

Environmental Assessment Under Siege – Again!

Reference re Impact Assessment Act

April 2024

The common future of all Canadians — and humanity as a whole — depends on a healthy environment (*114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40, [2001] 2 S.C.R. 241, at para. 1). Over 25 years ago, this Court recognized that environmental protection had become “a major challenge of our time” (*Hydro-Québec*, at para. 127). Since then, major environmental risks have only intensified. As this Court recently warned, the environmental harms caused by climate change pose “an existential challenge” and “a threat of the highest order to the country, and indeed to the world” (*References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 (“*References re GGPPA*”), at para. 167). Today, “[t]he undisputed existence of a threat to the future of humanity cannot be ignored” (para. 167).¹

1. Introduction - p.2
2. Supreme Court of Canada - p.4
3. Treatment of Greenhouse Gas Emissions - p.8
4. Reactions to SCC Opinion - p.12
5. Impact on Climate Action - p.16
6. Conclusion - p.20
- Appendix 1 - Summary of *Impact Assessment Act* - p.23
- Appendix 2 - Alberta Court of Appeal - p.26

It has been more than six months since the Supreme Court of Canada (SCC) rendered its opinion that significant parts of the federal *Impact Assessment Act* (IAA) are unconstitutional, and the reverberations are still being felt. From the perspective of trying to control greenhouse gas emissions (GHGs) in Ontario and elsewhere, and reduce the severity of the climate crisis, this paper reviews the lead up to the decision, what the judgment says, and its potential consequences.

¹ From paragraph 226 of the October 23, 2023 judgment of the Supreme Court of Canada in *Reference re Impact Assessment Act*, 2023 SCC 23, and found at <https://decisions.scc-csc.ca/scc-csc/scc-csc/en/20102/1/document.do>. The majority opinion written by Chief Justice Wagner is 125 pages, and the minority (dissenting) opinion by Justices Karakatsanis and Jamal is 76 pages. An abbreviated version is found in the decision’s 15-page summary, referred to as a headnote, at pp. 7-22. The symbol § in this paper refers to specific paragraph numbers in the judgment.

1. **Introduction:**

The *IAA* came into force in 2019² and provides for environmental assessment (EA) in the federal sphere. EA is intended to be a vital, forward-looking, environmental planning and decision-making tool designed to help government anticipate and prevent serious mistakes before they are made - mistakes that could cause serious and irreversible harm. In other words, look before you leap!³ The literature and jurisprudence (judicial case law) on EA law in Canada is voluminous, and the field is technical and complex. Ottawa began using EA about fifty years ago. Appendix 1 of this paper provides a brief summary of the *IAA*.

The need for robust EA is more important now than ever before, as climate litigation in Canada is progressing too slowly, and the public trust doctrine has not been embraced by our courts.⁴ And in Ontario, the provincial EA regime was severely undermined when the conservative government of Premier Mike Harris was in power for eight years, commencing in 1995. Moreover, since its election in 2018 the conservative government under Premier Doug Ford has been actively dismantling provincial EA ever further.

After the *IAA* was passed, the Alberta Government quickly led the way in the courts in an attempt to derail the legislation, in part to avoid having to face up to the climate crisis and begin to

² Bill C-69, the *IAA*, S.C. 2019 c. 28 (<https://laws.justice.gc.ca/PDF/I-2.75.pdf>) is Canada's fourth and most recent legal regime to deal with environmental assessment since the 1970s. It replaced the *Canadian Environmental Assessment Act, 2012*. The Act is 114 pages and has 188 sections, 4 schedules and 5 separate Regulations (<https://www.canlii.org/en/ca/laws/stat/sc-2019-c-28-s-1/latest/sc-2019-c-28-s-1.html#regulation>). The previous legislation, the *Canadian Environmental Assessment Act*, was passed in 2012, and is often referred to as *CEAA 2012*.

³ An open letter (December 1, 2023) to the Prime Minister and nine Cabinet Members, by eight, Canadian, legal experts in environmental law and impact assessment, described the significance of EA as follows:

Impact assessment is the best, and often only, tool we have for serving the public interest by identifying the impacts, risks, benefits and uncertainties of proposals before they occur. Often called a 'look before you leap' process, impact assessment is a cornerstone of environmental policy around the globe. It is a requirement of the 1992 Rio Declaration, the Convention on Biological Diversity, the Kunming-Montreal Global Biodiversity Framework, and numerous other international, regional and development bank instruments, and can be integral to fostering sustainability.

⁴ "Public Trust Doctrine and Climate Litigation in Canada," July 19, 2023 paper by Myrna El Fakhry Tuttle, Alberta Civil Liberties Research Centre.

control its GHGs and those of the fossil fuels it produces and sells.⁵ It appears that Conservative governments appear to want little or nothing to do with environmental protection if it gets in the way of making money on resource extraction.⁶ The judicial challenge was first dealt with by the Alberta Court of Appeal (ACA) in 2022 and later by the SCC. The 210-page decision by Canada's top court was rendered on October 13, 2023. Questions continue about the legacy of the court's decision, and whether federal EA will be allowed to play an effective role in controlling GHGs in Ontario and beyond.

The basic argument advanced in the ACA was that the federal government did not have the power or right under the *Constitution Act, 1867* to impose EA on industrial projects within the province. In a 4:1 split decision, the ACA agreed, and declared that the Act and Regulations made thereunder are unconstitutional.⁷ Excerpts from this judgment are included in Appendix 2 of this paper.

The ACA opinion set the stage for the appeal to the SCC which was heard on March 21-22, 2023. A total of 34 interveners participated in the hearing in addition to the federal and Alberta

⁵ One public interest environmental lawyer described anti-environment politicians as running in circles and setting their hair on fire over the fear of the *IAA*.

⁶ In contrast with this zeal to bull-doze at full speed, scientists warn that climate breakdown is getting worse quickly. See for example "The 2023 state of the climate report: Entering uncharted territory" by William J. Ripple et al, published in *Bioscience* on October 24, 2023:

In 2023, we witnessed an extraordinary series of climate-related records being broken around the world. The rapid pace of change has surprised scientists and caused concern about the dangers of extreme weather, risky climate feedback loops, and the approach of damaging tipping points sooner than expected. ... This year, exceptional heat waves have swept across the world, leading to record high temperatures. The oceans have been historically warm, with global and North Atlantic sea surface temperatures both breaking records and unprecedented low levels of sea ice surrounding Antarctica In addition, June through August of this year was the warmest period ever recorded, and in early July, we witnessed Earth's highest global daily average surface temperature ever measured, possibly the warmest temperature on Earth over the past 100,000 years. ... It is a sign that we are pushing our planetary systems into dangerous instability.

The following excerpt was reported in an article in the Guardian by Oliver Milman on July 19, 2023:

The world is shifting towards a superheated climate not seen in the past 1m years, prior to human existence, because "we are damned fools" for not acting upon warnings over the climate crisis, according to James Hansen, the US scientist who alerted the world to the greenhouse effect in the 1980s.

⁷ The 209 page ACA decision, cited as *Reference re Impact Assessment Act*, 2022 ABCA 165, was issued on May 10, 2022 (https://albertacourts.ca/docs/default-source/ca/reference-re-impact-assessment-act-2022-abca-165.pdf?sfvrsn=8eeea683_5).

governments, including seven other provincial Attorneys General, eight Indigenous organizations and ten environmental groups.

2. **Supreme Court of Canada:**

The optics and potential consequences of the appeal were patently clear to most observers concerned about the climate crisis. Some provinces which have an established track record of doing little or nothing about reducing GHGs and otherwise mitigating climate disintegration, appeared before the court and claimed that

- they are responsible governments that could be trusted to do the right thing in assessing major industrial projects;
- oversight and intervention by the federal government in the EA's of these projects is unnecessary and an unreasonable intrusion;
- interprovincial and international impacts from provincial GHGs are no big deal and nothing to worry about;
- provincial sensitivity to the exercise of federal powers trumps the need to ramp up GHG assessment and control.

To the great disappointment of the environmental community, most of the judges sided with Alberta, although the majority's opinion in the 5:2 split decision differed somewhat from the majority in the ACA.⁸ The SCC majority opinion contains a useful history of EA in the federal sphere (§9-28) and an overview of the *IAA* (§29-49).

As noted by some observers, it “is the first time a majority of the Supreme Court has declared any federal environmental legislation unconstitutional in four decades.”⁹ The Constitution was

⁸ See the detailed analysis of the SCC judgment posted on October 19, 2023 by the Canadian Environmental Law Association (CELA), authored by staff lawyers Joseph Castrilli and Richard Lindgren: (<https://cela.ca/blog-the-supreme-court-ruling-on-the-impact-assessment-act-climate-change-implications/>).

⁹ From “Federal Impact Assessment in Flux: the Implications of the Supreme Court’s Decision in the *Reference Re Impact Assessment Act*” (March 14, 2024), by Liane Langstaff, Stacy Porter and Maggie Sainty at Gowlings, a very large Canadian law firm: <https://gowlingwl.com/en/insights-resources/articles/2024/federal-impact-assessment-in-flux/#:~:text=The%20federal%20IAA%20was%20enacted,energy%2C%20infrastructure%20and%20mining%20projects..>

drafted a very long time ago, and does not mention environment or climate. As a result, it has fallen to the courts to determine which levels of government have power in these areas. Over time the case law has established that there is a shared and overlapping responsibility on the provinces as well as the federal government to govern with respect to this subject matter. The majority opinion stated in §2:

Three decades ago, this Court acknowledged that the “protection of the environment has become one of the major challenges of our time” In a long line of cases since then, this Court has affirmed that both Parliament and the provincial legislatures have the ability to enact laws to address various facets of environmental protection, including schemes of environmental assessment.

Traditionally, pollution created within a province was viewed as the sole responsibility of that province unless the pollution spreads to other provinces, impacts or involves areas under federal control (e.g., fisheries, endangered species, nuclear waste) or has other and wider impacts (e.g., international environmental obligations). The hearing was in no way restricted to the application of the Act to regulating the discharge of GHGs, but it is worth noting that the topic of climate and sustainability is referenced throughout the majority and minority opinions.¹⁰

Several aspects of the majority opinion are listed below:

- The court stated that the “sole issue in this appeal is whether the *IAA* and its Regulations are *ultra vires* Parliament” (§59).
- The portion of the Act dealing with projects on federal lands or outside of Canada (sections 81-91) is valid.
- Other projects can be subjected to *IAA* review for those aspects which fall within federal jurisdiction.
- “Alberta’s concerns about the scheme’s designation mechanism are, with respect, misplaced. The fact that a project involves activities primarily regulated by the provincial legislatures does not create an enclave of exclusivity. Even a ‘provincial’ project may cause effects in respect of which the federal government can properly legislate.

¹⁰ Lest there be any doubt about the subject matter of the court’s focus, the word environment is mentioned 456 times throughout the judgment, climate 18 times, greenhouse gas 18 times, sustainability 33 times, and sustainable 15 times.

Accordingly, the inclusion in the Regulations of some ‘provincial’ projects — in the sense that they involve activities primarily regulated by the provinces — is not itself problematic.” (§142)

- In the EA process, Canada is allowed to gather information about potential impacts that are not within federal jurisdiction.
- During the EA screening process, the potential for adverse federal effects must be given “primacy” over other considerations.¹¹
- Parliament does not have broad jurisdiction over GHGs except for carbon pricing, at least not pursuant to the national concern aspect of the peace, order and good government power (POGG)¹² granted to the federal government by the Constitution.¹³
- During the planning and assessment stages of an EA, Ottawa may temporarily stop progress of a project if it affects any aspects of the environment falling within federal jurisdiction, but “these prohibitions are too broad to be permanent.”¹⁴
- The *IAA*’s designated project regime has overstepped federal constitutional limits and is therefore unconstitutional.
- The federal government should confine its EA program to its own constitutional lane, and not veer into that of the provinces.
- The definition of “effects within federal jurisdiction” is overbroad and this can

¹¹ From a blog posted by the Faculty of Law of the University of Calgary titled “Wait, What!? What the Supreme Court Actually Said in the *IAA Reference*,” October 16, 2023, by Martin Olszynski, Nigel Bankes and David Wright: [https://ablawg.ca/2023/10/16/wait-what-what-the-supreme-court-actually-said-in-the-iaa-reference/#:~:text=Writing%20for%20a%205%3A2,%E2%80%9CIAA%E2%80%9D\)%20is%20unconstitutional.](https://ablawg.ca/2023/10/16/wait-what-what-the-supreme-court-actually-said-in-the-iaa-reference/#:~:text=Writing%20for%20a%205%3A2,%E2%80%9CIAA%E2%80%9D)%20is%20unconstitutional.) Olszynski (for WWF Canada) and Wright (for the Canadian Association of Physicians for the Environment, CAPE) were co-counsel in the *IAA* proceeding before the SCC.

¹² The national concern doctrine, a branch of the peace, order and good government power (POGG) of the federal government under the Constitution (s.91), applies to matters which did not exist at the time of Confederation and are not listed in the Constitution: *R. v. Crown Zellerbach*, [1988] 1 SCR 401. According to the case headnote, it also applies to matters involving a local or private nature within a province, but have become elevated in importance and risen to become a national concern. However, it is separate and distinct from the national emergency doctrine of POGG, which can have only temporary application and requires a time limit.. To qualify as a national concern, a matter must have a singleness, distinctiveness and indivisibility that distinguishes it from a matter of provincial concern. In evaluating this question, consider the effect on extra-provincial interests if a province failed to deal effectively with the matter.

The SCC’s opinion in the *Reference re GGPPA* case indicated that the federal government cannot comprehensively regulate GHGs under the national concern doctrine (§199). §186 of the SCC’s *IAA* opinion states that similarly, “inclusion of such sweeping regulatory powers in impact assessment legislation is likewise impermissible.”

¹³ Op. cit. Olszynski et al.

¹⁴ Op. cit. Olszynski et al.

inappropriately influence the regime's decision-making functions.

- The *IAA* inappropriately permits the federal government to make decisions on projects that it has no jurisdiction to regulate.

The key complaint about the *IAA* is illustrated in the following excerpts from the majority opinion:

[134] In my view, the pith and substance of the portion of the scheme that deals with “designated projects” exceeds the bounds of federal jurisdiction, and this portion of the scheme is therefore *ultra vires*. This is so for two overarching reasons.

[135] First, even if I were to accept Canada's contention as to the defined federal effects, these effects do not drive the scheme's decision-making functions. Consequently, the scheme is not in pith and substance directed at regulating these effects.

[136] Second, I do not accept that the defined term “effects within federal jurisdiction” aligns with federal legislative jurisdiction under s. 91. This overbreadth exacerbates the constitutional frailties of the scheme's decision-making functions. ...

[166] In my view, s. 63 of the *IAA* represents an unconstitutional arrogation of power by Parliament. Even if this Court were to accept Canada's submission that the defined “effects within federal jurisdiction” are aligned with federal legislative competence - a point to which I will return - the public interest decision is constitutionally vulnerable. This decision-making process transforms what is *prima facie* a determination of whether adverse federal effects are in the public interest into a determination of whether the project as a whole is in the public interest.

[167] Two features of the mandatory public interest factors warrant attention. First, these factors are not all confined to federal legislative competence. For example, s. 63(a) requires a consideration of “sustainability”, a term defined as meaning “the ability to protect the environment, contribute to the social and economic well-being of the people of Canada and preserve their health in a manner that benefits present and future generations” (s. 2). This encompasses all environmental, social and economic effects, not only those that the federal government has jurisdiction to regulate.

[168] Second, some factors are framed in relation to the assessment of the project *as a whole* rather than to the adverse “effects within federal jurisdiction”. To use the same

example, s. 63(a) requires a consideration of “the extent to which the designated project contributes to sustainability.” Similarly, s. 63(e) requires a consideration of “the extent to which the effects of the designated project” - in other words, not only its federal effects - “hinder or contribute to the Government of Canada’s ability to meet its environmental obligations and its commitments in respect of climate change.”

[169] The central problem with the public interest decision is not the s. 63 factors themselves but rather the manner in which these factors drive decision making. The public interest decision must reflect a focus on the project’s federal effects. As I will explain, however, s. 63 permits the decision maker to blend their assessment of adverse federal effects with other adverse effects that are not federal, such as the project’s anticipated greenhouse gas emissions (under s. 63(e)). Put another way, the adverse *non-federal* effects can amplify the perceived severity of the adverse *federal* effects and, effectively, become the underlying basis for the conclusion that the latter are not in the public interest. The mandatory cumulation of adverse non-federal effects shifts the focus of the decision from the adverse effects within federal jurisdiction to the overall adverse effects of the project.

The minority opinion held that the *IAA*’s decision-making process is constitutionally valid. The adverse federal effects in the Act anchor the federal review and decision-making, and fit within the heads of power which support Canada’s jurisdiction (§224, 304, 336, 354). In the event the federal government attempts to exceed its jurisdictional limits in a specific case, the court noted that judicial review proceedings can be instituted to rectify the situation.

3. Treatment of Greenhouse Gas Emissions:

At the hearing it appears that the federal government maintained that GHGs produced within a province are not Ottawa’s responsibility, unless the evidence establishes that they contribute substantially to interprovincial or extra-territorial climate impacts.¹⁵ In my opinion this position suggests a misunderstanding by the court of the science related to trajectory of GHGs.

Although I am not a scientist, it is my understanding that GHGs spread beyond the municipal, provincial and federal boundaries where they originate. They rise, float, travel and mix, thereby

¹⁵ See for example §187 in the SCC majority opinion.

contributing to the atmospheric greenhouse effect and resulting in climate disturbance and warming throughout the planet.¹⁶ There is nothing to contain GHGs to the geographic area where they are discharged. Winds and other conditions mix and transport GHGs very long distances. For example, some of the areas suffering most from the effects of global warming (e.g., the Arctic) are extremely far from major sources of GHG discharge, such as the Alberta tar sands.

According to critics, in the case it presented to the SCC the federal government failed to rely on the transboundary impacts of projects, including GHGs, and “this was a missed opportunity to develop this area of the law.”¹⁷ But that said, “the majority has not completely shut the door on the possibility that a more fully developed argument to the effect that transboundary impacts, appropriately circumscribed, might fall within a new [constitutional] category of national concern.”

The majority opinion states in §169 (reproduced above) that GHGs are not automatically assumed to have federal adverse effects. Rather, they fall within exclusive provincial jurisdiction unless proven otherwise. Yet the court stated in §96 that “the prohibition on doing any act that may cause ‘a change to the environment’ in another province *prima facie* captures any act that may result in greenhouse gas emissions,” and this represents “a pollution problem that is not merely interprovincial, but global in scope.” This point is also made in §184 and acknowledges the 2021 SCC decision in *References re Greenhouse Gas Pollution Pricing Act (GGPPA)* at §173. It is reproduced below:

Given that the matter at issue is establishing minimum national standards of GHG price

¹⁶ For example, the following is an excerpt from §149 of the decision in *Mathur v. Ontario* by Justice Vermette, Superior Court of Justice on April 14, 2023:

As stated by the Supreme Court of Canada in the *GHG Reference* at para. 188, the notion that a province’s GHG cause no measurable harm and do not have a tangible impact should be rejected. Such an argument, if accepted, would apply to most jurisdictions and all individual sources of emissions everywhere. It would impede collective action and hinder the solving of global problems. Given that only five countries individually emit more than 2% of global GHG, I agree with the Applicants that “most jurisdictions could paralyze the required global effort by claiming that their emissions are of little consequence.” Ultimately, Ontario’s emissions contribute to climate change and the increased risks that it creates. Every tonne of CO₂ emissions adds to global warming and lead to an quantifiable increase in global temperatures that is essentially irreversible on human timescales.

This judicial fact-finding made after a full hearing of evidence was not mentioned by the SCC.

¹⁷ Op.cit. Olszynski et al.

stringency to reduce GHGs, it is important to begin by observing that these gases are a specific and precisely identifiable type of pollutant. The harmful effects of GHGs are known, and the fuel and excess emissions charges are based on the global warming potential of the gases Moreover, GHG emissions are predominantly extraprovincial and international in their character and implications. This flows from their nature as a diffuse atmospheric pollutant and from their effect in causing global climate change. GHG emissions are precisely the type of diffuse and persistent substances with serious deleterious extraprovincial effects that the dissent in *Hydro-Québec* suggested might appropriately be regulated on the basis of the national concern doctrine: para. 76. In *Interprovincial Co-operatives*, a case concerning one province's emission of pollutants into an interprovincial river, Pigeon J. observed that the Court was "faced with a pollution problem that is not really local in scope but truly interprovincial": p. 514. GHG emissions represent a pollution problem that is not merely interprovincial, but global, in scope.

A key finding regarding GHGs in the *IAA* opinion is found in §186:

[186] In the *References re GGPPA*, this Court upheld a law whose matter was limited to carbon pricing of greenhouse gas emissions, "a narrow and specific regulatory mechanism" (para. 199). By contrast, the "designated projects" scheme's defined interprovincial effects lack specificity as to the type or scale of the "change to the environment" that is said to be a federal effect. In the *References re GGPPA*, this Court expressly cautioned that "[a]ny legislation that related to non-carbon pricing forms of [greenhouse gas] regulation — legislation with respect to roadways, building codes, public transit and home heating, for example — would not fall under the matter of national concern" (para. 199). If the matter of national concern recognized by this Court in the *References re GGPPA* does **not extend to enabling the federal government to comprehensively regulate greenhouse gas emissions**, then the inclusion of such sweeping regulatory powers in impact assessment legislation is likewise impermissible. (emphasis added)

The dissenting opinion in the *IAA* judgment also repeats what appears to be a misunderstanding about the transboundary impact of GHGs emitted within a province, and cites the federal government's submission in support of it:

[351] We agree with Canada's concession that greenhouse gas ("GHG") emissions —

although relevant to the public interest determination — will generally not be an effect within federal jurisdiction under the *IAA*'s definition. Under the *IAA*'s project-specific approach, the federal government would need to show that an individual project's GHG emissions would cause a non-trivial change to the environment in another province or outside Canada. If Canada attempts to treat a project's GHG emissions as an effect within federal jurisdiction, then whether an individual project's GHG emissions, in context of the global scale of the climate crisis, may cause non-trivial changes to the environment is best assessed through case-specific judicial review of whether a particular exercise of discretion is consistent with the national concern test, set out in the *References re GGPPA*. Nor, we would add, is there any evidence that Canada has ever treated GHG emissions as an effect within federal jurisdiction in administering the *IAA*. While the Minister has referred to a project's GHG emissions when discussing the impacts of a project that was otherwise not in the public interest, we are not aware of any instance in which GHG emissions have themselves ever been relied on as an effect within federal jurisdiction (see Impact Assessment Agency of Canada, *Minister's Response: Vista Coal Underground Mine Project and Vista Mine Phase II Expansion Project*, September 29, 2021 (online), explaining that a mine was designated based on potential adverse effects on fisheries and Indigenous peoples; Suncor Energy Inc., *Base Mine Extension: Initial Project Description*, February 2020 (online), identifying potential adverse impacts on fisheries, aquatic species, and migratory birds). ... And although Canada may have contemplated treating GHG emissions as an effect within federal jurisdiction in a discussion paper when proposing the Regulations, neither the Regulations nor the Regulatory Impact Analysis Statement take that position. Rather, Canada rejected proposals to use GHG emissions as a standalone basis for an effect within federal jurisdiction.

This is the nub of the problem: GHGs are unlike most other pollutants and must be treated very differently for that reason. This brings to mind the caution advocated by a legal scholar and referenced in a decision (December 29, 2023) by Judge Ann Aiken in the federal District Court of Oregon, in the youth climate case of *Juliana v. United States* at p.6:

Legal scholar and professor Mary Christina Wood contends that the all-encompassing breadth of ongoing "irreparable harm" sets the climate emergency apart from any other crisis, in terms of the human interests at stake. As Professor Wood eloquently states: "Because no crisis is as ominous, imminent, and far reaching, the climate emergency must be considered *sui generis*," that is, "in a class of its own." The legal approach must

“rise to the emergency rather than repeat a failed past paradigm.”

4. Reactions to the SCC Opinion:

According to Anna Johnston, staff lawyer at West Coast Environmental Law (WCEL) in Vancouver, “Canada’s lawyers didn’t come well prepared to answer questions” about federal EAs for projects with impacts in other provinces beyond the source.¹⁸ This is in contrast to the carbon reference case “where the government made a strong case and pushed those arguments to a win.” She suggested that “the justices sought a ‘political balance’ that would maintain national unity.” During a webinar conducted by WCEL on October 30, 2023, she noted that GHGs affect all aspects of the economy. This led to concerns by the majority that federal intervention related to GHGs might allow Ottawa to pervade every provincial activity. That said, she feels that the Project List has passed constitutional muster and is supported by the decision. As a result, she feels it should be expanded by IAAC (Impact Assessment Agency of Canada) immediately.

Some lawyers have warned that uncertainty regarding the future of the *IAA* will cause more litigation and continuing unpredictability, which will deter business investment in Canada.¹⁹ This might affect such things as LNG facilities, bitumen projects and mining. They also predict that in future, the SCC decision will narrow the federal role in approving projects. For provincially regulated projects, the federal role will be “a secondary sliver, not the main driver.” Fewer projects may be designated for federal EA than in the past.

Environmental law Professor Stewart Elgie wrote that the SCC opinion has “reaffirmed 35 years of jurisprudence establishing that Ottawa has broad authority to make laws about the environment and climate change, as long as it stays within its constitutional limits, which it normally does.”²⁰

¹⁸ Report in The Energy Mix, “Oil and Gas Cap to Proceed While Feds Respond to Supreme Court IAA Ruling” (October 17, 2023).

¹⁹ From webinar transcript posted at <https://www.torlys.com/our-latest-thinking/torlys-quarterly/q4-2023/impact-assessment-act-found-unconstitutional>. Torlys LLP is a large, Canadian law.

²⁰ “The feds’ control over climate policy is alive and well,” by Stewart Elgie, the National Observer (October 20, 2023).

Prior to the SCC ruling, was the *IAA* being utilized to play an effective role in controlling greenhouse gas emissions? Not according to several commentators. Stephen Hazell, counsel for Nature Canada at the SCC hearing, indicated that few projects have been stopped by the *IAA* process.²¹ Moreover, fewer and fewer projects are even being assessed under federal EA.

The dissent opinion noted that “the *CEAA 1992* regime applied to roughly five to six thousand projects annually” (§241). By contrast, “the *CEAA 2012* regime applied to only about 70 projects” annually (§242). And “only seven new projects entered the *IAA* regime during its first year.” And worse, although the GHGs of a fossil fuel production facility might be examined, none of the downstream carbon emissions produced by the burning of its fossil fuel products are assessed.²² As noted by the minority opinion in §351 (reproduced above), the federal government has never treated GHGs as falling within its jurisdiction under the *IAA*.

After the SCC judgment was released, the federal government asked a new cabinet working group on regulatory efficiency, chaired by Labour and Seniors Minister Seamus O’Regan, to consider possible amendments.²³

[As reported by iPolitics] Prime Minister Justin Trudeau has “made it clear that the working group is focused on getting ‘big projects built,’ with a focus on slashing red tape and making the regulatory process more efficient.” ...

Meanwhile, the government will press ahead with its forthcoming cap on oil and gas emissions and Clean Electricity Regulations, the Globe and Mail says. “The opinion of the court does not call into question other regulatory initiatives under development, and we are confident that they are within the purview of the federal government,”

[Environment Minister Steven] Guilbeault told the paper in a statement.

A press release from IAAC issued the same date as the SCC decision, indicates that at present

²¹ He participated along with Anna Johnston in the West Coast Environmental Law webinar on October 30, 2023 referred to previously.

²² By way of contrast, consider the decision of the Oslo District Court in Norway, on January 18, 2024, in *The Greenpeace Nordic Association & Nature and Youth v. Ministry of Energy*. That court ruled that some petroleum production licenses were invalid because they were issued without consideration of the impact from downstream GHG emissions.

²³ Source: The Energy Mix on October 17, 2023.

“there are 23 projects in the federal impact assessment process under the *IAA*, with eight final decisions having been issued by the Minister or the Agency allowing those projects to move forward.” On October 25, 2023 the Minister “issued interim guidance on the law for project proponents and [IAAC] until the legislation is revised.”²⁴ The CBC’s coverage of this also included the following:

According to a government guidance document, the environment minister’s discretionary authority to conduct assessments of projects has been paused. Those powers will resume only once the amendments take effect, says the guidance document. Current project assessments will continue, the document says, and the IAAC will provide opinions on whether proposed projects fall under federal jurisdiction. The agency also can determine “whether a full impact assessment” of a project “is warranted,” the guidance document says. Guilbeault said 23 projects are currently being assessed, all in their “early stages.”

The IAAC confirmed it will continue its work on Ring of Fire projects in Ontario and offshore wind turbine projects in Nova Scotia and Newfoundland and Labrador, saying the work will help the agency better understand the impacts of these proposed developments. “We don’t want this federal adjustment to cause delays down the road,” Guilbeault said.

Other political reactions to the SCC decision were swift. As reported by The Energy Mix, Ontario’s Premier Ford “said the ruling would allow the province to ‘get shovels in the ground.’” And further: “This is a great decision - both for economic development in Canada and for our federal system.” One commentary described anti-EA comments of this sort as “hyperbole and misinformation.”²⁵

Elizabeth May, co-leader of the federal Green Party, wanted to “set aside a lot of nonsense that has been put forward” about the decision’s effect:

The court’s decision on C-69 [the *IAA*] has no effect on the federal government’s right to price carbon, nor does it impact federal authorities’ ability to regulate to protect climate.

²⁴ CBC News, “Liberals will amend *Impact Assessment Act* after Supreme Court found it unconstitutional,” by David Thurton, October 26, 2023.

²⁵ Op. cit. Olszynski et al.

It also does not mean the federal government cannot review environmental impacts. It does mean that the sloppy and discretionary approach of one part of C-69 needs to be corrected.²⁶

She claims that the Act “was deeply flawed” from the outset in ways that she had warned about before Bill C-69 was passed. The legislation adopted the approach implemented by the Conservative government of former Prime Minister Harper in 2012, which “drastically reduced the number of projects facing review - from over 4,000 a year to fewer than 100.” She objected to the type of “environmental assessment process that places too much power in the hands of the federal minister and what happens to land on an arbitrary list of designated projects.” By limiting designation and review to “major” projects alone, numerous potentially harmful undertakings were “simply pushed ahead under the radar.”

In amending the Act to pass muster with the SCC, she recommends the government now follow the advice it received from “a blue-ribbon panel of environmental law experts” in 2017.

The federal NDP Party was also opposed to Bill C-69 when it was debated in 2018:

“From the beginning, New Democrats had serious concerns with the Liberals’ environmental assessment law,” the NDP’s environment and climate change critic Laurel Collins said in a media statement. “We’re going to push the Liberals to make sure that the amendments needed to fix the law and protect the environment are brought forward quickly.”²⁷

As usual, the opposite position has been taken by the federal Conservative Party. The same CBC News report indicated as follows:

The Conservatives, on the other hand, are promising to drop the law [the IAA] entirely, arguing it drives investors away. “Conservatives will scrap Bill C-69, streamline red tape, reduce permitting timelines, and cut the carbon taxes so the private sector can build

²⁶ “Elizabeth May: Good Riddance to the Impact Assessment Act,” opinion column in *The Tyee*, October 18, 2023. She is a former environmental lawyer, and was senior policy advisor to a federal, Conservative, environment minister in the 1980s.

²⁷ Op. cit. Thurton, CBC News.

major projects, create jobs and expand traditional and renewable resource development and exports,” Conservative natural resources critic Shannon Stubbs said in a media statement.

5. **Impact on Climate Action:**

What effect might the SCC decision have on climate action in Ontario and beyond?

Environmental lawyer, David Wright, noted that the *IAA* was Ottawa’s attempt to deal with the wild west, namely Alberta, and impose some semblance of environmental regulation and stewardship. He feels that the majority opinion represents a step backward in democratic accountability.²⁸ Josh Ginsberg at Ecojustice said: “It’s never good news to hear that we’re losing an environmental protection tool, especially one so central as [EA], but the news is not as bad as it seems.”²⁹

Another general concern is that the SCC has “killed” the hope that Ottawa will legislate minimum EA requirements and standards which the provinces must follow.³⁰

In the short term, the possibility of persuading the federal government to designate (under the *IAA*) a new project or activity that falls within provincial jurisdiction in Ontario may have been lost, at least temporarily. As noted previously, in the immediate aftermath of the SCC decision the Minister announced he would not make any further designations under the Act.

What follows from that is the loss of the powerful prohibition on interim activity, the stop-all-work-now tool provided by s.7 of the *IAA*, which is discussed in Appendix 1. It has been so effective that in the SCC proceeding, the Ontario government sought to introduce new evidence

²⁸ David Wright was co-counsel to CAPE (Canadian Association of Physicians for the Environment) at the SCC hearing. His comments were made during a webinar on the SCC opinion hosted by the West Coast Law Association on November 14, 2023.

²⁹ Telephone interview with Ben Cousins on October 13, 2023 at BNN Bloomberg.

³⁰ This according to Anna Johnston, staff lawyer at West Coast Environmental Law in Vancouver.

indicating that it interfered with progress on the controversial highway 413 project.³¹ The court noted that this highway plan has been subjected to the *IAA*'s planning process since May 2021 (§214). Ontario's motion was denied on the basis that the 'fresh' evidence would not add "anything that is not already apparent from a close reading of the legislative scheme."

The majority opinion dwelt extensively with concerns expressed about the actual and potential hardship and unfairness of project delays caused by the impact of the s.7 prohibition (§94-102, 165, 180, 190-204). On this point, the dissenting opinion commented as follow:

[297] In the present reference, the majority of the Court claims that the *IAA* has two practical effects relevant to the legislation's pith and substance: first, "the scheme results in delays of indeterminate duration," while the regulatory process evaluates whether a project would have a significant adverse environmental effect; and second, "the impact assessment process requires the Agency, the project proponent, federal authorities and other implicated jurisdictions to expend resources" (paras. 106-7). In our view, both these inevitable consequences of applying the legislation are irrelevant in determining the pith and substance or constitutionality of the *IAA*. In the modern regulatory state, federal and provincial legislation often result in delay as regulatory agencies evaluate for compliance with statutory norms enacted to protect the public. Those statutes almost invariably result in the expenditure of resources — and often substantial resources.

³¹ The highway 413 proposal, also known as the GTA West Corridor, is a 60 km route connecting Vaughan with Milton. It will cost \$10 billion or more to build, cross the Greenbelt and "harm 2,000 acres of farmland, cut through 85 waterways, damage 220 wetlands and disrupt the habitats of 10 species-at-risk": from The Narwhal, "Everything You Need to Know about Doug Ford's Controversial Plans for new highways in Ontario," by Emma McIntosh, updated April 25, 2023. The route will also "cut through the protected Nashville Conservation Reserve" in order to avoid a proposed development. Consultants had warned that this would "maximize damage" to the Greenbelt. The government promised to streamline the project's EA to "allow work on bridges and other early construction ... before the review is completed." In addition, in 2020 the government "passed a bill to water down Ontario's environmental assessment regime overall."

An investigation by Torstar and the National Observer "found eight powerful developers, many of them prolific PC donors, owned over 3,300 acres of land near the highway's proposed path, which could skyrocket in value if the highway was built." They also reported that some "developers had hired lobbyists with ties to the PCs, including [Transportation Minister Caroline] Mulroney's former campaign chair."

Immediately after the SCC decision the Ontario government announced that it was applying to the Federal Court to challenge Ottawa's intervention in provincial projects like highway 413 and Ontario Place. As reported in the Narwhal in "How a Supreme Court ruling could affect highway 413, Ontario Place and the Ring of Fire" by Emma McIntosh on November 13, 2023, the application claimed the *IAA* process "has resulted in significant delays to a project that is of the highest priority to the province." We now know that the Federal Court challenge has been settled and the federal government has agreed to withdraw its *IAA* review of highway 413. In addition, there will be no *IAA* review of the government's plans for Ontario Place.

Legislation regulating toxic substances, food standards, product safety, and medicines come to mind, to name a few. But the delay and costs involved in complying with these and many other statutes that protect the public do not affect their constitutionality under the *Constitution Act, 1867*. Such concerns relate to the efficacy or wisdom of the legislation. They may be important policy matters for Parliament, but they are irrelevant for constitutional purposes.³²

The temporary halt in progress with some controversial Ontario projects backed by the province, resulting from potential or actual federal EA reviews, has been vital from an environmental and climate perspective. The Duffins Rouge Agricultural Preserve³³ east of Toronto, Highway 413 and Ring of Fire³⁴ development plans were slowed or paused, and additional time has allowed for

³² See also §271, 287 and 288.

³³ The battle to save Duffins Rouge Agricultural Preserve (DRAP) was summarized in a CBC News report published online, titled “1,200 homes on prime farmland: What’s known about the plan to develop the Greenbelt in Pickering, Ont.” by Ryan Patrick Jones (August 16, 2023). It is located beside the Rouge National Urban Park (RNUP) and consists of 4,700 acres of high quality farmland and “rare Carolinian habitat” that was supposed to be protected from development by such things as the Greenbelt, permanent agricultural easements and the *Duffins Rouge Agricultural Preserve Act*. Almost 30% is comprised of natural habitat and is a refuge for many wildlife species including snapping turtles, woodfrogs and bullfrogs. Despite objections from the local municipal council, in late 2022 the Ford government repealed this legislation and removed 2,300 acres of the DRAP from Greenbelt protection so that private well-connected developers could build and sell housing. Federal Environment Minister Guilbeault quickly warned that if necessary, Ottawa would use the *IAA* and intervene and protect both the DRAP and RNUP. The scandal over the provincial government’s gift of Greenbelt lands to developer friends led it to reverse course and restore all of the land to the Greenbelt.

³⁴ The Ring of Fire is a 5,000 km² (3,100 miles²) region located in the remote James Bay Lowlands of Northern Ontario, 540 km northeast of Thunder Bay, and contains large quantities of sought-after minerals such as chromite, nickel, copper, platinum group elements, gold and zinc. The Ontario government wants it to become a mining mecca. There are three federal EAs involving proposed supply roads to the site. In addition, there is a regional assessment underway pursuant to the *IAA*. It will study potential cumulative impacts from many projects.

The following is an excerpt from The Narwhal, “How a Supreme Court ruling could affect Highway 413, Ontario Place and the Ring of Fire” by Emma McIntosh (November 13, 2023):

But the outcome of any court case challenging the [*IAA*] could have huge implications for the future of the Far North region, which is blanketed with carbon-rich and ecologically sensitive peatlands. ...

A lot rests on the regional assessment in the Ring of Fire. Technically speaking, Ontario could forge ahead with its plans to facilitate road construction while the review plays out. But the province wants federal funding to advance the work, and National Resources Minister Jonathan Wilkinson has said he won’t decide whether to provide that funding until various environmental reviews, including the regional assessment, are complete.

The Supreme Court didn’t mention regional assessments in its [*IAA*] decision, and the federal government has said it plans to continue all regional assessments since they don’t appear to be affected by the ruling. But it’s not clear whether this type of assessment could be affected later if the courts do strike down the Act entirely.

meaningful investigation, media scrutiny, public input and mobilization.

Even without a federal decision to intervene pursuant to the *IAA*, its potential use has led in some cases to interruption and delay of the Ontario government's plans to proceed without comprehensive, or any, EAs. Examples of this include the Bradford By-pass highway project,³⁵ a 16 km road connecting Highways 400 and 404, and the plan to convert Ontario Place without prior public consultation into a giant, private spa under a 99-year lease to an Austrian spa company named Therme.³⁶

A comprehensive blog by the Canadian Environmental Law Association with respect to the SCC

³⁵ The proposed Bradford Bypass will cost upwards of \$1.5 billion to build, and run through the Holland Marsh section of the Greenbelt. According to the report in the *Narwhal* noted previously ("Everything You Need to Know about Doug Ford's Controversial Plans for new highways in Ontario"), this road will "cut through the narrowest point of its remaining wetlands [the Holland Marsh section of the Greenbelt], which are supposed to be protected from development," and "would also cross 27 waterways, including the Holland River, which drains into the already-threatened Lake Simcoe." It has also been exempted from the provincial *Environmental Assessment Act*. Among other things, it has been re-routed "around a golf course co-owned by the father of a Progressive Conservative MPP," Stan Cho.

When federal environment minister Guilbeault repeatedly refused to intervene in the project pursuant to the *IAA*, seven environmental and community groups applied to Federal Court for judicial review. On April 20, 2022 Justice Furlanetto's decision agreed with their complaint. She held that the minister's decision failed to meet the "threshold for transparency, intelligibility and justification and is unreasonable as a result."

³⁶ Ontario Place (OP) is a provincial park with 155 acres of beautiful waterfront located beside Exhibition Place in downtown Toronto. Created in 1971, it has included a marina and been used for public activities, live music, festivals and other family events. Facilities at OP were closed in 2012 but it remains a public park without admission fees. The Conservative government's recent application to Federal Court to challenge Ottawa's EA interventions in provincial projects, has cited OP as an example. According to a report in *The Narwhal*, "How a Supreme Court ruling could affect Highway 413, Ontario Place and the Ring of Fire" by Emma McIntosh (November 13, 2023), the site involves several species at risk, and the government's EA of the project "excluded the spa building; construction of the spa and parking garage." This work "involves clearing trees and filling in areas of the park's shoreline on Lake Ontario." The report continues:

The federal government isn't currently doing an impact assessment for Ontario Place. But it is currently weighing whether it should - the grassroots group Ontario Place For All wrote to [Minister] Guilbeault in September [2023] to ask him to get involved, arguing that the Ontario government's plans would trigger several areas of federal concern, including fish habitat and climate change. "While it is clear that the relative size of this project may not be as significant as a large mine or a major highway, this project and what it says about Canada's commitment to climate responsibilities is significant," Ontario Place For All said.

Usually, Guilbeault would have 90 days, or until Dec.27, 2023, to decide whether to grant or deny the request. But now, the whole thing is on hold [due to the SCC's *IAA* opinion]. The federal government has announced it will pause Guilbeault's ability to start new impact assessments while it rewrites the law. There's no telling what could happen with Ontario Place and when - or how the lawsuits and updated rules might come into it. ... That lack of clarity is the Ontario government's stated reason for filing a lawsuit about Ontario Place in particular.

decision, referred to previously (see footnote 8), noted that Ottawa immediately announced that ‘surgical’ changes to the *IAA* would be drafted quickly. CELA acknowledged the range of views held by environmental lawyers on how to fix the *IAA*, from a few focussed amendments to a complete re-casting similar to the *Canadian Environmental Assessment Act, 1992*. CELA focussed on the decision’s “unsettled, if not unsettling” treatment of GHGs and the question of whether “there is a role for a new, or amended, federal impact assessment law to play in controlling GHGE from designated projects.”

CELA is concerned that if inappropriate *IAA* amendments are made, they might result in “a narrow federal impact assessment law that is unable to address what the SCC itself has acknowledged to be both an ‘existential challenge’ and ‘a threat to the future of humanity.’” It advocates for amendments based on the criminal law power in s.91(27) of the Constitution. GHGs like carbon dioxide (CO₂), methane (CO) and nitrous oxide (N₂O) have already been designated as toxic substances under the *Canadian Environmental Protection Act* for many years, and courts have upheld the criminal law power as authority for this regulation.

The open letter to the Prime Minister and nine Cabinet Members, by several Canadian legal experts in environmental law and impact assessment, referred to above (footnote 3), included the following plea:

We are concerned that the Supreme Court of Canada’s recent opinion on the constitutionality of the *Impact Assessment Act* is being viewed as an opportunity to weaken federal impact assessment in the name of regulatory efficiency. We urge you and your Cabinet to resist these calls and instead use this occasion as an opportunity to consider ways to strengthen federal impact assessment and apply it to a wider range of projects that impact areas of federal jurisdiction.

6. **Conclusion:**

As noted previously, a frustrating aspect of the SCC opinions from a climate perspective, is the court’s view that GHGs do not necessarily have an extra-provincial, negative impact on the climate. The decision appears to discuss the idea that it is somehow possible for some/any GHGs to cause only “trivial” changes to a province’s environment (§351), and insignificant or *de*

minimis contributions to interprovincial or extra-territorial climate impacts (§193).³⁷

It is my understanding that this view is inconsistent with accepted climate science. It also seems to conflict with other statements found in the court's opinion,³⁸ and contradicts judicial findings elsewhere in Canada and abroad. Apart from this, we also know for a fact that

- the atmosphere is loaded with accumulating and irreversible levels of GHGs;
- hundreds of deaths are recorded each year throughout Canada - deaths which are related to health and weather impacts from the climate crisis;
- young people, low income communities, vulnerable groups like seniors and Indigenous peoples in Canada, are suffering more than others from significant physical and mental health impacts related to the disintegration of the climate (see for example, §25 of Justice Vermette's April 2023 decision in *Mathur*); and
- these things will continue to get far worse in the near future.

If/when the *IAA* is amended by Parliament, Conservative governments like those in Alberta and Ontario will probably try to derail it again, and likely run to court seeking rulings of unconstitutionality. The climate in Canada and abroad will have deteriorated even more by that point.

Hopefully the judges who hear those cases in the next round of EA-bashing will pay heed to Professor Wood's sage advice, referred to above at p.11:

“Because no crisis is as ominous, imminent, and far reaching, the climate emergency must be considered *sui generis*,” that is, “in a class of its own.” The legal approach must “rise to the emergency rather than repeat a failed past paradigm.”

Our judges must recognize that the *IAA* is an extremely important and constitutionally acceptable tool for helping to reduce GHGs. If they find that the amended *IAA* does not comply with the doctrinal limitations of old judge-made canons such as those related to the national concern doctrine, then they should devise new ones. Those old precedents were never intended

³⁷ See also SCC §271-280.

³⁸ For example, §96 which is reproduced in Appendix 1.

to apply to a scenario as dire as climate breakdown. Judge-made law can be quickly revised or changed by judges in appropriate cases.

Back to the present. The impact of the SCC opinion continues to reverberate today in various ways in Ontario and elsewhere. Hopefully, Parliament will find the resolve to greatly augment the *IAA*'s capacity as a tool to help reduce GHGs and boost climate action throughout Canada.



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Appendix 1

Overview of *Impact Assessment Act*

The *IAA* provides for an information-gathering and follow-up decision-making process with respect to major projects, activities and facilities in Canada that may have significant, adverse, environmental effects involving areas of federal jurisdiction.³⁹ Its full title is “An Act respecting a federal process for impact assessments and the prevention of significant adverse environmental effects.”

The Act’s Preamble indicates that the federal government “recognizes that impact assessment contributes to Canada’s ability to meet its environmental obligations and its commitments in respect of climate change.” It defines sustainability in s.2 as “the ability to protect the environment, contribute to the social and economic well-being of the people of Canada and preserve their health in a manner that benefits present and future generations.” And s.63(a) directs the Environment Minister to consider the extent to which a designated project contributes to sustainability.

Several aspects of the legislation are listed below:

- full examination of the environmental, health, social and economic effects⁴⁰ of the project;
- fostering sustainability is a mandate of the Act (s.6(2));⁴¹
- requirement for public participation and consultation, including participant funding;
- possible referral for hearing by a review panel if the Minister of Environment considers it to be in the public interest;
- the legislation’s Preamble recognizes that EAs provide an effective means of integrating

³⁹ On August 6, 2019, shortly after the *IAA* was enacted, the Canadian Environmental Law Association (CELA) published a detailed “Briefing Note on Bill C-69: Overview of Canada’s New *Impact Assessment Act*, authored by staff lawyer Richard Lindgren (<https://cela.ca/wp-content/uploads/2019/08/1289-IAA-Briefing-Note-August-6-2019.pdf>). It is a worthwhile resource.

⁴⁰ ‘Effects’ are defined by s.2 as changes to the environment or to health, social or economic conditions, and the various positive and negative consequences of these changes.

⁴¹ This is defined by s. 2 as the ability to protect the environment, contribute to the social and economic well-being of the people of Canada, and preserve their health in a manner that benefits both present and future generations.

scientific information and Indigenous knowledge into decision-making;

- an EA must consider whether and how a project affects Canada's ability to meet its international environmental and climate obligations and commitments (s.22(1)(I));
- in making a decision about a project, the Minister of Environment must also consider international environmental and climate obligations and commitments (s.63(e)).
- the Act applies to all layers of the atmosphere, according to the definition of environment in s.2;
- one of the purposes of the Act is protect the components of the environment, and health, social and economic conditions within Parliament's authority, from the adverse effects caused by a designated project (s.6(1)(d));
- the application of the precautionary principle⁴² is a mandate of the Act (s.6(2)); see also s.6(1)(d) and (l);
- the Act is intended to promote cooperation and coordinated action between federal and provincial governments, and with Indigenous governing bodies (s.6(1)(e));
- the assessment of the cumulative effects of physical activities in a region is encouraged (s.6(1)(m));
- s.6(3) requires the government to adhere to the principles of scientific integrity, honesty, objectivity, thoroughness and accuracy.

The *Physical Activities Regulations*, also known as the Project List, enacted under the *IAA*, identify categories and types of projects which are governed by this regime including national parks and protected areas; defence; mines and metal mills; nuclear facilities including storage and disposal; oil, gas and other fossil fuels; electrical transmission lines and pipelines; renewable energy; transport; hazardous waste; and water projects.

In addition, s.9 of the *IAA* also provides the Minister with the discretionary power to apply the Act to physical activities that are not included on the Project List. This residual power may be used on the Minister's own initiative, or if requested by the public. Before making such a designation, the Minister must believe that

⁴² The precautionary principle is described in §145 of the SCC majority opinion as follows: "[w]here there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation."

- the activity might cause adverse effects within federal jurisdiction; or
- possible adverse direct or incidental effects⁴³ which warrant the designation of the activity.

The designation provision creates two important, immediate and temporary (indefinite) holds or pauses which are placed on projects. They are referred to in the *IAA* as prohibitions, and are described below in the SCC’s majority opinion:

[94] ... The first of these temporary holds is set out in s. 7 of the *IAA*, which imposes a series of broad prohibitions on proponents of designated projects. Contravening s. 7 is a strict liability offence punishable by steep fines (s. 144). Section 7(1) prohibits the proponent of a designated project from doing “any act or thing in connection with the carrying out of the designated project . . . if that act or thing may cause” any of the enumerated effects. These effects track the definition of “effects within federal jurisdiction” in s. 2. They include “a change” to fish and fish habitat, aquatic species or migratory birds (s. 7(1)(a)); “a change” to the environment that would occur in another province or outside Canada (s. 7(1)(b)(ii) and (iii)); “an impact” on Indigenous peoples’ heritage or traditions (s. 7(1)©; and “any change” to the health, social or economic conditions of the Indigenous peoples of Canada (s. 7(1)(d)).

[95] In practice, these effects-based prohibitions serve to pause all projects immediately upon designation. This pause applies to both designated physical activities and “any physical activity that is incidental to those physical activities” (s. 2). The restrictions on acts that may cause a “change” or “impact” encompass both positive and adverse changes of any magnitude. And, as a qualitative matter, it is difficult to envision a proposed major project in Canada that would not involve any activities that “may” cause at least one of the enumerated effects.

[96] For example, the prohibition on doing any act that may cause “a change to the environment” in another province *prima facie* captures any act that may result in greenhouse gas emissions, which “represent a pollution problem that is not merely interprovincial, but global, in scope” (*References re GGPPA*, at para. 173). Similarly, Alberta submits that the prohibition on doing any act that may cause an effect on

⁴³ Direct or incidental effects are defined by s.2 as those effects directly linked or necessarily incidental to a federal authority’s power to permit a physical activity or designated project, or to provide financial assistance for it.

Indigenous peoples' traditional land use would bar any physical activity associated with a designated project proposed to be carried out on provincial lands where traditional use is asserted by Indigenous peoples (s. 7(1)(c)(ii)).

[97] The second temporary hold that flows directly from designation is set out in s. 8, which prohibits a federal authority from “exercis[ing] any power or perform[ing] any duty or function . . . that could permit a designated project to be carried out” and from providing financial assistance for the purpose of enabling a designated project to be carried out. This decision-based prohibition bears some resemblance to the Guidelines Order scheme upheld by this Court in *Oldman River* (p. 47).

Appendix 2 Excerpts from Opinion of Alberta Court of Appeal

In May 2022 the ACA declared that the *IAA* and Regulations made thereunder are unconstitutional. The focus and tone of comments in the judgment are pointed and particularly revealing. In the introduction to the majority opinion, the court stated at p.6:

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

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

The ACA opined that the *IAA* regime would bring a ‘wrecking ball’ to the constitutional regime of Canada and effectively end the federal/provincial federation:

[28] The *IAA* raises an issue of fundamental fairness. Through this legislative scheme, Parliament has taken a wrecking ball to the constitutional right of the citizens of Alberta

and Saskatchewan and other provinces to have their 92A natural resources developed for their benefit. And in doing so, it has also taken a wrecking ball to something else – and that is the likelihood of capital investment in projects vital to the economy of individual provinces. Capital investment does not just happen, especially where the capital investment is measured in the billions, not millions of dollars. And it particularly does not happen where, as under this legislative scheme, the investing rules are uncertain, unpredictable, unquantifiable and unreliable.

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

...

[423] If upheld, the *IAA* would reduce the plainly applicable provisions of s 92A, s 92(5), s 92(10), s 92(13), s 92(16) and s 109 to a subordinate status to federal authority. The unavoidable effect of the *IAA* would be the centralization of the governance of Canada to the point this country would no longer be recognized as a real federation. This is not what the framers of our Constitution intended. And it is certainly not what provincial governments agreed to either on patriation of the Constitution.

[424] Where natural resources are involved, it is each province that is concerned with the sustainable development of its natural resources, not the federal government. It is the province that owns those natural resources, not the federal government. And it is the province and its people who lose if those natural resources cannot be developed, not the federal government. The federal government does not have the constitutional right to veto an intra-provincial designated project based on its view of the public interest. Nor does the federal government have the constitutional right to appropriate the birthright and economic future of the citizens of a province.

And finally, from the concluding portion of the majority's judgment:

[433] We would add this. Legitimate concerns about the environment and climate

change shared by all Canadians and provincial governments as well as the federal government do not justify overriding our existing form of federalism and the division of powers. If the federal government believes otherwise, it should make the case for an increase in its jurisdiction to the Canadian public. Constitutional change should be effected as the Constitution requires – by agreement amongst the federal and provincial governments.

[434] We ought never lose sight of the great genius of our constitutional structure which has produced a free and secure democracy, one that has served Canadians well for 155 years. Our ancestors chose a federal, not unitary, structure for a purpose – to unify separate colonies and create a country. The negotiated division of powers lies at the heart of what makes this country what it is, and why, despite significant tensions from time to time, Canada has been able to survive and prosper since Confederation. It remains one of this country's greatest strengths. It will continue to benefit present and future generations as we face the environmental, economic and security challenges ahead providing that we respect the principles on which Canada has been founded: federalism, responsible government and the Rule of Law.

For the sake of brevity I will not dwell on the 87-page dissent of Justice Sheila Greckol. However, her comments in the following excerpts are apt in my view, and reflect a collaborative perspective missing from the majority opinion:

[716] ... Alberta submits the *IAA* is a “Trojan horse” - a “colourable device to invade areas of provincial jurisdiction which are unconnected to the relevant heads of federal power”: *Ibid* at para 132, citing *Oldman River* at 72.

...

[717] It is true that a federal decision under the *IAA* can halt a project. But there are several problems with Alberta's characterization of this federal role as a “veto.” It fails to recognize the legitimate role of the federal government in assessing projects that cause *effects* within federal jurisdiction, manifest in different ways: (1) a true interpretation of the *IAA* shows it has strengthened its control over adverse environmental effects in federal jurisdiction rather than sought to control outcomes of the federal and provincial processes; (2) federal and provincial decision-makers make different decisions, rather than one exercising a “veto” power⁴⁴; (3) the approach that a project cannot proceed *as*

⁴⁴ The majority opinion in the Supreme Court of Canada referred to this so-called federal veto power in §58.

proposed without endorsement by both levels of government has been in place since at least *Oldman River*; and (4) both the *IAA* and *EPEA* are designed to facilitate cooperation between levels of government rather than one holding a “veto” power over the other.

...

[723] Both the *IAA* and *EPEA* are expressly designed to permit and encourage inter-jurisdictional cooperation in the conduct of assessments and sharing of information across agencies and governments. Both are drafted to work harmoniously to achieve these aims. Both recognize among their purposes, the importance of inter-jurisdictional cooperation: *EPEA*, s 2(h); *IAA*, s 6(1)(e).

...

[730] In summary, the *IAA* and *EPEA* contain provisions that contemplate cooperation between various jurisdictions and agencies, including Canada’s Agency, Alberta’s agencies, and Indigenous jurisdictions. The *IAA* and *EPEA* schemes can cooperate and are “not incompatible with the boundaries dictated by the *Constitution Act, 1867*”: *Pan-Canadian Securities Reference* at para 18. The principle of co-operative federalism supports such an interpretation that will, in turn, foster and support the division of powers: *Ibid* at paras 17-18. An interpretation of the *IAA* that permits interlocking federal and provincial environmental processes to coexist is also consonant with the double aspect principle and the presumption of constitutionality.