada's position was that a federal assessment was required because the mine would impact fish, requiring an authorization from the Minister of Fisheries under s 35(2) of the *Fisheries Act*. Quebec's position was that no federal assessment was required because there was not a valid trigger – notwithstanding that s 35(2) was clearly one of the triggers listed in the *Law List Regulations* pursuant to s 59(f) of *CEAA, 1992*. Quebec argued that the "affirmative regulatory duty" described in *Oldman River* was a constitutional imperative and was lacking here. (In *Oldman River* at 49, only the decision of the Minister of Transport under the *Navigable Waters Protection Act* was said to constitute an "affirmative regulatory duty" – the decision of the Minister under the *Fisheries Act* was merely an "*ad hoc* legislative power").

[676] Canada argued that *CEAA, 1992* had overtaken *Oldman River* on this point, such that authorization under the *Fisheries Act* was now a valid trigger, a position Quebec said "ignores the sharing of powers under the *Constitution Act, 1867* and enables federal environmental legislation to be used as a *Trojan horse to invade provincial jurisdiction*": 2008 QCCA 741 at para 68 [emphasis added]. The Quebec Court of Appeal rejected Quebec's argument, finding that *CEAA, 1992* applied. The majority of the Supreme Court of Canada agreed, rejecting Quebec's argument that it would be unconstitutional for the federal Fisheries Minister to refuse to grant the necessary permits under s 35(2) of the *Fisheries Act* without first complying with *CEAA, 1992:* 2010 SCC 17 at para 13. The Court went on to state that both federal and provincial assessment laws "should be allowed to operate within its assigned field of jurisdiction": *Ibid*. This was so notwithstanding Quebec's claim that the mine should be regulated only provincially because it falls under s 92A (para 36):

> There is no doubt that a vanadium mining project, considered in isolation, falls within provincial jurisdiction under s. 92A of the *Constitution Act, 1867* over natural resources. There is also no doubt that ordinarily a mining project anywhere in Canada that puts at risk fish habitat could not proceed without a permit from the

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[230] Martin Z Olszynski, "Impact Assessment" in William A Tilleman et al, eds, *Environmental Law and Policy*, 4th ed (Toronto: Emond Montgomery Publications, 2020) 453 [Olszynski] at 462-463; see also Bowden & Olszynski at 472-474.

[231] The decision is described in Bowden & Olszynski at 445-446, 460-462, 465-466.

> federal Fisheries Minister, which he or she could not issue *except after compliance with the CEAA. The mining of non-renewable mineral resources aspect falls within provincial jurisdiction, but the fisheries aspect is federal*" [emphasis added].

[677] It is true that the triggering mechanism in *CEAA, 1992* is still much closer to *EARPGO* than the trigger in *CEAA, 2012* and the *IAA*. In *CEAA, 1992*, a federal assessment of a project (or an aspect thereof) was triggered by that project needing some sort of permit or the federal government making some sort of decision (though federal assessments were permitted in other cases, including with respect to projects having extra-provincial effects). In *CEAA, 2012* and the *IAA*, the potential for an assessment is triggered (subject to being screened out) if the project is on the Project List. But while all of this may be true, it is not clear why it is important – at least from a constitutional perspective. If Canada indeed has the authority to assess "any project that has any effect on any matter within federal jurisdiction", as Hogg states (§ 30:32), then the focus on a Project List of "major projects" in *CEAA, 2012* and in the *IAA* appears to be essentially a policy choice designed to put different limits on how Canada will exercise that authority.

[678] Choices must be made (and accordingly limits put in place) in terms of which projects may (potentially) be assessed. In *EARPGO* and *CEAA, 1992*, the limit generally (but not exclusively) came in the form of projects requiring a separate authorization. At first blush, the move to a major Project List may be seen as expanding the number of projects over which Canada has some sort of involvement. However, the move to such a list under *CEAA, 2012* coincided with Parliament having "drastically reduced the scope of Canada's *Fisheries Act*, and the protections for fish habitat in particular" as well as amending the *Navigable Waters Protection Act* to apply "to only a fraction of the water bodies that were subject to the pre-2012 regime": Olszynski at 467. Accordingly, had the pre-2012 trigger remained the same, there would have been fewer federal assessments since there were fewer projects requiring federal decisions. Moreover, since the trigger post-2012 is limited to a handful of matters (e.g., fish, migratory birds, but excluding pre-2012 matters like navigable waters), the number of projects undergoing federal assessment has been reduced from around 3000 per year to around 70 per year: *ibid*.

[679] The reason Parliament might have moved away from the "decision-based" triggers in s 5 of *CEAA, 1992* (at least in part) is explained by authors Meinhard Doelle & Chris Tollefson in *Environmental Law: Cases and Materials*, 3rd ed (Toronto: Thomson Reuters, 2019) [Doelle & Tollefson] at 599:

> The requirements of section 5 created practical difficulties in cases where it was unclear for one reason or another whether a section 5 decision would be required. For example, section 35 of the *Fisheries Act*, R.S.C. 1985, c. F-14, required an approval in cases of harmful alteration of fish habitat. Whether a project would cause a sufficient alteration of fish habitat may not be known for certain until the late design stages of the project, much later than an EA process should ideally be initiated.

[680] The majority suggests Canada only has the *constitutional* jurisdiction to assess a local project – even where that project is not disputed to have effects on areas of federal jurisdiction –

if federal *legislative* decision-making authority exists independent of the assessment process. I disagree. In my view, this confuses the jurisdiction Parliament has been granted under the *Constitution Act, 1867* with how it chooses to exercise that jurisdiction. That Parliament has not chosen to exercise its full legislative power over fisheries in external legislation under the *Fisheries Act* does not mean it is precluded from doing so now in the *IAA*.[232] Indeed, La Forest J was clear in *Oldman River* at 47 when discussing the application of *EARPGO* that federal decision-making responsibility in an external statute is by no means co-extensive with matters falling within federal jurisdiction.

[681] Nor is such legislative decision-making authority (whether as an "affirmative regulatory duty" or otherwise) needed to ascertain whether a local project will have effects within federal jurisdiction. Again, a case in point is *Oldman River* itself. While a federal decision under the *Navigable Waters Protection Act* was found to have triggered the federal assessment given how *EARPGO* was structured, the Court had no trouble concluding that the assessment should include effects on federal matters for which Canada had no independent legislative decision-making authority. Noting that "the scope of assessment is not confined to the particular head of power under which the Government of Canada has a decision-making responsibility" (73), La Forest J directed a consideration of "the environmental implications on all areas of federal jurisdiction potentially affected" (*ibid*), including the environmental impact of the dam on "Indians and Indian lands" – notwithstanding that the project did not require that Canada make any decision external to *EARPGO* in relation to "Indians and Indian lands".

[682] I do not dispute that a federal assessment must be tied to a federal decision. Assessments are not done in the abstract or for no reason; they are done for the purpose of providing a decision-maker with the information needed to make an informed decision. However, Parliament can, within its constitutional limits, structure federal decision-making as it sees fit. That includes by protecting against adverse effects in federal jurisdiction through decisions in the assessment process itself rather than in external legislation, and by making decisions with respect to certain kinds of projects and not others. In the case of the *IAA*, that involves the "public interest" decision in ss 60 and 62 authorizing or not authorizing a proponent to proceed with a designated project found to have adverse effects in one or more areas of federal jurisdiction.

[683] Were it otherwise and the majority correct, Canada would never have jurisdiction to, for example, assess a local project on the basis of its adverse environmental effects in another province – effects not contemplated in external legislation but which have been included in federal assessment legislation since *CEAA, 1992*. Canadians might be surprised to learn that no level of government in this country has jurisdiction to address the environment effects in their province from mercury dumped in a river by a project located in another province.

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[232] As noted in Anna Johnston, "Federal Jurisdiction and the *Impact Assessment Act*: Trojan Horse or Rational Ecological Accounting?" in *The Next Generation of Impact Assessment*, Meinhard Doelle & A John Sinclair, eds (Toronto: Irwin Law, 2021) 97 [Johnston] at 111, "[f]ailure to have enacted the *Fisheries Act* would not have nullified the federal fisheries power, and Parliament would still have authority to assess projects based on potential impacts on fish".

h. Review of all Aspects of a Project is Permitted

[684] Nor is it constitutionally impermissible for the *IAA* to allow the Agency or a review panel to assess *all* the effects of a designated project, both positive and negative, and regardless of whether those effects fall within federal jurisdiction. Assessing the whole of a project is simply a means of obtaining as much information about the project as possible. This in turn allows for a more fulsome analysis of the factors used to determine whether adverse effects within federal jurisdiction are in the public interest. As elaborated upon below, the public interest determination requires a consideration of costs and benefits which themselves transcend purely "federal" matters, best achieved by an assessment process that does not attempt to limit its scope at an early stage.

[685] The approach is also not new. It was considered and sanctioned by the Supreme Court of Canada under *CEAA, 1992* in *MiningWatch* (sometimes called *Red Chris*). In that case, Red Chris Development Company sought to develop a copper and gold open pit mine and milling operation. Red Chris proceeded through the provincial environmental regulation process. The British Columbia Environmental Assessment Office released a positive environmental assessment certifying that the project was not likely to cause adverse environmental, heritage, social, economic, or health effects. Red Chris applied to the federal Department of Fisheries and Oceans as the dam required a tailings pond to store the mine's effluent. Fisheries concluded that an environmental assessment was required and would be conducted by it on the basis that the project fell within the *Comprehensive Study List Regulations*, SOR/94-638 under *CEAA, 1992*. Fisheries decided to conduct a screening with narrow scope including the tailings pond rather than a comprehensive study, relying on steps completed by the provincial process, including public consultations. The Screening Report was issued to that effect and the project allowed to proceed.

[686] MiningWatch, a public interest group, filed for judicial review based on a breach of the duty under *CEAA, 1992* to conduct a comprehensive study and to consult the public. Rothstein J, writing for the Court, characterized *CEAA, 1992* this way, at paras 1-2:

> The *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 ("CEAA" or "Act"), is a detailed set of procedures that federal authorities must follow before projects that may adversely affect the environment are permitted to proceed. The Act and its regulations provide for different levels of intensity with which environmental assessments are to be performed depending upon the nature of the project under scrutiny. In practice, the intensity with which an environmental assessment should be conducted determines the "track" on which the assessment proceeds, whether by screening, comprehensive study, mediation or review panel.
>
> The issue in this appeal is whether the environmental assessment track is *determined by the project as proposed by a proponent or by the discretionary scoping decision of the federal authority*. In my opinion, the Act and regulations require that the environmental assessment track be determined according to the project as proposed; it is generally not open to a federal authority to change that level [emphasis added].

[687] The Court rejected the idea that *CEAA, 1992* allowed "scoping to trigger", the practice of a federal Minister or "responsible authority" limiting the scope of a federal assessment to a narrow component of a proposed project thought to fall within federal jurisdiction rather than the scope of the project as proposed by the proponent. The idea of "scoping to trigger" originated in case law from the Federal Court of Appeal that was premised on constitutional concerns over the jurisdiction of federal assessments[233], however the Supreme Court opted not to follow that law in interpreting the legislation: para 26.

[688] The Court observed that responsible departmental authorities can and should minimize duplication by using the coordination mechanisms, encouraging federal and provincial governments to adopt mutually agreeable terms for coordinating environmental assessments, to reduce unnecessary, costly, and inefficient duplication. Cooperation and coordination were expressly recognized in *CEAA, 1992*: para 41. MiningWatch obtained a declaration as to the federal government's obligation to conduct a full assessment under *CEAA, 1992*.

[689] While *MiningWatch* was not a constitutional case, nonetheless the Supreme Court would have been alive to the constitutional issues when it concluded that for federal environmental assessment purposes under *CEAA*, *1992*, a "project" will include the entire project as proposed.

i. A Project in the Public Interest vs all Aspects of a Project in the Public Interest

[690] While environmental assessment of the whole project may be within federal constitutional authority under the *IAA* and *Regulation*, the next inquiry concerns whether the *IAA* provisions for *decision-making* based on that assessment are within federal constitutional authority. Does the *IAA* purport to confer power on the Minister and Governor in Council to use the federal impact assessment regime to authorize or not authorize a project by determining whether the project *as a whole* is in the public interest without qualification (not solely by reference to its *effects* in federal jurisdiction), in a fashion that exceeds its constitutional authority?

[691] The provision relevant to this question, s 60(1), is set out at para 509 above. In brief, after considering an impact assessment report for a designated project, the Minister or the Governor in Council must determine whether the adverse effects within federal jurisdiction and the direct or incidental effects detailed by the report are in the public interest: ss 60, 62.

[692] Both the Minister and Governor in Council must base their decisions on the impact assessment report, the factors set out in s 63, and the extent to which they are in the public interest: see para 512 above. In brief, they include (a) the project's contribution to sustainability, (b) the significance of the projects adverse effects within federal jurisdiction and its adverse direct or incidental effects, (c) appropriate mitigation measures, (d) the impact the designated project may have on any Indigenous group and their s 35 rights, and (e) the extent to which the designated project will help or hinder the federal government's ability to meet its environmental obligations and climate change commitments.

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[233] Bowden & Olszynski at 452-455.

[693] If either decision-maker determines that the relevant effects are in the public interest, it must impose any condition it thinks appropriate. Following a decision that the designated project is in the public interest, the project may proceed.

[694] The question is whether only the "adverse effects within federal jurisdiction" must be in the public interest, or, as Alberta contends, the project *as a whole* must be in the public interest, because the factors to be considered are either i) themselves outside of federal jurisdiction or ii) sufficiently broad that the public interest determination extends beyond *effects within federal jurisdiction*.

i. Consideration of broad factors in federal decision-making is constitutional

[695] As noted, a distinction must be drawn between legislating on a matter and decision-making pursuant to that legislation. Canada relies on this distinction, and it has been considered in academic commentary,[234] recently expressed in this way:

> ... there is a distinction between legislating on a matter and making decisions under that legislation. So long as a statute is *intra vires*, La Forest J indicated that the considerations that may inform decision making under it are not restricted to the jurisdictional root anchoring that legislation.[235]

[696] An example La Forest J gives in *Oldman River* at 69-70 is the Australian case, *Murphyores Incorporated Pty. Ltd. v Commonwealth of Australia* (1976), 136 CLR 1 (HC), which describes a Minister being able to make an export decision under his trade and commerce power that includes considerations which do not themselves relate to trade and commerce.

[697] Environmental impacts, by their very broad and pervasive nature, require broad, multifactorial consideration. "Quite simply, the environment is all around us and as such must be part of what actuates many decisions of any moment": *Oldman River* at 70.

ii. Consideration of broad factors in federal decision-making does not mean the decision – the public interest determination – extends beyond *effects within federal jurisdiction*

[698] It is important to bear in mind that the jurisdictional questions shift as one goes through the impact assessment process:

> [W]e need to consider federal jurisdiction at three key stages: (1) in deciding whether to do an assessment; (2) in deciding the scope of an assessment, and (3) in the post-assessment decision-making processes. *With respect to the decision to*

[234] Reconsidering Red Chris at 272. See also La Forest J himself in *Oldman River* at 69.
[235] Johnston at 114.

> *carry out a federal assessment*, the process would need a trigger that *gives careful consideration to* the potential of a proposed activity to affect an area of federal jurisdiction. It seems clear that in principle, the federal government has the *constitutional authority to carry out an assessment where a proposed activity has a realistic potential to affect an area of federal jurisdiction. With respect to the scope of the assessment, it seems unlikely in light of cases such as Oldman, Red Chris, and Syncrude that once a federal EA is triggered, courts would impose limits on its scope. And with respect to post-assessment decision-making, there is some uncertainty about the precise limits of federal jurisdiction, but it is clear that the results of the assessment need to lay a proper foundation for federal decision-making*. If the assessment identifies clear impacts on areas of federal jurisdiction, there would be a solid basis for federal jurisdiction that implements an integrated approach to addressing the impacts identified.[236] [emphasis added]

[699] There is an important distinction between the impact assessment stage and the decision-making stage. Section 22(1)(a) allows a federal assessment to consider "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" [emphasis added]. However, this does not mean that the *IAA* sanctions a federal decision-maker deciding whether a project *as a whole is* in the public interest. It is important to note that s 22 sets out factors to consider at the impact assessment stage. At the impact assessment stage, the Agency is trying to obtain as much information about the project as possible.

[700] However, the decision-making stage is different, and the relevant considerations are narrower (at least in terms of mandatory factors set out in the *IAA*) and centred upon whether the *effects* within federal jurisdiction are in the public interest (ss 60, 62, 63), though the decision-maker must also take the assessment report into account: ss 60, 63.

[701] That is not to say that a federal Minister or the Governor in Council at the decision-making stage need necessarily only consider "positive" effects of the project (e.g., jobs created) to offset the adverse effects within federal jurisdiction (e.g., harm to fish). But it is possible for a federal decision-maker to consider certain factors like those in s 63 (e.g., sustainability) because they are relevant to "adverse effects within federal jurisdiction" without the "public interest" decision being merely the sum total of *all* the positive and negative aspects of the project. Negative effects of the project which are not themselves within federal jurisdiction may inform concepts like sustainability that are used to determine whether adverse federal effects are deemed to be acceptable in the circumstances. However, because one side of the ledger is always adverse *federal* effects, very minor adverse effects within federal jurisdiction are unlikely to outweigh countervailing considerations and a designated project will not be prohibited from proceeding merely because it has negative effects outside federal jurisdiction of which the Minister or Governor in Council may disapprove.

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[236] Jason MacLean, Meinhard Doelle & Chris Tollefson, "Polyjural and Polycentric Sustainability Assessment: A Once-In-A-Generation Law Reform Opportunity" (2016) 30 J Env L & Prac 3 [MacLean, Doelle & Tollefson] at 44-45.

[702] It is true that after compliance with the *IAA* regime, a local project such as a new *in situ* oil sands extraction facility could fail to obtain authorization because the environmental *effects* in federal jurisdiction are not in the public interest. However, that result does not mean the *IAA* regime is unconstitutional or has squeezed out the operation of the *EPEA*. There are three junctures at which the two processes may intersect – substitution (s 31(1)), delegation (s 29) and joint review (s 39(1)) - under which the assessment processes address the adverse environmental effects in federal jurisdiction, and the project may be authorized. There is nothing in the *IAA* to suggest that the federal assessment regime is simply duplicating the provincial assessment process and thus occupying the entire field of environmental assessment so as to block resource development. As noted in *GGPPA SCC* at para 65, "[c]ourts should generally hesitate to attribute to Parliament *an intention to occupy an entire field*" [emphasis added].

j. Materiality and the Incidental Effects Doctrine

[703] The majority suggests that even if the effects of an intra-provincial designated project are linked to a federal head of power, federal jurisdiction is not engaged until the point at which the effects become "significant". Significance being a kind of constitutional pre-requisite, the *IAA* is unconstitutional, at least in part, because it allows federal decision-makers to prohibit adverse effects within federal jurisdiction from taking place even if those effects do not attain this threshold.

[704] The theory relies on the vernacular of the "incidental effects doctrine", using the term "incidental" to mean that if a local project wholly within provincial legislative authority, such as an oil sands extraction facility, has only an "incidental" *qua* "insignificant" impact on a federal matter, such effects are constitutionally irrelevant, and cannot be subject to federal constitutional authority. As I understand this in practical terms: if a few Canada geese meet their death in the tailings pond of a mega oil sands project authorized under provincial legislation, Parliament lacks the constitutional authority to protect them by environmental regulation to the extent the project's effects on geese are merely "incidental effects" of the province's exercise of authority.

[705] With respect, this use of the concept of "incidental effects" is misplaced. The majority seeks to equate *insignificant effects with incidental effects* – and as a corollary, *significant effects with non-incidental effects* – in hopes of creating a clean dividing line (significance) to determine when effects become constitutionally relevant. However, whether or not the effects of a project are "significant" says nothing about whether they are "incidental effects" for purposes of the division of powers. Indeed, from the point of view of valid provincial legislation, the effects of a provincially authorized project on federal heads of power will *always* be incidental effects, regardless of the degree of materiality or significance.

[706] The incidental effects doctrine provides that if an impugned law is in "pith and substance" within a head of power assigned to the enacting legislature, the fact that such law may have "incidental effects" on another head of power outside the jurisdiction of the enacting legislature is irrelevant for constitutional purposes: Hogg at §15:5; *Paul v British Columbia (Forest Appeals*

Commission), 2003 SCC 55 at para 14, [2003] 2 SCR 585; *Firearms Reference* at para 49. It is crucial to parse these terms of art. In the constitutional context, the term "incidental effects" means "consequential effects": *Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 SCR 297 at 332. It also means effects which are "*collateral and secondary* to the mandate of the enacting legislature": *Canadian Western Bank v Alberta*, 2007 SCC 22 at para 28, [2007] 2 SCR 3, emphasis added [*Canadian Western Bank*].

[707] Because "incidental effects" refer to consequences which are collateral or secondary to a law's dominant purpose and effects, it does not necessarily speak to the *magnitude* of the effect on the head of power of the other level of government. Such effects can be minor in nature; however, they can equally constitute a "substantial impact" (Hogg at §15.5) or be of "significant practical importance" (*Canadian Western Bank* at para 28). Accordingly, when a provincial law authorizing a local project has effects in areas of federal jurisdiction (e.g., migratory birds), those effects will be "incidental" *regardless of whether they are significant* because they are collateral or secondary to the provincial law's pith and substance.

[708] If effects being "significant" were indeed synonymous with effects being *more than merely* incidental, and thus constitutionally relevant for purposes of triggering federal jurisdiction, on the majority view, federal assessments of local projects would only ever be triggered in instances where provincial legislation authorizing such projects was itself *ultra vires*. The point of incidental effects as a doctrine is to condone as proper and expected "incidental intrusions into matters subject to the other level of government's authority" (*Canadian Western Bank* at para 28) without thereby rendering that law unconstitutional. Although the effects of a law may reveal its pith and substance, incidental or consequential or collateral effects "will not disturb the constitutionality of an otherwise *intra vires* law": *Global Securities Corp. v British Columbia (Securities Commission)*, 2000 SCC 21 at para 23, [2000] 1 SCR 494. Once the effects of a provincial law on a federal head of power are no longer merely "incidental", however, it becomes a law that in "pith and substance" relates to a federal subject matter and is invalid.

[709] The incidental effects doctrine does not mean that merely "insignificant" effects – whether *relative* to the magnitude of the intra-provincial undertaking, or absolutely – put such effects beyond the pale of Parliament's legislative authority. Moreover, in my view, that incidental effects may be discounted in the constitutional analysis does not mean that the opposing constitutional authority must show that the impact is material *vis-a-vis* the magnitude of a project or activity, or in absolute terms. Public policy concerns militate against a high threshold to trigger protection under environmental legislation in any event. It is not for the courts to tell Parliament at what point it is allowed to be concerned about harm to the environment in areas within its constitutional jurisdiction.

k. *IAA*: Cooperative Federalism, not Federal Veto

[710] Provincial environmental assessment regimes vary from province to province.[237] The *EPEA* governs the regime in Alberta.[238] Under the *EPEA*, regulations prescribe what types of activities require an environmental assessment.[239] Not all projects are subject to an assessment. For example, a surface coal mine producing more than 45,000 tonnes per year would require an environmental assessment, but *the drilling or operation of an oil or gas well would not*.[240]

[711] The *IAA* purposes are detailed above, but generally, the legislative purpose is to foster sustainability and to protect the environment and health, social, and economic conditions within Parliament's legislative authority from adverse effects caused by designated projects. Some of the *EPEA* purposes are to protect the environment, support sustainable development, predict social, environmental, and economic consequences, and consult with stakeholders: *EPEA*, s 40.

[712] The *IAA* employs an environmental impact assessment approach culminating in a report that sets out the effects that may be caused by the designated project and from among those effects, those that are adverse effects within federal jurisdiction: s 28(3).

[713] The *EPEA* employs an environmental impact assessment approach culminating in an "environmental impact assessment report" that must describe the proposed activity and its various effects. The *EPEA* sets out 15 requirements for the report, including a description of the proposed activity, the need for the activity, as well as potential positive and negative environmental, social, economic, and cultural impacts: s 49.

[714] The *EPEA* impact assessment report will be used for decision-making by the appropriate regulator (such as Alberta Environment and Parks, the Alberta Energy Regulator, or the Alberta Utilities Commission) to decide whether the activity is in the public interest.[241]

[715] Alberta submits that its environmental assessment regime and the federal environmental regime cannot comfortably co-exist: a project could be subject to a rigorous and full assessment under the Alberta assessment regime, resulting in an approval, perhaps with significant conditions, but that provincial process could be entirely frustrated by an *IAA* review arriving at a different decision about the public interest, and withholding federal approval to proceed. This would

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[237] Doelle & Tollefson at 594.

[238] Affidavit of Corinne Kristensen ("Kristensen Affidavit"), Alberta Record, Vol 1, paras 13-17, A3-A4.

[239] See *Environmental Assessment (Mandatory and Exempted Activities) Regulation*, AR 111/1993 [*Activities Regulation*]. The EA Director also has discretion to subject a proposed activity to an environmental assessment, see *EPEA*, s 44.

[240] *Activities Regulation*, Schedules 1 & 2.

[241] Kristensen Affidavit, Alberta Record, Vol 1, para 19, A5.

constitute a significant "displacement" of the provincial regulating regime and impairment of provincial jurisdiction: Alberta's Factum at para 129.

[716] Alberta submits that environmental, social, economic, and Indigenous benefits and impacts are already addressed under its provincial regulatory regime which considers local and regional concerns arising from the exercise of exclusive provincial jurisdiction over resource management, provincial lands, and undertakings. Instead of being a planning tool in aid of federal decision-making, Alberta sees the *IAA* as broadly regulating all "effects" of a designated project allowing for a veto of projects that provincial review processes approve as in the public interest. In this way, Alberta submits the *IAA* is a "Trojan horse" - a "colourable device to invade areas of provincial jurisdiction which are unconnected to the relevant heads of federal power": *Ibid* at para 132, citing *Oldman River* at 72.

[717] It is true that a federal decision under the *IAA* can halt a project. But there are several problems with Alberta's characterization of this federal role as a "veto". It fails to recognize the legitimate role of the federal government in assessing projects that cause *effects* within federal jurisdiction, manifest in different ways: (1) a true interpretation of the *IAA* shows it has strengthened its control over adverse environmental effects in federal jurisdiction rather than sought to control outcomes of the federal and provincial processes; (2) federal and provincial decision-makers make different decisions, rather than one exercising a "veto" power; (3) the approach that a project cannot proceed *as proposed* without endorsement by both levels of government has been in place since at least *Oldman River*; and (4) both the *IAA* and *EPEA* are designed to facilitate cooperation between levels of government rather than one holding a "veto" power over the other.

i. *IAA* strengthens control over environmental effects in federal jurisdiction

[718] Rather than adopting a "veto" approach, the *IAA* has carved out its areas of environmental concern in federal jurisdiction and focussed on controlling those effects. It is fair to observe that the federal government has strengthened its control over its own assessment process in the *IAA*. An example is the *IAA*'s elimination of the concept of equivalency. Under *CEAA, 2012,* equivalency allowed the federal government to exempt a project from the federal environmental assessment process if the project was undergoing an equivalent provincial assessment: s 37.[242] This exemption meant there would be no federal decision with respect to the project. Under the *IAA*, even if a different jurisdiction carries out the impact assessment, it appears that there will always be a federal decision to approve or deny the project.[243]

[719] Though the *IAA* allows the Minister to substitute a provincial process for impact assessment, the Minister still maintains certain controls over the assessment. Before approving a substitution, the Minister must be satisfied the provincial assessment meets certain criteria: ss 31,

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[242] Doelle & Tollefson at 609, 612.

[243] *Ibid* at 618.

33. It must consider the same factors as a federal impact assessment, provide federal authorities with an opportunity to participate, allow for public consultation, and identify the adverse effects within federal jurisdiction: s 33. The Minister also has the power to seek additional information from a proponent or province after reviewing the report from a substituted assessment: s 35.

[720] Though this may be increased federal oversight of provincial assessments, it is also a way for the Minister to ensure that the federal effects of a project are assessed in accordance with federal standards. The *IAA* deems that a substituted assessment is an impact assessment for the purposes of the *IAA* and satisfies all statutory and regulatory requirements: s 34. Since the federal government will use a substituted assessment to make its decision about whether the effects of the project within federal jurisdiction are in the public interest, it is reasonable for the federal government to ensure that its own environmental standards are met.

ii. Federal and provincial decision-makers make different decisions, rather than a "veto" of one by the other

[721] The concept of a "veto" signifies one decision-maker over-ruling another with respect to a single decision. That is not the result here. Rather, the provincial and federal decision-makers are making *different decisions* (albeit with overlap). One is deciding whether effects within provincial jurisdiction are in the public interest, while the other is deciding whether effects within federal jurisdiction are in the public interest. These are distinct inquiries and decisions.

iii. The approach that a project cannot proceed *as proposed* without endorsement by both levels of government has been in place since at least *Oldman River*

[722] To the extent a "veto" simply means that a given project cannot go ahead *as proposed* without both levels of government "signing off" on the project (assuming it engages federal jurisdiction), this has *always* been the case, certainly at least since *Oldman River*. In academic commentary on *Oldman River*, Steven Kennett describes the federal government as having a "veto" over projects.[244] As discussed, Kennett then makes the case for federal-provincial cooperation in such circumstances.[245]

iv. The *IAA* and *EPEA* are designed to facilitate cooperation rather than a competitive veto, one over the other

[723] Both the *IAA* and *EPEA* are expressly designed to permit and encourage inter-jurisdictional cooperation in the conduct of assessments and sharing of information across agencies and governments. Both are drafted to work harmoniously to achieve these aims. Both recognize among their purposes, the importance of inter-jurisdictional cooperation: *EPEA*, s 2(h); *IAA*, s 6(1)(e).

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[244] See Steven A Kennett, "Federal Environmental Jurisdiction After *Oldman*" (1993) 38:1 McGill L J 180 at 191 at 200.

[245] *Ibid* at 203.

[724] Both statutes contain general provisions permitting the respective Minister to enter into agreements with the government or agency of another jurisdiction on various matters pertaining to environmental assessment: see *EPEA*, s 19; *IAA*, s 144(c)-(d). In practice, federal-provincial cooperation has existed between Canada's and Alberta's environmental assessment regimes for decades. An early agreement to coordinate through a bilateral agreement is the *Canada-Alberta Accord for the Protection and Enhancement of Environmental Quality,* OC 8775, (1975). Later came the 1993 *Canada-Alberta Agreement for Environmental Assessment Cooperation, the most* recent iteration of which was from 2005. It continues to be used by Canada and Alberta in establishing joint review panels. For instance, the recent Joint Review Panel decision regarding the Grassy Mountain Coal Project references the 2005 bilateral agreement in the agreement to establish the joint review panel.[246] This project was reviewed under *CEAA, 2012*. The 2005 bilateral agreement was signed when *CEAA, 1992* was in force and yet it clearly continued to apply after *CEAA, 1992* was replaced by *CEAA, 2012.* Nothing presented in this Reference suggests that the bilateral agreement does not apply now under the *IAA*.

[725] Several provisions of the *IAA* are designed specifically to avoid duplication of effort in the assessment process. The Agency may *delegate* any part of an impact assessment and report preparation to another jurisdiction: s 29. The Minister may *substitute* the assessment process of another jurisdiction for the process under the *IAA*, upon request (s 31) and upon being satisfied of certain aspects of the process: s 33(2). Every federal authority in possession of expert information or knowledge with respect to a designated project must make that information available to a government or agency conducting a substituted assessment: s 23(c). Section 36 requires the Minister, when deciding whether to refer an impact assessment to a review panel, to consider opportunities for inter-jurisdictional cooperation: see also ss 21(1)(p), 92-93. Section 39 provides for the joint establishment of a review panel with another jurisdiction.

[726] Similarly, the *EPEA* contemplates overlap and permits inter-jurisdictional agreements to allow the assessment process to be carried out jointly (s 57(b)); or to provide for the adoption by one or both jurisdictions of all or part of the assessment process and reports of the other: s 57(c). Section 55 permits the Minister, following the submission of an environmental impact assessment report, to make any recommendations in respect of the activity to the government or agency of another jurisdiction.

[727] Both the federal and provincial statutory schemes envision and support consultation and the sharing of information relating to environmental assessments and related matters: see *IAA*, ss 21, 22(1)(o); *EPEA*, ss 10, s 12(b).

[728] That a goal of the *IAA* is to promote cooperation and coordinated action between federal and provincial jurisdictions is shown by the Minister's statements during the Bill C-69 legislative

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[246] Alberta Energy Regulator & Impact Assessment Agency of Canada, Decision 2021 ABAER 010: *Benga Mining Limited, Grassy Mountain Coal Project, Crowsnest Pass* (Report), by the Joint Review Panel Established by the Federal Minister of Environment and Climate Change and the Alberta Energy Regulator, CEAA Reference No 80101 (17 June 2021).

debates. In Second Reading in the House of Commons, the Minister made the following comments:

> I am very pleased that we are bringing forward better rules for reviewing major projects. That is not just pipelines. That is hydro projects. That is mines ...
>
> [W]e will have a single agency, the impact assessment agency of Canada, which will lead all impact assessments for major projects. That will ensure the approach is consistent and efficient. That is something the industry made very clear that it needed. Also, *our goal is one project, one review. We need to streamline the process and coordinate with provinces and territories to reduce red tape for companies and avoid duplicating efforts in reviewing proposed projects.* We have also reduced the timelines.[247] [emphasis added]

[729] These goals were reiterated at Third Reading in the House of Commons.[248]

[730] In summary, the *IAA* and *EPEA* contain provisions that contemplate cooperation between various jurisdictions and agencies, including Canada's Agency, Alberta's agencies, and Indigenous jurisdictions. The *IAA* and *EPEA* schemes can cooperate and are "not incompatible with the boundaries dictated by the *Constitution Act, 1867*": *Pan-Canadian Securities Reference* at para 18. The principle of co-operative federalism supports such an interpretation that will, in turn, foster and support the division of powers: *Ibid* at paras 17-18. An interpretation of the *IAA* that permits interlocking federal and provincial environmental processes to coexist is also consonant with the double aspect principle and the presumption of constitutionality.

v. Section 92A(1): Exclusive Jurisdiction over Natural Resources?

[731] Alberta's position is effectively that s 92A of the *Constitution Act, 1867*, sometimes called the "resource amendment", creates an enclave for non-renewable resources that is immune from federal assessment. This would mean there is no "federal aspect" to "provincial" natural resource projects which nevertheless impact federal matters, such as fish, because s 92A(1) grants the provinces exclusive jurisdiction over *all aspects* of environmental consequences from exploration and management of natural resources.

[732] The starting point for considering s 92A must be first principles.

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[247] "Bill C-69 An Act to enact the Impact Assessment Act and the Canadian Energy Regulatory Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts", 2nd reading, *House of Commons Debates*, 42-1, No 267 (27 February 2018) at 17401 (Hon Catherine McKenna).

[248] "Bill C-69 An Act to enact the Impact Assessment Act and the Canadian Energy Regulatory Act, to amend the Navigation Protection Act and to make consequential amendments to other Acts", 3rd reading, *House of Commons Debates*, 42-1, No 313 (12 June 2018) at 20774-8.

[733] The fact that provinces have exclusive jurisdiction to legislate "in relation to" a subject does not mean federal legislation of general application cannot *apply* to that subject. This is a crucial distinction in Canadian constitutional law which acts to ensure that a subject within the exclusive jurisdiction of one level of government (e.g., "Indians, and Lands reserved for the Indians") does not become an enclave immune from the application of all legislation of the other level of government: *Cardinal v Attorney General of Alberta*, [1974] SCR 695 at 702-703. Indeed, it is this distinction that allowed federal assessment legislation to apply to a local work and undertaking like the dam in *Oldman River* without it being legislation in relation to a local work and undertaking. Where a local project has a "federal aspect" (i.e., an effect on an area of federal jurisdiction), Canada can legislate *in relation to* that aspect without usurping the "exclusivity" of provincial jurisdiction.

[734] The same is true of s 92A(1), which is the only "exclusive" power in s 92A. There is no reason why s 92A(1) should be interpreted differently from other provincial powers in s 92, such that the "double aspect" doctrine does not apply to natural resource projects. First, there is no significance to the placement of s 92A as a standalone provision, which was necessitated by the fact that two of its three legislative powers – inter-provincial trade (s 92A(2)) and taxation (s 92A(4)) – are not exclusive powers but concurrent powers and thus incapable of being listed amongst the exclusive powers in s 92. Second, the reference to "conservation" in s 92A(1)(b) does not relate to "the environment" generally, but "non-renewable natural resources and forestry resources" only.

[735] Moreover, there is no support for the view that s 92A(1) creates an enclave of exclusive provincial power, either in decided cases or academic authorities. Instead, it is well established that the powers in s 92A, in affirming provincial powers over exploration, development, conservation and management of non-renewable natural resources, do not diminish any pre-existing powers of Parliament: *Westcoast Energy Inc v Canada (National Energy Board)*, [1998] 1 SCR 322 at paras 80-84, 156 DLR (4th) 456; *Ontario Hydro v Ontario (Labour Relations Board***,** [1993] 3 SCR 327 at 376-378 (per La Forest J), 410 (per Iacobucci J, dissenting), 107 DLR (4th) 457; *GGPPA SCC* at para 346, per Brown J (in dissent but not on this point); Robert D Cairns, Marsha A Chandler & William D Moull, "Constitutional Change and the Private Sector: The Case of the Resource Amendment" (1986) 24:2 Osgoode Hall L J 299 at 299-300; Robert D. Cairns, Marsha A. Chandler & William D. Moull, "The Resource Amendment (Section 92A) and the Political Economy of Canadian Federalism" (1985) 23:2 Osgoode Hall L J 253 at 272.

[736] Subsection 92A(1) authorizes provincial legislation with intra-provincial purpose and effect, but federal powers remain intact:

> Unlike the other subsections of section 92A, subsection 92A (1) states that its enumerated powers are conferred 'exclusively' on the provincial legislatures. Because of this, it could be suggested that subsection 92A (1) restricts federal legislative powers to the extent that it may have amplified provincial legislative powers. *But this is not really the case.* For one thing, nothing in subsection 92A (1) – or in the rest of section 92A, for that matter – limits the extraordinary powers

> of Parliament over natural resources. These considerable powers include the authority to assume legislative jurisdiction over intra-provincial subject-matters in emergencies, or by invoking the federal declaratory power in section 92(10)(c), under which Parliament can unilaterally declare a local work wholly within a province to be 'for the General Advantage of Canada' and thus transfer that work to exclusive federal jurisdiction. Further, *the more ordinary constitutional powers of Parliament (such as its jurisdiction over extra-provincial trade and commerce) do not usually allow it to legislate directly 'in relation to' intra-provincial subject-matters, such as those listed in subsection 92A (1). Thus, the entrenchment of those intra-provincial powers in the Constitution 'exclusively' in favour of the provinces does not seem to take from Parliament any jurisdiction that it had before section 92A*. In any event, the judicially developed doctrine of 'paramountcy' (by which federal legislation prevails over provincial legislation in any event of direct conflict) grants precedence to any federal measure that is at odds with a provincial measure enacted under subsection 92A (1), notwithstanding that both orders of government may be exercising 'exclusive' legislative powers.
>
> …
>
> *Section 92A does not appear to diminish federal legislative powers*. By subsection 92A (3), those powers are expressly preserved in relation to the new provincial 'export' jurisdiction under subsection 92A (2). They are preserved by implication with respect to the new provincial taxation jurisdiction under subsection 92A (1), because these taxation powers are not said to be 'exclusive' to the provinces. And *they are preserved by implication with respect to the regulatory powers conferred on the provinces by subsection 92A (1), even though the provincial powers are there said to be 'exclusive': this is because nothing in that provision restricts either the extraordinary purposes of Parliament to legislate for intra-provincial purposes or the ordinary powers of Parliament to legislate for extra-provincial purposes*. In any event, the judicially developed doctrine of paramountcy will continue to accord precedence to any federal legislative measure in the event of a direct conflict with any provincial measure enacted under subsection 92A(1). [249] [Emphasis added]

[737] Nor is the view that s 92A creates an enclave of exclusive provincial power consistent with the extrinsic evidence found in the constitutional debates leading up to the passage of s 92A.[250]

[738] And finally, an interpretation of s 92A as an enclave of provincial powers is plainly inconsistent with the Supreme Court of Canada decision in *Moses* at para 36:

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[249] William D Moull, "The Legal Effect of the Resource Amendment – What's New in Section 92A?" in J Peter Meekison, Roy J Romanow, and William D Moull, eds, *Origins and Meaning of Section 92A: The 1982 Constitutional Amendment on Resources* (Montreal: Institute for Research on Public Policy: 1985) 33 at 53-54, 61.

[250] Canada, Parliament, *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, 32nd Parl, 1st Sess, No 54* (5 February 1981) at 54:38 to 54:76.

> There is no doubt that a vanadium mining project, considered in isolation, falls within provincial jurisdiction under s. 92A of the *Constitution Act, 1867* over natural resources. There is also no doubt that ordinarily a mining project anywhere in Canada that puts at risk fish habitat could not proceed without a permit from the federal Fisheries Minister, which he or she could not issue except after compliance with the *CEAA*. The mining of non-renewable mineral resources aspect falls within provincial jurisdiction, but the fisheries aspect is federal.

[739] In short, the fact that provinces have exclusive legislative jurisdiction over natural resources in s 92A(1) of the *Constitution Act, 1867* does not preclude federal legislation from applying to natural resource projects located solely in one province. Just as the provision does not prohibit the application of the *Fisheries Act*, it does not immunize local natural resource projects from federal assessment legislation like the *IAA*. Accordingly, such natural resource projects are not enclaves immune from federal environmental legislation any more than federal undertakings are enclaves immune from provincial environmental legislation: *Reference re Environmental Management Act (British Columbia)*, 2019 BCCA 181 at para 93, aff'd 2020 SCC 1.

3. Conclusion as to Validity of the *IAA* and *Regulation*

[740] In my opinion, the *IAA* and its *Regulation* are a valid exercise of Parliament's authority to legislate on the matter of the environment. Section 7 of the *IAA* prohibits proponents of physical activities or designated projects on the Project List (or by Ministerial order) from doing anything to advance the project if it may cause *effects within federal jurisdiction* until it can be determined whether any such adverse effects are in the public interest. Most of the designated projects involve activities within areas of federal jurisdiction and *prima facie* within s 91 of the *Constitution Act, 1867* – such as national parks, interprovincial railways, or offshore oil and gas facilities – that may have effects upon areas *also* within federal jurisdiction, such as fish habitat, federal lands, or Indigenous peoples. The remainder of the designated projects are intra-provincial and *prima facie* within s 92 or 92A of the *Constitution Act, 1867* – such as certain mines and metal mills, and oil and gas facilities – that may have *effects upon areas of federal jurisdiction*, such as fish habitat, federal lands, or Indigenous peoples. In either case, the project-based federal environmental assessment regime in the *IAA* and *Regulation* target adverse environmental effects in federal jurisdiction.

[741] The history, extrinsic and intrinsic evidence, and the literal interpretation of the *IAA* and *Regulation* support its constitutionality, as do the presumption of constitutionality, double aspect doctrine, and imperatives of cooperative federalism.

C. Inter-Jurisdictional Immunity

1. Issue not Raised by Reference Questions

[742] Alberta submits that the *IAA* should be declared *ultra vires* in its entirety, but if found valid as limited to activities under federal jurisdiction, the doctrine of interjurisdictional immunity applies so that this Court should declare that the *IAA* does not apply to activities and undertakings

exclusively under provincial jurisdiction, including those "designated activities" listed in the *Regulation*. Alberta contends there is a minimum unassailable core of federal and provincial heads of power into which the other level of power cannot intrude. Its argument comes back to the position that the *IAA* and *Regulation* constitute a federal veto power over provincial projects; that the core of the power to manage and develop natural resources must include the final determination of whether a given project should proceed based on an evaluation of its benefits and effects. The federal approval process therefore impairs the provinces' exclusive legislative competence.

[743] Canada replies that the doctrine of interjurisdiction immunity presumes the law is valid, so that this argument is beyond the scope of the specific Reference questions.

[744] Professor Hogg recounts the ways to attack a law said to be outside the jurisdiction of the enacting legislature. The first is to argue "that the law is invalid because the matter of the law (or its pith and substance) comes within a class of subjects that is outside the jurisdiction of the enacting legislative body": Hogg at § 15:16. The question posed by this Reference is: are the *IAA* and *Regulation* "unconstitutional in whole or in part, as being beyond the legislative authority of the Parliament of Canada under the Constitution of Canada?" The question before us involves the first method of attack: it asks whether the law is invalid because it is beyond Parliament's jurisdiction.

[745] The second approach is to "acknowledge that the law is valid in most of its application, but to argue that the law should be interpreted so as not to apply to the matter that is outside the jurisdiction of the enacting body … the law is not held to be invalid but simply *inapplicable* to the extra-jurisdictional matter": *Ibid*. This approach of limiting the applicability of a law by reading it down is defined by Professor Hogg, and others, as the doctrine of interjurisdictional immunity.

[746] The third approach is to argue "that the law is *inoperative* through the doctrine of paramountcy … that, where there are inconsistent federal and provincial laws, it is the federal law that prevails; paramountcy renders the provincial law inoperative to the extent of the inconsistency": *Ibid* [emphasis in original]. This method of attack is not used in this case.

[747] This Reference questions the constitutional validity of the *IAA* and *Regulation*. The answer to the questions posed is that the *IAA* and *Regulation* are either invalid as unconstitutional or are valid. Alberta's submission that this Court should declare the *IAA* and *Regulation* inapplicable to the extent of their application to activities and undertakings it says are exclusively under provincial jurisdiction – natural resources, for example – raises a question not within the scope of this Reference. Our jurisdiction is limited to the question asked. This is a full answer to the interjurisdictional immunity argument raised by Alberta: application of the doctrine is beyond the scope of this Reference. The argument that interjurisdictional immunity was beyond the scope of the Reference questions was accepted in *Reference Re Greenhouse Gas Pollution Pricing Act*, 2019 SKCA 40 at paras 206-209.

2. If the Application of the Doctrine of Interjurisdictional Immunity is Not Beyond the Reference Scope, In Any Event, It Does Not Apply Here

[748] The *IAA* and *Regulation* are either constitutionally valid or invalid. If they are valid, and the application of the doctrine of interjurisdictional immunity is not beyond the scope of this Reference, then a preliminary issue is whether the doctrine applies to federal legislation at all, such that a federal law can be found inapplicable for having intruded too deeply into provincial jurisdiction. The doctrine serves to determine whether the valid law is applicable or operative in these specific circumstances: *Canadian Western Bank* at para 76. In my view, the interjurisdictional immunity doctrine does not apply in the circumstances of this case.

[749] Alberta relies on *Canadian Western Bank* to submit that the *IAA* meets both parts of the test for application of the doctrine of interjurisdictional immunity: the *IAA* encroaches on Alberta's exclusive jurisdiction over development and management of natural resources under s 92A of the *Constitution, 1867*, and profoundly impairs it by creating a federal veto power over natural resources projects. A law that trenches on the core of power of another level of government must be read down so as not to apply to the matter within the other level of government's jurisdiction.

[750] Canada submits that the Supreme Court of Canada has limited the application of the interjurisdictional immunity doctrine and rejected its application to protect provincial legislation from the application of federal legislation on the occasions when it has been argued, citing *Canada (Attorney General)* v *PHS Community Services Society*, 2011 SCC 44 at paras 61-64, 67-70, [2011] 3 SCR 134 [*PHS*] and *Carter v Canada (Attorney General)*, 2015 SCC 5 at paras 49-53, [2015] 1 SCR 331.

[751] The parties join issue over whether the doctrine of interjurisdictional immunity applies to federal legislation at all, such that a federal law can be found inapplicable for having intruded too deeply into provincial jurisdiction. The Supreme Court of Canada has *never* found an instance where a province has been able to avail itself of the interjurisdictional immunity doctrine, though it has suggested that the doctrine is theoretically reciprocal: *Canadian Western Bank* at para 35. However, the Court in that case also called for a restrained approach to the doctrine, noting that "interjurisdictional immunity is of limited application and should in general be reserved for situations *already covered by precedent*": *Canadian Western Bank* at para 77 [emphasis added].

[752] What this "means in practice", said the Court more recently, is "that we will usually not expand the doctrine to protect the core of legislative powers that have not already been so defined in our jurisprudence": *Desgagnés Transport* at para 93. In my view, since there is no precedent to date on protecting the "core" of s 92A(1), this case, involving as it does the environment and environmental protection legislation, already found by the Supreme Court of Canada to cut across heads of both federal and provincial power, is not the circumstance in which to expand the doctrine.

[753] Second, and alternatively, if it is decided that s 92A(1) is an appropriate candidate for the application of the doctrine of interjurisdictional immunity, it would still have to be determined what the "core" of s 92A (1) is and whether the *IAA* and *Regulation* impair that core.

[754] The test for application of the interjurisdictional immunity doctrine is summarized in *Desgagnés Transport* at para 92: "Two conditions must be met for the doctrine to apply. First,

the impugned provision must trench on the core of an exclusive head of power under the *Constitution Act, 1867*. Second, the effect of this overlap must impair the exercise of the core of the head of power".

[755] Alberta contends that even if the *IAA* is valid, federal assessments should be inapplicable to natural resource projects falling under s 92A because the *IAA* impairs the "core" of s 92A(1). It is incumbent upon Alberta to delineate a "core" of an exclusively provincial power: *PHS* at para 68. The issue in the *PHS* case was "whether the delivery of health care services constitutes a protected core of the provincial power over health care in s. 92(7), (13) and (16) . . . and is therefore immune from federal interference": at para 66. The Court concluded that it did not. In *PHS*, the Court rejected the proposed core of the "provincial health power" because such "a vast core would sit ill with the restrained application of the doctrine called for by the jurisprudence": *Ibid* at para 68.

[756] Alberta's identification of the core of its power to manage and develop natural resources is "the ultimate decision over whether and when resources will be developed, and the balancing of the interests central to such decisions" (Alberta's Factum at para 154).

[757] Alberta identifying the "core" of s 92A(1) as the ultimate decision over the development of natural resources is too broad, since it would then immunize natural resource projects from federal legislation such as the *Fisheries Act*, clearly a function of the federal fisheries power under s 91(12). A "core" is meant to be a subset of the overall power: *Canadian Western Bank* at para 51; *Desgagnés Transport* at para 95. Conversely, the ultimate decision over whether and when resources will be developed, and the balancing of the interests central to such decisions, seems to subsume the entirety of the power itself.

[758] Alberta identifying the "core" of the natural resources power more specifically as the issuance of ultimate approval or permits for natural resource projects is also problematic since the *IAA* does not impair a province's ability to issue approval or permits – what the *IAA* does, at least in certain circumstances, is make those permits *insufficient* for the project to proceed as planned. But so does the *Fisheries Act* in certain cases. The logical extension of Alberta's analysis rendering the *IAA* inapplicable to natural resource projects would likewise render federal legislation like the *Fisheries Act* inapplicable, directly contrary to express federal powers under s 91.

[759] In these two ways, Alberta's position seeks to turn natural resource projects that fall under s 92A into "enclaves" immune from federal legislation. The notion of an "enclave" of power runs contrary to modern federalism, with its emphasis on the double aspect doctrine, overlapping jurisdiction, and cooperative federalism, in favour of the long discarded "watertight compartments" doctrine. In the words of the Chief Justice writing for the Court in *PHS*: "the doctrine of interjurisdictional immunity is narrow" and its "premise of fixed watertight cores is in tension with the evolution of Canadian constitutional interpretation towards the more flexible concepts of double aspect and cooperative federalism": para 70. Indeed, as noted above, environmental assessment legislation is itself a quintessential example of these modern trends because shared jurisdiction over "the environment" has required that Canada and the provinces

work together – often through bilateral agreements – to properly deal with multifaceted environmental concerns.

VI. Conclusion

[760] It is my opinion that the *IAA*, establishing a federal environmental impact assessment regime, is a valid exercise of federal constitutional authority. The answers to the questions are:

> 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? No.
>
> 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? No.

[761] The federal environmental assessment regime in the *IAA* and *Regulation* prohibits projects on the Project List that may have *effects in federal jurisdiction* – on fish and fish habitat, aquatic species, migratory birds, on federal lands or federally funded projects, between provinces, outside Canada, and with respect to Indigenous peoples – from proceeding unless and until the proponents engage the process and a decision is made that an assessment in unnecessary or that it is in the public interest for the project to proceed.

[762] The *IAA* and *Regulation* are the product of broad community consultation and the result of effectuating the collective views of many stakeholders, including Indigenous groups, NGOs, provinces, territories and municipalities, industry associations and companies.[251] The *IAA* and *Regulation* comprise Canada's effort to move towards sustainability while balancing the interests of the economy, communities, Indigenous peoples, and international commitments. Regulation of environmental impacts to capitalize upon the earth's resources with minimal impact is the way of the future in a world where fresh air and clean water will be seen as fundamental human rights, requiring a balance between the interests of a thriving economy and the interests of protecting the environment and people from its harmful effects.

[763] In a thought-provoking *cri de coeur* written prior to promulgation of the *IAA* and *Regulation,* environmental academics envisioned a future where sustainability assessments are responsive to the interests of both the economy and the citizenry, calling for harmonization of environmental assessment regimes among multiple jurisdictional actors, including the federal government, provinces, territories, municipalities, Indigenous peoples, NGOs, academia, project

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[251] See Canada, Canadian Environmental Assessment Agency, *Building Common Ground: a new vision for impact assessment in Canada* (Final Report of the Expert Panel for the Review of Environmental Assessment Processes) (Canadian Environmental Assessment Agency, 2017) at 86-106.

proponents and industry groups, as well as the Canadian public. This approach is anticipated to have "the potential not only to resolve intensifying multijurisdictional disputes over the direction of energy and economic development in Canada in a manner that is effective, efficient, and socially inclusive, but also to develop widely-shared commitments about Canada's future".[252]

[764] All this to say, the complexities and urgency of the climate crisis call for co-operative, interlocking environmental protection regimes among multiple jurisdictions, each functioning at its highest and best within their constitutional jurisdiction.

[765] In my opinion, in enacting the *IAA* and *Regulation*, Parliament has established a federal environmental assessment regime designed to regulate *effects within federal jurisdiction* caused by physical activities or designated projects; and to authorize such projects when it is in the public interest to do so, in cooperation with other jurisdictions that bear responsibility for the environment, especially the provinces and First Nations. The *IAA* confines its reach to protection of the environment and the health, social and economic conditions within Parliament's legislative authority from the adverse environmental effects of select activities that in its view, have the greatest potential for adverse effects on areas of federal jurisdiction. Having done so, the legislative regime prescribed in the *IAA* and *Regulation* is a valid exercise of Parliament's authority and compliant with the *Constitution Act, 1867,* as amended.

Special Hearing heard February 22-25, 2021

Opinion filed at Calgary, Alberta
this 10th day of May, 2022

Greckol J.A.

[252] MacLean, Doelle & Tollefson at 66.

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