SCC File Number: 40195

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE ALBERTA COURT OF APPEAL)

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

BETWEEN:

ATTORNEY GENERAL OF CANADA

Appellant

- and –

ATTORNEY GENERAL OF ALBERTA

Respondent

- and –

(Title of proceedings continued on next page)

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I. OVERVIEW AND STATEMENT OF FACTS

(a) Introduction

1. The *Impact Assessment Act*[1] is a profound threat to provincial areas of jurisdiction under the division of powers, including those exclusive powers over natural resources, local works and undertakings, and property and civil rights.

2. The *IAA* subjects physical activities listed in the *Physical Activities Regulations* or otherwise designated by a federal minister to a comprehensive regulatory regime, the components of which include a statutory prohibition and stay of all work[2] pending a decision that an impact assessment is not required. If such an assessment is required, the stay continues, and an assessment of *all* the "effects"[3] of the designated project must occur, followed by a federal public interest decision to approve or deny the physical activity. Where approved, federal regulation will continue through ongoing oversight and licensing of the physical activity by Canada under binding conditions. Where not approved, the stay continues in respect of the physical activity, representing a federal veto of the activity. The regime is enforceable through significant offence provisions, including fines of up to $8 million per offence.

3. The fundamental defect of the *IAA* is that it purports to apply that comprehensive regulatory regime to numerous physical activities which are by their nature matters falling within the exclusive legislative competence of the provinces and subject to comprehensive provincial regulatory assessment and approval processes. These include natural resource projects (92A), electricity generation facilities (92A), local works and undertakings (92(10)), activities relating to use of public lands (92(5)), property and civil rights (92(13)) and matters of a local or private nature (92(16)). The *IAA* gives the federal government the ability to substitute its assessment of

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[1] *Impact Assessment Act*, SC 2019, c 28 [***IAA***].
[2] *Ermineskin Cree Nation v Canada (Environment and Climate Change)*, 2021 FC 758 at paras 66, 76 [***Ermineskin***].
[3] According to section 2 of the *IAA*, "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.

the relative impacts – pro and con – of a given activity, according to federal priorities, and thereby frustrate the outcome of the provincial review and approval of such project or activity.

4. Unlike its predecessors the *Environmental Assessment and Review Process Guidelines Order*[4] and the *Canadian Environmental Assessment Act, 1992,*[5] the *IAA* applies to physical activities even where there is otherwise no federal role or decision-making function applicable to the project or activity. The *IAA* is not "auxiliary"[6] to other valid federal legislation, but is instead impermissibly an end in and of itself.[7]

5. Alberta submits that the true purpose of the *IAA* is plainly the regulation of projects and physical activities themselves, not their effects, irrespective of whether such activities are under provincial or federal jurisdiction. As applied to physical activities falling within provincial heads of power, the *IAA* does not contain a sufficient federal tether to support its constitutionality. To the contrary, the Alberta Court of Appeal recognized the dramatic impact of the *IAA* on provincial authority over economic activity, holding that, if upheld, "all provincial industries, almost every aspect of a province's economy that the federal government chooses to sweep within the *IAA*…would be subject to federal regulation, including an effective federal veto," and that this would "undermine the division of powers".[8] The *IAA* does not represent a valid exercise of federal jurisdiction, and the Opinion of the Alberta Court of Appeal should be affirmed.

(b) The Alberta Economy is Tied to Responsible Resource Development

6. Alberta provided an extensive evidentiary record[9] in support of the Reference, covering matters such as the nature of the Alberta economy and its reliance on natural resource development, Alberta's legislation for the assessment and regulation of environmental and regulatory matters

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[4] *Environmental Assessment and Review Process Guidelines Order*, SOR/84-467 [***EARPGO***].
[5] *Canadian Environmental Assessment Act*, SC 1992, c 37 [***CEAA 1992***].
[6] *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3, 88 DLR (4th) 1 at 72 [***Oldman River***].
[7] *Attorney General of Québec v IMTT-Québec inc*, 2019 QCCA 1598 at para 226 [***IMTT***], leave to appeal to SCC refused, 38929 (16 April 2020) .
[8] *Reference Re Impact Assessment Act*, 2022 ABCA 165 at para 24 [***ABCA Reasons***].
[9] Canada did not file any evidence in support of its position on the Alberta Court of Appeal Reference, nor cross-examine on any of the affidavits tendered by Alberta.

including greenhouse gases ("**GHGs**"), and Alberta's policies and guidelines concerning Indigenous consultation, and the limited role of federal involvement in certain physical activities listed in the *Regulations*.[10]

7. Alberta's economic wellbeing, and the employment and prosperity of its population, are dependent on its ability to sustainably manage and develop its natural resources, and in particular its oil and gas resources.[11] Alberta's objective is to achieve development of its publically owned natural resources in a way that balances the benefits of resource development with its impacts in a responsible way.[12] To achieve this objective, Alberta, like other Provinces, has a robust regime for regulating and evaluating projects associated with its resource industries and other activities within provincial jurisdiction.[13]

8. Following a major review of Alberta's environmental protection and pollution control legislation,[14] the *Environmental Protection and Enhancement Act*[15] was proclaimed in force in 1993. It sets out a comprehensive process for environmental assessments,[16] and for the issuance of authorizations. Activities that are subject to the environmental assessment process and require an environmental impact assessment ("**EIA**") under the *EPEA* include a broad range of local works and undertakings many of which relate to natural resource development.[17] Environmental impact assessments conducted under the *EPEA* consider a comprehensive list of factors including an analysis of the need for and alternatives to the activity; the potential positive and negative environmental, health, social, economic and cultural impacts of the proposed activity and their significance; information on public consultation programs undertaken; GHG emissions and air

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[10] *Physical Activities Regulations*, SOR/2019-285 [***Regulations***]; Affidavit of Camille Almeida, dated December 12, 2019 at paras 28-29 [**Almeida Affidavit**] [**Canada Appeal Record Vol 4, Tab 10**].
[11] Affidavit of Paul Tsounis, dated December 12, 2019 at para 3 [**Tsounis Affidavit**] [**Canada Appeal Record Vol 7, Tab 11**].
[12] *Ibid* at para 3.
[13] *ABCA Reasons* at para 123-144.
[14] Affidavit of Corinne Kristensen, dated December 12, 2019 at para 13 [**Kristensen Affidavit**] [**Canada Appeal Record Vol 2-4, Tab 9**].
[15] *Environmental Protection and Enhancement Act*, RSA 2000, c E-12 [***EPEA***].
[16] *ABCA Reasons* at paras 124-130.
[17] *Ibid* at para 125.

emissions management; and effects on vegetation, fish, wildlife and wildlife habitat and biodiversity.[18]

9. An EIA under *EPEA* will also include an assessment of impacts on historic resources, public health and safety, socio-economic conditions, and Indigenous traditional land use and social and cultural implications. Where a decision is to be made by the Government of Alberta or a provincial authority, the duty to consult is managed and addressed by the provincial Crown. The federal Crown has not been involved in such consultation.[19]

10. Once complete, the EIA is used by the appropriate provincial regulatory authority to determine if the activity is in the public interest and whether to grant regulatory approvals for the activity under its governing legislation.

(c) The *Impact Assessment Act* Reference

11. The Alberta Court of Appeal issued its Opinion on the unconstitutional nature of the *IAA* on May 10, 2022. In finding the *IAA ultra vires* Parliament, the Court majority observed:

> 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.[20]

12. Canada has appealed the question of the constitutionality of the *IAA* to this Court.

II. STATEMENT OF POSITION

13. The Questions on this Reference are set out in the Order in Council:

(a) Is Part 1 of An Act to enact the *Impact Assessment Act* and the *Canadian Energy Regulator Act*, to amend the *Navigation Protection Act* and to make consequential

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[18] *Ibid* at para 128; Kristensen Affidavit at paras 32-35.
[19] Almeida Affidavit at para 75; Kristensen Affidavit at para 86.
[20] *ABCA Reasons* at para 421.

amendments to other *Acts*, S.C. 2019, c. 28, unconstitutional in whole or in part, as being beyond the legislative authority of the Parliament of Canada under the Constitution of Canada?

(b) Is the *Physical Activities Regulations*, SOR/2019-285, unconstitutional in whole or in part by virtue of purporting to apply to certain activities listed in Schedule 2 thereof that relate to matters entirely within the legislative authority of the Provinces under the Constitution of Canada?

14. Alberta submits that the *IAA* departs significantly from the auxiliary nature of its predecessor legislation, which was typically invoked as a result of an independent federal permit or decision required for a project or activity. In the absence of such an independent trigger, the *IAA* creates a sweeping project assessment and decision-making regime that extends beyond links or connections to federal heads of power and as such is beyond Parliament's jurisdiction. The *IAA* overreaches in terms of the projects and activities to which it applies, and the scope of the assessment it purports to require. The *IAA* gives a federal veto power over provincial project management and approvals, representing a threat, *inter alia*, to exclusive provincial jurisdiction over local works and undertakings, and resource ownership and development under section 92A of the *Constitution Act, 1867*, as well as other areas of provincial power.

15. On the second question, Alberta submits that the *Regulations* designate projects and undertakings within exclusive provincial authority and, to the extent they purport to do so, are *ultra vires*.

16. Alberta requests that the two questions on the Reference be answered in the affirmative.

III. STATEMENT OF ARGUMENT

1. Support for Robust Federalism

17. This Court recently reaffirmed federalism as a "foundational principle", highlighting that within their spheres of jurisdiction, the Provinces' autonomy is to be respected, and that "[f]ederal power cannot be used in a manner that effectively eviscerates provincial power."[21]

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[21] *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at paras 48-49 [***Greenhouse Gas Reference***].

18. The constitutional division of powers represents a "careful and complex" balancing of interests.[22] It supports legislatures and Parliament having the ability to make policy choices within their respective spheres of jurisdiction, without review of their constitutional validity being based on the Court's conception of what may be appropriate. "The question for a court is squarely constitutional compliance, not policy desirability."[23]

19. The unanimous Court in *Comeau* went on to note that behind this constitutional value is the recognition of regional diversity, and the fundamental importance that each province must have room to exercise its legislative authority. The "shape of Canadian federalism…is built upon regional diversity within a single nation".[24] Accordingly:

> A key facet of this regional diversity is that the Canadian federation provides space to each province to regulate the economy in a manner that reflects local concerns.[25]

20. In the *Reference re Secession of Quebec*, this Court discussed the relationship of federalism and democracy, observing that federalism "enables different provinces to pursue policies responsive to the particular concerns and interests of the people in that province."[26]

21. In this Reference, Canada ignores the federalism principle. Its factum is largely silent on the concept, even failing to acknowledge this Court's repeated recognition of federalism's value and interpretive weight. Instead, Canada speaks of "cooperative federalism."[27] However, this Court has been clear that cooperative federalism may be used neither to "override nor [to] modify the division of powers itself", nor to "impose 'limits on the otherwise valid exercise of legislative competence.' It cannot, therefore, be used to make *ultra vires* legislation *intra vires*."[28]

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[22] *R v Comeau*, 2018 SCC 15 at para 82 [***Comeau***]
[23] *Ibid* at para 83.
[24] *Ibid* at para 85, citing *Reference re Secession of Quebec*, [1998] 2 SCR 217, 161 DLR (4th) 385 [***Secession Reference***].
[25] *Comeau* at para 85.
[26] *Secession Reference* at para 66.
[27] Factum of the Attorney General of Canada at paras 1, 100, 119, 144, 152 [**Canada Factum**].
[28] *Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48 at para 18, citing *Rogers Communications Inc v Chateauguay (City)*, 2016 SCC 23 at para 39, *Reference re Securities Act*, 2011 SCC 66 at paras 61-62 [***SCC Securities Reference***] [Citations omitted].

22. The *IAA* fails to respect this fundamental principle. It treats provincial areas of jurisdiction as subordinate to, rather than coordinate with, those of the federal Parliament. As the detailed discussion of the *IAA* below demonstrates, the result is indeed the evisceration of provincial jurisdiction about which this Court has cautioned.

2. Pith and Substance – Introduction

(a) Approach

23. The object of the pith and substance analysis is to determine "the dominant or most important characteristic of the law".[29] In *Reference re Securities Act*, the Supreme Court of Canada explained:

> 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…[30] [Emphasis in original]

24. Purpose can be determined both from intrinsic sources in the text, as well as extrinsic sources, such as Hansard and other evidence of the legislative process. The effects of a law can be assessed from the text, and the practical consequences of its application.[31]

25. In assessing constitutional validity from a division of powers perspective, the proper characterization of the law is critical. As observed in the *Reference re Genetic Non-Discrimination Act*, and more recently in the *Greenhouse Gas Reference*, it is important to be "as precise as possible" in identifying the pith and substance of the legislation.[32] Ultimately, the objective of the pith and substance analysis is to determine the law's essential character: "(*t)he focus is on the law itself and what it is really about*".[33]

(b) The Main Thrust or Dominant Purpose of the *IAA*

26. Alberta submits that the *IAA*'s pith and substance is:

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[29] Peter Hogg & Wade Wright, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2007) (loose-leaf updated 2022) at 15-16 [**Hogg**].
[30] *SCC Securities Reference* at para 63.
[31] *Ibid* at para 64.
[32] *Reference re Genetic Non-Discrimination Act*, 2020 SCC 17 at para 163 [***Genetic Non-Discrimination***]. See also *Greenhouse Gas Reference* at paras 52, 69, 316.
[33] *Genetic Non-Discrimination* at para 31 [Emphasis added].

> Establishment of a comprehensive impact assessment and regulatory regime that requires proposed resource developments, infrastructure projects and other specified physical activities to undergo a broad ranging assessment of their impacts, and to subject those projects to federal oversight and approval.

27. The Alberta Court of Appeal came to a similar conclusion on the pith and substance of the *IAA*:

> 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".[34] [Emphasis added]

28. This formulation of pith and substance is primarily derived from the *IAA*'s text, the effects of the *IAA* on the existing provincial assessment and public interest decision-making processes, and upon the projects and activities governed by them.

(c) Canada's Approach is Flawed

29. Canada says "the Dominant Purpose of the *IAA* is Environmental Assessment of Possible Adverse Federal Effects".[35] But this statement of the dominant thrust clearly fails to heed the Court's repeated admonition to state the pith and substance of legislation with as much precision as possible. Canada does not do that. One significant indication of this: the failure to identify the possible adverse effects of what? The answer is obvious: large resource projects; significant infrastructure developments; all manner of economic activity that is typically recognized as being within, or primarily within, provincial jurisdiction.

30. Canada conflates the first step of the pith and substance test – characterization of the law – with the second step – identification of a head of power. Canada's characterization of the law is circular and runs contrary to the courts' guidance on the matter.[36] On Canada's interpretation, any

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[34] *ABCA Reasons* at para 372.
[35] Canada Factum at para 78.
[36] See, e.g., *Reference re Greenhouse Gas Pollution Pricing Act,* 2019 ONCA 544 at para 224 and *Reference re Securities Act (Canada),* 2011 ABCA 77 at para 17 [***ABCA Securities Reference***].

matter could be stated to be an "effect within federal jurisdiction" in the legislation, thereby rendering that matter federal. Such an interpretation would "drain" provincial powers "of their content".[37]

(d) Purpose of *IAA* is to Regulate Projects According to Canada's Priorities

31. A review of the language and structure of the *IAA* reveals that the legislation is far from singularly focused on "safeguard[ing] against adverse environmental effects in relation to matters within federal jurisdiction", as Canada submits.[38] Even if that concept was sufficiently precise to provide a coherent definition of the *IAA*'s purpose, that purported "dominant thrust" is simply not reflected by the *IAA*'s language of purpose. The *IAA* is anything but focused on areas of federal jurisdiction.

32. The *IAA's* preamble sets out statements regarding Canada's commitment "to fostering sustainability", its recognition of the importance of public participation in the impact assessment process, and the Government of Canada's recognition that "impact assessment contributes to Canada's ability to meet its environmental obligations and its commitments in respect of climate change."[39]

33. The purposes section of the *IAA* repeats the reference to the objective of "fostering sustainability", and includes "to protect 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".[40] Section 6 also refers to the purpose of ensuring that impact assessments take into account *all* effects that may be caused by carrying out a designated project and the implementation of a fair, predictable and efficient process for such assessments.[41]

34. The scope of the *IAA* goes far beyond environmental impacts, and Canada's analysis largely ignores the many broad purpose provisions, including "fostering sustainability" where

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[37] *Canadian Western Bank v Alberta,* 2007 SCC 22 at para 43 [***Canadian Western Bank***].
[38] Canada Factum at paras 4, 47, 61, 77.
[39] *IAA*, Preamble.
[40] *Ibid*, s 6(a), (b).
[41] *Ibid*, s 6(b.1), (c).

"sustainability" is broadly defined in the *IAA* in terms of environmental and social and economic effects generally, and is in no way restricted to "matters within federal jurisdiction".[42]

35. Indeed, references to "fostering sustainability" show up in several prominent places in the *IAA*, including the preamble, purpose section, mandate, section 22 factors to be considered in an assessment, and section 63 public interest factors. Significantly, references to "effects within federal jurisdiction" do not appear in the preamble, mandate or the section 22 factors. Even the full title of the *IAA* refers to establishing a federal assessment process, and generally to impacts and environmental effects, without a limitation to those within federal jurisdiction: "An Act respecting a federal process for impact assessments and the prevention of significant adverse environmental effects".

36. The report of the federal environmental assessment expert review panel, *Building Common Ground*, recommended that, "sustainability be central to IA", with a focus on projects.[43] The *Practitioner's Guide to Impact Assessment* also confirms "[f]ostering sustainability is one of the purposes of the Act."[44] The concept of fostering sustainability in the *IAA* is not tied to or constrained by any notion of, or reference to, federal heads of power, but rather is focused on the regulation and approval of projects and activities.

37. The language of the *IAA* simply does not support the limited purpose of the legislation advanced by Canada. As discussed below, the remarks of the Minister of Environment and Climate

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[42] *Ibid*, s 2.

[43] Expert Panel for the Review of Environmental Assessment Processes, *Building Common Ground: A New Vision for Impact Assessment in Canada* (Ottawa: Her Majesty the Queen in Right of Canada, as represented by the Minister of Environment and Climate Change, 2017) at 3, 20, online (pdf): *Government of Canada* <https://www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews/environmental-assessment-processes/building-common-ground.html>.

[44] Practitioner's Guide to Federal Impact Assessments, "Guidance: Considering the Extent to which a Project Contributes to Sustainability" (6 December 2021), online: *Government of Canada* at s 1.2 <https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/guidance-considering-extent-project-contributes-sustainability.html>.

Change Canada (the "**Minister**") during the legislative process for Bill C-69[45] reveal the purpose of the *IAA* as entrenching a "final" decision-making role for the federal government on major energy and infrastructure projects regardless of jurisdiction.[46] The *IAA*'s purpose, therefore, is the establishment of a federal impact assessment and approval process for projects and activities without regard for the existence of a federal responsibility for the activity at issue. It purports to support federal views on sustainability, not limited to environmental concerns, or impacts in federal jurisdiction.

(e) Effects of the *IAA* Amount to Comprehensive Project Regulation

38. A review of the *IAA*'s legal and practical effects provides ample demonstration of the pith and substance as found by the Alberta Court of Appeal. The comprehensive legislative scheme subjects physical activities listed in the *Regulations* (including any incidental physical activities), or otherwise designated pursuant to section 9 of the *IAA*, to: (i) a statutory prohibition and stay of all work[47] pending a decision that an impact assessment is not required or, if one is required; (ii) an assessment of all the effects of the designated project; (iii) a federal public interest decision to approve or deny the physical activity; (iv) where approved, ongoing oversight and licensing of the physical activity by Canada in the form of binding conditions; and (v) where not approved, a continuing prohibition and veto of the designated activity (an outcome not addressed in Canada's factum).[48] The regime is enforceable through offence provisions that provide federal enforcement officers with broad powers of search and seizure, including the use of force and that impose significant penalties including fines up to $8,000,000 per offence. Offences include doing any act or thing in connection with the carrying out of a designated project, in whole or in part, if that act or thing *may* cause any so called effects within federal jurisdiction.

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[45] Bill C-69, *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*, 1st Sess, 42nd Parl, 2015 (assented to 21 June 2019).
[46] Paras 92 to 104, below.
[47] *Ermineskin* at paras 66, 76.
[48] *ABCA Reasons* at paras 346-347.

(i) The *IAA* Departs Significantly from its Predecessor Legislation and is not Supported by *Oldman River*

39. The *IAA*'s structure, scope and effects are very different from, and more sweeping than its predecessor statutes.

40. The *EARPGO* required a federal "initiating department" with a decision-making authority in respect of a "proposal" to determine whether it may give rise to any potentially adverse environmental effects. The application of *EARPGO* to federal authority was carefully defined and limited, and applied only to any proposal that: (i) was to be undertaken by an initiating department; (ii) that may have an environmental effect on an area of federal *responsibility*; (iii) for which the Government of Canada made a financial commitment; or (iv) that was to be located on lands, including the offshore, that are administered by the Government of Canada.[49]

41. This Court in *Oldman River* confirmed that "responsibility" meant "an affirmative regulatory duty pursuant to an Act of Parliament which relates to the proposed initiative, undertaking or activity."[50]

42. The "affirmative regulatory duty" that triggered the *EARPGO* in *Oldman River* was a required approval under the federal *Navigable Waters Protection Act*,[51] for a proposed dam project. The Court distinguished an "affirmative regulatory duty" from *ad hoc* legislative power, holding that the *EARPGO* was:

> An adjunct of the federal legislative powers affected…It must also be remembered that what is involved is essentially an information gathering process in furtherance of a decision-making function within federal jurisdiction...[52]

43. This Court stated that the substance of *EARPGO* was "environmental impact assessment to facilitate decision-making under the federal head of power through which a proposal is regulated".[53] Because the *EARPGO* was only triggered in cases where there was a clear federal

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[49] *EARPGO*, s 6.
[50] *Oldman River* at 47 [Emphasis added].
[51] *Navigable Waters Protection Act*, RSC 1985, c N-22.
[52] *Oldman River* at 75.
[53] *Ibid* at 73 [Emphasis added].

decision-making function (such as the issuance of a permit under other existing legislation), it was constitutionally supported by the particular head of power invoked in each instance.[54]

44. The *CEAA 1992* replaced the *EARPGO*, and provided a process to assess environmental effects of projects requiring federal decisions. Consistent with *Oldman River*, the *CEAA 1992* was triggered in circumstances where a federal decision was required, including, most commonly, when a federal entity issued a permit, licence or approval pursuant to a provision prescribed by the *Law List Regulations*.[55] Like the *EARPGO*, the *CEAA 1992* was "auxiliary" to the exercise of a federal decision-making function under other valid federal legislation such as the *Fisheries Act*[56] or the *Navigable Waters Protection Act*, where, as this Court stated in *Oldman River*, the federal government had "entered the field in a subject matter assigned to it under section 91 of the *Constitution Act, 1867*…".[57]

45. The *Canadian Environmental Assessment Act, 2012*[58] replaced the *CEAA 1992* and introduced a number of procedural and substantive changes to the federal assessment regime. *CEAA 2012* represented a significant departure from the previous legislative approach by introducing the concept of a project list (where the project list was based on the *Comprehensive Study List Regulations*[59] under *CEAA 1992*) as the basis upon which to engage the federal environmental assessment process. This largely eliminated the decision-making triggers found in the *EARPGO* and the *CEAA 1992*, particularly in respect of intra-provincial activities. Instead, the *CEAA 2012* referred to potential changes in areas stated to be in federal jurisdiction, but without necessarily engaging an actual federal decision.[60] The constitutional validity of *CEAA 2012* was never tested.

46. The *IAA* replaced the *CEAA 2012,* maintaining the fundamental changes that distinguished the *CEAA 2012* from the *EARPGO* and the *CEAA 1992*. However, the *IAA* greatly expanded application of federal assessment and oversight of provincial activities by, *inter alia*: (i) expanding

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[54] *Oldman River* at 72.
[55] *Law List Regulations*, SOR/94-636.
[56] *Fisheries Act*, RSC 1985, c F-14 [***Fisheries Act***].
[57] *Oldman River* at 47.
[58] *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52 [***CEAA 2012***].
[59] *Comprehensive Study List Regulations*, SOR/94-638.
[60] *CEAA 2012*, s 5.

the nature of the legislation from “environmental” assessment to “impact” assessment legislation; (ii) expanding the number of factors to be considered in an assessment from 10 to 20; (iii) imposing a broad public interest test based on federal priorities; (iv) removing materiality thresholds such as "significance" in the assessment of adverse effects and decision-making; and (v) significantly increasing the magnitude of potential fines for proceeding with any act or thing in connection with a designated project if it may cause so-called effects within federal jurisdiction.

47. Unlike *EARPGO* and *CEAA 1992*, the *IAA*, like *CEAA 2012*, applies to designated activities regardless of the existence of an independent federal decision-making function. In *Oldman River,* the Court found the *EARPGO* contained a properly defined link to federal powers in the form of an affirmative regulatory duty under other valid federal legislation. This supported the application of the *EARPGO* to matters that were otherwise provincial in nature, with the Court noting that, "[i]t cannot have been intended that the [EARPGO] would be invoked every time there is some potential environmental effect on a matter of federal jurisdiction".[61]

48. In *Moses c Canada (Procureur general)*, the Quebec Court of Appeal confirmed that a valid federal decision-making authority is required to trigger federal environmental assessment. There, the Court stated that environmental statutes "are constitutionally valid as long as they remain accessory to the exercise of a (federal or [provincial]) legislative jurisdiction."[62] This view was reiterated by the majority of the Alberta Court of Appeal in its *IAA* Opinion.[63]

49. Commentators in respect of *CEAA 2012*, including Northey, have similarly observed that:

> *Oldman* made it a principle of federal [environmental assessment] that its triggers needed to be tied to federal regulatory decision-making. Further, *Oldman* tied this principle to each of the two rationales for *EARPGO's* constitutionality. The first rationale was that federal [environmental assessment] could be justified in a stand-alone way as an information gathering process. The second rationale was that federal [environmental assessment] could be constitutionally justified in relation to specific

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[61] *Oldman River* at 47. See also *Moses c Canada (Procureur général)*, 2008 QCCA 741 [***Moses***], varied on other grounds 2010 SCC 17 [Emphasis added].
[62] *Moses* at para 63 [Emphasis added].
[63] *ABCA Reasons* at para 222.

> headings of federal constitutional authority that had existing legislative and regulatory controls.[64] [Emphasis added]

50. This interpretation of the principles in *Oldman River* was confirmed by the Quebec Court of Appeal in *Attorney General of Québec v IMTT-Québec inc*, which ruled that the affirmative regulatory duty reflected "the constitutional basis under which the [*EARPGO*] was enacted".[65] The Court went on to state:

> Consequently, an 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.[66] [Emphasis added]

51. The Court in *IMTT* was clear that "[i]n order to require the environmental assessment of a project, the authority in question must have a constitutional power allowing it to participate in the decision-making process regarding the project. This is an essential prerequisite", the absence of which "jeopardize[s] the Canadian constitutional balance".[67]

52. The *EARPGO* and *CEAA 1992* were "auxiliary" or "adjunct" and designed to inform independent federal decision-making functions in relation to activities otherwise in federal jurisdiction.[68] In *Oldman River,* LaForest J noted:

> Because of its auxiliary nature, environmental impact assessment can only affect matters that are "truly in relation to an institution or activity that is

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[64] Rodney Northey, *Guide to the Canadian Environmental Assessment Act* (Toronto: LexisNexis Canada Inc, 2018) at 245-246.
[65] *IMTT* at para 225.
[66] *Ibid* at para 226.
[67] *Ibid* at para 222 [Emphasis added].
[68] Referred to in *Oldman River* as an "affirmative regulatory duty".

> otherwise within [federal] legislative jurisdiction"; see *Devine v. Quebec (Attorney General)*, [1988] 2 S.C.R. 790, at p. 808.[69] [Emphasis added]

53. "Auxiliary" means: "*offering or providing help; functioning in a subsidiary capacity*".[70] The *IAA* is not auxiliary; it is objectionable because it may operate largely independent of other federal statutes and applies to a physical activity even where the only federal decision is the one under the *IAA* itself. The substantive, standalone decision-making power created by the *IAA* is, in respect of its broad application to certain intra-provincial designated projects, not properly supported by or tethered to any federal head of power. The *IAA* is improperly an "end in and of itself".

(ii) The *Regulations* do not Discriminate Between Federal and Local Works and Undertakings

54. Rather than a federal decision-making power, the application of the *IAA* begins with the *Regulations*. As Rothstein J observed in *Mining Watch Canada v Canada*:

> It is appropriate to consider the regulations when interpreting the governing statute because "[w]hen regulations are made to complete the statutory scheme, they are clearly intended to operate together and to be mutually informing." [71] [Citations omitted]

55. The *IAA* applies to "designated projects", which are designated by the *Regulations* made pursuant to section 109(b), or designated in an order by the Minister under section 9(1) in accordance with certain criteria, including public concern.[72] If an activity is a designated project under the *Regulations*, or made subject to the *IAA* by order under section 9, it, and "any physical

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[69] *Oldman River* at 72.
[70] Merriam-Webster, "Auxiliary", online: <https://www.merriam-webster.com/dictionary/auxiliary>.
[71] *Mining Watch Canada v Canada*, 2010 SCC 2 at para 31.
[72] *IAA*, s 2.

activity that is incidental" to it,[73] immediately fall under the prohibitions set out in section 7 of the *IAA*, and then in relation to all of the applicable provisions regarding impact assessment.

56. There are no thresholds or criteria in the *IAA* with respect to the physical activities that the Governor in Council may designate in the *Regulations*. The power of the federal government under section 109, in combination with section 9, to subject projects and physical activities to the *IAA* is very broad.

57. Canada argues that its discretionary powers under the *IAA* are necessarily constrained by its objects and purposes, which Canada says are focused on effects within federal jurisdiction. Canada asserts that judicial review is available in circumstances where the Impact Assessment Agency (the "**Agency**") or Canada overstep constitutional boundaries in the exercise of their discretion under the *IAA.*

58. But the question of how discretion may in the future be exercised under the *IAA,* and the availability of judicial review to challenge such exercises of discretion, are not relevant to the pith and substance analysis. As LaForest J noted in *R v Hydro-Québec*:

> …the constitutional validity of a statute cannot depend on the ebb and flow of existing government practice or the manner in which discretionary powers appear thus far to be exercised. It is the *boundaries* to the exercise of that discretion and the scope of the regulatory power created by the impugned legislation that are at issue here. It is no answer to a charge that a law is unconstitutional to say that it is only used sparingly. If it is unconstitutional, it cannot be used at all.[74]

59. The lack of any meaningful constraints in the *IAA* is demonstrated by a review of the physical activities listed in the *Regulations*, which currently include several physical activities with no obvious ties to federal jurisdiction, including *in-situ* oil sands projects (which are only regulated

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[73] According to section 2 of the *IAA*, "designated project" means one or more physical activities that (a) 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).

[74] *R v Hydro-Québec*, [1997] 3 SCR 213, 151 DLR (4th) 32 at para 73, per LaForest J (in dissent).

under the *IAA* if the province does not have a cap on GHG emissions)[75], fossil fuel-fired power generation facilities, oil refineries, sour gas processing facilities, natural gas liquefaction facilities, petroleum storage facilities, natural gas liquids storage facilities, coal, diamond, metal and rare earth mines, stone quarries, sand and gravel pits, public highways of a certain length, railway lines of a certain length and railway yards,[76] among others. While some of these activities may in certain cases require federal permits or authorizations related to aspects of the activity, this is not a prerequisite to the application of the *IAA* to such activities.

60. Canada repeatedly asserts that the physical activities included in the *Regulations* are those with the greatest potential for adverse effects in areas of federal jurisdiction; however, beyond a bare statement in the RIAS, there is no evidentiary support for Canada's position. To the contrary, historically, "activities such as *in-situ* oil sands and power plants did not typically require a federal assessment".[77] Similarly Canada has provided no evidence that activities that are fundamentally and obviously local, such as intra-provincial public highways and rail lines, power plants, petroleum storage facilities and sand and gravel pits have the greatest potential for adverse effects within federal jurisdiction. Indeed, Canada has provided no evidence that any of these activities consistently and necessarily require any authorizations whatsoever under any existing federal statute or regulation other than the *IAA* itself.

61. Furthermore, as noted by the Alberta Court of Appeal majority, the project list established under *CEAA 2012*, which was largely carried through into the project list in the *Regulations,* substantially mirrored the activities in the *Comprehensive Study List Regulations* under *CEAA 1992.*[78] Importantly, however, physical activities listed in the *Comprehensive Study List Regulations* were only subject to assessment under *CEAA 1992* where they *also* had a trigger, such

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[75] *Regulations*, schedules 32-33.
[76] *Regulations*, schedules 30-31, 37(a), (c), (d), (e), (f), 18(a), (b), (c), (e), (f), 51, 54(a)-(b), respectively.
[77] Kristensen Affidavit at para 88.
[78] *ABCA Reasons* at para 96.

as being located on federal lands or requiring a federal permit or approval. No such trigger exists under the *IAA*.

62. According to the *Discussion Paper on the Proposed Project List*,[79] specific oil and gas projects were included in the *Regulations* primarily due to their GHG emissions:

> 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.[80] [Emphasis added]

63. This passage clarifies the federal view regarding purported jurisdiction over emissions. But there is no constitutional basis for claiming federal jurisdiction over projects due to their GHG emissions. The *Greenhouse Gas Reference* was expressly not an affirmation of a general or exclusive federal jurisdiction over GHG emissions. This Court noted, "the focus of the statute was not broadly on regulating GHG emissions or establishing minimum national standards to reduce GHG emissions, but was, rather, on establishing minimum National Standards of GHG price stringency".[81]

64. Distinguishing the *GGPPA* from less focused and more pervasive legislation that would address broader regulation of GHG emissions, the majority decision states:

> Significantly, the *GGPPA* does not require those to whom it applies to perform or refrain from performing specified GHG-emitting activities. Nor

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[79] "Discussion Paper on the Proposed Project List: A Proposed Impact Assessment System" (May 2019), online (pdf): *Government of Canada* at s 4.2 <https://www.canada.ca/content/dam/themes/environment/conservation/environmental-reviews/project-list-en.pdf>.

[80] Kristensen Affidavit at Exhibit P.

[81] *Greenhouse Gas Reference* at paras 66, 69. The Court noted at para 68 that the purpose of the *GGPPA* was "consistently described …in terms of imposing a Canada-wise GHG pricing system, not of regulating GHG emissions generally". See also para 199.

> does it tell industries how they are to operate in order to reduce their GHG emissions.[82]

65. The *IAA,* however, does precisely this. It prohibits proponents of designated projects from undertaking activities associated with such projects that result in GHG emissions (sections 7(1)(b)(ii) and (iii)) and permits Canada to condition designated projects with respect to their operation to address purported "effects within federal jurisdiction", including to reduce GHG emissions (section 64).[83]

66. The remaining effects cited in the above excerpt of the *Discussion Paper* (i.e., land disturbance, water pollution and usage, accidental spills, flaring) are, to the extent they are caused by local works and undertakings, matters that fall directly within provincial heads of power and that are routinely regulated by provincial regulators. The links to federal jurisdiction vis-à-vis such effects are speculative and remote and do not provide a valid basis for asserting federal jurisdiction. For example, the simple fact that the transport of substances to and from a local work and undertaking such as a petroleum storage facility *could* result in an accidental spill that *could* find a pathway to waters frequented by fish and *could* have a deleterious effect on fish is too remote to anchor broad federal regulatory jurisdiction over such activities.

67. The *Discussion Paper* reveals one of the fundamental jurisdictional flaws in the *IAA*: effects within federal jurisdiction" are defined (and interpreted by Canada) so broadly that, if accepted by this Court, virtually any activity could be added to the *Regulations* or designated under section 9 on the basis that it may cause such effects and be prohibited temporarily under section 7 or permanently if determined to not be in the federal public interest.

(iii) Section 7 Results in a Prohibition and "Statutory Stay" of All Work Associated with a Designated Project

68. Section 7 is one of the *IAA* provisions that most significantly impair provincial jurisdiction. If a physical activity is listed in the *Regulations* or is designated pursuant to section 9, section 7

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[82] *Greenhouse Gas Reference* at para 71.

[83] Environment and Climate Change Canada, *Strategic Assessment of Climate Change* (Ottawa: Environment and Climate Change Canada, 2020), online: *Government of Canada* <https://www.canada.ca/en/services/environment/conservation/assessments/strategic-assessments/climate-change.html> [**SACC**].

prohibits a proponent from doing *any* act or thing in connection with the carrying out of the designated project, in whole or in part, if it *may* cause effects enumerated in section 7 (which mirror the definition of "effects within federal jurisdiction"), until a decision is made under section 16 that an impact assessment is not required, or the proponent complies with the conditions in a final decision statement issued under section 65.

69. To fully appreciate the breadth of the section 7 prohibition, it is necessary to consider certain defined terms, including the word "effects": "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." In addition, the words "designated project" include not only the physical activities listed in the *Regulations*, but also "any physical activity that is incidental to those physical activities".

70. Canada's assertion[84] that section 7 only applies to prevent a proponent of a designated project from causing effects within federal jurisdiction as defined in the *IAA* ignores the broad scope of the provision (and associated definitions), the practical realities of project development, and the profound effect on local works and undertakings. It also fails to acknowledge the legitimate boundaries of the relevant heads of federal power, and the stark impact of section 7 on provincial heads of power in two important ways.

71. First, the definition of "effects within federal jurisdiction" is so broad that it is likely all designated projects will engage the section 7 prohibition in some manner. In Alberta, for example, the prohibition on doing anything that may cause an effect on Indigenous traditional land use (section 7(1)(c)(ii)) would effectively prohibit any physical activity associated with a designated project proposed to be carried out on provincial lands where Indigenous traditional use is asserted (including most public lands and even private lands in the province).[85]

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[84] Canada Factum at paras 15-16, 81, 84-86,104-105, 129-142.

[85] Alberta's First Nations have the right to hunt, fish and trap for food throughout the Province, at any time of year, on all unoccupied Crown land and on other lands to which they have been given access for such purposes: *R v Badger*, [1996] 1 SCR 771, 133 DLR (4th) 324 at paras 49-51, 59, 66.

72. The dramatic impact of section 7, and the fact that it causes an immediate stay of all work regardless of the specific effects, led the Federal Court in *Ermineskin* to conclude:

> The designation of an activity by the Minister immediately and by statute prevents a proponent from advancing a project (see subsection 7(1)). This statutory stay of all work continues until the Agency decides a) that no impact assessment is required, or b) the proponent complies with conditions in a decision statement issued following a federal impact assessment, or c) the Agency permits the proponent to do take steps to provide the Agency or a review panel with information considered necessary to conduct an impact assessment (see subsection 7(3)).[86]

73. Second, Alberta disputes that the effects enumerated in section 7 are, in all cases and in respect of all designated projects, matters of federal jurisdiction. For example, the potential effects on Indigenous traditional land use of land disturbance associated with construction of a 200-megawatt natural gas-fired power plant located on provincial public lands is not a matter of federal jurisdiction. Nor does the definition properly tether Canada's ability to prohibit – that is, regulate and, through conditions, essentially license – such a project.

74. Because there are specific provisions in the *IAA* aimed at projects on federal lands, which would include Indian reserves (section 82),[87] and projects that require the exercise of a federal power, duty or function, or federal funding (section 8), the section 7 prohibition clearly must be aimed at capturing privately or provincially funded projects that are on provincial lands and that do not otherwise require the exercise of a federal power, duty or function. Section 7 operates as a "catch-all" to ensure that projects that do not otherwise require a federal authorization are nonetheless unable to proceed without permission from Canada under the *IAA*.

75. The *IAA*'s overreach is unnecessary. Canada's alleged "zone of protection"[88] provided by sections 7 and 16 is already provided by relevant federal legislation. A proponent cannot kill fish or cause harmful alteration, disruption or destruction of fish habitat without an authorization under

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[86] *Ermineskin* at para 66. See also para 76.

[87] According to section 2 of the *IAA*, "federal lands" means, *inter alia*, 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.

[88] Canada Factum at para 81.

the *Fisheries Act.*[89] A proponent is prohibited from carrying out any activities in contravention of the *Migratory Birds Convention Act*,[90] or the *Species at Risk Act*[91] and is required to obtain approval to carry out activities on Indigenous reserve lands, including through the *Indian Oil and Gas Act*.[92]

(iv) Section 8 – Narrow Federal Role Becomes Broad Assessment

76. Section 8 prohibits a federal authority from exercising any power or performing any duty or function conferred on it under any Act of Parliament that could "permit a designated project to be carried out in whole or in part" unless a decision is made under section 16 that no impact assessment is required or a decision statement is issued under section 65. While the range of powers, duties or functions is not defined, it would include matters related to the issuance of permits under other federal legislation that may be required for the designated project to be carried out, in whole or in part. If the designated project is found to not be in the public interest and no decision statement is issued, federal authorities would be prohibited from issuing a required permit, regardless of whether or not the permit would be denied under the legislation under which such permits are issued.

77. For example, federal authorities would be prohibited from issuing a permit that is required under the *Fisheries Act* for an aspect of a local work or undertaking where it is determined that the project is inconsistent with Canada's priorities with respect to sustainability or climate change. The result is a decision not to issue a permit under the *Fisheries Act* for matters that are not prohibited under the *Fisheries Act*, or for reasons that are not related to the protection of fisheries or otherwise not tethered to federals heads of power. As noted by the Alberta Court of Appeal majority, in such a case, the "federal government would be operating outside its constitutional lane" and the result would be to "deny the federal permit even if the actual effects of the project on a federal head of power did not warrant the denial."[93]

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[89] *Fisheries Act*.
[90] *Migratory Birds Convention Act, 1994*, SC 1994, c 22.
[91] *Species at Risk Act*, SC 2002, c 29.
[92] *Indian Oil and Gas Act*, RSC 1985, c I-7.
[93] *ABCA Reasons* at para 341.

(v) Section 16 Can Result in a Physical Activity Being Screened Out of the *IAA* Process, but not Before Federal Jurisdiction has been Applied to Stay a Designated Project

78. Section 16 of the *IAA* provides that after a description of a designated project is submitted, and certain other steps are completed, the Agency must decide whether an impact assessment of the designated project is required. In making this determination the Agency *must* take into account seven mandatory factors, including "any other factor that the Agency considers relevant".

79. Canada's suggestion[94] that the most important of the seven mandatory factors that must be considered by the Agency under section 16 is the potential for the project to cause effects within federal jurisdiction, is not supported by the *IAA*'s language.

80. Even after completing the screening process under section 16, it remains that the mere "possibility" that a project "may" cause adverse effects within federal jurisdiction or "direct or incidental effects"[95] is sufficient to trigger a full federal assessment.[96] In other words, even after prohibiting the activity for a period of time necessary to screen the activity, Canada is prepared to continue the prohibition and move forward with a full impact assessment where it remains uncertain, even to Canada, whether it has any jurisdiction whatsoever.

81. That the Agency may screen a project out of the *IAA* process under section 16 is no answer to the reality that, before that decision point, federal jurisdiction has been asserted over a physical activity through its designation in the *Regulations* or under section 9 and the resultant application of the section 7 prohibition, with attendant exposure to enforcement and sanction. This hold or "stay", no matter how temporary, cannot be construed as anything less than an application of invasive federal jurisdiction in a manner that significantly impairs provincial jurisdiction.

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[94] Canada Factum at para 92.

[95] According to section 2 of the *IAA*, "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.

[96] *IAA*, s 16(2)(b).

82. Nor does the screening process in section 16 change the fact that, pursuant to the *IAA,* the federal government can deny a designated project on the basis that it may have some potential effect in an area of asserted federal jurisdiction, no matter how insignificant, if the federal government determines that such effects are not in the public interest. Section 16 represents a potential off-ramp from the legislation, but it does not change the nature of the *IAA* as a stand-alone federal decision-making statute or the fact that the activity has been subject to a prohibition with the potential for delay and serious harm to the advancement of local works and undertakings.[97]

(vi) Section 17 Permits the Federal Government to Effectively Deny a Project at the Start of the Impact Assessment Process on the Basis of Federal Priorities

83. Prior to the Agency issuing a notice of commencement under section 18 in respect of a designated project, if the Minister is advised by a federal authority that it will not be exercising a power that must be exercised for the project to be carried out in whole or in part, or the Minister is of the opinion that the project would cause unacceptable environmental effects within federal jurisdiction, the Minister must, in accordance with section 17, provide the proponent with a written notice advising same.

84. To date, at least two notices have been issued under section 17 to project proponents: one in respect of a proposed coal project and the other in respect of a proposed oil sands mine expansion. Both projects were in Alberta, and both were subject to extensive provincial regulatory and approval requirements administered by the Alberta Energy Regulator.[98] In both cases, the Minister cited potential effects of the projects on Canada's international commitments in respect of climate change, and the lack of a net positive contribution to sustainability, as factors that led the Minister to conclude the projects would cause unacceptable environmental effects within federal jurisdiction.

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[97] *ABCA Reasons* at paras 356-365.

[98] See Letter from the Honourable Minister Jonathan Wilkinson, P.C., M.P. to Simon Stepp (11 June 2021) re: Coalspur Mines, online: *Government of Canada* <https://iaac-aeic.gc.ca/050/evaluations/document/140865> [**Coalspur Mines s 17 Notice**]; Letter from the Honourable Steven Guilbeault, P.C., M.P. to Mark Little (6 April 2022) re: Base Mine, online: *Government of Canada* <https://iaac-aeic.gc.ca/050/evaluations/document/143528>.

85. Neither climate change (nor Canada's commitments in respect thereof) nor "sustainability" are matters falling within exclusive federal heads of jurisdiction in relation to such local works and undertakings.

86. While a notice issued under section 17 does not technically stop the process under the *IAA*, it "would allow the company to make an informed decision about whether, or how, to go forward with the project in the impact assessment process."[99] As noted by the Minister in the section 17 notice issued to the coal proponent, however, "the Government of Canada must ultimately determine that the effects of the Projects are in the public interest in order to allow the Projects to proceed."[100]

87. Notably, the proposed coal project did not meet the arbitrary threshold in the *Regulations,* but was instead designated by a federal minister under section 9 of the *IAA.* Moreover, it was the fact of coal production *itself,* and not any other particulars of the project as proposed, that the Minister found to be inconsistent with Canada's commitments in respect of climate change.[101]

88. Thus, a practical effect of the *IAA* is the ability of Canada to designate natural resource projects under section 9 and then prevent them from being carried out "in whole or in part", on the basis of matters such as climate change and sustainability, which are not matters falling under section 91 of the *Constitution Act, 1867*. Canada's policy statement on future thermal coal mining projects and project expansions in Canada states that Canada will utilize the *IAA* for that very purpose.[102]

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[99] "Bill C-69, 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", 3rd reading, *House of Commons Debates*, 148-1, No 313 (12 June 2018) at 1940-1945 (Hon Catherine McKenna).
[100] Coalspur Mines s 17 Notice.
[101] *Ibid*.
[102] "Statement by the Government of Canada on Thermal Coal Mining", online: *Government of Canada* <https://www.canada.ca/en/environment-climate-change/services/managing-pollution/energy-production/electricity-generation/statement-government-canada-thermal-coal-mining.html>.

(vii) Section 22 – Broad List of Mandatory Factors Goes Beyond "Federal Effects"

89. Section 22 sets out a list of twenty mandatory factors to be taken into account in an impact assessment under the *IAA*. These mandatory factors range from *all* changes to the environment or health, social or economic conditions, to the purpose of, and need for, a designated project, the extent to which the project contributes to sustainability, to the extent to which the effects of the designated project hinder or contribute to the federal government's ability to meet its environmental obligations in respect of climate change. An assessment may also consider "any other matter relevant to the impact assessment that the agency requires to be taken into account."

90. The factors required to be considered under an assessment go significantly beyond matters with a clear connection to federal jurisdiction, and include factors of an economic and social character, as well as the need for the project, alternatives to the project, and alternative means of carrying out the project.[103] Plainly an assessment of the need for, and alternatives to, a project engages factors that constitute the heart of provincial jurisdiction over resource development and local works and undertakings. Within these twenty mandatory factors, there is no reference to "effects within federal jurisdiction."

91. The broad scope of the mandatory impact assessment factors demonstrates that the *IAA* is far from focused on matters of federal jurisdiction. Indeed, contrary to the direction in *Oldman River*,[104] the *IAA* requires that the body responsible for impact assessment (the Agency, a review panel or Indigenous governing body) consider *all* effects of a designated project, regardless of the nature of the project (e.g. local work or undertaking requiring no or partial federal involvement, versus a federal work or undertaking) and whether the effects are matters falling within federal jurisdiction. The report prepared by the impact assessment authority must identify *all* effects of the designated project and the public interest decision under section 63, discussed next, must "be based" on the report and consider all of the section 22 factors.[105] The breadth of the section 22

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[103] *IAA*, s 22.
[104] *Oldman River* at 47.
[105] Practitioner's Guide to Federal Impact Assessments, "Policy Context: Public Interest Determination under the *Impact Assessment Act*" (6 December 2021), online: *Government of Canada* <https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/public-

factors illustrates the constitutional mischief caused when federal impact assessment is not tied to federal decision-making. By removing the decision-making trigger, the factors to be assessed for local works and undertakings are the same as those for federal works and undertakings, even in cases where no federal authorizations are required for the local work or undertaking.

(viii) The *IAA* Permits the Government of Canada to Deny a Project Due to Perceived Misalignment With Federal Priorities

92. The decision-making provisions of the *IAA* are set out in sections 60 to 64. Pursuant to section 60, the Minister takes into account the report prepared by the Agency or a review panel in respect of the impact assessment of the designated project and must determine whether the adverse effects within federal jurisdiction and the adverse direct or incidental effects identified in the report are in the "public interest" or refer the determination to the Governor in Council.

93. In determining whether such effects are in the public interest, the Minister or the Governor in Council as the case may be, is to consider the factors referred to in section 63, which are:

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

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interest-determination-under-impact-assessment-act.html> [***Public Interest***], wherein it states that "Given the overlap in content between the factors listed under section 22 and the public interest factors, the portions of the report addressing the section 22 factors will inform the decision-maker's consideration of the public interest factors."

> (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.[106]

94. If the effects within federal jurisdiction and direct or incidental effects are determined to be in the public interest, the Minister must establish conditions under section 64 to address those effects, with which the proponent of the designated project must comply. In essence, the Minister becomes a licensing authority of local works and undertakings based on a federal public interest determination, even if no authorizations are required under other existing federal legislation.

95. Pursuant to section 65, the Minister must issue a decision statement to a proponent of a designated project that informs the proponent of the public interest decision, includes the conditions established under section 64, the sunset date established under section 70 and a description of the designated project.

96. If the public interest decision is negative, then conditions will not be established under section 64 and the section 7 prohibition will continue to apply to prevent the proponent from carrying out any work in connection with the designated project. The effect of such a decision would, essentially, be to deny the entirety of the project, based on the determination of the Minister's or Cabinet's view of federal priorities and policies.

97. While Canada now argues that its mandate under the *IAA* is to determine whether "effects within federal jurisdiction", and not projects themselves, are in the public interest, Environment and Climate Change Canada states in the *Strategic Assessment of Climate Change* that:

> Under the *IAA*, the Minister or Governor in Council must decide whether the project is in the public interest.[107]

98. Canada's argument is also inconsistent with the Minister's comments during second reading of Bill C-69:

> The impact assessment agency of Canada will work with and draw expertise from other bodies, such as the Canadian energy regulator, which is currently the National Energy Board, the Canadian Nuclear Safety Commission, and

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[106] *IAA*, s 63.
[107] SACC, s 7.

> offshore boards, but the final decision on major projects will rest with me or with the federal cabinet, because our government is ultimately accountable to Canadians for the decisions we make in the national interest.[108] [Emphasis added]

99. Notably, there is no materiality threshold for the adverse "effects within federal jurisdiction" or "direct or incidental effects" that must be met before the Government of Canada can deny a designated project.[109] Provided "adverse" effects are identified, the Minister or the Governor in Council can deem them to not be in the public interest, no matter how insignificant, resulting in denial of a project.

100. In this aspect, the *IAA* is different from *CEAA 2012*. There, a federal decision on whether or not a project could proceed was only required to be made if the Minister determined that the project was likely to cause "significant adverse environmental effects",[110] in which case the Governor in Council had to determine whether such effects were "justified in the circumstances".

101. This is also different from *EARPGO* and *CEAA 1992*, where the results of the environmental assessment were used to inform (that is, make recommendations in aid of) decision-making under other federal legislation (e.g., whether to issue a *Fisheries Act* authorization for a project). If the relevant federal authorization was denied following an environmental assessment, a proponent could not proceed with the portion of the project requiring the federal authorization, but the proponent was not otherwise prohibited from carrying out other aspects of the project that did not require federal authorization.

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[108] "Bill C-69, 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", 2nd reading, *House of Commons Debates*, vol 148, 42-1, No 264 (14 February 2018) at 1705-1710 (Hon Catherine McKenna).

[109] *Public Interest*, wherein it states "There are no thresholds or decision points for these five [section 63] factors, but rather the factors will be considered together, along with the Impact Assessment Report, to inform the public interest determination."

102. This is also different from the process *within* the *IAA* applicable to projects on federal lands and outside of Canada (sections 81-91). That process is far less extensive than the main process applicable to designated projects, and does not require a public interest determination.

103. It is here that we can see one of the fundamental implications of the *IAA* for the development of energy and natural resource projects, as well as local works and undertakings. Given the breadth of "effects within federal jurisdiction" and manner in which these have been interpreted by Canada, the "non-approval" from a federal entity is no longer limited to a specific federal decision-making function such as the issuance of an authorization under the *Fisheries Act*. A "non-approval" under the *IAA* could be based on climate change, sustainability, the potential for a truck to tip over and spill a substance into a waterway, or any number of issues related to federal priorities, but not powers. Given the lack of specific federal decision-making in relation to a project, a proponent would not have the opportunity to modify a project such that, for example, a federal authorization is no longer required. Instead, the proponent is prohibited from proceeding with any aspect of the project, in whole or in part, as the range of potential impacts, environmental or otherwise, tied to the broad concept of effects within federal jurisdiction are essentially boundless.

104. Moreover, the suggestion of "cooperation"[111] between federal and provincial authorities in relation to designated projects under the *IAA* is illusory. If Canada determines a designated project is not in the public interest, then that is the end of the matter. The proponent cannot proceed with the designated project, no matter what the decision of the provincial authority and no matter how important or beneficial the project may be to local interests. As noted by the Minster in para 98, above, the federal government makes the "final decision" on major projects under the *IAA* – this is the federal veto.

(ix) The Minister is Required to Impose Binding Federal Conditions Creating Ongoing Regulatory Oversight of Designated Projects

105. If the public interest decision is positive, section 64 of the *IAA* requires the Minister to establish any condition that he or she considers appropriate in relation to the adverse effects within federal jurisdiction and the adverse direct or incidental effects. Such conditions are included in the

[111] Canada Factum at para 101.

decision statement issued to the proponent under section 65, are binding and are subject to the enforcement provisions of the *IAA*. As noted, this essentially creates a federal licensing regime applicable to local works and undertakings that may not otherwise exist under the other federal legislation, such as the *Fisheries Act*.

106. The recently released draft federal conditions for the Cedar Liquefied Natural Gas project (which would form part of the decision statement issued under the *IAA*), demonstrate how under the *IAA* the federal government can purport to directly regulate matters of provincial jurisdiction (e.g., dust, weeds, sound, local air emissions, workplace policies, and disposal of non-hazardous waste, among others) through binding conditions ostensibly to address adverse effects within federal jurisdiction.[112]

107. Thus, an effect of the *IAA* is to provide the federal government, through the Agency, with continued oversight and regulation of local works and undertakings, including in relation to matters falling within provincial jurisdiction, through binding conditions.

(x) *IAA* Regulates Physical Activities, not just their Purported Federal Effects

108. Canada suggests that if upheld, the positions of Alberta, and the Alberta Court of Appeal majority "would mean that any project, and the effects of any project tied to natural resources, would be immune from any federal regulation of the environment".[113] Canada's submission significantly overstates Alberta's position, which is not arguing for a provincial enclave for natural resources nor for any other matter falling under provincial jurisdiction. To the contrary, Alberta's position is that federal legislation can apply to natural resource projects, local works and undertakings, and other activities that fall within provincial heads of power, provided such federal legislation is properly linked to a federal head of power (e.g., through a decision-making function) and does not purport to regulate the activity *itself*.

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[112] Impact Assessment Agency of Canada, "Potential Conditions under the *Impact Assessment Act*" (21 September 2022), online (pdf): *Government of British Columbia, Epic, Cedar LNG* <https://projects.eao.gov.bc.ca/api/public/document/632a0a25f9c1eb0022cbcf6d/download/Draft%20Potential%20Federal%20Conditions_Cedar%20LNG_EN.pdf>.
[113] Canada Factum at para 144.

109. In the context of federal undertakings, this Court has considered the point at which provincial legislation crosses the line between incidentally affecting matters of federal jurisdiction to impermissibly regulating them.

110. In *Construction Montcalm Inc v Minimum Wage Commission,* this Court determined that "federal works, undertakings, services and businesses remain subject to provincial law as long as provincial law does not reach them quâ federal organizations, that is, as long as provincial law does not regulate them under some primary federal aspect."[114] Beetz J, for the majority, suggested that in their references to regulating a federal undertaking, the Judicial Committee had in mind, *inter alia*, those directions which result in the "structural alteration of a federal work, or in the creation of new works, or, presumably and *a fortiori,* in the prohibition of new works."[115]

111. Alberta submits the same principles must apply vis-à-vis the application of federal law to matters that are within the exclusive legislative jurisdiction of the provinces, including natural resources, local works and undertakings and public lands. Federal laws may apply to such matters provided the federal laws do not regulate them in some primary provincial aspect.

112. Through the *IAA,* the federal government can prohibit the construction of certain natural resource projects, electricity facilities, and projects otherwise falling within the category of local works and undertakings. The federal government can also impose binding conditions the effect of which could require physical alteration of a local work and undertaking, including in relation to the technology employed for the purposes of the project. For example, the federal government can impose conditions on a proponent of a designated project, which "may refer to mitigation measures and other requirements to reduce or control a project's GHG emissions."[116] Following the description of Beetz J in *Montcalm,* the *IAA* regulates provincial activities in their provincial aspects.[117]

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[114] *Construction Montcalm Inc v Minimum Wage Commission*, [1979] 1 SCR 754, 93 DLR (3d) 641 at 774 [Emphasis added].
[115] *Ibid* at 773 [Emphasis added].
[116] SACC, s 7.
[117] See also *Canadian Western Bank* at para 27.

3. Classification: *IAA* Does not Fall within Section 91 Heads of Federal Jurisdiction

113. Canada's attempt to classify the *IAA* under a variety of federal heads of power because the law purports to address effects in federal jurisdiction is flawed. The *IAA* is not legislation in respect of fisheries, or migratory birds or Indigenous People, as these concepts are understood under the *Constitution Act*. Legislation in respect of those matters would address specific issues relevant to those subjects, provide criteria, and identify objectives and prohibitions, as well as sanctions. Indeed, those already exist in the legislation enacted under those heads of power by Parliament.[118] The *IAA* operates almost entirely independent of such legislation.

114. Rather, the *IAA* is about the prohibition, assessment, approval or denial, and regulation of physical activities based on their effects, and a consideration of federal priorities. It is tied to no federal head or heads of power except insofar as those sections which connect it directly to federal lands, actions or decisions in other legislation. But the main scheme, which asserts an assessment and regulatory power over designated projects cannot be so characterized. It cannot be sustained as legislation in relation to fisheries or any of the other federal heads of power to which the *IAA* makes reference.

115. The pith and substance of the *IAA* is, in its simplest form, the impact assessment and regulation of physical activities. Apart from an asserted "potential" to cause "effects within federal jurisdiction", many of the physical activities to which the *IAA* applies fall within provincial powers over natural resources, local works and undertakings, and property and civil rights, among others. As this Court confirmed in *Ward v Canada (Attorney General)*, if a measure is in pith and substance directed at a matter of provincial jurisdiction, it will not fall under a federal power simply because some aspects of the matter touch upon that federal power:

> These cases suggest that measures essentially directed to regulating fish processing and labour relations fall under the provincial power over property and civil rights, and outside the federal fisheries power. If the activity is in pith and substance a matter of trade and industry within the province, it will not fall under the federal fisheries power merely because some aspects of the activity touch upon the fishery. Conversely, measures that are in pith and substance directed to the fishery fall within the federal

[118] See e.g. the list of federal legislation in Canada Factum at footnote 15.

> fisheries power even though they possess aspects relating to property and civil rights.[119]

116. As set out below, the *IAA*'s overall regulatory scheme, and in particular the section 7 prohibition on any effect, positive or negative, on the enumerated factors, is not sufficiently tied to protection of, or prevention of harm to, those asserted federal factors, such as to allow characterization of the *IAA* as legislation in respect of those federal matters.

(i) Not Legislation in Relation to Fisheries, Migratory Birds or Species at Risk

117. The *IAA* is not a law in relation to fish or fisheries, migratory birds, or species at risk.

118. For example, the regulation of fisheries is a matter given to Parliament under section 91(12) of the *Constitution Act, 1867*. Legislation in relation to fisheries, such as the *Fisheries Act*, may also affect property and civil rights in the Province, local works and undertakings and other matters allocated to the provinces under section 92. If the true purpose of the federal provision is protection of the fishery, its effect on property is found to be merely incidental to the federal purpose and the conflict does not prevent Parliament from legislating. On the other hand, if the federal provision is insufficiently connected to protection of fisheries, the federal provision will be found to be outside the power of Parliament to enact.

119. In *Fowler v The Queen*,[120] the Court struck down a provision of the *Fisheries Act*, which prevented the deposit of the ordinary by-products of logging into all waterways, ruling it was not a law in relation to fisheries. Instead, it sought "to control certain kinds of operations not strictly on the basis that they have deleterious effects on fish but, rather, on the basis that they might have such effects."[121] The Court characterized the impugned *Fisheries Act* section as a law in relation to property and civil rights.

120. If the federal government revised the *Fisheries Act* to incorporate a provision that prohibited a person from doing anything that may cause an effect, positive or negative, on fish or fish habitat as those terms are broadly defined, would that stand up to constitutional scrutiny? The

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[119] *Ward v Canada (Attorney General)*, 2002 SCC 17 at para 47.
[120] *Fowler v The Queen*, [1980] 2 SCR 213, 113 DLR (3d) 513.
[121] *Ibid* at 224.

answer, according to *Fowler*, must be no. But that is exactly what Canada has done in the *IAA*. Under the *IAA*, the Agency, which has no authority or role under the *Fisheries Act* would, in effect, have the ability to make regulations on a case-by-case basis, in a manner that would not be available under the *Fisheries Act* and ultimately may have no connection at all to fish and fish habitat. Section 7(1)(a)(i) prohibits any act or thing in connection with listed local works and undertakings (as well as any incidental physical activities) that may have any effect (positive or negative – environmental, health-related, social or economic) resulting in a change to "fish" or "fish habitat" as those terms are broadly defined under the *Fisheries Act*. This prohibition, which applies to listed local works and undertakings and is not limited to deleterious effects, is much broader than the provisions struck down by the Court in *Fowler* and is not sufficiently connected to the protection of fisheries to be valid.[122]

121. Similar concerns arise in relation to sections 7(1)(a)(ii) and (iii) with respect to effects resulting in a change to "aquatic species" under the *Species at Risk Act* or a change to "migratory birds" as defined under the *Migratory Birds Convention Act*. In the case of section 7(1)(a)(iii), the Alberta Court of Appeal majority observed that 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*."[123]

(ii) Not Legislation in Relation to Interprovincial and International Effects

122. The *IAA* is not a law in relation to extra-provincial effects, nor are sections 7(1)(b)(ii) and (iii), which prohibit effects outside a province where the project is located and effects outside of Canada, respectively, supported by Canada's residuary Peace, Order and Good Government ("**POGG**") power.[124]

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[122] *ABCA Reasons* at paras 232-235, 272-277.
[123] *Ibid* at para 281.
[124] Canada Factum at paras 136, 138.

123. Unlike in the decisions cited by Canada where federal jurisdiction was confirmed under the residuary POGG power in relation to marine pollution[125] and pollution of interprovincial rivers,[126] sections 7(1)(b)(ii) and (iii) do not attempt to define the types or levels of extra-provincial or international effects that trigger the application of the *IAA.* Absent such definition, or a federal decision-making role under valid federal legislation in respect of such effects, sections 7(1)(b)(ii) and (iii) are too broad to be supported by Supreme Court of Canada decisions such as *Interprovincial Co-operatives*,[127] which support the position only that certain forms of interprovincial pollution "<u>may</u> fall within federal jurisdiction".[128] Without any particulars in the *IAA,* or any evidence from Canada, the cited effects are not "single, distinct and indivisible" such that they meet the national concern test.[129]

(iii) Not Legislation in Relation to Indigenous Peoples and Reserved Lands

124. The *IAA* is not, in pith and substance, legislation directed at matters falling within section 91(24) of the *Constitution Act*, Indians and Lands Reserved for Indians. This Court has recognized that Indigenous peoples are "members of the broader population and, therefore, in their day-to-day activities, they are subject to provincial laws of general application."[130] The "basic, minimum and unassailable content" of the federal power relates to the "status and rights of Indians," for which purpose, Indians are federal persons.[131]

125. The relevant provisions do not apply "only to Indians"; do not affect the "identity of First Nations"; do not affect incidents of Indian status such as registrability, membership in a band, the right to participate in the election of Chiefs and Band Councils or reserve privileges; and do not

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[125] *R v Crown Zellerbach Ltd*, [1988] 1 SCR 401, 49 DLR (4th) 161.
[126] *Interprovincial Co-operatives Ltd et al v R,* [1976] 1 SCR 477, 53 DLR (3d) 321.
[127] *Ibid*.
[128] *Greenhouse Gas Reference* at para 195 [Emphasis added].
[129] Canada tendered no evidentiary record in support of the POGG criteria.
[130] *NIL/TU,O Child & Family Services Society v BCGEU,* 2010 SCC 45 at para 73 [***NIL/TU,O***].
[131] *Ibid* at para 70.

relate to rights and entitlement to reserve lands.[132] Nor do the provisions affect any other matters that have been found to fall under the section 91(24) power.[133]

126. The fact that the *IAA* references in some part Indigenous rights and interests does not render it legislation in relation to the section 91(24) power; that is not what the *IAA* is about. In *Kitkatla Band* this Court held that provisions of the British Columbia *Heritage Conservation Act*[134] that had as their purpose the protection of certain aboriginal heritage objects from damage, alteration or removal, did not engage the federal power under section 91(24) despite the fact that the impugned provisions could "sometimes affect aboriginal interests" and "directly affect the existence of aboriginal heritage objects".[135]

127. Meanwhile in *Grassy Narrows First Nation v Ontario (Natural Resources),* the Court ruled that section 91(24) does not give the federal Crown the power to take up treaty lands for provincial purposes, nor does it grant the federal Crown supervisory jurisdiction over such matters.[136] Canada has no right, let alone an obligation, to supervise the provinces with regard to matters that fall within exclusive provincial jurisdiction on the basis that such matters may affect Indigenous peoples or their interests.[137]

128. Plainly, if section 91(24) does not confer on Canada the broad power to regulate natural resource projects, electricity generation facilities, local works and undertakings or to deal with public lands or resources, the vague reference to *potential* impacts of projects on Indigenous interests in the *IAA* cannot give the federal government that power. The fact that such matters, with respect to which the provincial government has exclusive legislative jurisdiction, may impact

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[132] *Ibid* at para 71.
[133] *Ibid.*
[134] *Heritage Conservation Act*, RSBC 1996, c 187.
[135] *Kitkatla Band v British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31 at paras 62, 66.
[136] *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48 [***Grassy Narrows***]; *Chartrand v The District Manager*, 2013 BCSC 1068 at paras 204-206 [***Chartrand***], aff'd in part 2015 BCCA 345.
[137] *Grassy Narrows* at paras 30-37, 50. See also *George Gordon First Nation v Saskatchewan,* 2022 SKCA 41 at para 162; *Chartrand* at paras 204-206.

Indigenous peoples or their interests as contemplated by the *IAA* cannot engage federal jurisdiction, nor make the *IAA* legislation in respect of section 91(24).[138]

129. Canada appears to assert that effects of designated projects on Indigenous peoples and their interests are automatically matters falling within federal jurisdiction under Canada's section 91(24) power and which entitle Canada to regulate those effects. If this submission were accepted, Canada would be able to insert itself into any provincial decision that may result in impacts on Indigenous traditional land use, culture, Aboriginal and Treaty rights and other interests, in effect subordinating provincial powers in that regard, and undermining the provincial Crown duty of consultation. This is directly contrary to the rulings in *Chartrand* and of this Court in *Grassy Narrows.*

130. Canada itself recently argued *against* this position before the Federal Court. In *Mikisew Cree First Nation v Canadian Environmental Assessment Agency*, Canada argued that the federal Crown's duty to consult Mikisew Cree First Nation was not triggered by the Minister's decision to not designate an oil sands project for federal environmental assessment under *CEAA 2012*.[139]

131. Ultimately, the Federal Court agreed that the decision to not designate the oil sands project did not trigger the federal Crown duty to consult.[140] The Federal Court found that it is the provincial "[Alberta Energy Regulator] that examines the Extension Project and any environmental or Aboriginal and Treaty right concerns".[141] The Court (and indeed, Canada) acknowledged that provincial decisions with respect to a physical activity that may affect Aboriginal and Treaty rights and Indigenous interests do not require federal involvement, let alone trigger federal jurisdiction in relation to such activities. These are the very same issues and "effects" on Indigenous peoples

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[138] While considered in the context of labour relations, which has a distinct "functional test" for determining jurisdiction, this Court's decision in *NIL/TU,O* "is strong authority for the proposition that an undertaking, usually provincially regulated, does not become federally regulated just because it" has a substantial Indigenous component: *Canada (Attorney General) v Northern Inter-Tribal Health Authority Inc*, 2020 FCA 63 at para 24.

[139] *Mikisew Cree First Nation v Canadian Environmental Assessment Agency*, 2022 FC 102 at paras 1-6, 53-58.

[140] *Ibid* at paras 98-99.

[141] *Ibid* at para 98.

and their interests, with respect to which Canada argued in *Mikisew* it had no involvement, that fall within the definition of "effects within federal jurisdiction" in the *IAA.*

132. A simple example illustrates the constitutional overreach of the *IAA* in relation to Indigenous peoples and their interests. A proponent plans to build a 200-megawatt natural gas-fired electricity generation station on provincial public lands within Treaty 8 (which encompasses much of the northern half of Alberta) and the asserted traditional territory of an Indigenous group. This physical activity is a designated project under the *IAA* and *Regulations.* On that basis, the *IAA* stay under section 7 would apply, an impact assessment could be ordered based on such effects and following an assessment Canada could determine ***that such effects, no matter how minor, are not in the public interest*** and refuse to issue a decision statement, in effect denying the project.

133. But-for the *IAA,* that electricity generation station on provincial public lands would generally not involve any federal decision-making.[142] On the basis of potential impacts to Indigenous peoples or their interests, not connected in any way to the recognized scope of section 91(24), the *IAA* would allow the federal government to take an activity that is normally subject to provincial regulation and approval (like an electricity generation facility), and pull it into a federal decision-making process that, in the end, could stop the project from proceeding altogether.

4. *IAA* Interferes with Exclusive Areas of Provincial Jurisdiction Including over Natural Resources

(a) NRTA and Section 92A, Exclusive Provincial Power over Resources

134. Whether the *IAA* represents a valid exercise of federal power is also informed by its impact on and interference with areas of provincial jurisdiction.[143] The provincial jurisdiction most affected by the *IAA* is the exclusive section 92A power over the development and management of non-renewable natural resources. Prior to the enactment of section 92A, the Natural Resources Transfer Agreement ("**NRTA**") transferred ownership over natural resources to those provinces, which previously did not have such power.[144] This Court has acknowledged the significance of this power, and its importance to the realization of provincial objectives and financial stability:

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[142] Kristensen Affidavit at para 88.
[143] See *Canadian Western Bank* at para 27.
[144] *Constitution Act*, 1930, RSC 1985, App II, No 26.

> The allocation in 1930, by agreement and constitutional amendment, of property of 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 C. J. to "enjoy the fruits of that property" [in *Attorney General for British Columbia v Attorney General for Canada* (1922), 64 SCR 377 ("*Johnny Walker*"), at 395]. 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.[145] [Emphasis added]

135. The establishment of section 92A in the 1982 constitutional amendment[146] confirmed the vital importance of the power over natural resources to provincial aspirations, following a challenging period of difference which "tested the internal strength of Canadian federalism".[147] Section 92A was a response to major provincial concerns about "the interventionist policies of the federal authorities in the 1970s in relation to natural resources, particularly oil and other petroleum products."[148]

136. In the Alberta Court of Appeal's decision in *Redwater*, Martin JA (as she then was) commented on the historic role played by the NRTA, and indeed the resource sector in the Alberta economy:

> The oil and gas industry is a main driver of the Alberta economy, and the distinctive and longstanding legislative regime that governs it is a product of history and the 1930 National Resources Transfer Agreement. It is also true that Alberta, like other jurisdictions in Canada, has other legislation that deals broadly with the protection of the environment...[149]

137. In *Westcoast Energy v Canada (NEB)*, McLachlin J (as she then was), observed that "[t]he ability to control and manage aspects of natural resource production is a core area of provincial jurisdiction."[150] Her comment arose in the context of the concern that, in assimilating certain

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[145] *Re: Exported Natural Gas Tax*, [1982] 1 SCR 1004, 136 DLR (3d) 385 at 1080.
[146] *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.
[147] Robert D Cairns et al, "The Resource Amendment (section 92A) and the Political Economy of Canadian Federalism" (1985), 23:2 Osgoode Hall LJ 253 at 254.
[148] *Ontario Hydro v Ontario (Labour Relations Board),* [1993] 3 SCR 327, 107 DLR (4th) 57 at 376.
[149] *Orphan Well Association v Grant Thornton Limited*, 2017 ABCA 124, rev'd on other grounds 2019 SCC 5 at para 118.
[150] *Westcoast Energy Inc v Canada (National Energy Board)*, [1998] 1 SCR 322, 156 DLR (4th) 456 at para 166, McLachlin J in dissent.

resource production facilities into an interprovincial undertaking, "the federal government might acquire control over resource development and production."[151]

138. That caution is all the more applicable in the case of the *IAA*, where tenuous threads to federal heads of power could result in the assumption of effective control over the development and management of natural resources by Parliament, in blunt conflict with the intent of section 92A's hard fought compromise.

139. Indeed, it was clear that in the development of the *IAA* and *Regulations,* the focus of the Government of Canada was not on addressing effects within federal jurisdiction, but was instead on regulating "resource" and "energy" projects, suggesting that decisions around resource development were to be made by the *federal* government. In her speech during second reading of Bill C-69, the Minister stated:

> Our government understands the importance of the resource sector to our economy. Over $500 billion in major resource projects are planned across Canada over the next decade. These projects would mean tens of thousands of well-paying jobs across the country and provide an economic boost for nearby communities and our economy as a whole, but we cannot get there without better rules to guide **our decisions around resource development**.[152] [Emphasis added]

140. Decisions on resource development do not belong to the federal Executive. The *IAA* is a reflection of the apparent federal government perspective that natural resource development is ultimately under its purview, and as such clearly violates section 92A of the *Constitution Act.*

(b) The *IAA* Duplicates Provincial Assessment Regimes and Creates a Federal Veto Power over Project Approvals

141. The *IAA* makes no meaningful effort to connect with or limit its application to a federal head or heads of power. Nor does the *IAA* represent a surgical attempt to address discrete federal concerns arising from projects or activities under provincial jurisdiction. To the contrary, where it

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[151] *Ibid* at para 166.

[152] "Bill C-69, 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", 2nd reading, *House of Commons Debates*, vol 148, 42-1, No 264 (14 February 2018) at 1655-1700 (Hon Catherine McKenna).

purports to apply to such a project, the *IAA* represents a significant overreach of any legitimate federal assessment role. The *IAA* "replicate[s] the existing provincial schemes"[153] insofar as the broad assessment of the impacts and benefits of resource and infrastructure projects is concerned. As the review of the Alberta regulatory assessment regimes demonstrates, the same types of review factors and local interests are contemplated for review under the *IAA*, as are already provided for under review by the AER and other provincial regulators.[154] The *IAA* thus leads to "concurrent jurisdiction" in respect to the review and regulation of matters of exclusive provincial legislative jurisdiction, including certain natural resource projects and local works and undertakings.[155]

142. Just as the thrust of the proposed federal *Securities Act* in 2011 was held to be a matter of property and civil rights within the provinces, so too is the *IAA* primarily concerned with the assessment of the types of interests under provincial jurisdiction over natural resources, local works and undertakings and property and civil rights. As the Alberta Court of Appeal noted in the *Securities Act Reference* it is "not…particularly desirable" to have both levels of government legislating in the same area particularly where there is broad duplication.[156]

143. It is not simply a matter of duplication of effort, however. The more objectionable nature of the *IAA* is its *displacement* of the provincial structures and any approvals they generate. For example, a project could be subject to a rigorous and full assessment process under the Alberta assessment regime, resulting in an approval, perhaps with significant conditions. Yet that provincial approval process could be entirely frustrated by a review under the *IAA* that arrived at a different decision about the need for a project, alternatives to it, and thus the public interest, and denied federal approval. This would constitute a significant "displacement"[157] of the provincial regulating regime, and represent a significant impairment of the core of several areas of provincial jurisdiction, including ownership and development of natural resources.

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[153] *SCC Securities Reference* at para 116.
[154] *ABCA Reasons* at paras 123-135.
[155] *Ibid* at para 249; *Reference re Environmental Management Act*, 2019 BCCA 181 at para 3, aff'd 2020 SCC 1 [***Environmental Management***].
[156] *ABCA Securities Reference* at para 46.
[157] *SCC Securities Reference* at para 117.

144. The comprehensive provincial regulatory regimes illustrate that there is no greenfield area that calls for federal regulation. Environmental, social, economic and Indigenous benefits and impacts are already addressed under provincial regulatory regimes which take into account local and regional concerns arising from the exercise of exclusive provincial jurisdiction over resource management, provincial lands and undertakings.

145. The *IAA* regime marginalizes that provincial jurisdiction, and renders the exclusivity illusory. As the *IAA* assessment process elbows its way into an effective veto position over projects and activities otherwise subject to exclusive provincial authority, it is plain that the statute represents a real threat to the careful balance of interests and jurisdiction under the *Constitution*.

146. In this way, the *IAA* is the "Trojan horse" that this Court addressed in *Oldman River*, as a "device to invade areas of provincial jurisdiction which are unconnected to the relevant heads of federal power".[158]

(c) The *IAA*'s Effects on Areas of Provincial Jurisdiction are not Incidental

147. The principle of federalism contemplates that legislation may in some cases incidentally affect the subjects of the other order of government. However, such impact cannot be such as to frustrate and impair the core element of the exclusive jurisdiction of the other.[159] The authorities speak of whether the impugned law impairs or frustrates the vital or essential element of the matter regulated by the other legislature.

148. Here, that impairment is easily demonstrated. Section 92A provides for the provincial management and development of natural resources. That management inherently involves an assessment of the impacts and benefits of the project or undertaking under review. The province must have the ultimate say over that management of the public asset under its exclusive jurisdiction.

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[158] *Oldman River* at 71-72.

[159] See e.g. *Canadian Western Bank* at para 31: "The scale of the alleged incidental effects may indeed put a law in a different light so as to place it in another constitutional head of power."

149. Canada's "effects-based" approach turns the concept of incidental effects on its head. It uses effects not as a means to limit the exercise of excess jurisdiction, but rather to ground and encourage it, with a resulting negative impact on provincial jurisdiction. The existence of incidental impacts from activities properly regulated by one level of government in an area of the other level of government's jurisdiction is long recognized in Canadian law. However, the case law has never permitted the wholesale oversight and regulation of activities outside a legislative body's area of jurisdiction for the ostensible purpose of legislating with respect to an incidental effect in its area of competence.[160] That is what the *IAA* purports to do, and that is what is constitutionally objectionable about the *IAA*. The potential existence of incidental impacts of a provincial activity in a federal area has never been a basis to oust that provincial jurisdiction nor, Alberta submits, should it be a basis to confer a veto on the federal government over the projects and activities made subject to that assessment regime.

150. Indeed, the Alberta Court of Appeal observed that the existence of incidental effects in areas of jurisdiction of another order of government cannot be allowed to undermine the legitimate exercise of jurisdiction of the other order:

> 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.[161]

151. The effects of the *IAA* on provincial heads of power are not secondary or collateral. To the contrary, the *IAA*'s impairment of provincial powers is patent.

152. The question naturally arises whether such a concept would work in a reciprocal fashion. Typically that question has been answered in the negative. Would an amendment to the EIA

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[160] *ABCA Reasons* at para 179.
[161] *Ibid* at para 171.

provisions of the Alberta *EPEA* prohibiting carrying out any work in connection with a "federal work or undertaking" until a provincial public interest test was applied and a decision was issued from provincial authorities be constitutionally valid?

153. We know from decisions such as *Attorney-General for Ontario v Winner*[162] and *Reference re Environmental Management Act*,[163] that such legislation would be determined to be "regulating" a federal work and undertaking and found to be unconstitutional, despite a focus on matters of asserted provincial jurisdiction.

154. The frustration and impairment created by a federal assessment regime to conduct a further review, evaluation and balancing of the effects and benefits of projects under provincial jurisdiction goes to the heart of the management and development decisions. These evaluations, under the various comprehensive energy regulatory processes, and the *EPEA* review, are part of a detailed and evolving regime in Alberta, reflected in other provinces, designed to make the determination about the development of public resources, and to do so in an accountable way.

155. The *Constitution Act* does not intend such provincial decisions to be subject to oversight and veto by a federal regime, removed from the issues and accountability for those decisions. As discussed, there is no legal presumption that federal policies are preferable, or that exclusive provincial jurisdiction will be made subject to overarching review on thin pretexts of federal subject matter. That is the essence of the Trojan horse which *Oldman River* warned of, and the Alberta Court of Appeal identified in this Reference.[164]

(d) Inter-Jurisdictional Immunity

156. The Alberta Court of Appeal majority concluded that, in the event the *IAA* was constitutionally valid, inter-jurisdictional immunity should then apply to protect the cores of relevant provincial powers, specifically sections 92A(1), 92(5), 92(10), 92(13), 92(16) and 109. Alberta submits in the alternative that, in the event the *IAA* is found to be constitutional, the Court of Appeal's Opinion in this regard is correct.

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[162] *Attorney-General for Ontario v Winner*, [1954] 3 All ER 177, [1954] 4 DLR 657 at 668, 675.
[163] *Environmental Management*.
[164] *ABCA Reasons* at paras 256-257.

157. Inter-jurisdictional immunity is founded on the exclusivity of the legislative powers assigned to the federal and provincial governments in sections 91 and 92 of the *Constitution Act, 1867.* There are minimum unassailable "cores" of both federal and provincial heads of power, into which the other level of government cannot intrude. A law that is found to trench on the core of a legislative power assigned to the other level of government is read down so as to not apply to that core.[165]

158. The doctrine can apply once it is determined that the impugned legislation is, in pith and substance, within the legislative competence of the enacting government.[166] To be triggered, inter-jurisdictional immunity does not require that a law be enacted by the other level of government covering the same subject matter,[167] only that a two-part test be satisfied. First, does the legislation trench on the core of the head of power at issue? If that part of the test is answered in the affirmative, the court goes on to consider the second part of the test: is the encroachment sufficiently serious to invoke the doctrine of inter-jurisdictional immunity? An encroachment is sufficiently serious where it impairs – a midway point between affecting and sterilizing[168] – legislative competence.[169]

159. *Canadian Western Bank v Alberta* clarified that, while not previously applied to protect areas of provincial jurisdiction, there is no basis in principle to rule out such a use of the doctrine. Citing Professor Hogg, the Court of Appeal majority said of inter-jurisdictional immunity:

> 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 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

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[165] *Canadian Western Bank* at paras 33-34.
[166] *Ibid* at para 76.
[167] *Ibid* at para 34; *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 at para 59 [***PHS***]; *Quebec (Attorney General) v Canadian Owners and Pilots Association,* 2010 SCC 39 at para 52 [***COPA***].
[168] *COPA* at para 44; Guy Régimbald & Dwight Newman, *The Law of the Canadian Constitution*, 1st ed (Markham: LexisNexis Canada, 2013) at §5.99 [**Régimbald**].
[169] *Canadian Western Bank* at paras 48-49; *COPA* at paras 27, 43.

> immune from incursion by the other level of government": Hogg at §15:21.[170]

160. Indeed, the cases that Canada cites as rejecting "the application of the doctrine to protect provincial legislation from the application of federal legislation" are the same cases in which this Court has gone to great lengths to emphasize the reciprocal nature of inter-jurisdictional immunity.[171]

161. Further, the doctrine of inter-jurisdictional immunity is rooted in references to "exclusivity" present throughout sections 91 and 92 of the *Constitution Act, 1867*.[172] Such exclusivity is a key term in section 92A, granting each province the *exclusive* power to regulate the exploration, development, conservation, and production of natural resources, as well as sites and facilities for the generation and production of electrical energy.[173]

162. The wide-reaching powers and impacts of the *IAA* on these exclusive grants leave little question that it trenches on a provincial head of power. This discussion also reveals that the impairment of the core or vital aspect of that power – that being the ultimate decision-making over whether and when resources will be developed, as well as the balancing of the interests central to such decisions – is sufficiently serious to warrant invoking the doctrine of inter-jurisdictional immunity in favour of a provincial head of power.

163. The *IAA* does not merely affect a provincial power, it impairs it. The *IAA* uses the prospect of a *potential* "effect under federal jurisdiction" as a springboard to determining project approval based on a wide range of factors dictated by, among other provisions, sections 22 and 63 of the *Act*. The result is that the federal decision-maker under the *IAA* can use a mere potential effect to gain jurisdiction and deny approval for a designated project found to be in the public interest by the applicable provincial regulatory regime, despite that project not requiring a single specific federal permit or approval.

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[170] *ABCA Reasons* at para 429, citing Hogg.
[171] *PHS* at para 65; *Carter v Canada (Attorney General)*, 2015 SCC 5 at para 50; *Canadian Western Bank* at paras 35, 67, 77; Régimbald at §5.78.
[172] Régimbald at §5.79.
[173] *Ibid* at §5.92.

164. Canada's submissions on inter-jurisdictional immunity hide behind the "dominant trend in constitutional law" and allude to the broad reach of cooperative federalism, in order to argue that the doctrine cannot be invoked. But at the same time, Canada ignores the cautions in *Canadian Western Bank*, in which this Court noted that the use of inter-jurisdictional immunity without caution runs the risk of reinforcing the creeping centralization tendency of constitutional interpretation. The inverse applies here – a failure to use inter-jurisdictional immunity in situations that warrant it, reinforces that same creeping centralization. The *IAA* and provincial natural resource regimes cannot coexist. Inter-jurisdictional immunity therefore must be applied to *resist* centralization and preserve the exclusive jurisdiction of the provincial legislatures.

165. Inter-jurisdictional immunity would apply to the *IAA* to exclude its application to projects, works and undertakings that are otherwise primarily under provincial jurisdiction. To hold otherwise would mean that the careful calibration of those local and regional interests is handed to the remote central government, one which may even lack a representative in the province whose balancing decision it would veto.

CONCLUSION

166. The *IAA* is not legislation in relation to effects in federal jurisdiction. It is instead about conferring on the federal government a comprehensive mechanism to assess and decide about projects and activities including those at the core of the section 92A jurisdiction, and local works and undertakings and property and civil rights.

167. The intrusion into areas of exclusive provincial jurisdiction is clear. The *IAA* purports to impose what amounts to a veto over provincially regulated resource and infrastructure projects. Even if a provincial body approves a project as being in the public interest pursuant to its own comprehensive assessment regime, the *IAA* provides the federal Minister or Governor in Council the power to come to a contrary conclusion about whether provincial resources should be developed, or local undertakings constructed. Such a power invades the core of the exclusive provincial jurisdiction over the development, conservation and management of natural resources. It also wrests the ultimate authority to make the judgment about the merits of such activities away from the level of government closest to the citizens impacted by them, and it does so in the absence

of any tangible federal jurisdiction. The *IAA* and its disregard for the established principles of federalism should be firmly rejected.

IV. SUBMISSIONS CONCERNING COSTS

168. Alberta submits that there should be no order as to costs.

V. ORDER REQUESTED

169. Alberta seeks the Court's opinion affirming the opinion of the Alberta Court of Appeal that the *IAA* and the *Regulations* are *ultra vires* the Parliament of Canada, and respectfully requests that the Court answer "Yes" to both of the Questions on this Reference.

Respectfully submitted at the City of Calgary this 23rd day of November, 2022.

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Per: 

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VI. SUBMISSION ON CASE SENSITIVITY

None.

VII. TABLE OF AUTHORITIES

Cases		Paragraph Ref
1.	*Attorney-General for Ontario v Winner*, [1954] 3 All ER 177, [1954] 4 DLR 657	153
2.	*Attorney General of Québec v IMTT-Québec inc*, 2019 QCCA 1598, leave to appeal to SCC refused, 38929 (16 April 2020)	4, 50, 51
3.	*Canada (Attorney General) v Northern Inter-Tribal Health Authority Inc*, 2020 FCA 63	128
4.	*Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44	158, 160
5.	*Canadian Western Bank v Alberta*, 2007 SCC 22	30, 112, 134, 147, 150, 157, 159 160, 164
6.	*Carter v Canada (Attorney General)*, 2015 SCC 5	160
7.	*Chartrand v The District Manager*, 2013 BCSC 1068	127, 129
8.	*Construction Montcalm Inc v Minimum Wage Commission*, [1979] 1 SCR 754, 93 DLR (3d) 641	110, 112
9.	*Ermineskin Cree Nation v Canada (Environment and Climate Change)*, 2021 FC 758	2, 38, 72
10.	*Fowler v The Queen*, [1980] 2 SCR 213, 113 DLR (3d) 513	119, 120
11.	*Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3, 88 DLR (4th) 1	4, 41, 42, 43, 44, 47, 49, 50, 52, 91, 146, 155
12.	*George Gordon First Nation v Saskatchewan*, 2022 SKCA 41	127
13.	*Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48	127, 129
14.	*Interprovincial Co-operatives Ltd et al v R*, [1976] 1 SCR 477, 53 DLR (3d) 321	123
15.	*Kitkatla Band v British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31	126
16.	*Mikisew Cree First Nation v Canadian Environmental Assessment Agency*, 2022 FC 102	130, 131
17.	*Mining Watch Canada v Canada*, 2010 SCC 2	54
18.	*Moses c Canada (Procureur général)*, 2008 QCCA 741, varied on other grounds 2010 SCC 17	47, 48
19.	*NIL/TU,O Child & Family Services Society v BCGEU*, 2010 SCC 45	124, 125, 128

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20.	*Ontario Hydro v Ontario (Labour Relations Board)*, [1993] 3 SCR 327, 107 DLR (4th) 57	135
21.	*Orphan Well Association v Grant Thornton Limited*, 2017 ABCA 124, rev'd on other grounds 2019 SCC 5	136
22.	*Quebec (Attorney General) v Canadian Owners and Pilots Association*, 2010 SCC 39	158
23.	*R v Badger*, [1996] 1 SCR 771, 133 DLR (4th) 324	71
24.	*R v Comeau*, 2018 SCC 15	18, 19
25.	*R v Crown Zellerbach Ltd*, [1988] 1 SCR 401, 49 DLR (4th) 161	123
26.	*R v Hydro-Québec*, [1997] 3 SCR 213, 151 DLR (4th) 32	58
27.	*Re: Exported Natural Gas Tax*, [1982] 1 SCR 1004, 136 DLR (3d) 385	134
28.	*Reference re Environmental Management Act*, 2019 BCCA 181, aff'd 2020 SCC 1	141, 153
29.	*Reference re Genetic Non-Discrimination Act*, 2020 SCC 17	25
30.	*Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544	30
31.	*References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11	17, 63, 64
32.	*Reference re Impact Assessment Act*, 2022 ABCA 165	5, 7, 8, 11, 27, 38, 48, 61, 77, 82, 120, 121, 141, 142, 149, 150, 155, 156, 159
33.	*Reference re Pan-Canadian Securities Regulation*, 2018 SCC 48	21
34.	*Reference re Secession of Quebec*, [1998] 2 SCR 217, 161 DLR (4th) 385	19, 20
35.	*Reference re Securities Act (Canada)*, 2011 ABCA 77	30, 142
36.	*Reference re Securities Act*, 2011 SCC 66	21, 23, 141, 143
37.	*Rogers Communications Inc v Chateauguay (City)*, 2016 SCC 23	21, 150
38.	*Ward v Canada (Attorney General)*, 2002 SCC 17	115
39.	*Westcoast Energy Inc v Canada (National Energy Board)*, [1998] 1 SCR 322, 156 DLR (4th) 456	137

Legislative Authorities		Language		Paragraph Ref
40.	Bill C-69, *An Act to enact the Impact Assessment Act and the Canadian Energy Regulator Act, to*	English	French	37

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	amend the Navigation Protection Act and to make consequential amendments to other Acts, 1st Sess, 42nd Parl, 2015 (assented to 21 June 2019)			
41.	*Canadian Environmental Assessment Act*, SC 1992, c 37	English	French	4, 44, 45, 46, 47, 52, 61, 101
42.	*Canadian Environmental Assessment Act, 2012*, SC 2012, c 19	English	French	45, 46, 47, 49, 61, 100, 130
	a) s 5	English	French	
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43.	*Comprehensive Study List Regulations*, SOR/94-638	English	French	45, 61
44.	*Constitution Act, 1867*, 30&31 Victoria, c 3 (UK)	English	French	3, 14, 44, 88, 113, 118, 124, 125, 126, 127, 128, 129, 133, 134, 135, 138, 140, 148, 155, 156, 157, 159, 161, 166
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	f) s 92(10)	English	French	
	g) s 92(13)	English	French	
	h) s 92(16)	English	French	
	i) s 92A	English	French	
	j) s 109	English	French	
45.	*Constitution Act*, 1930, RSC 1985, App II, No 26	English	French	134, 135, 136
46.	*Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c 11	English	French	135

Legislative Authorities		Language		Paragraph Ref
47.	*Environmental Assessment and Review Process Guidelines Order*, SOR/84-467 a) s 6			4, 40, 42, 43, 44, 45, 46, 47, 49, 50, 52, 101
48.	*Environmental Protection and Enhancement Act*, RSA 2000, c E-12	English		8, 9, 152, 154
49.	*Fisheries Act*, RSC 1985, c F-14	English	French	44, 75, 77, 101, 103, 105, 118, 119, 120
50.	*Heritage Conservation Act*, RSBC 1996, c 187	English		126
51.	*Impact Assessment Act*, SC 2019, c 28 a) Preamble b) s 2 c) s 6 d) s 6(a) e) s 6(b) f) s 6(b.1) g) s 6(c) h) s 7 i) s 7(1)(a)(i) j) s 7(1)(a)(ii) k) s 7(1)(a)(iii) l) s 7(1)(b)(ii) m) s 7(1)(b)(iii) n) s 7(1)(c)(ii)	English English English English English English English English English English English English English English English	French French French French French French French French French French French French French French French	1, 2, 32, 33, 34, 35, 38, 55, 56, 65, 67, 68, 70, 71, 72, 73, 74, 75, 76, 78, 79, 80, 81, 82, 83, 84, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 102, 105, 116, 120, 121, 122, 123, 132, 163

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	x) s 61	English	French	
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	aa) s 64	English	French	
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	ff) s 83	English	French	
	gg) s 84	English	French	
	hh) s 85	English	French	
	ii) s 86	English	French	
	jj) s 87	English	French	

Legislative Authorities		Language		Paragraph Ref
	kk) s 88	English	French	
	ll) s 89	English	French	
	mm) s 90	English	French	
	nn) s 91	English	French	
	oo) s 109	English	French	
	pp) s 109(b)	English	French	
52.	*Indian Oil and Gas Act*, RSC 1985, c I-7	English	French	75
53.	*Law List Regulations*, SOR/94-636	English	French	44
54.	*Migratory Birds Convention Act*, 1994, SC 1994, c 22	English	French	75, 121
55.	*Navigable Waters Protection Act*, RSC 1985, c N-22	English	French	42, 44
56.	*Physical Activities Regulations*, SOR/2019-285	English	French	2, 6, 15, 38, 54, 55, 56, 59, 60, 61, 62, 67, 68, 69, 81, 87, 132, 139
	a) Schedule	English	French	
	b) s 18(a)	English	French	
	c) s 18(b)	English	French	
	d) s 18(c)	English	French	
	e) s 18(e)	English	French	
	f) s 18(f)	English	French	
	g) s 30	English	French	
	h) s 31	English	French	
	i) s 32	English	French	
	j) s 33	English	French	
	k) s 37(a)	English	French	

Legislative Authorities		Language		Paragraph Ref
	l) s 37(c) m) s 37(d) n) s 37(e) o) s 37(f) p) s 51 q) s 54(a) r) s 54(b)	English English English English English English English	French French French French French French French	
57.	*Species at Risk Act*, SC 2002, c 29	English	French	75, 121

Legislative Debates		Paragraph Ref
58.	"Bill C-69, 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", 2nd reading, *House of Commons Debates*, vol 148, 42-1, No 264 (14 February 2018) (Hon Catherine McKenna), online: *House of Commons* https://www.ourcommons.ca/DocumentViewer/en/42-1/house/sitting-264/hansard	98, 139
59.	"Bill C-69, 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", 3rd reading, *House of Commons Debates*, vol 148, 42-1, No 313 (12 June 2018) (Hon Catherine McKenna), online: *House of Commons* https://www.ourcommons.ca/DocumentViewer/en/42-1/house/sitting-313/hansard	86

Secondary Sources		Paragraph Ref
60.	"Discussion Paper on the Proposed Project List: A Proposed Impact Assessment System" (May 2019), online (pdf): *Government of Canada* https://www.canada.ca/content/dam/themes/environment/conservation/environmental-reviews/project-list-en.pdf	62, 66, 67
61.	Environment and Climate Change Canada, *Strategic Assessment of Climate Change* (Ottawa: Environment and Climate Change	65, 97, 112

Secondary Sources		Paragraph Ref
	Canada, 2020), online: *Government of Canada* https://www.canada.ca/en/services/environment/conservation/assessments/strategic-assessments/climate-change.html	
62.	Expert Panel for the Review of Environmental Assessment Processes, *Building Common Ground: A New Vision for Impact Assessment in Canada* (Ottawa: Her Majesty the Queen in Right of Canada, as represented by the Minister of Environment and Climate Change, 2017), online (pdf): *Government of Canada* https://www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews/environmental-assessment-processes/building-common-ground.html	36
63.	Guy Régimbald & Dwight Newman, *The Law of the Canadian Constitution*, 1st ed (Markham: LexisNexis Canada, 2013) at §§5.78, 5.79, 5.92, 5.99	158, 160, 161
64.	Impact Assessment Agency of Canada, "Potential Conditions under the *Impact Assessment Act*" (21 September 2022), online (pdf): *Government of British Columbia, Epic, Cedar LNG* https://projects.eao.gov.bc.ca/api/public/document/632a0a25f9c1eb0022cbcf6d/download/Draft%20Potential%20Federal%20Conditions_Cedar%20LNG_EN.pdf	112
65.	Letter from the Honourable Steven Guilbeault, P.C., M.P. to Mark Little (6 April 2022) re: Base Mine, online: *Government of Canada* https://iaac-aeic.gc.ca/050/evaluations/document/143528	84
66.	Letter from the Honourable Minister Jonathan Wilkinson, P.C., M.P. to Simon Stepp (11 June 2021) re: Coalspur Mines, online: *Government of Canada* https://iaac-aeic.gc.ca/050/evaluations/document/140865	84, 86, 87
67.	Merriam-Webster, "Auxiliary", online: https://www.merriam-webster.com/dictionary/auxiliary	53
68.	Peter Hogg & Wade Wright, *Constitutional Law of Canada*, 5th ed (Toronto: Carswell, 2007) (loose-leaf updated 2022) at 15-16	23, 159
69.	Practitioner's Guide to Federal Impact Assessments, "Guidance: Considering the Extent to which a Project Contributes to Sustainability" (6 December 2021), online: *Government of Canada* https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/practitioners-guide-impact-assessment-act/guidance-considering-extent-project-contributes-sustainability.html	36
70.	Practitioner's Guide to Federal Impact Assessments, "Policy Context: Public Interest Determination under the *Impact Assessment Act*" (6 December 2021), online: *Government of Canada* https://www.canada.ca/en/impact-assessment-	91, 99

Secondary Sources		Paragraph Ref
	agency/services/policy-guidance/public-interest-determination-under-impact-assessment-act.html	
71.	Robert D Cairns et al, "The Resource Amendment (section 92A) and the Political Economy of Canadian Federalism" (1985), 23:2 Osgoode Hall LJ 253	135
72.	Rodney Northey, *Guide to the Canadian Environmental Assessment Act* (Toronto: LexisNexis Canada Inc, 2018) at 245-246	49
73.	"Statement by the Government of Canada on Thermal Coal Mining", online: *Government of Canada* https://www.canada.ca/en/environment-climate-change/services/managing-pollution/energy-production/electricity-generation/statement-government-canada-thermal-coal-mining.html	88